PROTECTING THE FAMILY HOME BY REUNDERSTANDING *UNITED STATES V. BAJAKAJIAN*

Yan Slavinskiy†

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"[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry."[1]

† Submissions Editor, Cardozo Law Review. J.D. Candidate (May 2014), Benjamin N. Cardozo School of Law; B.A., *summa cum laude*, The George Washington University, 2011. I would like to express my gratitude to Professor Jessica Roth for her guidance throughout the research and writing process; Eric Rosoff, Chloe Orlando, and Yuu Kinoshita for invaluable editing and advice; my parents, Inna and Yevgeniy, for immeasurable love and support, and grandparents, Boris and Natalya, for making this journey possible; and Emy, who too often was asked to listen to my musings on asset forfeiture, but who helped make the daunting process of writing this Note enjoyable.

1 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 372 (1979).

INTRODUCTION

The Supreme Court's 1998 holding in *United States v. Bajakajian*,[2] was the high court's seminal attempt to establish a framework for evaluating when a criminal or civil forfeiture constitutes an excessive fine in violation of the Excessive Fines Clause of the Eighth Amendment.[3] The Court articulated this framework as the process of determining whether the value of the property forfeited is grossly disproportional to the gravity of the underlying offense.[4] Unfortunately, in the aftermath of *Bajakajian*, lower courts have failed to utilize this framework to implement the protections offered by the oft-ignored[5] Excessive Fines Clause.

This Note addresses the rigidity with which lower courts have applied *Bajakajian*'s excessiveness standard, and the consequent failure by lower federal courts to develop the requisite legal vocabulary to interface with the Excessive Fines Clause of the Eighth Amendment[6] as

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2 524 U.S. 321 (1998).

3 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The Excessive Fines Clause is distinct from the Eighth Amendment's remaining two provisions, the Excessive Bail Clause and the Cruel and Unusual Punishment Clause. *See* Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 474 ("Unlike the Cruel and Unusual Punishments Clause, which is concerned with matters such as the duration or conditions of confinement, '[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'" (alteration in original)); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1274 (1987) ("A fresh and critical examination of its historical antecedents indicates that the scope of the excessive fines clause differs from that of the punishments clause."). Although its passage generated limited debate in the First Congress, Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 839 (2013), the Excessive Fines Clause traces its roots to monumental protections enacted in the English Bill of Rights in 1689 as a response to the abuses of punishment by English sovereigns. Jason M. Scherer, Case Note, *Upping the Ante: Fines for Ignoring EPA Information Requests Unlikely to be "Excessive" in Sixth Circuit*, 13 MO. ENVTL. L. & POL'Y REV. 37, 39 (2005).

4 *Bajakajian*, 524 U.S. at 337.

5 *See, e.g.*, Johnson, *supra* note 3, at 468 ("Prior to 1993, the Excessive Fines Clause was virtually a dead letter."); Massey, *supra* note 3, at 1274 ("Consideration of the excessive fines clause has been clouded by the cruel and unusual punishments clause."); Michael E. Raabe, *The Excessive Fines Clause*, 45 ORANGE COUNTY LAW. 34, 34 (2003) ("It can fairly be said that the Excessive Fines Clause is the 'sleeping clause' of the Bill of Rights.").

6 After two centuries of silence on the issue, in 1987 scholars began attempting to apply the once forgotten Excessive Fines Clause to a diverse assortment of legal issues. A Lexis search for scholarly publications with "Excessive Fine" in the title from 1800 to 1987 resulted in no results. Since 1987, forty articles have been published attempting to develop an Excessive Fines vocabulary that adequately addresses the complex modern legal landscape. *See, e.g.*, Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407 (1998); Amy Kristin Sanders, *When is Enough Too Much? The Broadcast Decency Enforcement Act of 2005 and the Eighth Amendment's Prohibition on Excessive Fines*, 2 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 75 (2007); Scherer, *supra* note 3; Matthew J. Klaben, Note, *Split-Recovery*

it applies to the forfeiture of facilitating property, specifically family homes. This Note concludes that *Bajakajian* should be read as providing a standard by which to judge whether the gravity of the offense outweighs the value of the forfeiture, and that both of these competing considerations—the gravity of the offense and the value of the property forfeited—should be determined based on factors that best fit the facts of a particular case, but not necessarily those factors that in 1998 best facilitated the analysis of the facts of *Bajakajian*.[7] Significantly, this approach would enable a probing excessiveness inquiry, distinguishable from the static and ineffective one applied by courts today, in the context of the forfeiture of the family home.

Legal and academic scholarship is rife with books,[8] studies,[9] journal articles and student Notes,[10] investigative journalism,[11] and online

Statutes: The Interplay of the Takings and Excessive Fines Clauses, 80 CORNELL L. REV. 104 (1994); Donald S. Yarab, Case Comment, Browning-Ferris Industries v. Kelco Disposal, Inc.*: The Excessive Fines Clause and Punitive Damages*, 40 CASE W. RES. L. REV. 569 (1990).

7 *Compare* 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."), *with* United States v. Dodge Caravan Grand SE/Sport Van, 387 F.3d 758, 763 (8th Cir. 2004) ("'To determine whether the facts indicate gross disproportionality, the district court must consider multiple factors, including the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited.' . . . [W]e have criticized an excessive fines analysis that failed to consider factors, such as 'the monetary value of the property, the extent of the criminal activity associated with the property, the fact that the property was a residence, the effect of the forfeiture on innocent occupants of the residence, including children, or any other factors that an excessive fine analysis might require.'" (quoting United States v. Bieri, 68 F.3d 232, 236 (8th Cir. 1995) and United States v. 9638 Chi. Heights, 27 F.3d 327, 331 (8th Cir. 1994))).

8 *See, e.g.*, REP. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS (1995); GREGORY M. VECCHI & ROBERT T. SIGLER, ASSETS FORFEITURE: A STUDY OF POLICY AND ITS PRACTICE (2001).

9 *See, e.g.*, DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, A STACKED DECK: HOW MINNESOTA'S CIVIL FORFEITURE LAWS PUT CITIZENS' PROPERTY AT RISK (Jan. 2013), *available at* http://www.ij.org/images/pdf_folder/other_pubs/stacked-deck.pdf; MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 41–104 (Mar. 2010), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeitureto email.pdf (surveying the use of asset forfeiture at all levels of government and concluding that most state civil forfeiture laws fail to provide protections to property owners, that public accountability over civil asset forfeiture is limited, and that reform to better protect property rights is necessary).

10 *See, e.g.*, David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328 (1988); Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343 (1996); Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009); Joi Elizabeth Peake, Note, *Bound by the Sins of Another: Civil Forfeiture and the Lack of Constitutional Protection for Innocent Owners in* Bennis v. Michigan, 75 N.C. L. REV. 662 (1997); Douglas A. Terry, Note, *Take a Drink, Lose a Car: The Constitutionality of the New York City Forfeiture Policy, as Applied to First-Time DWI Offenders, in the Wake of Recent Excessive Fines and Double Jeopardy Clause Jurisprudence*, 61 OHIO ST. L.J. 1793 (2000).

11 Lexington, *A Truck in the Dock: How the Police Can Seize Your Stuff When You Have Not Been Proven Guilty of Anything*, ECONOMIST, May 27, 2010, *available at*

repositories,[12] chronicling a myriad of circumstances where asset forfeiture, in particular civil *in rem* forfeiture,[13] has been abused by state and federal law enforcement agencies. The function of this Note is neither to aggregate—nor dramatize—the most shocking of these cases, nor to sound an alarm regarding the risks surrounding this significant law enforcement tool.[14] Undoubtedly, asset forfeiture is both an appropriate punishment for many crimes,[15] and an important deterrent in law enforcement's security scheme to combat a wide array of dangerous crimes.[16] Instead, this Note seeks to explain how the concerns raised by those who do sound the alarm[17] can be alleviated not by drastic, and likely unattainable, legislative measures[18] such as prohibitions against civil forfeiture,[19] the forfeiture of facilitating property,[20] or amendment of the Civil Asset Forfeiture Reform Act,[21]

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http://www.economist.com/node/16219747; William K. Rashbaum, *Auditors Find Chaos in U.S. Marshal's Asset Sales Record-Keeping*, N.Y. TIMES, Sept. 14, 2011, at A31; Sarah Stillman, *Taken*, New Yorker, Aug. 12, 2013, at 48.

12 *See, e.g.*, FORFEITURE ENDANGERS AM. RTS., http://www.fear.org (last visited Mar. 19, 2014).

13 *See, e.g.*, WILLIAMS ET AL., *supra* note 9. Although criminal forfeiture has been criticized on similar constitutional grounds as civil forfeiture, and is equally susceptible to an Eighth Amendment analysis as civil forfeiture, the requirement that forfeiture only follow a criminal conviction leaves it less exposed to criticism.

14 *See infra* note 24 and accompanying text.

15 *See, e.g.*, United States v. Sabhnani, 599 F.3d 215 (2d Cir. 2010) (forfeiture of residence after defendants harbored illegal aliens, subjected them to involuntary servitude, and tortured them by means of starvation and beatings).

16 *See* Craig Gaumer, *Criminal Forfeiture*, 55 U.S. ATTY'S' BULL. (U.S. Dep't of Justice, D.C.), Nov. 2007, at 22, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5506.pdf; *see also* Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 197 (2011) ("Financial penalties, like asset forfeiture, deter crime by making it less profitable. The Department of Justice frequently argues for asset forfeiture because forfeiture, in conjunction with a prison sentence, deters a wider range of offenders." (footnote omitted)); *cf.* VECCHI & SIGLER, *supra* note 8, at 72–74.

17 Some of the concerns raised by asset forfeiture include: (1) the corruptible influences of the profit incentive generated by asset forfeiture due to the fact that forfeited property is used to fund law enforcement efforts; (2) the rapid increase in the use of civil forfeiture since the creation of the Asset Forfeiture Fund in 1984; (3) the opportunity that state law enforcement agencies have to avoid state law protecting property owners by working with federal law enforcement to forfeit goods; (4) the budgetary dependence on asset forfeiture; (5) a flawed low standard of proof for prosecutors; and (6) limited public oversight and accountability over asset forfeiture. WILLIAMS ET AL., *supra* note 9, at 9–14; *see also supra* notes 8–12 and accompanying text.

18 The last two decades have seen a dramatic increase in punishments, not legislative action to decrease them. *See, e.g.*, Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 103 (1995) ("There has been a remarkable increase during the last decade in the imposition of overlapping civil, administrative, and criminal sanctions for the same misconduct, as well as a steady rise in the severity of those sanctions." (footnote omitted)).

19 *See* WILLIAMS ET AL., *supra* note 9, at 6.

