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Civil Forfeiture and the Excessive Fines Clause: Does Bajakajian Provide False Hope for Drug-Related Offenders?

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NOTE

CIVIL FORFEITURE AND THE EXCESSIVE FINES CLAUSE: DOES *BAJAKAJIAN* PROVIDE FALSE HOPE FOR DRUG-RELATED OFFENDERS?

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"We are troubled by the government's view that any property, whether it be a hobo's hovel or the Empire State Building can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction."[1]

United States v. 508 Depot Street.

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* This note received the Barbara W. Makar writing award for Spring 2000.

** In loving memory of Juanita Little.

1. 964 F.2d 814, 818 (8th Cir. 1992) (emphasis omitted), *rev'd sub nom.* United States v. Austin, 509 U.S. 602 (1993).

I. INTRODUCTION

Civil forfeiture[2] is one of the most highly debated topics in American jurisprudence today. The reason for the debate is centered on the scope of its application and the limited protection afforded to those affected by it.[3] Under current federal procedure, a person's assets are subject to forfeiture if the government can show probable cause that the property was involved in the related offense.[4] Once probable cause has been shown, the burden shifts to the owner, who must prove by a preponderance of the evidence that his property is not subject to forfeiture.[5] If the owner fails to meet the burden, the government becomes the rightful owner of the property regardless of whether the original owner is found guilty of the crime charged.[6]

Today, civil forfeiture is most often used to seize assets in drug-related crimes.[7] Adopted by the government as a deterrent to drug trafficking, civil forfeiture was intended as "the ideal weapon for breaking the backs of sophisticated narcotics operations."[8] Not only is civil forfeiture designed to take the profit out of drug-related crime, but it also provides law enforcement agencies with the opportunity to use the proceeds for their own benefit in the fight against narcotics.[9]

While government agencies fill their coffers with proceeds from drug-related seizures, instances of forfeiture abuse become more routine across

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2. Civil forfeiture, as referred to in this note, is the codification of the common law civil forfeiture into 21 U.S.C. § 881 (1988 & Supp. IV 1992). Section 881 authorizes, among others, the forfeiture of all illegal controlled substances; property used as a container for the controlled substances; conveyances used to traffic the narcotics; assets furnished by or used in the drug trade; and all real property involved in drug related violations. *See id.*

3. *See, e.g.*, Bennis v. Michigan, 516 U.S. 442 (1996). In his concurring opinion, Justice Thomas warned of the potential for abuse in civil forfeitures, stating that "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice system." *Id.* at 456.

4. *See* 21 U.S.C. § 881 (1988).

5. *See* Rick Fueyo, Note, *Normative Considerations of Asset Forfeiture Under the Drug Abuse Control Act–Who Will Protect the People?–The Judiciary as Vox Populi*, 7 U. FLA. J.L. & PUB. POL'Y 143, 150-51 (1994).

6. *See* Charmin Bortz Shiely, Note, United States v. Bajakajian: *Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis?*, 77 N.C.L. REV. 1595, 1596 n.3 (1999).

7. *See* Scott Hiaasen, *Forfeiture Law Funds Police Targeting Drug Dealers*, COX NEWS SERV., Oct. 1, 1999 at 3.

8. S. REP. No. 225, 98th Cong., 2d Sess. 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

9. *See* M. Lynette Eaddy, Note, *How Much Is Too Much? Civil Forfeitures and the Excessive Fines Clause After* Austin v. United States, 45 FLA. L. REV. 709, 711 (1993).

the country.[10] Although civil forfeiture was meant to paralyze sophisticated narcotics operations, small-time dealers often feel its sting.[11] For example, in New York, the Second Circuit Court of Appeals upheld the forfeiture of a $140,000 apartment that was used to consummate the sale of $250 worth of cocaine.[12] Although the federal guidelines for the crime recommended the maximum sentence of $30,000, the court stated: "We recognize that these are merely possible sentences and are not conclusive as to what a court might do in an individual case. The fine in this case, while large, is not a grossly disproportionate punishment within the meaning of Eighth Amendment jurisprudence."[13]

In North Carolina, the Fourth Circuit Court of Appeals upheld the seizure of a woman's farm after she pled guilty to selling 2.9 grams of cocaine on her property.[14] Although the court acknowledged that she was only a middleman in the transaction and received a minimal profit from the deal, the claim by the government was allowed.[15] As a result of the Fourth Circuit's decision, the woman was rendered homeless.[16]

This note will address the disproportionate impact civil forfeiture has on minor drug offenses as well as the defenses available under the Supreme Court's current interpretation of the Excessive Fines Clause. First, this note examines the incorporation and evolution of civil forfeiture in America's

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10. *See* Marvin Zalman, *Another View: Marvin Zalman: Insidious Side of Drug Forfeiture Laws*, THE DETROIT NEWS, May 9, 1997 at A11. Marvin Zalman, a professor of criminal justice at Wayne State University in Detroit, wrote:

> This is not news. Since 1991, newspapers have uncovered a host of abuses. Grandparents lost a house because their grandson had a marijuana joint. The owner of a $5-million California estate was shot dead at 8 in the morning during a raid based on a misguided hunch that he was growing drugs. A cosmetics salesman with a gambling hobby lost $9,000 of purely legal cash in the Miami airport on the way to Vegas. Federal agents seized his cash on the "probable cause" that anyone carrying cash from Miami to Las Vegas was a drug dealer. The gambler gave up his money when he discovered that he had to sue the government to get his money back and the costs came to more than $9,000. A New York prosecutor drove a confiscated BMW.

Id.

11. *See* Fueyo, *supra* note 5, at 144. In 1994, Fueyo noted that "[t]he wide net that Congress created to ensnare the kingpins of illegal narcotics has also snared unintended targets, and law enforcement has not always thrown back the extra catch." *Id.*; *see also* Hiassen, *supra* note 7, at 2 (quoting Stephen Melnick, an attorney who once prosecuted forfeiture cases for the Boca Raton, Florida Police Department) ("[t]he statute had some good intentions to punish the big-time trafficker . . . [b]ut the only one getting punished is the small-time user").

12. *See* United States v. 38 Whalers Cove Drive, 954 F.2d 29, 32 (2d Cir. 1992).

13. *Id.* at 39.

14. *See* United States v. Santoro, 866 F. 2d 1538, 1540-41 (4th Cir. 1989).

15. *See id.* at 1541.

16. *See id.*

'War on Drugs.' The note then explains the Supreme Court's decision in *United States v. Bajakajian*[17] and its impact on the excessive fines defense. The third section of the note discusses the recent interpretations of *Bajakajian* in minor narcotics cases. In the forth section, the note analyzes the reasons why the excessive fines defense has failed in current cases, despite the ruling in *Bajakajian*. Finally, the note considers possible solutions to the current application of civil forfeiture.

