Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home

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INTRODUCTION

A 23-year old mother of three must find a new home. In a couple of days the police will come to her house with hammers and plywood to nail boards over the windows and doors of her home. Wondering how this could happen, she enlists the help of her lender. Eventually they learn that shortly after the mother purchased the home, a court entered an order under the public nuisance abatement statute directing the prior owner to close the house because of drug-related activity. Neither the mother, nor her lender, were parties to the public nuisance action. Neither received notice that public nuisance proceedings were pending even though the mother lived in the home during the entire course of the abatement action and the lender's interest in the property was duly recorded. Although the mother eventually secured legal assistance after learning of the court's order, her attorneys soon learned that the public nuisance statute offered their client few options.[1]

Law enforcement agencies increasingly use public nuisance law, much as they use civil forfeiture law, to aid in battling the War on Drugs. This Article examines the application of public nuisance law to control unlawful activities conducted within a person's home. An order abating a public nuisance may not only prevent owners and occupants

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1. The mother was a client of the SMU Civil Clinic for six months in 1995. Records relating to her case are on file with the SMU Civil Clinic.

from using their homes for prohibited purposes, but also may prevent the use of the home for any purpose. Indeed, an order of abatement may direct permanent seizure of a home without compensation to its owner or other occupants. A recent Supreme Court case, *Bennis v. Michigan*,[2] suggests that such a result may be permissible despite recent major developments in constitutional property law under the Fifth and Fourteenth Amendments limiting the ability of states to impair private property rights without compensation. Permanent seizure of a home as a remedy for public nuisance conduct may also occur despite the high level of protection the Constitution provides the home and interests associated with it under the Fourth and Fourteenth Amendments.

The Article suggests an approach courts should use when considering whether to abate a public nuisance within a home that is consistent with the goals and purposes of traditional public nuisance law as well as modern approaches to the regulation of individual rights and property. Part I provides the background for the analysis as it examines the common law origins of public nuisance law and the expansion of the equitable remedy of abatement. It also contrasts the law of public nuisance with the law of civil forfeiture. Although the law of civil forfeiture also permits uncompensated seizure of property connected to unlawful conduct, it often provides important procedural and substantive protections that public nuisance law does not.[3] Part II examines the constitutional rules that protect the home and individual rights related to it from government intrusion under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. Part III considers the home as property and the protection the Constitution provides private property rights. It also examines the role of public nuisance law in the Court's takings analysis, which now largely rejects the broad exercise of police power that has justified much of public nuisance law. Part IV examines *Bennis v. Michigan*,[4] the 1996 public nuisance case in which the Supreme Court failed to apply the takings analysis it outlined only a few years earlier in *Lucas v. South Carolina Coastal Council*.[5] *Bennis* has been criticized for, among other things, its treatment of innocent family members in the context of criminal law and contemporary notions of the rights of married women.[6] This Article criticizes

2. 516 U.S. 442 (1996).

3. *See, e.g.*, 21 U.S.C. § 881(a)(7) (Supp. II 1996) (excluding from forfeiture real property used "without the knowledge or consent" of that owner).

4. 516 U.S. 442 (1996).

5. 505 U.S. 1003 (1992).

6. *See, e.g.*, Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil*

the Court's analysis of Michigan's public nuisance statute in light of recent cases analyzing claims of statutory impairment of individual and economic rights. Finally, Part V suggests an approach for reconciling the public power expressed in public nuisance law with the importance of private rights embodied in the home. It urges courts to consider the abatement of public nuisances with the same critical, case-by-case analysis of state power that they must apply to takings and due process law challenges in land-use and other areas. Application of public nuisance law in this manner acknowledges its historical and common law roots as an equitable tool used by the state to further public policy goals. It also promotes greater consistency in the application of takings and due process doctrine.

I. THE LAW OF PUBLIC NUISANCE

A. *Historical Background of Public Nuisance Law*

The law of public nuisance has characteristics that are both punitive and remedial. Although these qualities may conflict, they contribute to a body of law that, from its English beginnings, has changed as the needs of the public have changed.

1. *English Origins*

a. Nuisance Conduct: Criminal Interference with Public Rights

The law of public nuisance originated in the English law of "common" or public nuisance,[7] which included an assortment of petty criminal offenses involving public rights of ways—such as waterways and roads—or "noisome trades."[8] These offenses were entirely distinct from conduct included in the tort law of private nuisance, which protects the

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Drug Asset Forfeiture, 81 CORNELL L. REV. 343 (1996); Amy D. Ronner, *Husband and Wife Are One—Him:* Bennis v. Michigan *as the Resurrection of Coverture*, 4 MICH. J. GENDER & L. 129 (1996).

7. *See* J. R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 58 & n.10 (1989) (noting that despite some effort to define the terms "common nuisance" and "public nuisance" distinctly, they are generally used interchangeably).

8. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 643-44 (5th ed. 1984); Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359 (1990); Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 ENVTL. L. REP. 10292 (1986); Spencer, *supra* note 7, at 59.

use and enjoyment of land.[9]

Over time, conduct prosecuted as a common nuisance was not limited to interferences with public rights of way, but included interferences with public rights in general. Thus defendants could be prosecuted for allowing infirm animals to wander, selling unwholesome food and drink, washing hemp or flax in water used for cattle, fishing or hunting out of season, operating "lewd ale-houses," even subdividing houses to prevent them from becoming "hurtful to the place by overpestring it with poor."[10]

William Hawkins is credited as the first to assign a definition to the term "common nuisance" in the early eighteenth century.[11] In *A Treatise of the Pleas of the Crown*,[12] Hawkins grouped an assortment of minor offenses such as damaging a public highway, failing to repair a bridge, "running a bawdy-house," and operating a "gaming house" under the title "common nuisance" which he defined as: "an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the common Good requires."[13] Blackstone included Hawkins' definition in his *Commentaries* to describe a category of "Offences against the public health, and the public polic[y]"[14] and identified seven types of

9. *See* Spencer, *supra* note 7, at 59; *see also* RESTATEMENT (SECOND) OF TORTS § 821B(1) & cmt. a (1977); Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995) (asserting that confusion between public and private nuisance contributes to "takings muddle"); Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 639 & n.97 (1976) (same); Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775, 778-85 (1986) (highlighting basic distinctions between public nuisance and private nuisance tort); *see generally* RESTATEMENT (SECOND) OF TORTS § 821A (1977); KEETON ET AL., *supra* note 8, § 90, at 643.

As early as the thirteenth century, English legal scholars noted that the civil tort of private nuisance was unlike "nuisances which sheriffs are authorised to redress . . . as is the case of a way being stopped." Spencer, *supra* note 7, at 58 & n.7 (quoting Britton, lib. II, ch. XXX, cap. 8). By 1535, English courts appeared to recognize that a defendant who had "stopped the King's highway" had committed a "common" or public nuisance, a criminal offense punished in the criminal courts, which had jurisdiction over the highways and could fine or otherwise punish persons who dumped garbage and waste in them, thus causing them to flood. *See, e.g.*, Anon, Y.B., Mich. 27 Hen. 8, f.27, pl. 10 (1535), *reprinted in* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 603 (5th ed. 1990) [hereinafter Anon].

10. Spencer, *supra* note 7, at 60 & n.15 (citing William Sheppard). J. R. Spencer clarifies the courts' use of public nuisance law to avoid overcrowding "because they thought the impoverished inhabitants would catch the plague, not because they thought they were one." *Id.*

11. *Id.* at 65.

12. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (Garland Pub., Inc. facsimile reprint 1978) (1721).

13. Spencer, *supra* note 7, at 65-66 (1989); HAWKINS, *supra* note 12, at 197.

14. 4 WILLIAM BLACKSTONE, COMMENTARIES *161, 167 (defining common nuisance as "either

common nuisances: interfering with public highways, bridges and rivers, including building on real property owned by the crown; maintaining disorderly places; operating unlicensed lotteries; making, selling or using fireworks; eavesdropping; and being a "*common scold.*"[15]

b. Remedies Available to the Sovereign: From the Criminal Courts to the Equity Courts

Until the mid-eighteenth century, the sovereign's only remedy for a public nuisance was to prosecute in criminal court, which historically would not grant injunctions to the crown except in cases involving the unauthorized building on land belonging to the king.[16] However, criminal prosecution soon proved ineffective against public nuisance conduct such as the improper disposal of sewage contaminating urban drinking supplies.[17] Neither a fine nor a jail sentence could alleviate the threat such conduct had on public health. Moreover, criminal prosecution of responsible corporations was almost impossible because corporations were generally immune from criminal liability.[18] As a result, public officials were left without meaningful means to enforce the public nuisance law. In time, the chancery courts responded to the situation and began to issue permanent injunctions upon application by a state official.[19]

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the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires").

15. *Id.* at *168-69. A scold was a term used to describe "a troublesome and angry person who, by brawling and wrangling among his or her neighbors, breaks the public peace, increases discord, and becomes a public nuisance to the neighborhood." BLACK'S LAW DICTIONARY 1346 (6th ed. 1990).

16. *Compare* Baines v. Baker, 27 Eng. Rep. 105, 107 (1752) (injunction issued to stay building inoculation hospital in cold bath fields), *with* Attorney-General v. Richards, 145 Eng. Rep. 980 (1794) (issuing injunction to abate). *See* Spencer, *supra* note 7, at 68. This interference with royal property was known as a "purpresture," which Blackstone considered to be a type of common nuisance similar to an interference with a public right of way. *See* BLACKSTONE, *supra* note 14, at *167. Where a purpresture existed, the Crown could choose between alternative remedies: criminal prosecution or collection of rents or court-ordered removal by abatement. *See* Attorney General v. Richards, 145 Eng. Rep. 980, 984 (1795) (determining that property on which buildings existed was "property of the Crown" and ordering that "buildings be abated"); Spencer, *supra* note 7, at 68.

17. *See* Spencer, *supra* note 7, at 71.

18. *See id.* at 70-72.

19. The chancery courts' willingness to award equitable relief to the sovereign may have resulted from the ability of a private plaintiff to obtain an injunction from the equity courts to abate the defendant's conduct pending the outcome of the legal proceedings. *See* KEETON ET AL., *supra* note 8, § 90, at 643; Spencer, *supra* note 7, at 66 & n.46 (citing *Baines*, 27 Eng. Rep. at 105). *See also* Abrams & Washington, *supra* note 8, at 379-82. Although private parties

Lawmakers also responded. They enacted comprehensive regulatory schemes designed to protect the public health and safety and expressly authorized public officials to seek abatement to enforce them. An example is the Sanitary Act of 1866,[20] which shifted emphasis away from the prosecution of persons responsible for creating health and safety risks toward elimination and prevention of the risks themselves.[21] The Sanitary Act allowed the prosecutor to seek abatement of the nuisance as a corrective measure instead of criminal penalties.[22] As a result, by the middle of the nineteenth century, the chancery courts' power to order public nuisance defendants to abate the conditions they created was well-established. By the end of the century, the permanent injunction almost completely replaced the criminal prosecution as a remedy for public nuisance conduct in England.

2. *American Contributions to Public Nuisance Law and the Equitable Remedy of Abatement*

The principles that Hawkins first articulated regarding acts or omissions harmful to the public, and the language describing them, formed the basis of the modern American public nuisance law.[23] By the end

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were generally without standing to sue on a public nuisance, a private plaintiff suffering "special damages" was an early exception. *See* KEETON ET AL., *supra* note 8, § 90, at 646. This private right of action for a public nuisance is traced to a 1535 case in which the plaintiff claimed that the defendant had obstructed a public highway depriving the plaintiff access from his house to a "close" on the highway. *See* Anon, *supra* note 9, at 603. Chief Justice Baldwin stated the general rule that the obstruction could not be the basis of a private suit; rather, it was a "common nuisance" punishable only in the criminal courts. *See id.* However, Judge Fitzherbert believed otherwise: "he who has suffered such greater displeasure [than the generality have] can have an action to recover the damage which he has by reason of this special hurt." *Id.*; *see also id.* at 604; Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present and Future*, 54 ALB. L. REV. 189, 195 & n.28 (1990).

20. Sanitary Act, 1866, 29-30 Vict., ch: 90 (Eng.).

21. *See id.* § 22-23. The Act authorized a Nuisance Authority upon certification of medical personnel, to notify property owners to "cleanse and disinfect" premises and contents to eliminate and prevent infectious or contagious diseases. Although the Act imposed a penalty upon persons who failed to comply, it also exempted owners unable to pay for the fines and clean-up charges and provided alternative methods for disinfection at no cost to the owners. *See id.* § 22-23; *see also* Spencer, *supra* note 7, at 76.

22. *See* Sanitary Act, 1866, 29-30 Vict., ch. 90, § 22 (Eng.). It also authorized local police to institute proceedings for the removal of nuisances "[p]rovided always, that no Officer of Police shall be at liberty to enter any House or Part of a House used as the Dwelling of any Person without such Person's Consent, or without the Warrant of a Justice of the Peace." *Id.* § 16.

23. Indeed, California is one of several states which have defined nuisance in terms as broad as those used by Hawkins:

Anything which is injurious to health, including, but not limited to the illegal sale of

of the nineteenth century, however, American courts had made an important addition to the development of public nuisance law: the notion that once something is "characterized as a 'nuisance,' . . . there is nothing more to be said."[24] This feature of public nuisance law surfaced as early as 1785 in a Pennsylvania criminal case, in which the court rejected the defendant's argument that the utility of the public nuisance conduct could serve as a defense to it.[25] As public nuisance law moved out of the criminal courts, the uncompromising notion that "there is nothing more to be said" followed. It re-emerged with the expansion of the equitable remedy of abatement at the end of the nineteenth century and will be discussed more fully below.[26] Prior to that time, however, the law of public nuisance and the remedies it provided closely tracked those available in England.

a. Courts and legislatures permit states to seek abatement to protect health and safety and to promote morality

By the early nineteenth century, American equity courts—like their English counterparts—acknowledged that public officials could obtain

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controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

CAL. CIV. CODE § 3479 (West 1997). *See* N.M. STAT. ANN. § 30-8-1 (Michie 1978); N.D. CENT. CODE § 42-01-01 (1997); *see also* IND. CODE § 34-1-52-1 (1997); IOWA CODE § 657.1 (1997); MONT. CODE ANN. § 27-30-101 (1997); RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1977) (quoting JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (London, MacMillan 2d ed. 1890) defining a public nuisance as "an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects"); KEETON ET AL., *supra* note 8, § 86, at 616-17 (using same definition); *see also* BLACK'S LAW DICTIONARY 961 (6th ed. 1990) ("maintaining a public nuisance is by act, or by failure to perform a legal duty, intentionally causing or permitting a condition to exist which injures or endangers the public health, safety or welfare").

24. In Prosser and Keeton's treatise on torts, the authors describe nuisance law as follows:

Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a "nuisance," and there is nothing more to be said.

KEETON ET AL., *supra* note 8, § 86, at 616-17.

