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IS THE EXCESSIVE FINES CLAUSE EXCESSIVELY KIND TO MONEY LAUNDERERS, DRUG DEALERS, AND TAX EVADERS?

ANN JENNINGS MARON*

INTRODUCTION

*If I were in the drug business, I'd be popping the champagne corks right now.*¹

The weight of currency generated from heroin sales has been estimated to be ten times the weight of the drug that has been sold.² For every ton of heroin sold, drug traffickers must contend with ten tons of illicit currency.³

A conservative estimate reports that over fifty billion dollars is realized annually from the sale of illegal drugs in the United States.⁴ This volume of money amounts to over thirteen million pounds of illicit currency.⁵ Imagine the dilemma the drug dealer faces when pondering how to launder this massive volume of currency into the legitimate system without drawing law enforcement's attention. Imagine that a huge roadblock has been removed from a money launderer's path. In 1998, the United States Supreme Court held in *United States v. Bajakajian* that merely "moving" money illegally, in the absence of evidence that a defendant has committed another offense or that the source of the funds is some type of illegal activity, is not a sufficient basis to forfeit the entirety of the currency. According to the implications of *Bajakajian*, the forfeiture may be limited to only five percent of

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1. Jerry Zremski, *Justices Limit Forfeiture Losses*, BUFF. NEWS, June 23, 1998, at 1B (quoting Stefan Cassella, Assistant Chief of the Department of Justice's Asset Forfeiture and Money Laundering Section).

2. IRS, *Narcotics Program* (visited Nov. 25, 1998) <<http://www.hq.irs.gov/CI/CI/media/narcotics.htm>>.

3. *Id.*

4. *Id.*

5. *Id.*

the money attempted to be “moved.”⁶

With its decision in *Bajakajian*, the United States Supreme Court struck down a fine as excessive under the Eighth Amendment for the first time in over two hundred years.⁷ In a five to four decision, the Court ruled that a punitive forfeiture cannot be grossly disproportional to the gravity of the offense.⁸ The Court also re-affirmed its decision in *United States v. Austin* that the Excessive Fines Clause of the Eighth Amendment applies to both criminal forfeitures and civil forfeitures that are punitive in nature.⁹

On June 9, 1994, United States Customs officials arrested Hosesep Krikor Bajakajian for violating currency-reporting requirements. He and his family had lied repeatedly about the amount of currency they were carrying while attempting to board an international flight at Los Angeles International Airport with \$357,144 in currency hidden in their baggage, wallets and a purse.¹⁰ Title 31 U.S.C. § 5316(a)(1)(A) requires the declaration of any currency in excess of \$10,000 that is being transported out of the United States.¹¹ The government subsequently indicted Bajakajian for willfully failing to report the currency¹² and for making false statements to customs officials.¹³ The government moved for forfeiture of the entire \$357,144 pursuant to 18 U.S.C. § 982, which permits forfeiture of “any property, real or personal,” involved in a violation of § 5316 “or any property traceable to such

6. *United States v. Bajakajian*, 118 S. Ct. 2028, 2045-46 (1998) (Kennedy, J., dissenting). There is also a remote possibility that none of the money may have to be forfeited. *Id.* at 2038 n.11. The majority was careful to note that the only issue that it was addressing was whether full forfeiture of the entire amount was constitutional. *Id.* It did not address the appropriateness of the district court’s decision to impose a \$15,000 fine on Mr. Bajakajian. *Id.*

7. Stuart Taylor, *Of Forfeitures and Freedom; An Atypical High Court Coalition Invokes the Eighth Amendment’s Ban on Excessive Fines to Strike Down a Criminal Forfeiture*, TEX. LAW., July 6, 1998, at 23. See *Bajakajian*, 118 S. Ct. at 2033 (stating that the “Court has had little occasion to interpret, and has never actually applied the Excessive Fines Clause”). See also *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259 (1989) (holding that the Excessive Fines Clause does not apply to punitive damages).

8. *Bajakajian*, 118 S. Ct. at 2036.

9. *Id.* at 2033.

10. *Id.* at 2032. Bajakajian and his wife had declared that they were carrying \$8,000 and \$7,000, respectively. *Id.* A total of \$357,144 was discovered after their belongings were searched. *Id.*

11. 31 U.S.C. § 5316(a)(1)(A) (1994).

12. *Bajakajian*, 118 S. Ct. at 2032. See 31 U.S.C. § 5322(a) (1994) (providing that the penalty for willfully failing to report currency may result in one or both of the following: a fine of up to \$250,000 or a prison sentence of up to five years).

13. *Bajakajian*, 118 S. Ct. at 2032. See 18 U.S.C. § 1001 (1994) (providing that the penalty for making a fraudulent or false statement to a customs official will result in a fine, or imprisonment of up to five years, or both).

property," as part of the offender's sentence.¹⁴

In its holding, the Court affirmed a decision by the Ninth Circuit Court of Appeals that the forfeiture of all the currency would be unconstitutional under the Excessive Fines Clause of the Eighth Amendment.¹⁵ After determining that the forfeiture would be punitive rather than remedial because the currency was not shown to be an instrumentality of the offense, the Court held that the test for excessiveness "involves solely a proportionality determination."¹⁶

The decision in *Bajakajian* has substantially weakened one of the government's strongest weapons and has resulted in a victory for "drug dealers, money launderers and tax evaders."¹⁷ Without proof of an underlying violation in addition to the currency reporting violation, the government cannot force the violator to forfeit the full amount of the currency that has been seized.¹⁸ Therefore, individuals involved in illegal activities will pay a much smaller price for their attempts to "move" currency into or out of the country if caught, absent proof of an additional violation. United States Supreme Court Justice Anthony Kennedy dissented in *Bajakajian* and stated that "[t]he decision is disturbing both for its specific holding and for the broader upheaval it foreshadows."¹⁹ Kennedy predicted that the "decision portends serious disruption of a vast range of statutory fines."²⁰

Although the Court previously held that the Excessive Fines Clause applied to punitive forfeitures, it never established a standard for excessiveness.²¹ In *Bajakajian*, the Court defined the

14. *Bajakajian*, 118 S. Ct. at 2032 (quoting 18 U.S.C. § 982(a)(1) (1994)). This statute also authorizes the forfeiture of property that is derived from, or traceable to, proceeds for other offenses such as money laundering, structuring, wire fraud and mail fraud. 18 U.S.C. § 982 (a)(2).

15. *Bajakajian*, 118 S. Ct. at 2041.

16. *Id.* at 2036.

17. Appellant's Petition for a Writ of Cert., *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1997) (No. 96-1487). In its petition, the government noted that the forfeiture provision that allows full forfeiture of currency seized for reporting violations is a powerful tool for combating illegal activity. *Id.* Without it, the government warned, the Ninth Circuit "could readily become a haven for drug dealers, money launderers, and tax evaders intent on conducting non-traceable currency transactions." *Id.*

18. *Bajakajian*, 118 S. Ct. at 2038-39.

19. *Id.* at 2041 (Kennedy, J., dissenting).

20. *Id.* See also Tony Mauro, *Court Strikes Down Government Penalty*, USA TODAY, July 23, 1998, at 3A (stating that the decision was called a "huge disappointment" by a Department of Justice official). Stefan Cassella, Assistant Chief of the Department of Justice's Asset Forfeiture and Money Laundering Section, said the Court "eviscerate[d] one of law enforcement's most effective tools." *Id.*

21. *Austin v. United States*, 509 U.S. 602, 622 (1993). The Court stated that prudence dictates that the lower courts determine the test for excessiveness. *Id.* See Laila Abou-Rahme et al., *Procedural Issues*, 35 AM.

standard as “grossly disproportional,”²² but it left other issues unresolved. The majority opinion provides little guidance regarding what constitutes a proportional forfeiture. Additionally, because the opinion is contradictory, it remains unclear what impact, if any, *Bajakajian* will have on traditional *in rem* civil forfeitures.²³ Most likely, the decision will render “a wide range of forfeitures subject to challenge on excessiveness grounds” and “will clearly make it easier to succeed on an excessiveness claim than it was before in some circuits.”²⁴

This Comment explores the impact *United States v. Bajakajian* is likely to have on future criminal and civil forfeitures. Part I provides an overview of the history of forfeiture, the types of forfeiture proceedings, and the Court’s application of the Excessive Fines Clause to criminal and civil forfeitures. Part II analyzes the history and purpose of the Eighth Amendment and attempts to determine what constitutes a proportional fine. Part III proposes that the circuits adopt a hybrid test to determine whether a fine is proportional, and suggests that the contradictory language in *Bajakajian* has not compromised the decision in *Austin*. Part IV concludes that the government can best overcome excessiveness challenges by including proof of additional violations whenever possible.

I. BACKGROUND

Section A examines the origins and development of forfeiture law. Next, Section B explains the two types of forfeiture proceedings. Finally, Section C discusses the Eighth Amendment and the protections it offers under the Excessive Fines Clause.

A. *From Deodands and Forfeiture of the Estate to Civil and Criminal Forfeitures of the Modern Age*

Civil forfeiture has an extensive history.²⁵ It began in

CRIM. L. REV. 1061, 1089 (1998) (stating that the *Austin* Court declined to establish a test for excessiveness, which resulted in a split among the circuits).

