William & Mary Bill of Rights Journal

Volume 25 (2016-2017)
Issue 4

Article 7

May 2017

Excessively Unconstitutional: Civil Asset Forfeiture and the Excessive Fines Clause in Virginia

Rachel Jones

EXCESSIVELY UNCONSTITUTIONAL: CIVIL ASSET FORFEITURE AND THE EXCESSIVE FINES CLAUSE IN VIRGINIA

Rachel Jones*

INTRODUCTION

Imagine that you are a small business owner in Virginia with the opportunity to buy equipment for your business from an independent seller. You decide to bring money in cash to purchase the equipment because you think it will give you a better negotiating position. As you drive to the appointment with the seller, you are pulled over by a police officer for a minor traffic violation. During this traffic stop, the police officer searches your car and asks you to disclose any weapons, illegal substances, or large amounts of cash you may have on your person or in your vehicle. You disclose to the officer that you have a large amount of cash because you are headed to buy business equipment. The officer then arrests you and seizes the money, alleging that it is connected to drug trafficking.

While this scenario may seem far-fetched, it happened to Mandrel Stuart on Interstate 66 in Virginia.[1] Stuart owned a barbeque restaurant in Staunton, Virginia and was headed to buy restaurant equipment in Northern Virginia when he was stopped by a Fairfax County officer for having a video screen in his vehicle.[2] The officer proceeded to search the car and found $17,000 in cash as well as a few "green" "flakes," which the officer assumed was marijuana.[3] Stuart was arrested and the $17,000 was seized through an action of civil asset forfeiture.[4] Stuart was eventually acquitted of all criminal charges resulting from the arrest, but it took over a year and an arduous legal process[5] to get the $17,000 back.[6]

---

* JD, William & Mary Law School, 2017; BA, American University, 2013. I would like to thank my parents, Craig Jones and Linda Fussell, for their unwavering support in all of my endeavors. I would also like to thank the editorial staff and executive board of the *William & Mary Bill of Rights Journal* for all their work on this and other student notes.

[1] *See NBC29 Special Report: Asset Forfeiture Laws*, NBC29.COM (May 28, 2015, 5:32 PM), http://www.nbc29.com/story/29067896/nbc29-special-report-asset-forfeiture-laws [https://perma.cc/2X53-H6X8] [hereinafter *NBC29 Special Report*].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] It is estimated that a contest to a civil asset forfeiture "[c]ould cost at least $10,000[,]" and some defense attorneys "will not accept a [civil forfeiture] case unless the forfeiture value is large." Karis Ann-Yu Chi, Comment, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1642 (2002) (footnote omitted).

[6] *NBC29 Special Report*, *supra* note 1.

In fact, Stuart was lucky to have any of his seized money returned. In Virginia, the $17,000 could be seized and forfeited to the state *even if* Stuart was acquitted by a jury of any crime.[7] Even though having property forfeited to the state when a jury has found insufficient evidence to prove a crime was committed may seem like an excessive fine, in Virginia, the Commonwealth only has to prove that a crime was committed "by clear and convincing evidence" in order to seize and forfeit property.[8]

How can police take a person's property without first proving a crime was committed, especially in a state and nation that guarantees that no excessive fine will be levied against its citizens? Simple. Civil asset forfeiture laws "allow[ ] police to seize—and then keep or sell—any property they allege is involved in a crime."[9] Because police agencies benefit financially from civil forfeitures, forfeiture is pursued aggressively at both the state and federal level.[10] Further, seized assets may be "thousands of times more valuable than contraband sold by defendants[,]"[11] which provides an incentive for police to seize high value chattels. With many state and local police agencies facing budget cuts, forfeiture proceeds are used by these agencies to offset lost funding.[12] One survey of police departments reported that

---

[7] *See* VA. CODE ANN. §§ 19.2-386.1, 386.22 (West 2016); Rob Poggenklass, *Reform Virginia's Civil Asset Forfeiture Laws to Remove the Profit Incentive and Curtail the Abuse of Power*, 50 U. RICH. L. REV. ONLINE 75, 76 (2016).

[8] VA. CODE ANN. § 19.2-386.10 (West 2016) (amending VA. CODE ANN. § 19.2-386.10 (West 2015)). When Stuart's property was seized, the Commonwealth only had to prove that a crime was committed by the preponderance of the evidence. *NBC29 Special Report*, *supra* note 1. The law has since been amended to increase the Commonwealth's burden of proof to clear and convincing evidence. *Compare* § 19.2-386.10 (West 2016), *with* § 19.2-386.10 (West 2015).

[9] *Asset Forfeiture Abuse*, AM. C.L. UNION, https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse [https://perma.cc/4VJF-V83Z]. *But see* Douglas Leff, *Money Laundering and Asset Forfeiture: Taking the Profit out of Crime*, FBI: FBI L. ENFORCEMENT BULL. (Apr. 2012), https://leb.fbi.gov/2012/april/money-laundering-and-asset-forfeiture-taking-the-profit-out-of-crime [https://perma.cc/9943-DHUF] (defining asset forfeiture as a way to "[t]ak[e] the [p]rofit [o]ut of [c]rime" instead of a revenue raising mechanism); *Asset Forfeiture Program*, U.S. DEP'T JUST., http://www.justice.gov/afp [https://perma.cc/2ZK2-P2VM] (emphasizing the "remov[al] [of] the proceeds of crime and other assets relied upon by criminals and their associates to perpetuate their criminal activity against our society").