20 *See, e.g.*, Fried, *supra* note 10, at 380–88; David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 58 (2012) (explaining how as a

but by an adjustment in the way that state and federal courts understand and apply *Bajakajian*. Specifically, when determining whether a particular forfeiture of facilitating property, in particular the forfeiture of a family home, violates the Excessive Fines Clause of the Eighth Amendment.[22]

Part I of this Note will provide a brief historical background on the development of American forfeiture laws, articulate the interplay between various forfeiture statutes and theories, and underscore the important role that forfeiture plays in the law enforcement scheme to combat crime. Part II will trace the trajectory of Eighth Amendment Excessive Fines jurisprudence in the context of asset forfeiture. The purpose of this Part will be two-fold: First, to introduce pre-*Bajakajian* interpretations of the excessiveness analysis and suggest that they provide an important framework for the application of *Bajakajian* today; and second, to discuss post-*Bajakajian* applications of the excessiveness analysis and demonstrate that they lack the fluid application of the Excessive Fines Clause envisioned by the *Bajakajian* Court. Finally, by focusing specifically on the failure of the current excessiveness inquiry to adequately account for the forfeiture of the family home, Part III will conclude that *Bajakajian* must not be read as a linear three- or four-factor test for excessiveness, but rather as adding a disproportionality standard to a multifaceted excessiveness evaluation.

I. FORFEITURE LAW IN THE UNITED STATES

A. *Asset Forfeiture's Role in America's Law Enforcement Apparatus*

Asset forfeiture, the "legal mechanism by which property derived from or used in the furtherance of unlawful activity can be seized and forfeited to the government . . . without compensation [to the owner],"[23] is a powerful and effective law enforcement tool to punish and disincentivize crime,[24] and one with an extensive historical pedigree.

consequence of history, the United Kingdom has abandoned the forfeiture of facilitating property).

21 *See* Moores, *supra* note 10.

22 *See infra* Part III.

23 U.S. DEP'T OF THE TREASURY, TREASURY FORFEITURE FUND STRATEGIC PLAN FY 2007–2012, at 1 n.1 (Sept. 2007), *available at* http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/strategic-plan-2007-2012.pdf; *see also* HYDE, *supra* note 8, at 26 ("[L]oss of some right or property as a penalty for some illegal act." (internal quotation marks omitted)); VECCHI & SIGLER, *supra* note 8, at 41 ("Assets forfeiture . . . is 'something surrendered as a penalty.'" (quoting THE ILLUSTRATED OXFORD DICTIONARY 319 (J. Metcalf & F. Abate eds., 1998))).

24 In fiscal year 2012, the Department of Justice forfeited approximately four-and-a-half billion dollars worth of assets through asset forfeiture. *Total Net Deposits to the Fund by State*

Forfeiture of property tainted by illegality traces its roots to Biblical notions of punishment,[25] and developed as a legal concept in early English Common Law.[26] At common law, property used to commit grave offenses was forfeited to the sovereign as a "deodand."[27] Moreover, upon a conviction for a serious felony, the convicted felon would forfeit his entire estate to the sovereign[28] under the legal theory of corruption of the blood.[29] While early American colonists adopted limited aspects of common law forfeiture traditions to forfeit ships and cargo involved in customs offenses and piracy,[30] the notion of "forfeiture of estates" was conclusively rejected.[31]

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of Deposit as of September 30, 2012, U.S. DEPARTMENT JUST., http://www.justice.gov/jmd/afp/02fundreport/2012affr/report1.htm (last visited Mar. 19, 2014). This was more than two times the value of assets forfeited in fiscal year 2011. *Total Net Deposits to the Fund by State of Deposit as of September 30, 2011*, U.S. DEPARTMENT JUST., http://www.justice.gov/jmd/afp/02fundreport/2011affr/report1.htm (last visited Mar. 19, 2014). The advantages of asset forfeiture are manifold. *See* Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 55 U.S. ATT'YS' BULL. (U.S. Dep't of Justice, D.C.), Nov. 2007, at 8–9, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5506.pdf (identifying the advantages of asset forfeiture as (1) punishing wrongdoers and destroying the instrumentalities of crime; (2) recovering property that may compensate victims; (3) taking the profit out of crime; and (4) making a statement to the public that crime does not pay); *see also 9-118.010: The Attorney General's Guidelines on Seized and Forfeited Property*, U.S. DEPARTMENT JUST., http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/118mcrm.htm#9-118.010 (last visited Mar. 19, 2014). Significantly, asset forfeiture is also able to compensate victims of crime. *See* Nancy Rider, *Returning Forfeited Assets to Victims*, 55 U.S. ATT'YS' BULL. (U.S. Dep't of Justice, D.C.), Nov. 2007, at 30, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5506.pdf ("[Forfeited] assets . . . can . . . be used to compensate fraud victims for their losses."). In 2006 for example, the Department of Justice returned over 400 million dollars of forfeited assets to 14,000 victims. *Id.*

25 *See Exodus* 21:28 ("When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten, but the owner of the ox shall not be liable.").

26 *See infra* notes 27–31.

27 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–81 (1974).

28 *Id.* at 682 ("The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord . . . .").

29 *See, e.g.*, Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888) ("There were three principal incidents consequent upon an attainder for treason or felony,—forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death." (punctuation in original)); Terrance G. Reed & Joseph P. Gill, *RICO Forfeitures, Forfeitable 'Interests,' and Procedural Due Process*, 62 N.C. L. REV. 57, 61 (1983); Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 729 (1992) ("Corruption of blood refers to the common law penalty that followed a finding of attainder, a judgment that a felony or treason had been committed. An attained person lost all property as well as the legal ability to inherit or pass on property to his heirs." (footnote omitted)).

30 *See* The Malek Adhel, 43 U.S. (2 How.) 210 (1844) (forfeiture of ship engaged in piracy); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) (same).

31 *See* U.S. CONST. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); Stier, *supra* note 29, at 732 ("After the Constitutional Convention, the first Congress quickly reconfirmed its disapproval of the corruption of blood penalty. In 1790, Congress passed an act providing that 'no conviction or

American forfeiture laws have drastically developed since the forfeiture of pirate ships during the colonial period. Beginning with the introduction of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[32] federal and state forfeiture statutes have expanded to "reach virtually any type of property that might be used in the conduct of a criminal enterprise."[33] These statutes have not only expanded the category of crimes that permit the government to seek forfeiture,[34] but they have also dramatically expanded the types of property that may be forfeited.[35] As the Department of Justice's use of the forfeiture statutes rapidly became more robust,[36] calls for reform led to the enactment of the Civil Asset Forfeiture Reform Act (CAFRA)[37] in 2000. CAFRA established a uniform "innocent owner" defense to civil forfeiture;[38] established uniform procedures for property owners to

judgment . . . shall work corruption of blood or any forfeiture of estate.'" (alteration in original) (quoting An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 24, 1 Stat. 117 (1790))). In *Wallach v. Van Riswick*, 92 U.S. 202 (1875), Justice Strong explained that the rejection of the corruption of the blood doctrine was a testament to the harm that forfeiture of estate inflicted on the children and heirs of convicted individuals. *Id.* at 210; *see also* Stier, *supra* note 29, at 732.

32 Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

33 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974); *see also* Jean B. Weld, *Forfeiture Laws and Procedures in the United States of America*, *in* UNITED NATIONS ASIA & FAR EAST INST., RESOURCE MATERIAL SERIES NO. 83, at 18, 18 (Mar. 2011), *available at* http://www.unafei.or.jp/english/pdf/RS_No83/No83_00All.pdf ("'When we look back,' [Attorney General Eric Holder] said, [']on the last 25 years of the programme, we see a forfeiture regime that has been transformed from a collection of centuries-old laws designed to fight pirates, enforce customs laws and fight illegal contraband, into an array of modern law enforcement tools designed to combat 21st century criminals both at home and abroad.'").

34 *See, e.g.*, 18 U.S.C § 982 (2012).

35 *See, e.g.*, *id.* § 981(a)(1)(G)(i) (The USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), provides for the forfeiture *of all assets* of individuals convicted of crimes of terrorism).

36 *See* WILLIAMS ET AL., *supra* note 9, at 11 ("[I]n 1986, the second year after the creation of the Department of Justice Assets Forfeiture Fund, the Fund took in $93.7 million in proceeds from forfeited assets. By 2008, the Fund for the first time in history topped $1 billion in net assets, i.e., forfeiture proceeds free-and-clear of debt obligations and now available for use by law enforcement.").

37 Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. § 983); *see also* David B. Smith, *An Insider's View of the Civil Asset Forfeiture Reform Act of 2000*, 24 CHAMPION 28, 28 (2000) ("[CAFRA was] the first significant reform of civil forfeiture procedure since the dawn of the Republic.").

38 *See* 18 U.S.C. § 983(d). A person contesting the forfeiture must both establish an ownership interest over the property in question, and prove innocence by a preponderance of the evidence showing that she "did not know of the conduct giving rise to forfeiture," or "upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." *Id.* § 983(d)(2)(A); see Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates A Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 KY. L.J. 653 (2001), for a comprehensive overview of CAFRA's uniform innocent owner defense; *see also* Pimentel, *supra* note 20, at 15–22 (providing an overview of CAFRA's reforms).

challenge forfeitures;[39] heightened the standard the government must meet for forfeiting some forms of property;[40] imposed liability on the government for attorneys' fees in unsuccessful forfeiture actions;[41] and provided for court appointed counsel in select cases.[42] Although CAFRA streamlined the procedures for challenging forfeiture, and enhanced due process protections for property owners, it did not fundamentally alter the way courts determine whether the forfeiture of certain property is unconstitutionally excessive.[43]

B. *Different Forms of Asset Forfeiture*

Asset forfeiture takes three different forms: administrative forfeiture,[44] criminal *in personam* forfeiture,[45] and civil *in rem* forfeiture.[46] Of the two judicial forfeiture options available to prosecutors,[47] criminal and civil forfeiture, the primary distinction is that criminal forfeiture is a legal action made against a specific individual,[48] and it must be accompanied by an underlying criminal conviction for a crime that authorizes forfeiture.[49] While third party

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39 18 U.S.C. § 983(a).

40 *Id.* § 983(c).

41 28 U.S.C. § 2465(b)(A) (2012).

42 *Id.* §§ 983(b)(1)(A), 2(A).

43 The only contribution CAFRA provided to the excessiveness analysis was a codification of the principle, more broadly articulated in *Austin v. United States*, 509 U.S. 602 (1993), and *Alexander v. United States*, 509 U.S. 544 (1993), that the *Bajakajian* gross disproportionality standard applies to all civil forfeitures. 18 U.S.C. § 983(g). CAFRA does not, however, address how that standard should be applied and what factors should be considered. *Id.* § 983(g)(2).

44 *See generally* Cassella, *supra* note 24, at 12–13. Once assets are seized pursuant to administrative forfeiture, the law enforcement agency responsible for the seizure sends notice of its intent to forfeit the seized property to any known owners. *Id.* at 13. If the forfeiture is not contested within a statutorily specified amount of time, title passes over to the government, as it would have had a judicial order been issued. *Id.* ("An administrative forfeiture is not really a proceeding, at all, in the judicial sense. It is more like an abandonment."). Significantly, real property may not be forfeited through administrative forfeiture proceedings. *Id.*; *see also* 18 U.S.C. § 985(a). In fiscal year 2012, for example, approximately 80% of the Drug Enforcement Administration's forfeitures were administrative forfeitures with no judicial process. *See* U.S. DEP'T OF JUSTICE, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S ADOPTIVE SEIZURE PROCESS AND STATUS OF RELATED EQUITABLE SHARING REQUESTS (AUDIT REPORT 12-40) 3 (Sept. 2012), *available at* http://www.justice.gov/oig/reports/2012/a1240.pdf.