22. 118 S. Ct. at 2036.

23. *Id.* at 2034-35 nn.4 & 6.

24. David B. Smith, *Forfeiture: Supreme Court Adopts Reasonableness Test for Excessive Fines*, THE CHAMPION, Aug. 1998, at 49. However, it is unlikely that *Bajakajian* poses any threat to the constitutionality of prior forfeitures. *United States v. \$267,522*, No. 90-5773, 1998 U.S. Dist. Lexis 13233, at *15-16 (E.D. Pa. Aug. 27, 1998). The District Court for the Eastern District of Pennsylvania noted there was nothing in the *Bajakajian* decision to indicate that the holding applied to forfeiture judgments that had already been entered. *Id.* at 16.

25. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974). Providing an overview of the origin and history of forfeiture, the Court noted that a reference to early forfeiture can be found in the Bible. *Id.* at 681. “[I]f an ox gore a man or a woman, and they die, he shall be stoned: and his

England during the reign of Edward I in the late thirteenth century.²⁶ The Crown required felons to forfeit their entire estate,²⁷ and any instrumentality that caused the death of one of the King's subjects was forfeited to the Crown as a deodand.²⁸ Ships and their goods were also seized when entering Great Britain's waters if the ships were not carrying British goods or if they had not originated in a port that the King had first approved.²⁹ Forfeitures were a source of substantial revenue for the Crown, and English forfeiture law was subsequently exported to the American colonies.³⁰ Although the United States does not permit forfeiture of an estate and has rejected the law of the deodand,³¹ other forms of forfeitures have continued under the authority of maritime and customs statutes.³²

The United States government currently uses forfeiture statutes to combat a multitude of crimes,³³ and asset forfeiture is

flesh shall not be eaten." *Id.* at n.17 (quoting *Exodus* 21:28).

26. *Criminal Asset Forfeiture: Hearing Before the Subcomm. on Crime of the House Judiciary Comm.*, 105th Cong. (1997), available in LEXIS, News Library, ARCHIVES File [hereinafter *Hearing on Criminal Asset Forfeiture*] (testimony of E.E. Edwards, National Association of Criminal Defense Lawyers).

27. *Id.*; *Calero-Toledo*, 416 U.S. at 682. See generally STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE § 1.02 (7th ed. 1998) (providing a historical overview of forfeiture).

28. *Calero-Toledo*, 416 U.S. at 680-81. Either the item itself or its equivalent value was forfeited to the King. *Id.*; *Hearing on Criminal Asset Forfeiture*, *supra* note 26 (testimony of E.E. Edwards, National Association of Criminal Defense Lawyers). See generally KESSLER, *supra* note 27, at § 1.02 (providing a historical overview of forfeiture).

29. See generally *Hearing on Criminal Asset Forfeiture*, *supra* note 26 (providing the testimony of E.E. Edwards, National Association of Criminal Defense Lawyers). See generally KESSLER, *supra* note 27, at § 1.02 (providing a historical overview of forfeiture).

30. See *Hearing on Criminal Asset Forfeiture*, *supra* note 26 (discussing the history of forfeiture). Eighty percent of the nation's revenues were raised from customs duties during the first hundred years of this country's existence. *Id.*

31. *Calero-Toledo*, 416 U.S. at 682-83; see generally *Hearing on Criminal Asset Forfeiture*, *supra* note 26 (discussing the history of forfeiture). See also 1 EDWARD HYDE EAST, PLEAS OF THE CROWN 386-87 (P.R. Glazebrook, ed., Professional Books Limited 1972) (1803) (discussing original application of deodands). Deodands are objects that were subject to forfeiture because they caused the death of a person. *Id.* at 386. If a man died while watering his horse, and the horse caused his death, the horse would be forfeited to the crown. *Id.* However, if the horse did not cause the man's death, it would not be considered a deodand. *Id.*

32. *Boyd v. United States*, 116 U.S. 616, 623 (1886). English law has authorized forfeitures for tax and customs violations for approximately two hundred years, and similar laws have been in place in the United States since its formation. *Id.* See generally KESSLER, *supra* note 27, at § 1.02 (providing a historical overview of forfeiture).

33. See *infra* notes 40-46 (describing crimes for which forfeiture statutes have been enacted).

one of the government's most powerful tools.³⁴ Federal forfeiture statutes³⁵ are effectively used by the Department of Justice³⁶ and the Department of Treasury³⁷ to strike at the heart of criminal

34. *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the Subcomm. on Crime of the House Judiciary Comm.*, 104th Cong. 216 (1996) [hereinafter *Hearing on H.R. 1916*] (statement of Stefan Cassella, Deputy Chief of Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice).

35. See generally JIMMY GURULÉ & SANDRA GUERRA, *THE LAW OF ASSET FORFEITURE* 401-30 (1998) [hereinafter GURULÉ] (listing selected criminal and civil forfeiture statutes). Selected criminal forfeiture statutes include 18 U.S.C. § 982 (1994) (authorizing forfeiture of property involved in, or traceable to, a money laundering violation); 18 U.S.C. § 1963 (1994) (RICO) (ordering forfeiture of a defendant's interest in a racketeering enterprise and any property derived therefrom); and 21 U.S.C. § 853 (1994) (directing forfeiture of property and proceeds derived from or facilitating narcotics violations). *Id.* at 401-15. Selected civil forfeiture statutes include 18 U.S.C. § 981 (1994) (ordering forfeiture of any property involved in a money laundering violation or an attempted money laundering transaction); 18 U.S.C. § 984 (1994) (permitting forfeiture of goods not specifically identified as being involved in the offense); 19 U.S.C. § 1595a (1994) (allowing forfeiture of property illegally imported into, or exported from, the United States in violation of Customs laws); 21 U.S.C. § 881 (1994) (ordering forfeiture of property used to manufacture, contain or convey controlled substances); and 31 U.S.C. § 5317 (1994) (permitting forfeiture of monetary instruments and property traceable to violations of Customs reporting requirements). *Id.* at 415-430.

36. *Hearing on H.R. 1916*, *supra* note 34, at 216-17 (statement of Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice). Mr. Cassella stated that *in rem* forfeiture statutes are very beneficial to the government because they enable the forfeiture of assets that cannot be reached criminally. *Id.*

37. *Id.* at 240 (statement of Jan P. Blanton, Director, Treasury Executive Office for Asset Forfeiture). Ms. Blanton stated:

[b]y relentlessly focusing on the profitability of crime, it is an enforcement tool that keeps pace with evermore well-financed and international criminal groups. It is an enforcement tool with notable interrelated benefits. It pays for its own property management costs and relieves additional burdens that otherwise would fall to our law abiding citizens and taxpayers. It strengthens law enforcement by rechanneling forfeited value back into this most fundamental societal purpose. It promotes cooperation among federal, state and local police around the country through our ability to equitably share forfeited assets with those who have assisted in our investigations. It allows for victim restitution by permitting us to return the forfeited assets of criminals to those who were once their prey. Under the Weed and Seed program, it turns tainted properties back to constructive community use. It even sanctions the donation of forfeited assets to charitable organizations and the transfer of forfeited monies to support our national effort to reduce the demand for illegal drugs.

Id. See generally Susan Jacobson, *Kissimmee Man Pleads Guilty in Fraud; Ben O. Carroll Agreed to Forfeit \$32 Million for Selling Adult Diapers as Medical Devices and Billing Medicare*, ORLANDO SENTINEL, Oct. 12, 1996, at 1 (stating that an individual who defrauded Medicare out of \$70 million by selling adult diapers as medical devices will forfeit \$32 million in cash and securities); Eric Miller, *Drug Dealing Fuels Tucson 'Success Story,' Dad, Son Used Top Radio*

activity by separating criminals from their profit and the instrumentalities that they use to commit their offenses.³⁸ The impact of forfeiture is far-reaching, and the government uses civil and criminal forfeiture statutes to combat numerous different types of criminal activity,³⁹ including money laundering,⁴⁰ drug dealing,⁴¹ tax evasion,⁴² child pornography,⁴³ health care fraud,⁴⁴ food stamp fraud,⁴⁵ and illegal immigration.⁴⁶

Station to Launder Cash, ARIZ. REPUBLIC, Feb. 20, 1996, at B1 (discussing jury verdict that ordered forfeiture of \$5 million in drug proceeds by two defendants who were found guilty of drug-trafficking and money laundering); *Cooperative Legal Effort by L.A. Law Firm of Gibson, Dunn & Crutcher and U.S. Attorney's Office Ensures Japanese Victims Will Recover Money in \$800 Million Country-Club Fraud*, BUS. WIRE, Oct. 5, 1993, available in LEXIS, News Library, BWIRE File (stating that a Japanese company that pleaded guilty to laundering approximately \$256 million in the United States will forfeit its assets and all the assets of its subsidiary and related companies).

38. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974). Forfeiture prevents criminals from profiting from crime, and it prevents property from being used for further illegal purposes. *Id.*

39. *Id.* at 683.

