Notre Dame Law Review

Volume 74
Issue 4 *Federal Practice & Procedure Issue*

Article 10

5-1-1999

Forfeiture Law, the Eight Amendment's Excessive Fines Clause and Unites States v. Bajakajian

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FORFEITURE LAW, THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE, AND *UNITED STATES v. BAJAKAJIAN*

I. INTRODUCTION

In *United States v. Bajakajian*,[1] the Supreme Court struck down a forfeiture as "excessive" under the Eighth Amendment for the first time. This decision came as part of a long line of cases involving the constitutionality of different statutory forfeiture provisions. In these previous cases, the Court held that the Fourth, Fifth, and Eighth Amendments operate to limit the Government's ability to interfere with the right to property through the mechanism of forfeiture. However, even though the Court applied the Eighth Amendment to protect the right to property, in reality the protections it provided were limited. In *Bajakajian*, the Court expanded the Eighth Amendment's protections on property using the Excessive Fines Clause of the Eighth Amendment.

In addition to the right to property, the Court held in earlier decisions, in the context of capital punishment, that the Eighth Amendment serves to protect the right to life, but offered little or no protection for liberty. When these earlier decisions are combined with the holding in *Bajakajian*, the outcome is stark—the Eighth Amendment protects life and property, but not liberty. How this result occurred is the subject of this Case Comment.

This Case Comment will discuss forfeiture law, the *Bajakajian* decision, and the effect the case will have on the criminal justice system. In particular, Part II of this Case Comment will provide an overview of forfeiture law, including the historical roots of forfeiture law and the distinction between criminal and civil forfeiture. It will also discuss the various statutory forfeiture provisions and the constitutional limitations on forfeiture, looking particularly at the Eighth Amendment and how the circuit courts have applied it. Part III of this Case Comment will discuss *Bajakajian* and the decisions by the district court, the Ninth Circuit, and the Supreme Court. Finally, Part IV will discuss the

1 524 U.S. 321 (1998).

effects that the *Bajakajian* decision will have on how the courts will analyze and decide forfeiture cases under the Eighth Amendment. It will also question the limited protections provided by the Eighth Amendment and its effect of making property a more constitutionally sacred right than liberty.

II. FORFEITURE LAW

A. *Historical Roots of Forfeiture Law*

Forfeiture is rooted in biblical law,[2] ancient Greek and Roman law, and early English law.[3] Under English law, some of these early forfeiture laws were known as "deodands." Deodands were enforceable against the property itself and not its owner. The English medieval law of deodand held that when an inanimate object or an animal caused the death of a person, that object was forfeited.[4] In early times, the object was sold and the proceeds went to pay for masses for the dead. Subsequently, the Crown took the proceeds.[5] The guilt or innocence of the property owner was irrelevant; the law viewed the object as being guilty itself. That distinction is still reflected in the law.

Also under English law, forfeiture might be imposed after conviction of a felony or treason. The law of attainder provided that a person found guilty of treason automatically lost all her civil rights and her property was forfeited to the Crown. Using the same idea, persons convicted of a felony other than treason had their chattels forfeited to the Crown. Under the Corruption of Blood laws, the heirs of a person convicted of a felony also lost all their rights to the convicted person's property.[6]

These early forfeiture laws gave rise to the English admiralty laws. Among them was the Navigation Act, which required the forfeiture of all vessels, including cargo, that were not made, manned, or owned by British men.[7] These forfeiture actions could be brought against either the property or the owner. Typically, they were brought against the property, because the owners were overseas and thus not subject to

2 *See Exodus* 21:28 ("If an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.").

3 *See* OLIVER WENDELL HOLMES, THE COMMON LAW 8 (1881).

4 *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682–83 (1974).

5 *See id.* at 681.

6 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *374–81.

7 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *261.

the jurisdiction of the English courts. Therefore, in rem forfeiture was the only way that England could enforce these admiralty laws.[8]

English forfeiture law was unpopular with the colonists, as reflected in the Constitution and subsequent early legislation. The Fifth Amendment requires due process of law as a protection of property,[9] Article III specifically forbids automatic forfeiture for treason,[10] and Article I outlaws bills of attainder.[11] In the Act of April 30, 1790,[12] the First Congress outlawed forfeiture of a defendant's estate after conviction of a felony.

American forfeiture law expanded after the Civil War. Using the military power in Article I, Congress passed the Confiscation Act that authorized forfeiture prosecution against property owned by rebel soldiers.[13] The Government sought forfeiture of rebel-owned land located in the North, while the owners were located in the South. Thus, like England's forfeiture laws, the Confiscation Act could only be enforced against the property.[14] The Court justified the Act constitutionally by saying that the forfeitures were intended to put an end to the war, not to punish the individual rebels.[15] Looking past the Fifth Amendment's Takings Clause to the War Provision, the Court viewed the forfeitures as being against the South, rather than against the landowners.[16]

In rem forfeiture was also used during Prohibition to suppress the illegal alcohol trade. These forfeitures were challenged as unconstitutional, but were upheld based on the use of in rem forfeiture during the Civil War.[17] The requirement that the forfeiture be in time of war was forgotten and the groundwork for the expansive use of forfeiture was in place.

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8 *See id.* at *262.

9 *See* U.S. CONST. amend. V ("[N]or [shall any person] be deprived of . . . property, without due process of law. . . .").

10 *See* U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during Life of the Person attainted.").

11 *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

12 Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 (repealed 1987) ("no conviction of judgment . . . shall work corruption of blood, or any forfeiture of estate").

13 *See generally* JAMES RANDALL, THE CONFISCATION OF PROPERTY DURING THE CIVIL WAR (1913).

14 *See* Dobbins's Distillery v. United States, 96 U.S. 395 (1878).

15 *See* Miller v. United States, 78 U.S. 268, 307 (1871); Tyler v. Defrees, 78 U.S. 331 (1871).

16 *See Dobbins's Distillery*, 96 U.S. at 395.

17 *See* J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921).

Not until the 1980s did forfeiture law become a major tool in the war on crime and drugs. Today, there are over one hundred federal statutes covering a wide range of both civil and criminal forfeiture. Before analyzing forfeiture law further, an important distinction must be made between the two different types of forfeiture: civil and criminal.

B. Criminal Versus Civil Forfeiture

Civil forfeiture is an in rem proceeding against the property itself and not its owner. It is based upon the fiction of guilty property;[18] accordingly, the guilt or innocence of the property owner is irrelevant. Criminal forfeiture, on the other hand, is an in personam proceeding against a defendant who forfeits nothing unless she is convicted of a crime.

The distinction between civil and criminal forfeiture is not as clear as the distinction between civil and criminal law. Civil law determines private rights and provides compensation for harm done to those rights; criminal law punishes criminal offenders. However, civil law can also punish, making the distinction between the two unclear in some cases. Civil forfeiture almost certainly does not define private rights, and in many cases seems only to serve as punishment. The distinction between civil and criminal forfeiture is an important one.[19] In criminal forfeiture cases, courts use a higher burden of proof standard, and more constitutional protections are provided for defendants.[20] Whether the legislature intends a forfeiture statute to be civil or criminal is usually evident upon the face of the statute,[21] but this intent is not always conclusive.[22]

Between the two types, civil forfeiture has been the most criticized for being unjust. This stems from situations, as in *Bennis v. Michigan*,[23] where a completely uninvolved innocent owner is punished by the loss of her property. Criminal forfeiture, however, punishes a defendant for committing a criminal offense. In most of these cases, it is

18 *See id.* ("the thing is primarily considered the offender").

19 *See* Austin v. United States, 509 U.S. 602, 606 n.4 (1993) ("As a general matter, this Court's decisions applying Constitutional protections to civil forfeiture proceedings have adhered to this distinction between provisions that are limited to criminal proceedings and provisions that are not.").

20 *See generally In re* Winship, 397 U.S. 358 (1970) (holding that the due process requirement of guilt beyond a reasonable doubt does not apply to civil forfeiture proceedings).