25. *See* Respublica v. Caldwell, 1 U.S. 150 (1785). In *Caldwell*, the defendant was convicted for committing a nuisance by erecting a wharf on public property, an offense long considered to be within the scope of public nuisance law. The Court rejected defense evidence that the wharf had benefitted the public, and should not be regarded as a nuisance, and affirmed the conviction. *See id.*

26. *See infra* Part I.C.

abatement of a public nuisance in a court of equity.[27] By the middle of the century, public nuisance law was widely used to regulate public health and safety, and statutes authorizing abatement were common, particularly in cases of perceived dangers to public health.[28] New York's 1881 statute was typical, favoring detection and correction of potential health risks over criminal prosecution.[29] It established a metropolitan sanitary police company and authorized it to investigate "all ferry-boats, manufactories, slaughter-houses, tenements, houses, hotels and boarding-houses and edifices suspected of, and charged with being unsafe, and to take all necessary legal measures for promoting the public peace, security of life or health . . . ."[30] After complaint and summary hearing, a magistrate could order the business to cease operations and close until the condition was removed.[31] In the event the person responsible did not comply, the "captains of the sanitary company" could cause the condition to be abated at the owner's expense.[32] These general principles remain in place today in New York and elsewhere,[33] as public nuisance law remains important to local governments for

27. Courts provided equitable relief to private plaintiffs complaining of special damages and granted their requests for abatement of the public nuisance. *See, e.g.*, Corning v. Lowerre, 6 Johns. Ch. 439 (N.Y. Ch. 1822). In 1838, on the authority of an 1814 New York case, the United States Supreme Court acknowledged that in "rare" cases the Attorney General could also seek abatement of a public nuisance in a court of equity. *See* City of Georgetown v. Alexandria Canal Co., 37 U.S. 91 (1838). The Court relied on *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371 (N.Y. Ch. 1814), in which the New York court rejected the attorney general's request for an injunction to prevent unlawful banking practices as a public nuisance on the facts of the case, but cited purpresture case as authorizing injunctions in limited circumstances.

28. *Compare* HENRY LACEY MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY (2d ed. 1948), *with* 1815 N.C. Sess. Laws ch. 893, § 1 (declaring "ponds of stagnant water" and "slaughterhouses," among other things, to be "nuisances, productive of offensive vapours and noxious exhalations, the causes of disease, and ought to be restrained, regulated and removed"). One of the earliest such statutes, enacted in North Carolina in 1815, declared that "ponds of stagnant water," "cellars . . . whose bottoms contain stagnant and putrid water" and "slaughter houses" to be common nuisances and authorized local authorities to remove the conditions at the expense of the property owner if he did not do so himself. 1815 N.C. Sess. Laws ch. 10; *compare* Sanitary Act, 1866, 29-30 Vict., ch. 90, § 22 (authorizing Nuisance Authority to take steps for ensuring proper disinfecting and "cleansing" of areas determined to be a public nuisance).

29. *See* 1881 N.Y. PENAL CODE § 388.

30. 1864 N.Y. GEN. STAT. ch. 403, § 52.

31. *See id.*

32. *Id.* at §§ 53, 54.

33. *See* N.Y. PUB. HEALTH LAW ch. 44, §§ 1301-1330 (McKinney 1997); *see also* MD. CODE ANN. ENVIR. §§ 10-101 to -305 (1997) (creating local boards of health with broad anti-nuisance powers); PA. STAT. ANN. tit. 53, §§ 37311-37340 (West 1998) (authorizing third-class cities to create local boards of health with jurisdiction over public health nuisances).

maintaining sanitation and health standards and avoiding fire, health, and safety hazards.[34]

The public's physical well-being was not the only target of public nuisance legislation. Nineteenth century legislatures also enacted public nuisance statutes to promote contemporary conceptions of morality.[35] A provision in place in Florida prior to statehood authorized courts to order the abatement of "any nuisance which tends to the immediate annoyance of the citizens in general, or is manifestly injurious to the public health and safety or "tends greatly to corrupt the manners and morals of the people."[36] Likewise, California's public nuisance statute of 1876 included a general definition of conduct that "offends decency."[37] It provided alternative remedies: criminal indictment, a civil action or abatement by a public official.[38] Some states expressly defined public nuisances in a manner that suggests the early criminal offenses identified by Hawkins and Blackstone[39] and included "immoral" activities such as prostitution,[40] illegal alcohol sales,[41] and gambling,[42] and made provisions for the abatement of nuisance conduct.

b. Early Distinction Between Abatement and Confiscation

Although remedies for public nuisance conduct may have varied

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34. *See, e.g.*, Schneider v. County of San Diego, 28 F.3d 89 (9th Cir. 1994) (affirming interpretation of public nuisance provision of municipal building code); Wendt v. County of Yakima, No. CY-92-3037, 1993 WL 29160, at *10 (E.D. Wash. Jan. 15, 1993) (dismissing § 1983 claim against county for conduct in enforcing local provisions of uniform code); Mackey v. City of Cleveland, Nos. 66912, 66929, 1995 WL 143824, at *3 (Ohio App. Ct. Mar. 30, 1995) (holding city entitled to summary judgment that demolition of home under city building code did not amount to taking without compensation).

35. *See Kurtz, supra* note 9, at 652. Professor Kurtz credits the growth of legislative output from 1871 to 1916 for producing public nuisance provisions directed at "moral vice, such as drinking, gambling, and bawdy houses," as well as public health and land-use issues such as slaughter houses and hospitals for the contagiously ill. *Id.*

36. Pub. Act of Fla. Terr. Legis. Counc. of Feb. 7, 1831, § 47 (emphasis added).

37. CAL. CIV. CODE § 3494 (West 1876); *see also* 1890 Okla. Sess. Laws ch. 56, § 8; 1881 LAWS IND. § 289.

38. *See* CAL. CIV. CODE § 3494 (providing that "a public nuisance may be abated by any public body or officer authorized thereto by law"). Similar language appeared in public nuisance statutes of other western states which, like California, provided for equitable abatement as an alternative to prosecution. *See also* 1890 Okla. Sess. Laws ch. 56, § 8; 1877 N.D. Laws § 2054 (now codified at N.D. CENT. CODE § 42-01-07 (1997)); 1887 S.D. Laws § 2054-2055, 2059 (now codified as revised S.D. CODIFIED LAWS § 21-10-5 (West 1997)); UTAH CODE ANN. § 76-10-806 (1995); WASH. REV. CODE § 7.48.200 (1997).

39. *See* source cited *supra* note 12 and accompanying text.

40. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 125.021(2)-(3) (West 1997).

41. *See id.*; KAN. STAT. ANN. ch. 35, § 7 (1868).

42. *See id.*; MASS. GEN. LAWS ch. 405, § 1 (1855).

from state to state, at least until the end of the nineteenth century, "abatement" was not synonymous with "confiscation" or "destruction" without compensation. This was true regardless of whether abatement occurred pursuant to the so-called morality statutes or pursuant to health and safety provisions. In *Ely v. Supervisors of Niagara County*,[43] a New York appellate court affirmed an award of $4,500 to Maria Moody, for houses she "kept and maintained" as "bawdy houses,"[44] in Niagara City. The houses were destroyed during an 1865 riot and Ms. Moody sought damages under a statute which provided property owners with compensation for property destroyed under such circumstances. The county appealed the award on the ground that by operating the bawdy house, Ms. Moody "stir[red] up the virtuous indignation of contiguous society"[45] and therefore contributed to the actions of the mob. The court rejected the argument and stated:

> A house kept as a house of ill fame and as a resort for thieves and other disreputable persons, is a public and common nuisance; but the destruction of the building and its furniture is not necessary to its abatement, and is unlawful; so, too, are riots and mobs.[46]

Thus, even where an abatable nuisance may have existed, courts generally recognized and gave meaning to the property rights associated with it by compensating owners for losses suffered as a result of public or private conduct.[47]

However, when public nuisance conduct could not be controlled without destruction of goods or property connected to it, courts did not generally require compensation. Instead, they analyzed a state's destruction of property in the same manner as they would analyze a tort case in which a private party destroyed another's property out of necessity to prevent a greater harm to the public.[48] Because the right of

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43. 36 N.Y. 297 (1867).

44. *Id.* at 299.

45. *Id.* at 300.

46. *Id.*

47. *See also* Lawrence v. Metropolitan El. Ry. Co., 27 N.E. 765 (1891) (affirming award of $2,150 to lessor for loss of rents caused by construction of elevated railway despite evidence that tenants used house for "disreputable purposes").

48. *See, e.g.*, American Print Works v. Lawrence, 21 N.J.L. 248, 257 (N.J. 1847). In *Lawrence* the court rejected plaintiff's claim that a city's order to destroy his property to prevent "conflagration" was taking for public use requiring compensation. Instead, the court held that the city's conduct was justified under the common law tort defense of public necessity. *See id.* at 257.

public necessity[49] would relieve a private defendant from liability for damages, courts reasoned that the state should be relieved from the obligation to pay compensation.[50] For example, if a statute defined a public nuisance to include the sale of contaminated meat or produce, a court could order the goods destroyed without compensation to the owner.[51] Like a private plaintiff who destroyed another's property out of a public necessity without liability for the value of the property to avoid a public disaster,[52] the sovereign could also destroy the meat to prevent the spread of disease without compensation to its owner.[53] While such cases constituted exceptions, as the substantive scope of public nuisance law and the application of the equitable abatement remedy grew, the exceptions began to swallow the rule.

B. Mugler v. Kansas: *Crossing the Line Between Abatement and Confiscation*

Distinctions between abatement and destruction all but vanished as courts increasingly relied on the police power, not the right of public necessity, as the source of legislative power to control public nuisances.[54] Signaling this shift was the Supreme Court's 1887 decision in *Mugler v. Kansas*[55] in which the Court affirmed criminal convictions under the state's prohibition laws as well as civil public nuisance abatement orders seizing certain personal property and closing "the group of buildings . . . constituting the brewery" for a year.[56] The defendants argued that implementation of the orders by closing the breweries and

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49. *See* KEETON ET AL., *supra* note 8, § 24, at 146-47.

50. *See, e.g.*, Lawton v. Steele, 152 U.S. 133 (1894) (affirming summary seizure of unlawful fishing nets without compensation); Hart & Hoyt v. Mayor of Albany, 9 Wend. 571 (N.Y. 1832) (refusing to award money damages for defendant's destruction of unsafe rooming houses); Seavey v. Preble, 64 Me. 120 (1874) (reversing award of damages resulting from the city physician's removal of wallpaper from rooms in which small pox patients were confined).

51. *But cf.* 2 WILLIAM BLACKSTONE, COMMENTARIES *62; *Lawton*, 152 U.S. at 136 (referring to state's ability to destroy contaminated food at common law).

52. Tort law describes such circumstances as giving rise to a "public necessity." *See* KEETON ET AL., *supra* note 8, § 24, at 146.

53. A recent example can be found in *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3d Cir. 1987), in which the court rejected a takings challenge after the state's quarantine of poultry to prevent spread of disease greatly diminished poultry's value to owner.

54. *Cf.* Miller v. Schoene, 276 U.S. 272 (1928) (affirming destruction of ornamental cedar trees under public nuisance statute to prevent spread of disease as valid exercise of police power without regard to whether the property owner's conduct amounted to a public nuisance).

55. 123 U.S. 623 (1887).

56. *Id.* at 654.

seizing their contents would render the property of "no value as property, or, at least . . . materially diminished in value." As a result, they argued, the orders amounted to a taking of property for public use without compensation, and a deprivation of their property without due process of law.[57]

In a famous opinion by Justice Harlan, the Court acknowledged that enforcement of the abatement orders "materially diminished" the value of defendants' property.[58] It concluded, however, that the exercise of the police power to declare certain uses of property harmful to the health, morals, or safety of the community—not the tort defense of necessity—provided the basis for uncompensated regulation. Moreover, it held, such power "*cannot*, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[59]

The Court also distinguished between a state's power to physically appropriate property through the exercise of eminent domain and its police power to abate a public nuisance. It reasoned that the power exercised, not its effect on the individual, triggered the duty to pay compensation.[60] Because implementation of "the police powers of the State,"[61] required not only a determination of the public interest, but also a determination of the best way to protect that interest, any diminished value resulting from protection of that interest through abatement of a public nuisance need not be compensated. Moreover, Justice Harlan suggested that such diminished value was consistent with the purposes of abatement, "unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation to deprive the owner of his liberty and property without due process of law."[62] He added:

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57. *Id.* at 664.

58. *Id.* at 667.

59. *Id.* at 668 (emphasis added). The Court continued: "[S]uch legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." *Id.* at 669.

60. *See id.*

61. *Id.*

62. *Id.* On this point, Justice Field dissented. He maintained that even if the legislation declaring a nuisance was a valid exercise of the police power, legislation requiring destruction of property was not. *See id.* at 678 (Field, J., dissenting). Rather, he wrote, it was up to the courts and not the legislature to exercise their equitable powers to fashion an order of abatement to protect the public from harm caused by the nuisance conduct. The issue was one of fairness that required fashioning a remedy to stop the conduct without inflicting "wanton or unnecessary injury . . . to the property or rights of individuals." *Id.*

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[63]

By analogizing the "destruction of property" with the "prohibition of its use," Justice Harlan effectively equated the two.[64] *Mugler*'s distinction between the power of eminent domain to physically appropriate property and the police power to regulate it extended far beyond the limited area of public nuisance. It also influenced courts as they considered a variety of comprehensive regulatory schemes designed to promote the public interest and their effect on private property rights.

Part III of this Article will consider the Court's examination of states' general regulatory conduct in more detail in connection with its discussion of regulatory takings law under the Fifth Amendment. The remainder of this Part will examine the aftermath of *Mugler* in the expansion of public nuisance law.

C. *The Aftermath of* Mugler*: Enlargement of Scope and Remedies*

Within a few years after *Mugler*, and continuing to the present, legislatures began to enlarge the scope of public nuisance law relatively free from judicial scrutiny.[65] Today, legislatures define public nuisance to include such things as "cruising,"[66] maintaining a usurious small loan business,[67] failing to immunize cattle,[68] distributing pornography,[69] and

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63. *Id.* at 668-69.

64. In his dissent, Justice Field described the Kansas legislation approved by the majority as having "passed beyond that verge, and crossed the line which separates regulation from confiscation." *Id.* at 678 (Field, J., dissenting).

65. *See* Lawton v. Steele, 152 U.S. 133 (1894) (rejecting constitutional challenge to New York public nuisance statute authorizing summary destruction of unlawful fishing nets).

66. *See* Scheunemann v. City of West Bend, 507 N.W.2d 163 (Wis. Ct. App. 1993) (upholding statutory definition of "cruising," i.e., "repetitive, unnecessary driving of automobiles" as nuisance).

67. *See, e.g.*, State v. Hooker, 87 N.W.2d 337 (N.D. 1957) (usurious small loan as business); *see also* State v. J.C. Penney Co., 179 N.W.2d 641 (Wis. 1970) (usurious charges on revolving credit line).

68. *See* People v. Anderson, 189 N.E. 338 (Ill. 1934) (failure to immunize cattle).