40. *Bar Owner Admits Role in Big Black Market Operation*, TIMES UNION, Nov. 6, 1998, at B2. The mastermind of a multimillion-dollar smuggling operation that smuggled \$687 million in alcohol and cigarettes into Canada pleaded guilty to money laundering charges and agreed to forfeit up to \$160 million in property. *Id.* See also Jim Leusner, *McCorkles Lose Their Possessions; The Convicted Couple Must Forfeit Their Homes, Cars and Bank Accounts, Keeping Only Their Jewelry*, ORLANDO SENTINEL, Nov. 6, 1998, at B1 (discussing a jury verdict against an infomercial salesman and his wife, who were convicted of fraud and money laundering and ordered to forfeit approximately \$10.6 million in assets); Larry Dougherty, *Father, Son Guilty of Conspiracy*, ST. PETERSBURG TIMES, Nov. 26, 1998, at 4B (stating that two men who pleaded guilty to conspiracy to launder drug proceeds estimated at \$1.5 million will forfeit two parcels of real property valued at approximately \$121,000).

41. *Brendan Stephens, \$6 Million Forfeiture Ordered in Drug Trafficking Conspiracy*, CHI. DAILY L. BULL., Apr. 17, 1998, at 3. Five defendants were ordered to forfeit \$6 million for engaging in a conspiracy to distribute cocaine and heroin on the west side of Chicago. *Id.*

42. *Jon Steinman, Couple Plead Guilty to Smuggling, Tax Evasion; Court: Glendale Pair, Accused of Bringing Illegal Chinese Medicines into the United States, Agree to Forfeit About \$6.5 Million in Property and Cash*, L.A. TIMES, Nov. 26, 1997, at B6. A husband and wife agreed to forfeit \$6.5 million in assets after pleading guilty to failure to report \$4.8 million in income, and evasion of \$1.3 million in taxes. *Id.*

43. *Dan Herbeck, Government Trying to Seize House in Child Porn Case*, BUFF. NEWS, Sept. 5, 1998, at 1C. Forfeiture proceedings were initiated against a house where videotapes of child pornography were made and where one of its residents engaged in a sexual act with a minor. *Id.*

44. *Carri Geer, Woman Pleads Guilty to Health Care Fraud*, LAS VEGAS REV. J., Feb. 20, 1998, at 1B. A former insurance claims manager who defrauded state and county health care programs forfeited over \$600,000 in currency and assets. *Id.*

45. *Food Stamp Fraud*, PITTSBURGH POST-GAZETTE, May 16, 1998, at A-5. A defendant's house and property were forfeited as part of punishment for

The government has stated that the goals of asset forfeiture are threefold.⁴⁷ Through the use of forfeiture, the government strives to: 1) deter and punish criminal activity by depriving criminals of the fruits of their crime; 2) strengthen cooperation between international, federal, state, and local law enforcement agencies by means of asset sharing; and 3) enhance law enforcement by channeling the proceeds from forfeited assets back into law enforcement programs.⁴⁸ Additionally, forfeiture is used to provide restitution to victims.⁴⁹

Asset forfeiture has been enormously successful as a tool for deterrence and punishment.⁵⁰ Individuals manufacturing illegal drugs may reconsider using their real property as a drug factory knowing that the government can, and mostly likely will, initiate forfeiture proceedings against the property if the drug manufacturer is caught. Similarly, individuals using their vehicle to engage in illegal activity may face forfeiture of the vehicle if the government can prove that it facilitated the offense. The next section describes the two methods the government uses to effect judicial forfeitures.⁵¹

illegal food stamp trafficking. *Id.*

46. Gary E. Endelman, *Power Practice; Aliens—And Counsel—Beware*, TEX. LAW., Nov. 18, 1996, at 32. The Illegal Immigration Reform and Immigrant Responsibility Act permits the forfeiture of assets owned by individuals who violate immigration laws. *Id.*

47. Raymond W. Kelly, *Introduction to DEPARTMENT OF TREASURY FORFEITURE FUND ANN. REP.* (1996).

48. *Id.* at 1-19; GURULÉ, *supra* note 35, at 26. *See generally* Gloria Padilla & Jacque Crouse, *Seized Property Aids Police Coffers; DA Says Practice Will Continue Despite Ethical Objections Raised by Some*, SAN ANTONIO EXPRESS-NEWS, Aug. 16, 1998, at 2B (discussing millions of dollars in cash and property that has been seized and forfeited and turned over to law enforcement agencies to support their enforcement activities). According to United States Attorney Bill Blagg, forfeiture statutes allow the government to remove profitability from crime. *Id.*

49. *United States v. BCCI Holdings*, 833 F. Supp. 32, 34-35 (D.C. Cir. 1993). Pursuant to a plea agreement, 50% of the forfeited funds were placed into a compensation fund for victims and creditors, and the other half of the money was allocated to be used to reimburse banking agencies' insurance funds for any losses incurred as a result of BCCI's illegal activity. *Id.* *See generally* *Hearing on Criminal Asset Forfeiture*, *supra* note 26 (presenting the statement of Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Justice Department). The Asset Forfeiture Fund does not retain any proceeds from forfeited property if there are victims who incurred financial loss relating to the criminal activity. *Id.* *See generally* *Cooperative Legal Effort by L.A. Law Firm of Gibson, Dunn & Crutcher and U.S. Attorney's Office Ensures Japanese Victims Will Recover Money in \$800 Million Country-Club Fraud*, *supra* note 37 (stating that 90% of the bilked assets that were recovered will be returned to Japanese victims of fraud).

50. *See infra* note 63 (providing revenue statistics for asset forfeiture).

51. The scope of this Comment does not include administrative forfeitures, which are permitted by federal civil forfeiture statutes. Under these statutes,

B. *In Rem v. In Personam Forfeitures*

Forfeiture proceedings are either *in personam* or *in rem*. *In personam* forfeitures require a criminal conviction prior to the forfeiture of assets. In *in rem* forfeitures, however, the property that is being forfeited is deemed to be the guilty party.⁵² The property itself is the offender,⁵³ and although a criminal proceeding against the owner of the property may accompany an *in rem* proceeding, each proceeding has been held to be independent of one another.⁵⁴

The government initiates a civil forfeiture by filing a

Department of Justice and Department of Treasury administrative agencies are authorized to forfeit assets valued under \$500,000 through extra judicial administrative proceedings. GURULÉ, *supra* note 35, at 209-28.

52. *United States v. Brig Malek Adhel*, 43 U.S. 210, 233 (1844). In *Brig Malek Adhel*, the Court noted that in an *in rem* forfeiture, the property is what is deemed to have committed the offense. *Id.* No regard is given to the actions of the owner. *Id.* The Court ruled similarly in *United States v. Stowell*, 133 U.S. 1, 23 (1889). In upholding the forfeiture of a distillery, where illegal stills had been placed on the owner's property without his knowledge, the Court said that the owner's lack of knowledge or participation in the illegal activity was irrelevant. *Id.* See also *Dobbin's Distillery v. United States*, 96 U.S. 395, 399 (1877) (ordering forfeiture of a distillery). In *Dobbin's Distillery*, the Court said that a distillery could be forfeited even though the owner had no knowledge of the illegal activity. *Id.* The Court said that if a property owner allows a still to be placed on his land, and the still turns out to be illegal, the owner is in the same position as if he were the individual engaged in the illegal activity, and his property may be forfeited. *Id.* See also *The Palmyra*, 25 U.S. 1, 24-25 (1827) (upholding forfeiture of a pirate ship). The Court stated that *in rem* forfeitures create the fiction that the "thing" is a guilty party, and that there is no need for an accompanying *in personam* forfeiture. *Id.* at 24-25.

53. *The Palmyra*, 25 U.S. at 24-25. See *Austin v. United States*, 509 U.S. 602, 615 (1993) (stating that

[f]orfeiture has been justified on two theories—that the property itself is 'guilty' of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence).

See also *Goldsmith v. United States*, 254 U.S. 505, 508 (1921) (affirming forfeiture of vehicle used to transport illegal spirits); *Dobbin's Distillery*, 96 U.S. at 404 (upholding forfeiture of a distillery); *Brig Malek Adhel*, 43 U.S. at 234 (ordering forfeiture of a ship guilty of piracy).

54. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974) (citing *The Palmyra*, 25 U.S. at 25). *In rem* forfeitures are neither dependent on nor affected by *in personam* proceedings; the two proceedings are entirely separate. *Id.* See *Brig Malek Adhel*, 43 U.S. at 233 (explaining that

[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any references whatsoever to the character or conduct of the owner . . . [T]his is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party).

complaint and issuing a warrant of arrest *in rem* against the property itself.⁵⁵ A significant advantage of civil forfeiture, and a source of criticism against it, is that it permits courts to impose a penalty or fine without obtaining *in personam* jurisdiction over the owner of the property.⁵⁶ Thus, civil forfeiture is an effective tool for a court to use when the owner of the asset cannot be criminally prosecuted, as is the case when there is insufficient evidence of an underlying violation, or when the property owner has titled the property in the name of a nominee-owner.⁵⁷

Although civil forfeiture has been used for almost 200 years, criminal forfeiture is a more recent development.⁵⁸ While an *in rem* forfeiture is a proceeding against the property itself,⁵⁹ an *in personam* forfeiture is a proceeding against the individual and requires a criminal conviction prior to the forfeiture of any assets.⁶⁰

The government initiates a criminal forfeiture by filing an indictment that includes forfeiture allegations against the individual.⁶¹ Congress authorized *in personam* forfeitures when it enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970, the Comprehensive Drug Abuse and Prevention Act of 1970, the Crime Control Act of 1984, the Anti-Drug Abuse Act of 1986, and other statutes in more recent years that authorize civil and criminal forfeiture for child pornography, obscenity, and

55. GURULÉ, *supra* note 35, at 61.

56. *Calero-Toledo*, 416 U.S. at 684 (citing *Brig Malek Adhel*, 43 U.S. at 233). In *Brig Malek Adhel*, the Court found that treating a pirate ship as the guilty party was the only way to achieve a remedy where the ship was used for piracy without the owner's consent. *Id.* at 233-34.