45 *See generally* Cassella, *supra* note 24, at 13–15; *see also* 18 U.S.C. § 982. Criminal forfeitures are extremely prevalent. *See* Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case*, 32 AM. J. CRIM. L. 55, 56 (2004).

46 *See generally* Cassella, *supra* note 24, at 15–16; *see also* 18 U.S.C. § 981.

47 Criminal and civil forfeitures are considered "judicial forfeitures" as distinguished from administrative forfeitures because they are challenged by the purported owner in court and must be resolved through the judicial process. McCaw, *supra* note 16, at 190–91.

48 18 U.S.C. § 982(a)(1).

49 *Id.* §§ 982(a)(1), (2).

interests in forfeited property are not considered in the forfeiture component of a criminal trial, they are protected from criminal forfeiture by means of an "ancillary proceeding" conducted after a trial is concluded and a forfeiture ordered.[50] During an ancillary proceeding, third parties with ownership interests in forfeited property are entitled to prove that they were the legal owner of the forfeited property at the time of the defendant's crime,[51] or that they were bona fide purchasers for value after the property became subject to forfeiture without knowledge of the underlying crime.[52] Civil forfeiture, on the other hand, takes the form of an *in rem*[53] proceeding that is not taken against any one defendant, but rather against specific property that is tainted by crime.[54] Therefore, unlike criminal forfeiture where the government can only generally seek the forfeiture of the defendant's property,[55] in civil forfeiture proceedings questions of ownership are not considered because legal action is taken against the tainted property itself.[56] Purported innocent owners challenging civil forfeiture proceedings are required to seek recourse based on the innocent owner protections outlined in CAFRA.[57] As the asset forfeiture landscape has developed over the past twenty years,[58] civil *in rem* forfeiture has borne the brunt

50 *See* 21 U.S.C. § 853(n)(6)(A)–(B) (2012); FED. R. CRIM. P. 32.2(a) (governing the procedure for criminal forfeiture); McCaw, *supra* note 16, at 194.

51 21 U.S.C. § 853(n)(6)(A). A third party owner's success in an ancillary hearing pursuant to this theory however, does not insulate property from subsequent civil forfeiture. McCaw, *supra* note 16, at 194 ("[T]he government may still] be able to confiscate [property] through civil forfeiture because civil forfeiture depends on the guilt of the property rather than the guilt of the party.").

52 21 U.S.C. § 853(n)(6)(B).

53 *See* Cassella, *supra* note 24, at 15 ("Civil forfeiture is *not* part of a criminal case. In a civil forfeiture case, the government files a separate civil action *in rem* against the property itself, and then proves, by a preponderance of the evidence, that the property was derived from, or was used to commit, a crime. . . . The *in rem* structure of civil forfeiture is simply procedural convenience."); Gaumer, *supra* note 16, at 72.

54 *See* 18 U.S.C. § 981.

55 *Id.* § 982.

56 This allows civil asset forfeiture proceedings to be initiated against property tainted by crime where the individual associated with that crime might be a fugitive, or deceased. *See* Gaumer, *supra* note 16, at 72 (explaining the advantages of the "Ken Lay" rule and the "fugitive disentitlement" statute, 28 U.S.C. § 2466 (2012)). For a discussion of the advantages and disadvantages of each form of asset forfeiture, see McCaw, *supra* note 16, at 195–97.

57 *See supra* note 38 and accompanying text. However, courts have been inconsistent in applying the innocent owner defense. *See* Pimentel, *supra* note 20, at 26–27; Anthony J. Franze, Note, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the "Innocent Owner,"* 70 NOTRE DAME L. REV. 369 (1994). Innocent owner defenses, as well as substantial connection challenges, *see supra* note 74, usually accompany excessiveness challenges. *See* United States v. 7079 Chilton Cnty. Rd., 123 F. Supp. 2d 602 (M.D. Ala. 2000), *reversed by* United States v. Cleckler, 270 F.3d 1331 (11th Cir. 2001).

58 The Supreme Court's 1993 *Austin v. United States* and *Alexander v. United States* decisions mark the substantive birth of Excessive Fines Clause jurisprudence. For the development of scholarly thought in this realm, see *supra* note 6.

of the criticism leveled at the practice.[59] However, while many of these criticisms are important for policy makers to consider, for purposes of the Eighth Amendment excessiveness analysis, both criminal *and* civil forfeitures are equally susceptible to challenge.[60] In other words, property that is currently being improperly valued by the misapplication of the *Bajakajian* analysis can be forfeited both civilly and criminally; therefore, this Note does not distinguish between criminal and civil forfeiture insofar as the procedures used to evaluate excessiveness under both mechanisms need to be reexamined.

C. *Assets Forfeitable Through Asset Forfeiture Proceedings*

Practically all forms of property involved in most crimes can be forfeited through criminal and civil forfeiture. What distinguishes one form of property from another for purposes of asset forfeiture is the theory used to forfeit it; this theory is directly related to what role the property played in the crime.[61] While commentators have disagreed as the precise way to characterize each theory,[62] substantively three different forms of property may be forfeited:[63] proceeds of crime,[64] contraband,[65] and property used to facilitate a crime.[66] This latter category encompasses both property that is an instrumentality of crime,[67] such as monetary instruments used to commit cash smuggling

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59 *See supra* note 13.

60 *See, e.g.*, United States v. Yu Tian Li, 615 F.3d 752 (7th Cir. 2010); United States v. 325 Skyline Circle, 534 F. Supp. 2d 1163 (S.D. Cal. 2008).

61 *See infra* note 71.

62 *Compare* Pimentel, *supra* note 20, at 6 ("Some of the literature distinguishes between property integral to the commission of the crime and the property that merely 'facilitates' it, but the law does not make such a distinction." (footnote omitted)), *with* McCaw, *supra* note 16, at 186–87 (distinguishing between facilitating property and instrumentalities of crime). *Cf.* DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 13–15 (2d ed. 2008) ("Forfeitable property used in criminal activity is often referred to as 'instrumentality' or 'facilitation' forfeitures. Although these words are often used interchangeably there are subtle yet important differences between the two terms.").

63 *See* Bennis v. Michigan, 516 U.S. 442, 459 (1996) (Stevens, J., dissenting) ("For purposes of analysis it is useful to identify three different categories of property that are subject to seizure: pure contraband; proceeds of criminal activity; and tools of the criminal's trade."); Pimentel, *supra* note 20, at 3 ("[D]istinctions must be made between forfeitures (1) of contraband, (2) of proceeds of crime, and (3) of 'facilitating property,' which is sometimes characterized more narrowly as 'instrumentalities' of crime.").

64 *See, e.g.*, United States v. Betancourt, 422 F.3d 240 (5th Cir. 2005); United States v. Fruchter, 137 F. App'x 390 (2d Cir. 2005).

65 *See, e.g.*, United States v. Jeffers, 342 U.S. 48 (1951); Pimentel, *supra* note 20, at 12 ("Least controversial, and perhaps least interesting, are contraband forfeitures. These have been around as long as the concept of contraband has been in existence. Whenever possession of something is criminalized, the forfeitability of that property can be assumed.").

66 *See, e.g.*, United States v. Yu Tian Li, 615 F.3d 752 (7th Cir. 2010); United States v. 325 Skyline Circle, 534 F. Supp. 2d 1163 (S.D. Cal. 2008).

67 *See, e.g.*, United States v. Malewicka, 664 F.3d 1099 (7th Cir. 2011).

crimes,[68] and property that facilitates a crime, such as a bank account used to conceal fraud,[69] or a family home used to store narcotics.[70] The distinctions between the different forms of property that can be forfeited are vital for the purposes of this Note because the Eighth Amendment excessiveness analysis should be uniquely tailored for each type.[71]

Most of the litigation over the application of the Excessive Fines Clause in forfeiture cases concerns the forfeiture of property used to facilitate crimes.[72] Facilitating property can generally be defined as property that "is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation."[73] For purposes of both criminal and civil forfeiture, the government is required to establish a substantial connection between the property to be forfeited and an underlying offense before the property can be subject to forfeiture as facilitating property.[74] The forfeiture of facilitating property is the most likely target for excessiveness review because of the often-attenuated relationship between the property and the underlying

68 *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 337 (1998); Stefan D. Cassella, *Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332*, 22 BERKELEY J. INT'L L. 98 (2004).

69 *See, e.g.*, United States v. Aguasvivas-Castillo, 668 F.3d 7 (1st Cir. 2012).

70 *See, e.g.*, von Hofe v. United States, 492 F.3d 175 (2d Cir. 2007).

71 Pimentel, *supra* note 20, at 3 ("Because the policy foundation for each of these forfeitures is different, the appropriate procedure for each—striking a proper balance between legitimate government interests and the rights of property owners—must also be different.").

72 *See, e.g.*, *von Hofe*, 492 F.3d at 175 (forfeiture of home as facilitating property for an underlying crime of distribution of a controlled substance). The extensive risks posed by the forfeiture of facilitating property to excessiveness considerations is precisely why this Note chooses to focus specifically on the forfeiture of facilitating property, specifically the family home, in lieu of considering proceeds forfeiture and contraband forfeiture.

73 21 U.S.C. § 881(a)(7) (2012); *see also* STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 942–43 (2d ed. 2013) ("'Facilitating property[]' . . . is not limited to property that is integral, essential or indispensable to the offense, but includes any property that makes the prohibited conduct 'less difficult or more or less free from obstruction or hindrance.'" (quoting United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990))).

74 *See* 18 U.S.C. § 983(c)(3) (2012). In the case of drug offenses, for example, factors relevant in finding a substantial connection include large quantities of drugs on premises, documents indicating a large customer base, long-term history of sales, distribution materials, and admissions of prior sales. EDGEWORTH, *supra* note 62, at 243; *see also* CASSELLA, *supra* note 73, at 951–58. This substantial connection requirement is critical because it undercuts the claims by some commentators that Excessive Fines Clause concerns may be alleviated by focusing on the relationship the property being forfeited has to the offense. *See, e.g.*, Brent Skorup, Comment, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. C.R. L.J. 427, 451–54 (2012). The substantial connection requirement ensures that the property being forfeited *does* have a substantial connection to a crime; basing an Excessive Fines Clause analysis on the degree of that substantial connection does not adequately highlight the critical components of the excessiveness inquiry—specifically the value of the property forfeited. *See infra* Part III. Moreover, as statutes are passed allowing for the forfeiture of *all* property owned by perpetrators of egregious crimes pursuant to criminal forfeiture, reliance on an "enhanced" substantial connection inquiry becomes moot. *See supra* note 35.

crime.[75] Unlike proceeds of crime, which are only generated due to the underlying crime,[76] or contraband which is inherently illegal,[77] facilitating property exists independent of the underlying crime.[78] Moreover, the value of the property forfeited is not guaranteed to have any relationship to the underlying crime.[79] This difficulty is demonstrated by the forfeiture of family homes;[80] courts consistently struggle to quantify the value of the property being forfeited and adequately compare it to the gravity of the offense.[81] Although federal forfeiture statutes do not hesitate to legitimize the forfeiture of real property under a facilitating theory of forfeiture,[82] the absence of authorization for such forfeitures in several state forfeiture statutes reveals the genuine concerns surrounding the breadth of the facilitation theory.[83]

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75 See *infra* note 161.

