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Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures

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INTRODUCTION

After forty-nine years working the sugar plantations in Hawai'i, Joseph Lopes retired with his wife Frances in a modest home they had managed to buy with the fieldwork earnings.[1] Their adult, mentally disabled son Thomas lived with them.[2] The *Pittsburgh Press* recounted their story:

> For a while, Thomas grew marijuana in the back yard—and threatened to kill himself every time his parents tried to cut it down. In 1987, the police caught Thomas, then 28. He pleaded guilty, got probation for his first offense and was ordered to see a psychologist once a week. He has, and never again has grown dope or been arrested. The family thought the episode was behind them. But [four years later], a detective scouring old arrest records for forfeiture opportunities realized the Lopes house could be taken away because they had admitted they knew about the marijuana.[3]

Federal drug agents subsequently paid Joseph and Frances Lopes a visit and claimed their home for the U.S. government.[4] The police stood to "make a bundle" on the house, as law enforcement was entitled to keep forfeited property and the proceeds of its sale.[5]

There was little recourse available to the Lopes family at the time, although developments in the law since then raise some potential defenses.[6] One of the more significant developments is recognition that the Eighth

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[1] Andrew Schneider & Mary Pat Flaherty, *Government Seizures Victimize Innocent*, PITTSBURGH PRESS, Aug. 11, 1991, at A1.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) offers some protections for innocent owners. *See* 18 U.S.C. § 983(d) (2012). However, this may not have helped the Lopeses, as they were not entirely innocent on these facts. CAFRA also offers some procedu-

Amendment's Excessive Fines Clause could apply to, and prohibit, a civil forfeiture so out of proportion to the gravity of the offense.[7] The problem is that it is not entirely clear how to apply the Excessive Fines Clause in a case like that of the Lopes family; the Supreme Court has acknowledged the potential applicability of the Eighth Amendment but has not given clear or meaningful guidance for when a forfeiture should be deemed "excessive."

Forfeitures, particularly civil forfeitures, have become a powerful tool for the Department of Justice, as well as for local law enforcement agencies. The ability to seize assets from suspected criminals, without having to prove their guilt, has proven irresistible, particularly because the seizing agency usually gets to keep the seized assets for its own use. Increasing application of forfeiture procedure in the war on drugs has caused the number and size of asset forfeitures to skyrocket over the past thirty years.[8]

Abuse of forfeiture procedure stirred sufficient concern on both sides of the aisle that in 2000, Congress, in a rare display of election-year bipartisanship, passed the Civil Asset Forfeiture Reform Act (CAFRA).[9] CAFRA was designed to rein in the worst abuses of the procedure but, for a variety of reasons, fell short of its intended objectives.[10]

A number of states were sufficiently concerned about the resulting injustices that they passed laws aimed at reining in the practice. Montana's and New Mexico's laws purported to end civil forfeitures altogether, although neither piece of legislation went that far.[11] The Department of Justice, for a time, suspended its "equitable sharing" program that allowed local law enforcement to invoke federal forfeiture authority to seize assets and keep a portion of the assets seized.[12] But equitable sharing has now resumed,[13] and

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ral protections, ensuring rights to court-appointed counsel to represent individuals in the forfeiture proceeding before a primary residence can be taken. *See* 18 U.S.C. § 983(b)(2)(A) (2012).

[7] *E.g.*, United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 740–42 (C.D. Cal. 1994) (holding that forfeiture of the father's home of twenty-two years for the acts of his son was an excessive fine barred by the Eighth Amendment).

[8] *See* DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 10 (2d ed. 2015) (noting a 4667% increase in revenue from assets seized by civil forfeitures from 1986 to 2014).

[9] Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000). The House vote of 375-48 included "yes" votes from 191 Republicans and 183 Democrats. *H.R. 1658 (106th): Civil Asset Forfeiture Reform Act of 2000*, https://www.govtrack.us/congress/votes/106-1999/h255 [https://perma.cc/H4N2-AQJQ]. The Senate then unanimously passed the bill with changes, and the House approved the changes. *H.R. 1658 (106th): Civil Asset Forfeiture Reform Act of 2000*, https://www.govtrack.us/congress/bills/106/hr1658 [https://perma.cc/UZ92-5G8U].

[10] *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 15 (2012).

[11] Both require a criminal conviction before the forfeiture can be effected, but it appears that those proceedings are still civil in nature, particularly as they apply to forfeitures from owners who were not actually defendants in the underlying case. *See* 2015 N.M. Laws 1688 (codified at N.M. STAT. ANN. § 31-27-4 (2015)) (requiring a criminal conviction before a forfeiture can be effected); 2015 Mont. Laws 1928 (codified at MONT. CODE ANN. § 44-12-207 (2015)) (same).

[12] Press Release, U.S. Dep't of Justice, Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), http://www.justice.gov/opa/pr/attorney-general-pro-

the practice continues unabated in most states, including in some that have attempted to limit its use.[14] In the meantime, the property rights of innocent people, as well as less-than-innocent people, are being compromised.

This article's focus is on Eighth Amendment rights, widely cited and known to prohibit "cruel and unusual punishment" but also prohibiting "excessive bail" and "excessive fines."[15] In *Austin v. United States*, the U.S. Supreme Court first ruled that a forfeiture could be deemed an excessive fine under the Eighth Amendment, but only if the forfeiture was "punitive" and not merely "remedial."[16] In *United States v. Bajakajian*, the Court, for the first time, applied the Excessive Fines Clause to strike down a civil forfeiture.[17] In that decision, the Court adopted and applied a standard borrowed from the Cruel and Unusual Punishment Clause cases, holding that the forfeiture is an excessive fine only if it is "grossly disproportional to the gravity of a defendant's offense."[18]

This standard has not proven to be a very useful guide for lower courts, however. It leaves them to decide whether specific amounts in particular cases exceed the "excessive" threshold, and if so, how much the forfeiture must be reduced to bring it within permissible constitutional bounds.[19] While the Supreme Court may have hoped that lower courts would sort out a reasonable and straightforward approach to applying this "grossly disproportional" test, the result has been a patchwork of inconsistent tests that have

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hibits-federal-agency-adoptions-assets-seized-state-and-local-law [https://perma.cc/945C-EKLX].

[13] Christopher Ingraham, *The Feds Have Resumed a Controversial Program That Lets Cops Take Stuff and Keep It*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it/ [https://perma.cc/H5KB-VBDA].

[14] *See, e.g.*, Anne Constable, *Civil Forfeiture Ongoing Despite Change to State Law*, SANTA FE NEW MEXICAN (Sept. 5, 2016), http://www.santafenewmexican.com/news/local_news/civil-forfeiture-ongoing-despite-change-to-state-law/article_bbc6c721-b1ff-5438-b735-65d533fd3706.html [https://perma.cc/7SLV-S3QG]; Martin Kaste, *New Mexico Ended Civil Asset Forfeiture. Why Then Is It Still Happening?*, NPR (June 7, 2016) http://www.npr.org/2016/06/07/481058641/new-mexico-ended-civil-asset-forfeiture-why-then-is-it-still-happening [https://perma.cc/8XTE-TBTH].

[15] U.S. CONST., amend. VIII.

[16] *See* 509 U.S. 602, 609–18 (1993).

[17] *See* 524 U.S. 321, 336–38 (1998).

[18] *Id.* at 334.

[19] *See, e.g.*, Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 295 n.92 (2014) (illustrating how the "[*Bajakajian*] doctrine has created a quagmire, both with respect to the question of what a fine is and the question of what renders a fine excessive"); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 845–46 (2013) ("[E]ach circuit has had to develop its own version of the *Bajakajian*[ ] multi-factor gross disproportionality test, with the gross disproportionality determination often characterized as an inherently fact-intensive inquiry.") (internal quotations omitted); Yan Slavinskiy, *Protecting the Family Home by Reunderstanding* United States v. Bajakajian, 35 CARDOZO L. REV. 1619, 1637–39 (2014) (noting how circuit courts have taken different approaches in applying the factors set forth in *Bajakajian*); Matthew C. Solomon, *The Perils of Minimalism:* United States v. Bajakajian *in the Wake of the Supreme Court's Civil Double Jeopardy Excursion*, 87 GEO L.J. 849, 884 (1999) (stating that *Bajakajian* "provides only limited guidance to future parties and the lower courts about the scope and applicability of the Excessive Fines Clause").

emerged in the various circuits and only muddled the issue. The Eleventh Circuit, for example, applies a three-factor test[20] but complains about "[t]he murkiness of these factors."[21] The Tenth Circuit, at the other extreme, applies a nine-factor test.[22] Yan Slavinskiy contrasts the multi-factor test approach used in these and other courts with "some courts" which "have limited themselves to considering only one primary factor—comparison of the value of the forfeiture with the maximum fine available under the relevant statute or the sentencing guidelines calculation."[23] He notes that "other [courts] do not consider any factors at all, citing *Bajakajian* for the vague proposition that courts should consider merely excessiveness."[24] The primary point of consistency in these tests may lie in their general permissiveness. "In fact, in the [first] fifteen years since *Bajakajian* was decided, only four courts of appeals applying *Bajakajian* . . . found a forfeiture to be excessive," two of which were on facts almost identical to *Bajakajian*'s.[25]

Rather than look solely to the Cruel and Unusual Punishment Clause—which has been criticized for being a volatile area of law[26]—for guidance, the courts should draw upon the Supreme Court's treatment of punitive damages under the Due Process Clause. When looking at punitive damage awards, courts have used the rule of thumb that if the ratio of punitive damages to compensatory damages is above single digits, there is a presumption that it violates due process, lending some consistency to lower court decisions.[27] A similar but more formal system for evaluating the excessiveness of

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[20] United States v. Browne, 505 F.3d 1229, 1281 (11th Cir. 2007).

[21] United States v. Chaplin's, Inc., 646 F.3d 846, 852 (11th Cir. 2011). "These [three] factors are not an exclusive checklist . . . . '[I]t would be futile to attempt a definitive checklist of relevant factors. The relevant factors will necessarily vary from case to case.'" *Id.* at 851 n.16 (quoting United States v. 427 and 429 Hall St., Montgomery, Montgomery Cty., Ala., 74 F.3d 1165, 1172 (11th Cir. 1996) (citations omitted)).

[22] United States v. Wagoner Cty. Real Estate, 278 F.3d 1091, 1101 (10th Cir. 2002) ("[I]n in addition to the *Bajakajian* factors, we [have] suggested other considerations: the general use of the forfeited property, any previously imposed federal sanctions, the benefit to the claimant, the value of seized contraband, and the property's connection with the offense.").

[23] Slavinskiy, *supra* note 19, at 1637 (citing, *inter alia*, United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1309 (11th Cir. 1999)) ("[I]f the value of forfeited property is within the range of fines prescribed by Congress, a strong presumption arises that the forfeiture is constitutional."); United States v. Hill, 167 F.3d 1055, 1072–73 (6th Cir. 1999) (en banc) ("[T]here is no constitutional violation when the forfeiture does not exceed the maximum fine allowed by statute.").

[24] Hill, 167 F.3d at 135 (citing United States v. Matai, Nos. 97-4129, 97-4130, 1999 U.S. App. LEXIS 1976 (4th Cir. Feb. 10, 1999) (*Bajakajian* analysis conducted in footnote)).

[25] *See id.* at 1637; *see also id.* at 1634 n.117 ("In a comprehensive survey of every circuit court that has applied *Bajakajian* to structure their excessiveness inquiry, the author found only four courts that have found forfeiture to be excessive. Two of these cases, *United States v. Ramirez*, 421 F. App'x 950 (11th Cir. 2011) and *United States v. Beras*, 183 F.3d 22 (1st Cir. 1999), have facts virtually identical to *Bajakajian*. The other two decisions, *Von Hofe v. United States*, 492 F.3d 175 (2d Cir. 2007) and *United States v. 3814 NW Thurman St.*, 164 F.3d 1191 (9th Cir. 1999), superseded by statute, 18 U.S.C. § 983 (2012), involve the forfeiture of family homes.").

[26] *See generally* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, 97 VA. L. REV. 899 (2011) (noting that the Cruel and Unusual Punishment Clause jurisprudence has been highly volatile and problematic over the past century).

[27] *See* State Farm v. Campbell, 538 U.S. 408, 411 (2003).

a fine, drawing on the U.S. Sentencing Guidelines Manual as a measure of the gravity of the offense, could provide trial courts and law enforcement with functional tools and meaningful standards for the constitutional analysis. In addition, an approach that gives teeth to the Excessive Fines Clause in these cases may also provide a long overdue check on the government's overreach in forfeiture cases.[28] Congress's attempt to rein in forfeiture abuse, through CAFRA, has failed to curb these excesses;[29] perhaps a revitalized, functional, and practical Excessive Fines Clause analysis can do what CAFRA could not.

This article begins with a description of what civil forfeitures are and how forfeiture procedure has, in some instances, led to abuse and overreach by law enforcement. In Part II, it explains how the Eighth Amendment's Excessive Fines Clause applies to civil forfeitures, including the vague and unworkable standard adopted by the Supreme Court, and the courts' failure to pay adequate attention to the problem of the owner's ability to pay. Part III describes how the Supreme Court has addressed constitutional limits on punitive damages, including the introduction of mathematical ratios as part of the test. The article concludes with Part IV, which lays out specific formulae that could be adopted to guide courts in the application of the Excessive Fines Clause in these cases. By drawing on the Sentencing Guidelines, a court can determine the seriousness of the offense, and then do a mathematical calculation to generate a ratio by which the excessiveness of a fine can objectively assessed.

I. What are Civil Forfeitures and Why are They Problematic?

At the outset, it is important to understand the difference between a criminal forfeiture and a civil forfeiture. The former follows a criminal conviction of the owner of the property and functions primarily as an additional punishment of the wrongdoer. The latter requires no criminal conviction, or even criminal charges, against the owner or anyone else. The jurisdiction for a civil forfeiture is *in rem*, so the guilt of the owner of the property is not relevant.[30] A case brought *in rem* is brought against the property, and it is sufficient that the property is considered guilty.[31]

These seizures fall into three different categories of forfeitable property, each of which is grounded in different legal justifications and public policy objectives: (1) contraband, (2) proceeds of an illicit activity, and (3) facilitat-

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[28] *See* Pimentel, *supra* note 10, at 23–32 (discussing the injustices inherent in, and tolerated by, the current forfeitures system).