57. See also *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 87 (1992). In *in rem* forfeitures, the legal fiction that the property is the guilty party was developed to allow the court to achieve a remedy in situations where it otherwise could not. *Id.* See generally *Hearing on H.R. 1916*, *supra* note 34, at 216-17 (statement of Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Department of Justice) (stating that civil forfeiture is a highly effective tool to reach the assets of individuals who would otherwise escape justice). Assets can be forfeited merely on the grounds that the owner of the property had knowledge of the criminal activity and consented to it. *Id.* at 217. The government used this tool to confiscate a ranch in Montana that was owned by a member of the Columbian drug cartel, and has also used it to confiscate airplanes, boats, and apartment buildings that have been used for criminal activity with the owner's consent. *Id.* at 216-17. Civil forfeiture statutes are an effective means of dealing with fugitives and other criminals who elude prosecution because civil forfeiture does not require a conviction, as criminal forfeitures do, and it permits the forfeiture of property owned by individuals other than the defendant. *Id.*

58. See generally *Hearing on Criminal Asset Forfeiture*, *supra* note 26 (statement of Rep. Bill McCullum) (discussing criminal forfeiture statutes that Congress had enacted since 1970).

59. See *supra* notes 52-58 and accompanying text (defining *in rem* forfeitures).

60. *The Palmyra*, 25 U.S. 1, 24-25 (1827).

61. GURULÉ, *supra* note 35, at 59.

fraud affecting financial institutions.⁶²

Although asset forfeiture has been tremendously successful,⁶³

62. *Hearing on Criminal Asset Forfeiture, supra* note 26 (statement of Hon. Bill McCollum, committee chairperson). *See generally* GURULÉ, *supra* note 35, at 401-15 (providing text of selected criminal forfeiture statutes).

63. *Hearing on H.R. 1916, supra* note 34, at 217 (statement of Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice). From 1991 to 1996, an average of nearly half a billion dollars a year has been deposited into the Department of Justice's Asset Forfeiture Fund, which holds the proceeds of forfeitures. *Id.* Deposits for Fiscal Year 1992 through Fiscal Year 1996 are as follows:

FY1992	FY1993	FY1994	FY1995	FY1996 (projected)
\$531,000,000	\$555,700,000	\$549,900,000	\$487,500,000	\$325,000,000

Id.

Half of the forfeited funds are shared with state and local law enforcement agencies:

FY1992	FY1993	FY1994	FY1995	FY1996 (projected)
\$246,600,000	\$224,500,000	\$228,900,000	\$228,700,000	\$175,000,000

Id. at 218.

Forfeiture not only removes profit from crime, but also provides support to law enforcement agencies who assist in "catching the criminal and bringing them to justice." *Id.* *See generally* DEP'T OF TREASURY FORFEITURE FUND ANN. REP. (1996) (analyzing the goals and accomplishments of the Department of Treasury's forfeiture program and providing the financial statements for the Asset Forfeiture Fund). Forfeiture Fund receipts for fiscal year 1994 through 1996 are as follows:

FY1994	FY1995	FY1996
\$184,300,000	\$271,700,000	\$190,200,000

Id. at 5.

The Department of Treasury also authorizes equitable sharing payments to state and local law enforcement agencies and other federal agencies that participate in joint investigations that result in the seizure of assets for federal forfeiture. *Id.* at 10.

Equitable Sharing by Bureau—FY 1996

Customs Service	Internal Revenue Service	U.S. Secret Service	ATF
\$46,124,000	\$13,258,000	\$259,000	\$246,000

Id.

See generally U.S. Plans to Build Cells with Criminals' Money, ST. LOUIS POST-DISPATCH, Oct. 1, 1989, at 11D (stating "[i]t is now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation"); *Cooperative Legal Effort by L.A. Law Firm of Gibson, Dunn & Crutcher and U.S. Attorney's Office Ensures Japanese Victims Will Recover Money in \$800 Million Country-Club Fraud, supra* note

criticism and allegations of abuse by allegedly overzealous law enforcement officers and prosecutors have overshadowed this success.⁶⁴ While opponents of forfeiture contend that forfeitures are often disproportional to the conduct of the offender,⁶⁵ proponents of the program argue that Congress has intentionally enacted strict forfeiture statutes to deal with what it considers to be serious crimes.⁶⁶ As the impact and the effectiveness of

37 (stating that a Japanese company that pleaded guilty to laundering approximately \$256 million in the United States will reimburse the United States government for the \$2.1 million in investigative expenses that it incurred).

64. See generally REP. HENRY J. HYDE, CATO INSTITUTE, *FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?* (1995) (commenting on the abuses that have resulted from indiscriminate application of forfeiture statutes and the need for substantial reform of forfeiture laws). "Foremost among the invasions we now witness are unrelenting government assaults on property rights, fueled by a dangerous and emotional vigilante mentality that sanctions shredding the U.S. Constitution into meaningless confetti." *Id.* at 1. See generally Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998) (stating in part that forfeiture laws have led to improper motives by law enforcement agencies); see generally Mary M. Cheh, *Constitutional Limits On Using Civil Remedies To Achieve Criminal Law Objectives*, 42 HASTINGS L.J. 1325 (1991) (discussing the constitutional implications of combining criminal and civil remedies); Naftali Bendavid, *Second Thoughts on Forfeiture*, TEX. LAW., July 26, 1993, at 18 (discussing U.S. Rep. Henry Hyde's efforts to reform civil asset forfeiture laws); Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money? Volusia Deputies Have Seized \$8 Million From I-95 Motorists. The Trap is For Drug Dealers, But Money is the Object. Three of Every Four Drivers Were Never Charged*, ORLANDO SENTINEL TRIB., June 14, 1992, at A1 (exposing objectionable practices used by state law enforcement officers to seize currency from motorists traveling on interstate); Dennis Cauchon, *Are Seizures Legalized Theft? Government Doesn't Have To Prove Guilt*, USA TODAY, May 18, 1992, at 1A (noting that forfeiture laws allow police to take property from individuals who have neither been convicted of nor charged with a crime). See also David Heilbroner, *The Law Goes On A Treasure Hunt*, N.Y. TIMES, Dec. 11, 1994, § 6, at 70 (suggesting that improper motives have turned law enforcement officers into financial opportunists); Craig Quintana, *Confiscated Cash Bankrolls Fight Against Drugs; Critics Say The Seizure Law Encourages Police Agencies To Spend Time Looking For Drug Money Instead Of Fighting Crime*, ORLANDO SENTINEL TRIB., June 16, 1992, at A1 (commenting on the motives of law enforcement agencies who benefit financially from the assets that they seize and forfeit).

65. HYDE, *supra* note 64, at 7. Rep. Hyde states that penalties are often not proportional to the gravity of the offense. *Id.* He provides examples of forfeiture statutes that he feels are unreasonably applied, such as the seizure of apartment buildings and hotels where tenants and guests, respectively, have used the property as a location for drug sales; the seizure of three fraternity houses at the University of Virginia where drug sales occurred; and the seizure of a research vessel owned by Scripps Oceanographic Institute after a marijuana cigarette was found in the locker of a former crew member. *Id.*

66. Brief for the United States at *30, *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1997) (No. 95-50094). The government noted that the penalty for

forfeiture have grown, courts have become increasingly involved in issues relating to proportionality.⁶⁷ Section C provides an overview of the Supreme Court's recent activity relating to proportionality and the Excessive Fines Clause.

C. *The Constitutional Protection of the Excessive Fines Clause*

With an increase in both the volume of forfeiture cases and the number of forfeiture statutes that Congress has enacted, the U.S. Supreme Court has used closer scrutiny to determine whether constitutional rights are being adequately protected.⁶⁸ Prior to *Austin v. United States*,⁶⁹ courts deemed *in rem* forfeitures as purely remedial and therefore not subject to the Excessive Fines Clause. *In rem* forfeitures were viewed as a means to reimburse the government for its investigative expenses⁷⁰ and to remove facilitating property and proceeds from "circulation."⁷¹

In *Austin* and its companion case, *Alexander v. United*

violating currency report requirements was "perfectly calibrated" to the offense, since the amount to be forfeited would match the amount of currency that was illegally concealed. *Id.* The government also stated that when Congress enacts a stiff penalty, it demonstrates the seriousness with which it views the particular crime. *Id.* Inherent in the maximum penalty that Congress has enacted is an indication of the seriousness with which it views the offense. *Id.* (citing *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541 (1989)).