76 *See supra* note 64.

77 *See supra* note 65.

78 *See supra* note 66.

79 For example, the forfeiture of crime proceeds always bears a proportional relationship to the underlying crime: the amount forfeited is limited to the amount obtained by illicit means. On the other hand, a five million dollar home can be forfeited for facilitating a drug transaction, but a substantially less valuable garage can also be forfeited for facilitating that same transaction. *See* McCaw, *supra* note 16, at 200 ("[I]f a defendant transports drugs in a junky old car, the car will be subject to forfeiture as facilitating property. But the defendant could have committed the same crime in a fancy new Jaguar and would have to forfeit more valuable property.").

80 In fiscal year 2012, 424 units of real property were forfeited by the federal government, collectively valued at $80,744,581. *Assets Forfeiture Fund and Seized Asset Deposit Fund: Method of Disposition of Forfeited Property—Fiscal Year 2012*, U.S. DEPARTMENT JUST., http://www.justice.gov/jmd/afp/02fundreport/2012affr/report5.htm (last visited Mar. 19, 2014). Twelve of these units were valued at over one million dollars each. *FY 2012 Seized Property Inventory Valued Over One Million Dollars as of September 30, 2012*, U.S. DEPARTMENT JUST., http://www.justice.gov/jmd/afp/02fundreport/2012affr/report7.htm (last visited Mar. 19, 2014). This was a marked increase over fiscal year 2011 when 340 units of real property were forfeited valued at $65,938,740. *Assets Forfeiture Fund and Seized Asset Deposit Fund: Method of Disposition of Forfeited Property—Fiscal Year 2011*, U.S. DEPARTMENT JUST., http://www.justice.gov/jmd/afp/02fundreport/2011affr/report5.htm (last visited Mar. 19, 2014); *see also* King, *supra* note 18, at 188 (citing the high profit margin of forfeiture as incentive for prosecutors to seize assets in an abusive manner); Pimentel, *supra* note 20, at 51 n.294 ("Studies have suggested that the most commonly seized assets are real property and monetary instruments." (citing JOHN L. WORRALL, U.S. DEP'T OF JUSTICE, ASSET FORFEITURE 4 (Nov. 2008))).

81 *See infra* Part III.

82 *See* 18 U.S.C. §§ 981–982 (2012).

83 *See* EDGEWORTH, *supra* note 62, at 239–42 (comparing state asset forfeiture statutes and identifying Alaska, Nebraska, New Mexico, North Carolina, and Vermont as states not authorizing the forfeiture of real property).

II. THE ROAD TO *BAJAKAJIAN* AND ITS AFTERMATH

The expansive use of both forms of judicial asset forfeiture by law enforcement[84] raises the concern that without greater judicial oversight of asset forfeiture, the protections of the Excessive Fines Clause will not be realized.[85] Prior to 1993, the Supreme Court's neglect of the Excessive Fines Clause led at least one scholar to conclude that the Clause was "virtually a dead letter."[86] Lower federal courts believed that civil forfeiture judgments were not subject to the protections of the Excessive Fines Clause,[87] and applied the Eighth Amendment's Cruel and Unusual Punishment Clause to evaluate criminal forfeitures—predictably concluding that forfeiture, regardless of size, was not cruel and unusual.[88] In 1993, the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment acts as a check on the government's ability to seek "punitive" asset forfeiture despite forfeiture not constituting a traditional "fine."[89] Although holding that the Excessive Fines Clause applies to forfeiture proceedings, the Court waited five years to address how to determine whether the forfeiture is so excessive that it violates the Clause.[90] Finally in 1998, the Supreme Court held in

84 *See supra* note 24.

85 The harsher and more encompassing forfeiture provisions become, *see supra* note 35, the more they begin to resemble forfeiture of estate. *See supra* notes 27–31. Early American lawmakers feared the consequences excessively harsh forfeitures would have on innocent family members, and acted swiftly to prohibit forfeiture of estate. Reed & Gill, *supra* note 29, at 59–69 ("In 1787, the framers of the Constitution, with little debate, banned imposition of forfeiture of estate and corruption of blood for the offense of treason; three years later the first Congress abolished forfeiture of estate for all convictions and judgments." (footnotes omitted)).

86 Johnson, *supra* note 3, at 468; *see also supra* note 5.

87 Johnson, *supra* note 3, at 469 ("The absence of discussion of the Excessive Fines Clause in the context of civil *in rem* forfeiture can be explained by the prevailing view that the Eighth Amendment did not apply to civil proceedings.").

88 *Id.* ("Criminal forfeitures were held to be subject to Eighth Amendment restrictions, but courts tended to conceptualize the Eighth Amendment as a single, unified entity, rather than attempting to distinguish and apply the individual clauses."). Therefore courts applied the holdings of *Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Solem v. Helm*, 463 U.S. 277 (1983), providing the standard for proportionality review under the Cruel and Unusual Clause, to review criminal forfeitures in merely a cursory fashion. As Professor Johnson explains, because proportionality protections are "very weak" in the Cruel and Unusual Punishment context, the limited consideration of forfeiture proportionality challenges is understandable. Johnson, *supra* note 3, at 470, 499 (citing United States v. Sarbello, 985 F.2d 716 (3d Cir. 1993) and United States v. Busher, 817 F.2d 1409 (9th Cir. 1987)).

89 In *Alexander v. United States*, 509 U.S. 544 (1993), and *Austin v. United States*, 509 U.S. 602 (1993), the Supreme Court found that the Excessive Fines Clause applies not only to criminal forfeitures, but to punitive civil forfeitures as well. The key holding in both *Austin* and *Alexander* is that forfeiture is a form of punishment not distinguishable from the "fines" that the Excessive Fines Clause purports to limit. *See, e.g.*, 2 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 13.05 (2000) (analyzing *Austin* and *Alexander*).

90 Johnson, *supra* note 3, at 463 ("Unfortunately, in the ensuing five years, the promise of *Austin* and *Alexander* remained unfulfilled, largely because most of the courts implementing

United States v. Bajakajian that asset forfeiture is unconstitutional when it is "grossly disproportional to the gravity of the defendant's offense."[91]

A. United States v. Bajakajian

On June 9, 1994, customs inspectors, alerted by dogs trained to detect currency by smell, apprehended Hosep Bajakajian, his wife, and his two daughters at Los Angeles International Airport, while waiting to board an international flight to Italy.[92] Upon being notified by a customs inspector that he was required by federal law[93] to report all money in excess of $10,000 in his possession, Bajakajian acknowledged possessing, in total, $15,000 in cash.[94] A search of Bajakajian's checked baggage and carry-on items, however, revealed a total of $357,144 in cash.[95] Pursuant to its criminal forfeiture authority,[96] the federal government brought an action in federal district court to require Hosep Bajakajian to forfeit the entire amount of cash he had attempted to carry onto the plane.[97] The Central District Court of California held that although the entire $357,144 was subject to forfeiture as being "involved in" the reporting offense,[98] full forfeiture would be "extraordinarily harsh" and "grossly disproportionate to the offense in question,"[99] and would consequently violate the Excessive Fines Clause of the Eighth Amendment.[100] The District Court found that the $357,144 in cash was not connected to any other crime,[101] was being transported solely for the purpose of repaying a lawful debt,[102] and was not reported because of Bajakajian's justifiable fear of authority stemming from "cultural

the cases' holdings fundamentally misconceived either the nature or the scope of the 'excessiveness' inquiry.").

91 United States v. Bajakajian, 524 U.S. 321, 337 (1998).

92 *Id.* at 324.

93 *See* 31 U.S.C. § 5316(a)(1)(A) (2012) ("Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—(A) from a place in the United States to or through a place outside the United States . . . .").

94 *Bajakajian*, 524 U.S. at 325.

95 *Id.*

96 *See* 18 U.S.C. § 982(a)(1) (2012) (Section 982, the criminal counterpart to 18 U.S.C. § 981, the civil forfeiture statute, authorizes "[t]he court, in imposing sentence on a person convicted of an offense in violation of [18 U.S.C. §§] 1956, 1957, or 1960 . . . [to] forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.").

97 *Bajakajian*, 524 U.S. at 325.

98 *Id.* at 325–26.

99 *Id.* at 326 (internal quotation marks omitted).

100 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

101 *Bajakajian*, 524 U.S. at 326.

102 *Id.*

differences" fostered by growing up as an Armenian minority in Syria with general "distrust for the Government."[103] Upon the government's appeal seeking full forfeiture of the currency, the Ninth Circuit[104] and Supreme Court affirmed[105] that full forfeiture of the unreported cash Bajakajian attempted to bring onto the flight in violation of federal reporting requirements would violate the Excessive Fines Clause of the Eighth Amendment.[106] In its most significant application of the Excessive Fines Clause to asset forfeiture to date,[107] the Supreme Court in *Bajakajian* found that the gross disproportionality between the reporting crime that Bajakajian committed, and the extensive forfeiture order sought by the government, was not constitutionally sustainable.[108]

There are four factors generally acknowledged by courts that considered excessiveness claims in the years after *Bajakajian* as comprising the core factors that the Supreme Court in *Bajakajian* found dispositive: (1) The nature of the crime and its connection to other criminal activity;[109] (2) whether the defendant fits into the class of persons at whom the statute was aimed;[110] (3) the maximum sentence or fine under the applicable statute and the sentencing guidelines;[111] and (4) the harm caused by the offense.[112] The Court in *Bajakajian* relied on these four factors to quantify the "gravity of the offense." The gravity of the offense was then weighed against the value of the cash being forfeited, leading the Court to conclude that the forfeiture of the total sum was grossly disproportional.[113]

The two main problems that have emerged from the way lower courts have applied *Bajakajian* are intricately linked. First, courts refuse to consider factors not applied by the *Bajakajian* Court.[114] This is rarely a problem when courts consider cases factually similar to *Bajakajian*, but is amplified when courts consider the forfeiture of facilitating

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103 *Id.* (internal quotation marks omitted).

104 United States v. Bajakajian, 84 F.3d 334, 338 (9th Cir. 1996) ("Forfeiture of any amount would be unconstitutionally excessive under the [Ninth Circuit's existing] Excessive Fines Clause test."), *aff'd*, 524 U.S. 321. The Ninth Circuit applied a two-part instrumentality-proportionality test, to determine that the forfeiture was not excessive. *Id.* at 336.

105 *Bajakajian*, 524 U.S. at 344.

106 *Id.*

107 The Supreme Court addressed forfeiture in the context of the Excessive Fines Clause in two major decisions five years before deciding *Bajakajian*. In *Austin v. United States*, 509 U.S. 602 (1993), and *Alexander v. United States*, 509 U.S. 544 (1993), the Supreme Court found it "obvious[]" that the Excessive Fines Clause applies to asset forfeiture and serves as a vital check on the government in obtaining monetary judgments as punishment for crimes. *Austin*, 509 U.S. at 609–12.

108 *Bajakajian*, 524 U.S. at 324.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 337–41.