[29] *Id.*; *see also* Constable, *supra* note 14 (illustrating that state legislation has similarly fallen short of eliminating the evils of the civil forfeiture practice).

[30] *See* Pimentel, *supra* note 10, at 26–28.

[31] *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 452 (1996); Goldsmith-Grant Co. v. United States, 254 U.S. 505, 513 (1921).

ing property or "instrumentalities" of crime.[32] It is important to distinguish these types of forfeitures, and to understand the nature of each, as the Eighth Amendment will apply only to forfeitures that are, at least in part, punitive.[33]

A. Types of Civil Forfeitures

1. Forfeiture of Contraband

Contraband is forfeitable for purely remedial reasons; the forfeiture of illegal drugs, obscene material, or adulterated food is not designed to punish the owner, but to remove the noxious material from circulation. These are the least controversial of forfeitures. We need not be concerned with the rights of owners, because any protection for owners' rights to such property would "frustrate[ ] the express public policy against the possession of such objects."[34] The forfeiture of contraband, therefore, serves remedial purposes and would not be characterized as punitive. As discussed *infra*, this is a critical distinction, because only a punitive forfeiture would be considered a "fine" for purposes of the Eighth Amendment.[35] Accordingly, contraband forfeitures will be viewed as entirely beyond the reach of the Excessive Fines Clause.[36]

2. Forfeiture of Proceeds

Proceeds, by contrast, originally applied to stolen property. In such cases, the forfeiture by the thief in favor of the owner "has a powerful restitutionary justification."[37] In recent years, a variety of federal statutes, starting with the Racketeer Influence and Corrupt Organizations Act (RICO),[38] have "dramatically enlarged this category to include the earnings from various illegal transactions," including the drug trade.[39] The theory here is one of unjust enrichment, that one should never be allowed to profit from his or her criminal activity, and that the property seized is something that the claimant never had a legitimate right to in the first place.[40]

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[32] *See, e.g.*, *Bennis*, 516 U.S. at 459–61 (Stevens, J., dissenting) (citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965); United States v. 92 Buena Vista Ave., Rumson, N.J., 507 U.S. 111, 121, n.16 (1993); Dobbins's Distillery v. United States, 96 U.S. 395, 399 (1877)).

[33] Austin v. United States, 509 U.S. 602, 609–10 (1993).

[34] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965).

[35] *See infra*, Part II.A.

[36] *See Bennis*, 516 U.S. at 459 (Stevens, J., dissenting).

[37] *Id.*

[38] Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C.A. §§ 1961–1968 (West 2016)).

[39] *Bennis*, 516 U.S. at 459 (Stevens, J., dissenting) (citing United States v. 92 Buena Vista Ave., Rumson, N.J., 507 U.S. 111, 121, n.16, (1993)); *see also* Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683, 694–700 (2014) (discussing the history and use of civil forfeitures in the war on the drugs).

[40] David Pimentel, *Forfeiture Procedure in Federal Court: An Overview*, 183 F.R.D. 1, 6 (1998).

Proceeds forfeitures are unique because they allow the seizure of substitute assets.[41] If the claimant made fifty thousand dollars dealing drugs, the law allows the forfeiture of any fifty thousand dollars the claimant may possess—there is no requirement, or reason to insist, that it be the *same* fifty thousand dollars that was earned in the drug trade.

A particularly interesting and divisive question is whether proceeds forfeitures should be viewed as solely remedial, or whether they may be applied in a punitive way. This issue, critical for the application of the Eighth Amendment, is explored in Part II.B.

3. Forfeiture of Facilitating Property

Facilitating property forfeitures, sometimes referred to as instrumentality forfeitures, are by far the most problematic constitutionally. These cases involve the forfeiture of property that (unlike contraband) is licit, and that (unlike proceeds) is legally acquired. The property becomes forfeitable only because of how the property has been used; specifically, the forfeitable property "includes tools or instrumentalities that a wrongdoer has used in the commission of a crime."[42] These types of forfeitures have repeatedly been upheld against due process challenges notwithstanding the fact that the owner may have been entirely innocent.[43] If, for example, the criminal borrows or steals a car and uses it to commit the crime, the car may be forfeited as facilitating property, although the forfeiture harms only the car's owner.[44] CAFRA created an "innocent owner" defense, in an effort to remedy this injustice, but because the burden of proof is on the owner to prove his own innocence, and because owners are understandably reluctant to come forward and give testimony tying them to the criminal evidence, this defense has had only a limited impact.[45] But even if these forfeitures are beyond the reach of the Due Process Clause, they may still be subjected to Eighth Amendment scrutiny.[46]

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[41] *See, e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 3207–13. The substitute assets provisions apply to RICO forfeitures as well, and appear to go beyond mere proceeds and allow forfeiture of substitute assets for instrumentalities of these crimes. *See also* 18 U.S.C. § 1963(m) (2012); 21 U.S.C. § 853(p) (2012).

[42] *Bennis*, 516 U.S. at 460 (Stevens, J., dissenting) (citing *One 1958 Plymouth Sedan*, 380 U.S. 693, 699 (1965)).

[43] *See* discussion of *Bennis* and *Goldsmith-Grant*, *infra* at Part I.B.

[44] *See Bennis*, 516 U.S. at 455 (Thomas, J., concurring) (citing Van Oster v. Kansas, 272 U.S. 465 (1926)).

[45] Pimentel, *supra* note 10, at 7 (noting that eighty percent of civil forfeitures are uncontested); *see also* Constable, *supra* note 14 (discussing a recent case on precisely these facts).

[46] They are subject to the Eighth Amendment if they are at all punitive, and *Austin* suggests that even the civil *in rem* forfeitures qualify for such treatment. *See* United States v. Austin, 509 U.S. 602, 618 (1993) ("We conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."). *But see* United States v. Bajakajian, 524 U.S. 321, 331 (1998) (stating in dictum that "[t]raditional *in rem* forfeitures were thus not considered punishment against the individual for an offense."). For a more detailed analysis on problems with the *Bajakajian* decision, see discussion *infra* Part II.D. This statement in *Bajakajian* was immaterial to the holding, because

B. History of Forfeitures

Although heavy use of forfeitures by law enforcement is a relatively new development, the roots of the procedure are ancient.[47] Early examples are found in Mosaic Law, which prescribed that if an ox gores a man, the ox shall be killed and its flesh not eaten.[48] More relevant to our common law jurisprudence are the Navigation Acts of the Seventeenth Century, which allowed for the seizure of ships employed in piracy and smuggling, a clear example of a facilitating property forfeiture.[49] The roots of civil *in rem* forfeiture are so deep that twentieth century case law relied on its hoary history as a reason to uphold its constitutionality, even in cases where the equities cut strongly in favor of innocent owners.[50] Two examples are worth noting.

First, in *Goldsmith-Grant v. United States*, an automobile dealer financed a vehicle at the sale, retaining a security interest in the car.[51] The purchaser of the car, however, used it to run liquor illegally during the Prohibition.[52] When the car was seized, the dealer argued that the government had seized his property without due process, particularly since the dealer was entirely innocent of the liquor running charge.[53]

Second, in *Bennis v. Michigan*, Mr. Bennis took the family car out and engaged a prostitute in it.[54] When Mr. Bennis was arrested, the car was seized.[55] Mrs. Bennis, who was certainly innocent in this case (indeed, there is no way to imagine her complicity in the crime), contested the forfeiture of her one-half interest in the car.[56]

In both cases, the U.S. Supreme Court rejected the claimants' arguments, citing the long history of the doctrine and of the legal fiction of "guilty property."[57] The doctrine was in existence at the time the Constitution was adopted, after all, and the Supreme Court reaffirmed in 1815,[58] 1827,[59] and 1844[60] upholding the forfeiture of ships. Against such a backdrop, the Supreme Court in 1996 felt that its hands were tied and ruled

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Bajakajian involved a criminal *in personam* forfeiture, not a civil *in rem* forfeiture. *Bajakajian*, 524 U.S. at 333 ("[T]he Government has sought to punish respondent by proceeding against him criminally, *in personam*, rather than proceeding *in rem* against the currency. It is therefore irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive . . . .").

[47] *See Pimentel*, *supra* note 10, at 7–8.

[48] *Exodus* 21:28 (King James).

[49] An Act for the Encouraging and Increasing of Shipping and Navigation 1660, 12 Car. 2 c. 18, § 1 (Eng.); CHARLES DOYLE, CONG. RESEARCH SERV., 97–139 A, CRIME AND FORFEITURE 2–3 (2007).

[50] *See* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2457–67 (2016) (discussing the history of *in rem* civil forfeitures).

[51] 254 U.S. 505, 508–09 (1921).

[52] *Id.* at 508.

[53] *Id.* at 509.

[54] 516 U.S. 442, 444–45 (1996).

[55] *Id.*

[56] *Id.*

[57] *Id.* at 446–50; Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511–12 (1921).

[58] The Mary, 13 U.S. 126, 151 (1815).

[59] The Palmyra, 25 U.S. 1, 15 (1827) (piracy).

against Mrs. Bennis: "We conclude today, as we concluded 75 years ago [in *Goldsmith-Grant*], that the cases authorizing actions of the kind at issue are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'"[61]

C. Abuse of the Procedure

Documented elsewhere is the "parade of horribles" that the doctrine has produced in the past thirty years. Congress held hearings in the 1990s, where witnesses told shocking stories of innocent property owners summarily relieved of their property on nothing more than suspicion that a crime may have occurred.[62] The burden of proof was on the property owner to prove the *property's* innocence (and we know from *Bennis* that the *owner's* innocence was immaterial).[63]

At the same time, the Department of Justice implemented a program called "equitable sharing," which allowed local law enforcement to seize assets under federal authority and keep a portion of the assets forfeited.[64] This allowed officials to take advantage of the favorable legal standards for forfeitures in federal court.[65] The result was a bonanza for local law enforce-

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[60] The Brig Malek Adhel, 43 U.S. 210, 210 (1844). Justice Story explained the concept in his 1827 opinion in *The Palmyra*:

> The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty.

25 U.S. at 14.

[61] *Bennis*, 516 U.S. at 453 (quoting *Goldsmith-Grant*, 254 U.S. at 511). Justice Thomas's concurrence did not hide his distaste for the result, but rather concluded: "This case is a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable." *Id.* at 454 (Thomas, J., concurring). It is worth noting that the *Bennis* case characterized civil *in rem* forfeitures under the headings of both "punitive and remedial jurisprudence." *Id.* at 442 (majority opinion).

[62] *See, e.g.*, *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the H. Comm. on the Judiciary*, 105th Cong. 105, 193–200 (1997) (prepared statements from the American Civil Liberties Union and Cato Institute).

[63] *See Bennis*, 516 U.S at 456–61 (documenting the well-established authority rejecting the innocent owner defense before the enactment of CAFRA). However, CAFRA in 2000 created an "innocent owner" defense, albeit one that is difficult to invoke and of limited value to owners. Civil Asset Forfeiture Reform Act of 2000, P.L. 106-185, 114 Stat. 202 (2000) (enacting that now "the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture"); *see also* Pimentel, *supra* note 10, at 26–27.

[64] DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1 (2009), https://www.justice.gov/criminal-afmls/file/794696/download [https://perma.cc/BLB6-XUQ6].

[65] The Comprehensive Crime Control Act of 1984, Pub L. No. 98-473, 98 Stat. 1976 (1984); *see also The Fund,* U.S. DEP'T OF JUSTICE, https://www.justice.gov/afp/fund [https://perma.cc/WP83-YTDC] (describing the national asset forfeiture program of the Department of Justice).

ment, which could parlay any suspicious circumstance—including the carrying of large quantities of cash—into an excuse to seize the desired property.[66]

The city attorney in Las Cruces, New Mexico provides an example of how law enforcement officials could abuse civil forfeitures. In 2014, he boasted that through civil forfeitures: "We could be czars. We could own the city. We could be in the real estate business."[67] He detailed how police targeted nice vehicles and other desirable assets, but that they should pursue bigger fish: "This is a gold mine! A gold mine! You can seize a house, not a vehicle!"[68]

The fact that the law enforcement agencies get to keep the seized assets, of course, creates a conflict of interest, if not a moral hazard.[69] Literally billions of dollars have been generated through these seizures.[70] There are reports of police departments creating wish lists of assets they want and choosing raid targets accordingly.[71] There are concerns that police prioritize their work to maximize forfeitures, neglecting a range of other cases, such as domestic violence cases, that rarely generate assets for the department.[72] As noted in the *Harvard Law Review*, "Civil forfeiture changes police behavior . . . : the allure of cash diverts police attention from nonfinancial crimes toward more lucrative drug cases. Within drug cases, police prefer to raid

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[66] *See, e.g.*, Michael Sallah et al., *Police Seizure of Motorists' Cash on Rise, Netting $2.5 Billion Since 9/11*, CHI. TRIB. (Sept. 8, 2014), http://www.chicagotribune.com/classified/automotive/sns-wp-washpost-bc-forfeiture-1-repeat06-20140906-story.html [https://perma.cc/H9T4-MV9S].

[67] Laura Sullivan, *Police Can Seize And Sell Assets Even When The Owner Broke No Law*, NPR (Nov. 10, 2014, 5:46 PM), http://www.npr.org/sections/thetwo-way/2014/11/10/363102433/police-can-seize-and-sell-assets-even-when-the-owner-broke-no-law [https://perma.cc/DEC7-BK47].

[68] *Id.* Needless to say, these statements attracted a lot of unfavorable attention; the episode ended with the city attorney going on leave as "a personnel matter" and then being replaced as city attorney a month later. *See* James Staley, *Las Cruces City Attorney on Leave After Controversial Comments Emerge*, ALBUQUERQUE J. (Nov. 20, 2014) https://www.abqjournal.com/499037/las-cruces-city-attorney-on-leave-after-controversial-comments-emerge.html [perma.cc/2SJA-VQY8]; Press Release, City of Las Cruces, New City Attorney Named (Dec. 2014), http://www.las-cruces.org/en/departments/public-information-office/news-releases/2014/december/new-city-attorney-named [perma.cc/Y82E-ALXY].