21 *See* United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398 (1814).

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

23 516 U.S. 442 (1996). *See infra* note 29 and accompanying text.

easy to see the justice of not allowing someone to profit from her illegal activity. This is where a proportionality requirement[24] comes in: the punishment, what the owner loses, must be comparable to the harm the owner, or the property, caused.

C. Statutory Forfeiture Provisions

1. Civil Forfeiture Statutes

The biggest expansion in civil forfeiture law, since Prohibition, was the 1970 Comprehensive Drug Abuse Prevention and Control Act.[25] This Act authorized the forfeiture of the illegal substance involved in the commission of an offense and all instrumentalities used in the manufacturing and distribution of the illegal substance. In 1978, the Act was amended to provide for the forfeiture of all the proceeds from an illegal drug transaction. The 1978 amendment also provided for an innocent owner defense.[26]

The innocent owner defense protects the owner of property who was not involved in the criminal activity and did not consent to the property being used to commit the offense.[27] To defeat a forfeiture, the innocent owner must not have been involved in the offense, must not have consented to the use of the property, and must not have had any knowledge of the criminal activity.[28] The innocent owner defense is only available for those forfeitures that are specifically allowed in the statute.[29]

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24 *See infra* notes 108–21 and accompanying text.

25 21 U.S.C. § 801 (1994).

26 "The original forfeiture provisions of the 1970 statute had closely paralleled the early statutes used to enforce custom laws . . . . They generally authorized the forfeiture of property used in the commission of criminal activity and they contained no innocent owner defense." United States v. 92 Buena Vista Avenue, 507 U.S. 111, 122 (1993). *See, e.g.*, 18 U.S.C. § 981(a)(1)(1994) ("No property shall be forfeited under this section . . . by reason of any act or omission established . . . to have been committed without the knowledge of that owner or leinholder.").

27 *See* Austin v. United States, 509 U.S. 602, 618 n.11 (1993) ("There is nothing inconsistent . . . in viewing forfeiture as punishment even though the forfeiture is occasioned by the acts of a person other than the owner.").

28 *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687 (1974) (noting that civil forfeiture "impos[es] an economic penalty); Dobbins's Distillery v. United States, 96 U.S. 395, 404 (1878) ("The acts of violation as to the penal consequences to the property are to be considered just the same as if they were the acts of the owner."); J.W. Goldsmith, Jr.-Grant v. United States, 254 U.S. 505, 511 (1921) ("Such misfortunes are in part owing to the negligence of the owner and therefore he is properly punished by such forfeiture.").

29 Of course, the innocent owner defense is only available for civil forfeitures, where the action is against guilty property. *See, e.g.*, 18 U.S.C. § 981(a)(2) (1994)

2. Criminal Forfeiture Statutes

The three main criminal forfeiture statutory provisions are the Racketeer Influenced and Corrupt Organizations Act (RICO),[30] the Continuing Criminal Enterprise statute (CCE),[31] and the Money Laundering Control Act of 1986 (MLC).[32] Although criminal forfeiture is less controversial than civil forfeiture, courts have criticized the broad scope of these statutes as being too expansive.[33]

The courts use the broad language of RICO's criminal forfeiture provision to combat the profitable business of criminal enterprise,[34] as intended by Congress. This allows the Government to seize both the profits illegally gained by these enterprises and those profits gained legally. Forfeiture can be of illegal proceeds from illegal activities, property connected to the enterprise, or any interest in the enterprise.

Criminal forfeiture under CCE, like forfeiture under RICO, allows for the seizure of all proceeds from a violation, all property derived from such proceeds, and all property related to the operation or control of the illegal activity.[35] The MLC is used for the forfeiture of property that is "involved in" a violation, or attempted violation, of the money-laundering statutes. Under § 982(a)(1), the definition of "involved in" includes not only the subject of the offense but also the proceeds of the offense. Therefore, the main question under this statute is whether the property is "involved in" an illegal activity. All three of these statutes—RICO, CCE, and MLC—have been limited by the courts to prevent encroachment on constitutionally protected rights.[36]

D. Constitutional Limitations on Forfeiture

Forfeiture statutes, especially civil statutes, have received substantial criticism, principally for encroaching on a person's right to prop-

(setting forth an innocent owner defense to property which is forfeitable under § 981(a)(1)); 21 U.S.C. § 881(a)(6)–(7) (1994) (explicitly including lienholders as innocent owners).

30 Criminal forfeiture for a RICO violation is available in 18 U.S.C. § 1963 (1994).

31 21 U.S.C. § 848 (1994).

32 18 U.S.C. § 982 (1994).

33 *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 54–55 (1993) (Thomas, J., concurring in part and dissenting in part); United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1068–69 (9th Cir. 1994).

34 *See* Russello v. United States, 464 U.S. 16, 28 (1983) ("to remove the profit from organized crime by separating the racketeer from his dishonest gains").

35 *See* United States v. McKeithen, 822 F.2d 310, 314–15 (2d Cir. 1987); United States v. Amend, 791 F.2d 1120, 1127 n.6 (4th Cir. 1986).

36 *See* Alexander v. United States, 509 U.S. 544, 555 (1993).

erty.[37] In many instances, the courts agree and hold that several constitutional provisions apply to forfeiture law.[38] The constitutional protections afforded the property owner in a civil forfeiture proceeding, however, are limited compared to those given to a defendant in a criminal forfeiture prosecution. Defendants in criminal forfeiture proceedings are given the same constitutional protections as in all criminal prosecutions. This includes, for example, the Sixth Amendment rights to a speedy trial, by a jury, with confrontation of witnesses, and with the assistance of counsel. The Sixth Amendment rights also apply to civil forfeiture cases to a lesser extent, but those cases will not be discussed in this Case Comment.[39]

The concept of forfeiture, whether civil or criminal, is subject to many constitutional challenges. A minority of the Court's holdings on these issues have provided a clear "bright line" rule that applies equally to all forfeitures, both civil and criminal. Other decisions are less clear and apply to only one type of forfeiture, either civil or criminal, but not to both, or to each one to differing degrees. Some cases seem to discard the civil-criminal distinction altogether. In canvassing these cases, it is easier to order them according to the constitutional amendment to which they apply, and not chronologically, though this is troublesome because the Court uses the same standards for different amendments. The next Section will discuss the application of the First Amendment, the Fourth Amendment's seizure provision, the Fifth Amendment's Due Process and Double Jeopardy Clauses, and the Eighth Amendment's Excessive Fines Clause, to forfeiture cases. In addition, the discussion of the Eighth Amendment will analyze the property protection afforded by the Eighth Amendment and will compare the protection the Eighth Amendment gives to life and liberty.

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37 *See generally* Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1257 (noting that "[i]nnocent third parties owners, lienholders, unsecured creditors, bona fide purchasers, business partners, corporate shareholders, joint tenants, and many others" have all lost property to forfeiture).

38 *See* United States v. One 1978 Mercedes Benz Four-Door Sedan, 711 F.2d 1297, 1300–03 (5th Cir. 1983).

39 *See generally* United States v. Monsanto, 491 U.S. 600 (1989); Caplin & Drysdale v. United States, 491 U.S. 617 (1989) (holding that forfeiture of defendant's assets, which prevented him from hiring the attorney of his choice, does not violate the Sixth Amendment). *But see* United States v. Zucker, 161 U.S. 475, 480–82 (holding that the Sixth Amendment's Confrontation Clause does not apply to civil forfeiture cases).

1. The First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[40] The First Amendment challenges to forfeiture deal mainly with the forfeiture of pornography. It is settled law that the First Amendment does not protect obscene material.[41] The issue is the forfeiture of nonobscene material that is "involved in" the obscenity violation. The Supreme Court upheld the forfeiture of nonobscene material in *Alexander v. United States*.[42] In *Alexander*, the defendant owned several pornography stores and was convicted on multiple obscenity and RICO violations. The convictions stemmed from the possession of four obscene magazines and six obscene videos. The defendant was sentenced to six years in prison, fined $100,000, and his entire enterprise was forfeited. The enterprise included his inventory at the several stores as well as nine million dollars that he had received as proceeds from the enterprise. The Court upheld the forfeiture under the First Amendment,[43] holding that it did not violate the defendant's First Amendment rights because the property was "involved in" a criminal enterprise.