II. THE EVOLUTION OF CIVIL FORFEITURE IN DRUG-RELATED CASES

A. *The Creation of Section 881*

Reasons for the debate over the use of civil forfeiture in drug-related cases not only stem from the nature of civil forfeiture but also from governmental policy toward drug offenses.[18] In recent decades, the United States government has tried to take a hard-line stance on narcotics offenses.[19] With the escalating problem of drug use in the United States,[20] Congress enacted the Comprehensive Abuse Prevention and Control Act ("the Act") in 1970, which provided tough enforcement and strict punishment for drug-related offenses.[21] Although the Act, later codified in 21 U.S.C. Section 881, authorized the forfeiture of contraband and property used in violation of federal drug laws, it failed to provide law enforcement agencies with the necessary means to combat the sophisticated drug trade.[22]

In response to the failure of the Act to meet expectations, Congress enacted legislation that would eventually become the government's most powerful weapon against narcotics trafficking.[23] The Comprehensive Crime Control Act of 1984 revised Section 881 to include all real property that

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17. 118 S. Ct. 2028, 2032 (1998).

18. *See* President's Radio Address to Nation on Federal Drug Policy (Oct. 2, 1982), in 18 WEEKLY COMP. PRES. DOC. 1249, 1250. In his radio address, President Reagan said: "[W]e've taken down the surrender flag and run up the battle flag. And we're going to win the war on drugs." *Id.*

19. *See* Lance Gay, *Asset Forfeiture Seen as Out of Hand; Suspects Paying For Unproven Crimes, Critics Contend*, THE WASH. TIMES, Mar. 13, 1999, at A3. Gay, quoting former Assistant U.S. Attorney General David Smith: "seizing farms, boats[,] and houses was never intended to subsidize police budgets, and the asset forfeiture laws weren't meant to be used to enforce drunken-driving laws or to take the belongings of people who aren't charged with crimes." *Id.*

20. *See* Zalman, *supra* note 10, at A11.

21. *See* Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 881 (1970)). Among the amendments provided for by the Act was the adoption of authorized civil forfeiture for any contraband or property used or acquired in violation of federal narcotics laws. *See id.*

22. *See* S. REP. No. 98-225, at 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

23. *See* Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3381.

was used in any manner to facilitate any violation of federal narcotics law.[24] According to Senate reports, the intent behind the revisions was to punish and deter by stripping the offenders of their economic power.[25]

Under Section 881, civil forfeiture may be imposed on all illegal controlled substances, property used as a container for controlled substances, conveyances used to traffic drugs, assets furnished by or used in the drug trade, and real property involved in drug violations.[26] The potency of Section 881 comes from its codification of the civil forfeiture theory that was used by the government in admiralty cases.[27] Historically, civil forfeiture was used to seize pirate ships operating in United States waters.[28] In an 1827 case, *The Palmyra*, the Supreme Court upheld the forfeiture of an alleged pirate ship even though its crew had been acquitted of criminal charges.[29] According to Justice Story, the ship was subject to forfeiture under the "guilty property theory."[30] Under this theory, the offense is attached to the property rather than the owner.[31] Establishing the guilt of the offenders became unnecessary.[32] Moreover, because the proceedings were civil and did not require any criminal adjudication prior to the forfeiture, the lower burden of persuasion used in civil cases

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24. 21 U.S.C. § 881(a)(7) (1992). Section 881 provided for the forfeiture of:

> All real property, including any right, title, and interest (including any leasehold interest) in the whole or any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used in any manner or part, to commit, or to facilitate the commission of, a violation of this sub-chapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have committed or omitted without the knowledge or consent of that owner.

Id.

25. *See* S. REP. No. 98-225, at 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

26. 21 U.S.C. § 881(1992).

27. *See* Paul Dryer, Note, Bennis v. Michigan: *Guilty Property Not People is Still The Focus of Civil Forfeiture Law*, 28 U. TOL. L. REV. 371, 374 (1997).

28. *See id.*

29. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

30. *See id.* at 14. The civil forfeiture theory relied upon by the Court had its origins in English Common Law. *See* Austin v. United States, 509 U.S. 602, 613-14 (1993) (summarizing the history of civil forfeiture). In medieval England, if an object caused the death of a human, it was subject to a deodand. *See id.* According to the law of deodand, property involved in the death of a person would be forfeited to the King who would either use the value of the property to fund a Mass in recognition of the dead person or give the property to some charity. *See id.*

31. *See The Palmyra*, 25 U.S. (12 Wheat.) at 14. Justice Story wrote: "The thing is here primarily considered as the offender, or rather the offence [sic] is attached primarily to the thing; and this, whether the offence [sic] be *malum prohibitum*, or *malum in se*." *Id.*

32. *See id.* at 12.

applied.[33] Recognizing the potential impact civil forfeiture could have on narcotics cases, Congress incorporated this theory into anti-drug legislation.[34]

The impact that the revised Section 881 had on the government's fight against the drug offenders was astounding.[35] Between its inception in 1985 and 1991, Section 881 resulted in the forfeiture of more than 1.5-billion dollars in assets.[36] From 1992 to 1997, federal agencies almost doubled that amount.[37] As incredible as these statistics are, they do not reflect the amount seized through state forfeiture statutes.[38]

Although Section 881 proved to be valuable in preventing drug dealers' access to their ill-gotten gain, there was some question as to how much property should be subject to forfeiture.[39] The problem appeared to cause the most debate when the value of the property seized was much greater than the value of the drugs seized from the underlying drug offense.[40]

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33. *See id.*

34. *See* S. REP. No. 98-225, at 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

35. *See* Eaddy, *supra* note 9, at 715; Molly Ivins, *U.S. Citizens Are Victims of Those Fighting 'War on Drugs,'* St. Louis Post-Dispatch, Aug. 24, 1998, at B7.

36. *See* Ivins, *supra* note 35, at B7.

37. *See* Zophia Rendon, *G.P.D. Help in Arresting Drug Lord Nets Community Almost $500,000*, INDEP. FLA. ALLIGATOR, Oct. 27, 1999 at 4. Even a small college town like Gainesville, Florida feels the influence of asset forfeiture. *See id.* As recognition for its part in the capture of an international drug lord, the Gainesville Police Department received five checks totaling $461,784 from the U.S. Attorney for the Northern District of Florida. *See id.* According to the U.S. District Attorney, the forfeited assets will be "used to benefit the community." *Id.*

38. *See* Gay, *supra* note 19, at A3 (referring to statements by Rachel King of the American Civil Liberties Union).