[69] United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 735 (C.D. Cal. 1994) ("Failure to strictly enforce the Excessive Fines Clause inevitably gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain for the government.").

[70] Developments in the Law, Chapter One, *Policing and Profit*, 128 HARV. L. REV. 1723, 1732 (2015).

[71] Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), http://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html?_r=0 [https://perma.cc/3L3U-RFL8].

[72] Richard Miniter, *Ill-Gotten Gains*, REASON.COM (Aug. 1, 1993), http://reason.com/archives/1993/08/01/ill-gotten-gains/ [https://perma.cc/QF5L-KFBU]; *see also* Karis Ann-Yu Chi, Comment, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1637, 1665 (2002); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 62 (1998).

drug buyers instead of sellers because the former are more likely to have cash."[73]

There are reports of police officers conducting traffic stops and asking every driver they stop how much cash they are carrying, only to seize the cash if it is a substantial sum.[74] New concerns have been raised in recent months, as some law enforcement officers are now equipped with card-reading technology that allows them to seize prepaid debit cards and confiscate whatever money is loaded on the card.[75] Victims of the seizures who profess their innocence are sometimes told that they can contest the seizure of their cash, or other assets, but with cautionary words: "Good luck proving it. You'll burn it up in attorney fees before we give it back to you."[76]

The problem is not limited to the seizure of assets from innocent persons. Even when there is wrongdoing, there may be no correlation between the seriousness of the owner's wrongdoing and the total value forfeited. Police intent on seizing valuable assets have strong incentives to target the owners, looking for an excuse to claim the desired property and deeming virtually any suspicious activity "good enough."[77]

The case of the Lopes family, which introduced this article, illustrates the harshness of federal civil forfeiture as a tool in the War on Drugs. Another case aired in congressional hearings on the forfeiture crisis in the mid-1990s involved Bill Munnerlyn,[78] who operated his own small business: an airplane charter service. His airplane was seized by federal authorities after he transported a client who was suspected of carrying drug money.[79] Mr. Munnerlyn spent $85,000 on legal fees and was forced to sell his three other planes to finance the legal battle to recover his seized plane.[80] When he finally got the plane back, Mr. Munnerlyn found that the government had

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[73] *Policing and Profit*, *supra* note 70, at 1735 (citing Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 869 (2014)).

[74] Ingraham, *supra* note 13. Presumably the fact that the individual is carrying a large sum of cash is, standing alone, sufficient basis to suspect criminal activity, and therefore forms the basis for the seizure. Clifton Adcock & Ben Fenwick, *Asset Forfeiture: Do Police Seize Innocent People's Money?*, OKLA. WATCH (Aug. 31, 2015), http://oklahomawatch.org/2015/08/31/asset-forfeiture-do-police-seize-innocent-peoples-money/ [https://perma.cc/PC97-TRM2] ("[S]heriff Randall Edwards, an outspoken supporter of seizure laws, has said that amounts of $10,000 or more are among the key indicators that cash is likely connected to drug operations.").

[75] Cristina Corbin, *Oklahoma's Use of Card Readers to Freeze, Seize Funds Comes Under Fire*, FOX NEWS (June 17, 2016), http://www.foxnews.com/tech/2016/06/17/oklahomas-use-card-readers-to-freeze-seize-funds-comes-under-fire.html [https://perma.cc/NZE9-S8LJ].

[76] Ingraham, *supra* note 13 (embedded video at 0:54). Michael Van Den Berg has proposed to remedy these types of situations by raising the transactional cost for police to conduct civil forfeitures so it is no longer profitable for the police to pursue forfeitures under ten thousand dollars. Michael Van Den Berg, Comment, *Proposing a Transaction Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867 (2015).

[77] *See, e.g.*, Sallah et al., *supra* note 64 ("For many innocents caught in the seizure net, the biggest misstep was carrying more cash than police thought was normal for law-abiding citizens.").

[78] Helen M. Kemp, *Presumed Guilty: When the War on Drugs Becomes a War on the Constitution*, 14 QUINNIPIAC L. REV. 273, 274 (1994).

[79] H.R. REP. NO. 106–192, at 8 (1999).

[80] *Id.*

done extensive damage to it ($100,000 worth), presumably searching for drugs or other evidence.[81] Sovereign immunity protected the government from liability for the damage done, so Mr. Munnerlyn lost his business and was forced to declare personal bankruptcy.[82]

A third horror story told to the House Judiciary Committee, and included in its report, illustrates the potential for profiling and unfair enforcement. In 1991, Willie Jones attempted to fly to Houston to purchase nursery stock for his landscaping business in Tennessee, carrying with him nine thousand dollars in cash.[83] He explained that it is easier to strike deals, especially for someone from out of town, if he paid in cash: "[T]he nursery business is kind of like the cattle business. You can always do better with cash money."[84] At the airport, he was confronted by officers who accused him of dealing drugs.[85] Their background check on him showed him to be "clean," so they had to let him go, but because drug-sniffing dogs alerted them to the money, they kept the currency.[86] The officers did not actually count the money and refused to issue a receipt for it.[87] Mr. Jones, who is African American, sued for the return of his money, arguing, among other things, that he was the victim of racial profiling by police.[88] He ultimately succeeded in securing the return of his nine thousand dollars, but only after more than two years of litigation and a weeklong trial, in which the court held that the government had failed to meet even the modest burden of showing probable cause for the seizure.[89] But the problem persists, as long as

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[81] *Id.*

[82] *Id.* at 9. Apparently, Mr. Munnerlyn ended up driving a truck for a living after the government's failed attempt to forfeit his plane destroyed his business and his credit. *Id.*

[83] *Id.* at 6.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 6–7.

[87] *Id.* at 7.

[88] *Id.*

[89] Jones v. U.S. Drug Enf't Admin., 819 F. Supp. 698, 724 (M.D. Tenn. 1993). The court declined to enter an injunction, however, and held that Jones did not prove that he was the victim of racial discrimination. The court's observation about forfeitures in general is compelling:

> The Court also observes that the statutory scheme as well as its administrative implementation provide substantial opportunity for abuse and potentiality for corruption. DIU personnel encourage airline employees as well as hotel and motel employees to report "suspicious" travellers and reward them with a percentage of the forfeited proceeds. The forfeited monies are divided and distributed by the Department of Justice among the Metropolitan Nashville Airport and the Metropolitan Nashville Police Department partners in the DIU and itself. As to the local agencies, these monies are "off-budget" in that there is no requirement to account to legislative bodies for its receipt or expenditure. Thus, the law enforcement agency has a direct financial interest in the enforcement of these laws. The previous history in this country of an analogous kind of financial interest on the part of law enforcement officers—i.e., salaries of constables, sheriffs, magistrates, etc., based on fees or fines—is an unsavory and embarrassing scar on the administration of justice. The obviously dangerous potentiality for abuse extant in the forfeiture scheme should trigger, at the very least, heightened scrutiny by the courts when a seizure is contested.

the law permits police to seize cash or other assets from people, such as Mr. Jones, on such flimsy grounds,[90] and as long as it is so costly and time-consuming to contest such seizures.

D. Legislative Reponses to the Problem

Congress passed CAFRA in 2000, in an effort to rein in the worst abuses. Unfortunately, the legislation—by the time it was watered down sufficiently to secure passage during an election year, and by a unanimous vote in the Senate—did far too little to contain the problem, and the crisis continues.[91]

CAFRA attempted to shift the burden of proof to the government to demonstrate that the property was indeed forfeitable, creating also an "innocent owner" defense to the seizure.[92] These innovations have had very little impact, however.[93] The government is forced to marshal its evidence and persuade a court that the forfeiture is justified only if the forfeiture is contested.[94] Because forfeitures are contested only about twenty percent of the time, in part due to poor notice,[95] the overwhelming majority of cases can be handled administratively without any oversight by a court.[96] So, police are not deterred and can retain large portions of seized property without having their grounds for or evidence supporting the seizure examined or questioned

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Id.

[90] The facts suggest that the dog's "alert" on the money is of extremely limited probative value. United States v. $242,484, 351 F.3d 499, 510–11 (11th Cir. 2003) (a drug dog's sniff of cash is "of little value" in determining whether the currency is presently being used for narcotics trafficking because as much as eighty percent of all cash in circulation contains drug residue). The cases go both ways on this point, however. *See* Pimentel, *supra* note 10, at 26 n.164–165.

[91] Pimentel, *supra* note 10, at 23–32.

[92] *Id.* at 16, 25.

[93] *See generally* Pimentel, *supra* note 10. "David B. Smith, author of the [treatise] Prosecution and Defense of Forfeiture Cases, says the courts have been steadily mitigating the 2000 bill's impact, both by narrowly interpreting the protections it grants defendants and by being overly deferential to prosecutors when determining if they've met the new evidentiary standard." Radley Balko, *Forfeiture Folly: Cover Your Assets*, REASON.COM (Apr. 2008), http://reason.com/archives/2008/03/07/forfeiture-folly [https://perma.cc/D2CF-H8KN].

[94] Pimentel, *supra* note 10, at 7. A possible reason for the high percentage of uncontested civil forfeitures may be the inadequate notice given to property owners. *See* Rebecca Hausner, Note, *Adequacy of Notice under CAFRA: Resolving Constitutional Due Process Challenges to Administrative Forfeitures*, 36 CARDOZO L. REV. 1915, 1932 (2015) (noting that "a more convincing explanation for the rate of over eighty percent of uncontested administrative forfeitures is that many claimants are simply not aware of the procedure to contest, or lack notice of the forfeiture proceeding itself").

[95] Pimentel, *supra* note 10, at 29–31 (discussing reasons owners may be reluctant to come forward and contest a forfeiture, including the high cost of litigation). Indeed, Mr. Jones's willingness pursue a federal case for two years, and then take it trial, over a mere $9,000 seizure would appear to be unusual, even irrational. That makes his case a rare exception. More likely, his case went to trial because of the civil rights claim, which he ultimately lost, but which might have allowed him to claim his attorney fees. Jones v. U.S. Drug Enf't Admin., 819 F. Supp. 698, 723 (M.D. Tenn. 1993).

[96] Pimentel, *supra* note 10, at 7–8.

and without having to answer any defenses, including the "innocent owner" defense.[97]

Similarly, CAFRA offers little protection to innocent owners, as they bear the burden of proving their own innocence, even as they claim the property that law enforcement suspects is tied to criminal activity.[98] By asserting their claim to the contested property, and giving testimony regarding it, they may well be waiving their own Fifth Amendment rights—including the right to remain silent—as to the underlying crime.[99] It is little wonder so few are willing to come forward and claim the seized property.[100]

However, forfeiture reform does not need to come from the federal government; state legislatures could also step in to curtail the practice. The state of New Mexico, responding in large part to the outrage generated by the Las Cruces City Attorney's remarks being made public, passed legislation to do away with civil forfeiture altogether.[101] Montana has done the same.[102] But, as noted above, recent news stories suggest that notwithstanding the new legislation in New Mexico, civil forfeitures are still taking place there.[103]

II. When and How Does the Eighth Amendment Apply to Forfeitures?

The Eighth Amendment, which prohibits cruel and unusual punishment as well as "excessive fines,"[104] is designed to be a check on the power of government to impose overly punitive sanctions on its populace. It has the potential, therefore, to serve as a vital check on prosecutorial overreaching in the seizure of assets. Unfortunately, the courts' application of the doctrine,

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[97] *See id.* at 31–32.

[98] *See id.* at 29–30.

[99] *Id.* at 29.

[100] *See id.* Nevertheless, under CAFRA, if a property owner does challenge a civil forfeiture and prevails against the government, he is entitled to an award of attorney's fees. 28 U.S.C. § 2465(b)(1)(A) (2012). Recently, in interpreting this provision of CAFRA, the Ninth Circuit Court of Appeals held that an attorney fees award of $50,775 of an attorney billing at an hourly rate of $500 was reasonable. *See* United States v. $28,000.00 in U.S. Currency, 802 F.3d 1100, 1104 (9th Cir. 2015). This is powerful precedent and, if followed in other circuits, it may deter police from pursuing assets in dubious or marginal circumstances.

[101] 2015 N.M. Laws 1688 (codified in N.M. Stat. Ann. § 31-27-4 (West 2017) (requiring a criminal conviction for a civil forfeiture); *see also* Nick Sibilla, *Civil Forfeiture Now Requires a Criminal Conviction in Montana and New Mexico*, Forbes (July 2, 2015, 8:45AM), http://www.forbes.com/sites/instituteforjustice/2015/07/02/civil-forfeiture-now-requires-a-criminal-conviction-in-montana-and-new-mexico/#83565fd6a481 [https://perma.cc/KV8Y-43ZU].

[102] 2015 Mont. Laws 1928 (codified in Mont. Code Ann. § 44-12-207 (2015) (requiring a criminal conviction for a civil forfeiture).

[103] *See* Kaste, *supra* note 14; Nicky Woolf, *Woman sues Albuquerque for Seizing Car Despite Ban on Civil Asset Forfeiture*, The Guardian (Aug. 31, 2016), http://www.theguardian.com/us-news/2016/aug/31/woman-sues-albuquerque-seizing-civil-asset-forfeiture-ban [https://perma.cc/9LZ8-9QF].

[104] U.S. Const., amend. VIII.

discussed below, has been too unfocused to establish effective limits on forfeitures, or to give meaningful guidance on what those limitations may be.