2. The Fourth Amendment

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[44] The Fourth Amendment is especially pertinent in forfeiture cases. The Fourth Amendment applies to every criminal case involving a search or a seizure, including criminal forfeiture. In 1886 the Supreme Court held, in *Boyd v. United States*,[45] that although in rem forfeiture proceedings were civil, they also served in part to punish. Thus, they were classified as "quasi-criminal" and, as such, subject to the Fourth and Fifth Amendments. The seizure provision of the Fourth Amendment places limitations on the Government's ability to seize property

40 U.S. CONST. amend. I.

41 *See* Ginsburg v. United States, 383 U.S. 463, 464–65 (1966).

42 509 U.S. 544 (1993).

43 The case was remanded for examination under the Eighth Amendment. *See id.* at 559.

44 U.S. CONST. amend. IV.

45 116 U.S. 616 (1866).

for a civil forfeiture proceeding.[46] The strict application of this provision in criminal forfeiture cases, allowing only the seizure of property that was illegal to possess, ended in *Warden, Maryland Penitentiary v. Hayden,*[47] where the Court held that the Fourth Amendment did not apply to the forfeiture of "mere evidence."[48] However, the constitutional limitations on forfeiture do not stop with the Fourth Amendment.[49] Other constitutional provisions must also be examined.

3. The Fifth Amendment

The Due Process Clause of the Fifth Amendment declares that "[n]o person . . . shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[50] This clause provides both procedural and substantive protections. Procedurally, the Supreme Court held that "the general rule [is] that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."[51] Substantively, a civil in rem forfeiture does not violate the Fifth Amendment's due process rights of an innocent owner.[52] The Court has upheld forfeitures against innocent owners based upon "a long and unbroken line of cases hold[ing] that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know it was being put to such use."[53]

Civil forfeiture may also be challenged under the Double Jeopardy and Self-Incrimination Clauses of the Fifth Amendment. Those clauses state that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in

46 *See generally* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (holding that the Fourth Amendment, and therefore the Exclusionary Rule, apply to civil forfeiture).

47 387 U.S. 294 (1967).

48 *Id.* at 300–01.

49 *See* United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). The Court stated: "[I]t does not follow that the Fourth Amendment is the sole constitutional provision in question when the Government seizes property subject to forfeiture," *id.* at 49, thereby refuting the Government's argument that the Fifth Amendment does not apply to seizures for civil forfeitures. The Court went on to hold that absent exigent circumstances due process requires notice and a hearing before seizure of real property for purposes of civil forfeiture.

50 U.S. CONST. amend. V.

51 *James Daniel Good,* 510 U.S. at 48.

52 *See* Bennis v. Michigan, 516 U.S. 442 (1996) (upholding a forfeiture where respondent's husband was convicted under a prostitution statute and the car they owned jointly was forfeited in a civil proceeding as an instrumentality of the offense).

53 *Id.* at 446.

any criminal case to be a witness against himself . . . ."[54] In 1971, the Supreme Court reaffirmed its earlier decision in *Boyd*:[55] the Self-Incrimination Clause of the Fifth Amendment applies to civil forfeiture cases.[56] The Double Jeopardy Clause of the Fifth Amendment, on the other hand, does not apply to civil forfeiture proceedings.[57] The Court held that even if civil forfeitures are punitive in nature they do not constitute "punishment" for purposes of double jeopardy.[58]

4. The Eighth Amendment

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[59] The Eighth Amendment can be separated into three distinct clauses: Bail, Excessive Fines, and Cruel and Unusual Punishments. These are protections on the fundamental rights of life, liberty, and property. This Section discusses constitutional limitations placed upon the legislature by these three clauses—especially the Excessive Fines Clause—and compares the amount of protection provided to each of the three relevant fundamental rights.

a. The Bail Clause

The Bail Clause states that "[e]xcessive bail shall not be required."[60] The Supreme Court held, in *United States v. Salerno*,[61] that bail is not constitutionally required in every case.[62] "The only argua-

54 U.S. CONST. amend. V.

55 *See supra* note 45 and accompanying text.

56 *See* United States v. United States Coin & Currency, 401 U.S. 715, 721–22 (1971) ("When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. It follows . . . that the Fifth Amendment's privilege may properly be invoked in those proceedings.") (footnote omitted); *Boyd v. United States*, 116 U.S. 616, 634 (1866) (holding that the Fifth Amendment's Self-Incrimination Clause applies to civil forfeitures when there is a possibility of future criminal proceedings); United States v. Ward, 448 U.S. 242, 253–54 (1980).

57 *See* United States v. Ursery, 518 U.S. 267 (1996) (holding civil forfeiture does not, under double jeopardy, bar subsequent criminal proceedings). *But see* United States v. Halper, 490 U.S. 435, 446–49 (1989) (holding that Double Jeopardy prohibits a second sanction that may not be fairly characterized as remedial).

58 *See infra* notes 82–86 and accompanying text (civil forfeitures that are punitive in nature constitute a "fine" for purposes of the Eighth Amendment and are therefore limited by the Excessive Fines Clause).

59 U.S. CONST. amend. VIII.

60 *Id.*

61 481 U.S. 739 (1987).

62 *See id.* at 751.

ble substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' . . . ."[63] If the Government seeks to withhold bail completely, the courts must compare the detention to the Government's interest in detaining the defendant to determine if the detention would be excessive.[64] The Bail Clause provides protection of liberty: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[65]

In a dissenting opinion, Justice Marshall strenuously objected to the majority's reading that the Bail Clause did not prohibit the Government from detaining a defendant without a trial. This, Justice Marshall believed, compromised the fundamental concept of ordered liberty. Marshall noted that "[t]here could be no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or of the dangers which the almost inevitable abuses pose to the cherished liberties of a free society."[66]

The Bail Clause has limited application: it does not guarantee bail, nor does it work to prevent the detention (and thus secure the liberty) of all defendants before they are tried on their guilt or innocence. It also does not provide any limitation on the punishment imposed after a guilty verdict. Once found guilty, the defendant must rely on the other two clauses—the Cruel and Unusual Punishments Clause and the Excessive Fines Clause—to prevent unjust sentencing.[67]

b. The Cruel and Unusual Punishments Clause

The most well-known Eighth Amendment Clause is the Cruel and Unusual Punishments Clause, which states that "nor [shall] cruel and unusual punishments [be] inflicted."[68] In 1976, the Supreme Court held, in *Gregg v. Georgia*,[69] that the death penalty is not per se unconstitutional under the Cruel and Unusual Punishments Clause,[70] re-

63 *Id.* at 754.

64 *See id.*

65 *Id.* at 755.

66 *Id.* at 766–67 (Marshall, J., dissenting).

67 The Fifth Amendment's Due Process Clause has also been held to prevent unjust sentencing. *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348 (1996); Schlup v. Delo, 513 U.S. 298 (1995).

68 U.S. CONST. amend. VIII.

69 428 U.S. 153 (1976).

70 *See id.* (setting forth a bifurcated trial system where in the first phase the jury decided guilt or innocence, and in a second, separate, phase the sentence was decided).

versing its earlier decisions on the matter.[71] The Supreme Court has, however, set detailed guidelines for the imposition of the death penalty by finding limitations on the constitutionality of a death sentence.[72]

The Supreme Court has not had such uniformity regarding the imposition of severe prison sentences. In 1980, in *Rummel v. Estelle*,[73] the Court held that the Cruel and Unusual Punishments Clause's proportionality review used in capital cases also applied to noncapital cases, but still upheld a mandatory life sentence contained in a recidivist statute.[74] Then, in 1983, a 5–4 majority held, in *Solem v. Helm*,[75] that a sentence of life imprisonment without parole under a recidivist statute violated the Eighth Amendment's Cruel and Unusual Punishments Clause because it was not constitutionally proportional to the offense.[76] However, in 1992, in a plurality opinion in *Harmelin v. Michigan*,[77] the Court retreated and held that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."[78] As a result, after *Harmelin* it is difficult to tell whether a proportionality guarantee is contained in the Cruel and Unusual Punishments Clause.