39. *See Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing on H.R. 1658 Before the Criminal Justice Oversight Subcommittee*, 106th Cong. 1, (1999) [hereinafter Forfeiture Hearing] (statement of Gilbert Gallegos, National President of the Fraternal Order of Police). Gallegos states:

> The impetus for this hearing is no doubt the recent attempts to reform forfeiture procedures through enactment of H.R. 1658, which passed the House of Representatives last month.... Proponents of the bill attacked law enforcement's use of civil forfeiture and made several veiled references to police officers serving as the government's bounty hunters. Several lawmakers came to the floor to describe the "horror stories" of law enforcement's supposedly unjust attempts to take property away from innocent citizens.

Id.

40. *See* Ivins, *supra* note 35, at B7. Ivins writes, "police forces can get far more money by busting small-time marijuana buyers in reverse stings (where the cops sell drugs to unsuspecting customers) and then seizing their assets than they can by, say, going after major methamphetamine dealers." *Id.*

Judicial concern for the possible misuse of Section 881 became apparent when, in 1992, defendants in two different circuits argued that the Eighth Amendment barred excessive civil forfeitures.[41] Even though both cases involved the seizure of property that was disproportional to the value of the drugs involved, each circuit held that the forfeitures were constitutional under the Eighth Amendment.[42] While the courts agreed that the seizures were valid, they differed as to whether civil forfeiture was a form of punishment.[43] When the Eighth Circuit disagreed with the Second Circuit, holding that the seizures were not a form of punishment and that the Excessive Fines Clause was inapplicable to civil forfeitures, the stage was set for the Supreme Court to step in and provide guidance.[44]

B. Austin v. United States

In *Austin v. United States*,[45] a South Dakota court sentenced the defendant for one count of possession of cocaine with the intent to distribute.[46] Subsequently, the federal government filed a forfeiture action under Section 881 in federal district court against Austin's mobile home and body shop.[47] The court granted the government's request for summary judgment based on an officer's affidavit that Austin had brought two grams of cocaine from his mobile home to the body shop in order to finalize a sale.[48] On appeal, the Eighth Circuit reluctantly rejected Austin's argument that the civil forfeiture of his home and workplace violated the Excessive Fines Clause of the Eighth Amendment.[49] Disagreeing with the Eighth Circuit, the Supreme Court held that the Excessive Fines Clause did apply

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41. *See* Kristen Michelle Caione, Note, *When Does In Rem Civil Forfeiture Under* 21 U.S.C. 881(a)(7) *Constitute an Excessive Fine?: An Overview and an Attempt to Set Forth a Uniform Standard*, 47 SYRACUSE L. REV. 1093, 1099-1100 (1997) (referring to United States v. 508 Depot St., 964 F.2d 814, 817 (8th Cir. 1992); United States v. 38 Whaler's Cove Drive, 954 F.2d 29, 35 (2d Cir. 1991)).

42. *See id.* at 1099.

43. *See id.*

44. *See id.*

45. 509 U.S. 602 (1993).

46. *See id.* at 604.

47. *See id.* at 605.

48. *See id.* at 604-05. Upon the execution of a search warrant, state authorities discovered small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately $4,700 in cash. *See id.*

49. *See* United States v. 508 Depot St., 964 F.2d at 814, 818 (8th Cir. 1992). Although the Eighth Circuit thought that the government was "exacting too high a penalty in relation to the offense committed," the court felt that its hands were tied from deciding whether the forfeiture was unconstitutional based on the guilt or innocence of the landowner. *Id.* "We are constrained to agree with the Ninth Circuit that '[i]f the [C]onstitution allows *in rem* forfeiture to be visited upon innocent owners . . . the Constitution hardly requires proportionality review of forfeitures.'" *Id.* (quoting United States v. Tax Lot 1500, 861 F.2d 232, 234 (9th Cir. 1988)).

to civil forfeitures.[50] According to the Court, the answer as to whether the Excessive Fines Clause applied to civil forfeitures depended on whether the seizure was a form of punishment.[51]

Traditionally, the Excessive Fines Clause only applied to criminal forfeitures because the punishment was directly aimed at the defendant.[52] However, with civil forfeiture and the theory of "guilty property," the defendant was not considered part of the proceedings and was not the object of the punishment.[53] Although the Supreme Court upheld the legal fiction surrounding civil forfeiture, it recognized that the owner of the property was the true recipient of the punishment brought on by the seizure.[54] Because the owner was considered to have been punished by the forfeiture, the Court reasoned that he was entitled to bring an excessive fines defense.[55]

Although the Court held that the Eighth Amendment was applicable, it declined to articulate a test for determining when a forfeiture is excessive.[56] Instead, the Court left the task of determining excessiveness up to the lower courts.[57] As a result, inconsistency arose among the circuits as to what standard to use.[58] One standard used among the circuits was the proportionality test.[59] According to Justice Scalia's concurrence in *Austin*, the proportionality test considers the callousness of the seizure against the gravity of the offense.[60] The Fourth Circuit, however, rejected the proportionality analysis and adopted the instrumentality test instead.[61] Under the instrumentality test, the focus is on the relationship between the

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50. *See Austin*, 509 U.S. at 604.

51. *See id.* at 607-08. Some provisions of the Bill of Rights are expressly limited to criminal cases. *See id.* For example, the Fifth Amendment's Self-Incrimination Clause provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." *Id.* The text of the Eighth Amendment contains no similar limitation. *See id.*

52. *See id.*

53. *See id.* at 615 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

54. *See id.* at 618.

55. *See id.*

56. *See id.* at 622.

57. *See id.*

58. *See* Caione, *supra* note 41, at 1103 (quoting United States v. Sarbello, 985 F.2d 716, 722 (3d Cir. 1995)). "[T]hose jurisdictions applying Eighth Amendment proportionality analyses in non-capital cases have adopted methods which have not been fully reconciled either within or among the circuits, making it difficult to predict . . . [w]hat type of analysis will be applied." *Id.*

59. *See Austin*, 509 U.S. at 627-29 (Scalia, J., concurring).

60. *See id.* Justice Scalia noted that a consideration of excessiveness should only concern the property's role in the commission of the underlying offense rather that its value. *See id.* Scalia reasoned that "[u]nlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use . . . ." *Id.* at 627.