114 *See infra* note 187 and accompanying text.

property, such as the family home, and are unable to adequately quantify the "value of the forfeiture."[115] This rigidity[116] in applying *Bajakajian* has led only 4 out of 150 Federal Courts of Appeals that have relied on *Bajakajian* in conducting an excessiveness inquiry to find an excessive forfeiture.[117] Second, because the factors used in *Bajakajian* are linked to the specific facts of *Bajakajian*, courts considering the excessiveness of forfeiture go to great lengths to distinguish the facts of a particular case from those in *Bajakajian*. Because *Bajakajian*'s facts were particularly sympathetic to the claimant, involved a victimless crime,[118] and featured a strict liability standard of fault,[119] virtually the only time that excessiveness has been found by courts applying the *Bajakajian* standard is when the facts of a particular case were remarkably similar to those of *Bajakajian*.[120]

As articulated by David B. Smith, a prominent asset forfeiture scholar, "*Bajakajian* does not answer every question about the test for excessiveness."[121] Courts need to liberate themselves from the rigidity

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115 *See infra* note 181 and accompanying text.

116 The concern regarding rigidity in addressing asset forfeiture is not new. *See, e.g.*, Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. PITT. L. REV. 1 (1991) (suggesting that the RICO statute be amended to give courts discretion in ordering forfeiture judgments).

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. These findings demonstrate several key ideas: First, courts are not just treating *Bajakajian* factors rigidly, but they are treating the *Bajakajian facts* just as rigidly, resulting in an unspoken requirement that in order for forfeiture to be excessive, the facts of a case must be identical, or at the very least very similar, to *Bajakajian*'s. Second, it indicates a reluctance by courts to forfeit family homes and sheds light on the mechanisms relied on by courts to rescue family homes from forfeiture without recognizing, as this Note suggests, that the valuation prong of the *Bajakajian* analysis is the key to effectuate this policy decision with logical consistency. Finally, the timing of these cases is worth noting: two decisions came out right after *Bajakajian*, while two have been made quite recently. This indicates that courts in the immediate aftermath of *Bajakajian* were willing to treat the decision quite liberally, and that courts today are growing frustrated with the rigidity imposed upon the decision by years of inadequate interpretation and are looking for a way out. *See infra* note 180 and accompanying text.

118 *Bajakajian*, 524 U.S. at 339.

119 *Id.* at 321–22.

120 *See supra* note 117 and accompanying text.

121 SMITH, *supra* note 89, ¶ 13.05 ("[I]t does not say whether the personal benefit reaped by the defendant from the crime is a factor that can be considered. It does not say whether a court should consider the other sanctions imposed on the defendant by the sovereign seeking forfeiture. It does not say whether a court can consider the intangible, subjective value of the property, e.g., whether it is the family home. The Court noted that Bajakajian did not argue that his wealth or income were relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood; and that the district court made no findings in this regard.").

involved with strictly applying the facts and factors of *Bajakajian*, and instead understand that *Bajakajian* only provides a standard by which to balance the gravity of the offense with the value of the crime. One way to embrace this understanding is to explore the way pre-*Bajakajian* courts applied a similar proportionality analysis while considering more diverse factors;[122] the other is to recognize the flawed application of *Bajakajian* today.

B. *Pre*-Bajakajian *Approaches to the Excessive Fines Clause*

Bajakajian did not completely change the Excessive Fines landscape, but rather rejected the excessiveness tests that existed at the time the case arose, which were not premised on a proportionality analysis,[123] and endorsed those that were. To better understand the appropriate way to apply the Court's guidance in *Bajakajian*, it is critical to analyze the way pre-*Bajakajian* courts approached the gross disproportionality analysis. To ignore pre-*Bajakajian* applications of the Excessive Fines Clause would confirm the incorrect assumption by post-*Bajakajian* courts that *Bajakajian*'s factors are exclusive.[124] Treating *Bajakajian* as providing a strict test is a mistake. *Bajakajian* involved facts unique to a reporting offense, and suggested an analysis that adequately addressed those facts; moreover, *Bajakajian* did not involve facilitating property, but rather unreported cash that was the subject matter of the offense.[125]

Although some pre-*Bajakajian* decisions, like the majority of post-*Bajakajian* decisions, failed to consider the characteristics of the offender and the value of the property forfeited, looking exclusively to

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122 *See id.* ("It is still useful . . . to consider how the lower courts have dealt with Eighth Amendment claims prior to *Bajakajian* and, indeed, prior to *Austin* and *Alexander*.").

123 *See, e.g.*, United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994). Specifically, *Bajakajian* was a rejection of the "instrumentality test" developed by multiple circuits, grounded in Justice Scalia's concurring opinion in *Austin*. Austin v. United States, 509 U.S. 602, 627 (1993) (Scalia, J., concurring) ("Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use, to which issue the value of the property is irrelevant. Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal."); *cf.* Judd J. Balmer, Note, *Civil Forfeiture Under 21 U.S.C. § 881 and the Eighth Amendment's Excessive Fines Clause*, 38 ARIZ. L. REV. 999 (1996) (advocating for an exclusive instrumentality test); Kristen Michelle Caione, Note, *When Does In Rem Civil Forfeiture Under 21 U.S.C. § 881(a)(7) Constitute an Excessive Fine?: An Overview and an Attempt to Set Forth a Uniform Standard*, 47 SYRACUSE L. REV. 1093 (1997) (same).

124 *See infra* notes 158, 163.

125 United States v. Bajakajian, 524 U.S. 321, 324–25 (1998).

the gravity of the crime in making their assessment,[126] a number of circuits developed tests that took care to incorporate multiple other factors into their analysis.[127] In considering the forfeiture of a parcel of land including a family home in response to a marijuana distribution conviction,[128] in 1995 the Second Circuit articulated a test in *United States v. Milbrand* that purported to balance the gravity of the offense with the "harshness of the forfeiture." The Second Circuit accomplished this balancing by considering the nature *as well as* the value of the property being forfeited *and* the effect of forfeiture on innocent third parties."[129] By considering the harshness of the forfeiture as the dispositive factor, and not the monetary value of the forfeiture judgment alone, the *Milbrand* test afforded the court greater flexibility to consider innocent third-party concerns, individual culpability, and the subjective value of property in the excessiveness analysis.[130] Other circuits went further, not limiting themselves to the expansive approach used by the *Milbrand* test, instead choosing to consider whatever factors best helped them balance the gravity of an underlying harm with the value of the property consequently forfeited.[131] These circuits provided exhaustive

126 *See, e.g.*, United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999) ("[E]xcessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender.").

127 *See, e.g.*, United States v. Milbrand, 58 F.3d 841, 847–48 (2d Cir. 1995) ("In our view, the factors to be considered by a court in determining whether a proposed *in rem* forfeiture violates the Excessive Fines Clause should include (1) the harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.").

128 *Id.* at 842–43.

129 *Id.* at 847–48; *see also* Ann Jennings Maron, Comment, *Is the Excessive Fines Clause Excessively Kind to Money Launderers, Drug Dealers, and Tax Evaders?*, 33 J. MARSHALL L. REV. 243, 264 (1999) (describing the test formulated by *United States v. Milbrand* as a combination of the instrumentality and proportionality approaches used by former courts).

130 Several other pre-*Bajakajian* approaches also consider the harshness factor prominent in *Milbrand*. In *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 982 (9th Cir. 1995), the Ninth Circuit first ensured that the property was an instrumentality of the offense, and then considered the relationship between the forfeiture and the offense by weighing the harshness of the forfeiture and the owner's circumstances with the gravity of the harm. A similar test was also suggested in *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 733 (C.D. Cal. 1994); *see* Skorup, *supra* note 74, at 440–53 (proposing that the *Zumirez* "harshness" approach should be adopted by all courts when considering civil forfeiture). While I agree that the harshness factor used by the *Zumirez* court, like the *Milbrand* court, is a valuable pre-*Bajakajian* example of a conscientious judicial approach to the excessiveness inquiry, any readjustment in the forfeiture analysis must be considered through the lens of *Bajakajian* and must interface with post-*Bajakajian* realities. By focusing on the "value" of the forfeiture prong as this Note suggests, courts will be able to address *both* criminal and civil forfeiture excessiveness issues and do so without running afoul of the Supreme Court's last word on the issue.

131 *See, e.g.*, United States v. Van Brocklin, 115 F.3d 587, 601–02 (8th Cir. 1997) (the fact that defendant was a secondary figure in the crime, a victim of misguided loyalty, and received no

lists of factors that they suggested should be considered by district courts in determining whether forfeiture violates the Excessive Fines Clause.[132]

C. *The State of Post-*Bajakajian *Excessiveness Approaches*

While the majority of courts understand *Bajakajian* to supply both a standard by which to evaluate whether forfeiture is excessive, and the four factors that should be considered when making that determination,[133] some courts, without doctrinal justification, 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.[134] Yet others do not consider any factors at all, citing *Bajakajian* for the vague proposition that courts should consider merely excessiveness.[135] In fact, in the fifteen years since *Bajakajian* was decided, only four courts of appeals applying *Bajakajian* have found a forfeiture to be excessive,[136] and a *Bajakajian* analysis that thoroughly considers the excessiveness of a forfeiture beyond what *Bajakajian* suggests should be considered is even more rare.[137]

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criminal profit all factored into the court's analysis); United States v. 829 Calle de Madero, 100 F.3d 734, 738–39 (10th Cir. 1996) (refusing to adopt one particular test and instead urging that weight should be given to various factors—including nexus, proportionality, harshness, and culpability of the owner).

132 *See, e.g.*, United States v. 11869 Westshore Drive, 70 F.3d 923, 927–30 (6th Cir. 1995) (collecting tests that other circuits have proposed and directing district courts to select the appropriate test to fit the facts in a given case).

133 *See, e.g.*, United States v. Haleamau, 887 F. Supp. 2d 1051, 1065 (D. Haw. 2012) (applying a four-factor *Bajakajian* analysis including "'(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))).

134 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."); *cf.* Newell Recycling Co. v. U.S. Envtl. Prot. Agency, 231 F.3d 204, 210 (5th Cir. 2000) ("[I]f the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment.").

135 *See, e.g.*, 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).

136 *See supra* note 117 and accompanying text.

137 In a rare extensive consideration of forfeiture, including a thorough comparison of past forfeiture awards by courts considering similar facts, Judge Weinstein of the Eastern District of New York rejected a forfeiture as excessive as against the spirit of *Bajakajian*. United States v. $293,316 in U.S. Currency, 349 F. Supp. 2d 638 (E.D.N.Y. 2004). This opinion is the only one found by the author that actively compares forfeiture judgments by other courts to attempt to determine what would make an excessive forfeiture.

Relying on the most objective of the possible ways to evaluate the gravity of the harm, many courts conclude that if the value of the property forfeited is lower than the maximum fine available to punish the offender for the underlying offense, than the forfeiture is presumptively not excessive.[138] Some courts look to the maximum fine available under the statute,[139] while others refer to the penalty set by the Sentencing Guidelines.[140] However, considering this factor alone does not shed any light on the "value" prong of the analysis,[141] nor does it find justification in *Bajakajian*. Furthermore, considering this factor in isolation attempts to create a formula that removes all subjective considerations from the analysis.[142]

To supplement the gravity of the harm inquiry that might be left somewhat bare by looking at the maximum fine available to punish the offender, the majority of courts tend to choose the factors articulated in *Bajakajian* that best help them in condoning forfeiture. Generally, this involves focusing on the "nature of the offense," in particular the harm caused by the underlying crime.[143] Ironically, these factors infuse subjectivity into the "gravity of the offense" consideration, and give courts the opportunity to shape the gravity of the offense consideration to match the particular facts of a case; courts do not hesitate in conducting their analysis in such a manner while at the same time rejecting subjectivity that could enhance the analysis of the value of property forfeited.[144] Two recent courts of appeals decisions, *United States v. Aguasvivas-Castillo*,[145] and *United States v. Malewicka*,[146] demonstrate the standard application of *Bajakajian*: both courts

138 *See supra* note 134 and accompanying text.