69. *See* Fehlhaber v. North Carolina, 675 F.2d 1365 (4th Cir. 1982) (hardcore pornography).

bull-fighting.[70] In Ohio, the public nuisance statute contains seven separate categories of public nuisance conduct.[71] In Arizona the number is twenty.[72] Moreover, even in states where the legislative definition of a nuisance is quite broad—as, for example, in Alabama where a nuisance is defined as "anything that works hurt, damage, or inconvenience to another"[73]—courts routinely give public officials great leeway to adapt public nuisance statutes to address contemporary areas of concern, such as the environment,[74] pornography,[75] and gang-related criminal activity.[76]

Legislatures also expanded the scope of the abatement remedy available to control public nuisances.[77] Although treated as an equitable action, legislative language leaves courts little room to fashion individual relief on a case by case basis.[78] For example, in Texas, the public nuisance statute specifies that in the event a nuisance is found "[t]he judgment *must* order that the place where the nuisance exists be closed for one year after the date of judgment."[79] While such an order may be avoided by posting a bond,[80] absent the resources necessary to post

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70. *See* TEX. REV. CIV. STAT. ANN. art. 125.021 (West 1998).

71. *See* OHIO REV. CODE ANN. § 3767 (Baldwin 1997).

72. *See* ARIZ. REV. STAT. ANN. § 36-601 (West 1997).

73. ALA. CODE § 6-5-120 (1996).

74. *See, e.g.*, Commonwealth v. Barnes & Tucker Co., 319 A.2d 871 (Pa. 1974) (holding common law of public nuisance available to state to compel abatement of acid drainage from closed mine); *see also* Abrams & Washington, *supra* note 8, at 294 (describing nuisance abatement as a "useful weapon in the arsenal against environmental degradation" as in the New York Love Canal litigation); *see generally* Halper, *supra* note 8 (reviewing historical and contemporary use of public nuisance for environmental control).

75. *See, e.g.*, Fehlhaber v. North Carolina, 675 F.2d 1365 (4th Cir. 1981) (public nuisance statute authorizing abatement of "adult" bookstores and theaters); City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851 (N.D. 1981) (approving city's use of public nuisance abatement statute to regulate adult entertainment center).

76. People v. Acuna, 929 P.2d 596, 613-14 (Cal. 1997) (affirming use of general public nuisance statute to enjoin gang members from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings' . . . known to have complained about gang activities"), *cert. denied*, 117 S. Ct. 2513 (1997). *See also* TEX. REV. CIV. STAT. ANN. § 125.062 (West 1997) (defining public nuisance to include a "combination or criminal street gang that continuously or regularly associates in organized criminal activities").

77. *See* State v. Michels Pipeline Constr., Inc., 217 N.W.2d 339 (Wis. 1974) (stating that "legislative bodies have great latitude in determining what is a public nuisance").

78. *But see* Spenard Action Comm. v. Evergreen Subdiv., 902 P.2d 766, 773 (Alaska 1995) (holding that despite mandatory language in statute, court has "discretion to refuse to issue an injunction or an order of abatement" under certain circumstances).

79. TEX. REV. CIV. STAT. ANN. § 125.002 (West 1997) (emphasis added).

80. *See, e.g., id.*

the bond, closure or seizure is inevitable, a fact not lost on law enforcement agencies in states where similar provisions exist.[81]

D. *Public Nuisance Meets Civil Forfeiture: Making Matters Worse*

Much of the use of public nuisance law in the last quarter of the twentieth century can be traced to the explosion in the use of civil forfeiture laws, which, in turn, can be traced to the commencement of the War on Drugs in the 1970s.[82] The battle escalated with Congress's passage of the Comprehensive Crime Control Act of 1984[83] that contained increased fines and periods of imprisonment for drug-related crimes. It also contained provisions for the civil forfeiture of property related to particular criminal activity which were designed to reduce the profitability of drug trading.[84]

1. *Civil Forfeiture: From Punishment of Guilty People to Seizure of Guilty Property*

With origins distinct from those of public nuisance law, the law of civil forfeiture is generally regarded as having ancient roots.[85] Over

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81. *See, e.g.*, WIS. STAT. ANN. § 823.114 (West 1997) (requiring removal and sale of all personal property used in connection with public nuisance conduct as well as "closure" of the building or structure where it occurred for any purpose); MICH. COMP. LAWS ANN. § 600.3825 (West 1997); *cf.* OR. REV. STAT. § 105.580 (1996) (discretionary closing of premises for one year).

82. *See* Alfred W. McCoy, *Heroin as a Global Commodity: A History of Southeast Asia's Opium Trade*, *in* WAR ON DRUGS: STUDIES IN THE FAILURE OF U.S. NARCOTICS POLICY 237, 261 (Alfred W. McCoy & Alan A. Block eds., 1992). The president described the policy as an all-out "offensive" on heroin manufacturing sources in the Mediterranean region designed to eradicate 80% of the supply of United Stated heroin. Although the policy was largely effective in eradicating almost all of the heroin supplied to the U.S. from Turkey, the source of opium production and distribution to the United States simply shifted eastward into Asia, and south into Mexico. *See id.* at 261-64.

83. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976-2040 (codified as amended in scattered sections of 5, 18, 21, 26, 28, 29 & 49 U.S.C.). Congress recognized drug trafficking and racketeering as two of the most serious crime problems facing the United States. *See* S. REP. NO. 98-225, 101st Cong., 2d Sess., 191-92 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3374-75.

84. *See* 21 U.S.C. § 881(a)(7) (1994) (subjecting to forfeiture "all real property, including any right, title, and interest (including any leasehold interest) . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission" of a drug crime); *see also* S. REP. NO. 98-225, 101st Cong., 2d Sess., 191-92 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3374-75.

85. Civil forfeiture's origins are traced to an ancient custom of forfeiting an inanimate object involved in causing an accidental death. The value of the object, known as a deodand, often provided the crown with a fund from which it might compensate the family of the deceased or

time, three categories of property traditionally subject to forfeiture have been identified. The first two categories—"pure contraband" and "proceeds"—were so closely connected to the illegal conduct that forfeiture or destruction served the "obvious" and "powerful" government purposes of removing the goods from commerce and providing restitution.[86] Although property in the third category may have had little connection to the prohibited conduct, it was subject to forfeiture historically as "tools or instrumentalities that a wrongdoer has used in the commission of a crime."[87] Examples of such property include ships used in the course of acts of piracy or containers used to transport contraband. Courts sometimes labelled this category of property as "guilty" for purposes of seizure and forfeiture.

Such property also served important historical and practical goals to not only "suppress[] the offence," but also to "insur[e] an indemnity to the injured property."[88] In forfeiture cases, courts often considered the nature of the owner's relationship with the wrongdoer on the theory that such a relationship might provide a basis for an innocent owner to mitigate losses suffered in a forfeiture.[89] The Court's language in *Dobbins's Distillery*, illustrates the point:

> [T]he legal conclusion must be that the unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself. Power to that effect the law vests in him by virtue of his lease; and, if he abuses his trust, it is a matter

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engage in other charitable work in the community. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 & nn.18, 19 (1974); *see also* Van Oster v. Kansas, 272 U.S. 465 (1926) (holding that an innocent owner who entrusted the use of his possession to a wrongdoer forfeited his property); Dobbins's Distillery v. United States, 96 U.S. 395 (1878) (holding that the distilling equipment was subject to forfeiture notwithstanding the owner's ignorance of its illegal use); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) (holding that vessels used for piracy may be attached by the government). Thus, civil forfeiture also differs from criminal forfeiture, which occurs after conviction of certain felonies or treason, and amounts to an element of punishment for an offense. *See, e.g.*, United States v. Bajakajian, 118 S. Ct. 2028, 2090 (1998) (distinguishing between criminal forfeiture and civil forfeiture and holding that statutory forfeiture following conviction must comply with Eighth Amendment's Excessive Fines Clause).

86. Bennis v. Michigan, 516 U.S. 442, 458-63 (1996) (Stevens, J., dissenting).

87. *Id.* at 460.

88. *Id.* at 461 n.5; *see also Calero-Toledo*, 416 U.S. at 684.

89. *See, e.g., Calero-Toledo*, 416 U.S. at 677-78 & n.12 (discussing respective contractual rights of owner and lessor at time of seizure); *Van Oster*, 272 U.S. at 465 (describing seller's use of the car as "part consideration" for its sale, suggesting a contractual basis for the owner to seek relief from the wrongdoer); *Dobbins's Distillery*, 96 U.S. at 404; *The Palmyra*, 25 U.S. (12 Wheat.) at 14.

to be settled between him and his lessor . . . .[90]

The "guilty property" aspect of civil forfeiture also served as a basis for jurisdiction in admiralty and other in rem proceedings on the theory that the status of property—not the owner—was at issue.[91] The legal fiction concerning the "guilt" or "innocence" of property that formed the procedural background for such a forfeiture proceeding eventually evolved into its central substantive theme.[92] As that theme of "guilty property" flourished, the guilt or innocence of the owner became irrelevant to the state's power to forfeit private property.[93]

That was not the case in a public nuisance action where the effectiveness and availability of criminal prosecution and penalties were traditionally highly relevant to a court's decision to permit equitable abatement on behalf of the state.[94]

Modern federal civil forfeiture laws have come to be regarded by some as an effective and profitable weapon in the war on drugs[95] and by others as a "virtual nightmare."[96] They have survived constitutional attack on the grounds of double jeopardy,[97] excessive fines,[98] and procedural due process.[99] No longer merely a single weapon in the arsenal

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90. *Dobbins's Distillery*, 96 U.S. at 404.

91. *See The Palmyra*, 25 U.S. (12 Wheat.) at 10.

92. *See Van Oster*, 272 U.S. at 469 (affirming forfeiture of car despite owner's lack of knowledge regarding use); *Dobbins's Distillery*, 96 U.S. at 404 (affirming tax forfeiture of leased premises despite lessor's lack of knowledge).

93. *Calero-Toledo*, 416 U.S. at 680-87.

94. *See supra* Part I.A.

95. *See* Terrence P. Farley, *Asset Forfeiture Reform: A Law Enforcement Response*, 39 N.Y.L. SCH. L. REV. 149 (1994) (criticizing attempts to reform forfeiture laws by reference to positive effects enjoyed by federal agencies).

96. Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95, 95 (1994) (describing a number of civil liberties abuses). *See also, e.g.*, Roger Pilon, *Can American Asset Forfeiture Law Be Justified*, 39 N.Y.L. SCH. L. REV. 311 (1994) (answering "No" to the question); Don Van Naha, Jr., *Make Crime Pay*, N.Y. TIMES, June 30, 1996, at E16. *See generally* Symposium, *What Price Civil Forfeiture?: Constitutional Implications and Reform Initiatives*, 39 N.Y.L. SCH. L. REV. 1 (1994) (held at New York Law School on March 5, 1994).

97. *See* United States v. Ursery, 518 U.S. 267, 289 (1996) (holding that civil nature of in rem proceedings for forfeiture are not sufficiently punitive to fall within scope of double jeopardy clause).

98. *Compare* Austin v. United States, 509 U.S. 602 (1993) (holding that Eighth Amendment's excessive fines clause applied to drug asset forfeiture and remanding for consideration in light of court's opinion), *with* United States v. One Parcel of Real Property, 4 F. Supp. 2d 65 (D.R.I. 1998) (holding that, under circumstances of the case, forfeiture of home did not violate Eighth Amendment).

99. *See* United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (holding that Fourth Amendment places limits on government's ability to seize real property for purposes of civil forfeiture).

to fight the war on drugs, federal asset forfeiture appears to have become a driving force in law enforcement strategy.[100] In 1994 alone, the value of assets seized by federal officials through drug forfeiture statutes amounted to more than one-half billion dollars.[101] Congress also encouraged states to employ forfeiture techniques in concurrent state proceedings.[102] The response was widespread adoption of the Uniform Controlled Substances Act that allows state agencies, like their federal counterparts, to initiate civil forfeiture proceedings without the benefit of a state conviction.[103]

2. *Civil Forfeiture and Public Nuisance Law: Many Similarities, Significant Differences*

Forfeiture actions and public nuisance proceedings to seize property share many characteristics, not the least of which is that they are conducted as civil, rather than criminal matters. Accordingly, prosecutors need not prove their cases beyond a reasonable doubt as they would in a criminal case. Instead, in both a forfeiture and a public nuisance case, prosecutors may prevail by establishing their cases with only a preponderance of the evidence or, in some states, a clear and convincing standard.[104]

Adverse inferences not permissible against criminal defendants may be drawn against a defendant's refusal to testify in both a forfeiture and a public nuisance case.[105] Evidence of past criminal conduct or

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100. *See* Robert E. Bauman, *Take It Away*, 47 NAT'L REV., Feb. 20, 1995, at 34.

101. *See* 1994 ANN. REP. OF THE DEP'T OF JUSTICE ASSET FORFEITURE PROGRAM 35 (reporting that more than $549.9 million in assets were seized in 1994, approximately half of which was shared with state and local law enforcement agencies). The last year for which dollar figures have been reported was 1994.

102. *See* 21 U.S.C. § 903 (anti-preemption provision); City of Hartford v. Tucker, 621 A.2d 1339 (Conn. 1993) (existence of federal forfeiture proceeding did not require stay of state proceeding foreclosing tax lien on property); *see also* S. REP. NO. 98-225, at 217 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3400 (stating that new amendments in the Comprehensive Crime Control Act of 1984 would "enhance cooperation between Federal and State and local law enforcement agencies").

103. *See* Uniform Controlled Substances Act § 503(b), 9 U.L.A. 584 (1994). Forty-eight states, the District of Columbia, Puerto Rico, and the Virgin Islands have adopted either the 1970, 1990, or 1994 version of the Uniform Controlled Substances Act. *See* Table at 9 U.L.A. 1-2 (1994).

104. In Spenard Action Comm. v. Lot 3, 902 P.2d 766 (Alaska 1995), the Alaska Supreme Court applied the clear and convincing standard to an action to abate a public nuisance after reviewing similar public abatement laws in a number of other states. *See id.* at 774-75 & n.18.

105. *Compare* Griffin v. United States, 380 U.S. 609, 615 (1965) (holding that Fifth Amendment right to avoid self-incrimination prevents prosecutor from commenting on criminal defen-

reputation can be used to establish the present existence of a nuisance.[106] Likewise, despite any applicability of the Excessive Fines and Double Jeopardy Clauses, defendants in forfeiture and public nuisance actions generally do not have the right to confront witnesses or to have legal representation; in some cases they need not even be present.[107] And, of course, both may result in the government's seizure of real or personal property.

There are also important differences. Although reform is still needed in the area of civil forfeiture, many forfeiture provisions contain procedural safeguards for individual rights not found in public nuisance statutes. For example, the federal and uniform state forfeiture acts prohibit forfeiture where the property owner can establish innocence of the underlying offense.[108] Few public nuisance statutes explicitly provide for such a defense,[109] and now the Supreme Court has stated they need not do so.[110] While a right to a jury may exist under a state's uniform forfeiture act,[111] a jury is generally not available in a public nuisance action.[112]

Because public nuisance statutes may produce results identical to forfeiture statutes, including seizure of a home,[113] the absence of even

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dant's silence and court from instructing jury that adverse inference may be drawn from silence), *with* Whitaker v. Prince George's County, 514 A.2d 4 (Md. 1986) (holding that adverse inference was permissible in a civil public nuisance case where the public nuisance defendant invoked the Fifth Amendment to avoid self-incrimination by refusing to testify).