67. See, e.g., *Alexander v. United States*, 509 U.S. 554, 558-59 (1993) (holding that criminal forfeitures are subject to the Excessive Fines Clause of the Eighth Amendment); *Austin v. United States*, 509 U.S. 602, 622 (1993) (concluding that a forfeiture that is not solely remedial is subject to an excessiveness inquiry under the Eighth Amendment); *United States v. 6625 Zumirez Dr.*, 845 F. Supp. 725, 735 (C.D. Cal. 1994) (stating that "[f]ailure to strictly enforce the Excessive Fines Clause inevitably gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain for the government").

68. See, e.g., *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 123-29 (1993) (providing that an innocent owner's property interest supersedes the relation back doctrine); *United States v. Ursery*, 518 U.S. 267, 290-92 (1996) (determining that where a fine is not solely punitive, there is no double jeopardy violation); *Alexander*, 509 U.S. at 544 (holding that criminal forfeitures are subject to an excessiveness inquiry under the Eighth Amendment); *Austin*, 509 U.S. at 602 (holding that forfeitures of real property and facilitating conveyances are punitive and require analysis under the Excessive Fines Clause); *United States v. Bajakajian*, 118 S. Ct. 2028 (1998) (holding that the standard for excessiveness is grossly disproportional).

69. *Austin*, 509 U.S. at 602.

70. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972). The Court stated that forfeiting of goods involved in customs violations is "a reasonable form of liquidated damages . . . that serves to reimburse the government for investigation and enforcement expenses." *Id.*

71. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984).

States,⁷² the Court held that civil forfeitures were not exclusively remedial and could be found to be punitive. The Court further stated that a determination whether the Excessive Fines Clause applies to a forfeiture hinges on whether the forfeiture is punitive, not whether the nature of the proceeding is *in rem* or *in personam*.⁷³ Forfeitures may be remedial and punitive, and the fact that a forfeiture may be only partially punitive does not remove it from the protection of the Eighth Amendment.⁷⁴ The Court stated that while some amendments are limited only to criminal prosecutions, there is nothing in the language of the Eighth Amendment⁷⁵ to indicate that it should be similarly restricted.⁷⁶

Although the *Austin* Court determined that punitive forfeitures were subject to an excessiveness inquiry, it declined to set forth a test to determine whether a forfeiture is excessive.⁷⁷ The result was a conflict in the circuits regarding the proper test to be applied.⁷⁸

The decision in *United States v. Bajakajian* provided an answer. In *Bajakajian*, the Court said the Eighth Amendment requires an assessment of the gravity of the owner's offense and the value of the property being forfeited to determine whether the

72. *Alexander*, 509 U.S. at 576.

73. *Austin*, 509 U.S. at 610, 621.

74. *Id.* at 622. See generally Nancy J. King, *Proportioning Punishment: Constitutional Limits On Successive And Excessive Penalties*, 144 U. PA. L. REV. 101, 162 (1995) (discussing civil forfeitures that are partly punitive and thus subject to constitutional protection). With its decisions in *Austin*, 509 U.S. 602 (1993), and *United States v. Halper*, 490 U.S. 435 (1989), the Court notes that there are three levels of civil forfeitures: remedial forfeitures, which do not trigger any constitutional protections; forfeitures that are partially punitive, which require double jeopardy and excessiveness protection; and criminal forfeitures, which entitle a defendant to all of the constitutional protections that are triggered in a criminal prosecution. King, *supra*, at 163.

75. *Austin*, 509 U.S. at 605. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

76. *Austin*, 509 U.S. at 608.

77. *Id.* at 622. See *infra* note 128 (noting the Court's decision to allow the standard for an excessiveness inquiry to be determined by the lower courts).

78. *United States v. 415 E. Mitchell Ave.*, 149 F.3d 472, 477-78 (6th Cir. 1998) (following the hybrid test); *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995) (following a hybrid approach); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 982 (9th Cir. 1995) (applying hybrid test); *United States v. Bieri*, 68 F.3d 232, 236-38 (8th Cir. 1995) (following the hybrid approach); *United States v. 427 & 429 Hall St.*, 74 F.3d 1165, 1170 (11th Cir. 1996) (adopting a proportionality approach); *United States v. Wild*, 47 F.3d 669, 676 (4th Cir. 1995) (utilizing a proportionality test); *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) (adopting an instrumentality approach). See Stacy J. Pollock, *Proportionality in Civil Forfeiture: Toward a Remedial Solution*, 62 GEO. WASH. L. REV. 456, 475-78 (1994) (noting that there is no national standard for excessiveness inquiries in civil forfeitures).

fine is grossly disproportional.⁷⁹ In solving one problem, the Court has seemingly created others. Although the Court indicated that the standard is “grossly disproportional,” it provided little guidance regarding what constitutes a proportional forfeiture. As one Department of Justice official commented, the Court has left “it up to every judge in the country to decide what’s grossly disproportional.”⁸⁰

Additionally, the impact *Bajakajian* will have on the forfeiture of proceeds, conveyances, and instrumentalities is unclear. These items are frequently forfeited in *in rem* proceedings.⁸¹ In *Austin*, the Court held that a forfeiture that is even partly punitive will fall within the protections of the Eighth Amendment, regardless of whether it is designated *in rem* or *in personam*.⁸² However, in *Bajakajian*, the Court defined certain *in rem* customs forfeitures as non-punitive.⁸³ Consequently, the Court’s decision in *Bajakajian* casts doubt about whether the Excessive Fines Clause applies to *in rem* forfeitures that have been traditionally considered remedial.

II. PROPORTIONALITY AND THE EXCESSIVE FINES CLAUSE

Section A analyzes the history, purpose and development of the Excessive Fines Clause of the Eighth Amendment. Next, Section B provides an overview of the tests used by the circuits (prior to the Court’s decision in *Bajakajian*) to determine whether a fine was excessive.

A. *The Excessive Fines Clause*

*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*⁸⁴

When drafted, the Excessive Fines Clause of the Eighth Amendment received little attention.⁸⁵ In general, the First Congress hardly discussed the Excessive Fines Clause and the Eighth Amendment.⁸⁶ Consequently, courts have had to determine

79. *Bajakajian*, 118 S. Ct. at 2036.

80. Zremski, *supra* note 1, at 1B (quoting Stefan Cassella, Assistant Chief of the Department of Justice’s Asset Forfeiture and Money Laundering Section).

81. 18 U.S.C. § 981 (1998). This statute authorizes the civil forfeiture of real and personal property that is involved in an offense such as money laundering or structuring, or a violation of currency reporting requirements. *Id.* Title 21 U.S.C. § 881 authorizes the civil forfeiture of real and personal property that is involved in drug offenses. 21 U.S.C. § 881 (1998).

82. *Austin v. United States*, 509 U.S. 602, 621 (1993).

83. See *415 E. Mitchell Ave.*, 149 F.3d at 477 n.3 (discussing *Bajakajian*).

84. U.S. CONST. amend. VIII.

85. *Bajakajian*, 118 S. Ct. at 2037.

86. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264

the meaning and scope of the Excessive Fines Clause independently.

Apparently, the Framers of the U.S. Constitution drafted the Excessive Fines Clause to prevent the government from exacting excessive punishment in criminal prosecutions.⁸⁷ One reason the clause did not receive debate at the time of its drafting may have been that several states already had similar language in their constitutions.⁸⁸ The colonies were eager to prevent the abuses that had occurred in England before the reign of William and Mary.⁸⁹

Prior to the adoption of the English Bill of Rights of 1689, which is the precursor to the Excessive Fines Clause, English judges often assessed heavy fines against enemies of the King.⁹⁰ They intended to subject individuals unable to pay their fines to periods of lengthy imprisonment.⁹¹ These abuses prompted the legislature to enact the English Bill of Rights of 1689,⁹² which protected individuals from excessive fines.⁹³ The drafters of the Virginia Declaration of Rights and the Framers of the U.S. Constitution⁹⁴ adopted the language of the English Bill of Rights.

The Court has interpreted the Excessive Fines Clause to mean that the government cannot abuse its power by imposing excessive fines as punishment.⁹⁵ It is fundamental law that a punishment must be proportional to the gravity of the offense.⁹⁶ In *Weems v. United States*, the Court re-affirmed the power of the legislature to define offenses and establish corresponding

(1989); *Bajakajian*, 118 S. Ct. at 2037.

87. *Browning-Ferris Indus.*, 492 U.S. at 262-65.

88. *Id.* at 264.

89. *Id.* at 267.

90. *Id.*

91. *Id.*

92. *Weems v. United States*, 217 U.S. 349, 376 (1910). In its discussion of the Eighth Amendment, the Court notes that one of the earliest uses of the Excessive Fines Clause was in 1689 when an English lord was fined 30,000 pounds for assaulting a fellow lord. *Id.* In striking down the fine as excessive, the court of King's Bench said that the fine was "excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land." *Id.*

93. *Solem v. Helm*, 463 U.S. 277, 284-85 (1983).

94. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989). The Framers of the Constitution adopted the Eight Amendment to restrict the prosecutorial powers of the government. *Id.*

95. *Id.* at 267. "The [E]ighth [A]mendment is addressed to courts of the United States exercising criminal jurisdiction." *Id.* at 262-63 (citing *Ex parte Watkins*, 7 Pet. 568, 573-74 (1833)). A fine has been defined as a "payment to the sovereign as punishment for some offense." *Browning-Ferris Indus.*, 492 U.S. at 265 (citing 1 E. Coke, *Institutes*). "A fine signifieth a pecuniarie punishment for an offence, or a contempt committed against the king." *Id.*

96. *Solem*, 463 U.S. at 286-87. "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 287. (citing *Weems*, 217 U.S. at 367).

punishments, but stated that it is the duty of the Court to intervene if a legislative act is contrary to the Constitution.⁹⁷ The Court must consider the perspective and the goals of the legislature when it enacted the punishment to determine whether the government has appropriately used its power.⁹⁸

In seeking to determine the boundaries of the Excessive Fines Clause, the Court found interpretations of the Cruel and Unusual Punishments Clause useful.⁹⁹ In *Ingraham v. Wright*, the Court stated that the Cruel and Unusual Punishments Clause establishes limits for the types of punishments that can be enacted and imposed.¹⁰⁰ The *Ingraham* Court also said that punishments not criminal in nature may be subject to an Eighth Amendment analysis if they are sufficiently similar to criminal punishment.¹⁰¹

For almost 100 years, the Court has used the proportionality concept as the constitutional standard for satisfying an Eighth Amendment inquiry.¹⁰² The Court has continued to hold that the Eighth Amendment forbids punishments grossly disproportional to the gravity of the offense.¹⁰³ In *Solem v. Helm*, which involved an application of the Cruel and Unusual Punishments Clause, the Court stated that several factors should be considered when determining whether a particular punishment satisfies the requirements of the Eighth Amendment.¹⁰⁴ First, the severity of the offense must be considered in relation to the harshness of the punishment.¹⁰⁵ Second, the court should consider the types of punishments it imposes for other offenses in the same jurisdiction, as well as punishments other courts impose for similar offenses in other jurisdictions.¹⁰⁶ Third, the court may compare the seriousness of the crime, the threatened or actual harm, and the motive of the offender.¹⁰⁷

While some circuits used the *Solem* test to determine the

97. *Weems*, 217 U.S. at 378-79.

98. *Id.* at 379.

99. *Browning-Ferris Indus.*, 492 U.S. at 263 n.3.

100. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

101. *Id.* at 669 n.37. See generally *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993) (discussing the application of various constitutional protections to criminal and civil forfeiture proceedings). “[E]ven those protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that the proceeding must reasonably be considered criminal.” *Id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

102. *Solem v. Helm*, 463 U.S. 277, 286 (1983). The Eighth Amendment “is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged.” *Id.* at 287 n.11 (citing *O’Neil v. Vermont*, 144 U.S. 323 (1892) (Field, J., dissenting)).

103. *Id.* at 288.

104. *Id.* at 290-93.

105. *Id.* at 290-91.

106. *Id.* at 291.

107. *Solem*, 463 U.S. at 292-94.

proportionality of civil forfeitures,¹⁰⁸ other circuits have held that an Eighth Amendment analysis is inappropriate¹⁰⁹ because the decision in *Ingraham* did not address the question whether the Eighth Amendment applied solely to criminal matters.¹¹⁰

Prior to the Court's decision in *Austin*, it had considered the Excessive Fines Clause only once before, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*¹¹¹ However, with its decisions in *Austin v. United States* and *United States v. Alexander*, the Court held that the Excessive Fines Clause applied to both civil¹¹² and criminal forfeitures.¹¹³ In *Austin*, the Court held that nothing in the language or the history of the Eighth Amendment restricted its application to criminal matters.¹¹⁴ The Court stated that the nature of the forfeiture will determine whether an Excessive Fines Clause inquiry is necessary.¹¹⁵

The *Austin* Court disagreed with the government's argument that an *in rem* forfeiture of a mobile home and auto body shop used by defendant Austin to store and sell cocaine was remedial rather than punitive.¹¹⁶ After Austin pleaded guilty to possession of cocaine with intent to distribute, the government sought to seize his properties on the grounds that they were instrumentalities of the crime, and their forfeiture would reimburse the government for its investigative expenses.¹¹⁷ The Court found that the forfeiture of the property could not be considered "solely" remedial.¹¹⁸ After reviewing several factors, including congressional intent that the statute punish culpable owners, the

108. GURULÉ, *supra* note 35, at 283.

109. *Id.* For a list of cases in which the lower courts that held that the protections of the Eighth Amendment apply only to criminal forfeitures, see *id.* at n.111.

110. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989). The Court "left open in *Ingraham* the possibility that the Cruel and Unusual Punishments Clause might find application in some civil cases." *Id.* "Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977). "[W]e need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases." *Browning-Ferris Indus.*, 492 U.S. at 263.

111. *Austin v. United States*, 509 U.S. 602, 606 (1993); GURULÉ, *supra* note 35, at 265 n.3.

112. *Austin*, 509 U.S. at 622.

113. *Alexander v. United States*, 509 U.S. 544, 558-59 (1993).

114. *Austin*, 509 U.S. at 608.

115. *Id.* at 610. "[T]he question is whether forfeiture serves in part to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion." *Id.* at 618 n.12 (citing *United States v. Halper*, 490 U.S. 435, 447-48 (1989)).

116. *Id.* at 620-21.

117. *Id.* at 604-06.

118. *Id.* at 622.

Court concluded that the forfeiture was at least partially punitive.¹¹⁹ Consequently, the Court remanded the case to the Sixth Circuit Court of Appeals to determine whether the forfeiture was excessive.¹²⁰ The Court indicated that the lower courts should establish their own analysis for evaluating excessiveness claims.¹²¹

In *Austin's* companion case, *United States v. Alexander*, the Court held that an *in personam* forfeiture required an assessment under the Eighth Amendment to determine whether a penalty was excessive.¹²² After the government convicted defendant Alexander of seventeen obscenity charges and three counts of violating the RICO Act, he was sentenced to six years in prison and assessed a \$100,000 fine.¹²³ In addition, the District Court for the District of Minnesota ordered Alexander to forfeit his interest in real estate and businesses valued at \$9 million, which represented his share of property that was either associated with or derived from the racketeering offenses.¹²⁴ The Eighth Circuit Court of Appeals affirmed the decision, holding that an Eighth Amendment proportionality analysis was not required if a defendant's sentence was less than life imprisonment without the possibility of parole.¹²⁵ On *certiorari*, the Supreme Court distinguished the Cruel and Unusual Punishments Clause, stating it was irrelevant to determining whether a fine was excessive, from the Excessive Fines Clause, which it said applied to any fine assessed by the government as punishment.¹²⁶ As in *Austin*, the Court remanded the judgment to the Court of Appeals to determine whether the fine was excessive.¹²⁷

Although the Court stated that *in personam* and punitive *in rem* forfeitures were subject to an excessiveness inquiry, it declined to provide the lower courts with a standard for determining what constitutes an excessive fine under the Eighth

119. *Austin*, 509 U.S. at 621-22.

In light of the historical understanding of forfeiture as punishment, the clear focus of § 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under 881(a)(4) and (a)(7) serves solely a remedial purpose.

Id.

120. *Id.* at 622-23.

121. *Id.* "Prudence dictates that we allow the lower courts to consider that question in the first instance." *Id.*

122. *Alexander v. United States*, 509 U.S. 544, 559 (1993).

123. *Id.* at 547-48.

124. *Id.* at 548.

125. *Id.* at 558.

126. *Id.* "[T]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *See id.* (citing *Austin*, 509 U.S. at 609-10).

127. *Alexander*, 509 U.S. at 559.

Amendment.¹²⁸ The result was a split among the circuits with different tests to determine what constitutes excessiveness.¹²⁹

B. Tests used by the Circuit Courts for Excessiveness Inquiries

The circuit courts developed three different approaches for evaluating fines under the Eighth Amendment: the instrumentality test, the proportionality test, and the hybrid (or multi-factor) test.¹³⁰ Although courts no longer apply the instrumentality test, certain aspects of it are relevant to the hybrid test. Therefore, a discussion of the instrumentality test is included to better understand the current analysis that courts apply.

Justice Scalia advocated the instrumentality test¹³¹ in his concurring opinion in *Austin*.¹³² Because the fines assessed in *in rem* forfeitures generally correlate with the value of the property that has been unlawfully used rather than the severity of the offense or the value of the forfeited property, an *in rem* forfeiture opposes the requirements of the Eighth Amendment, unless the property sufficiently relates to the offense.¹³³ The proper test, according to Justice Scalia, requires an inquiry into whether the relationship was “close enough to render the property, under traditional standards, ‘guilty’ and hence forfeitable.”¹³⁴ The majority declined to establish a test to determine what constitutes “excessiveness” and noted that the courts were free to include any

128. See *Austin v. United States*, 509 U.S. 602, 622-23 (stating that it is best to let the lower courts establish the test for excessiveness); *Alexander*, 509 U.S. at 559 (stating that it prefers that the lower court determine its own test for excessiveness).