61. *See, e.g.*, United States v. Chandler, 36 F.3d 358, 360-65 (4th Cir. 1994).

property involved and the offense charged.[62] With the circuits applying different standards in the consideration of excessiveness, inconsistencies naturally occurred throughout the federal courts.[63] Eventually, the Supreme Court revisited the issue and attempted to provide some answers as to what is considered excessive.[64]

III. *UNITED STATES V. BAJAKAJIAN*

Although *United States v. Bajakajian*[65] was a criminal forfeiture case involving customs violations, it gave the Supreme Court the opportunity to address the growing concern about inconsistent interpretations of excessiveness in civil forfeitures.[66] In *Bajakajian*, customs officials stopped the defendant as he attempted to board a plane bound for Cyprus.[67] Aided by dogs trained to smell for currency, customs officials asked Bajakajian if he was aware of the federal law that required all persons leaving the United States to report any money they were carrying in excess of $10,000.[68] Even though officials had already discovered $230,000 in Bajakajian's checked baggage, he denied carrying more than the $10,000 limit.[69] In total, U.S. Customs recovered $357,144 from Bajakajian, his wife, and their luggage.[70] As a result, Bajakajian was indicted by a federal grand jury on three counts, including failure to report pursuant to 18 U.S.C. § 982(a)(1).[71] Bajakajian plead guilty to the charge of failure to report and requested a bench trial for the count upon which the total forfeiture amount was based.[72]

At trial, the district court determined that the money involved was lawfully earned and that forfeiture of the entire amount would be extremely harsh.[73] Despite Section 982,[74] which states that the entire unreported amount was subject to forfeiture because it was involved in the offense, the

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62. *See id.* at 365. The instrumentality test, according to the Fourth Circuit Court of Appeals, considers three factors: (1) The connection between the offense and the extent of the property's role in the crime; (2) the culpability of the owner; (3) a determination of whether the offending property can be separated from the remainder. *See id.*

63. *See* Caione, *supra* note 41, at 1103.

64. *See* United States v. Bajakajian, 118 S. Ct. 2028 (1998).

65. *See id.*

66. *See* Shiely, *supra* note 6, at 1597.

67. *See Bajakajian*, 118 S. Ct. at 2032.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.* at 2029, 2032; Section 982(a)(1) provides that anyone convicted of willfully violating 31 U.S.C. § 5316(a)(1)(A), failure to report currency in excess of $10,000 that is transported out of the country, shall forfeit any property involved in such an offense. *See* 18 U.S.C. § 982(a)(1) (1996).

72. *See Bajakajian*, 118 S. Ct. at 2029.

73. *See id.* at 2029-30.

74. *See* 18 U.S.C. § 982(a)(1) (1996).

trial judge held that such application would violate the Excessive Fines Clause.[75] Instead of allowing the seizure of the entire amount, the court fined the defendant $5,000 under the Federal Sentencing Guidelines and ordered the forfeiture of an additional $15,000 to reflect the seriousness of the offense.[76]

On appeal by the government, the Ninth Circuit used a two-prong test to consider whether the government's original forfeiture claim over the entire amount was excessive under the Eighth Amendment.[77] According to the Ninth Circuit, excessiveness was determined by combining the instrumentality test with the proportionality test.[78] In its analysis, the court noted that the money was not an instrumentality of the crime because the charge involved a failure to report and not the transportation of the currency.[79] Because the currency did not meet the instrumentality prong of the test, the court stated that there was no need to go forward with the second prong and held that the forfeiture violated the Excessive Fines Clause.[80]

The Supreme Court granted certiorari to resolve the conflict as to what standard applied to an excessive fines analysis.[81] In a five-to-four decision, the Supreme Court held that the original forfeiture amount violated the Excessive Fines Clause.[82] Disagreeing with the Ninth Circuit's analysis of excessiveness, the majority stated that reviewing the forfeiture under an instrumentality test was unnecessary because the seizure was punitive.[83] Instead, the Court reasoned that excessiveness in a punitive forfeiture could

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75. *See Bajakajian*, 118 S. Ct. at 2030.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 2032.

82. *See id.* at 2031. Justice Thomas wrote the opinion for the Court and was joined by Justices Stevens, Souter, Ginsberg and Breyer. *See id.* at 2028. Justice Kennedy penned the dissent and was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. *See id.* The interesting aspect of this division among the justices is that Thomas, a noted conservative, sided with the more liberal justices. *See also* Frank Murray, *Scalia, Thomas Part Ways on Excessive Fine Decision: Like-Minded Justices Disagree on Customs' Action Toward Traveler*, WASH. TIMES, June 23, 1998, at A3.

83. *See Bajakajian*, 118 S. Ct. at 2036. According to the Court, an instrumentality analysis was unnecessary because

> [t]he currency in question is not an instrumentality in any event . . . the currency is merely the subject of the crime of failure to report. Cash in a suitcase does not facilitate the commission of that crime as, for example, an automobile facilitates the transportation of goods concealed to avoid taxes.

Id. at 2036 n.9.

only be decided from a proportionality determination.[84] The majority then articulated the first test for determining excessiveness in forfeiture actions by stating: "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[85]

Under the grossly disproportional analysis, the Court's main concern was determining the gravity of Bajakajian's offense.[86] In deciding the appropriate penalty for failing to report, the majority considered two issues.[87] First, because judicial determination of the gravity of an offense is "inherently imprecise," the Court stated that judgments concerning appropriate punishment were for the legislature to decide.[88] Second, the majority noted that specific factors relative to the individual defendant should also be considered.[89] In applying the first part of this rationale, the Court looked to the Federal Sentencing Guidelines for the maximum fine allowed for the crime of failing to report.[90] According to the Court, the $5,000 maximum fine was a quantitative measure of the gravity of failing to report.[91] Because the $5,000 maximum fine indicated only a minimal level of culpability, the Court stated that the amount sought was greater than the amount imposed by the federal guidelines "by many orders of magnitude."[92]

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84. *See id.* at 2036.

85. *Id.*

86. *See id.* at 2037-38.

87. *See id.* According to Justice Thomas, reviewing a proportionality determination requires comparing the amount of forfeiture to the gravity of the offense. *See id.* In order to determine the gravity of the offense, the majority stated that the amount subject to forfeiture should be compared to the maximum fines imposed by sentencing guidelines. *See id.* However, in the case at bar, Justice Thomas also took into consideration individual factors concerning the defendant. *See id* at 2038.

> [A]s the District Court found, respondent's violation was unrelated to any other illegal activities [and] . . . was to be used to repay a lawful debt. Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader.

Id.

88. *Id.* at 2037 (referring to the reasoning in Solem v. Helm, 463 U.S. 277, 288 (1983)).

89. *See id.* at 2038.

90. *See id.* The maximum fine for willfully violating the statutory reporting requirement is $250,000. *See id.* at 2038-39 n.14. Because the maximum fine to which Bajakajian was subject to was only a fraction of the penalty authorized by the guidelines, the Court reasoned that the defendant's culpability was minimal when compared to other potential violators (i.e., tax evaders and drug kingpins). *See id.* at 2038.