106. *See, e.g.*, State v. Anthony, 647 N.E.2d 1368 (Ohio 1995) (holding evidence of defendant's prior convictions admissible to establish existence of nuisance); People v. Griffin, 633 N.E.2d 773 (Ill. App. Ct. 1993) (affirming permanent injunction closing residence as nuisance based, in part, on evidence regarding defendant's reputation).

107. *See, e.g.*, State v. American Banking Ins. Co., 622 A.2d 261 (N.J. Super. Ct. App. Div. 1993) (default judgment). In Houston, Texas, a federal grant enables a state trial court to set aside one week each month to sit as a civil asset forfeiture court. In "roughly half of the trials," ad litem attorneys are appointed by the judge to represent property owners not responding to notice of the action. *See* Susan Borreson, *Ill-Gotten Gains Up For Grabs in Asset Forfeiture Court*, TEXAS LAWYER, Apr. 14, 1997, at 6.

108. *See* 21 U.S.C. § 881(a)(7) (1994); TEX. CODE CRIM. P. ANN. art. 59 (West 1998). The mere existence of the provision does not mean it works effectively. *See* Guerra, *supra* note 6, at 344 (asserting that the defense has resulted in "troublesome" findings in the context of the family).

109. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. § 125.001 (1997).

110. *See* Bennis v. Michigan, 516 U.S. 442 (1996).

111. *See* People v. 6323 N. LaCrosse Ave., 634 N.E.2d 743 (Ill. 1994) (holding absence of jury trial provision in state's drug asset forfeiture provision unconstitutional under state constitution).

112. *See* State v. Anthony, 647 N.E.2d 1368 (Ohio 1995) (no jury trial in nuisance abatement case); People v. Allen, 767 P.2d 798 (Colo. Ct. App. 1988) (same).

113. *See, e.g.*, Bochas v. State, 951 S.W.2d 64 (Tex. Ct. App. 1997) (affirming forfeiture of

the minimal protections contained in most forfeiture statutes is cause for concern as law enforcement officials increasingly use public nuisance law to enhance their efforts to control, deter, and punish criminal drug activity.

II. CONSTITUTIONAL PROTECTION FOR INDIVIDUAL RIGHTS IN THE HOME

> The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement![114]

The young mother grew up in the neighborhood in which she now lives. Her mother lives around the corner and is close enough to help with the children on a regular basis. All of the children attend the neighborhood public school, even her youngest—age 4—who is finally eligible for the pre-kindergarten program the school offers. Recently a young couple and their year-old infant moved in with her. She admits that they've been a big help. She likes having the extra adults in the house. Even with the additional child, the presence of three adults makes her life easier than when it was just her and the three children. The couple helps the mother with the children, especially in the mornings on the days she works. The mother leaves for her job on a production line before dawn four days a week and she's off in time to pick the children up from school. Then, when she gets home, she can help the couple with their baby. The rent they pay to her each month helps too.

Whether a home is owned[115] or leased, occupied by a single family

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home owned by mother of drug offenders purchased for safety of grandchildren); *Allen*, 767 P.2d at 798 (affirming application of state nuisance provisions to forfeit wife's interest in home). *See also supra* note 2 and accompanying text.

114. William Pitt, *Address in the House of Commons (1763), in* OXFORD DICTIONARY OF QUOTATIONS 379 (2d ed. 1953), *quoted in* Miller v. United States, 357 U.S. 301, 307 (1958). The Miller court reversed a conviction where police entered the defendant's home without a warrant and without notice of authority or purpose. Twelve years after *Miller*, Justice Stevens noted the force of William Pitt's moving oratory: "There can be no doubt that Pitt's address in the House of Commons in March 1763 echoed and re-echoed throughout the Colonies." Payton v. New York, 445 U.S. 573, 601 n.54 (1980).

115. The most common form of privately-held real property is the American home. The 1991 Census data states that 64% of all households reported being homeowners. *See* Bureau

or shared by unrelated persons, privately-owned or publicly subsidized, one's home is unquestionably "property."[116] Yet, a home is more than any property rights that may attach to it. Rather, it is the product of a unique combination of values that transform a house into a home.[117] It represents values that are expressed in the exercise of individual liberties regarding such things as marriage,[118] family[119] and childbearing,[120] education[121] and school,[122] security,[123] and marital relations[124] for which

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of the Census, Homeownership: 1989 to 1991 (June 1992), noted in Julia P. Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 69 TUL. L. REV. 373, 456 n.177 (1994).

116. Blackstone suggests that the home or "habitation" may have been the first object to which societies recognized property interests, even before the land upon which it sat:

> In the case of habitations in particular, it was natural to observe that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had their nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall . . . .

2 WILLIAM BLACKSTONE, COMMENTARIES, *4. *See also* EDWARD KEYNES, LIBERTY, PROPERTY AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS 6-10 (1996) (describing property in general as one of three "core values" government is obligated to protect).

117. Professor Margaret Radin has described the home's place in American law in quasi-mystical terms: "Our reverence for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society." Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1013 (1982). In a recent article, Professor Joan Williams describes ownership of a single-family house as an "American obsession" that has greatly influenced the American legal landscape. *See* Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 326 (1998). Professor Williams finds that this obsession arises, in part, from a non-legal, intuitive sense about the nature of property that is embedded in American property law. *See id.* at 278. She notes that although a widespread distribution of property may have resulted from this obsession, it also has a "dark underside" that has resulted in the exclusion of minorities and the poor from achieving home ownership. *See id.* at 328.

118. *See* Loving v. Virginia, 388 U.S. 1 (1967).

119. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (Due Process Clause of Fourteenth Amendment prevents zoning ordinance from defining "family" to only a few categories of related individuals).

120. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming and certain rights of women of childbearing age).

121. See Meyer v. Nebraska, 262 U.S. 390 (1923) (Due Process Clause of Fourteenth Amendment prevents the prohibition of foreign language classes in parochial school).

122. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (Oregon statute requiring attendance at public school rather than at parochial school found to be violative of the Fourteenth Amendment).

123. The Fourth Amendment guarantees that it is the "right of the people to be *secure* in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. CONST. amend. IV (emphasis added); *see also* Payton v. New York, 445 U.S. 573 (1980) (Fourth Amendment prohibits warrantless, unconsented entry into home to effect a felony ar-

the law provides protection. The Constitution recognizes the connection between these individual liberties and the home by offering several forms of protection to the property rights associated with the home and the "privacies of life" occurring within it.[125] This part will examine two of them: the Fourth Amendment and the Fourteenth Amendment.[126] The next part will examine the protections provided the home under the Fifth Amendment's Takings Clause.

A. *The Fourth Amendment Provides Explicit Textual Protection for the Home*

The Fourth Amendment[127] embodies the sentiments expressed in the moving oratory of William Pitt regarding the importance of the home as against government intrusion.[128] The Fourth Amendment's language is explicit: it guards "persons, houses, papers, and effects from unreasonable searches and seizures."[129] The heart of its protection, as it has been interpreted by the Supreme Court, is not the structure of the home, but rather the individual's "reasonable expectation of privacy."[130] Although it is clear that the Amendment "protects people, not places,"[131] the individual's expectation of privacy is generally greater the more closely related it is to the home.[132]

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rest).

124. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

125. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886) (describing "essence of constitutional liberty and security" as "apply[ing] to all invasions, on the part of the government and its employees of the sanctity of a man's home and the privacies of life").

126. Of course, other provisions may provide protection for rights connected with the home as well. *See, e.g.*, Lindsey v. Normet., 405 U.S. 56 (1972) (holding that Equal Protection Clause prohibited state from imposing double-rent bond as prerequisite to tenant-in-possession's appeal in landlord's action for possession).

127. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

128. *See supra* note 114 and accompanying text.

129. U.S. CONST. amend. IV.

130. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Arguably, this language refers to "searches" and not to "seizures." That is not to say, however, that the Amendment does not prohibit seizures of the home. *See* Soldal v. Cook County, 506 U.S. 56 (1992).

131. *Katz*, 389 U.S. at 351.

132. *Compare* Wilson v. Arkansas, 514 U.S. 927 (1995) (reversing drug conviction where officers failed to knock and announce prior to entering defendant's residence), *with* Oliver v.

1. *Protecting Privacy by Preventing Unreasonable Government Entry into the Home*

Typically, Fourth Amendment issues arise in a criminal proceeding when a criminal defendant challenges the validity of the arrest[133] or the seizure of things or information later used at trial against the defendant.[134] However, the Amendment's protection for "every householder"[135] is not limited to the criminal law; it extends to a range of circumstances in the civil arena as well.[136] Regardless of the context, a Fourth Amendment analysis begins with a determination whether the

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United States, 466 U.S. 170, 180 (1984) (holding that expectation of privacy in open fields outside of curtilage of home is not reasonable). That is not to say that circumstances not involving the home do not implicate an expectation of privacy protected by the Fourth Amendment. *See, e.g.*, See v. City of Seattle, 387 U.S. 541, 546 (1967) (holding that fire inspector's warrantless, unconsented search of warehouse without probable cause to believe that any code violation existed violated Fourth Amendment); *see generally* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993) (asserting that Court's stated willingness to rely on "society understandings" about expectations of privacy, does not correlate with actual understandings of innocent members of society).

133. *See, e.g.*, Payton v. New York, 445 U.S. 573, 603 (1980) (holding warrantless, nonconsensual entry into suspect's home for routine felony arrest violated Fourth Amendment); Miller v. United States, 357 U.S. 301 (1958) (reversing conviction on Fourth Amendment grounds where warrantless arrest occurred in defendant's home).

134. *See, e.g.*, Wilson v. Arkansas, 514 U.S. 927, 930 (1995) (remanding and holding that whether officers knocked and announced prior to entry must be considered in determining constitutional reasonableness of search of home).

135. *See, e.g.*, Miller, 357 U.S. at 313. In *Miller*, the Court reversed the defendant's conviction by holding that an officer's warrantless entry into home after ripping the chain off the door, violated the Fourth Amendment. *See id.* at 313-14. Writing for six members of the Court, Justice Brennan stated: "Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house." *Id.* at 313.

136. *See, e.g.*, United States v. James Daniel Good Real Property, 510 U.S. 42 (1993) (holding that Fourth Amendment places limits on government's ability to seize real property for purposes of civil forfeiture); Soldal v. Cook County, 506 U.S. 56, 71 (1992) (holding Fourth Amendment protected individual's property rights in mobile home when county deputies participated in wrongful eviction); Camara v. Municipal Court, 387 U.S. 523, 534 (1967) (holding Fourth Amendment requires warrant prior to administrative search of residence absent exigent circumstances), *rev'g* Frank v. Maryland, 359 U.S. 360 (1959) (rejecting homeowner's Fourth Amendment challenge to conviction for violation of public nuisance law after he refused to permit a municipal inspector from entering premises without a warrant). *See also* Flatford v. City of Monroe, 17 F.3d 162, 170 (6th Cir. 1994) (holding that Fourth Amendment requires, absent exigent circumstances, "pre-eviction judicial oversight" to tenants forced to leave apartments because of owners' violations of local building or housing codes); Richmond Tenants Org., Inc. v. Kemp, 956 F.2d 1300, 1309 (4th Cir. 1992) (holding Due Process Clause protects tenants of public housing from summary eviction).

government's conduct amounts to a "search" or "seizure" within the meaning of the Fourth Amendment.[137] This determination is made without reference to the nature of the government's interest in the conduct but rather by reference to the degree of the individual's expectation of privacy.[138] It is defined as a "meaningful interference with an individual's possessory interests in that property."[139] If a warrantless search or seizure falls within the meaning of the Fourth Amendment, it is presumed unreasonable.[140] From that point, a "careful balancing of governmental and private interests"[141] occurs to determine whether the warrantless conduct is nevertheless reasonable under the circumstances.[142]

The 1967 case of *Camara v. Municipal Court*[143] is widely regarded as the first case in which the Court explicitly applied the Fourth Amendment to circumstances where the individual was not suspected of criminal behavior.[144] Unwilling to permit a building code enforcement official to enter his home during a routine administrative inspection, the plaintiff challenged the ordinance that authorized the city's unconsented entry into the home. The Supreme Court struck the ordinance, holding that the unconsented entry of a government official into a private home amounted to a "significant intrusion[] upon the interests protected by the Fourth Amendment."[145] In reaching its conclusion that a municipal ordinance authorizing the warrantless, unconsented entry into a private home without any requirement of probable cause violated the Fourth Amendment, the Court balanced the government's interest in protecting the health and safety of the public on the one hand, against the individual's right to be free from unreasonable entries into the home,

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137. *See, e.g., Camara*, 387 U.S. at 534 (determining that inspection of residence to determine compliance with housing code fell within Fourth Amendment). *But see* Wyman v. James, 400 U.S. 309, 317-18 (1971) (holding that caseworker's home visit to AFDC applicant was not a "search" within the meaning of the Fourth Amendment because its purpose was "rehabilitative" rather than "investigatory").

138. *See* Slobogin & Schumacher, *supra* note 132, at 754.

139. *Soldal*, 506 U.S. at 61.

140. *See* Payton v. New York, 445 U.S. 573, 586 (1980).

141. *Soldal*, 506 U.S. at 71.

142. *See* Wilson v. Arkansas, 514 U.S. 927 (1995).

143. 387 U.S. 523 (1967).

144. Eight years earlier, a divided Court held otherwise in Frank v. Maryland, 359 U.S. 360 (1959). In *Frank*, the Court affirmed the defendant's conviction under municipal code for refusing to allow a city inspector entry into his home to inspect for suspected nuisance.

145. Camara v. Municipal Court, 387 U.S. 523, 534 (1967). *But see* Wyman v. James, 400 U.S. 309 (1971) (social worker's unconsented entry into AFDC applicant's home for "investigative" or "rehabilitative" purpose did not implicate Fourth Amendment).

on the other. It identified the rights protected by the Fourth Amendment in terms of privacy:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[146]

The *Camara* Court describes the Fourth Amendment's safeguards for an individual's home in terms of the individual's right of privacy. However, just as privacy rights receive constitutional protection from provisions other than the Fourth Amendment,[147] the Fourth Amendment protects more than abstract notions of "privacy." Indeed, there is some support for the theory that the Fourth Amendment was originally regarded as offering protection to individual property rights,[148] which also are protected elsewhere in the Constitution.[149] Before examining alternate sources of constitutional protection for privacy and property interests later in this Article, the next section will consider the Fourth Amendment's protection of an individual's property rights in her home.

2. *The Fourth Amendment Also Protects Property Rights in the Home*

The Supreme Court recently affirmed the application of the Fourth Amendment in civil matters implicating possessory rather than privacy rights. In *Soldal v. Cook County*,[150] the Court reviewed the conduct of

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146. *Camara*, 387 U.S. at 529 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

147. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). The Court noted:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.

Id. at 484.

148. *See generally* Radin, *supra* note 117, at 957, 996-1002 (discussing the Fourth Amendment and its protection of property rights).