Just two years after its decision in *Harmelin*, the Court rendered its opinion in *Alexander v. United States*.[79] In *Alexander*, the Court held that the Excessive Fines Clause of the Eighth Amendment does con-

71 *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (holding the death penalty unconstitutional in the cases before the Court but not deciding the constitutionality of the death penalty in all cases and in all circumstances).

72 *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1988). In *Thompson*, four members of the Court noted that the Eighth Amendment prevents the execution of a defendant charged for a crime committed before reaching the age of sixteen. *See also* Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits execution of an insane person); Woodson v. North Carolina, 428 U.S. 280 (1976) (holding unconstitutional statutes that provide for mandatory death sentence for all first-degree murders).

73 445 U.S. 263 (1980).

74 *See id.* (holding a mandatory life sentence under Texas recidivist statute did not violate the Cruel and Unusual Punishments Clause).

75 463 U.S. 277 (1983).

76 *See id.* at 303 ("The Constitution requires us to examine [the Defendant's] sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that [he] has received the penultimate sentence for relatively minor criminal conduct.").

77 501 U.S. 957 (1991).

78 *Id.* at 965.

79 509 U.S. 544 (1993). Petitioner was convicted of seventeen counts of obscenity, five counts of engaging in selling obscene materials, and three counts of RICO, and was sentenced to six years in prison and fined $100,000. The Government also sought forfeiture of his pornography businesses and over nine million dollars in cash. *See id.* at 547.

tain a proportionality guarantee.[80] In its opinion, however, the Court stated, in dicta, that the Cruel and Unusual Punishments Clause required a proportionality review, but only when the sentence was greater than life imprisonment without the possibility of parole.[81] Thus, given the Court's opinion in *Solem*, the plurality's words in *Harmelin*, and the dicta in *Alexander*, it is difficult to tell exactly when, or even if, a proportionality review is required under the Cruel and Unusual Punishments Clause.

c. The Excessive Fines Clause

The Excessive Fines Clause states that "nor [shall] excessive fines [be] imposed . . . ."[82] *Alexander*, and its companion case, *Austin v. United States*,[83] offered the first material and substantive constitutional limitations on forfeiture under the Eighth Amendment. In *Alexander*, the Eighth Circuit had upheld the forfeiture of the defendant's pornography businesses and nine million dollars in cash under both the Cruel and Unusual Punishments Clause and the Excessive Fines Clause of the Eighth Amendment.[84] The Supreme Court granted certiorari, stating that the Eighth Circuit had "failed to distinguish between these two components of [the] petitioner's Eighth Amendment challenge."[85] In the Court's opinion, it held for the first time that the Excessive Fines Clause of the Eighth Amendment applies to criminal forfeitures.[86] The Court noted that two separate analyses are required in criminal forfeiture cases, because the Cruel and Unusual Punishments Clause "does not require any proportionality review of a sentence less than life imprisonment without the possibility of parole,"[87] but the Excessive Fines Clause requires a proportionality review in every case to determine if a fine is excessive.[88] The Court held that a criminal forfeiture was a "fine"[89] as covered by the Eighth Amendment. Therefore, the Court noted, these forfeitures are limited by the

80 *See id.* at 558; *see also infra* notes 86–90 and accompanying text.

81 *See id.*

82 U.S. CONST. amend. VIII.

83 509 U.S. 602 (1993).

84 Alexander v. Thornburgh, 943 F.2d 825 (8th Cir. 1991).

85 *Alexander*, 509 U.S. at 558.

86 *See id.* at 548–49.

87 *Id.* at 558.

88 *See id.*

89 *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989) ("[A]t the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense.").

Excessive Fines Clause, which provides a proportionality guarantee. In *Alexander*, the Court seems to have clearly divided the two clauses and prescribed different standards to each. The Court based this distinction upon the idea that the two clauses serve different purposes: the Excessive Fines Clause regulates the Government's power to extract payments as a form of punishment, while the Cruel and Unusual Punishments Clause regulates the "duration or conditions of confinement."[90]

Austin was decided on the same day as *Alexander*. In *Austin*,[91] the Court extended the Excess Fines Clause to in rem forfeitures.[92] *Austin* changed the question that courts use to determine whether the Eighth Amendment constitutional protections apply to a particular forfeiture. The Court stated that "the question is not . . . whether [the] forfeiture . . . is civil or criminal . . . but rather whether it is punishment,"[93] finding that only forfeitures designed to punish are afforded Eighth Amendment protection. The Court noted that forfeiture will be deemed to serve as a punishment when it is aimed at retribution or deterrence, or when it does not serve a remedial purpose.[94] The Court did acknowledge that forfeiture could serve both a punitive and a remedial purpose;[95] however, even if even one of the purposes is to punish, the Excessive Fines Clause would apply to limit the forfeiture.[96] The Excessive Fines Clause thus applies to all forfeitures, civil and criminal, that "can only be explained as serving in part to punish."[97]

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90 *Alexander*, 509 U.S. at 558.

91 Petitioner was sentenced to seven years in prison for violating South Dakota's drug laws. The State then commenced an in rem proceeding against petitioner's mobile home and car repair shop. *See* Austin v. United States, 509 U.S. 602, 604 (1993).

92 *See id.* at 622 ("We therefore conclude that forfeiture under these conditions constitutes 'payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause.") (citations omitted).

93 *Id.* at 610.

94 To determine whether or not civil forfeiture constituted a punishment, the Court looked at the nature of forfeiture at the time the Eighth Amendment was ratified, and whether the statute in question was "so understood" to be a punishment today. *See id.* at 621.

95 *See id.* at 610.

96 *See* United States v. Halper, 490 U.S. 435, 448 (1989) (noting that when a forfeiture serves to punish, that does not exclude the possibility that it serves other purposes).

97 *Austin*, 509 U.S. at 610.

The Court remanded both *Alexander* and *Austin* to the Eighth Circuit to determine if the forfeitures were excessive.[98] Unfortunately, neither opinion set forth any guidance for determining excessiveness[99]—the court refused to provide a test for lower courts to use in determining whether a particular forfeiture violates the Excessive Fines Clause. As a result, after *Austin* and *Alexander*, the circuit courts developed three different tests to determine whether a forfeiture is excessive: (1) the instrumentality test; (2) the proportionality test; and (3) the hybrid of the instrumentality and the proportionality tests.[100]

i. The Instrumentality Test

The instrumentality test gained guidance and support from Justice Scalia's concurrence in *Austin*.[101] Justice Scalia noted that in rem forfeitures are not a fixed amount, but rather the value of the property that has been "tainted" by a crime. He argued that the actual value of the property was irrelevant to the excessiveness analysis,[102] noting "[t]he question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relation to the offense."[103] To be constitutional under the instrumentality test, the property forfeited must have a close enough relationship to the crime that the property is deemed an instrumentality of the crime and is therefore rendered guilty.[104] Despite Scalia's concurring opinion, the majority in *Austin* did not specifically endorse the instrumentality test. Rather, it noted that while it would not rule out the relevance of a relationship between the crime and the property, it also would not limit the lower courts to only using that factor.[105]

98 *See id.* at 623; Alexander v. United States, 509 U.S. 544, 559 (1993).

99 *See Austin*, 509 U.S. at 622–23 ("Prudence dictates that we allow the lower courts to consider that question in the first instance."). Although the majority in *Austin* did not give any test for excessiveness, Justice Scalia set forth an instrumentality test in his concurrence. *See id.* at 627–26 (Scalia, J., concurring).