[10] *See* DICK M. CARPENTER II ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 6 (2d ed. 2015), http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf [https://perma.cc/U4ZK-W3SE].

[11] Brent Skorup, Comment, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. C.R. L.J. 427, 427 (2012) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 693 (1974) (Douglas, J., dissenting in part) (involving the seizure of a yacht where one marijuana cigarette was found); United States v. 38 Whalers Cove Drive, 954 F.2d 29, 32 (2d Cir. 1991) (concerning the seizure of a $145,000 condominium at which the defendant sold $250 worth of cocaine)).

[12] *See generally* Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 784–85 (2009) (discussing how local police agencies depend on asset

forty percent of police executives believe civil forfeiture funds are "necessary as a budget supplement."[13]

Today, the majority of asset forfeitures occur through civil asset forfeiture.[14] In Virginia, civil forfeitures are a powerful law enforcement tool because they require a lower standard of proof than criminal forfeitures,[15] may be brought and decided prior to any criminal trial,[16] and Virginia courts have not established an Excessive Fines Test that adequately protects citizens.[17] Further, police may seize essentially any type of property, as long as the property can be connected, however tenuously, to a crime.[18]

Civil forfeiture has steadily increased in Virginia,[19] which in turn has increased public concern regarding the legitimacy of the practice.[20] Multiple constitutional challenges can be made against the practice of civil asset forfeiture and substantial literature has been devoted to the topic. However, the Supreme Court "has rebuffed most constitutional challenges by finding that the particular constitutional right

---

forfeiture to supplement budgets); Merris Badcock, *Virginia: Proposed Budget Cuts Heavy for State Police, Corrections*, YOUR4STATE.COM (Oct. 22, 2016, 7:08 PM), http://www.your4state.com/news/news/virginia-proposed-budget-cuts-heavy-for-state-police-corrections [https://perma.cc/R7UW-Y56U] (discussing $43 million in Virginia state budget cuts from the Office of Public Safety and Homeland Security); *The Impact of the Economic Downturn on American Police Agencies*, U.S. DEP'T JUST.: COPS, http://www.cops.usdoj.gov/Default.asp?Item=2602 [https://perma.cc/S5Z2-TS7B] ("The economic downturn of the past several years has devastated local economies and their local law enforcement agencies.").

[13] *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), http://www.economist.com/node/16219747 [https://perma.cc/DG9K-4NQP] [hereinafter *A Truck in the Dock*].

[14] CARPENTER II ET AL., *supra* note 10, at 13 (demonstrating that only thirteen percent of all Department of Justice (DOJ) forfeitures are criminal asset forfeitures, while eighty-seven percent of all DOJ forfeitures are civil asset forfeitures).

[15] *See* VA. CODE ANN. § 19.2-386.10 (West 2016); Scott Bullock, *Real Changes Needed in Virginia Forfeiture Law*, RICHMOND TIMES-DISPATCH (Oct. 14, 2011, 1:00 AM), http://www.richmond.com/news/article_b4f906d3-2488-5869-b9c3-a1e3f9ede354.html?mode=story [https://perma.cc/2GE6-2YBF].

[16] *See* VA. CODE ANN. §§ 19.2-386.1, 386.22 (West 2016); *NBC29 Special Report*, *supra* note 1.

[17] *See, e.g.*, Commonwealth v. One 1970, 2 Dr. H.T. Lincoln Auto., Identification No. OY89A826833, 186 S.E.2d 279 (Va. 1972).

[18] *See* VA. DEP'T OF CRIMINAL JUSTICE SERVS., FORFEITED ASSET SHARING PROGRAM MANUAL 1 (2015), https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/dcjs/forfeited-asset-sharing-program-manual.pdf [https://perma.cc/GS5S-3DS7] [hereinafter FORFEITED ASSET SHARING PROGRAM MANUAL].

[19] CARPENTER II ET AL., *supra* note 10, at 138.

[20] *See, e.g.*, Mark Bowes, *Virginia Forfeiture Laws Come Under Scrutiny*, ROANOKE TIMES (Aug. 2, 2015, 5:15 PM), http://www.roanoke.com/news/politics/virginia-forfeiture-laws-come-under-scrutiny/article_de1cd6f2-81a0-54b3-89ab-21cc0b22a2a8.html [https://perma.cc/WR9X-AR5Z]; *NBC29 Special Report*, *supra* note 1.

either does not apply in a civil proceeding, or that it cannot be asserted by the property owner, who is not officially a party to the proceeding."[21] In addition to claims of Eighth Amendment Excessive Fines violations, objections include: violations of the Fifth Amendment Double Jeopardy Clause,[22] violations of the Fifth and Fourteenth Amendment's Due Process Clause,[23] and criticisms that law enforcement directly profits and therefore has a financial stake in forfeitures.[24] Though all of these challenges call the legitimacy of civil asset forfeiture into question, this Note focuses specifically on Excessive Fines Clause violations.

Civil asset forfeiture laws in Virginia have recently come under scrutiny, though efforts to reform the laws through the legislature have largely failed.[25] In the absence

---

[21] Chi, *supra* note 5, at 1641.

[22] The Double Jeopardy Clause states, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. CONST. amend. V. In *United States v. Ursery*, 518 U.S. 267 (1996), the Supreme Court held that in rem civil forfeitures do not constitute "punishment . . . for [the purpose of the] Double Jeopardy Clause[,]" *id.* at 292, because "[s]ince the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events[,]" *id.* at 274.