149. For a more detailed discussion of this issue, see *infra* Part III.

150. 506 U.S. 56 (1992).

several county deputy sheriffs in connection with a landlord's removal of a mobile home from a rented lot. Although the landlord had previously filed an eviction proceeding against the plaintiff in state court, it sought and received assistance from the deputies to remove the mobile home prior to a hearing, much less a judgment in its favor.[151] Rejecting the defendants' arguments that the Fourth Amendment was not applicable because it did not protect the individual's property rights unless privacy interests were also implicated,[152] the Court held that the homeowner's property interests in the home were protected by the Fourth Amendment even in the absence of intrusion upon privacy.

Although the Court suggested that the Fourth Amendment may not protect possessory interests in other types of property, the *Soldal* decision makes clear that the Fourth Amendment does protect possessory rights in the home.[153] Thus, the demolition of a home pursuant to a municipal public nuisance ordinance, without the prior authorization of a judicial officer, may violate the Fourth Amendment's reasonableness standard under *Soldal*.[154] Even when conduct implicating individual liberty and property rights satisfies the Fourth Amendment, additional analysis may be required under other provisions of the Constitution.[155]

B. *Substantive Due Process Protects the Values Expressed in the Home*

In a number of cases, the Court has closely associated the home with individual privacy rights regarding marriage, childbearing, and education and has protected them from government interference by reference not to the Fourth Amendment, but to principles of substantive due process under the Fourteenth Amendment.[156]

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151. *See id.* at 58-60.

152. *See id.* at 65.

153. *See id.* at 64 n.7.

154. *See* Thomas v. City of Dallas, No. 3:94-CV-0214-R, 1997 WL 560615 (N.D. Tex. Aug. 29, 1997); Burns v. City of Dallas, No. 3-94-CV-2770-R, 1997 WL 118424 (N.D. Tex. Mar. 12, 1997).

155. *See, e.g.*, United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (even assuming pre-hearing seizure of forfeitable real property satisfied Fourth Amendment, analysis still required under Due Process Clause); *see also* Samuels v. Meriwether, 94 F.3d 1163 (8th Cir. 1996) (sustaining public nuisance demolition after independent review for reasonableness under Fourth Amendment in addition to Fourteenth Amendment analysis regarding procedural due process).

156. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (describing such matters as "central to liberty" protected by the Fourteenth Amendment). The Court has suggested that reference to these "other" interests or values are necessary to define the rights protected by the Fourteenth Amendment. *See* Slobogin & Schumacher, *supra* note 132.

1. *Protection for Core Values Associated with Traditional Family Life*

These core values are protected under the Fourteenth Amendment's Due Process Clause[157] regardless of their source within the constitution and "regardless of the fairness" of the government conduct affecting them."[158] Not easily reduced to a simple formula,[159] the Court has described its approach to substantive due process by reference to Justice Harlan's dissent in *Poe v. Ullman*:[160]

> [Substantive due process] is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[161]

Despite expressions of unwillingness to avoid substituting its judgment for what appears to be a reasonable exercise of legislative power, the Court nevertheless has stricken state and local regulations when it concluded that the regulation intruded too severely upon the exercise of fundamental individual rights.[162] The test it employed balances those rights against "the demands of organized society"[163] and requires courts to scrutinize the legislation to determine whether it too severely imposes upon individual liberties. For example, the Court has struck other-

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157. The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. Nearly identical language applicable against the federal government is contained in the Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

Because the subject of this Article is state nuisance abatement statutes, references to the Due Process Clause will be to the provision, applicable against the states, contained in the Fourteenth Amendment, unless stated otherwise.

158. Daniels v. Williams, 474 U.S. 327, 331 (1986).

159. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992).

160. 367 U.S. 497, 543 (Harlan, J., dissenting).

161. *Id., quoted in Planned Parenthood*, 505 U.S. at 848.

162. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977), in which the Court struck, on substantive due process grounds, a housing ordinance limiting occupancy of a dwelling to certain related individuals. Justice Powell wrote, "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499.

163. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting), *quoted with approval in Moore*, 431 U.S. at 501-02.

wise legitimate exercises of the police power in the form of zoning ordinances[164] and compulsory education laws[165] when it has concluded that they intrude too deeply upon what it concludes are core, fundamental rights.[166] A common thread among the Court's analysis of fundamental rights is the articulated connection between the rights under consideration and the home. For example, in *Stanley v. Georgia*,[167] the Court invalidated a Georgia statute that criminalized the private possession of obscene materials. Holding that a conviction under the statute for merely possessing obscene materials within one's home implicated rights of privacy as well as rights regarding speech, Justice Marshall wrote:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[168]

Likewise, in *Griswold v. Connecticut*,[169] Justice Goldberg's image of government officials searching "the sacred precincts of the marital bedrooms"[170] for evidence of unlawful contraceptive devices suggests the close connection between the home and rights exercised within it. While the Court has refused to extend the protections of the Fourteenth Amendment to all private, consensual conduct occurring within the home,[171] it has nevertheless characterized those rights the Amendment does protect in terms of the intimacy, privacy, and security that are

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164. *See Moore*, 431 U.S. at 494 (occupancy limits on dwelling units struck because of restriction to certain statutory definitions of family); *cf.* Village of Belle Terre v. Borans, 415 U.S. 1 (1974) (upholding ordinance prohibiting certain unrelated persons from living together).

165. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state law prohibiting parochial school education); Meyer v. Nebraska, 262 U.S. 390 (1923) (although state law designed to require English as students' primary language was within police power, provision forbidding the teaching of the German language violated due process protection).

166. *See* Stanley v. Georgia, 394 U.S. 557 (1969) (reversing conviction for possession of obscene reading materials).

167. *Id.*

168. *Id.* at 565.

169. 381 U.S. 479 (1965).

170. *Id.* at 485-86.

171. *See* Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to extend constitutional protection to consensual homosexual conduct on the theory that such conduct was not a fundamental right). Although the Court acknowledged a connection between substantive due process protection and rights regarding heterosexual family and marriage, it refused to connect those rights to homosexual conduct. *See id.* at 190-91.

associated with the home.[172]

2. *Protection of Individual, Not Economic, Interests*

Despite the occasional protestation to the contrary,[173] the Court has generally reserved the careful, painstaking scrutiny of the police power it employs under the Due Process Clause for those cases in which it concludes that only certain fundamental, individual liberties are at stake.[174] On the other hand, at least until recently, where state regulation adversely affected economic or property rights and not individual liberties, the Court appeared to substitute reliance upon the legislative articulation of legitimate state goals for rigorous analysis.[175]

An example is *Moore v. City of East Cleveland*,[176] in which the Court struck an ordinance that limited dwelling occupancy to single families and defined families to include only limited kinds of blood relationships.[177] Application of the ordinance resulted in the criminal conviction of Inez Moore who lived in her home with an adult son, his child and the child of another son.[178] Acknowledging its traditional practice of deferring to land-use regulations as valid exercises of the police power in cases where fundamental rights were not at stake,[179] the Court nevertheless held that such deference is "inappropriate" when the regulation "slic[es] deeply into the family itself."[180] Noting that operation of the regulation had the result of criminalizing a grandmother's living arrangement with her son and grandsons, the Court held that the ordinance's impact on the household was too great to sustain it under the substantive Due Process Clause.[181]

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172. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992).

173. *See* Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).

174. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (rejecting argument that private homosexual activity was a fundamental right).

175. Of course, the Court has been reluctant to admit to any such distinction. *See, e.g., Lynch*, 406 U.S. at 542-46; United States v. Carolene Prod. Co., 304 U.S. 144, 153 & n.4 (1938). The famous footnote is widely regarded as the source of the approach. The historical roots and transformation of the Court's substantive due process doctrine are summarized succinctly in Lawrence Berger, *Public Use, Substantive Due Process and Takings—An Integration*, 74 NEB. L. REV. 843, 846-52 (1995).

176. 431 U.S. 494 (1977).

177. *See id.* at 496.

178. *See id.*

179. *See, e.g.*, Village of Belle Terre v. Borans, 416 U.S. 1 (1974) (involving land use provision limiting occupancy of single-family dwellings to those occupied by unlimited number of persons related by blood, marriage, or adoption or not more than two unrelated persons); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (comprehensive land use ordinance).

180. *Moore*, 431 U.S. at 498.

181. *See id.* at 499 (citing Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961)).

Recent cases suggest that the Court has moved to close the gap between constitutional protection for individual liberties and constitutional protection for economic property rights in at least one area under the Fifth Amendment's Takings Clause—regulatory takings law.[182] Part III examines the area of regulatory takings as it considers the constitutional protection for the home as property under the Fifth Amendment.

III. CONSTITUTIONAL PROTECTION FOR THE HOME AS PROPERTY

The mother paid $3,000.00 down for the house and borrowed the rest from an individual lender to whom she has agreed to pay $427 each month for ten years. The lender reports that she often pays in excess of the monthly payment and if she continues to do so she will pay off the note in less than ten years. She is responsible for taxes and all maintenance on the house. Recently, she and her tenants bought several cans of paint and brushes and spent the weekend painting in time for Easter. If the police board up the house as they have told her, she won't be able to live there, but she will still be responsible for the mortgage payments, taxes, and the upkeep of the house. If she has to pay rent to live elsewhere, she won't be able to continue making her payments on the house. And if she can't keep up with the payments, then she's likely to lose the house. Although the lender says he will try to work with her, business is business and there are no guarantees.

Legal scholars rarely define property as simply a thing, but as an individual's rights with respect to a thing.[183] Such rights generally include the right to use,[184] possess,[185] and transfer[186] the thing, such as a

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See Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (quoting *Moore* with approval).

182. According to one tally, the Court has held government conduct to be constitutionally infirm in four out of nine cases over the last ten years. *See* Robert Brauneis, *The Foundation of Our "Regulatory Takings" Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613 (1996). Professor Brauneis notes that the Court's decisions since 1986 amount to a trend when compared to only four cases of constitutional infirmity in 200 years prior to 1986. *See, e.g.*, Dolan v. Tigard, 512 U.S. 374, 396 (1994) (Stevens, J., dissenting) (criticizing majority for applying substantive due process analysis in property case); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

183. *See* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 58-59 (1985); *Williams, supra* note 117 (identifying traditional and alternative approaches to analyzing property rights); *see also* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (describing the "essence of property," as "fluidity" and defining it as "the end result of a process of competition among inconsistent and contending economic values").

184. *Compare* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (noting that "right

home. Property rights in the home often enjoy a preferred status under state and federal law. For example, federal tax law provides deductions for amounts paid as interest on the purchase of a taxpayer's primary residence[187] and most states provide homestead exemptions to protect homes from general creditors.[188] In addition, Congress has declared it a national goal that "every American family be able to afford a decent home in a suitable environment."[189]

A. *Protecting Property?*

As "property," the home receives constitutional protection under the Fifth Amendment which provides that no person shall "be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."[190] However, describing a home as "property" does not protect it from confiscation, much less provide compensation if the home is seized as a public nuisance.[191] Indeed, a public nuisance action may not only leave a homeowner without the use of her home, but it may also require her to pay for the investigative costs and attorneys' fees incurred by the state in seeking the abatement.[192]

This paradox has its roots in *Mugler v. Kansas*,[193] which, as dis-

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to coal for practical purposes is the right to mine coal"), *with* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (sustaining ordinance preventing plaintiff's use of land for brickmaking despite value of soil for bricks but expressing no opinion on whether the owner could continue to "use" land by transporting clay for brickmaking elsewhere).

185. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

186. *See, e.g.*, Andrus v. Allard, 444 U.S. 51 (1979) (sustaining against takings challenge federal regulation prohibiting sale of eagle feathers without regard to when the feathers were collected).

187. *See* I.R.C. § 163 (Law. Co-op. 1996).

188. *See, e.g.*, TEX. CONST. art. XVI, § 50.

189. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 101, 104 Stat. 4085 (codified at 42 U.S.C. § 12701 (1994)). *See* Forrester, *supra* note 115, at 393-409 (1994) (describing federal support of the mortgage market, federal tax policy, bankruptcy law, and federal pre-emption of state law as constituting comprehensive federal effort to promote home ownership).

190. U.S. CONST. amend. V.

191. *See, e.g.*, State v. Anthony, 647 N.E.2d 1368 (Ohio 1995) (affirming abatement order padlocking home for one year); State v. Griffin, 633 N.E.2d 773 (Ill. Ct. App. 1993) (affirming public nuisance injunction preventing use of defendant's residence for any purpose for one year).

192. *See* City of Oakland v. McCullough, 46 Cal. App. 4th 1 (Ct. App. 1996) (affirming as modified post-closing order awarding the city attorneys' fees and investigative costs incurred in pursuing abatement of drug house).

193. 123 U.S. 623 (1887).

cussed in Part I above, distinguished between the power of eminent domain to appropriate property for public use[194] and the police power to control public nuisance conduct.[195] Believing that only the former required compensation, while the latter did not, Justice Harlan wrote:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of the property to inflict injury upon the community.[196]

The notion that states might prevent harmful activity through the exercise of the police power without compensation played an important role in the development of the Court's takings jurisprudence under the Fifth Amendment.[197] This was especially true in the development of land-use regulations, in which public nuisance law continued to occupy an important place. For example, in cases such as *Reinman v. City of Little Rock*[198] and *Hadacheck v. Sebastian*,[199] the Court refined the analysis articulated in *Mugler*:

> [I]t is clearly within the police power of the State to regulate the business and to that end to declare that in particular cir-

194. That is not to say, however, that all clearly identified appropriations "for public use" are uncontroversial. *See, e.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (affirming legislation designed to re-distribute land ownership as a legitimate public use); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (affirming city's attempt to acquire privately held land in residential neighborhood for transfer to General Motors for construction of for-profit assembly plant); *Growing Pains: Mall's Expansion Claims Neighborhood*, DALLAS MORNING NEWS, Feb. 1, 1998, at 9A, *available in* 1998 WL 2510031 (reporting controversy over city's appropriation of residential neighborhood for expansion of privately-owned shopping mall).

195. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928) (affirming destruction of ornamental cedar trees under Virginia public nuisance statute to prevent spread of disease potentially harmful to apple orchards); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (affirming misdemeanor conviction for violating Los Angeles municipal ordinance prohibiting brick manufacturing).

196. *Mugler*, 123 U.S. at 669 (emphasis added).

197. Professor Richard Epstein explains, "The most distinctive aspect of the police power under the eminent domain clause has been its antinuisance component." EPSTEIN, *supra* note 183, at 112. Increasingly, scholars have criticized its place within the law of takings. *See, e.g.*, Halper, *supra* note 9; John Fulton Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

198. 237 U.S. 171 (1915).

199. 239 U.S. 394 (1915).