91. *See id.*

92. *Id.* at 2039.

In its consideration of the specific factors of the case, the Court noted that the harm caused by the defendant was minimal.[93] Justice Thomas stated that "[h]ad his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country."[94] Relying on the district court's findings, the majority stated that the respondent did not fit the mold of a money launderer or drug trafficker.[95] Because Bajakajian's actions posed little threat to the government, the Court held that the forfeiture of the entire $357,144 was grossly disproportional to the offense.[96]

IV. POST-*BAJAKAJIAN* INTERPRETATION

A. United States v. 817 N.E. 29th Drive

Since the Supreme Court's adoption of an excessiveness standard in *Bajakajian*, property owners in drug-related cases have tried to apply the gross disproportionality test to their own forfeiture defenses.[97] For example, in October of 1991, Charles Howerin was arrested for selling cocaine out of his home.[98] After Howerin was convicted in a Florida court on drug possession and trafficking charges, the United States brought a forfeiture action against his property pursuant to Section 881.[99]

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93. *See id.*

94. *Id.* at 2039. The majority took exception with the dissents characterization of Bajakajian as a smuggler. *See id.* at 2038 n.13 (referring to the dissent written by Justice Kennedy). According to the majority, there was no evidence that the defendant violated any law other than failing to report. *See id.* The dissent's consideration of the individual characteristics surrounding the defendant were quite different. *See id.* at 2045 (Kennedy, J., dissenting). Under the dissent's interpretation, the lies Bajakajian told along with the suspicious circumstances (the unreported money was hidden in the false bottom of one of Bajakajian's suitcases) suggests that his culpability was much greater than the majority assumed. *See id.* (Kennedy, J., dissenting).

95. *See id.* at 2038.

96. *See id.* at 2039.

97. *See* United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1309 (9th Cir. 1999); United States v. The Premises & Real Property Located at 162-A, Civ. No. 1998-0082, 1999 U.S. Dist. LEXIS 8916 at *1 (D.C. V.I. June 9, 1999).

98. *See 817 N.E. 29th Drive*, 175 F.3d at 1307.

99. *See id.* In response to the government's claim, Howerin filed a claim of ownership with the court and then answered the Government's complaint. *See id.* Among Howerin's defenses to the forfeiture were: (1) The property consisted of two parcels of land ("Lot 1" and "Lot 56") and only Lot 56 was used for the criminal activity, therefore, only that parcel is subject to forfeiture; (2) the forfeiture of the property valued at nearly $70,000 for drugs worth $3,250 constituted an excessive fine; (3) the seizure of his property after having been tried on the underlying drug charges constituted double jeopardy in violation of the Fifth Amendment. *See id.*

According to Howerin, the property the government wished to seize actually consisted of two parcels of land, of which only one was used for criminal activity.[100] Moreover, Howerin contended that the forfeiture of both parcels of land (valued at $70,000) for drug sales totaling $3,250 was an excessive fine.[101] At trial, the district court granted the government's motion for summary judgment as to the lot on which the sales were made but held that the government had not shown a substantial connection between the other lot and the criminal activity.[102]

On appeal, the Eleventh Circuit began its analysis of whether the government's seizure was an excessive fine by acknowledging that the "grossly disproportionate" rule in *Bajakajian* controlled the issue.[103] Following the Supreme Court's reference to legislative deference in *Bajakajian*, the Eleventh Circuit stated that translating the gravity of the crime into monetary terms could be solved by referring to the opinions of both Congress and the United States Sentencing Commission.[104] In analyzing Congress' interpretation of maximum permissible fines, the court noted that its legislative pronouncements regarding the appropriate range of fines represented "the collective opinion of the American people as to what is and is not excessive."[105]

Because of the deference afforded to congressional decisions, the court stated that if the value of property was within the proscribed range, there was a strong presumption that the forfeiture was constitutional.[106] The court then noted that the United States Sentencing Commission promulgated sentencing guidelines that were "the product of extensive research, thought, input from commentators, and experience."[107] Because the commission was designed to proportion punishments with greater precision than criminal legislation, the Eleventh Circuit held that

> a defendant would need to present a very compelling argument to persuade us to substitute our judgment for that of the United States Sentencing Commission. Thus, in a forfeiture action, if the value of the property forfeited is within or near the permissible range of fines under the sentencing

100. *See id.*

101. *See id.* at 1309.

102. *See id.* at 1307.

103. *See id.* at 1309.

104. *See id.* Although the Eleventh Circuit's reliance on congressionally proscribed fines fits within the reasoning of *Bajakajian*, its reference to the United States Sentencing Commission was novel. *See id.* Unlike the Supreme Court, which stated that judgments concerning the appropriate punishment for an offense belong to the legislature, the Eleventh Circuit relied on a "judicial agency" to interpret permissible fines. *Id.*

105. *Id.* at 1309.

106. *See id.* (referring to the *Bajakajian* Court's deference to legislative decisions).

107. *Id.* at 1310.

guidelines, the forfeiture almost certainly is not excessive.[108]

Missing from the Eleventh Circuit's analysis under *Bajakajian* was a consideration of factors specific to the individual defendant.[109] Among Howerin's defenses was the contention that the forfeiture of his personal residence would impose a special hardship on him.[110] While the court acknowledged that characteristics of the offender are an important part in the trial court's determination of an appropriate fine,[111] it refused to consider any potential hardships under an excessive fines inquiry.[112] According to the court's interpretation of *Bajakajian*, "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender."[113] Thus, Howerin's argument that his actions posed only a minimal threat in relation to the size of the forfeiture was unpersuasive.[114] As a result, the Eleventh Circuit rested its decision solely on whether the value of the seized property was grossly disproportional to the permissible range of fines.[115] Because the maximum statutory fine for Howerin's four cocaine sales was over one-million dollars, the Eleventh Circuit held that the forfeiture of a $70,000 piece of property did not violate the Eighth Amendment.[116]

B. United States v. The Premises & Real Property Located at 162-A

In *United States v. The Premises & Real Property Located at No. 162-A*,[117] the defendant, Olivia Finley, rented the bottom floor of her house to two men that were allegedly engaged in the cultivation of marijuana plants.[118] After police obtained a warrant and found numerous plants

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108. *Id.*

109. *See id.* at 1311.

110. *See id.* Part of Howerin's contention that the forfeiture of his home would be an excessive fine was based on the fact that he had a permanent disability. *See id.* Because of his permanent disability, Howerin argued that he was prevented from obtaining employment and, therefore, had no other means of purchasing another residence. *See id.*

111. *See id.* (citing to 19 U.S.C. § 1618 (1994) which authorizes remission of forfeiture amounts when there are mitigating circumstances, such as hardship to the owner).