[23] The Fifth Amendment states, "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V. The Fourteenth Amendment states, "[N]or shall any state deprive any person of life, liberty, or property without due process of law[.]" U.S. CONST. amend. XIV, § 1. In *Bennis v. Michigan*, the Court found that "an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use[,]" and before a joint owner was able to defend her innocent ownership of the property. 516 U.S. 442, 446 (1996).

[24] Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 41 (1998) ("[T]he forfeiture laws in particular are producing self-financing, unaccountable law enforcement agencies divorced from any meaningful legislative oversight. There are numerous examples of such semi-independent agencies targeting assets with no regard for the rights, safety, or even the lives of the suspects." (footnote omitted)).

[25] Bowes, *supra* note 20. In 2016, the Virginia General Assembly passed a law raising the Commonwealth's burden of proof from a "preponderance of the evidence" standard to a "clear and convincing evidence" standard. Chris Horne, *Getting It Back: A Change in Property Seizure Law*, WAVY (July 21, 2016, 8:24 PM), http://wavy.com/investigative-story/getting-it-back-a-change-in-property-seizure-law/ [https://perma.cc/X855-7DHS]. When the bill was still in the state Senate, Senator Chap Petersen proposed a substitute amendment that would require a criminal conviction of the property owner before the state could seize any assets. S. 457, 2016 Gen. Assemb., Reg. Sess. (Va. 2016), https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB457S1 [https://perma.cc/3H2B-E87R]. Though this amendment would have provided substantially more protection for property owners, the state Senate declined to make meaningful changes to civil asset forfeiture law and rejected the proposed amendment. *2016 Session*, VA.'S LEGIS. INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SB457 [https://perma.cc/82HW-6YH8].

of meaningful legislative reform, the responsibility to protect citizens from civil asset forfeitures that result in excessive fines falls on Virginia Courts. By articulating an Excessive Fines Test for civil asset forfeitures, Virginia Courts will be better able to ensure that citizens are not subject to excessive fines by the government in violation of their constitutional rights.

This Note will demonstrate the need for an Excessive Fines Test in Virginia in order to preserve the constitutional rights guaranteed in article I, section 9 of Virginia's Constitution[26] and the Eighth Amendment of the United States Constitution.[27] This Note will also propose a five-factor test that will protect citizens from excessive fines.[28] Part I provides a brief introduction and overview of the history of civil asset forfeiture in the United States. Part II examines the state of civil asset forfeiture in Virginia. Part III discusses how the use of various Excessive Fines Tests have impacted citizen's constitutional rights. Part IV develops a test that adequately protects Virginians from excessive fines.

I. THE HISTORY OF CIVIL ASSET FORFEITURE IN THE UNITED STATES

A. Historical Context

It is necessary to consider the history of asset forfeiture in order to understand the complicated legal framework and differences between criminal and civil asset forfeiture. The origins of forfeiture can be traced back to Biblical and pre-Judeo-Christian practices that evolved into the deodand in Medieval England.[29] Under the

---

[26] VA. CONST. art. I, § 9.

> That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; that the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require; and the General Assembly shall not pass any bill of attainder, or any ex post facto law.

Id.

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

[28] *See infra* Part IV.

[29] *See generally* Calero v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–85 & n.17 (1974) (citing *Exodus* 21:28 ("If an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten.")); Michael van den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 873 (2015) (citing Jacob J. Finklestein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 181 (1973); Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237, 241 (2005)). Forfeiture of property is considered an ancient practice. Moores, *supra* note 12, at 780–81; Skorup, *supra* note 11, at 432; van den Berg, *supra*, at 873.

common law in England, three types of forfeiture were established: deodand,[30] forfeiture upon conviction for a felony or treason,[31] and statutory forfeiture.[32]

Of the three types of forfeiture articulated under the common law, only statutory forfeiture managed to survive in the United States.[33] The U.S. Constitution does not allow forfeiture of estate as a punishment for treason or felons.[34] Though the "Founding Fathers nearly abolished [both] criminal and civil forfeiture[,]"[35] "[t]he First Congress [also] passed laws subjecting ships and cargos involved in customs offenses to forfeiture."[36] It is generally accepted that these laws were used to target pirates and smugglers, as it was easier to prosecute a vessel, and seize its cargo than

---

[30] The "conventional view" is that is that the concept of forfeiture "arose from the deodand" in England. Brant C. Hadaway, Comment, *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81, 88 (2000). William Blackstone describes that under deodand, "[t]he value of the instrument was forfeited to the King, in the belief that the King would provide the money for the Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses." *Calero*, 416 U.S. at 680–81 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *300). Essentially, the deodand required that an object that had caused the death of a king's subject be forfeited directly to the Crown, presumably as a sort of punishment for an owner's negligent care of the property. Austin v. United States, 509 U.S. 602, 611 (1993) ("As Blackstone put it, 'such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture.'" (citing BLACKSTONE, *supra*, at *301)); van den Berg, *supra* note 29, at 873. Deodand was eventually abolished in England in 1846. *See* Barclay Thomas Johnson, Note, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1048 (2002).

[31] Forfeiture as a punishment for those convicted of a felony or treason evolved from the concept of deodand. *Austin*, 509 U.S. at 611. Under this type of forfeiture, "[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero*, 416 U.S. at 682 (citing 3 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 68–71 (3d ed. 1927); 1 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 351 (2d ed. 1909)).