> cumstances and in particular localities a livery stable shall be deemed a nuisance . . . provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment.[200]

However, even when land-use regulations were not nuisance-centered, the Court continued to return to the reasoning articulated in *Mugler*, *Reinman*, and *Hadacheck*. The comprehensive zoning plan at issue in *Euclid v. Ambler Realty Co.*[201] provides an example. Analogizing the comprehensive plan to regulation of individual land uses "likely to create nuisances,"[202] the Court found it to be a valid exercise of the police powers notwithstanding any loss in value an individual property owner might suffer as a result of the scheme.[203]

Euclid's analogy to public nuisance controls was not unique. Over and again, the Court has sustained regulations against constitutional attack on the ground that they—like public nuisance controls—were designed to prevent harmful consequences that would likely occur if the regulations did not stand.[204] From very early in the century, however, scholars recognized that the police power's ability to engage in regula-

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200. *Reinman*, 237 U.S. at 176. In both cases, municipal ordinances prohibited certain existing businesses from operating within designated areas of the city because of their "effect on the health and comfort of the community." *Hadacheck*, 239 U.S. at 410-11 (describing similarities with *Reinman* case). Plaintiffs in both cases owned businesses outlawed by the ordinances—livery stables in *Reinman*; a brickyard in *Hadacheck*—and both argued that their property would be significantly diminished in value if the ordinances prohibited them from conducting their business where they were currently located. *See Reinman*, 237 U.S. at 172-73. In *Hadacheck*, the Court assumed the prohibition against brickmaking within city limits caused the plaintiff to suffer an 80% reduction in value of his property. *See Hadacheck*, 239 U.S. at 405. In *Reinman*, the Court stated only that the economic losses would be "significant" and did not provide sufficient information to determine precise calculations. Acknowledging the economic losses suffered by the plaintiffs in both cases, the Court sustained both ordinances and found them to be properly within the scope of the city's powers. *See Reinman*, 237 U.S. at 171; *Hadacheck*, 239 U.S. at 414.

201. 272 U.S. 365 (1926).

202. *Id.* at 387. Oddly, the Court did not identify specifically whether it was referring to private or public nuisances. *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding ban on construction on petitioner's residential lots constituted a "taking," thereby entitling him to compensation).

203. *See Euclid*, 272 U.S. at 385 (75% reduction in value).

204. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987) (sustaining statute designed to minimize subsidence of surface area in coal regions as controlling activity "akin to a public nuisance"); Andrus v. Allard, 444 U.S. 51, 67 (1979) (rejecting a takings challenge to a federal conservation scheme designed to "prevent the destruction" of certain endangered species of birds by making it unlawful to sell artifacts containing feathers or other bird parts).

tion to prevent harm to the public without compensation for any destruction of economic value was often difficult to distinguish from a taking for public use under the power of eminent domain that required compensation.[205]

B. *Regulatory Takings*

1. *Physical Invasions*

Fortunately, in light of the inherent difficulty of determining whether a regulation prevents a harm or secures a benefit,[206] the harm-prevention analysis is only one of three major threads courts have used in weaving the fabric of regulatory takings doctrine.[207] The second major thread is the so-called "physical invasion test," which determines whether the regulation compels the property owner "to suffer a physical 'invasion' of his property."[208] In contrast to the harm-prevention analysis, which tolerates "significant" reductions in economic value under the police power without compensation, the physical invasion test will not tolerate even a "minute" physical intrusion without satisfying the constitutional requirement of just compensation.[209] Applying this analysis, the Court invalidated a New York statute designed "to facilitate tenant access to cable television" by requiring landlords to permit the placement of one-half inch television cables on their property without compensation.[210]

Under *Loretto*, the degree of economic loss is irrelevant to the

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205. *See* ERNST FREUND, THE POLICE POWER § 511 (1904).

206. Numerous courts have attempted to distinguish between preventing a harm and conferring a benefit. *See, e.g.*, Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972). Scholars, too, have remarked that the difference is often in the eyes of the beholder. *See, e.g.*, Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

207. *See* Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 75 (describing the Court's takings jurisprudence as a "crazy quilt pattern").

208. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (describing category of compensatory regulation and citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) as an example).

209. *See id.*

210. *Loretto*, 458 U.S. at 423. The Court was unequivocal on the takings issue: "Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test." *Id.* However, it expressed no opinion on what amount of compensation was just. *See id.* at 441. On remand, the New York Court of Appeals sustained the power of a regulatory commission created by the statute to set $1.00 "just." Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428 (N.Y. 1983). *Compare* Respublica v. Caldwell, 1 U.S. 150 (1 Dall.) (1785) (rejecting nuisance defense that construction increased value of wharf).

takings analysis, just as it is irrelevant to a harm-prevention analysis.[211] In contrast, such loss forms the core of the "diminution-in-value test" first announced in Justice Holmes's famous opinion in *Pennsylvania Coal Co. v. Mahon*.[212]

2. *Diminution in Value*

The diminution-in-value test announced in *Mahon* is considered to be the origin of the Court's modern approach to regulatory takings law.[213] *Mahon* is a case arising from the attempts of the Mahon family to prevent the Pennsylvania Coal Company from mining anthracite coal from beneath their home.[214] In an 1878 deed, the company had conveyed only "the surface" of the parcel to the Mahon family where the family home was located. The company retained for itself the "right to remove all the coal" from it and obtained a waiver from the Mahons of any right to complain about the collapse of the surface resulting from the company's mining activities.[215] Some years later, the Pennsylvania legislature enacted the Kohler Act to prevent the mining of coal where it would cause "subsidence" of the surface.[216] Although the statute effectively nullified the waiver, the company notified the Mahons that it intended to exercise its rights under the deed.[217] When the Mahons sought an injunction under the statute to prevent the company from proceeding, the company argued that the regulation deprived it of property without due process, took its property without compensation, and impaired its right to enter into contracts.[218] Rejecting the family's argument that the statute was a legitimate exercise of Pennsylvania's police power, Justice Holmes agreed. After a brief recitation of the facts, Holmes framed the issue before the Court as follows: "As applied to this case the statute is admitted to destroy previously existing rights

211. *Compare* Hadacheck v. Sebastian, 239 U.S. 394, 408 (1915) (no taking despite 87 1/2% diminution in property's value), *with Loretto*, 446 N.E.2d at 428 (affirming $1.00 as "just compensation" for regulatory taking despite finding that regulatory action *increased* property's value).

212. 260 U.S. 393 (1922).

213. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (discussing origins of regulatory takings doctrine); Brauneis, *supra* note 183, at 615-19, 670-71 (acknowledging importance of *Mahon* to regulatory taking law, but suggesting its concepts were not "radically novel").

214. *See Mahon*, 260 U.S. at 412.

215. *Id.*

216. *See id.* at 400.

217. *See id.* at 412.

218. *See id.* at 394-95.

of property and contract. The question is whether the police power can be stretched so far."[219]

Finding "the right to mine coal" to be valuable only if one can exercise the right to extract it, Justice Holmes concluded that by making it "commercially impracticable to mine certain coal [the statute] has very nearly the same effect for constitutional purposes as appropriating or destroying it."[220] He acknowleded that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[221] Holmes also considered it to be a "natural tendency of human nature" to continue to exercise the police power, "until at last private property disappears."[222] He concluded, "[t]he general rule, at least, is that which property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[223]

Holding that a regulation could go "too far," Justice Holmes identified limits to a legislature's ability to enact regulations that diminish property values without compensation, something that the Court had been unwilling to do only a short time earlier.[224] Indeed, in a vigorous dissent, Justice Brandeis, relying on the precedent of *Mugler*, considered the regulation to be a valid exercise of the police power which required no compensation. He stated, "[r]estriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put."[225]

Mahon's influence on takings law cannot be understated.[226] Nevertheless, as courts struggled to give meaning to Holmes's "too far" test, little changed for property owners suffering uncompensated losses caused by regulatory action.[227] Indeed, as late as 1978, the Court still

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219. *Id.* at 413.

220. *Id.* at 414.

221. *Id.* at 413.

222. *Id.* at 415.

223. *Id.*

224. *See, e.g.*, Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1913) (holding that state statute did not unconstitutionally deprive mine owner of his property although it required pillar of coal to be left in place for protection of mine workers).

225. *Mahon*, 260 U.S. at 418 (Brandeis, J., dissenting).

226. *See, e.g.*, BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Michelman, *supra* note 206; Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *supra* note 183. Recent scholarship examining *Mahon* include: Brauneis, *supra* note 182, and Halper, *supra* note 9.

227. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (holding that

struggled to give meaning to Holmes's "too far" test in the regulatory context, as it went behind *Mahon* to the public nuisance cases from which the noxious use doctrine arose to support broad regulatory powers that significantly diminished economic values.[228]

That struggle emerged in *Penn Central Transportation Co. v. City of New York*,[229] in which the Court considered plaintiffs' challenge to the application of New York City's Landmarks Preservation Law to the Grand Central Station Terminal. Plaintiffs argued that the law would force them to forego significant economic benefits and suffer great economic loss. Noting that "[l]egislation designed to promote the general welfare commonly burdens some more than others," Justice Brennan relied upon public nuisance law[230] for the proposition that government actions that prohibit pre-existing conduct involving no "blameworthiness" or "moral wrongdoing"[231] may, nevertheless, constitutionally cause significant economic loss without compensation. As he rejected plaintiffs' takings challenge and sustained the application of the law despite great economic losses, Justice Brennan temporarily extended the life of the harm-prevention exception to the Fifth Amendment.[232]

Not until *Lucas v. South Carolina Coastal Council*,[233] seventy years after *Mahon* and 14 years after *Penn Central*, did the Court expressly reject the notion that a legislative goal of preventing harm was sufficient justification for land-use regulations when they also diminished property values.[234]

C. Lucas *and Limited Government Powers*

At issue in *Lucas* was a provision of South Carolina's Beachfront Management Act, which prohibited the construction of "occupiable im-

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Pennsylvania statute enacted to control subsidence of surface through coal mining was an exercise of police power "to abate activity akin to a public nuisance"); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

228. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133-34 n.30 (1978).

229. *Id.*

230. *Id.* at 133 (citing Goldblatt v. Town of Hempstead 369 U.S. 590 (1962) (rejecting takings challenge to ordinance preventing operation of an existing sand and gravel mining business); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915)).

231. *Penn Cent. Transp.*, 438 U.S. at 133 n.30 (citing Sax, *supra* note 183, at 50).

232. *See also* Keystone Coal Bituminous Ass'n v. DeBenedictis, 480 U.S. 470, 490 (1987) ("[T]he State's exercise of its police power to prevent . . . impending danger" is proper and does not require compensation.).

233. 505 U.S. 1003 (1992).

234. *See id.*

provements"[235] on David Lucas's two beachfront lots. David Lucas did not dispute the statute's validity "as a lawful exercise of South Carolina's police power," but instead, he argued that he was entitled to compensation because of the Act's "complete extinguishment of his property's value."[236] A South Carolina trial court agreed and ordered the state to pay more than $1.2 million as "just compensation." The South Carolina Supreme Court reversed. Citing *Mugler v. Kansas*, the state's high court held that because the regulation was "designed to prevent serious public harm" in the form of beach erosion,[237] the state need not compensate the owner for any loss in property value suffered as a result of the enforcement of the regulation.

The Supreme Court disagreed and, as it did so, it re-cast the Court's reliance on the harm-prevention doctrine that evolved from public nuisance law as the "progenitor of our more contemporary statements that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests.'"[238]

> [I]t becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. A fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.[239]

Justice Scalia went further and provided a framework for analysis of "confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land."[240] The inquiry, he announced, required examination into the "background principles" of the "State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[241] He provided more specific instructions:

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235. *Id.* at 1009.

236. *Id.*

237. Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 901-02 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992).

238. 505 U.S. at 1023-24 (citations omitted).

239. *Id.* at 1026.

240. *Id.* at 1029.

241. *Id.* Professor Louise Halper criticizes the Court for its reliance on private nuisance law. *See* Halper, *supra* note 9.

> The "total taking" inquiry will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) . . . .[242]

Rejecting simple harm-prevention as a justification for land-use regulations that completely diminish the value of the property, Justice Scalia provided a balancing test that distanced the Court from the expansive view of government power expressed in *Mugler*. Instead, he rejected the State's ability to rely upon the mere articulation of a legitimate goal as a substitute for meaningful analysis of whether the means used achieved that goal.[243] In so doing, the Court relieved the burden on the property owner to show that the state's action was illegitimate and shifted it to the state to demonstrate that its action is consistent with "background principles of nuisance and property law" that prohibit the uses proscribed by the statute.[244] It concluded that "[o]nly on this showing can the state fairly claim that, in proscribing all such beneficial uses, the . . . Act is taking nothing."[245]

Although this shifting burden may provide some relief for property owners, it does not provide much guidance for courts on selecting the background principles to apply and deciding how to apply them. One scholar has written persuasively that any reliance the Court may be placing on private nuisance law is erroneous.[246] But, it is also erroneous to rely upon the common law of public nuisance to justify a state's destruction of private property without compensation. As discussed above, it is the right of public necessity, not the law of public nuisance that permits uncompensated destruction of private property.[247]

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242. *Lucas*, 505 U.S. at 1030-31.

243. *See id.* at 1031. "We emphasize that to win its case [the State] must do more than proffer the legislature's declaration that the uses [the owner] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . ." *Id.* (citations omitted).

244. *Id.* The principles of "nuisance law" to which Justice Scalia refers are principles of private nuisance law and not public nuisance law.

245. *Id.* at 1031-32.

246. *See* Halper, *supra* note 9, at 329.

247. *See supra* Part I.A.2.b.

Despite any confusion over the appropriate background principles to apply to the analysis, it is clear that *Lucas* requires courts to examine closely the regulatory conduct challenged because of the economic losses it causes. While the Court has yet to apply the *Lucas* test directly, its subsequent examination of other land-use rules suggests a level of scrutiny not unlike the one identified in *Lucas*.[248] For example, in the 1994 case of *Dolan v. City of Tigard*,[249] the Court considered a property owner's challenge to a requirement that she dedicate a portion of her land for flood control and other public use as a condition to obtaining a building permit. One after another, the Oregon courts found the condition to be a reasonable one.[250] Applying a two-part test requiring the Court to go behind the articulated goals of local officials, the Supreme Court reversed. First, it determined whether the "'essential nexus' exists between the 'legitimate state interests' and the permit condition exacted by the city."[251] After finding such a nexus, the Court engaged in the second part of the test in which it "must . . . decide the required degree of connection between the exactions and the projected impact of the proposed development."[252] In doing so, the Court found that the city's articulation of a possible connection was insufficient to satisfy constitutional requirements.[253] Although the Court rejected the property owner's argument that it should apply the test of *Lucas*,[254] it remanded the case with instructions that the city "make some effort to quantify its findings" beyond conclusory statements about the possibility of the effect that the plaintiff's proposed development would have on the area.[255]

The foregoing illustrates the increasing limits the Court has placed on government's power to impose significant reductions in economic and property rights without compensation. In contrast, *Bennis v. Michigan*[256] demonstrates how public nuisance law may adversely affect those same rights with little interference from the Constitution.

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248. *See, e.g.*, Babbitt v. Youpee, 117 S. Ct. 727 (1997) (finding escheat provisions of Indian Land Consolidation Act amounted to unconstitutional taking); Dolan v. City of Tigard, 512 U.S. 374 (1994) (remanding landowner's challenge for determination of whether challenged government action bore sufficient relationship to articulated goals).

249. 512 U.S. 374 (1994).

250. *See id.* at 382-83 (describing procedural background of case).