100 *See infra* notes 101–26 and accompanying text.

101 *See Austin*, 509 U.S. at 627–28 (Scalia, J., concurring).

102 *See id.* at 627–28 ("Unlike 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, to which the value of the property is irrelevant.").

103 *Id.* at 628.

104 *See* United States v. $1,020,378.05 of United States Currency, 1994 U.S. App. LEXIS 13152 (9th Cir. May 11, 1994) (holding that double jeopardy does not bar a forfeiture of property that was an instrumentality of the crime).

105 *See Austin*, 509 U.S. at 623 n.15.

The Fourth Circuit, following Scalia's analysis, uses an instrumentality test. In *United States v. Chandler*,[106] the court applied a three-part instrumentality test. Under part one, the court considers the connection between the offense and the property, and the role that the property has in the offense. Part two of the inquiry analyzes the culpability of the owner of the property. Finally, part three separates the property actually involved in the offense from the property that is not involved.[107]

ii. The Proportionality Test

The proportionality test was derived mainly from two cases: *Solem v. Helm* and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*.[108] The first decision, *Solem*, analyzed excessiveness under the Cruel and Unusual Punishments Clause,[109] using three factors to determine whether a punishment is "grossly disproportionate"[110] to the crime, and therefore excessive. The first *Solem* step is to analyze the gravity of the offense and compare it to the harshness of the punishment. In the second step, the punishment imposed is compared to punishments imposed for crimes with relatively the same gravity of offense. Finally, the third step compares the punishment given to punishments for the same offense in different jurisdictions.[111] Although the Supreme Court criticized *Solem*, in *Harmelin v. Michigan*,[112] the factors still seem to be good law for determining if a punishment is grossly disproportional to the offense.[113] That is, *Harmelin* only questioned the holding in *Solem* that the Cruel and Unusual Punishments Clause requires a proportionality analysis.

106 36 F.3d 358 (4th Cir. 1994) (finding a sufficient nexus, under the instrumentality analysis of the Eighth Amendment, between defendant's 33 acre farm and his drug operation to support forfeiture of the entire property).

107 *See id.*

108 492 U.S. 257 (1989).

109 *See* Solem v. Helm, 463 U.S. 277 (1983) (holding unconstitutional under the Eighth Amendment a life sentence without the possibility of parole when defendant was convicted for writing a bad check).

110 The majority in *Bajakajian* uses this term for determining excessiveness under the Eighth Amendment, but seems to alter the test. *See infra* Part III.

111 *See Solem*, 463 U.S. at 290–92.

112 "The Eighth Amendment does not require strict proportionality between the crime and the sentence. Rather it forbids only extreme sentences that are 'grossly disproportional' to the crime." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991).

113 The plurality in *Harmelin* seems to hold that proportionality is not the correct test under the Cruel and Unusual Punishments Clause, but the majority in *Bajakajian* seems to reestablish the relevance of proportionality with regard to the Excessive Fines Clause. *See infra* notes 159–64 and accompanying text.

Additional support for the proportionality test came from Justice O'Connor's dissenting opinion in *Browning-Ferris*.[114] In *Browning-Ferris*, which was a civil suit, the defendant was found to have violated the Sherman Antitrust Act and the jury awarded the plaintiff over six million dollars in punitive damages.[115] The defendant challenged the punitive award, claiming it was excessive under the Eighth Amendment.[116] The Court, however, refused to extend any Eighth Amendment coverage to a civil suit where the Government was not one of the parties and did not receive a portion of the judgment. Justice O'Connor concurred in part and dissented in part,[117] arguing that the Eighth Amendment should apply, and set forth a three-prong test to determine if a fine was excessive. The Eighth Amendment analysis for excessiveness set forth by Justice O'Connor was a modification of the *Solem* three-part test, which specifically applies to the Excessive Fines Clause.[118] Like the *Solem* test, Justice O'Connor's test required the courts to analyze the gravity of the offense and the severity of the punishment sought, and to compare the punishment sought against the defendant to punishments imposed in similar civil and criminal cases in that jurisdiction and in other jurisdictions.[119] Justice O'Connor's test then added to the previous analysis by requiring the courts to give "substantial deference" to the legislature when particular sanctions are set forth in legislation.[120]

The Eighth Circuit, in *United States v. 9638 Chicago Heights*,[121] expressly adopted a proportionality test and rejected the instrumentality test. This test uses multiple factors to determine if the culpability of the owner is proportional to the property forfeited, including: the value of the property, the nexus between the property and the offense, the role that the owner of the property played in the offense, the gravity of the offense, the culpability of the owner, and the harm caused. This list is not exhaustive; the analysis is flexible, allowing the district courts to consider the individual circumstances of each case.

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114 492 U.S. 257 (1989).

115 *See id.* at 262.

116 *See id.* at 297.

117 *See id.* at 282–301 (O'Connor, J., dissenting). Justice O'Connor's concurrence is not relevant to this Case Comment.

118 *See id.* at 300–01.

119 *See id.*

120 The majority in *Bajakajian* also used the requirement of giving "substantial deference" to the legislature. *See infra* Part III.

121 27 F.3d 327 (8th Cir. 1994) (reversing on other grounds the forfeiture of defendant's house after she confessed to three counts of selling a controlled substance from the house, but specifically rejecting the district court's use of an instrumentality test under the Eighth Amendment).

iii. The Hybrid Test

Courts that adopted a third test, a hybrid test, have used an analysis that looks at both the relationship of the property to the crime (an instrumentality analysis) and the gravity of the offense compared to the harshness of the forfeiture (a proportionality analysis).[122]

The Ninth Circuit adopted such a two-prong test in *United States v. Real Property Located in El Dorado County*.[123] This test is a hybrid of the instrumentality test adopted by the Fourth Circuit and the proportionality test adopted by the Eighth Circuit. The first prong of the test, the instrumentality prong, requires the Government to show a "substantial connection between the property, or the appropriate portion thereof, and the offense."[124] If the Government can show this connection, the burden then shifts to the defendant to "show that forfeiture of his property would be grossly disproportionate given the nature and extent of his criminal culpability."[125] The Ninth Circuit applied this hybrid test in *United States v. Bajakajian*.[126]

III. *UNITED STATES V. BAJAKAJIAN*

Bajakajian involved a criminal forfeiture, in which the Court found that the respondent caused minimal harm for which he was severely punished. The culpability of the respondent did not justify the forfeiture of the entire amount. The Court did more in this case than just minimize the severity of a violation of the reporting statute; it changed the requirements of forfeiture law. Surprisingly, in a case where the Court struck down a forfeiture as unconstitutional, it might actually have loosened the constitutional reins on forfeiture.

A. Case History

On June 9, 1994, a California gas station owner, Hosep Bajakajian, and his family were preparing to board an international flight from Los Angeles International Airport to Syria. A United States Customs inspector informed him that he was required to disclose all cash he was taking out of the country in excess of $10,000.

122 For an example of the hybrid analysis, see the Ninth Circuit's opinion in *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996). *See infra* notes 136–46.

123 59 F.3d 974 (9th Cir. 1995) (remanding the forfeiture issue for the district court to determine whether there was a sufficient nexus between defendant's farm and his drug operation, and if so whether forfeiture of the entire farm would be proportional to defendant's criminal culpability).

124 *Id.* at 985.

125 *Id.*

126 84 F.3d 334 (9th Cir. 1996).