[32] Statutory forfeiture provided for the forfeiture of offending objects that had been used in violation of customs and revenue laws, "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." *Calero*, 416 U.S. at 682. Most statutory forfeitures were considered in rem proceedings and enforced "in the Court of Exchequer to forfeit the property," "in violation of the customs and revenue laws." *Id.* (citing C. J. Hendry Co. v. Moore, 318 U.S. 133, 137–38 (1943); 3 BLACKSTONE, *supra* note 30, at *261–62).

[33] *See Austin*, 509 U.S. at 613; Hadaway, *supra* note 30, at 89 ("Forfeiture was a hated measure among the colonists, and both the Constitution and statutes passed by the First Congress forbade the use of criminal forfeiture in convictions for treason and federal felonies." (footnotes omitted)).

[34] *Austin*, 509 U.S. at 613 (citing U.S. CONST. art. III, § 3, cl. 2; Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117).

[35] *See generally* Skorup, *supra* note 11.

[36] *Austin*, 509 U.S. at 613. *See generally* The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

to prosecute the owner of the vessel who likely lived in Europe.[37] These laws were used in *The Palmyra*,[38] where a Spanish vessel was seized and accused of piratical aggression.[39] In this case, the Court articulated the basis of civil asset forfeiture in the United States, stating that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . ." and "no personal conviction of the offender is necessary to enforce a forfeiture *in rem*."[40] These in rem forfeitures remained relevant in maritime law, though were essentially dormant until the 1970s.[41]

Civil asset forfeiture rose to prominence in the 1970s and 1980s, and became a powerful tool used to fight the war on drugs.[42] In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA).[43] This act marked the first time civil asset forfeiture was used to combat the trafficking of illegal drugs.[44] The civil asset provision of CDAPCA was codified in 21 U.S.C. § 881 (2012), and only allowed for civil asset forfeiture of conveyances, drug manufacturing and storage equipment, and drugs.[45] Because Section 881 in its original form was fairly modest, forfeiture was not regularly pursued by law enforcement.[46]

---

[37] *See* Hadaway, *supra* note 30, at 89; Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), http://www.newyorker.com/magazine/2013/08/12/taken [https://perma.cc/2SA2-DCS3].

[38] 25 U.S. (12 Wheat.) 1 (1827).

[39] *See id.* at 3; *see also* Calero v. Pearson Yacht Leasing Co., 416 U.S. 663, 683–84 (1974).

[40] *The Palmyra*, 25 U.S. (12 Wheat.) at 14–15.

[41] *See* Hadaway, *supra* note 30, at 89–90 (noting that forfeiture was initially used for both revenue cases and admiralty laws in the United States, but when the Sixteenth Amendment was passed forfeitures mostly became a thing of the past and remained in U.S. law through admiralty laws). Civil forfeiture briefly surfaced again following the Civil War under the Confiscation Acts. van den Berg, *supra* note 29, at 875 ("[T]he doctrine long remained dormant in the American legal landscape, emerging only briefly during the Civil War as the Confiscation Acts, which allowed for the seizure of property belonging to those who aided the rebellion."). It also surfaced during the Prohibition era under the National Prohibition Act. Hadaway, *supra* note 30, at 89–91.

[42] *See generally, e.g.*, Blumenson & Nilsen, *supra* note 24; Hadaway, *supra* note 30; Johnson, *supra* note 30; Chet Little, Note, *Civil Forfeiture and the Excessive Fines Clause: Does* Bajakajian *Provide False Hope for Drug-Related Offenders?*, 11 U. FLA. J.L. & PUB. POL'Y 203 (2000); van den Berg, *supra* note 29.

[43] Pub. L. No. 91-513, 84 Stat. 1238 (1970) (codified in scattered sections of 21 U.S.C.).

[44] *See* van den Berg, *supra* note 29, at 875.

[45] CDAPCA did not allow for civil forfeiture of money, negotiable securities, or real property. Johnson, *supra* note 30, at 1048.

[46] *See* Hadaway, *supra* note 30, at 92. Section 881 underwent many amendments, the first of which expanded the type of property subject to forfeiture to include money, negotiable instruments, securities, or other property exchanged for illicit drugs. Johnson, *supra* note 30, at 1049–50 (stating that paragraph six of the Psychotropic Substances Act of 1978 allowed "[a]ll moneys, negotiable instruments, securities, or other things of value furnished . . . in exchange for a controlled substance." (quoting Pub. L. No. 95-633, § 301(a), 92 Stat. 3777 (1978))). Essentially, this broadened the law to include proceeds from drug transactions. This

The most significant amendments made to Section 881 occurred in 1984 with the enactment of the Comprehensive Crime Control Act (CCCA), which expanded the range of allowed forfeitures to include the forfeiture of real property and earmarked forfeited assets for law enforcement.[47] After the CCCA was enacted, the proceeds of forfeiture were deposited directly into the Department of Justice's Forfeiture Fund or the Department of Treasury's Forfeiture Fund, providing law enforcement with a revenue raising incentive to seize property through civil asset forfeiture.[48] The fact that law enforcement could benefit from civil asset forfeiture after 1984 resulted in a staggering increase in asset forfeitures.[49]

B. Civil Asset Forfeiture Reform Act of 2000

The Civil Asset Forfeiture Reform Act of 2000 (CAFRA)[50] was passed in response to widespread law enforcement abuses in the late 1980s and 1990s,[51] as well as Supreme Court decisions.[52] While CAFRA attempted to address some of these abuses, problems with civil asset forfeiture still exist.[53]

---

expansion in the type of property that could be forfeited to the state through civil asset forfeiture increased seizures sixfold and forfeitures twentyfold. Hadaway, *supra* note 30, at 92–93.