251. *Id.* at 386.

252. *Id.*

253. *See id.* at 396.

254. *See id.* at 385 n.6.

255. *Id.* at 395.

256. 516 U.S. 442 (1996).

IV. *BENNIS V. MICHIGAN*: MIXING APPLES AND ORANGES?

The police watch her house. She sees them often. Sometimes they wave to let her know they're there. Her lawyers have found out that the abatement order was signed by a judge several months ago. No one had ever told her the police were going to board up her house until a few days ago, when a man from the city came around. He said it was because the former owner sold drugs from the house. That explains why people sometimes knock on her door looking to buy drugs. She always tells them to go away. She doesn't understand why they want her house: she doesn't use drugs and she doesn't sell them. She hasn't done anything wrong.

A. *The Facts*

On October 3, 1988, Detroit police arrested John Bennis after observing him with a woman in a 1977 Pontiac parked on a Detroit street.[257] Police charged Mr. Bennis with gross indecency. Before criminal liability was established, county prosecutors commenced a public nuisance action against John Bennis and his wife, Tina, as co-owners of the car, seeking forfeiture of the car as abatement of a public nuisance. Within a month of the arrest, but prior to the disposition of the criminal charges, a trial on the public nuisance issue was held.[258] Tina Bennis testified at the nuisance trial; John Bennis did not.[259] In an effort to defend against the abatement of her interest in the car, Mrs. Bennis testified that she had neither any knowledge regarding her husband's association with prostitutes, nor any knowledge regarding his conduct or his whereabouts on the day of his arrest.[260] In a one-page, unreported order, the trial court rejected her defense, "declared the car a public nuisance, and ordered the car's abatement."[261] In addition, after considering the age of the car and the amount paid for

257. *See* Brief for Petitioner at 6, Bennis v. Michigan, 516 U.S. 442 (1996) (No. 94-8729). Several months after the abatement trial, Mr. Bennis pled guilty to a misdemeanor, was fined $250, and required to perform community service. *See id.* at 7 & n.2.

258. *Id.* at 6. Nearly three months after the abatement trial, on January 27, 1989, John Bennis pled guilty to a misdemeanor. He was fined $250 and ordered to perform community service. *See id.* at 7 & n.2.

259. Although called to testify, John Bennis refused, asserting his Fifth Amendment right to avoid self-incrimination. *See id.* at 7-9.

260. *Id.* at 7.

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

it—$600—the trial court rejected Mrs. Bennis's request to share in any sale proceeds resulting from the forfeiture. It reasoned that "there's practically nothing left minus costs in a situation such as this."[262]

1. *The State Appeals*

An intermediate appellate court reversed in Mrs. Bennis's favor on two grounds.[263] First, it held that under Michigan law, abatement of Mrs. Bennis's interest in the jointly-owned car was improper because the prosecution failed to establish that she had any knowledge regarding her husband's conduct.[264] The court of appeals also held that, under Michigan law, "one isolated incident of prohibited conduct" by Mr. Bennis was insufficient to establish that the Pontiac was a public nuisance under the statute.[265]

The Michigan Supreme Court disagreed, reversed on both grounds, and reinstated the trial court's abatement order.[266] After applying principles of statutory construction to determine the intent of the drafters of recent amendments to the public nuisance statute as well as evidence regarding other, similar incidents in the neighborhood where Bennis was arrested, the court held that Bennis's single episode in the car was sufficient to establish an abatable nuisance.[267] In addition, it also held that the state could constitutionally abate Mrs. Bennis's interest in the car without proof that she had knowledge regarding his conduct.[268]

Mrs. Bennis appealed to the United States Supreme Court for a determination of whether Michigan's public nuisance abatement scheme

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262. *Id.* at 445 (quoting trial court's order).

263. State v. Bennis, 504 N.W.2d 731 (Mich. Ct. App. 1993), *rev'd*, 527 N.W.2d 483 (Mich. 1994), *aff'd*, Bennis v. Michigan, 516 U.S. 442 (1996).

264. *Id.* at 733. The court of appeals held that recent Michigan Supreme Court authority supported reliance on People v. Schoonmaker, 216 N.W. 456 (Mich. 1927), a Michigan Supreme Court case that held that proof of defendant's knowledge was required despite a statutory provision that "proof of knowledge of the existence of the nuisance on the part of the defendant . . . is not required." MICH. COMP. LAWS § 600.3815(2) (1997).

265. *Bennis*, 504 N.W.2d at 734. With respect to this second point, the court of appeals relied upon State v. Motoroma Motel Corp., 307 N.W.2d 349 (Mich. Ct. App. 1981), which had held that a nuisance "should not be based upon proof of a single isolated incident unless the facts surrounding that incident permit the reasonable inference that the prohibited conduct was habitual in nature." *Id.* at 352.

266. Michigan v. Bennis, 527 N.W.2d 483 (Mich. 1994), *aff'd*, Bennis v. Michigan, 516 U.S. 442 (1996). The Michigan Supreme Court, noting a conflict between its own decisions regarding proof of knowledge and the plain language of the statute, overruled *Schoonmaker* and held that the statutory provision not requiring proof of knowledge controlled.

267. *Id.* at 489.

268. *Id.* at 494 & n.32 (citing The Palmyra, 25 U.S. 1 (1827)).

deprived her of her interest in the car without due process of law and effected a taking of her property for public use without compensation.[269] Although she did not contest the state's ability constitutionally to declare the car an abatable public nuisance, she urged the Court to apply a traditional takings analysis to determine the application of the provision to her interest in the car.[270] She argued that because of her lack of culpability, the failure to compensate her for the confiscation of her interest in the car amounted to a deprivation of property without due process and a taking of her property without just compensation.[271] Accordingly, Mrs. Bennis argued, the burden was the state's, not Mrs. Bennis's to establish an exception to the requirement that it pay just compensation for the property taken.[272] The analysis she proposed was the one the Court set out just four terms earlier in *Lucas*, which would have placed the burden upon the state to demonstrate that the result of its action on Mrs. Bennis's property—i.e., deprivation of all economic value—"substantially advance[d] legitimate state interests."[273]

2. *The Decision*

Rather than analyzing the case under the contemporary takings analysis that Mrs. Bennis urged, the Court reached back, past public nuisance law, to principles of nineteenth century admiralty law and affirmed. Justice Rehnquist wrote the opinion for a divided Court,[274] holding that despite Mrs. Bennis's lack of culpability in her husband's offense, forfeiture of her interests in the car was a legitimate exercise of the state's police power and that the seizure operated neither as a taking nor as a deprivation of her property without due process.[275]

As a result, *Bennis v. Michigan* resembles *Mugler v. Kansas*, the leading public nuisance case prior to *Lucas*. As explained above, under *Mugler*, the due process analysis consisted only of determining whether

269. *Bennis*, 516 U.S. at 444-46.

270. Brief for Petitioner at 9, Bennis v. Michigan, 516 U.S. 442 (1996) (No. 94-8729).

271. *Id.* at 14; United States Supreme Court Official Transcript, Bennis v. Michigan, 1995 WL 712350 (Nov. 29, 1995) (No. 94-8729).

272. United States Supreme Court Official Transcript at 27-30, Bennis v. Michigan, 1995 WL 712350 (Nov. 29, 1995) (No. 94-8729).

273. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).

274. Although Justices Thomas and Ginsburg joined Justices Scalia and O'Connor in Justice Rehnquist's opinion, they each filed separate concurrences. *See* 516 U.S. at 453 (Thomas, J., concurring); *id.* at 457 (Ginsburg, J., concurring). Justice Stevens dissented in an opinion joined by Justices Souter and Breyer. *See id.* at 458 (Stevens, J., dissenting). Justice Kennedy filed a separate dissent. *See id.* at 472 (Kennedy, J., dissenting).

275. *Bennis*, 516 U.S. at 451-52.

the government's conduct amounted to a legitimate exercise of the police power.[276] Under *Lucas*, however, where regulation causes a total diminution in the value of real property, conclusions about "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated"[277] and must yield to a "contemporary understanding of the broad realm within which government may regulate"[278] individual and property rights. Yet, as in *Mugler*, the *Bennis* Court assumes the legitimacy of Michigan's public nuisance provision and avoids analysis of the range of property and individual interests affected by the state's action. In addition, by collapsing the law of public nuisance into the law of civil forfeiture, the Court justifies the state's actions by resurrecting notions of "guilty property" that have no basis in the law of public nuisance.[279]

Instead, Justice Rehnquist relies on a "long and unbroken line of cases hold[ing] that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[280] He begins with *The Palmyra*,[281] an 1827 case involving the seizure of a Spanish ship by an American gunboat. But *The Palmyra* was not a public nuisance case, and no forfeiture occurred in it.[282]

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276. *See supra* Part I.B.

277. *Lucas*, 505 U.S. at 1026.

278. *Id.* at 1024.

279. *See supra* Part I.D.

280. *Bennis*, 516 U.S. at 446.

281. 25 U.S. 1 (1827).

282. After the ship was seized under a federal anti-piracy statute, a trial court entered an order that "the brig be acquitted," and returned it to its owner. Despite finding for the owner on the merits of the case, the court rejected the owner's claim for damages suffered during the time the ship was held prior to trial. Both sides appealed to the circuit court which affirmed the acquittal, but reversed on the issue of damages and awarded more than $10,000 to the owners. *Id.* at 6-9.

The government appealed. In 1825, the Supreme Court originally dismissed the appeal for procedural irregularities, but later reinstated. Once again both sides appealed. Upon review, the Supreme Court acknowledged that forfeiture historically served as punishment upon conviction of a felony, but described forfeiture in that context as arising out of the court's power in an in personam action. Such a forfeiture was distinct from what occurred in an admiralty or other in rem proceeding, where the status of property—not the owner—was on trial. The *Palmyra* Court considered this history to be a preliminary matter and on the facts of the case was divided on the primary issue of whether condemnation was appropriate. Although the Court found sufficient evidence to sustain the validity of the seizure, reversing the award of damages to the owner, it affirmed the judgment of acquittal resulting in the permanent return of the vessel to the owner. Thus, on its facts, *The Palmyra* stands for the proposition that

Nevertheless, *The Palmyra* served as the basis for the guilty property fiction which, as described in Part I above, served to confer jurisdiction on the courts, relieving them from the obligation of finding the owner, much less inquiring into any level of culpability.[283] As the guilty property fiction relieved courts from that obligation, it also relieved them from any obligation to inquire into the degree of economic loss the forfeiture caused.[284] It was the presence of the property, not its economic value that mattered in a forfeiture proceeding.[285] Indeed, there is some support for the theory that the greater the property's value—and, consequently, the owner's loss—the more the forfeiture served its purpose of securing a fund from which claims could be paid.[286]

The Court also ignores Tina Bennis's innocence and the equitable underpinnings of public nuisance law.[287] Even its description of Tina Bennis's interest in the car is consistent with that approach as it describes the property involved only parenthetically, as: "(an 11-year-old Pontiac sedan recently purchased by John and Tina Bennis for $600)."[288] That interest was further minimized by the trial court's refusal to order a division of the proceeds remaining after the sale of the car, on the ground that "there's practically nothing left minus costs in a situation such as this."[289] The value of her modest car and her resulting loss is inconsequential in the face of the government's ability to abate the nuisance.

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while a prior conviction may not be necessary for a seizure, it may be necessary for the ultimate *forfeiture* of property. *See id.* at 12-13.

283. Of course, any continuing vitality of the guilty property fiction as a basis for in rem jurisdiction must be suspect. *See generally* Shaffer v. Heitner, 433 U.S. 186 (1977) (requiring "the standard of fairness and substantial justice" articulated in International Shoe v. Washington, 326 U.S. 310 (1945) to apply to the exercise of in rem jurisdiction).

284. *See supra* Part I.D.

285. In contrast, the value of property seized may be highly relevant in a criminal forfeiture when it serves as punishment for a criminal offense and thus falls within the scope of protections offered by the Excessive Fines Clause of the Eighth Amendment. *See* United States v. Bajakajian, 118 S. Ct. 2028 (1998) (finding that criminal forfeiture of $357,144 for violating statute requiring a person to report the transportation of more than $10,000 outside of the United States, amounted to violation of Excessive Fines Clause).

286. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 663, 679-80 (1974).

287. Although Justice Ginsburg nods to the equitable nature of the abatement proceeding and the role of the trial judge in such a proceeding, the other members of the majority essentially ignore the historical, equitable nature of the abatement remedy. *See Bennis*, 516 U.S. at 457-58 (Ginsburg, J., concurring).

288. *Id.* at 445 (quoting trial court).

289. *Id.*

This analysis also ignores *Lucas*, which considers the degree of economic loss the owner suffers to be highly relevant to the analysis. Indeed, in circumstances where the owner suffers a total deprivation of property value, *Lucas* will not permit the government to avoid paying compensation by resting on the justification that the action is necessary to prevent a harm.[290] Thus, under *Lucas*, the degree of the owner's loss limits the government's ability to regulate the use without compensation. As Justice Thomas notes in his concurring opinion, such limits may be "especially significant when they are the sole restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime."[291] Because value is irrelevant to the guilty property fiction, the Court undertakes no such examination suggesting an absence of any meaningful limits on government conduct.[292]

Also, the Court does not engage in any significant level of analysis with respect to other individual interests affected by the state's action. It simply accepts the legitimacy of Michigan's decision to "deter johns from using cars they own (or co-own) to contribute to neighborhood blight."[293] It does not inquire further, either into less intrusive means of achieving its goals, such as revoking John Bennis's driver's license, or into the effects, if any, the forfeiture may have on others. This is ironic given the manner in which forfeiture law traditionally took into account the innocent owner's ability to mitigate losses by attempting to seek recovery from the wrongdoer. Indeed, in each of the cases relied upon by Justice Rehnquist, a relationship existed that, arguably, provided the innocent owner with a basis for indemnification.[294] Such a rela-

290. *See Lucas*, 505 U.S. at 1015-16.

291. *Id.* at 458 (Thomas, J., concurring).

292. *See Austin*, 509 U.S. at 621-27 (discussing the relevance of property value in the context of an Eighth Amendment excessive fines challenge); City of Milwaukee v. Arrich, 565 N.W.2d 291, 294 (Wis. Ct. App. 1997) (citing *Bennis* as standing for the proposition that while abatement of any nuisance adversely affects the owner of the property found to be subject to abatement, that situation has never been considered punishment subject to an excessive fines analysis).

293. *Bennis*, 516 U.S. at 458 (Ginsburg, J., concurring).

294. *See, e.g.*, Dobbins's Distillery v. United States, 96 U.S. 395 (1878) (owner of the forfeited property leased property to lessee who was convicted of wrongful conduct); *Calero-Toledo*, 418 U.S. at 677-78 & n.12 (discussing respective contractual rights of owner and lessor at time of seizure); Van Oster v. Kansas, 272 U.S. 465 (1926) (describing seller's use of the car as "part consideration" for its sale, suggesting a contractual basis for the owner to seek relief from the wrongdoer); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) (relevant relationship was between owner and captain of ship seized).

tionship does not exist in Tina Bennis's case. Her ownership rights do not arise out of a commercial relationship with the wrongdoer. They arise from her status as the wrongdoer's spouse, a relationship in which indemnification does not generally play a part and a fact that the Court fails to consider.