139 United States v. Bernitt, 392 F.3d 873, 880–81 (7th Cir. 2004) (forfeiture of farm worth $115,000 was not grossly-disproportional when the maximum statutory sentence for marijuana manufacturing was forty years imprisonment and a $2 million fine); United States v. Riedl, 82 F. App'x 538, 540 (9th Cir. 2003) (forfeiture twelve-times greater than the sentencing guidelines fine but less than the aggregate statutory fine was not considered excessive).

140 *See, e.g.*, United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1122 (9th Cir. 2004).

141 Considering an individual's sentencing guidelines calculation may shed light on his culpability, but it does not shed light on the value of the property to be forfeited.

142 *See* United States v. Varrone, 554 F.3d 327, 331–32 (2d Cir. 2009) (forfeiture forty-times over permissible statutory fine or Sentencing Guidelines recommendation causes court to express concern); San Huan New Materials High Tech, Inc. v. Int'l Trade Comm'n, 161 F.3d 1347, 1363–64 (Fed. Cir. 1998) (indicating confusion as to what total of forfeiture over a statutory maximum indicates excessiveness, but acknowledging that a ratio of 10:1 would surely be excessive).

143 *See, e.g.*, United States v. Chaplin's, Inc., 646 F.3d 846 (11th Cir. 2011) (money laundering is a serious offense); United States v. Sabhnani, 599 F.3d 215 (2d Cir. 2010) (forfeiture of residence used to harbor illegal aliens and subject them to involuntary servitude, torture, starvation, and beatings was not excessive because the crime was grave and the harm was great); *see also infra* note 162.

144 *See infra* note 181.

145 668 F.3d 7 (1st Cir. 2012).

146 664 F.3d 1099 (7th Cir. 2011).

consider subjective and objective factors to determine the gravity of the offense, exclude subjective factors in considering the value of the forfeiture, and refrain from considering factors not explicitly mentioned by the *Bajakajian* Court.

In *United States v. Aguasvivas-Castillo*, Bepsy Aguasvivas-Castillo, the owner of a supermarket chain in Puerto Rico who had been convicted of food stamp fraud, relied on *Bajakajian* when trying to convince the First Circuit that the forfeiture of more than twenty million dollars, only four million of which were the tainted proceeds of the fraud, violated the Excessive Fines Clause. The First Circuit, however, concluded that the forfeiture amount was not disproportionate to the gravity of Aguasvivas-Castillo's crimes.[147] As the court explained, not only did his crimes have the "real effect of diverting food stamp funds from feeding people and introduc[ing] waste into the program,"[148] but they were exactly the sort of crimes that the fraud statutes were meant to apply to and deter.[149] Similarly in *United States v. Malewicka*, the Seventh Circuit held that the claimant, who ran a successful cleaning service business, was not subjected to an excessive forfeiture when convicted of structuring transactions for the purpose of avoiding banking reporting requirements.[150] In *Malewicka* however, and unlike in *Aguasvivas-Castillo*, the court went to great lengths to distinguish the facts of *Bajakajian* even though the facts were objectively quite similar. *Malewicka* is the perfect example of how *Bajakajian*'s uniquely sympathetic facts make it exceedingly difficult for courts to rely on *Bajakajian* to find forfeiture excessive.[151]

147 *Aguasvivas-Castillo*, 668 F.3d at 17.

148 *Id.*

149 *Id.*

150 *Malewicka*, 664 F.3d at 1099.

151 First, in considering the "essence of the crime," the court found two major distinctions between *Bajakajian* and *Malewicka*: Malewicka was found guilty of twenty-three reporting offenses compared to Bajakajian's one offense, and Malewicka's crime affected more than just herself and the government—her actions implicated the bank and its legal duty to report certain withdrawals. In completing its analysis under this first factor, the Seventh Circuit also considered the motivation of the offender, and the connection of the crime to other criminal activity. Bajakajian, the Court related, committed his crime out of "fear and distrust for the government," while the court suspected that Malewicka structured her transactions the way she did to avoid paying taxes. *Id.* at 1104. Furthermore, the Seventh Circuit concluded that although Malewicka was not charged with any additional wrongdoing stemming from her illegal structuring (namely money laundering and tax evasion), her actions could have facilitated the very illegal conduct the statute was enacted to prevent. *Id.* at 1107.

III. (RE)VALUING THE FORFEITURE OF FAMILY HOMES

Many of the ambiguities[152] and concerns[153] created by the post-*Bajakajian* application of the Eighth Amendment can be resolved through a closer reading of *Bajakajian* and a better understanding of the factors that lower courts should consider when assessing the "value of the forfeiture" prong of the *Bajakajian* analysis.[154] This better understanding of *Bajakajian* is integral to the future prosperity of asset forfeiture because without a judicial mechanism to alleviate harsh and excessive forfeitures,[155] criticism of asset forfeiture will only continue sapping legitimacy from this crucial law enforcement tool.[156]

The appropriate way to respect the "value" factor of the *Bajakajian* analysis is for courts to consider factors such as the nexus between property subject to forfeiture and the underlying offense, the subjective value of the forfeited property, the effect of forfeiture on a defendant's livelihood, and the effect of the forfeiture upon innocent third parties,[157]

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152 Heather J. Garretson, *Federal Criminal Forfeiture: A Royal Pain in the Assets*, 18 S. CAL. REV. L. & SOC. JUST. 45, 75–76 (2008) ("From the complexity of its statutory authorization through its inconsistent application to third parties, the application of criminal forfeiture is unclear. This lack of clarity has spawned more than three decades of confusing and conflicting decisions. . . . These discrepancies belie the purpose of criminal forfeiture: to punish a convicted criminal, not to confuse litigants." (footnote omitted)).

153 *See supra* notes 8–12 and accompanying text.

154 United States v. Bajakajian, 524 U.S. 321, 336–37 (1998). This concern is particularly relevant as courts continue to forfeit homes not only as facilitating property, but also as substitute assets, *see, e.g.*, United States v. Shepherd, 171 F. App'x 611 (9th Cir. 2006), and as *Bajakajian*'s application is extended beyond forfeiture; *see also* Duckworth v. United States, 418 F. App'x 2, 3–4 (D.C. Cir. 2011) (application of *Bajakajian* to Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 (2012)); United States v. Lessner, 498 F.3d 185, 205 (3d Cir. 2007) (application of *Bajakajian* to Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A (2012)); United States v. Stebbins, 61 M.J. 366 (C.A.A.F. 2005) (application of *Bajakajian* to fines).

155 *See, e.g.*, United States v. 35 Ruth St., No. 3:06cv1844 (MRK), 2008 U.S. Dist. LEXIS 65136, at *11 (D. Conn. Aug. 25, 2008) ("One could rightly question the wisdom of the Government's decision to render Mr. Musumano homeless at the precise time in his life when he appears to be on the road to rehabilitation and recovery. Depriving Mr. Musumano of a home for himself and his son cannot possibly aid in his substantial and commendable efforts to turn his life around and to become a law-abiding member of society. It also cannot help his efforts to reintegrate into his community. But whether it is wise or sensible in these circumstances to deprive Mr. Musumano of a home is a decision that the United States Attorney must make.").

156 *See supra* note 24. Although Congressional action is unlikely, some scholars have proposed alternatives to judicial action such as legislative exceptions for family homes of residents not guilty of an underlying crime, or granting standing to challenge forfeiture to children whose homes may be forfeited. Guerra, *supra* note 10, at 390.

157 Stefan Cassella suggests that the best way to conceptualize the excessiveness analysis is through a line on a graph "that begins to rise linearly but then begins to curve and flatten as mitigating and aggravating factors representing the limitations imposed by the Eighth Amendment are taken into account." Cassella, *supra* note 68, at 112. This analysis however, should not be perceived linearly with different factors mitigating the amount that could be forfeited. Instead, the analysis should be envisioned as utilizing a scale with most of the factors

not as tests on their own, but as factors that affect *Bajakajian*'s command to consider the value of property that is to be forfeited. With facilitating property, and family homes in particular, examining the equity of the property standing alone is insufficient to grant a defendant or claimant the constitutional protections demanded by the Excessive Fines Clause of the Eighth Amendment.[158] Moreover, this proposed approach adequately accounts for the fact that the forfeiture of facilitating property often bears a tenuous relationship to the gravity of an underlying crime,[159] and is consistent with the premise of just dessert[160] embraced by the *Bajakajian* majority.[161] Although encouraging subjectivity in judicial analysis may seem problematic, subjective factors are already considered when determining the "gravity of the offense."[162]

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suggested by various circuits adding to and subtracting from the "value of the property" side of the scale. When forfeiting facilitating property would contribute to law enforcement efforts by serving as a strong deterrent, the property becomes more valuable to the government and thus tilts the value side of the scale down for the defendant; a home that is shared by a defendant's wife and child, however, becomes more valuable to him.

158 *Compare* Utah v. 633 E. 640 N., 2000 UT 17 ¶¶14–20, 994 P.2d 1254 (citing a pre-*Bajakajian* test to determine the value of a forfeited home, the Utah Supreme Court considered (1) the fair market value of the home; (2) the intangible, subjective value of the home; and (3) the effect of the forfeiture on the defendant's family or financial condition.), *and* Nez Perce Cnty. Prosecuting Att'y v. Reese, 136 P.3d 364, 370 (Idaho Ct. App. 2006) ("[A] proportionality inquiry is factually intensive and a catalog of factors is not exclusive."), *with* United States v. Seher, 686 F. Supp. 2d 1323, 1331 (N.D. Ga. 2010) (articulating a limited conception of "value" by holding that "value of the property" is the price defendant paid to acquire it, not its present retail value or any subjective value attached to it).

159 *See* McCaw, *supra* note 16, at 200 ("[F]orfeiture of facilitating property is more random. The amount of money a defendant loses is not as closely tied to the amount of crime he has committed."); Pimentel, *supra* note 20, at 42 ("[T]he amount of the forfeiture, which must be characterized as a 'fine' in the context of punishment, is almost entirely unrelated to the severity or seriousness of the offense.").

160 *See* Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 289 n.d1 (1998) (explaining the theory of "just deserts" as stemming from the eighteenth-century German philosopher Immanuel Kant's theory that "punishment should be proportionate to 'their internal wickedness'").

161 Johnson, *supra* note 3, at 494–96 (articulating the *Bajakajian* majority's rejection of a utilitarian excessiveness inquiry in lieu of one concerned with the defendant's specific offense and his just dessert and indicating that such a conception of the excessiveness test should benefit claimants of property who are involved in forfeiture proceedings solely due to the criminal behavior of another). Professor Guerra makes an important corollary to this claim in her scholarship on how civil forfeiture harms innocent victims of forfeiture. Guerra, *supra* note 10. Guerra posits that courts should recognize the harm posed by forfeiture to innocent children, as well as spouses and parents of individuals convicted of crimes authorizing forfeitures by valuing those parties' interests in the property. Moreover, Guerra concludes that the guilty would still be punished because they would be subject to all other avenues of criminal prosecution. *Id.* at 376–88.