[47] *See* Hadaway, *supra* note 30, at 93; Moores, *supra* note 12, at 781–82. Prior to the CCCA, the funds gained through forfeiture were deposited into the general fund of the U.S. Treasury. *See* Hadaway, *supra* note 30, at 93; Johnson, *supra* note 30, at 1050.

[48] *See* 28 U.S.C. § 524(c)(4) (2012); 31 U.S.C. § 9703 (2012); Hadaway, *supra* note 30, at 91; Johnson, *supra* note 30, at 1050.

[49] *See* Little, *supra* note 42, at 208 ("Between its inception in 1985 and 1991, Section 881 resulted in the forfeiture of more than 1.5-billion dollars in assets. From 1992 to 1997, federal agencies almost doubled that amount." (footnotes omitted)); van den Berg, *supra* note 29, at 876 ("The resulting revenue gains have been staggering: in 2012 the government seized $4.2 billion in property and has enjoyed other notable achievements, such as the seizure of real estate properties from Latin American drug kingpins." (footnote omitted)).

[50] Pub. L. No. 106-18, 114 Stat. 202 (2002) (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

[51] *See* Moores, *supra* note 12, at 182–83.

[52] *See generally* United States v. Bajakajian, 524 U.S. 321 (1998); Austin v. United States, 509 U.S. 602 (1993).

[53] *See generally* Chip Mellor, *Civil Forfeiture Laws and the Continued Assault on Private Property*, FORBES (June 8, 2011, 5:30 PM), http://www.forbes.com/2011/06/08/property-civil-forfeiture.html [https://perma.cc/W2Y2-ECQZ]; Stillman, *supra* note 37; *A Truck in the Dock*, *supra* note 13. While CAFRA did not remedy all abuses of civil asset forfeiture, it did make some important changes to asset forfeiture law, including shifting the burden of proof from the property owner onto the government, eliminating the requirement of a cost bond, and providing more protections to owners of real property that has been seized and indigent property owners. Hadaway, *supra* note 30, at 86–87. CAFRA also increased the burden that the government originally has to show from probable cause to the preponderance of the evidence standard. Barbara J. Van Arsdale, *Validity, Construction, and Application of Civil Asset Forfeiture Reform Act of 2000 (CAFRA)*, 195 A.L.R. FED. 349 (2004) ("CAFRA places

For all of its reforms, CAFRA failed to change the nature of civil asset forfeiture—lucrative seizures still occur on a large scale and the problematic fundraising incentive still exists at both the federal and state level.[54] Federally, years after CAFRA was adopted, the Bureau of Alcohol, Tobacco, Firearms and Explosives came under fire for adopting a new meaning for the "ATF" acronym, "Always Think Forfeiture," and using this label on some of their equipment that was purchased with funds raised from forfeitures.[55] However, this scandal did not prevent the Attorney General from actively pursuing civil asset forfeiture.[56]

One important change CAFRA made was the use of the grossly disproportionate standard when determining if a civil asset forfeiture constitutes an excessive fine.[57] While the grossly disproportionate standard is now codified into federal law, the Supreme Court and the legislature failed to articulate a test to determine what constitutes a grossly disproportionate seizure and what does not. This has allowed state and circuit courts to develop different analyses of the grossly disproportionate standard,[58] which has resulted in different constitutional implications for civil asset forfeiture and the Excessive Fines Clause.

C. Constitutional Context

The Eighth Amendment states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[59] This clause was "taken verbatim from the English Bill of Rights of 1689[,]" and was not extensively discussed by the First Congress during the debates over ratification of the Bill of Rights, leaving courts with little direction as to what constitutes an excessive fine.[60]

---

the burden of proof . . . on the government to establish by a preponderance of the evidence that the property is subject to forfeiture. Prior to CAFRA, the government was only required to show that there was probable cause . . . .").

[54] *See generally* MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 6 (2010), http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf [https://perma.cc/X6X9-PLU9].

[55] Mellor, *supra* note 53.

[56] *See, e.g.*, U.S. DEP'T OF JUSTICE: ASSET FORFEITURE & MONEY LAUNDERING SECTION, ASSET FORFEITURE POLICY MANUAL 1 (2016), https://www.justice.gov/criminal-afmls/file/839521/download [https://perma.cc/34JA-P83D].

[57] In determining if the forfeiture is excessive, the court compares the forfeiture to the gravity of the offense giving rise to the forfeiture, and if the court finds the forfeiture is grossly disproportionate to the offense it may reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-18, § 2, 114 Stat. 202.

[58] *See infra* Part III.

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

[60] United States v. Bajakajian, 524 U.S. 321, 335 (1998).

The Supreme Court has stated that the Excessive Fines Clause was "intended to prevent *the government* from abusing its power to punish, and therefore that 'the Excessive Fines Clause was intended to limit only those fines directly imposed by and payable to the government.'"[61] Later, the Supreme Court noted that it had "little occasion to interpret, and ha[d] never actually applied, the Excessive Fines Clause."[62] In *Austin v. United States*,[63] the Supreme Court found that civil asset forfeitures were at least partially punitive and subject to the Excessive Fines Clause.[64] In *United States v. Bajakajian*,[65] the Court applied the Excessive Fines Clause for the first time, and defined excessive, stating "'[e]xcessive' means surpassing the usual, the proper, or a normal measure of proportion."[66] These cases represent the seminal cases involving civil asset forfeiture and the Excessive Fines Clause.