A. When Forfeitures Are Subject to Excessive Fines Analysis

The seminal case is *Austin*, which lays out the essentials of the analysis, helping us understand when and how the Eighth Amendment might apply to a civil forfeiture. The Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'"[105] The government had argued that a civil *in rem* forfeiture could not be a "fine," given its civil nature,[106] but the Court recognized that even civil forfeitures could be punitive. The Court held that a forfeiture, civil or criminal, may be characterized as a fine for Eighth Amendment purposes if it serves, even in part, to punish the property owner for an offense that has been committed.[107] Thus, in applying the Excessive Fines Clause of the Eighth Amendment to forfeitures, the first issue that must be addressed is whether the forfeiture is strictly remedial[108] or whether it is at all punitive:[109] that is, whether it serves *either* retributive or deterrence purposes.[110] If a forfeiture is entirely remedial—for example, compensating the government for lost revenues—it cannot be characterized as a fine, and the Eighth Amendment does not apply.[111] But, as already noted, "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment," and are therefore subject to the Excessive Fines Clause.[112]

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[105] Austin v. United States, 509 U.S. 602, 609–10 (1993) (emphasis in original) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

[106] *See id.* at 607. The Court had previously held that a punitive damages award was not a fine, despite its explicitly punitive purpose, because punitive damages are not paid to the state. *See Browning-Ferris*, 492 U.S. at 260. A civil forfeiture *is* paid to the state; the harder question for forfeitures is whether, and to what degree, they are intended as punishment.

[107] *See Austin*, 509 U.S. at 610. Forfeitures in kind "are thus 'fines' if they constitute punishment for an offense." United States v. Bajakajian, 524 U.S. 321, 328 (1998).

[108] *See Austin*, 509 U.S. at 610; *Bajakajian*, 524 U.S. at 329 (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curiam)).

[109] *See Austin*, 509 U.S. at 610 ("Thus, the question is not, as the United States would have it, whether forfeiture . . . is civil or criminal, but rather whether it is punishment.").

[110] *See id.* (quoting United States v. Halper, 490 U.S. 435, 448 (1989)) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."); *Bajakajian*, 524 U.S. at 329 ("Deterrence, however, has traditionally been viewed as a goal of punishment.").

[111] *See Austin*, 509 U.S. at 622 n.14 ("The Clause prohibits only the imposition of 'excessive' fines, and a fine that serves purely remedial purposes cannot be considered 'excessive' in any event."); Hudson v. United States, 522 U.S. 93, 103 (1997).

[112] *Austin*, 509 U.S. at 618; *see also id.* at 610–11 ("We, however, must determine that it can only be explained as serving in part to punish."). *But see Bajakajian*, 524 U.S. at 331 ("Traditional *in rem* forfeitures were thus not considered punishment against the individual for an offense."). This dictum in the *Bajakajian* decision is a curious one, because it appears to be in direct conflict with the holding in *Austin*, as observed by the dissenters in *Bajakajian*. *See id.* at 347 (Kennedy, J., dissenting) ("The majority suggests *in rem* forfeitures of the instrumentalities of crimes are not fines at all.").

A problem arises in the context of the innocent owner, however, because the Court in *Bennis* held that there was no innocent owner defense inherent in the Eighth Amendment.[113] As a result, it could not protect Mrs. Bennis, whose husband had used the car to engage a prostitute, from the seizure of the family car. But post-*Bajakajian*, it may be possible still for someone in Mrs. Bennis's situation to claim protection of the Eighth Amendment, based not on her special status as an innocent, but rather on the disproportionality of the punishment she's suffering. Mrs. Bennis did not raise the issue in terms of disproportionality, as the test did not exist at the time. The forfeiture of her property will certainly have a deterrent effect as *Bennis* recognized[114] and is therefore punitive, as *Bajakajian* recognized. Accordingly, the seizure of her interest in the family car may still be grossly disproportional under the Eighth Amendment.[115] Excluding the innocent altogether from Eighth Amendment protection would yield nonsensical results, since a forfeiture from a modestly culpable person could be unconstitutionally excessive, but the same forfeiture from an innocent person would not be.[116] Indeed, since the issue is the proportionality of the forfeiture/fine to the gravity of the offense—as determined, post-*Bennis*, in *Bajakajian*—and an innocent owner has committed no offense at all, one might argue that any forfeiture beyond a *de minimis* one would be *per se* disproportional, and likely grossly disproportional.[117]

B. Proceeds Forfeitures and the Excessive Fines Clause

Contraband forfeitures, as noted above, are inherently remedial. Whatever the state has prohibited can and must be confiscated to serve the remedial purpose of the statute banning it. So the Eighth Amendment presumably will not apply to contraband forfeiture. A facilitating property forfeiture—the classic *in rem* civil forfeiture—is typically seen as punitive, at

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[113] *See* 516 U.S. 442, 443 (1996).

[114] *See* Bennis v. Michigan, 516 U.S. 442, 452 (1996) (alteration in original) (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687 (1974)) ("Forfeiture of property prevents illegal uses 'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.'"). Although *Bennis* stated that "forfeiture also serves a deterrent purpose distinct from any punitive purpose," *id.*, *Bajakajian*, decided later, stated that "[d]eterrence, however, has traditionally been viewed as a goal of punishment," 524 U.S. at 329.

[115] *See Bajakajian*, 524 U.S. at 334.

[116] *E.g.*, the Excessive Fines Clause would protect Mr. Bennis from over-punishment for his relatively minor indecency offense, but would not protect Mrs. Bennis from the same punishment for her blameless behavior, precisely because her behavior was blameless.

[117] *See Bajakajian*, 524 U.S. at 324. The Court, however, has shown great reluctance, in both *Goldsmith-Grant* and *Bennis*, to take steps to constitutionally protect innocent owners in *in rem* forfeiture cases. *See Bennis*, 516 U.S. at 454–55 (Thomas, J., concurring). The Court was also hostile to takings claims by innocent owners for just compensation of the property forfeited. *See id.* at 452 ("The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.").

least in part, according to *Austin*.[118] Accordingly, we should expect the Eighth Amendment to apply to those.

Proceeds forfeitures, however, present a more difficult case. They are widely viewed as remedial; after all, it is not punishment to deprive someone of something they never had a right to in the first place. Following this line of thinking, the seizure of assets acquired through illegal activity would not violate the Excessive Fines Clause. Indeed, most circuits have held that a proceeds forfeiture dodges Eighth Amendment scrutiny either because it is non-punitive or because it could never be considered grossly disproportional to the crime itself.[119]

But the Fourth Circuit held in *United States v. Jalaram* that, in some cases, proceeds forfeitures may be punitive.[120] It is easy to imagine, for example, a small player in a large conspiracy, such as a "mule" in a large drug distribution ring, who is ordered to "forfeit" the entire profits of the drug conspiracy, even though this individual never saw more than the modest payment she received for carrying drugs across the border.[121]

Indeed, in its 2010 *Jalaram* decision, the Fourth Circuit expressly declined to follow the other circuits' conclusion that proceeds forfeitures are inherently remedial, opting instead for a more nuanced view, based on detailed analysis of the Supreme Court's holdings in *Austin v. United States*,[122]

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[118] *See* Austin v. United States, 509 U.S. 602, 609–10 (1993).

[119] *See, e.g.*, United States v. Sum of $185,336.07 U.S. Currency Seized from Citizen's Bank Account L7N01967, 731 F.3d 189, 194 (2d Cir. 2013) ("All of our sister courts of appeal that have considered this provision have concluded that the forfeiture of 'guilty property,' such as illicit drug proceeds, 'has been traditionally regarded as non-punitive' as to which the Eighth Amendment's restrictions on punishment do not apply . . . . We agree with this view and hold that the Eighth Amendment does not apply to forfeitures under 21 U.S.C. § 881(a)(6).") (external citations omitted); United States v. Betancourt, 422 F.3d 240, 250 (5th Cir. 2005) ("This Court has held that the Eighth Amendment has no application to forfeiture of property acquired with drug proceeds."); United States v. 22 Santa Barbara Drive, 264 F.3d 860, 874 (9th Cir. 2001) ("[C]riminal proceeds represent the paradigmatic example of 'guilty property,' the forfeiture of which has been traditionally regarded as non-punitive . . . ."); United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386, 1395–96 (10th Cir. 1997) ("Because the amount of proceeds produced by an individual drug trafficker is always roughly equivalent to the costs that drug trafficker has imposed on society, the forfeiture of those proceeds can never be constitutionally excessive."); Smith v. United States, 76 F.3d 879, 883 (7th Cir. 1996) ("[T]here is also no reason to conclude that the forfeiture of property or money exchanged for contraband-that is, the proceeds of drug trafficking-is anything but remedial."); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994) ("Forfeiture of proceeds cannot be considered punishment, and thus, subject to the Excessive Fines Clause, as it simply parts the owner from the fruits of the criminal activity."); *see also* United States v. $184,505.01 in U.S. Currency, 72 F.3d 1160, 1168–69 (3d Cir. 1995) ("We therefore hold that the forfeiture under 21 U.S.C. § 881(a)(6) of proceeds from illegal drug transactions, or proceeds traceable to such transactions, does not constitute 'punishment' within the meaning of the Double Jeopardy Clause.").

[120] *See* 599 F.3d 347, 355 (4th Cir. 2010) ("In a case where a defendant played a truly minor role in a conspiracy that generated vast proceeds, joint and several liability for those proceeds might result in a forfeiture order grossly disproportional to the individual defendant's offence.").

[121] *See id.*

[122] 509 U.S. 602 (1993).

Alexander v. United States,[123] and *Bajakajian v. United States*.[124] Specifically, the Fourth Circuit noted that although in the vast majority of proceeds cases there will be no gross disproportionality to the gravity of a defendant's offense, this does not warrant a *per se* rule against application of the Eighth Amendment to proceeds forfeitures, despite the appeal of such a bright-line test.[125]

> [T]he Government's proposed shortcut may work a grave injustice in cases involving joint and several liability. In such cases, some defendants inevitably disgorge more money than they received from the conspiracy, thus forfeiting property that they obtained lawfully in order to satisfy the forfeiture judgment. In a case where a defendant played a truly minor role in a conspiracy that generated vast proceeds, joint and several liability for those proceeds might result in a forfeiture order grossly disproportional to the individual defendant's offense. Yet, if we adopt the rule advanced by the Government, those defendants would be unable to obtain relief.[126]

If the reason for holding that proceeds are not subject to the Excessive Fines Clause is because they are thought to be entirely remedial, this will also depend on how "proceeds" are defined. If only the net proceeds of the illicit activity are forfeited, the forfeiture may fairly be characterized as purely remedial and not subject to the Excessive Fines Clause because it is taking the profit, and only the profit, out of the prohibited activity. The profiteer, of course, has no right to such ill-gotten gains, as the activity that generated them was prohibited by law. If, however, forfeitable proceeds are defined to include more than net profits, or if "proceeds" is defined to include gross revenues or an in-kind forfeiture the value of which is not purely profit, the forfeiture takes on a punitive character.

The problem is not merely hypothetical. The government typically does argue for the forfeiture of gross *revenues*, disregarding costs, which goes beyond merely disgorging the unjust enrichment.[127] To the extent that the

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[123] 509 U.S. 544 (1993).

[124] 524 U.S. 321 (1998).

[125] *Jalaram*, 599 F.3d at 354–55 ("In doing so, we recognize that in most cases, courts ultimately will find a forfeiture of proceeds not grossly disproportional to the offense. In a case involving a single offender, it would be very difficult, and perhaps impossible, for the defendant to show that the forfeiture of proceeds was grossly disproportional to the gravity of his offense. Thus, we can understand the desire of some of our sister circuits to simplify the analysis by holding such forfeitures exempt from constitutional scrutiny in the first instance.").

[126] *Id.* at 355. If the reason for holding that forfeiture of proceeds is not subject to the Excessive Fines Clause is because they can never be grossly disproportional, this does not necessarily end the analysis, especially in a jurisdiction such as the First Circuit which then conducts a livelihood analysis. *See* discussion *infra* at notes 171–78.

[127] *See* DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 10.05[6] § 4.03 n.185 (2012) ("The government generally urges the courts to interpret 'proceeds' to mean gross receipts. At the same time, and without acknowledging any contradiction, the government contends that proceeds forfeiture is inherently a remedial measure that merely deprives criminals of their ill-gotten gains. The government cannot have it both ways.").

forfeiture exceeds the wrongdoer's enrichment, the difference would need to be paid out of her legitimate assets.[128]

The practical effect of taking more than the profit out of the illegal activity, of course, serves deterrence and retributive purposes, i.e., non-remedial purposes. The punitive impact of that forfeiture, even though it is termed a "proceeds forfeiture," should bring it within the reach of the Excessive Fines Clause.

C. *How Excessive Fines Analysis Applies*

Once it is determined that the forfeiture is at least in part punitive, and therefore a fine within the meaning of the Eighth Amendment, the question turns to whether the fine is excessive.

In *Bajakajian*,[129] the Supreme Court applied the principles articulated in *Austin* to strike down a forfeiture under the Eighth Amendment. The case involved a man who attempted to take a large sum of cash out of the United States without properly declaring it on the required customs forms.[130] It was not a terribly egregious infraction; no one suggested, then or now, that the cash was improperly held or connected in any way with illegal activity.[131] Mr. Bajakajian's sole violation was the failure to disclose that he had it with him. And, the court noted, his failure was apparently prompted by cultural differences, as he had grown up as part of an Armenian minority in Syria, where he had learned to be distrustful of government officials.[132]

Following *Austin*, the Court found the forfeiture to be punitive, and held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[133] A forfeiture of the full amount of undeclared cash—more than $350,000 in this case—for such a minor offense, the Court held, constitutes an excessive fine in violation of the Eighth Amendment.[134] The Court did uphold the forfeiture of $15,000 of the money, an arguably arbitrary amount assessed by the district court, but only because the parties had not appealed that assessment.[135]

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[128] Also, as the Fourth Circuit pointed out in *Jalaram*, there is a problem where the proceeds being forfeited are jointly owned, but the owners are not equally culpable. *See* 599 F.3d at 355. As interpreted by the Fourth Circuit, the gross disproportionality analysis refers specifically to gravity of the offense, not the culpability of the owner. *See id.* If the offense was serious enough, the forfeiture might not be disproportional to its gravity, but the fine may nonetheless excessive as to the less culpable defendant. *See id.*

[129] 524 U.S. 321 (1998).

[130] *See id.* at 324.