162 *See* Smalley v. Ashcroft, 354 F.3d 332, 339 (5th Cir. 2003) (comparing the "moral turpitude" of claimant's money laundering offense with the "moral turpitude" of the reporting offense in *Bajakajian*). *Compare* Ross v. Duggan, 113 F. App'x 33, 45 (6th Cir. 2004) ("Solicitation of prostitution, lewdness, public indecency, and other sexual vice crimes of the types material to the subject litigation may impact adversely the health, safety, welfare, and morals of the affected neighborhood and the larger community."), *with* One 1995 Toyota Pick-

The embrace of individual culpability, just dessert, and a probing inquiry of excessiveness suggested in *Bajakajian* have been abandoned by lower courts applying the decision.[163] In a recent Second Circuit forfeiture case however, *von Hofe v. United States*,[164] the court applied a variation of the *Bajakajian* gross disproportionality analysis that indicated the first real intention by a circuit court to consider the culpability of a non-innocent property owner, and represented the first time since *Bajakajian* was decided where a court attempted to quantify the "harshness . . . of [a] forfeiture," in addition to the equity value of the forfeiture.[165] In *von Hofe*, the Second Circuit held that forfeiting Kathleen von Hofe's share in a home used for drug manufacturing was unconstitutionally excessive.[166] Despite being aware of Kathleen von Hofe's husband's crimes and keeping that information from the authorities,[167] the Second Circuit applied a significantly revamped *Bajakajian* analysis, and determined that von Hofe should not be punished as if she shared her husband's culpability. Significantly, the Second Circuit recognized that von Hofe did not constitute an innocent owner, but nevertheless decided in her favor.[168]

Moreover, the First Circuit has also indicated willingness to adopt a standard in line with the suggestions of this Note, starting with its 2008 decision in *United States v. Levesque*.[169] There, the court held that underlying *Bajakajian* is the assumption that "forfeiture should not be so great as to deprive a wrongdoer of his . . . livelihood."[170] Considering the effect of forfeiture on a defendant's livelihood is doctrinally similar to considering the subjective value of property, because it involves

up Truck v. District of Columbia, 718 A.2d 558, 560–66 (D.C. 1998) ("Solicitation for prostitution . . . [is] a minor crime . . . .").

163 For just a small sampling of such cases, see United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) ("[W]e are not impressed with Heldeman's reliance upon the sentimental value of his house."); United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("[W]e do not take into account the personal impact of a forfeiture on the specific defendant in determining whether [it is an excessive fine]."); United States v. 817 N.E. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999) (holding that forfeiture of claimant's residence under federal drug forfeiture act was not an excessive fine under *Bajakajian*, even though claimant would suffer hardship because he could not purchase another home).

164 492 F.3d 175 (2d Cir. 2007).

165 *Id.* at 186.

166 *Id.* at 188–92.

167 *Id.* at 189.

168 *Id.* (citing United States v. 32 Medley Lane, 372 F. Supp. 2d 248, 267 (D. Conn. 2005), *aff'd in part, reversed in part, and remanded by* 492 F.3d 175). The Second Circuit has not shied away from the *von Hofe* formulation, but has not since rejected a forfeiture as excessive on its grounds.

169 546 F.3d 78 (1st Cir. 2008).

170 *Id.* at 83–84.

integrating the facts of a claimant's circumstances with the gravity of his offense.[171]

The family home commands a unique position in the operation of American law,[172] attesting to its unique value distinct from other forms of facilitating property. Moreover, the federal government, as well as many states,[173] has acknowledged the unique circumstances surrounding the forfeiture of family homes by providing for enhanced protections for such property in the form of multiple procedural safeguards.[174] These safeguards indicate that, much like death in the cruel and unusual punishment context, forfeiture of the family home is, too, "different" in kind.[175] Along with surveying the state of post-*Bajakajian* applications of the excessiveness inquiry,[176] the author focused specifically on the success, or lack thereof, of excessiveness

171 For an in-depth inquiry into the *Levesque* decision, an analysis of how the Excessive Fine Clause's origins support the *Levesque* holding, and convincing advocacy for why *Levesque* should be adopted by other circuits, see McLean, *supra* note 3, at 851–53. Although no First Circuit decision after *Levesque* has found a forfeiture excessive because it deprives a claimant of his livelihood, subsequent decisions have made approving references to that suggestion. *See* United States v. Fogg, 666 F.3d 13, 18–20 (1st Cir. 2011).

172 For example, the home holds unique value in the context of the First Amendment, Stanley v. Georgia, 394 U.S. 557, 565 (1969), the Second Amendment, District of Columbia v. Heller, 554 U.S. 570, 635 (2008), and of course the Fourth Amendment, Payton v. New York, 445 U.S. 573, 601 (1980) ("[T]he overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic."); *see also* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) ("'Home' is a powerful and rich word in the English language. As our cultural cliché 'a house is not a home' suggests, 'home' means far more than a physical structure. 'Home' evokes thoughts of, among many other things, family, safety, privacy, and community. In the United States, home and home ownership are held in high cultural esteem, as American as apple pie and baseball.").

173 *See* ALA. CODE § 20-2-93(h) (2013) (shifting burden of proof for the innocent owner exemption in cases of forfeiture of real property from the claimant to the state); N.Y. C.P.L.R 1311.3 (CONSOL. 2013) (increasing level of proof required to forfeit real property); *see also* Jonathan D. Colan, Comment, *You Can't Take That Away from Me: The Sanctity of the Homestead Property Right and Its Effect on Civil Forfeiture of the Home*, 49 U. MIAMI L. REV. 159 (1994) (analyzing the use of state homestead exemptions to protect real property from forfeiture on the state level). State homestead protection laws are valuable tools to protect the forfeiture of homes but they are considered by federal courts to be preempted by federal forfeiture law. *See* EDGEWORTH, *supra* note 62, at 247–48.

174 Federal forfeiture law includes additional innocent owner protections for homeowners, 18 U.S.C. § 983(d)(3)(B) (2012), mandatory appointment of counsel in cases of forfeiture of a primary residence, *id.* § 983(b)(2)(A), and unique release provisions for property whose forfeiture may cause hardship for innocent claimants, *id.* § 983(f)(1)(D); *see* Pimentel, *supra* note 20, at 17–18, 30. The manner in which the forfeiture statutes carve out exceptions for family homes and not other types of property is both recognition that homes are unique, and an indication of reluctance to over-incentivize the forfeiture of such property. *See also* 18 U.S.C. § 985(a) (real property may not be forfeited by means of administrative forfeiture).

175 Harmelin v. Michigan, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several respects in which we have held that 'death is different[]' . . . ."); *see also supra* note 29 and accompanying text.

176 *See supra* note 117 and accompanying text.

inquiries as applied to the family home. Not surprisingly,[177] only four federal courts, district courts included, have found the forfeiture of a family home to be excessive.[178] Significantly in three of these four cases, the court went beyond *Bajakajian*'s four factors to find excessiveness;[179] the final case was decided immediately after *Bajakajian* was decided, before the decision was misinterpreted by rigid lower court rulings.[180]

This willingness of courts to condone the forfeiture of family homes without properly considering the subjective value of the property is a by-product of the overwhelming focus on the value of the *equity* in a

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177 *See* United States v. 32 Medley Lane, 372 F. Supp. 2d 248, 267 (D. Conn. 2005) (acknowledging that the forfeiture of the "home will have a profound impact on the entire family," but that "Congress concluded that when real property is used to facilitate the . . . distribution of drugs, forfeiture—even of a family home—is appropriate, and this Court cannot say that in the circumstances of this case, the Constitution forbids that result."), *aff'd in part, reversed in part, and remanded by* von Hofe v. United States, 492 F.3d 175 (2d Cir. 2007); Borgen v. 418 Eglon Ave., 712 N.W.2d 809, 813 (Minn. Ct. App. 2006) ("Federal courts have long been faced with the forfeiture of homes and have routinely upheld forfeiture, despite the harsh result.").

178 *See von Hofe*, 492 F.3d 175; United States v. 3814 NW Thurman St., 164 F.3d 1191 (9th Cir. 1999), *superseded by statute*, 18 U.S.C. § 983 (2012); United States v. 11290 Wilco Highway, 3:11-cv-00640-MA, 2013 U.S. Dist. LEXIS 50032, at *8 (D. Or. Apr. 5, 2013); United States v. 892 Cnty. Rd. 505, No. 2:04CV750, 2006 U.S. Dist. LEXIS 15617, at *18 (M.D. Ala. Apr. 24, 2006). Circuit courts are just as likely to find a district court's finding of excessiveness incorrect. *See* United States v. Castello, 611 F.3d 116 (2d Cir. 2010); United States v. Carpenter, 317 F.3d 618 (6th Cir. 2003), *vacated*, Apr. 14, 2003.

179 *See von Hofe*, 492 F.3d at 186; *11290 Wilco Highway*, 2013 U.S. Dist. LEXIS 50032, at *5; *892 Cnty. Rd. 505*, 2006 U.S. Dist. LEXIS 15617, at *18. *Wilco Highway* explicitly cites *von Hofe* as justification for finding the forfeiture of a claimant's remainder interest in a family home excessive. *11290 Wilco Highway*, 2013 U.S. Dist. LEXIS 50032, at *5–*6. It is noteworthy that while *von Hofe* could be applied to any form of property, it has only successfully been applied to the forfeiture of the family home—an indication that courts are willing to apply a *Bajakajian* test that better protects the home. While *892 County Road 505* was decided prior to *von Hofe*, the court there too expressed a unique willingness to remain unconstrained by the four *Bajakajian* factors. In fact, not only did the district court state that "[t]here is no definitive checklist of relevant factors for the Court to consider in deciding whether a fine that results from a forfeiture is excessive," *892 Cnty. Rd. 505*, 2006 U.S. Dist. LEXIS 15617, at *15, but it cites *Bajakajian* only *once* and only for the general proposition, as this Note suggests it should be, that "[a] fine is excessive 'if it is grossly disproportional to the gravity of a defendant's offense.'" *Id.* (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)).