129. Pollock, *supra* note 78, at 475-78 (noting that there is no national standard for excessiveness inquiries in civil forfeitures). The decision in *Austin* appears to authorize the district courts to fashion their own tests based on either the factors set out in *Solem v. Helm*, 463 U.S. 277 (1983), or the relationship between the asset and the offense. *Id.* at 475. The contrast between these two approaches makes it unlikely that the courts will arrive at a uniform standard for determining whether a civil forfeiture is excessive. *Id.*

130. GURULÉ, *supra* note 35, at 273-79. See *United States v. Chandler*, 36 F.3d 358, 363 (4th Cir. 1994) (adopting an instrumentality approach); *United States v. 427 & 429 Hall St.*, 74 F.3d 1165, 1170 (11th Cir. 1996) (adopting the pure proportionality approach). See generally Sarah N. Welling & Medrith Lee Hager, *Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States*, 83 KY. L.J. 835, 850-79 (1995) (providing a comprehensive overview and analysis of the tests that are used by different circuits).

131. GURULÉ, *supra* note 35, at 273.

132. *Austin*, 509 U.S. at 627-28 (Scalia, J., concurring).

133. *Id.* at 627. “Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal.” *Id.*

134. *Id.* at 628.

other factors in their analysis deemed relevant.¹³⁵ Though the Fourth Circuit adopted a pure instrumentality approach in deciding when an *in rem* forfeiture is excessive,¹³⁶ other circuits developed tests that looked beyond the relationship of the property to the offense.

In *United States v. 427 and 429 Hall Street*, the Eleventh Circuit Court of Appeals applied a pure proportionality test,¹³⁷ as defined in *Solem v. Helm*.¹³⁸ The court upheld an *in rem* forfeiture of real property owned by an individual who pleaded guilty to unlawful possession of cocaine in Alabama state court.¹³⁹ In determining that the forfeiture of the defendant's house was not excessive, the court considered the value of the property, the seriousness of the offense, and the potential punishment for the offense under the United States Sentencing Guidelines.¹⁴⁰ After finding that the defendant could have been fined \$40,000 and imprisoned for twenty-one months, the Eleventh Circuit upheld the civil forfeiture of his house, which was valued at \$65,000.¹⁴¹ The court declined to establish a list of factors to consider, noting

135. *Id.* at 623 n.15. While the relationship between the property and the offense may be helpful in a proportionality determination, the decision should not be interpreted to mean that it limits the factors that can be considered, or that other factors are not relevant. *Id.*

136. GURULÉ, *supra* note 35, at 274. See *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994) (adopting an instrumentality approach rather than the proportionality test set forth in *Solem v. Helm*, 463 U.S. 277 (1983)). The Fourth Circuit stated that Congress intended that civil forfeitures for drug violations be correlated to the value of the property that was involved in the offense, rather than to a set fine. *Id.* at 364. Accordingly, it applied a three-part instrumentality test that considered the connection between the property and the offense, the role of the owner in the offense, and the ease with which the offending property can be severed from the rest of the property. *Id.* at 365. In summing up its determination that an instrumentality test should be used, the court said that the Eighth Amendment requires that "the court must be able to conclude, under the totality of the circumstances, that the property was a substantial and meaningful instrumentality in the commission of the offense, or would have been had the offensive conduct been carried out as intended." *Id.*

137. GURULÉ, *supra* note 35, at 276. See *United States v. 427 & 429 Hall St.*, 74 F.3d 1165, 1170 (11th Cir. 1996) (concluding that an excessiveness inquiry requires a proportionality test). The court based its decision on the history and meaning of the Excessive Fines Clause, and the rationale of the U.S. Supreme Court in the *Austin* decision. *Id.* "The proportionality test compares the nature of the offense with the harshness, monetary or otherwise, of the forfeiture imposed on the owner." *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 982 (1995).

138. *Solem v. Helm*, 463 U.S. 277, 291-93 (1983). See *supra* notes 104-107 and accompanying text (describing the factors that the Court considered in *Solem*).

139. *427 & 429 Hall St.*, 74 F.3d at 1173.

140. *Id.* at 1172.

141. *Id.* at 1172-73.

that such factors would differ with each case.¹⁴²

Many other circuits have adopted the hybrid, or multi-factor test,¹⁴³ which combines aspects of the instrumentality and proportionality approaches.¹⁴⁴ In *United States v. Bieri*, the Eighth Circuit Court of Appeals ordered the forfeiture of a farm that the defendants used in a conspiracy to distribute marijuana.¹⁴⁵ After noting "the Eighth Amendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime,"¹⁴⁶ the court considered several factors in determining that the forfeiture was not grossly disproportional. The Eighth Circuit considered the "extent and duration" of the criminal activity, the penalties that could have been assessed against Mr. and Mrs. Bieri for their offenses, and the severity of the offense in relation to the value of the property.¹⁴⁷

In *United States v. Milbrand*, the Second Circuit Court of Appeals also used a combination of the instrumentality and proportionality approaches to subject a farm, again used to grow large quantities of marijuana, to forfeiture.¹⁴⁸ The court considered several factors, including the severity of the forfeiture, the nexus between the property and the offense, and the extent of the owner's participation in the offense.¹⁴⁹

The Ninth Circuit Court of Appeals established a slightly different hybrid test. In *United States v. 6380 Little Canyon Road*, the court established a two-prong test.¹⁵⁰ First, the court determined whether the property was an instrumentality of the offense. Second, the court determined whether the forfeiture was

142. *Id.* at 1172 (citing *United States v. Monroe*, 866 F.2d 1357, 1366 (11th Cir. 1989)). "The Eighth Amendment prohibits only those forfeitures that, in light of all relevant circumstances, are grossly disproportionate to the offense committed." *Id.* (quoting *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987)).

143. GURULÉ, *supra* note 35, at 276-79. See *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995) (adopting hybrid approach); *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995) (adopting the hybrid approach); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 982 (9th Cir. 1995) (adopting a two-prong hybrid approach).

144. GURULÉ, *supra* note 35, at 273-79; *427 & 429 Hall St.*, 74 F.3d at 1170; *United States v. Chandler*, 36 F.3d 358, 363 (4th Cir. 1994). See generally *Welling & Hager*, *supra* note 130, at 850-79 (1995) (providing a comprehensive overview and analysis of the tests that are used by different circuits).

145. *Bieri*, 68 F.3d at 238.

146. *Id.* at 236 (quoting *United States v. Sarbello*, 985 F.2d 716, 724 (3d Cir. 1993)).

147. *Id.* 236-38.

148. *Milbrand*, 58 F.3d at 847.

149. *Id.* at 847-48.

150. *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 982 (9th Cir. 1995). GURULÉ, *supra* note 35, at 277.

proportional to the gravity of the offense.¹⁵¹ The court stated that the district court, in its proportionality analysis, should consider the harshness of the forfeiture and the role of the owner in the offense.¹⁵² Relevant factors include the value of the property, the hardship that the forfeiture would have on the defendant, whether the defendant intentionally or negligently allowed the property to be used in the offense, and the extent of harm that resulted from the offense.¹⁵³

When the Ninth Circuit applied its two-prong test in *United States v. Bajakajian*, it held that the forfeiture of any amount of the currency would be excessive under an Eighth Amendment analysis because the undeclared currency was not an instrumentality of the offense.¹⁵⁴ After granting the government's petition for a writ of *certiorari*, the Supreme Court determined that the proper standard was the grossly disproportional standard.¹⁵⁵ In adopting the standard it previously established for its analysis of the Cruel and Unusual Punishments Clause in *Solem*, the Court stated that the forfeiture amount must be compared to the severity of the offender's violation.¹⁵⁶ In other words, a forfeiture that is grossly disproportional is unconstitutional.¹⁵⁷

Although the Court established a standard for determining when a fine is excessive, the question of what constitutes a proportional penalty remains unanswered. Consequently, it is unclear whether the circuits will apply the pure proportionality test or the hybrid test. Part III of this Comment advocates using the hybrid test to determine whether a fine is proportional under the Eighth Amendment.

III. PROPORTIONALITY AS APPLIED TO CRIMINAL AND CIVIL FORFEITURES

*We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.*¹⁵⁸

Section A proposes that the hybrid test should be applied by district courts to determine what constitutes a proportional forfeiture. Section B argues that the holding in *Austin* is still good law and applies to *in rem* forfeitures that are partially punitive in

151. *6380 Little Canyon Rd.*, 59 F.3d at 982; GURULÉ, *supra* note 35, at 277.

152. *6380 Little Canyon Rd.*, 59 F.3d at 985-86.

153. *Id.*

154. *United States v. Bajakajian*, 84 F.3d 334, 337-38 (9th Cir. 1996).

155. *United States v. Bajakajian*, 118 S. Ct. 2028, 2036 (1998).

156. *Id.* at 2037-38.

157. *Id.* at 2038.

158. *Id.*

nature.

A. What is Proportionality?

In the aftermath of *Bajakajian*, it must be determined what constitutes a proportional fine. This requires a further determination of the test that district courts should apply.