[131] *See id.* at 337–38.

[132] *See id.* at 326 ("The District Court further found that respondent had failed to report that he was taking the currency out of the United States because of fear stemming from 'cultural differences': Respondent, who had grown up as a member of the Armenian minority in Syria, had a 'distrust for the Government.'").

[133] *Id.* at 334.

[134] *See id.* at 337.

[135] *See id.* at 337 n.11 ("[R]espondent did not cross-appeal the $15,000 forfeiture ordered by the District Court. The Court of Appeals thus declined to address the $15,000 forfeiture,

The "grossly disproportional" language the Court used to justify its decision was borrowed from the Excessive Fines Clause's jurisprudential neighbor, the Cruel and Unusual Punishments Clause.[136] Specifically, if a court determines that the forfeiture is grossly disproportional to the gravity of the offense, then that forfeiture is an excessive fine and is unconstitutional.[137]

D. Problems with the Bajakajian Decision

Shortly after the *Bajakajian* case came down, it was criticized as a minimalist decision that raised more questions than it answered about the scope and application of the Excessive Fines Clause.[138] Indeed, the Court made broad pronouncements about emerging constitutional protections, yet issued a narrow holding and rationale predicted to limit the decision's precedential value to a narrow subset of cases.[139]

In particular, the decision raised a problematic conflict with *Austin*, since *Bajakajian* suggest that *in rem* civil forfeitures are typically *not* subject to Excessive Fines analysis:[140] "Traditional *in rem* forfeitures were thus not considered punishment against the individual for an offense. Because they were viewed as non-punitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause."[141] This dictum flies in the face of the explicit holding of *Austin*, that civil *in rem* forfeiture can and usually do contain some element of punishment, and therefore *are* subject to the Excessive Fines Clause.[142] The dissenters in *Bajakajian* complained about this inconsistency, as did the Eighth Circuit in *United States v. Lippert*, the latter Court remaining uncertain whether Excessive Fines analysis applied to the civil *in rem* forfeiture in the case before it.[143] But because the issue was not part of the specific holding in *Bajakajian*,[144] the *Austin* holding should still be good law.

Assuming that *Bajakajian*'s standard applies to civil *in rem* forfeitures, consistent with the holding of *Austin*, the most serious problem with the

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and that question is not properly presented here either."); *see also id.* at 348 (Kennedy, J., dissenting) ("By affirming, the majority in effect approves a . . . $15,000 forfeiture.").

[136] *See id.* at 336 (citing Solem v. Helm, 463 U.S. 277, 288 (1983)).

[137] *Id.* at 337. A finding of unconstitutionality typically results in remanding the case back to the lower court to impose limits on the forfeiture so it is not excessive. *See, e.g.*, Von Hofe v. United States, 492 F.3d 175, 191 (2d Cir. 2007).

[138] *See* Solomon, *supra* note 19.

[139] *See id.*

[140] *See Bajakajian* 524 U.S. at 340–41 (stating *in rem* forfeiture "were not considered at the Founding to be punishment for an offence"); *see also id.* at 347 (Kennedy J., dissenting) ("The majority suggest *in rem* forfeitures of instrumentalities of cites are not fines at all.").

[141] *Id.* at 331 (citations omitted).

[142] *See* 509 U.S. 602, 618 (1993).

[143] 148 F.3d 974, 978 (8th Cir. 1998) (involving Anti-Kickback Act civil penalties).

[144] 524 U.S. at 333 ("[T]he Government has sought to punish respondent by proceeding against him criminally, *in personam*, rather than proceeding *in rem* against the currency. It is therefore irrelevant whether respondent's currency is an instrumentality; the forfeiture is punitive . . . .").

decision remains: the "grossly disproportional" standard it adopted. That standard does not provide a coherent framework to guide future parties and lower courts in the application of the Excessive Fines Clause to forfeitures.[145] The words "grossly disproportional" offer almost nothing to clarify the term "excessive." As Solomon observed shortly after the decision was rendered:

> [T]he Court's "grossly disproportional" standard is vague and does not purport to be a uniform excessive fines test. The *Bajakajian* Court declined to set guidelines on what dollar amounts are acceptable under what circumstances, choosing instead to defer to the sensibilities of the lower courts . . . . [T]he Court could have suggested a rough baseline . . . to assure some semblance of uniformity and fairness in future cases . . . . Furthermore, by approaching the unique facts of *Bajakajian* in isolation, the Court applied its newly-borrowed standard in a fashion that makes it unclear what future criminal fines may be deemed constitutionally excessive.[146]

Not only is "gross disproportionality" in the eye of the beholder, the "gravity of the offense" is difficult to discern by any objective standard. In a footnote, Justice Thomas observed, "In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence,"[147] reflecting the understanding that the legislature decides what is a crime and what is not, often prescribing the contours for punishment, and in so doing determines how serious the crime may be.[148] But Justice Thomas did not find the legislatively prescribed maximum penalties to be helpful in this particular case.[149]

Of course, even though congressionally authorized penalties are "relevant evidence,"[150] there is also some tension inherent in allowing the legislature to define constitutional standards. If the Court defers to Congress for the decision of what is proportional (and therefore what is unconstitutional under the Eighth Amendment), the Court may be failing to perform its constitutional duty, offending separation of powers principles in its failure to check congressional power.[151]

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[145] Solomon, *supra* note 19, at 875–76.

[146] *Id.* at 877–78 (citations omitted).

[147] *Bajakajian*, 524 U.S. at 336, 338 n.14.

[148] Excellent examples are anti-narcotics laws governing the possession and use of marijuana, which carries serious penalties under federal law, and in many states, but which has been entirely decriminalized in other states, which presumably perceive the offense as to be so innocuous as to be unworthy of *any* criminal penalties.

[149] *See* quote and discussion *infra*, at note 208 *et seq.*

[150] *Bajakajian*, 524 U.S. at 336, 338 n.14.

[151] *See id.* (suggesting that non-judicial guidelines for punishment "cannot override the constitutional requirement of proportionality review").

E. Ability to Pay and the Deprivation of One's Livelihood

Another problem with the *Bajakajian* decision is its failure to consider the individual's ability to pay. There is considerable evidence that the Excessive Fines Clause was intended to protect the individual from the imposition of fines that would be ruinous to him in particular. If that is what "excessive" means, then it is not enough to evaluate the proportionality of the fine to the seriousness of the offense. A fine that is easily paid by one party might be genuinely devastating to a less affluent individual who had committed the same offense. Characteristics of the offender must be relevant as well.

The historical roots of the Excessive Fines Clause are explained in considerable detail by Nicholas McLean, who traces the principles back to the English Bill of Rights in 1689 and even earlier.[152] In particular, he calls attention to the:

> largely forgotten principle of English law known as *salvo contenemento suo* (translated as "saving his contenement," or livelihood). Enshrined in the Magna Carta, this principle had become firmly established as a fundamental principle at common law by the seventeenth and eighteenth centuries. The principle required, among other things, that a defendant not be fined an amount that exceeded his ability to pay. The historical evidence suggests that the English Bill of Rights' outlawing of "excessive fines" was intended—at least in part—to reaffirm this principle.[153]

McLean goes on to argue that the financial capacity of the offender is an essential factor in any excessive fines analysis. "As a historical matter," he contends, "the Excessive Fines Clause of the Eighth Amendment can appropriately be understood as encoding two complementary, but distinct, constitutional principles: (1) a proportionality principle, linking the penalty to the offense, and (2) an additional limiting principle linking the penalty imposed to the offender's economic status and circumstances."[154]

In particular, the livelihood of the individual, his capacity to support himself, is a matter of particular sensitivity, demanding special protection. The Magna Carta was explicit in this regard, protecting an individual's right to retain his means of livelihood:

> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage.[155]

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[152] *See* McLean, *supra* note 19, at 835–38.
[153] *Id.* at 385–86.
[154] *Id.* at 386.
[155] Magna Carta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6–7 (1762 ed.).

The equitable principles behind such rules are evident in the modern jurisprudence of bankruptcy. The discharge of otherwise ruinous debt is considered to be a worthy legal objective, notwithstanding the injustice it inevitably wreaks on blameless creditors.[156] The homestead exemption in bankruptcy (and in taxation) is designed to ensure that the debtor (or taxpayer) is not rendered homeless by the financial obligation.[157]

The concept is closely related to "forfeiture of estate," a severe punishment that was meted out against traitors and other felons, by which their entire estate was seized by the Crown.[158] In English society, where inherited landholdings were a person's claim to both livelihood and social status, this was a particularly harsh punishment, ensuring the impoverishment not only of the wrongdoer, but of his progeny for generations to come.[159] Accordingly, the drafters of the U.S. Constitution were careful to explicitly prohibit forfeiture of estate as a punishment for treason.[160] Within months of convening, the very first Congress passed separate legislation barring forfeiture of estate for any other crime as well.[161]

This provides context for understanding the Excessive Fines Clause itself, adopted shortly after the Constitution, with the ratification of the Bill of Rights. The language of the Eighth Amendment states simply: "Excessive

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[156] *See e.g.*, Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047, 1059 (1987); Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) ("[T]he principal purpose of the Bankruptcy Code is to provide debtors in bankruptcy with a fresh start.").

[157] *See* Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 250–51 (2006).

[158] CHARLES DOYLE, CONG. RESEARCH SERV., 97–139 A, CRIME AND FORFEITURE 2 (2007).

[159] THOMAS WILLIAM HEYCK & MEREDITH VELDMAN, THE PEOPLES OF THE BRITISH ISLES: A NEW HISTORY FROM 1688 TO THE PRESENT 47–49 (2014), http://lyceumbooks.com/pdf/PeoplesBritishIslesII_Chapter_03.pdf [https://perma.cc/2YW6-HNNT]. Heyck and Veldman explain:

> The key feature of eighteenth-century English society was that it was arranged as a status hierarchy . . . . Gentle status was defined as the ability to live well without working for a living, or, as the novelist Daniel Defoe put it, gentlemen were "such who live on estates, and without the mechanism of employment."

Id.

[160] *See* U.S. CONST. art. III, § 3 ("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 the Life of the Person attained.").

[161] *See* Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ("[N]o conviction or judgment for any of the offences aforesaid, shall work corruption of blood, or any forfeiture of estate."). Forfeiture of estate remained consigned to dustbins of history until the PATRIOT Act revived the concept over two hundred years later, allowing forfeiture of estate for anyone "engaged in planning or perpetrating any . . . Federal crime of terrorism." 18 U.S.C. § 981(a)(1)(G)(i) (2012); *see also* 50 U.S.C. § 1702(a)(1)(C) (2012). Although, it has been invoked only rarely, if ever. CHARLES DOYLE, CONG. RESEARCH SERV., 97-139 A, CRIME AND FORFEITURE 1, 3–4 n.16 (2007) ("At least to date [May 9, 2007], this authority has rarely, if ever, been used."). Department of Justice reluctance to invoke this provision of the PATRIOT Act, is not surprising given its dubious constitutionality.

bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[162]

Beth Colgan has made a sweeping case for a reinterpretation of the Excessive Fines Clause, suggesting that its application should consider "the facts of a particular offense, the characteristics of a particular offender, [and] the effects of the fine on the defendant."[163] Her review of the historical record suggests that the spirit of the Eighth Amendment "resounds with quite remarkable humanity and pragmatism" and that the government "should recognize the practical consequences of imposing fines on individuals and their families, and should not impoverish even those who have committed crimes."[164]

With few exceptions, American courts have not, however, embraced this principle in the application of Excessive Fines jurisprudence. In most circuits, the gross proportionality determination is the end of the analysis.[165] In the majority opinion in *Bajakajian*, Justice Thomas quoted the Magna Carta language that fines "should be proportioned to the offense and that they should not deprive the wrongdoer of his livelihood,"[166] but went no further with the issue, presumably because the claimant "d[id] not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood."[167] And most circuits have declined to consider such factors.

The First Circuit presents a notable exception. In *United States v. Jose*[168] and *United States v. Levesque*,[169] it adopted an approach to Excessive Fines that follows the proportionality assessment with a subsequent analysis examining whether the forfeiture would result in a destruction of the property owner's livelihood. *Jose* derived this conclusion from the history, quoting Justice Thomas's discussion of the issue in the context of the English Bill of Rights and Magna Carta in *Bajakajian*: "Given the history behind the Excessive Fines Clause, it is appropriate to consider whether the forfeiture in question would deprive Jose of his livelihood."[170]

In *Levesque*, the district court had refused to "delve into . . . [the] defendant's personal finances,"[171] but the court of appeals vacated and re-

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[162] U.S. CONST. amend. VIII.

[163] Colgan, *supra* note 19, at 333–34.

[164] *Id.* at 350.

[165] *See, e.g.* United States v. Browne, 505 F.3d 1229, 1281 (11th Cir. 2007); United States v. Castello, 611 F.3d 116, 120-21 (2d Cir. 2010); United States v. Bollin, 264 F.3d 391, 418 (4th Cir. 2001).

[166] 524 U.S. 321, 335 (1998).

[167] *Id.* at 340 n.15.

[168] 499 F.3d 105, 113 (1st Cir. 2007).

[169] 546 F.3d 78, 83 (1st Cir. 2008) ("Beyond the three factors described in *Heldeman*, a court should also consider whether forfeiture would deprive the defendant of his or her livelihood."); *see also Bajakajian*, 524 U.S. at 340 n.15 (noting the failure of respondent to argue the issue of loss of livelihood). The Ninth Circuit has suggested that it will consider "deprivation of livelihood" in its analysis as well. *See* United States v. Hantzis, 403 F. App'x 170, 172 (9th Cir. 2010).

[170] 499 F.3d at 113.