During the summer of 1990, Richard Austin was approached in his body shop and agreed to sell two grams of cocaine.[67] Austin then went to his mobile home and returned to the body shop with the cocaine, which he sold.[68] Subsequently, state authorities executed a search warrant on both the body shop and the home and found small amounts of marijuana and cocaine, a gun, drug paraphernalia, and $4,700 in cash.[69] Austin pleaded guilty in state court to one count of possessing cocaine with intent to distribute and was sentenced to seven years imprisonment.[70] After the criminal proceeding, the United States sought to seize Austin's mobile home and body shop through an in rem proceeding in federal court, as sanctioned by Section 881(a)(4) and (a)(7).[71] Austin contested the forfeiture proceeding, arguing that the Eighth Amendment's Excessive Fines Clause applies to civil asset forfeiture cases.[72]

In its decision, the Supreme Court recognized that they had only considered the Excessive Fines Clause once before *Austin*.[73] After an extensive historical analysis

---

[61] Austin v. United States, 509 U.S. 602, 607 (1993) (internal citation omitted) (quoting Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989)). The only time the Court had addressed the Excessive Fines Clause prior to *Austin* was in *Browning-Ferris Industries*, where the Court addressed the question of whether the Excessive Fines Clause limited the award of punitive damages to a private party in a civil suit when the government did not prosecute the action nor have any right to receive a share of damages. 492 U.S. at 259–60.

[62] *Bajakajian*, 524 U.S. at 327.

[63] 509 U.S. 602 (1993).

[64] *See id.* at 604.

[65] 524 U.S. 321 (1998).

[66] *Id.* at 335.

[67] *Austin*, 509 U.S. at 605.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 604.

[71] *Id.* at 604–05.

[72] *Id.* at 606.

[73] *Id.* ("In *Browning-Ferris Industries of Vt.* . . . , we held that the Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit when the

that considered the historical understanding of forfeiture as punishment, the legislative intent behind Section 881, and the legislative history that provided evidence that Congress understood Section 881 as serving both to deter and punish, the Court found that civil asset forfeiture, at least in part, serves to punish the owner.[74] Because the Court found that civil asset forfeiture "constitutes 'payment to a sovereign as punishment for some offense,'" it is "subject to the limitations [provided in] the . . . Excessive Fines Clause."[75] Though the Court found civil asset forfeiture served some punitive purposes, it is important to note that the decision did not exclude the possibility that a forfeiture serves "remedial purposes" even though it is subject to the limitations of the Excessive Fines Clause.[76]

This case constituted an important shift in the understanding of civil asset forfeiture in the United States. Prior to *Austin*, civil asset forfeitures were considered purely remedial, as the legal fiction of "the thing is primarily considered the offender" reigned.[77] Now that civil asset forfeitures were considered punitive and subject to the Excessive Fines Clause, the question of how to determine what constitutes an "excessive fine" remained. The Court in *Austin* explicitly declined to establish a test for determining whether a forfeiture is constitutionally excessive, reasoning that lower courts needed to consider the question in the first instance.[78] The Court addressed this question five years later in *United States v. Bajakajian*.

In 1994, Hosep Bajakajian, an immigrant from Syria, attempted to take $357,144 on a flight from Los Angeles to Italy in violation of federal reporting laws.[79] Though the district court found that Bajakajian failed to report the cash because of a fear and distrust of the government[80] and that the funds were intended to pay a lawful debt, it also determined that "the entire $357,144 was subject to forfeiture because [the money] was involved in the offense."[81] However, the district court believed that even though federal statutes directed the imposition of full forfeiture, in this case that would result in an "extraordinarily harsh" punishment that would be "grossly disproportionate to the offense in question," and therefore would violate the Excessive Fines Clause.[82] After appeals by both the government and Bajakajian, the case was brought before the Supreme Court to determine "whether forfeiture of the entire

---

government neither has prosecuted the action nor has any right to receive a share of the damages." (citation omitted)).

[74] *Id.* at 614–16.

[75] *Id.* at 622 (quoting Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

[76] *Id.* at 622 n.14.

[77] *Id.* at 616.

[78] *Id.* at 622.

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

[80] Bajakajian grew up in Syria, where he was a member of the Armenian minority, leading to an inherent distrust of government. *Id.* at 326.

[81] *Id.* at 325–26 (internal quotation marks omitted).

[82] *Id.* at 326.

$357,144 that [Bajakajian] failed to declare would violate the Excessive Fines Clause of the Eighth Amendment."[83]

Because the Court had not previously considered this question, the Court looked to their cases interpreting the Cruel and Unusual Punishment Clause to define a constitutional excessiveness standard.[84] In its evaluation, the Court found that judgments about the appropriate punishment for an offense belong first to the legislature, and adopted the standard of gross disproportionality articulated in the Cruel and Unusual Punishments Clause precedents.[85] The Court then compared the gravity of the offense to the forfeiture to determine if the forfeiture was grossly disproportionate.[86] However, in doing so, the Court did not dictate a factor test, nor limit itself to a comparison of the forfeiture amount to the gravity of the offense.[87] Instead, it left the circuit courts and states to determine their own test for gross disproportionance.[88] The Court has not addressed the Excessive Fines Clause since *Bajakajian*.