Where, for instance, currency has been seized pursuant to a currency reporting violation, as in *Bajakajian*, and there is no evidence of additional illegal activity to render the currency "tainted," forfeiture of the full amount of currency is clearly impermissible under the holding in *Bajakajian*. What remains unanswered, however, is what percentage of the currency can be forfeited for a violation that is not considered to be a grave offense. Although the courts have not yet arrived at a definitive test, they have set forth several factors that are relevant to the determination of whether a forfeiture is proportional. Among the factors to be considered are: 1) the source of the currency (whether it was legally or illegally acquired); 2) its intended purpose (whether it was intended for an illicit purpose); 3) the nature of the offense; 4) the penalties that could be applied under the United States Sentencing Guidelines; 5) other penalties that have been enacted by Congress with regard to that particular violation; 6) the extent of the harm caused by the violation; and 7) the fact that the violation was unrelated to any other illegal activity.¹⁵⁹ Although these factors have been enumerated in cases involving currency-reporting violations, they provide a useful guideline for determining proportionality in instances where the violation merits a forfeiture of less than the full value of the asset.

In instances where there is evidence of illegal activity in addition to the violation giving rise to the forfeiture, the most appropriate test to determine proportionality is the hybrid test because it best balances the protections of the Excessive Fines Clause and the goals of law enforcement.

As discussed in Part II of this Comment, the hybrid test requires the Court to consider numerous factors in determining whether a fine is proportional. The factors that the Court may consider are 1) the severity of the forfeiture considered in relation to the nature of the offense and the value of the property,¹⁶⁰ 2)

159. *United States v. Beras*, 183 F.3d 22, 29 (1st Cir. 1999); *United States v. \$273,969.04*, 164 F.3d 462, 466 (9th Cir. 1999); *United States v. \$57,835*, No. 97-6023, 1998 U.S. App. LEXIS 23529, at *6 (2d Cir. Sept. 18, 1998); *United States v. \$64,000*, No. 97C5363, 1999 U.S. Dist. LEXIS 3372, at *22 (N.D. Ill. Mar. 10, 1999).

160. *United States v. Milbrand*, 58 F.3d 841, 847 (2d Cir. 1995). The court affirmed the forfeiture of a farm valued at \$68,000 after comparing the value of the farm to the amount of marijuana found on it and the potential penalties that could be imposed for possession of the crop. *Id.* at 848.

whether the property was an instrumentality of the offense,¹⁶¹ and 3) the potential sentence for the violation.¹⁶²

This test is most appropriate because it serves the goals of government, while protecting claimants and defendants with regard to their property. In addition, it does not arbitrarily determine whether a forfeiture is excessive. Since circumstances vary from case to case, the court should consider many factors in deciding whether a fine is proportional.

The hybrid test is superior to the pure proportionality approach, which compares the value of the property forfeited with the gravity of the offense,¹⁶³ because it considers additional highly relevant factors in an excessiveness inquiry. For example, a defendant may be accused of growing \$20,000 worth of marijuana on a farm that is valued at \$800,000. While the proportionality approach also considers the nature and extent of the criminal activity,¹⁶⁴ it focuses primarily on the proportionality of the forfeiture to the offense. This approach provides an incomplete picture of all factors district courts should consider to justify a forfeiture. A court should consider whether the farm was critical to the success of the marijuana-growing operation, and whether the owner used a majority of the property to grow marijuana. Equally relevant is whether the landowner realized large profits from the operation, and whether the sole purpose for purchasing the property was to grow marijuana. Including these factors would provide a more complete picture of why a court should not find forfeiture of the farm an excessive fine under the Eighth Amendment.

From the perspective of a property owner defending against the government's efforts to effect a forfeiture, the above factors are equally important and relevant. Using the same example, suppose that the farm owner was merely negligent in allowing another individual to grow marijuana on the farm owner's land and did not personally benefit from the sale of the marijuana. Balancing these

161. *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 982 (9th Cir. 1995). The court stated that the first prong of its two-prong approach for determining excessiveness requires a nexus between the offense and the property to be forfeited. *Id.*

162. *United States v. Bieri*, 68 F.3d 232, 237 (8th Cir. 1995). The court compared the criminal activity of the defendants to the actual and potential penalties that could have been imposed upon them. *Id.*

163. *United States v. Wild*, 47 F.3d 669, 676 (4th Cir. 1995). The court stated that the value of the property should be compared against the severity of the offense. *Id.* See *United States v. 427 & 429 Hall St.*, 74 F.3d 1165, 1172-73 (11th Cir. 1996) (affirming the forfeiture of property valued at \$65,000 after comparing the value of the property against the seriousness of the offense and the potential sentence that could have been imposed on the defendant).

164. *Wild*, 47 F.3d at 676.

factors allows a court and the government to make a more informed decision. Just as it is critical in an excessiveness review to weigh the value of the asset to be forfeited against the maximum penalty that could be imposed, it is equally important to consider the relationship between the property and the offense. A failure to include factors relevant to this relationship would be a failure to consider facts that can mitigate or strengthen a claim that a forfeiture is excessive.

The majority opinion in *Bajakajian* also raises the issue of whether Justice Clarence Thomas indicated that the holding in *Austin* was no longer good law. The next section proposes that this was not his intention, and that *Austin* continues to ensure that an *in rem* forfeiture of proceeds, instrumentalities or facilitating property falls within the protection of the Excessive Fines Clause if the forfeiture is deemed partially punitive.

B. Has *Bajakajian* Compromised the Holding in *Austin*?

As discussed in Section II of this Comment, *Austin v. United States* held that any forfeiture that is punitive in nature is subject to an excessiveness inquiry under the Eighth Amendment.¹⁶⁵ While purely remedial forfeitures that deprive individuals of property that facilitated or is derived from criminal activity likely cannot be considered excessive, the Court said that punitive forfeitures clearly fall within the protection of the Constitution.¹⁶⁶ However, dicta in *Bajakajian* weakens this position.

Although Justice Thomas cited *Austin* when he stated that “a modern statutory forfeiture is a ‘fine’ for Eighth Amendment purposes if it constitutes punishment even in part,”¹⁶⁷ he later provided contradictory language in one of his footnotes. After rejecting the government’s argument that forfeiture of the entire amount of currency seized from *Bajakajian* would be proportional because the First Congress enacted similar penalties at the time it ratified the Eighth Amendment, Justice Thomas noted that comparing the modern and early statutes is not useful to the proportionality argument.¹⁶⁸ Justice Thomas stated that the customs statutes enacted at the time of the First Congress do not support a conclusion that a full forfeiture of *Bajakajian*’s currency is proportional because “the type of forfeiture that they [the early customs statutes] imposed *was not considered punishment for a criminal offense*.”¹⁶⁹ He also noted that the Department of Justice recognized certain types of forfeitures as remedial, such as those

165. *Austin v. United States*, 509 U.S. 602, 621-22 (1993).

166. *Id.*

167. *Bajakajian*, 118 S. Ct. at 2035 n.6 (citing *Austin*, 509 U.S. at 627-28).

168. *Id.* at 2039.

169. *Id.* (emphasis added).

involving customs, narcotics, and revenue statutes.¹⁷⁰

This statement appears to conflict with the Court's holding in *Austin*, which states that any type of statute, regardless of whether it is a customs, narcotics or revenue statute, is protected by the Eighth Amendment if it is partially punitive.¹⁷¹ As the Sixth Circuit Court of Appeals pointed out in a subsequent decision regarding a narcotics case, it also appears that the context of the statement was a discussion regarding early customs statutes, rather than drug statutes.¹⁷² *Bajakajian*, however, involved a violation of customs laws. Nonetheless, Justice Thomas indicated that the forfeiture of Bajakajian's currency was punitive, and protected by the Excessive Fines Clause. Consequently, it does not appear that Justice Thomas intended to remove remedial forfeitures from the ambit of the Eighth Amendment if they are partially punitive.

CONCLUSION

In *United States v. Bajakajian*, the U.S Supreme Court stated that when the Eighth Amendment applies to forfeitures, the standard for excessiveness is whether the forfeiture is "grossly disproportional" to the severity of the offense. Where there is no evidence of additional wrongdoing besides the violation giving rise to the forfeiture, courts must carefully consider numerous factors relating to the nature of the offense.

In instances where the government can establish that there has been additional wrongdoing, the appropriate test to determine whether a forfeiture is proportional, as opposed to grossly disproportional, is the hybrid test. By including factors relating to instrumentality and proportionality, district courts can best satisfy the requirements of the Eighth Amendment and the goals of Congress in enacting the forfeiture statutes.

170. *Id.* at 2039-40 n.16. Justice Thomas included the following excerpt from a Senate hearing on the Organized Crime Control Act of 1970 in support of his statement.

The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is *in rem* against the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense. Examples of such forfeiture provisions are those contained in the customs, narcotics, and revenue laws.

Id. (emphasis added).

171. *Austin*, 509 U.S. at 621-22.

172. *United States v. 415 E. Mitchell Ave.*, 149 F.3d 472, 477 n.3 (6th Cir. 1998).

Regarding the increased burden on the government to demonstrate that forfeitures are proportional, the government should seek to include any additional violations that have a nexus to the forfeiture proceedings. Evidence of any additional violations would work towards establishing the proportionality of a forfeiture and would help to avoid successful challenges to forfeitures on excessiveness grounds.