112. *See id.* at 1311 n.12 (stating "[s]uch hardship merely is not part of an inquiry under the Excessive Fines Clause").

113. *Id.* at 1311 (noting, "The Supreme Court, however, has made it clear that whether a forfeiture is 'excessive' is determined by comparing the amount of the forfeiture to the gravity of the offense, *see Bajakajian*, . . . 118 S. Ct. at 2036, and not by comparing the amount of the forfeiture to the amount of the owner's assets.").

114. *See id.*

115. *See id.* at 1310.

116. *See id.*

117. Civ. No. 1998-0082, 1999 U.S. Dist. LEXIS 8916 at *1-2 (D.C. V.I. June 9, 1999).

118. *See id.* According to the trial court, in June of 1997, law enforcement officers assigned

throughout the property, Finley and the two men were arrested.[119] Charges against Finley were eventually dropped because of her lack of knowledge about the illegal activities.[120] Even though she was cleared of having any participation in the matter, the United States conducted forfeiture proceedings pursuant to Section 881.[121] In response, Finley contended that: (1) the forfeiture of her $150,000 house was grossly disproportionate to the $30,000 maximum fine imposed on the defendant Huggins and (2) the gravity of the offense mandated a fine worth substantially less than her house.[122]

In its analysis of the first argument, the District Court for the District of the Virgin Islands stated that Finley could not point to the fine imposed on her tenants as evidence of disproportionality.[123] The court noted that the $30,000 maximum fine imposed on the co-defendant Huggins did not apply to Finley.[124] Because she never admitted guilt for any portion of the crimes, the court held that Finley was subject to the full penalty for all of the marijuana plants found on her property.[125]

Under the federal statutes and the Federal Sentencing Guidelines, the maximum fine that could have been attributed to Finley was $2,000,000.[126] Because the value of Finley's house fell well below the maximum fine, the forfeiture was not excessive under the grossly disproportional test.[127]

In contrast to the Eleventh Circuit's decision in *817 N.E. 29th Drive*, the district court in *The Premises & Real Property Located at No. 162-A* took into consideration the individual characteristics of the property

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to St Croix's High Intensity Drug Trafficking Area (HIDTA) program found marijuana seedlings around the property. *See id.* The officers warned Finely about the discovery and then destroyed the plants. *See id.* After the warning, HIDTA officers continued surveillance on the property until the discovery of the 260 marijuana plants that were the subject the current forfeiture. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*; 21 U.S.C. § 881 (a)(7).

122. Finely's gravity argument was based on the fact that the charges against her were dropped and she was not involved in any other illegal activities. *See The Premises & Real Property Located at No. 162-A*, 1999 U.S. Dist. LEXIS at *5. Therefore, the government suffered no actual loss as a result of her actions. *See id.*

123. *See id.* at *7.

124. *See id.* The $30,000 fine referred to by Finely was the maximum fine that was attributable to Huggins as the result of a plea agreement. *See id.* As part of his agreement to plead guilty to possession of marijuana with an intent to distribute, Huggins admitted to possessing 20 marijuana plants (out of the 260 found) which carried an imprisonment range of 10-16 months and a fine between $3,000-$30,000. *See id.*

125. *See id.*

126. *See id.* at *6-7 (referring to 21 U.S.C. § 841(b)(1)(B) and U.S.S.G. § 5 E1.2).

127. *See id.* at *7. The district court also relied on the individual factors of Finely's situation in its justification of the forfeiture amount: "a forfeiture of her house worth $155,000 does not appear excessive, especially since officers found over 200 plants being cultivated on Finely's property on two different occasions." *Id.*

owner.[128] In considering whether the gravity of the offense was worth substantially less than the forfeited property, the court held that the government was not directly harmed by her actions.[129] However, the court noted that Finley's failure to act after being warned facilitated "drug production and use [which] exacts a heavy toll from government and society in the form of crime, addiction, and their concomitant ills."[130] Thus, the district court held that the repercussions of the claimant's actions justified the forfeiture of the house.[131]

V. ANALYZING POST-*BAJAKAJIAN* DECISIONS

The Supreme Court's decision in *Bajakajian* marked the first time a forfeiture had ever been struck down as excessive under the Eighth Amendment.[132] Since the Court's decision in the summer of 1998, federal courts have heard at least seven claims based on objections to forfeiture penalties under Section 881.[133] In each case, the property owner has tried to use the excessive fines test under *Bajakajian*.[134] Although each court agreed that *Bajakajian*[135] applied to Section 881 forfeitures, every seizure was upheld under the grossly disproportional analysis.[136] Whether the Excessive Fines Clause will ever be used to strike down a Section 881 forfeiture remains to be seen. If the decisions in *817 N.E. 29th Drive* and *The Premises & Real Property Located at No. 162-A* are any indication of future decisions, the outcome looks grim for minor drug offenders.[137]

One reason why the courts in *817 N.E. 29th Drive* and *The Premises & Real Property Located at No. 162-A* did not hold the Section 881 forfeitures as excessive was because of the judicial reliance on Draconian

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128. *See id.* at *1-2, *7-8.

129. *See id.* at *8.

130. *Id.*

131. *See id.*

132. *See Bajakajian*, 118 S. Ct. at 2033.

133. *See* United States v. 219 Ingersol St., Civ. No. 99-6115 1999 U.S. App. LEXIS 23704, at *2 (2d Cir. Sept. 27, 1999); 47 West 644 Route 38, Maple Park, Civ. No. 97-4145 1999 U.S. App. LEXIS 19655, at *2 (7th Cir. Aug. 19, 1999); United States v. Asquini, Civ. No. 98-10293 1999 U.S. App. LEXIS 15088, at *6 (9th Cir. May 12, 1999); Towers v. City of Chicago, 173 F. 3d 619, 624 (1999); United States v. 40 Clark Road, 52 F. Supp. 2d 254, 266 (D. Mass. 1999) (1999).

134. *See 219 Ingersol St.*, 1999 U.S. App. LEXIS, at *3; *47 West Route 38, Maple Park*, 1999 U.S. App. LEXIS, at *4; *Asquini*, 1999 U.S. App. LEXIS, at *9-10; *Towers*, 173 F.3d at 624; *40 Clark Road*, 52 F. Supp. 2d at 266.

135. *See Bajakajian*, 118 S. Ct. at 2028.

136. *See 219 Ingersol St.*, 1999 U.S. App. LEXIS, at *3; *47 West 644 Route 38, Maple Park*, 1999 U.S. App. LEXIS, at *6; *Asquini*, 1999 U.S. App. LEXIS, at *11; *Towers*, 173 F.3d at 626; *40 Clark Road*, 52 F. Supp. 2d at 267.