Bajakajian said he had only $8,000, and his wife $7,000. In fact, customs inspectors discovered a total of $357,144 in Bajakajian's luggage, including $100,000 in a hidden compartment at the bottom of his carry-on bag. Mr. Bajakajian admitted that he constructed a false bottom in his bag to hide the cash. Because he failed to declare the currency in violation of 31 U.S.C. § 5316, the Customs Service seized all of the money.[127]

The Government indicted Bajakajian on three charges: (1) failing to report that he was transporting over $10,000 in cash out of the country in violation of § 5316(a)(1)(A),[128] and in doing so, willfully violating § 5322(a);[129] (2) making a false statement to a customs official in violation of 18 U.S.C. § 1001; and (3) seeking forfeiture of the entire $357,144 under 18 U.S.C. § 982(a)(1).[130] Bajakajian pleaded guilty to count one, and the Government dropped count two. On count three, the defendant waived his right to a jury trial and, following a bench trial, the district court ordered forfeiture of $15,000.[131] The district court found that the entire $357,144 was "involved in" the offense and therefore subject to forfeiture under § 982(a)(1). In fact, § 982(a)(1) calls for the forfeiture of the entire amount of undeclared money, but the district court refused to do so, finding that the money was the proceeds of lawful activities[132] and that the respondent will-

127 *See* Brief for the United States, *Bajakajian* (No. 96–1487).

128 Section 5316(a) provides:

> [A] person or an agent or bailee of the person shall file a report . . . when the person, agent, or bailee knowingly—
>
> (1) transports, is about to transport, or has transported, monetary instruments of more then $10,000 at one time—
>
> (A) from a place in the United States to or through a place outside the United States; . . .

31 U.S.C. § 5316(a) (1994).

129 "A person willfully violating this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years or both." 31 U.S.C. § 5322(a) (1994).

130 "The court, in imposing sentence on a person convicted of an offense in violation of section . . . 5316, . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1994).

131 The Supreme Court did not decide the question of whether the forfeiture of $15,000 was excessive. *See United States v. Bajakajian*, 118 S. Ct. 2028, 2038 n.11 (1998).

132 The Supreme Court's dissenting opinion argued that this conclusion was erroneous. Bajakajian could not account for where he got the money. "He . . . told custom inspectors . . . Ajemian lent him about $200,000. Ajemian denied this. A month later, respondent said . . . Faroutan had lent him $170,000. Faroutan, however, said he had not made the loan and respondent had asked him to lie. Six months later,

fully concealed the money because of "cultural differences" that caused him to distrust the Government.[133]

The court sentenced Bajakajian to three years probation and ordered a fine of $5,000, the maximum allowed under the sentencing guidelines. However, the court found the fine alone to be inadequate, and stated that the forfeiture of $15,000 would "make up for what [it thought] a reasonable fine should be."[134] The district court also found that the mandated forfeiture of the entire $357,144 would have been "'extraordinarily harsh' and 'grossly disproportionate' to the offense in question, and would therefore violate the Excessive Fines Clause."[135]

B. Appeal to the Ninth Circuit

Seeking forfeiture of the entire amount, as allowed by § 982(a)(1), the Government appealed. On appeal, the Ninth Circuit affirmed the ruling of the district court.[136] Relying on the hybrid instrumentality-proportionality test the court developed in *United States v. Real Property Located in El Dorado County*,[137] the Ninth Circuit held that in order for a forfeiture to be constitutional under the Excessive Fines Clause, it must satisfy both prongs of a two-prong test: "(1) the property forfeited [must be] an 'instrumentality' of the crime committed, and (2) the value of the property [must be] proportional to the culpability of the owner."[138] The court found that the money did not satisfy the instrumentality prong of the test, and therefore held the forfeiture was unconstitutional.[139]

In doing so, the court made two crucial distinctions. First, it distinguished an instrumentality of a crime from the essence of a crime. In this case, the court reasoned that the money was not an instrumentality of the crime merely because it was required to carry out the illegal offense, but found instead that it was the essence of the crime.

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respondent resurrected the fable of the alleged loan from Ajemian . . . ." *Bajakajian*, 118 S. Ct. at 2045 (Kennedy, J., dissenting).

133 *See id.* (quoting the transcript from the district court trial, Tr. 61–62 (Jan. 19, 1995)).

134 *Id.* at 2032. (quoting Tr. 63 (Jan. 1995)).

135 *Id.*

136 United States v. Bajakajian, 84 F.3d 334, 338 (9th Cir. 1996).

137 59 F.3d 974 (9th Cir. 1995). *See supra* notes 123–25 and accompanying text.

138 *Bajakajian*, 84 F.3d at 336.

139 *See id.* at 338.

The court went further and held that because it was the essence of the crime, it could not be an instrumentality of it.[140]

Second, the court held that the unreported money was not contraband. To do this, the court had to distinguish money used in a reporting violation from the property in a smuggling violation. In other words, it had to separate the present facts from those in *One Lot Emerald Cut Stones and One Ring v. United States*,[141] which involved a civil forfeiture under 19 U.S.C. § 1497. In *One Lot*, the Court held that the forfeiture of undeclared property was remedial, not punitive,[142] reasoning that the forfeiture was designed to compensate the Government for investigation and other expenses involved.

To distinguish this case from *Bajakajian*, the court relied on the fact that it was legal to possess and transport the money. The only crime involved in *Bajakajian* was the "failure to provide information"[143]—"[t]he crime [was] not the illegal possession, transportation or smuggling of dutiable items."[144] Because the money was found to be legally possessed, no duty would have been imposed if the respondent had reported it. On the other hand, the defendant in *One Lot* would have been charged a duty if he had reported the stones. The key difference—what made the stones contraband, the court said—is that the Government was deprived of revenue. The court believed that it was this difference that made the stones in *One Lot* both an instrumentality of the offense and contraband, while the unreported money in *Bajakajian* was neither.

Using this distinction, the court noted that money used in a reporting violation under § 5316 can never satisfy the constitutional requirements of the Eighth Amendment, because it is not an instrumentality of the crime. Since it could never satisfy the instrumentality prong of the excessiveness test, the Ninth Circuit held that forfeiture of money used in a § 5316 violation was per se unconstitutional.[145] The Supreme Court relied on some of the same distinctions

140 The Court used the example of a car used to transport unreported currency out of the country as what would be an instrumentality of a reporting violation. *See id.* at 338 n.7.

141 409 U.S. 232 (1972) (holding that forfeiting undeclared goods that were concealed in luggage and imposing a fine equal to the value of the goods was a remedial not punitive sanction).

142 *See id.* at 237.

143 *Bajakajian*, 84 F.3d at 337.

144 *Id.* at 338.

145 *See id.*

as the Ninth Circuit when it justified finding the full forfeiture to be "grossly disproportionate" to the offense.[146]

C. *The Supreme Court Decision*

In its majority opinion, the Supreme Court did not think it was necessary to determine whether the property was an instrumentality of the offense. The only relevant question, in the majority's opinion, was the one that the circuit court never addressed: Did the punishment fit the crime? The majority said no; the punishment in this case was too severe given the nature of the crime committed. The dissent, on the other hand, argued that not only was the respondent's money an instrumentality of the crime, but that it was also relevant to the question of whether the forfeiture was constitutional. The dissent agreed that proportionality was also a pertinent question and it adopted the test the majority used to determine proportionality. The dissent did not agree with the way the majority applied the test in this case, however, stating that the majority had not followed its own advice. The majority opinion attempted to narrow the Government's power to forfeit property, while the dissenting opinion argued that the holding had the opposite effect.

1. Majority Opinion

To begin the analysis, the majority reiterated the Court's previous holding in *Austin* that a fine under the Eighth Amendment is a payment to the Government as a punishment.[147] The majority had little trouble deciding that the forfeiture of the respondent's cash served to punish him for his violation of the reporting statute,[148] and it easily combatted the Government's arguments. The majority then had to decide if this fine was excessive under the Eighth Amendment. In doing this, the majority set forth a new, specific test for courts to use in determining excessiveness.

a. Defining Forfeiture Under 18 U.S.C. § 982(a)(1)

The majority analyzed the history of forfeiture law's purpose, tracing its evolution from English common law to its decision in *Austin*. Following the precedent set in *Austin*, the Court looked at the nature of the forfeiture to determine whether it was a "fine" as covered by the Eighth Amendment. The Court held that forfeiture of

146 *See infra* notes 165–72.