[171] 546 F.3d at 83.

manded for consideration of whether the forfeiture "effectively would deprive the defendant of his or her livelihood."[172] The court observed that the deprivation of livelihood issue "is separate from the . . . test for gross disproportionality and may require factual findings beyond those previously made by the district court."[173] Thus, in the First Circuit, a fine that is not grossly disproportional may still be excessive for a given individual where that forfeiture would deprive the individual of his or her livelihood.[174] Only if a given forfeiture passes the grossly disproportional test *and* preserves the property owner's livelihood can the forfeiture be upheld as constitutional in the First Circuit.[175]

The Ninth Circuit has suggested that it may consider this factor as well. In *United States v. Hantzis*, the Court cited *Bajakajian*'s Magna Carta reference and upheld the forfeiture, in part because the claimant "was very wealthy, and as he refused to submit a financial affidavit, there was no evidence that a fine would 'deprive him of his livelihood.'"[176] The Ninth Circuit has yet to specifically hold, however, that deprivation of livelihood would render an otherwise permissible fine excessive under the Eighth Amendment, or that it would be error to ignore the claimant's personal financial circumstances.

The Eleventh Circuit, in contrast, has expressly rejected any analysis of the effect on the individual's livelihood, creating a split between the circuits.[177] Most circuits have not addressed this issue directly, although many have articulated tests for excessiveness, listing factors to be considered that omit any mention of deprivation of livelihood.[178]

It remains to be seen how this issue will resolve itself in the federal courts. The historical record reveals, however, considerable basis to argue that deprivation of livelihood and, arguably, ability to pay, should be critical factors in a complete Excessive Fines analysis.

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[172] *Id.* at 84.

[173] *Id.* at 85.

[174] *Id.* at 83.

[175] *Id.*; *see also* United States v. Aguasvivas-Castillo, 668 F.3d 7, 16 (1st Cir. 2012).

[176] *See* 403 F. App'x 170, 172 (9th Cir. 2010).

[177] *See* United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("More important, we do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment."); *see also* McLean, *supra* note 19, at 835 (arguing that the failure of other circuits to adopt a livelihood analysis "is both inequitable and ahistorical").

[178] *See, e.g.*, United States v. Wagoner Cty. Real Estate, 278 F.3d 1091, 1101 (10th Cir. 2002) (employing a nine-factor test for the Excessive Fines Clause, without mention of preserving the claimant's livelihood or of her ability to pay); United States v. Haleamau, 887 F. Supp. 2d 1051, 1065 (D. Haw. 2012) (applying a four-factor grossly disproportionate test that included "'(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused'" (quoting United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1122 (9th Cir. 2004))).

III. Contrasting Approach to Fourteenth Amendment (Due Process) Standards for Punitive Damages

The Court in *Bajakajian* needed to articulate some standard for what constitutes an "excessive fine" under the Eighth Amendment, and understandably turned to the Cruel and Unusual Punishment Clause jurisprudence for guidance.[179] After all, the clauses appear next to each other in the same amendment.[180] But for a variety of reasons, the constitutional limits on punitive damages, under the Due Process clause of the Fourteenth Amendment, provide a far more compelling parallel.

In *Browning-Ferris*, the Supreme Court held that the Eighth Amendment did not apply to punitive damages.[181] A punitive damages award could not violate the Eighth Amendment, because the damages are not paid to the sovereign, and therefore could not be construed as a fine, excessive or otherwise.[182] A forfeiture, in contrast, typically *is* paid to the sovereign, which is why it is subject to Eight Amendment analysis.[183]

This fundamental difference is dispositive in terms of Eighth Amendment application. However, punitive damages and forfeitures—at least those forfeitures intended to be punitive, which are the only ones the Eighth Amendment covers—are strikingly similar. Both are designed for a punitive purpose (deterrence and/or retribution) but operate outside of the criminal law context; both are available over and above any criminal penalties that may be imposed for the same conduct; and both are financial in their impact and can therefore be measured in quantitative (dollar) terms. It is therefore instructive to track the Supreme Court's treatment of punitive damages if we are looking for a logical constitutional analogue for forfeitures.

BMW v. Gore was a watershed moment for punitive damages, as the Supreme Court held for the first time that a punitive damages award could be so disproportionately high as to violate the defendant's due process rights.[184] To analyze the constitutionality of an award of punitive damages, the Supreme Court articulated three guideposts, or factors: (1) the reprehensibility of the conduct, (2) the ratio between the amount of compensatory damages and the amount of punitive damages awarded in the case, and (3)

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[179] *See* 524 U.S. 321, 336 (1998).

[180] *See* U.S. Const., amend. VIII.

[181] *See* Browning-Ferris Indus. v. Kelco, 492 U.S. 257, 259 (1989).

[182] *See id.* at 265. *But see* Colgan, *supra* note 19, at 300–11 (noting a very long history in English and American law in which fines were imposed that did *not* go to the sovereign).

[183] *See* United States v. Austin, 509 U.S. 602, 622 (1993) ("We therefore conclude that forfeiture under these provisions 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.") (internal quotations and citations omitted).

[184] *See* 517 U.S. 559, 559 (1996).

the fines and civil penalties already prescribed for the tortious behavior that prompted the award.[185]

Seven years later, the *BMW v. Gore* rubric was reaffirmed and clarified in *State Farm v. Campbell*.[186] Of particular interest was Campbell's discussion of *BMW v. Gore*'s guidepost Number 2, the ratio between the compensatory damages and punitive damages. Specifically, the Court observed that a 4:1 ratio should normally withstand constitutional scrutiny, but few awards with ratios in the double digits (i.e. 10:1 or greater) would be justified under the Due Process clause.[187] On the other hand, the Court observed that in some cases, even a 1:1 ratio may be too much if the compensatory damages are high, or if the compensatory damages already include a punitive element.[188]

State Farm and *Gore* have generated considerable comment and controversy, and the impact of these decisions has been hotly debated.[189] Empirical study indicates that the ratios suggested by the Supreme Court have had a marked impact on the range of punitive damages awards.[190] The result has

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[185] *See id.* at 560–61. A plurality opinion in *TXO Prod. Corp. v. Alliance Res. Corp.*, decided before *BMW v. Gore*, suggested that *potential* harm was relevant to assessing the constitutionality of the punitive damage award; it was not necessary that the harm actually occur and the compensatory damages actually accrue. *See Austin*, 509 U.S. at 459. About a quarter of the courts explicitly apply the potential harm baseline suggested by *TXO*. *See* Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages; Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257 (2015).

[186] 538 U.S. 408, 418 (2003).

[187] *See id.* at 425. The decision also identifies exceptions where the ratios may not be so compelling, including cases in which (1) particularly egregious acts result in small economic dangers, (2) injuries are difficult to detect, or (3) the value of non-economic harm is hard to detect. *See id.* at 410.

[188] *See id.* (citing "cases involving outrage or humiliation" as ones that already include a punitive element).

[189] *See, e.g.*, Heather R. Klaassen, *Punishment Defanged: How the United States Supreme Court Has Undermined the Legitimacy and Effectiveness of Punitive Damages*, WASHBURN L.J. 551, 555–57 (2008) (criticizing *State Farm v. Campbell* stating the decision "threaten[s] to undermine the historic value of punitive damages as a remedy by which to punish a particular defendant for particular conduct"); Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 292–96 (1997) (criticizing the idea of calculating punitive damages as a multiple of compensatory damages due to difference in policy objectives between the two sets of damages). *But see, e.g.*, Garrett T. Charon, Note, *Beyond a Bar of Double-Digit Ratios:* State Farm v. Campbell*'s Impact on Punitive Damages Awards*, 70 BROOK. L. REV. 605, 621–23 (2005) (arguing that *State Farm v. Campbell* is necessary to cure the many problems remaining after *BMW v. Gore* and is the best available method to protect a defendant's due process rights while carefully avoiding excessive interference with states' rights and legitimate interests); Daniel F. Thomas, *Necessary Protection: An Examination of the* State Farm v. Campbell *Standard and Why Economically Efficient Rules Do Not Work at the Intersection Between Due Process and Punitive Damages*, 70 ALB. L. REV. 367, 385–97 (noting the many benefits of *State Farm v. Campbell* and dismissing the primary criticisms of the decision).

[190] For example, the median of punitive damages awards across seventeen categories of cases has, since *State Farm v. Campbell*, gone down to below a 4:1 ratio. Hines & Hines, *supra* note 185, at 1288. While trial courts have allowed punitive damages in a ratio over 10:1 in thirty-nine percent of their cases, the appellate courts—presumably applying *Campbell*—have reduced more than half of those awards, bringing the total percentage over that ratio down to nineteen percent. *Id.* at 1289.

brought some consistency and predictability to the awards of punitive damages in the lower courts, because defense lawyers have some numbers to argue in court, and judges have a rubric to use in assessing these punitive damage awards.[191] While no one advocates strict mathematical tests, the *State Farm* formulae give the parties a basis for arguing the excessiveness issue, and give the courts a basis for evaluating such arguments. Judges or courts whose views of these matters are outliers on either end of the spectrum benefit enormously from the establishment of a presumptive range; expectations are clearer, and they can bring their judgments more in line with fellow courts' rulings in comparable cases.[192] At the same time, the predictability of the punitive damages award strongly promotes settlements, as the likely consequences of going to trial, for both parties, are more clearly spelled out.

IV. Practical Standards and Tools for Analyzing the Excessive Fines Issue

The Supreme Court's reliance on Cruel and Unusual Punishment Clause jurisprudence to articulate a standard for the Excessive Fines Clause is decidedly unhelpful in creating a meaningful precedent or in guiding lower courts and law enforcement on how to handle contested forfeitures. We know now that a forfeiture, if even partially punitive, *can* violate the Excessive Fines Clause, but only if it is "grossly disproportional" to the gravity of the offense,[193] terms only marginally more objective or meaningful, in the context of a forfeiture, than the word "excessive."

The issue of what is punitive remains somewhat murky, given the circuit courts' split over whether and when proceeds forfeitures can fall into this category, as well as the inconsistent messages from the Supreme Court about civil *in rem* forfeitures.[194] But the most serious problem lies in the application of the "grossly disproportional" standard, articulated in *Bajakajian*, in Excessive Fines cases.

The troubled history of the Cruel and Unusual Punishment Clause should put one on notice that the "grossly disproportional" standard is difficult to apply. The Supreme Court has had to revisit, reformulate and apply the rule again and again, handing down a series of problematic decisions applying that clause over the past century.[195] If the Supreme Court could

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[191] *See id.* at 1289.

[192] Some have argued, of course, that consistency in the court decisions is *not* a salutary goal. If each case must be decided on its own facts, and each case is different, there is no reason to believe that punitive damage awards in dissimilar cases should be similar.

[193] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[194] See discussion of the tension between *Austin* and *Bajakajian*, highlighted by the dissent in *Bajakajian* and by the Eighth Circuit in *Lippert*, *supra* notes 140–44. A more thorough explanation of the question of whether and when a forfeiture should be considered even partially punitive is a subject for another article.

[195] *See generally* Stinneford, *supra* note 26.

have found a brighter line or a more workable standard for those cases, perhaps the litigation and the ongoing controversies could have been limited. It would be very difficult to define bright lines or workable standards for measuring cruelty, of course. But because fines are easily quantified, there is great potential for a more practical test, even a formula, to assess the excessiveness of fines. The "grossly disproportional" standard may have been the best the Supreme Court could do for Cruel and Unusual Punishment, but it is a particularly unpromising standard to rely upon if the Court hopes to bring coherence to the Excessive Fines case law.

A. Finding Better Guidance in the Punitive Damages Cases

1. The Three-Factor Test and Mathematical Formulae

What is needed still is a formula, an analytical rubric, that trial courts can follow in analyzing the constitutionality of a forfeiture. It is not necessary to reject the "grossly disproportional" standard in developing this formula. The formula can simply provide a structure for assessing what is, and what is not, grossly disproportional. The *State Farm* three-factor formula for punitive damages is drawn in terms of ratios, and indeed, ratios are nothing more or less than a measure of proportionality. As articulated above, the formula for punitive damages may provide a useful guide for the creation of a formula for excessive fines.

2. Distinctions Between Forfeitures and Punitive Damages

Note, however, that the scenarios giving rise to excessive forfeitures are actually far more problematic than the scenarios giving rise to excessive punitive damages. Punitive damages are assessed when and precisely because compensatory damages are inadequate deterrence for reprehensible conduct,[196] and the punitive damages are an attempt to impose a more appropriate level of deterrence and retribution.[197] The constitutional protection against excessive punitive damages requires courts to determine how much punishment is too much, even as finders of fact attempt to determine and impose an appropriate level of punishment for the tortious behavior.

Forfeitures, in contrast, are typically assessed completely without reference to the seriousness of the crime, or to how much punishment is appropri-

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[196] David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 377 (1994).

[197] *See, e.g.*, BMW v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may be properly imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition"); Owen, *supra* note 196, at 375; Leila C. Orr, *Making A Case for Wealth-Calibrated Punitive Damages*, 37 LOY. L.A. L. REV. 1739, 1747 (2004) ("A fundamental basis for punitive damages is to provide retribution to the victim of an aggravated wrong.").

ate, but only according to the value of the property declared forfeitable.[198] Because the amount of the forfeiture is set without reference to culpability and determined by factors entirely unrelated to the appropriate level of punishment, there is far greater risk that the forfeiture will be somehow disproportionate. In the forfeiture situation, therefore, disproportionality should be expected, so one might argue that forfeitures should be subjected to a *more* exacting constitutional scrutiny than punitive damages.[199]

3. *Applying the Three-Factor Test to Forfeitures*

The test set forth by the Supreme Court involves consideration of three factors: (i) the reprehensibility of the conduct, (ii) the ratio between the compensatory damages and the punitive damages awarded, and (iii) the civil penalties for comparable conduct.[200] Consideration of these three factors sheds light on the question of excessiveness in the forfeitures context as well.

Certainly, the reprehensibility of the conduct (guidepost Number 1 in the *State Farm/BMW* test) should be considered in assessing the excessiveness of a forfeiture, and the Court has already held as much by applying the "grossly disproportional" standard with reference to the "gravity" of the underlying offense.[201]

The ratio between the compensatory damages and the punitive damages awarded in the case (guidepost Number 2 in the *State Farm/BMW* test) has no analogue in the area of forfeitures, because the amount of harm done (the amount necessary to compensate victims for their losses) is not measured or otherwise a factor in the forfeiture proceeding or in the underlying criminal action. Thus, there is no baseline from which to calculate a ratio.