137. *See 817 N.E. 29th Drive*, 175 F. 3d at 1309-12; *The Premises & Real Property Located at No. 162-A*, 1999 U.S. Dist. LEXIS 8916, at *4-8 (D.C. V.I. June 9, 1999).

sentencing guidelines.[138] According to the Supreme Court in *Bajakajian*, the judiciary must look to the legislature for a determination of what is considered the permissible range of fines.[139] Because the Federal Sentencing Guidelines and federal statutes impose heavy fines on drug related offenses, both courts had no choice but to find the forfeitures within the permissible range.[140] The reason for these extraordinary fines is that such penalties are necessary to make Section 881 forfeitures effective.[141] Without the government imposing high fines on narcotic offenders, the sophisticated dealer only would have to pay a minimal amount when compared to the profits taken in.[142]

Although these fines are justified for the sophisticated dealer, they appear quite unfair to the average drug peddler who uses the profits to pay for his own addiction or to supplement his income.[143] As in *817 N.E. 29th Drive*, a small time dealer who purchases his house through honest means may end up losing it just because the individual unwisely decides to use his house to sell a miniscule amount of narcotics.[144] Because the federal statutes and guidelines provide severe fines for drug offenses, the small time dealer risks losing the same amount of property as the drug baron.[145]

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138. *See* Matthew Campese & Patrick Dussol, Note, *Discretion: The Better Part of Valor in the War on Drugs*, 9 ST. JOHN'S J. LEGAL COMMENT. 725, 727 (1994). Campese and Dussol note:

> While the Guidelines reflect a new perspective towards the "war on drugs," they remain consistent with the Nation's earlier approaches to criminal justice. Historically, the United States emphasized capital punishment as a means of deterrence . . . . In the late 1970's, rehabilitation was denounced as ineffective because it created a "revolving door" whereby offenders were deemed reformed and released only to commit new crimes.

Id.

139. *See Bajakajian*, 118 S. Ct. at 2037.

140. *See* Campese & Dussol, *supra* note 138, at 737–38.

> The drug epidemic has a profound effect on the Supreme Court's interpretation of the Constitution. After *Hamerlin* [111 S. Ct. 2680 (1991)], it appears that no member of the Court will interfere in the 'offense grading' of noncapital punishment for violent crimes. Furthermore, the majority of the Court will uphold any period of incarceration, including life sentence without parole, for all drug trafficking convictions or simple possession cases . . . .

Id.

141. *See* S. REP. NO. 98-225, at 191 (1984).

142. *See id.*

143. *See* Hiaasen, *supra* note 7, at 3 (quoting Stephen Melnick, a former prosecutor of forfeiture cases for the Boca Raton Police Department) ("[t]he statute had some good intentions to punish the big-time trafficker, [b]ut the only one getting punished is the small-time user").

144. *See 817 N.E. 29th Drive*, 175 F.3d at 1309–11.

145. *See* Campese & Dussol, *supra* note 138, at 737-38.

Another reason why the excessive fines defense may fail, despite the ruling in *Bajakajian*, is the failure by the courts to consider individual characteristics as mitigating factors.[146] In *Bajakajian*, the majority took into account the factors surrounding the defendant's commission of the crime.[147] According to Justice Thomas, Bajakajian's only crime was failing to inform the government that $357,144 was leaving the country.[148] Because of the district court's finding that Bajakajian was not a money launderer or drug trafficker, the majority was able to conclude that he posed no threat to the government.[149] The Eleventh Circuit's analysis in *817 N.E. 29th Drive* is an excellent example of the judiciary's reluctance to be lenient to minor drug offenders.[150]

Unfortunately for the property owner in *817 N.E. 29th Drive*, the Supreme Court's consideration of individual factors was just dicta.[151] The Supreme Court noted Bajakajian's specific circumstances in order to emphasize the disparity between the crime and the amount seized.[152] As such, the Eleventh Circuit was not obligated to consider the specific characteristics of the property owner.[153] In *817 N.E. 29th Drive*, the property owner argued that forfeiture of his residence would create a special hardship because he lacked other assets and was permanently disabled.[154] Even though the Eleventh Circuit could have followed the Supreme Court's approach by considering the individual characteristics, it declined to do so.[155] The reason the court did not take into account the mitigating factors of the landowner was because of the public policy against drug offenders.[156] Concern for drug offenders and any special circumstances

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> Furthermore, the majority of the [Supreme] Court will uphold any period of incarceration, including life without parole, for all drug trafficking convictions or simple possession cases, provided the defendant possessed a substantial amount. Unfortunately, this approach places all offenders in the same category, and ignores drug couriers or marginally involved offenders. . . . The defendant's role has only minimal impact on the eventual sentence length.

Id.

146. *See Bajakajian*, 118 S. Ct. 2038.

147. *See id.*

148. *See id.* at 2039.

149. *See id.*

150. *See* United States v. 817 N.E. 29th Drive, 175 F.3d. 1304, 1311 (9th Cir. 1999).

151. *See id.*

152. *See Bajakajian*, 118 S. Ct. at 2039.

153. *See* United States v. Roeming, 52 F. Supp. 857, 861 (N.D. Iowa 1943). "The considered dicta of a court of last resort are entitled to the respectful recognition of inferior courts within the same judicial system." *Id.*

154. *See 817 N.E. 29th Drive*, 175 F.3d at 1311.

155. *See id.*

156. *See* Richard L. Berke, *Crime Replaces Economy as Top Concern in Poll*, GAINESVILLE

they may claim would frustrate the "zero tolerance" public policy.[157] While a court may consider mitigating factors in a customs violation, there is little chance it would show sympathy for drug offenders.[158]

Even if a court decides to follow the dicta of the Supreme Court and take individual characteristics of the property owner into consideration,[159] it is unlikely that drug offenders will receive helpful consideration.[160] Although the Supreme Court's reference to specific factors of the offender is persuasive, such characteristics are often harmful to the property owner.[161] In contrast to other crimes, drug-related offenses are typically viewed by the public as the most damaging to the fabric of society.[162] Because of strong public policy against drugs, even offenders with low culpability will not obtain sympathetic treatment by the courts.[163] The district court's decision in *The Premises & Real Property Located at No. 162-A* illustrates this attitude.[164]

In *The Premises & Real Property Located at No. 162-A*, the district court found that the property owner was not involved in the marijuana cultivation activity on her land.[165] Despite her lack of participation, the court stated that the failure to take any action after being warned justified the forfeiture.[166] According to the court, even the slightest involvement in drug- related activity "exacts a heavy toll from government and society."[167]

SUN, Jan. 23, 1994, at 2A; *see also 817 N.E. 29th Drive*, 175 F.3d at 1311 n.12.