180 *See 3814 NW Thurman St.*, 164 F.3d at 1191. *3814 NW Thurman Street*, decided immediately after *Bajakajian*, demonstrates a willingness to treat homes differently, but an inability to do so after fifteen years of improper interpretations of *Bajakajian*. These findings also corroborate the findings of my general survey of post-*Bajakajian* cases. *See supra* note 117. Courts are only finding excessiveness in three different categories of cases: (1) currency reporting offenses that resemble *Bajakajian*; (2) cases decided in the immediate aftermath of *Bajakajian*; and (3) recent cases that have deviated from *Bajakajian* to find excessiveness in considering the forfeiture of a family home. These are startling results both considering how many other different forms of property are forfeited, and how long *Bajakajian* has been on the books. These findings also directly support the thesis presented here: Re-understanding *Bajakajian* will permit courts to do what they felt comfortable doing immediately after *Bajakajian*, and what they struggle to attempt to do today.

home, to the exclusion of factors more difficult to quantify.[181] In fact, two of the four courts of appeals decisions that have recognized forfeiture as excessive have had facts virtually identical to *Bajakajian*.[182] In *United States v. Ramirez*,[183] the Eleventh Circuit upheld the determination by a district court that forfeiture was excessive when a reporting crime was committed, without an attempt to conceal wrongdoing, and unrelated to other criminal activity.[184] Similarly, in *United States v. Beras*,[185] decided just one year after *Bajakajian*, the First Circuit rejected forfeiture for a reporting offense because the violation was not related to any other illegal activities, the extent of the harm caused was limited, and the culpability of the offender was low, as indicated by the maximum fine available for the crime.[186] This limited treatment of the excessiveness analysis essentially dictates that under the status quo, unless the underlying offense is a reporting one, with a defendant similar to Hosep Bajakajian, the chances of finding an excessive forfeiture are close to none.

Instead of relying on *Bajakajian*'s four factors, courts should recognize that the ruling in *Bajakajian* was unique because the nature of Hosep Bajakajian's circumstances made any decision, other than finding excessiveness, difficult for any court to swallow. In order for the excessiveness clause to be able to flourish and reinforce our important asset forfeiture regime, there must be some room for excessiveness to be found despite facts not meeting *Bajakajian*'s extreme.

To do this, courts should take *Bajakajian* as providing a standard by which to weigh factors for consideration, but not as providing an

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181 *See* United States v. Yu Tian Li, 615 F.3d 752, 757 (7th Cir. 2010) (comparing equity value of home to maximum statutory fine); United States v. Hull, 606 F.3d 524, 530 (8th Cir. 2010) (same); *cf.* Barros, *supra* note 172, at 293 ("The value of the family home to its occupants cannot be measured solely by its value in the marketplace. The longer the occupancy, the more important these non-economic factors become and the more traumatic and disruptive a move to a new environment is to children whose roots have become firmly entwined in the school and social milieu of the neighborhood."). Although quantifying the subjective value of the home would be difficult, several scholars have suggested approaches by which this may be accomplished. Professor Barros suggests that in the context of eminent domain, for example, "taken homes could be compensated at a fixed premium over fair market value or a premium tied to a sliding scale that increases with the length of residence in the home." *Id.* at 299–300. Professor Pimentel alternatively points out the Supreme Court's willingness to create mathematical formulas to quantify difficult value judgments in the case of punitive damages, and this same approach could be adopted in the forfeiture context. Pimentel, *supra* note 20, at 54. While beyond the scope of this Note, the next step in the suggestion proposed here would be to determine precisely what mathematical formula to use in order to implement my reading of *Bajakajian*.

182 *See supra* note 117.

183 421 F. App'x 950 (11th Cir. 2011).

184 *Id.* at 952–53.

185 183 F.3d 22 (1st Cir. 1999).

186 *Id.* at 28–29.

exclusive list of those factors.[187] This does not conflict with the Supreme Court's general Eighth Amendment jurisprudence.[188] When dealing with asset forfeiture it is important to understand that a defendant has already been punished with a fine, a jail sentence, or both, and that asset forfeiture is an additional punishment.[189] Thus, although courts are, and should be, extremely hesitant to find a punishment is excessive, understanding the nature of asset forfeiture leads to the realization that an excessiveness inquiry needs to be more probing. Moreover, to the extent that some scholars have expressed displeasure with the suggestion by some pre-*Bajakajian* decisions that family homes should be treated differently,[190] this Note's proposal does not necessarily conflict with that position. While certainly this Note's proposal will

187 Cases decided shortly after *Bajakajian* stress this point, before being diluted by subsequent decisions that misunderstood *Bajakajian*. *See* Stoiber v. Sec. & Exch. Comm'n, 161 F.3d 745, 754 (D.C. Cir. 1998) ("Although *Bajakajian* did reject a fine because of a lack of proportionality with the offense, it certainly was not the source of any new or novel proportionality requirement. *Bajakajian* did not elevate Stoiber's Excessive Fines claim 'from completely untenable to plausible.'" (citation omitted)); Dean v. State, 736 S.E.2d 40, 49–50 (W. Va. 2012) ("The Supreme Court stopped short of holding that a lower court had to consider specific factors in assessing whether a forfeiture is grossly disproportionate to the gravity of a defendant's offense."); One 1995 Toyota Pick-up Truck v. District of Columbia, 718 A.2d 558, 560–61 (D.C. 1998) ("Emerging from [*Bajakajian*] . . . are two fundamental principles which shape the analysis of the present case. First, the limitation on excessive fines is meant to curb the 'government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.' . . . The second controlling principle relates to the severity of a fine allowed by the Eighth Amendment." (quoting Austin v. United States, 509 U.S. 602, 609–10 (1993))). As is clear, there is no mention of the factors that *Bajakajian* suggested as being integral to its holding.

188 In fact, while this Note does not comment on whether the gross disproportionality standard is appropriate for considering the forfeiture of family homes, Professor Johnson has persuasively suggested that gross disproportionality is the wrong standard to use when considering the Excessive Fines Clause. Johnson, *supra* note 3, at 510–15 (arguing that gross disproportionality is an adequate standard for the Cruel and Unusual Punishment Clause, but inappropriate for the Excessive Fines Clause because unlike imprisonment, fines are cost-free and beneficial for legislators: "Put differently, the fact that the Framers expressly prohibited, in adjacent clauses, excessive bail and excessive fines without also prohibiting excessive terms of imprisonment is strong textual evidence of an intent to treat fines and imprisonment differently under the Eighth Amendment.").

189 United States v. Judge, 413 F. App'x 340, 342 (2d Cir. 2011) ("[C]ivil forfeiture of . . . cash does not affect [the defendant's] fine . . . because the law requires that '[a]ny penalty imposed for violation of this subchapter . . . shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.'" (quoting 21 U.S.C. § 847 (2012))); *see also* King, *supra* note 18, at 186 ("[I]n cases involving multiple penalties for related conduct, courts should take special care to guard against unwarranted double-counting."); McCaw, *supra* note 16, at 208–09 ("Judges may not even know at sentencing whether the government will even pursue civil forfeiture. The courts must also ignore criminal forfeiture when determining sentencing, but at the same time, judges cannot be expected to devise appropriate punishments if they are punishing a person several times as if for the first time. . . . Because courts do not have a unified venue to consider whether punishments are appropriate, they must re-sentence defendants each time as if for the first time." (footnote omitted)); Pimentel, *supra* note 20, at 42 ("[F]orfeiture is 'extra' punishment, over and above the prescribed criminal penalty for the offense.").

190 *See* King, *supra* note 18, at 189–90.

value homes differently, it will do the same to all forms of facilitating property, only using homes here as an example of the proposed method.

A more aggressive forfeiture inquiry, supported by consideration of many factors, as distinguished from ones that could only be derived from the *Bajakajian* four, is also desirable because it will help the government effectuate its goals while balancing necessary respect for property rights.[191] Law enforcement's current forfeiture approach is to focus on "high impact" forfeitures that disrupt and dismantle criminal enterprises.[192] A stronger emphasis by courts to carefully value family homes would not harm this strategy and would help focus prosecutors on identifying forfeitures that can make a dent in criminal enterprise and take the profits out of crime. Furthermore, it is in the government's interest to have a consistent approach to asset forfeiture,[193] which citizens perceive as legitimate, as opposed to impermissibly permissive or harsh.[194]

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191 *See* Avital Blanchard, Note, *The Next Step in Interpreting Criminal Forfeiture*, 28 CARDOZO L. REV. 1415, 1444 (2006) (As asset forfeiture continues to evolve it attempts to "balanc[e] the interests of . . . innocent third part[ies with] the government's interest in crime deterrence"). Although harsh punishments might plausibly increase deterrence, one must ask what the cost of that deterrence would be. *See* United States v. 221 Dana Ave., 239 F.3d 78, 90 (1st Cir. 2001) (in concluding that the claimant was an innocent owner, the First Circuit noted in dicta that "permitting forfeiture here would deter drug dealing only in the most Draconian sense of deterrence. That Draconian sort of deterrence underlay the ancient common law doctrine that all of a felon's possessions were forfeited to the crown.").

192 U.S. DEP'T OF THE TREASURY, *supra* note 23, at i ("The mission of the Fund is to affirmatively influence the consistent and strategic use of high-impact asset forfeiture by our law enforcement bureaus to disrupt and dismantle criminal enterprise. Management's strategic vision of the Treasury Forfeiture Fund program is to focus the asset forfeiture program on strategic cases and investigations that result in high-impact forfeitures. We believe this approach to the use of asset forfeiture will incur the greatest damage to criminal organizations while accomplishing the ultimate objective—to disrupt and dismantle criminal enterprises." (emphasis omitted)).

193 *See supra* note 152.

194 *See* City of New Brighton v. 2000 Ford Excursion, 622 N.W.2d 364, 374 (Minn. Ct. App. 2001) (Randall, J., dissenting) (in refuting the majority's rejection of an excessiveness claim, Judge Randall passionately argued that "[p]eople understand being punished and getting their just desserts. They do not understand getting kicked when they are down. When you kick people when they are down, they tend to get together in small groups, politely drive down to the nearest wharf, carefully park to avoid fire hydrants and no parking zones, and then start throwing tea and coffee into the harbor."); Moores, *supra* note 10, at 784–85 ("Civil asset forfeiture has contributed to a general decline in the public perception of law enforcement agencies. . . . Public opinion polls reflect a declining respect and confidence in the police. When asked about their view of the police in a 2005 Gallup poll, 56% of respondents said they had a 'great deal of respect' for law enforcement. In 1967, the last time this same poll was conducted before the rise of civil asset forfeiture laws in the 1980s, 77% of participants expressed this same level of respect for police. In the world of civil asset forfeiture laws, a fairer system will likely engender more trust among citizens, which, in turn, will likely result in better cooperation between the public and law enforcement." (footnotes omitted)).

CONCLUSION

Asset forfeiture litigation has exponentially increased over the last fifteen years, and it will continue to do so. By liberating *United States v. Bajakajian* from the rigidity constraining it after fifteen years of inadequate circuit court interpretations, future courts can effectuate an honest and more precise excessiveness inquiry. By re-understanding *Bajakajian*, courts can alleviate the criticism being leveled at asset forfeiture, work towards creating a consistent policy amongst state and federal courts, and present a legitimate and just front to the citizenry. These important goals can be achieved without additional legislation or reform.

This Note has argued that by considering factors in the excessiveness analysis that extend beyond the factors considered in *Bajakajian*, factors derived from an analysis of pre-*Bajakajian* decisions, courts will be able to assess the "harshness of the forfeiture" prong of an excessiveness analysis without relying solely on the equity value of property. This approach will allow courts to claim independence from *Bajakajian*'s restrictive facts, which, because of their sympathetic nature, encourage courts to easily distinguish *Bajakajian* without giving due consideration to the particular facts of a case. By identifying the forfeiture of family homes as an area where the *Bajakajian* analysis as it is applied to today is particularly troublesome, this Note has demonstrated how its suggested solution would accommodate a more complete inquiry into the forfeiture of that particularly important type of property.