The civil penalties for comparable conduct (guidepost Number 3 of the *State Farm/BMW* test), however, does find an analogue in the criminal penalties specified for the crime that prompted the forfeiture. And it is here that we find great potential for a meaningful formula. Prescriptions for criminal punishments can be found in criminal statutes as well as in the applicable

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[198] The value of the assets used to commit a crime are unlikely to have any bearing on the seriousness of a crime. An assault committed with an axe is likely to be just as blameworthy, if not more so, than one conducted with sophisticated (and expensive) weaponry. Relatively minor crimes, such as reckless driving, may be committed with extremely expensive vehicles. *See* Pimentel, *supra* note 10, at 42 ("Someone who completes a drug deal in his own $20,000 car will suffer the criminal penalty plus an additional $20,000 'fine' in the form of the forfeiture of the car. The person who completes the same drug deal in the back of a taxi gets the same criminal penalty, but without the $20,000 fine. This disparity in punishment is difficult, if not impossible, to justify.") (citations omitted).

[199] The Cruel and Unusual Punishment Clause provides no better parallel, as it too is applied against punitive determinations made by a trial court, second-guessing the trial court's imposition of a punishment designed to fit the crime. Again, the amount of the forfeiture is typically determined *entirely without reference* to the severity of the crime. *See id.*

[200] *See* State Farm v. Campbell, 538 U.S. 408, 409 (2003); BMW v. Gore, 517 U.S. at 560.

[201] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998).

Sentencing Guidelines, the latter providing a particularly meaningful baseline for a proportionality analysis.

a. Statutory Fines

It may be tempting to rely on statutorily prescribed fines for this guidance, but there are compelling reasons that these may be the wrong guideposts to rely on. The United States Criminal Code articulates the maximum fines that can be imposed, specifying generally that the fine for felony shall be "not more than $250,000," the fine for a Class A misdemeanor "not more than $100,000," and the fine for Class B and C misdemeanors "not more than $5,000."[202] These figures are decidedly unhelpful guideposts for calibrating fines (or limits on forfeitures) that are "proportional," as all felonies are lumped together with the same fine limit.

Some statutes are more specific about fine limits, such as the statute making it a crime to obstruct access to reproductive health clinics.[203] It explicitly exempts itself from the Section 3571 limits set forth above, and provides that:

> for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense . . . .[204]

The $10,000 and $25,000 fines prescribed in this statute may be far more useful as guideposts for a constitutional proportionality assessment. Someone who parks a car in such a way as to block the entrance to such a clinic may be subject to forfeiture of the car, in which case the $10,000 and $25,000 limits might be useful in assessing the proportionality of the forfeiture under the Eighth Amendment. Some of these statutes may be old, however, and if they reflect currency values unadjusted for inflation, that would undermine their reliability as proportionality guideposts.[205] But most, if they specify maximum fines at all, fail to exempt themselves from Section

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[202] *See* 18 U.S.C. § 3571(b) (2012).
[203] *See* 18 U.S.C. § 248.
[204] *See* 18 U.S.C. § 248(b).
[205] 18 U.S.C. § 35(a) (specifying a fine of no more than $1,000 for knowingly conveying false information in relation to aircraft/motor vehicle/railway/shipping crime, a fine set in the original 1956 legislation and never updated).

3571[206] and are therefore superseded by the rough figures set forth in Section 3571.[207]

The fact that the statute authorized fines up to $250,000 was decidedly unpersuasive to the Court in *Bajakajian*:

> Here, as the Government and the dissent stress, 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.[208]

While "other penalties that the Legislature has authorized are certainly relevant evidence,"[209] those penalties were not at all meaningful in this case. Moreover, they are unlikely to illuminate the issue much in many other cases, as long as Congress applies a blanket $250,000 limit to *all* felonies alike.

b. The Sentencing Guidelines' Fine Table

A more promising source is the Sentencing Guidelines, which are calibrated to identify appropriate and proportional penalties for criminal conduct.[210] Just as punitive damages may be imposed over and above such civil penalties, the courts have made it clear that forfeitures may be assessed over and above any criminal punishment.[211] Whatever fine the Sentencing Guidelines prescribe for the conduct the claimant engaged in should be strongly indicative of what may be a proportional punishment for purposes of the Eighth Amendment.

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[206] *See, e.g.*, 15 U.S.C. § 1644(f) (specifying a $10,000 fine for fraudulent use of a credit card); ELLEN ALLRED & DENNIS JOINER, FED. PUB. DEF., MAXIMUM PENALTIES TITLE 18 CRIMES AND OTHER SELECTED STATES (2015), http://ms.fd.org/maxpenalties/maxpenalties.pdf [https://perma.cc/75PZ-5GCW] (noting that 15 U.S.C. § 1644(f) fails to exempt itself from Section 3571, so the maximum fine is actually $250,000, the same fine as for homicide offenses).

[207] *See* 18 U.S.C. § 3571(e) ("If a law setting forth an offense specifies no fine or a fine that is lower than the fine otherwise applicable under this section and such law, by specific reference, exempts the offense from the applicability of the fine otherwise applicable under this section, the defendant may not be fined more than the amount specified in the law setting forth the offense").

[208] 524 U.S. 321, 339 n.14 (1998).

[209] *Id.*

[210] U.S. SENTENCING GUIDELINES MANUAL § 1A (U.S. SENTENCING COMM'N 2015).

[211] *See, e.g.*, United States v. Ursery, 518 U.S. 267, 270–71 (1996) (holding that there was no double-jeopardy violation in a criminal prosecution for a drug crime when a separate forfeiture proceeding against the defendant's house, arising out of the same crime, was already pending).

The United States Sentencing Guidelines, of course, include a fine table of their own, one that gives a better breakdown of fine ranges for offenses of varying degrees of gravity.

TABLE 1: FINES BY OFFENSE LEVEL[212]

(3) Fine Table

Offense Level	A Minimum	B Maximum
3 and below	$200	$9,500
4-5	$500	$9,500
6-7	$1,000	$9,500
8-9	$2,000	$20,000
10-11	$4,000	$40,000
12-13	$5,500	$55,000
14-15	$7,500	$75,000
16-17	$10,000	$95,000
18-19	$10,000	$100,000
20-22	$15,000	$150,000
23-25	$20,000	$200,000
26-28	$25,000	$250,000
29-31	$30,000	$300,000
32-34	$35,000	$350,000
35-37	$40,000	$400,000
38 and above	$50,000	$500,000.

Because the Sentencing Commission is not part of the legislative branch—and not politicized in any significant way—reliance on this table neatly avoids the separation of powers problem.[213] The Sentencing Commission devotes meticulous attention to the categorization of crimes into an array of offense levels, ranging from one to forty-three, all with an eye toward "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[214]

It is not surprising, therefore, that numerous federal courts *have* relied on this fine table as a reference point for determining whether the corresponding forfeiture is grossly disproportional to the gravity of the offense.[215] But there is no formula and no consensus approach to how to use the infor-

[212] U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (U.S. SENTENCING COMM'N 2015).
[213] See discussion *supra* note 151.
[214] U.S. SENTENCING GUIDELINES MANUAL § 1A (U.S. SENTENCING COMM'N 2015).
[215] *See, e.g.*, United States v. Beecroft, 825 F.3d 991, 1001–02 (9th Cir. 2016) (striking down a forfeiture of $107 million because the maximum fine prescribed by the fines table was $1 million); United States v. Browne, 505 F.3d 1229, 1282 (11th Cir. 2007) (upholding a forfeiture, in part, because the forfeiture "was significantly less than the maximum fine allowable under the Guidelines").

mation in the Sentencing Guidelines' Fine Table ("Fine Table"). *Bajakajian* held that the forfeiture was an excessive fine when the forfeiture was about seventy-one times higher than the maximum fine provided in the Sentencing Guidelines.[216] The Ninth Circuit has also rejected forfeitures valued at an amount between three and twenty times the Guidelines' maximum,[217] and another where the forfeiture was "more than 40 times the maximum permitted under the Guidelines."[218] Other courts have upheld forfeitures that exceeded the Fine Table's maximum, as long as they didn't exceed the Fine Table's maximum by too much.[219]

At the same time, the Fine Table lumps offense levels together and then prescribes a wide range of sentences (a range that spans a full order of magnitude) for each cluster. For example, most of the offense categories call for a range where the maximum fine exceeds the minimum fine by a factor of ten, and the more minor offenses offer an even wider range.[220] If $200 may be an appropriate fine for a particular Level 1 offense, it is difficult to imagine that a forfeiture, in the same case, of $9,500—forty-seven times higher than the $200 fine warranted by the facts—would not be excessive, but the Fine Table would not flag that as a disproportionate amount.[221] As a result, the Fine Table may give only the most limited guidance to lower courts struggling to determine whether a forfeiture is "grossly disproportional" or not.

c. The Sentencing Guidelines for Months of Imprisonment

Unlike the Fine Table, the Sentencing Guidelines for imprisonment are extremely helpful in breaking down various offenses, and offenders, to prescribe proportional punishments. Unlike the Fine Table, they do not lump offense levels together; moreover, within each offense level, they further subdivide the sentences according to the criminal history of the offender. The range of sentences within each cell is a far cry from the 1:10 ranges we see in the Fine Table. For a first-time offender committing a Level 15 offense, for example, the Fine Table prescribes a fine of $7,500–$75,000 (a

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[216] United States v. Bajakajian, 524 U.S. 321, 326, 339–40 (1998).

[217] *See* United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1123 (9th Cir. 2004).

[218] United States v. 3814 NW Thurman St., 164 F.3d 1191, 1198 (9th Cir. 1999).

[219] *See e.g.*, United States v. Bollin, 264 F.3d 391, 418 (4th Cir. 2001) (upholding a $1,200,000 forfeiture, in part, because it was only 2.4 times the fine table's maximum allowable fine of $500,000).

[220] Offenses rated at level 3 or below bring fines that range from $200 to $9,500. U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(c)(3) (U.S. SENTENCING COMM'N 2015). The Fine Table also allows fines exceeding these stated maxima if the statute specifies a higher fine range. *Id.* § 5E1.2(c)(4).

[221] *Id.* § 5E1.2(c)(3). The same argument could be made here that Justice Thomas made about statutorily set fines in *Bajakajian*: "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 . . . is small indeed." 524 U.S. at 339 n.14.

1:10 ratio), while the imprisonment guideline is 18–24 months (a 1:1.33 ratio). A defendant with a long rap sheet (in Criminal History Category VI), committing the same crime yields the same answer on the Fine Table, $7,500–$75,000, a 1:10 ratio), but an imprisonment sentence of 41–51 months (approximately a 1:1.25 ratio). Not only are the imprisonment guidelines sensitive to the difference between a first-time offender and a serious recidivist, they also prescribe a relatively narrow range of permissible sentences for each of them.

TABLE 2: SENTENCING BY CRIMINAL HISTORY[222]

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

There is little question, therefore, that the imprisonment guidelines are far more sensitive to differences in the gravity of offenses, and therefore, far

[222] *See* U.S. SENTENCING GUIDELINES MANUAL 404 (U.S. SENTENCING COMM'N 2015).

more instructive on what penalties might be proportional (or disproportional) to them in the context of the Eighth Amendment.[223]

B. A Proposed Formula

The challenge, then, is to find a way to translate the "months of imprisonment" guidelines into monetary figures that would be meaningful in assessing the constitutionality of a fine or forfeiture under the Eighth Amendment. Such a formula could give the reviewing court a starting point for such analysis, a guidepost that is far more meaningful than anything the courts are using now.

The answer is simpler than it might seem. One might, for example, establish a presumptive forfeiture limit equal to $1,500 per month of permissible imprisonment.[224] So if a person has committed a crime punishable by up to six months in prison, the maximum amount of forfeiture he or she could be subjected to would be $9,000 (six months multiplied by $1,500/month); at least, there would be a legal presumption of constitutionality of any forfeiture up to $9,000. If the government sought to forfeit more value than that, the government would bear the burden of establishing that such forfeiture was *not* grossly disproportional, and that it was therefore constitutional under the Excessive Fines Clause.

The Supreme Court could certainly adopt a different formula (other than one month = $1,500), but the Sentencing Guidelines seem to suggest this is an appropriate figure to use. For example, the full range of low-level offenses (including Offense Level 1 at the highest Criminal History category up to Offense Level 7 at the lowest Criminal History category) are punishable by up to six months in prison and subject to fines up to $9,500 (on the Fine Table). Thus the $1,500 per month formula does a good job of approximating (at $9,000) the separately established fine limit ($9,500) for these same cases. The highest level offenses contain similar ratios, as Offense Level 38, for a first offense, carries a punishment of 235 to 293 months, and is subject to fines up to $500,000 (on the Fines Table), giving a value of $439,500 (293 months multiplied by $1,500/month) maximum fine. The ratio of $1,500 per month is, therefore, reflected roughly in the Sentencing Guidelines already.

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[223] *See* Pimentel, *supra* note 10, at 54 n.306 (suggesting a formula that would translate months of imprisonment into a monetary figure in assessing the excessiveness of a civil forfeiture under the 8th Amendment); *see also* Solomon, *supra* note 19, at 877 (noting that the court in *Bajakajian* "could have suggested a rough baseline—perhaps the maximum allowable fines under the Federal Sentencing Guidelines—to assure some semblance of uniformity and fairness in future cases").

[224] A rough example of this approach was proposed, using the figure $1000 per month, in a footnote in Pimentel, *supra* note 10, at 54 n.306. Since that publication, the Fine Table has been amended, and the $1,500 per month figure aligns far more closely with the new Fine Table. *See infra* the next paragraph for an explanation.

TABLE 3: SENTENCING TABLE (MONTHS OF IMPRISONMENT & MONTHS MULTIPLIED BY $1,500/MONTH.)