157. *See* Campese & Dussol, *supra* note 138, at 734-35.

158. *See id.* at 738-39. Campese and Dussol note that judicial discretion is not completely eliminated under the Federal Sentencing Guidelines. *See id.* at 739. Judges may depart from the required sentence under certain circumstances. *See id.*

159. *See Bajakajian*, 118 S. Ct. at 2038.

160. *See* Phillip J. Lavelle, *Local U.S. Judge Resigns; Cites Sentencing Guidelines*, SAN DIEGO UNION-TRIB., Sept. 27, 1990, at A-1.

161. *See The Premises & Real Property Located at No. 162-A*, Civ. No. 1998-0082, 1999 U.S. Dist. LEXIS 8916, at *8.

162. *See* Margaret P. Spencer, *Symposium: The Sentencing Controversy: Punishment and Policy in the War Against Drugs: Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 337-38 (1995).

163. *See* Lavelle, *supra* note 160. The judicial attitude towards drug related offenders has its dissention. *See id.* Some judges have come forth and criticized the sentencing guidelines for their harsh treatment of defendants; especially drug offenders. *See id.*

164. *See The Premises & Real Property Located at No. 162-A*, 1999 U.S. Dist. LEXIS 8916, at *8.

165. *See id.* at *5.

166. *See id.* at *8.

167. *Id.*

VI. SOLUTIONS TO THE CIVIL FORFEITURE DILEMMA

The likelihood that Congress will amend federal sentencing guidelines or statutes for drug-related offenses is remote.[168] One reason why the federal government will never ease its stance on drug-related sentencing is the impression such action would have on voters.[169] Fighting the 'War on Drugs' has been a popular platform for many politicians seeking support from disgruntled citizens.[170] By moderating the penalties for drug-related offenses, the government would give the impression that narcotics trafficking was no longer an important issue for the country.[171] Any politician that would support such a reform could be seen as out of touch with voter concerns.[172]

Another reason why Congress may be unwilling to temper sentencing guidelines is the impact such action would have on the funding of law enforcement agencies.[173] Reducing the amount of fines for drug offenses would result in less property subjected to forfeiture.[174] This would mean that Congress would have to look elsewhere for funding of federal agencies.[175] With the government's dependence on the proceeds of forfeitures to fight the seemingly impossible 'War on Drugs,' there is little chance that reform will be forthcoming.

Because legislative reform of federal sentencing guidelines or statutes does not appear likely, solutions to civil forfeiture's disparate effect on minor drug offenders must be found elsewhere.[176] One possibility for change is the proposed Civil Asset Forfeiture Reform Act ("CAFRA").[177] CAFRA is intended by its sponsors to level the playing field in civil forfeiture cases by eliminating "opportunities for abuse created by the combination of procedures which impose only minimal burdens on the

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168. *See* Campese & Dussol, *supra* note 138, at 728-29. The Federal Sentencing Guidelines have survived attacks based on the issues of delegation and the separation of powers, due process, and the Eighth Amendment. *See id.*

169. *See* Anthony Flint, *Voters' Fear of Violence Takes Hold in Senate Race*, BOSTON GLOBE, Oct. 24, 1994, at 1.

170. *See* Ivins, *supra* note 35, at B7. Ivins writes: "Envision the ads in re-election campaigns: 'My opponent sided with the drug dealers and against the police officers of our fair states.'" *Id.*

171. *See id.*

172. *See id.*

173. *See* Forfeiture Hearing, supra note 39, at 1. Gallegos states: "It provides State and local police agencies with much needed resources that can be used to provide officer safety equipment or to supplement the funds available to fight crime." *Id.*

174. *See id.*

175. *See* Fueyo, *supra* note 5, at 144. Fueyo writes, "These proceeds have enabled state and federal legislators to benefit from better funded law enforcement departments without reallocating tax dollars." *Id.*

176. *See id.* at 185–87.

177. *See* Elkan Abramowitz, *The Civil Forfeiture Reform Act*, N.Y.L.J., Sept. 7, 1999, at 3.

government, and the enormous financial incentives for law enforcement inherent in a system which plows forfeiture assets back into the very programs and agencies conducting forfeiture operations."[178]

If the bill is signed into law, new procedural advantages will provide property owners with a defense to government claims.[179] Among the procedures proposed by the bill is the return of property during the forfeiture proceedings.[180] Currently, a property owner challenging a civil forfeiture has no access to the property despite any hardships that may accompany the forfeiture.[181] This period of deprivation can cause irreparable harm to a claimant who has successfully defended a forfeiture.[182] Under CAFRA, if the property owner can show that substantial hardship would result if the property remained with the government until final disposition, courts can release the property to the owner.[183]

Another reform CAFRA would have on civil forfeiture is the heightening of the government's burden of proof.[184] Under current forfeiture procedure, the government only has to show probable cause for the seizure.[185] Once probable cause is established, the burden shifts to the property owner, who has to prove by a preponderance of the evidence that forfeiture of the asset is unjustifiable.[186] Under CAFRA, the burden of proof placed on the government would be raised to the clear and convincing standard.[187] The heightened standard of proof would prevent the government from seizing property based on "the rankest of hearsay and the flimsiest of evidence."[188]

VII. CONCLUSION

On June 23, 1998, newspapers around the country proclaimed that a new era in civil forfeiture had arrived. With the Supreme Court's decision in *Bajakajian*, it was unclear whether the excessive fines defense would severely restrict governmental forfeiture in drug-related cases. However, predictions of civil forfeiture's demise have fallen on deaf ears in the court system. If anything, *Bajakajian* has prevented drug offenders from using

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178. *Id.*

179. *See* Cassandra Burrell, *House Passes Bill to Restrain Seizure of Property by Police*, BOSTON GLOBE, June 25, 1999, at A21. The CFRA bill passed in the House by a vote of 375 – 48. *See id.*

180. *See* Abramowitz, *supra* note 177, at 7.

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.* at 9-10.

185. *See* Feuyo, *supra* note 5, at 150-51.

186. *See* Abramowitz, *supra* note 177, at 9-10.

187. *See id.*

188. *Id.* (quoting H.R. REP No. 106-192 (1999)).

the excessive fines defense. Regardless of the route taken, civil forfeiture reform must be addressed. The concern for society's welfare that fueled the government's 'War on Drugs' has spun out of control. Government forfeitures have become so excessive that the rights of unintended property owners are being violated. In effect, the public policy that gave birth to civil forfeiture's dominance has created a counter public policy that demands providing protection for those left in its wake.