147 *See* Austin v. United States, 501 U.S. 602, 621–22 (1993).

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

currency under § 982(a)(1) was a fine because it was imposed to punish the owner. Therefore, as a fine it was limited by the Excessive Fines Clause. It was evident to the majority that this forfeiture served to punish the respondent; it required a conviction under the reporting statute, in addition to both a fine and a prison sentence.[149]

The Government tried to show that the forfeiture was not a fine, and therefore not covered by the Eighth Amendment. It made three arguments to support this contention: (1) the forfeiture served a remedial interest and was therefore not punishment; (2) the forfeiture was a traditional forfeiture of tainted property; and (3) the money was an instrumentality of the crime.[150]

To refute the Government's first argument that the forfeiture served a remedial interest, the Court applied *One Lot*, where the Court held that forfeiture had a remedial purpose if it was "brought to obtain compensation or indemnity."[151] The Government did not argue that the money would repay the Government for its investigation and enforcement expenses, but argued that because full forfeiture would be an efficient deterrent, the forfeiture served an important remedial purpose. The Government conceded, however, that deterrence is a traditional goal of punishment. The Court, again relying on *Austin*, stated that if any part of the sanction is aimed to punish, the Eighth Amendment applies, regardless of the other goals. Therefore, the issue of whether the forfeiture in this case served a remedial purpose did not need to be decided.[152]

The Government's second argument was almost as futile, maintaining that the forfeiture was constitutional because it was a traditional forfeiture of tainted property. The Court concluded a lengthy analysis of the history of forfeiture by classifying forfeiture under § 982(a)(1) as an in personam forfeiture and therefore subject to Eighth Amendment scrutiny.[153] This argument does not rely on *Austin*, where the Court held that the question was not whether the forfeiture was in rem or in personam, but rather whether it was punitive or remedial. The Court had already found that the forfeiture was punitive so it did not readdress the question, but it did acknowledge in a footnote that the relevant distinction was the one presented in *Austin*.[154]

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149 *See id.*

150 *See id.* at 2034–37.

151 *Id.* at 2034 (quoting BLACK'S LAW DICTIONARY 1293 (6th ed. (1990)).

152 *See id.* at 2036.

153 *See id.*

154 *See id.* at 2036 n.6 ("Because some recent federal forfeiture laws have blurred the traditional distinction between civil . . . and criminal . . . forfeiture, we have held

Finally, the Court addressed the Government's argument that the forfeiture was constitutional because the money was an instrumentality of the crime. The Government argued that the currency was an instrumentality of the crime because without it there would be no crime. The Court did not believe that precedent could support this definition of "instrumentality," and refused to accept it, stating that an instrumentality of a crime is forfeited as guilty property only in an in rem proceeding, never in an in personam forfeiture. Therefore, because this was the latter, "it is . . . irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive, and the test for the excessiveness of a punitive forfeiture involves solely a proportionality determination."[155] In a footnote, the Court clarified the issue by adding that the currency was not an instrumentality of the crime:

> The currency in question is not an instrumentality in any event. The Court of Appeals reasoned that the existence of the currency as a "precondition" to the reporting requirement did not make it an "instrumentality" of the offense. We agree; 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. In the latter instance, the property is the actual means by which the criminal act is committed.[156]

This part of the opinion characterized the forfeiture in question as punitive and therefore subject to Eighth Amendment analysis. The Court then held that, because the forfeiture was meant to punish the respondent, it was "irrelevant whether [the] currency is an instrumentality"[157] of the crime, and that the test for excessiveness is "solely a proportionality determination."[158]

This holding settled the inconsistency that existed between the circuit courts and provided a uniform standard by which to judge every punitive forfeiture. The Court then proceeded to do what it had refused to do in both *Austin* and *Alexander*; it provided a test and relevant criteria that the lower courts should use to determine the constitutionality of a punitive forfeiture.

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that a . . . forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part regardless of whether [it] is styled as *in rem* or *in personam*.").

155 *Id.* at 2036.

156 *Id.* at 2036 n.9.

157 *Id.* at 2036.

158 *Id.*

b. Defining Excessiveness

The Court based its excessiveness test on the idea that "[t]he amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[159] The value of the property forfeited, or the harm caused to the defendant by the forfeiture, must be proportional to the gravity of the offense committed: "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[160] The Court was unable to find, in the history of Eighth Amendment jurisprudence, a definition of how disproportionate a forfeiture had to be in order to classify as excessive; therefore, it relied on outside sources to develop criteria to determine excessiveness. One of the sources utilized was the proportionality analysis developed under the Cruel and Unusual Punishments Clause; the other source was the general history of the judicial system.

Basing its opinion on decisions under the Cruel and Unusual Punishments Clause, the Court found that the role of determining appropriate punishments belonged to the legislature. Stating that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature,"[161] the Court noted that the judicial system could only serve as a check upon the legislature's determination. Courts, therefore, should give great deference to the sanctions prescribed by Congress in the statute.[162]

Based on the nature of the American court system, the Court acknowledged that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise."[163] Support for this theory can also be found in the standards used in Cruel and Unusual Punishments Clause cases to determine appropriate punishments. Based on these findings the Court ruled against requiring a strict proportionality between the amount of the punitive forfeiture and the gravity of the criminal offense, and instead adopted the standard of gross disproportionality articulated in the Cruel and Unusual Punishments Clause precedents.[164]

159 *Id.*

160 *Id.*

161 *Id.* at 2037.

162 *See id.*

163 *Id.*

164 *See id.*

c. Applying Excessiveness

Deferring to the legislature, the Court noted that the statute in this case called for the forfeiture of all the money involved in the offense.[165] This required the entire $357,114 to be forfeited. However, the Court concluded that, under the gross disproportionality standard, the forfeiture of the entire $357,144 would be unconstitutional.

The Court based this decision on the facts of the case, noting that the violation was "solely a reporting offense"[166] not connected to any other criminal offense, and that the harm caused was trivial. The Court greatly minimized the violation of the reporting statute, and found it to be only the withholding of information. It also found that, because the respondent was not within the class of persons the statute was aimed at punishing—money launderers and drug dealers—his offense was not serious.

The Court then examined the punishment prescribed in the Sentencing Guidelines. Under the Guidelines the maximum fine possible was $5,000, with a maximum of six months in prison.[167] The Court noted that "[s]uch penalties confirm a minimal level of culpability."[168] In a footnote, the Court analyzed the maximum penalties authorized by the legislature in the statute:

> In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence. Here, . . . Congress authorized a maximum fine of $250,000 plus five years' imprisonment for willfully violating the statutory reporting requirement, and this suggests that it did not view the reporting offense as a trivial one. That the maximum fine and Guideline sentence to which respondent was subject were but a fraction of the penalties authorized, however, undercuts any argument based solely on the statute, because they show that respondent's culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—is small indeed. This disproportion is telling notwithstanding the fact that a separate Guideline provision permits forfeiture if mandated by stat-

165 "The court, in imposing sentence on a person convicted of an offense . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1994).

166 *Bajakajian*, 118 S. Ct. at 2038.

167 *See* United States Sentencing Guidelines Manual § 5E1.2 (1994). *But see* 18 U.S.C. § 982(a)(1) (1994) (authorizing maximum fine of $250,000 and up to five years in prison).

168 *Bajakajian*, 118 S. Ct. at 2038.

ute. That Guideline, moreover, cannot override the constitutional requirement of proportionality review.[169]

Finally, the Court distinguished this case from *One Lot*, stating that "*One Lot* . . . differs from this case in the most fundamental respect."[170] The Court viewed the forfeiture in *One Lot* as being "entirely remedial and thus non-punitive, primarily because it 'provided a reasonable form of liquidated damages' to the Government."[171] Like the forfeiture in *Bajakajian*, the forfeiture in *One Lot* was also a method of reimbursing the Government for investigation and enforcement costs of patrolling customs. But the Court thought that this fact was irrelevant and never decided if the forfeiture in *Bajakajian* had a remedial purpose, because even punitive forfeitures can be used to reimburse the Government.[172]

2. The Dissent

Justice Kennedy, author of the dissent, was disturbed by the possible consequences of the decision. "At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court's test, its decision portends serious disruption of a vast range of statutory fines."[173] Kennedy found it more disturbing that, since the Court held that remedial forfeitures are not subject to analysis under the Eighth Amendment, there is no limit to how disproportional the amount forfeited can be with regards to the offense committed. The

169 *Id.* at 2038–39 n.14.