4. *The Dissenting Opinions: Pragmatism and Analysis*

The forfeiture rules applied by the majority developed as practical solutions for the realities of pre-industrial ocean travel and maritime commerce.[295] Yet, as Justice Kennedy notes in his dissenting opinion, the majority ignores the contemporary "practical necessity"[296] of American dependence on the automobile and the comprehensive systems for registering cars and licensing drivers that enable law enforcement officials to quickly and accurately reach persons whose property is suspected of misuse.

Paradoxically, the task of engaging in a meaningful analysis of the law and the facts at hand is left to Justices Stevens and Kennedy whose dissenting opinions more closely resemble the Court's modern precedent of *Lucas* than the majority's. Recognizing, as *Lucas* cautions, that a legislature's simple articulation of legitimate goals does not satisfy the Due Process Clause, the authors of both dissenting opinions do more than simply rely on the language of the statute or similar cases. Both Justices Kennedy and Stevens engage in a thoughtful analysis, not only of the nature of the property rights involved, but also of the range of interests that are affected. As discussed above, Justice Kennedy takes a pragmatic approach, recognizing that equitable results can be achieved without upsetting the long line of forfeiture cases upon which the majority relies.[297]

Justice Stevens, joined by Justices Souter and Breyer, tackles the majority head on.[298] Although he accepts the majority's reliance on forfeiture law rather than the law of public nuisance, he considers the property to be more than a parenthetical. Justice Stevens begins with an examination of the nature of the property involved to determine first, what relationship, if any, the property bears to the offense and secondly, whether forfeiture in the particular case would be fair. Thus, Justice Stevens considers evidence that John Bennis was sighted in the

295. *See Bennis*, 516 U.S. at 472 (Kennedy, J., dissenting).
296. *Id.* at 473.
297. *Id.*
298. *Id.* at 458-72.

neighborhood soliciting prostitutes without the car on at least one previous occasion as well as a lack of evidence that Mr. Bennis had previously used the car for a similar purpose. Further, he considered the car irrelevant to the criminal conduct because although the crime occurred in the car, the car was considered an abatable nuisance only so long as it remained in the area.[299] In the end, he finds only a "tenuous connection between the property forfeited here and the illegal act" which cannot, consistent with constitutional principles of due process, support the state's action.[300]

The dissenting opinions make it clear that application of a contemporary due process analysis to the facts produces a markedly different result. Although *Michigan v. Bennis* involved a car and not a home, its application is not limited to the abatement of personal property. The next section considers how the expansive view of state power that *Bennis* embraces extends to the abatement of public nuisance activity conducted within one's home.

C. *Public Nuisance Conduct Within the Home*

Two recent cases illustrate *Bennis*'s reach. The first is *State v. Anthony*,[301] which, although decided prior to the Court's decision in *Bennis*, resembles it as it analyzes a trial court order padlocking a home for one year. In *Anthony*, the owner had pled guilty to felony drug trafficking offenses and was on probation when police officers investigated complaints that the drug traffic continued from his home. The police obtained and executed a search warrant and found approximately one-half pound of marijuana, several guns, and cash. Despite the seizure, within a few days after the search, neighbors reported traffic had resumed outside Anthony's home.

Attorneys for Franklin County and the City of Columbus commenced a public nuisance action seeking preliminary and permanent injunctions abating the nuisance. After ordering a preliminary injunction, the court also granted the city's request for permanent relief and, in accordance with the statute, ordered "the premises padlocked for one

299. *Id.* at 465.

300. *Id.* at 459. *Compare with Lucas*, 506 U.S. at 1031 (requiring balancing of the degree of harm the claimant's conduct would have on others with the social value of claimant's conduct).

301. 647 N.E.2d 1368 (Ohio 1995).

year and taxed Anthony $300.00."[302] An intermediate appellate court reversed, holding that a jury trial was required under the state constitution and that the state failed to meet its burden under the statute of proving that a nuisance occurred at the time the complaint was filed, much less at the time the hearing occurred.

The Ohio Supreme Court reversed on both grounds. First, the court described the statutory remedy of padlocking the home for *any use* an equitable one that constituted an legitimate exercise of the police power under the Ohio Constitution. In language that once again echoes *Mugler*, the Court wrote:

> All property owners are obligated to use their property in a manner that will not injure the community at large. . . . The legislature may exercise its police power by authorizing the proper authorities to grant injunctions in order to prevent certain persons from allowing their property to pose a continuing detriment to public safety.[303]

Since the action was an equitable one, not a legal or criminal proceeding, the court determined that no jury was required.[304] It then turned to the issue of whether the nuisance conduct must be occurring at the time the complaint was filed or at the time of the hearing and concluded that there "need not be evidence that [nuisance activities] are occurring either at the time a complaint is filed or at the time a hearing takes place in order for a nuisance subject to abatement to exist."[305] Thus, although Anthony was not an innocent owner, the Ohio Supreme Court held that evidence of present nuisance activity was not necessary to the determination of whether the injunctive relief was necessary.[306] When read with *Bennis*, the case demonstrates that the existence of past nuisance conduct may subject the property to abatement despite the innocence of the owner or the cessation of the conduct.

A recent Wisconsin case decided after *Bennis* makes a similar point. In *City of Milwaukee v. Arrieh*,[307] officials from the City of Milwaukee commenced an action under Wisconsin's Drug Abatement

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302. *Id.* at 1370 (quoting Court's syllabus).
303. *Id.* at 1371 (internal citations omitted).
304. *See id.*
305. *Id.*
306. *See id.*
307. 565 N.W.2d 291 (Wis. Ct. App.), *review denied*, 569 N.W.2d 589, *and cert. denied*, 118 S. Ct. 885 (1997).

Law[308] to close and sell an apartment building owned by Brahim Arrieh in which he also resided. Under the statute, innocence was not a defense and there was no allegation that Arrieh himself participated in any drug-related activity. Based on evidence that one of Arrieh's tenants was engaged in prohibited activity, the trial court found that the building constituted a nuisance and ordered that the building—valued at $136,600—be closed and sold. On appeal, Arrieh argued that the court's order deprived him of his property without due process of law.[309] Although the court rejected his arguments, it nevertheless remanded the case for consideration of whether the closure and sale amounted to an excessive fine in violation of the Eighth Amendment.[310] After the case returned to the trial court, the judge held that the closure and sale of the apartment building constituted an excessive fine and therefore violated Arrieh's Eighth Amendment rights.[311] Before the Court's decision was final, *Bennis* intervened and the city appealed.

Unfortunately for Arrieh, the court read *Bennis* broadly and stretched its reasoning to the Eighth Amendment argument before it. The Wisconsin Court of Appeals reasoned because *Bennis* permitted public nuisance abatement despite an owner's innocence, abatement cannot amount to punishment for an offense. Since no punishment was involved, it reasoned, the Eighth Amendment did not apply. Accordingly, the court reversed the trial court's dismissal of the closure order and reinstated, paving the way for the sale to proceed without any consideration of the nature of the property involved.

Although some courts have reached different results, they are in the minority.[312] The majority view suggests that, however broad a state's power to abate a public nuisance may have been prior to *Bennis v. Michigan*, it can now be regarded as broader. This development is particularly troublesome when the state moves to abate a nuisance with-

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308. WIS. STAT. § 823.113 (1997).

309. City of Milwaukee v. Arrieh, No. 91-2628, 1994 WL 525931, at *5 (Wis. Ct. App. Sept. 27, 1994) (unpublished opinion), *appeal after remand*, 565 N.W.2d 291, *review denied*, 569 N.W.2d 589, *and cert. denied*, 118 S. Ct. 885 (1997).

310. *Id.*

311. *See Arrieh*, 565 N.W.2d at 291.

312. *See, e.g.*, City of St. Petersburg v. Bowen, 675 So. 2d 626, 627 (Fla. Dist. Ct. App. 1996) (holding that municipal order closing apartment complex for one year as a statutory nuisance, in an attempt to curtail the tenant's narcotics use, qualified as a compensable taking under the Fifth Amendment); Spenard Action Comm. v. Evergreen Subdiv., 902 P.2d 766, 773 (Alaska 1995) (holding that a court should have the discretion to refuse to issue an injunction or an order of abatement if the defendant voluntarily abated nuisance after the filing of a complaint).

in a person's home.

V. PUBLIC NUISANCE LAW SHOULD RECOGNIZE THE TRADITIONAL PROPERTY RIGHTS IN THE HOME AS WELL AS THE INDIVIDUAL INTERESTS EMBODIED WITH IT

At the hearing, the police admit that the mother isn't selling drugs. They only want to enforce the judgment they obtained against the prior owner. When asked why the police still want to close up the house(the city attorney replies, "We've got a judgment, Your Honor." The judge looks at the statute and then at the lawyer. He knows the lawyer is right, the statute requires that a judgment contain an order to board up the house. But, the mother's lawyers argue, "She's not selling drugs, she's got three children, she sends the druggies away." They know the judge doesn't want to put the mother and her three children on the street. He said so. He also said he doesn't want any drugs to be sold from the house. He looks at the city's lawyer, then at the mother's lawyers. "Can't you all go and settle this?" he asks.

Public nuisance law fails to recognize that a broad range of public policies regularly give way to the individual rights related to the home. Rules developed under the Fourth Amendment shield the home from government intrusion in the exercise of legitimate law enforcement activities. The Fourteenth Amendment protects individual, personal decisions related to family life and provides them with heightened protection from state regulation. Nevertheless, *Bennis* and *Anthony* suggest that a home may be seized despite the owner's innocence or even evidence that nuisance conduct is occurring at the time of the seizure. *Bennis* also disregards the private nature of those decisions by making no concessions for innocent family members who must suffer the consequences of others' wrongdoing.

Public nuisance law, as interpreted by *Bennis*, also has failed to keep pace with recent developments in property law. Although public nuisance law historically formed the basis of much of the Court's law of takings under the Fifth Amendment, the Court's re-examination of that precedent has found it to be an unsatisfactory limit on governments' ability to regulate private property. Yet, *Bennis* demonstrates that public nuisance law remains stagnant. Thus, despite *Lucas*'s refusal to justify dramatic reductions in property values caused by government regulation on the basis that the regulation prevents public harms, cases like *Arrieh* allow seizure of valuable property on the

same authority that *Lucas* rejects.

Courts and lawmakers must recognize that the abatement of a public nuisance within a person's home involves more than the government's interest in protecting health, safety, and welfare. It also involves the range of individual and property rights examined in this Article. One scholar has called upon Congress to take these issues into account in the context of federal drug forfeiture laws and enact exemptions to protect innocent family members from the loss of property.[313] Similarly, state legislators should begin with a threshold appreciation of the limits the Constitution places on government interferences with individual and property interests in one's home. Isolated examples of carefully drafted public nuisance statutes that require courts to take into account such factors do exist.[314] They can serve as models for other states by expressly exempting family homes from nuisance abatement[315] or by requiring courts to consider the availability of alternative housing or relocation assistance before ordering the closure of a home in connection with abatement of a public nuisance.[316] However, even widespread legislative reform is not likely to resolve inequities arising from abatement of a public nuisance.

The law of public nuisance has a rich history within the courts and it is there that meaningful reform must begin. Closure of a home or its seizure should be approached reluctantly, with the same degree of hesitation courts historically displayed to requests for abatement where criminal liability could also be established. Courts should not substitute the nuisance label for rigorous analysis when asked to close or seize a home. Instead they must ask whether the contemplated action fairly

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313. *See* Guerra, *supra* note 6, at 90.

314. For example, in Arkansas, courts shall "provide for any appropriate equitable relief" necessary to abate a public nuisance and may order a building's closure only upon a determination that it is the "least restrictive alternative available to effectively accomplish" the abatement. ARK. CODE ANN. § 16-105-412(b) (Michie Supp. 1997). Moreover, upon a finding that a building's closure would be harmful to the community, an Arkansas court may order the person responsible for nuisance to pay damages to be used for drug prevention and education programs. *See* ARK. CODE ANN. § 16-105-412(c)(1) (Michie Supp. 1997).

315. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11573.5 (West 1998) (requiring courts to consider, among other things, the effect closure may have on persons not involved in the nuisance and permitting courts to require agency seeking closure to pay for relocation assistance for persons displaced by closure).

316. *See, e.g.*, WIS. STAT. § 823.113(d) (1997):

> The effect of granting the request upon any resident or occupant of the premises who is not named in the action, including the availability of alternative housing or relocation assistance, the pendency of any action to evict a resident or occupant and any evidence of participation by a resident or occupant in the nuisance activity.

accomplishes legislative goals. In connection with this inquiry courts should consider several factors: 1) the degree of harm that ongoing public nuisance conduct may cause to the public and to other occupants of the home; 2) the effects abatement may have on persons other than the wrongdoer; 3) the availability of alternative, affordable housing opportunities for all persons occupying the home; and 4) the economic loss seizure or closure will likely have on persons currently occupying the home. While these factors are not exclusive, they should provide a meaningful framework upon which courts may build their analysis.

For example, when considering the first factor, a court should consider whether the nuisance conduct is ongoing and whether the wrongdoer continues to occupy the premises. In cases where the wrongdoer is absent, a court might reasonably conclude that the home no longer poses a threat to the public and, therefore, the state's action in closing the home no longer bears a sufficient nexus to any ongoing conduct.

Consideration of the second factor will require courts to inquire into whether persons other than the wrongdoer may be affected by an order closing or seizing a home. It will also require courts to consider the nature of relationship between such people and the wrongdoer. For example, does the order result in the displacement of innocent children or a spouse? What about other persons not related to the wrongdoer? Are they tenants? Does displacement of such persons result in unwanted interruptions in school or employment or interfere with access to public services or religious or cultural institutions?

The third and fourth factors are related and should be considered together as they require consideration of alternative housing opportunities and the economic means necessary to obtain them. Courts must take into account the significant adverse economic consequences that may result from abatement. Adverse economic consequences resulting from the total deprivation of a seizure are self-evident. Yet, there may be numerous other costs associated with dispossession and relocation. At the same time the property owner will be forced to pay for alternative housing, many statutes contemplate that the owner will be responsible for maintenance and repairs during the period the property is to be padlocked. Prevented from residing in the locked home, the owner may nevertheless be required to keep the premises in good repair, pay taxes, and prevent trespassers. Such costs may be in addition to the direct and consequential costs associated with securing alternative housing such as application fees, security deposits, moving costs, storage fees, and deposits, in addition to the costs for the alternative housing itself. Because few homeowners can afford to maintain an unoccupied

property for any length of time and also bear the immediate costs associated with alternative housing, even a temporary closure may result in the permanent loss of a home, placing additional burdens on those least able to afford them.

CONCLUSION

Public nuisance law, historically, has provided public officials with tools to reach conduct not easily addressed by other areas of the law. It has provided equitable remedies for practical problems where the criminal and legal systems have failed. However, as courts and lawmakers continue to use public nuisance law to fill in those gaps, they must not ignore the practical effects its remedies may bring about, especially when addressing nuisance conduct within one's home.