In applying the grossly disproportionate standard, the Court held that the full forfeiture of Bajakajian's money would violate the Excessive Fines Clause.[89]

After these two important Supreme Court decisions in the 1990s, and amidst widespread abuse of civil asset forfeiture,[90] Congress passed the Civil Asset Forfeiture Reform Act in 2000 which made substantial changes to federal civil asset forfeiture reform laws.[91]

II. THE STATE OF CIVIL ASSET FORFEITURE IN VIRGINIA

Virginia's Constitution mirrors the Eighth Amendment Excessive Fines Clause, stating "[t]hat excessive bail ought not to be required, nor excessive fines imposed."[92]

Recently, civil asset forfeiture has come under fire in Virginia.[93] Travis Fain notes that "[t]he state version [of civil asset forfeiture] has seen less scrutiny [than the federal version], but is used much more routinely, according to local law enforcement."[94] Virginia's civil asset forfeiture laws are significantly different than the

---

[83] *Id.* at 324.

[84] *Id.* at 336.

[85] *Id.*

[86] *Id.* at 339–40.

[87] *See id.*

[88] *Id.*

[89] *Id.* at 344.

[90] *See* CARPENTER II ET AL., *supra* note 10, at 6.

[91] Pub. L. No. 106-185, 114 Stat. 202 (2000) (codified in scattered sections of 18 U.S.C. and 28 U.S.C.).

[92] VA. CONST. art. I, § 9.

[93] *See generally* Bowes, *supra* note 20; Bullock, *supra* note 15; Travis Fain, *Virginia's Civil Asset Forfeiture Reform Effort Goes Down Again*, DAILY PRESS (Apr. 15, 2015, 12:58 PM), http://www.dailypress.com/news/politics/dp-virginias-civil-asset-forfeiture-reform-effort-goes-down-again-20150415-story.html [https://perma.cc/K5EM-DXKY]; *NBC29 Special Report*, *supra* note 1.

[94] Fain, *supra* note 93.

federal forfeiture laws dictated in CAFRA.[95] In Virginia, all asset forfeitures require a hearing and the burden of proof falls on the Commonwealth, who must prove, by "clear and convincing evidence," that the property forfeited is connected to the underlying criminal charge.[96] When filing an information for civil asset forfeiture in Virginia, all the State need provide is the name of all defendants, including all owners and lienholders, specifically describe the property, set forth the grounds of forfeiture, ask that the property seized be condemned and sold, and ask that all interested parties be notified to appear and "show cause why such property should not be forfeited."[97]

In Virginia, there are no restrictions on the type of property that can be seized through forfeiture.[98] The Commonwealth can seize property used in connection with or derived from terrorism,[99] computer crimes[100] (including unlawful electronic communication devices[101]), money laundering,[102] cigarettes sold or attempted to be sold in an unlawful delivery sale[103] (including forfeiture of counterfeit and contraband cigarettes[104]), illegal drug transactions,[105] and firearms in violation of Virginia Code Article 6.1[106] (including weapons that are concealed, possessed, transported, or carried in violation of the law[107]). Today, civil asset forfeiture is used most commonly in drug cases.[108] To establish a valid forfeiture, the property seized must be "substantially connected" to the manufacture, sale, or distribution of illegal narcotics.[109] If police believe property is connected with or derived from illegal drug transactions, "all moneys or other property, real or personal, traceable to such an exchange, together with any interest or profits derived from the investment of such money or other property" may be seized.[110] This means that any type of property can be seized if police can show that the property was purchased with proceeds from illegal activity.

---

[95] *See* Bowes, *supra* note 20.

[96] VA. CODE ANN. § 19.2-386.10 (West 2016) (amending VA. CODE ANN. § 19.2-386.10 (West 2015)).

[97] *Id.* § 19.2-386.1.

[98] FORFEITED ASSET SHARING PROGRAM MANUAL, *supra* note 18, at 1 ("Commonly seized items include cash, vehicles, cellular phones, televisions, handguns, and jewelry.").

[99] VA. CODE ANN. § 19.2-386.15 (West 2016).

[100] *Id.* § 19.2-386.17.

[101] *Id.* § 19.2-386.18.

[102] *Id.* § 19.2-386.19.

[103] *Id.* § 19.2-386.20.

[104] *Id.* § 19.2-386.21.

[105] *Id.* § 19.2-386.22.

[106] *Id.* § 19.2-386.27.

[107] *Id.* § 19.2-386.28.

[108] Skorup, *supra* note 11, at 427 (quoting Little, *supra* note 42, at 204).

[109] FORFEITED ASSET SHARING PROGRAM MANUAL, *supra* note 18, at 2.

[110] § 19.2-386.22.