170 *Id.* at 2041 n.19.

171 *Id.*

172 An important factor in the dissent's argument is that this case cannot be distinguished from *One Lot*. The only difference between the two cases is that one offense resulted in a failure to pay a small fine to the Government. The forfeiture in *One Lot* was deemed to be remedial because it involved the failure to pay a duty owed to the Government, and because it repaid the Government for their expenses in patrolling and enforcing their custom regulations which were in place to prevent this type of conduct. The dissent focused on historic customs cases where the forfeiture was greatly disproportional to the gravity of the offense, and "[m]any [of these] offenses did not require a failure to pay a duty at all." *Id.* at 2042 (Kennedy, J., dissenting). The dissent argued that the majority labeled these forfeitures as "nonpunitive and thus not subject to the Excessive Fines Clause, though they are indistinguishable from the fine in this case." *Id.* The dissent could not find any facts in the case that would prevent it from being remedial under *One Lot*. The real distinction, Justice Kennedy stated, was that one case involved an in personam forfeiture, which the majority classified as a fine, while the other was an in rem forfeiture that was not a fine. Justice Kennedy expressed a fear that this provided a way around the Excessive Fines Clause.

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

dissent found that the majority had used the same analysis to determine whether a fine was a punishment as it had used to determine whether that punishment was excessive. If the only test is whether a forfeiture is punishment, then every forfeiture that serves to punish will be unconstitutional and every forfeiture that does not punish will be constitutional. "In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses whether a fine is excessive with whether it is a punishment."[174]

The dissent also argued that the majority's finding that the instrumentality test was irrelevant could not be supported by precedent. The dissent did agree with both the holding that proportionality is an important analysis under the Excessive Fines Clause and the standards the majority gave to help determine excessiveness. It argued that the majority did not follow these standards, however, and therefore got the wrong results.

The dissent also disagreed with the majority's disposal of the instrumentality requirement. "The majority suggests *in rem* forfeitures of the instrumentalities of crimes are not fines at all. The point of the instrumentality theory is to distinguish goods having a 'close enough relationship to the offense' from those incidentally related to it."[175] Criticizing the majority's failure to analyze instrumentality forfeitures under the Eighth Amendment and its failure to find that the money was an instrumentality of this crime, Justice Kennedy wrote that "[t]he cash was not just incidentally related to the offense of cash smuggling. It [was] essential, whereas the car is not . . . . Even if there were a clear distinction between instrumentalities and incidental objects, when the Court invokes the distinction it gets the results backwards."[176]

The dissent agreed with the test the majority used for excessiveness, but not its application. The majority stressed the fact that the currency was itself lawful to possess. The dissent pointed out that this fact adds nothing to the argument that the forfeiture was excessive because, had the currency been unlawful to possess, its forfeiture would have been purely remedial. "The cash was lawful to own, but this fact shows only that the forfeiture was a fine; it cannot also prove that the fine was excessive."[177] The dissent went on to conclude that "the lawfulness of the money shows at most that the forfeiture was a fine, it cannot at the same time prove that the fine was excessive."[178]

174 *Id.*
175 *Id.* at 2043.
176 *Id.*
177 *Id.*
178 *Id.* at 2044.

Justice Kennedy also agreed that substantial deference should be paid to Congress when determining whether punishment is appropriate, but found that the majority did not give any deference to Congress. The dissent based this argument on the way that the majority analyzed the punishment that Congress had prescribed—it used a $5,000 fine to gauge excessiveness of the forfeiture, but the statute authorized a fine much larger than $5,000, and the forfeiture was in addition to a fine. "The fine thus supplements the forfeiture; it does not replace it."[179] The majority also stressed the fact that respondent committed no other crime, and therefore found his offense less serious. The dissent thought that the offense was a serious one in itself and, because the statute prescribes more severe penalties when other offenses have been committed, Congress must have agreed.

Thus, the dissent argued that the majority provided courts a way around the Eighth Amendment by failing to apply the Eighth Amendment at all to remedial forfeitures. The dissent noted that by making the analysis under the Excessive Fines Clause so strict, the Court might have encouraged lawmakers to avoid it all together.

IV. EFFECT OF *BAJAKAJIAN*

Several questions remain unanswered after *Bajakajian.* Was *Bajakajian* really a victory for the Government? The defendant may have won his money, but in the process the Government won a more lenient constitutional standard; the Government no longer has to prove that the object being forfeited is an instrumentality of the offense. The standard presented by the Court now requires the Government to show merely that the forfeiture is "substantially proportional" to the offense, which is a much lower standard than strict proportionality. Also, *Bajakajian* involved a criminal in personam forfeiture. Did the Court intend the same test to be used for in rem forfeitures? Based on the Court's holding, the distinction between criminal and civil forfeiture seems moot and the real question now is whether the forfeiture is remedial or punitive. The dissent seems to believe the majority removed all remedial forfeitures from Eighth Amendment review; if so, then the dissent is correct in fearing the ramifications of *Bajakajian.* Instead of limiting the use of forfeiture by striking down its use in reporting violations, the Court might have made available an entire and seemingly unlimited field of forfeiture.

Bajakajian seems to have greatly expanded the constitutional protections afforded to the right of property, but does it do so at the

179 *Id.*

expense of our liberty protections? The dissent argued that in England "[t]he main purpose of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison."[180] This was the source of our Eighth Amendment. Thus, the Excessive Fines Clause was premised on the protection of liberty, not property—"the Court's restrictive approach could subvert this purpose. Under the Court's holding, legislatures may rely on mandatory prison sentences in lieu of fines."[181] All three clauses of the Eighth Amendment, when read on their face, serve to protect liberty. As applied, however, the Eighth Amendment provides greater protections to life and property. Liberty seems to be a forgotten purpose.

No one questions the importance of the protections afforded to life. But how can the courts justify the protection of property over liberty? One explanation for the Court's zeal in applying the Eighth Amendment to property protections is that forfeitures are not as common as prison sentences. The vast majority of forfeitures are of contraband and, therefore, uncontested.

The Government simply cannot keep up with the court system when it extensively uses the forfeiture provisions. Forfeiture laws that started as "zero tolerance" laws are often relaxed because of the problems encountered in cases involving an innocent owner. "Every case, it seem[s], had extenuating circumstances."[182] These extenuating circumstances require a case-by-case analysis. "Such crackdowns have been highly popular with politicians and law-enforcement officials, but after the klieg-light hype, the programs are usually quietly dumped or throttled back."[183] The Federal Government's forfeiture program for drug offences, announced in 1988 by the Custom's Service Commissioner, William von Raab, is one example of such a cutback. "'There will be no mercy,' he vowed [when the program was announced]. And for a while it seemed to be true . . . . But within 18 months the program . . . evolv[ed] into a relatively lenient approach [where] people [were] cited and released without any confiscation of their property."[184]

Every conviction in a criminal case involves the right of the defendant's liberty; the Government cannot change that. To prevent the judiciary from having to do a case-by-case analysis to account for

180 *Id.* at 2046.

181 *Id.*

182 David Johnson, *Reprising Zero Tolerance: History Shows That Tough Talk Is Cheap*, N.Y. TIMES, January 31, 1999, § 4, at 1.

183 *Id.*

184 *Id.*

every extenuating circumstance, the Court left those protections to the legislature. The need for protecting liberty is so great, and the cases involved so numerous, that the only way to handle them is through legislation. The Court has not forgotten our liberty; it has left it in other hands.

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