	Criminal History Category (Criminal History Points)					
Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
7	0-6	2-8	4-10	8-14	12-18	15-21
	$0-9000	$3000-12,000	$6000-15,000	$12,000-21,000	$18,000-27,000	$22,500-31,500
38	235-293	262-327	292-365	324-405	360-life	360-life
	$352,500-439,500	$393,000-490,500	$438,000-547,500	$486,000-607,500	$540,000-	$540,000-

This formula, like the ratios posited in *State Farm v. Campbell*, would give trial courts a starting point and a frame of reference for evaluating the constitutionality of a forfeiture under the Excessive Fines Clause.[225]

1. Application of the Formula

a. Identifying the Crime and the Criminal with Specificity

The formula should be quite straightforward to apply. Any time there is a criminal prosecution and sentencing, the application of the sentencing guidelines will have been done already anyway. It is a simple matter to take the maximum sentence prescribed for that crime (and that offender) and multiply the months by $1,500 to determine the maximum fine that can enjoy a presumption of constitutionality. If the value of the forfeited property exceeds that amount, the constitutional question is raised, and the government must justify it under Eighth Amendment standards. Meanwhile, the court has a pretty clear idea, from a separate, objective source, as to the permissible range of forfeitures arising out of that particular offense.

Of course, if no criminal prosecution is brought, the government will still have to justify the forfeiture with respect to *some* crime in any case. Facilitating property forfeitures have always required that the government show that a crime was committed. Accordingly, the proposed formula may require the government to demonstrate with greater specificity exactly what crime was committed, as well as the culpability of the owner for that crime (including the criminal history of the owner, for purposes of Sentencing Guidelines application).

While the government is likely to complain about the costs and burdens associated with making such a showing, those burdens are likely to serve as

[225] *See* 538 U.S. 408, 425 (2003).

a meaningful check on government overreaching.[226] Increasing the transaction costs of forfeitures may be exactly what is needed to curb the too-quick and too-easy seizures of property that are going on now.[227] The small-value forfeiture is particularly vulnerable to abuse because any instance is likely to go unchallenged. If the government *cannot* show with any specificity what crime it believes was committed and does not have evidence to substantiate it, the forfeiture itself should be suspect. Those are precisely the cases of government overreaching that should be reined in, and imposing that type of burden or cost on the government's seizure will discourage the government from making the dubious seizures in the first place.

In the case of forfeitures attempted when the government declines to prosecute at all, the application of the formula may require some kind of presentence report, akin to that prepared by the court's probation and pretrial departments before a sentencing hearing, so the culpability of the owner under the Sentencing Guidelines can be established. No doubt the prosecution would object to bearing this burden, but the prospect of imposing a serious forfeiture (i.e. a fine) without first establishing the owner's culpability would seem to offend the Eighth Amendment in any case.

b. Innocent (and Mildly Culpable) Owners

Finally, the formula should, as a matter of fundamental fairness to the property owner and consistent with Eighth Amendment requirements, be tied to the crime committed by the owner, not a crime committed by a third party. If the owner is, in fact, innocent (as was the case in both *Bennis* and *Goldsmith-Grant*), the formula suggests that any forfeiture that is more than *de minimis* would be disproportional. An innocent party is subject a maximum of zero months of imprisonment, and the maximum forfeiture that could be upheld under the Eighth Amendment therefore would similarly be zero (0 multiplied by $1,500 equals 0). Again, the formula is only a starting point for analysis, but it appropriately suggests that any forfeiture from an innocent owner should require special scrutiny and special circumstances.

The Lopes case is also instructive, because the parents' culpability—when their adult son planted marijuana in the back yard—was far less than the son's.[228] An application of the formula would require calculation of the parents' relatively minor liability under the Sentencing Guidelines, with any forfeiture limited to that number of months of incarceration times $1,500, making it very difficult for the government to justify seizing their home. Again, the formula would effectively afford Eighth Amendment protection to people who would otherwise be subject to grossly disproportional punishment.

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[226] This concept is explored by Michael Van Den Berg in a provocative article. *See* Michael Van Den Berg, *Proposing a Transaction Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 913–23 (2015).

[227] *See id.*

[228] *See* Schneider & Flaherty, *supra* note 1.

2. *Incorporating the Ability to Pay in the Formula*

As noted above in Part II.E., some commentators and courts have argued persuasively that the definition of "excessive fine" should take into account the wrongdoer's ability to pay, or at least the possibility that the fine would be so ruinous as to deprive him of his livelihood.[229] This, of course, is a core principle in the calculation of punitive damages already, a justification for punitive damages set high enough to provide meaningful deterrence of tortious behavior by this particular defendant.[230]

Moreover, the Sentencing Guidelines' Fine Table is followed by several provisions urging that fines should be imposed with reference to such factors:

> (d) In determining the amount of the fine, the court shall consider:
> (1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;
> (2) any *evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources*;
> (3) *the burden that the fine places on the defendant and his dependents* relative to alternative punishments;
>
> * * *
>
> and
> (8) any other pertinent equitable considerations.[231]

No court has adopted "ability to pay" *per se* as a factor to consider in an Excessive Fines analysis. However, the First Circuit has demonstrated consonant sensibilities by considering whether the forfeiture will result in the deprivation of the claimant's livelihood,[232] and the Ninth Circuit has made a similar suggestion in one case.[233] Colgan and McLean both argue persuasively that the impact of the forfeiture on the individual—linked to the deprivation of one's livelihood and the ability to pay—must be a part of the

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[229] *See supra* text accompanying notes 152–78.

[230] *See, e.g.*, Robert R. Caputi & Frank J. Faruolo Jr., *Is Evidence of the Defendant's Wealth Admissible When Punitive Damages Are Awarded in New York?*, 21 ST. JOHN'S L. REV. 198, 199 (1947) (noting that where a case has been made that warrants exemplary damages, the majority of courts allow the pecuniary status of the defendant to be admitted to allow the jury to determine the amount of punitive damages appropriate to punish the defendant).

[231] U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(d) (U.S. SENTENCING COMM'N 2015) (emphasis added).

[232] *See* United States v. Levesque, 546 F.3d 78, 83–84 (1st Cir. 2008); *see also* discussion *supra* notes 172–177.

[233] *See* United States v. Hantzis, 403 F. App'x 170, 172 (9th Cir. 2010) (applying the Excessive Fines Clause and finding there was "no evidence that a fine would 'deprive [the appellant] of his livelihood'" (quoting United States v. Bajakajian, 524 U.S. 321, 335 (1998))).

Excessive Fines analysis, and they seem to have the history of the clause on their side.[234] Supreme Court dictum in *Bajakajian* similarly draws on the Magna Carta to acknowledge the concern about how ruinous the fine may be.[235] So we may yet see this aspect of the Excessive Fines analysis get full and formal recognition in the courts.

If the courts agree that "ability to pay" should be considered, the proposed formula is easily adjusted to reflect the concept. Someone with a typical income or assets may be limited to a forfeiture of $1,500 per month of potential imprisonment (see above). But a wealthy individual might be able to sustain a much larger forfeiture, with a formula tied to that person's income, for example, before running afoul of the Eighth Amendment.

The $1,500 per month figure runs about one-third the median family income in the United States ($4,471).[236] Assuming that the Fines Table (with which the $1,500 figure correlates) represents appropriate punishment for the average American, we might amend our formula to utilize one-third of the monthly income of this particular defendant instead of the standard $1,500-per-month amount. It might be reasonable, therefore, to establish a presumption that a forfeiture is *not* an excessive fine (and *is* constitutional under the Eighth Amendment) if it calculates at one-third of that person's monthly income times the number of months of imprisonment prescribed for that person's crime. For example, a person who makes $12,000 per month ($144,000/year) and commits a crime punishable by six months in prison could be constitutionally subject to a $24,000 forfeiture ($4,000 per month multiplied by six months). By the same token, someone who earns only $1,800 per month—i.e. someone living near the poverty line[237]—who commits the same crime, might be subject to a forfeiture of no more than $3,600 ($600 per month multiplied by six months) for that same crime before such forfeiture loses the presumption of constitutionality.

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[234] *See* Colgan, *supra* note 19, at 345–47.

[235] *See* United States v. Bajakajian, 524 U.S. 321, 335–36 (1998) (quoting Magna Carta, 9 Hen III, Ch. 14 (1225)).

[236] Tami Luhby, *Typical American Family Earned $53,657 Last Year*, CNN MONEY (Sept. 16, 2015), http://money.cnn.com/2015/09/16/news/economy/census-poverty-income/ [https://perma.cc/83UW-CAXZ].

[237] The poverty line for a family of four is $2,025 per month. Health & Human Servs. Poverty Guidelines, 81 Fed. Reg. 4036 (Jan. 25, 2016).

TABLE 4: SENTENCING TABLE (MONTHS OF IMPRISONMENT & MONTHS MULTIPLIED BY $4,000/MONTH)

	Criminal History Category (Criminal History Points)					
Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
7	0-6	2-8	4-10	8-14	12-18	15-21
	$0-24000	$8000-32000	$16000-40000	$32000-56000	$48000-72000	$60000-84000
38	235-293	262-327	292-365	324-405	360-life	360-life
	$940,000-1,172,000	$1,048,000-1,308,000	$1,168,000-1,460,000	$1,296,000-1,620,000	$1,440,000-	$1,440,000-

TABLE 5: SENTENCING TABLE (MONTHS OF IMPRISONMENT & MONTHS MULTIPLIED BY $600/MONTH)

	Criminal History Category (Criminal History Points)					
Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
7	0-6	2-8	4-10	8-14	12-18	15-21
	$0-3600	$1200-4800	$2400-6000	$4800-8400	$7200-10800	$9000-12600
38	235-293	262-327	292-365	324-405	360-life	360-life
	$141,000-175,800	$157,200-196,200	$175,200-219,000	$194,400-243,000	$216,000-	$216,000-

Of course, the cases have, to date, referred only to the figures on the Sentencing Commission's Fine Table and found forfeitures to be excessive fines when the forfeiture amounts to some *multiple* of the maximum fine prescribed.[238] A court might well decide that although the figure calculated may be a proportional fine, even a disproportional fine may be constitutional; after all, it is not excessive under the Eighth Amendment unless it is *grossly* disproportional.[239] One must recall that the forfeiture is on top of any criminal penalties, so for a Level 7 first-time offense, a defendant may be sentenced to serve six months' incarceration, fined $9,500, and subjected to forfeiture on top of that.[240] The Eighth Amendment comes to his aid only if the fine is grossly disproportional to the gravity of the offense.[241] The pro-

[238] *See, e.g., supra* notes 214–16.

[239] *Bajakajian*, 524 U.S. at 334.

[240] *See* 18 U.S.C. § 3551(b) (2012) (stating that "[a] sanction authorized by section 3554 [forfeiture] . . . may be imposed in addition to the sentence" of imprisonment, fine or probation).

[241] A separate question arises when a criminal fine is assessed, with a forfeiture on top of that. If the forfeiture is at least partly punitive, it will be subject to the Excessive Fines Clause,

posed formula, generating the numbers depicted in the tables above, give at least *some* basis for making such a determination, even if the Court were to decide that the numbers it produces should be doubled or tripled before the "grossly disproportional" threshold is crossed.[242]

There would be costs and burdens associated with evaluating the defendant's ability to pay, of course. Impoverished people may not have good financial records, and wealthier people will have incentives to conceal their income and assets from the court.[243] As Colgan observes, however, "[I]n the vast majority of cases much of the relevant evidence would already be gathered to assess indigency for Sixth Amendment purposes."[244] And if the primary factor is monthly income, as suggested above, that should be easy to determine with simple reference to tax returns in recent years.

Whether or not "ability to pay" is factored into the formula, formulae like this one give district courts the practical tools they need to analyze Excessive Fines issues in forfeitures with confidence and consistency. They will also guide law enforcement in the forfeitures they choose to pursue, providing an important check on such actions, a check that is now missing because so many of the forfeitures are unreviewed and even unreviewable in the courts.[245] The formula will not provide a new level of review, but it will give law enforcement some standards to follow. Because courts can hold law enforcement to these standards, the officers on the ground may be prompted to check their own ambition in the seizure of assets.

CONCLUSION

The Eighth Amendment's Excessive Fines Clause can be an important vehicle for reining in abusive forfeiture practices and ensuring that justice is done in the forfeiture cases. But in order for the Excessive Fines Clause to effectively serve this higher principle, the courts need a more practical and workable approach to conducting the Excessive Fines analysis. Taking a page from the Supreme Court's approach to punitive damages, the answer may well lie in mathematical ratios or formulae. Such formulae could be tied

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and arguably should be considered in conjunction with any criminal fine assessed for the same offense. It is easy to imagine a criminal fine that is not excessive, and a forfeiture that standing alone is not excessive, but when the fine and the forfeiture are added together, they pass the constitutionally-defined threshold and violate the Eighth Amendment. It seems appropriate, therefore, when considering fines for the purposes of the Excessive Fines Clause, to take into account the combined total of criminal monetary penalties and forfeiture amounts.

[242] *See, e.g.*, United States v. Bollin, 264 F.3d 391, 418 (4th Cir. 2001) (upholding a forfeiture valued at 2.4 times the maximum amount allowed under the Fine Table).

[243] Evidence would need to be introduced and evaluated, and potentially confusing data would have to be sorted out, such as when an investor has extensive holdings but is highly leveraged, so that her liabilities rival her assets, resulting perhaps in a negative cash flow.

[244] Colgan, *supra* note 19, at 347 n.351 (assessing indigency by considering the defendant's liquid assets, the household's net monthly income, and "basic living costs" including "shelter, food, utilities, health care, transportation, clothing, education, and support payments" (citing MASS. SUP. JUD. CT. R. 3:10)).

[245] *See* Pimentel, *supra* note 10, at 7.

to sentencing guidelines, which incorporate key measures of the offenses' gravity and generate presumptive limits on the forfeitures. A simple calculation could have revealed to prosecutors and to the court that the Lopes's home was too great a forfeiture; the Eighth Amendment should have protected them, even if Fifth Amendment due process guarantees could not. Presumptions—either for or against constitutionality of a particular forfeiture—can be overcome, of course, when surrounding circumstances dictate. But a formula-based starting point will be a powerful force in meaningfully and consistently effecting the Eighth Amendment's ideals of proportionality in the troubled world of asset forfeitures.