In Virginia, agencies take full advantage of this allowance.[111] Since 2008, more than $62,000,000 in assets have been seized by Virginia law enforcement.[112] Mark Bowes reports:

> On the high end, gold Krugerrand coins, $36,000 diamond-encrusted watches, a $100,000 Porsche, tricked-out chopper motorcycles, $20,000 worth of sneakers, custom 31-foot fishing boats, waterfront homes and piles of cash—as much as $401,200 in a single bust—top the list of loot that police confiscated since 2008 through Virginia's civil forfeiture program.[113]

The Department of Criminal Justice reports that for the 2016 fiscal year, $2,767,399.57 had been disbursed to local agencies through the Forfeiture Asset Sharing Program, a decrease from the $5,600,969.50 disbursed in 2015, and that $105,758,764.59 has been disbursed to local agencies since the program started in 1991.[114]

One of the most common complaints against civil asset forfeiture is that the practice gives police an incentive to seize people's property.[115] Virginia's Constitution requires all property that is forfeited to the Commonwealth go into the Literary Fund, a fund specifically designated to benefit schools in Virginia.[116] However, the Virginia Constitution also allows the General Assembly to exempt payment into the Literary Fund for assets forfeited to the Commonwealth because of a violation of Virginia drug laws.[117] In 1991, the General Assembly enacted a law allowing for this exemption, which redirected funds gained through civil asset forfeiture from the Literary Fund to the police departments where the forfeitures occurred.[118] This incentivized local agencies to "pursue the dealers more rigorously and convert their illegal gains into crime fighting resources."[119] However, many people think that this incentive encourages policing for profit and that local agencies will pursue forfeiture as a way to increase their budgets "at the expense of other policing priorities."[120] The resulting push for forfeiture can net innocent property owners in with guilty property

---

111 *See* Bowes, *supra* note 20.

112 *Id.*

113 *Id.*

114 VA. STATE CRIME COMM'N, 2015 ANNUAL REPORT 29 (2016), http://vscc.virginia.gov/RD193%20VSCC%202015%20Annual%20Report.pdf [https://perma.cc/RTP3-Y4D9].

115 *See generally* WILLIAMS ET AL., *supra* note 54.

116 FORFEITED ASSET SHARING PROGRAM MANUAL, *supra* note 18, at 1.

117 *Id.*

118 *Id.*

119 *Id.*

120 WILLIAMS ET AL., *supra* note 54, at 6.

owners at both the federal and local levels, which can result in excessive fines, especially for innocent property owners.[121]

In an attempt to remedy the possibility that innocent owners will have their property forfeited to the Commonwealth, legislators in the Virginia House of Representatives[122] and Senate introduced a bill during the regular session of the 2015 General Assembly that would require criminal defendants to be convicted of a crime before their property could be forfeited to the Commonwealth.[123] Unfortunately, this bill was killed in the Senate and the issue of civil asset forfeiture was sent to the Virginia Crime Commission for review.[124] The Virginia Crime Commission found that in Virginia, seventy-five percent of cases result in forfeiture and twenty-five percent of cases result in the item being returned to the owner or a lienholder, most forfeitures are a result of default or some type of plea agreement or settlement, and very few cases go to trial.[125] Five policy options were presented to the Crime Commission for consideration.[126] The Crime Commission failed to endorse any of the policy options, including whether "a criminal conviction should be required before any civil forfeiture could be ordered" and if the burden of proof on the Commonwealth should be increased from the "preponderance of the evidence" standard to a "clear and convincing evidence standard."[127]

Following the Virginia Crime Commission report, state Senator Charles Carrico introduced a bill that would increase the Commonwealth's burden of proof in civil asset forfeiture cases to a "clear and convincing evidence" standard while maintaining a preponderance of the evidence standard for a person claiming the forfeited property.[128] The Senate and House unanimously passed this bill, and it was approved by the Governor on April 1, 2016.[129] Though the heightened standard of proof is a step in the right direction, requiring that the Commonwealth prove that property is connected to an underlying crime only by clear and convincing evidence does not

---

[121] John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent with Guilty*, WALL ST. J. (Aug. 22, 2011), https://www.wsj.com/articles/SB10001424053111903480904576512253265073870 [https://perma.cc/K6SM-NAKF].

[122] Peter Dujardin & Ashley K. Speed, *McAuliffe Wants Criminal Convictions Before Forfeiture*, DAILY PRESS (Apr. 6, 2015), http://www.dailypress.com/news/crime/dp-nws-crime-notebook-0405-20150405-story.html [https://perma.cc/XL82-WSJG] ("'Any property eligible for forfeiture . . . shall be forfeited only upon the entry of final judgment of conviction . . . and the exhaustion of all appeals,' said the House's bill, sponsored by Del. Mark Cole, R-Spotsylvania.").

[123] Fain, *supra* note 93.

[124] *Id.*

[125] Presentation, Va. State Crime Comm'n, Asset Forfeiture (SB 684/HB 1287) 85 (Oct. 27, 2015), http://vscc.virginia.gov/Asset%20Forfeiture_FINAL-1.pdf [https://perma.cc/RTU9-HNLB].

[126] VA. STATE CRIME COMM'N, *supra* note 114, at 10.

[127] *Id.*

[128] S. 457, 2016 Gen. Assemb., Reg. Sess. (Va. 2016).

[129] *2016 Session*, *supra* note 25.

address the central Excessive Fines issue. The Commonwealth can still seize property from an individual who has been acquitted of an underlying crime,[130] resulting in an excessive fine. The Commonwealth can still seize property from an innocent owner if their evidence appears to be clear and convincing, and the property claimant still must show that the property is innocent by a preponderance of the evidence.[131]

While civil asset forfeiture remains a politically contentious issue, the constitutionality of the practice under an Excessive Fines analysis has not been addressed by Virginia courts since 1972.[132] Absent court articulated doctrine determining when a civil asset forfeiture becomes an excessive fine, the Commonwealth has broad authority to seize property through civil asset forfeiture without a constitutional "check."[133] Virginia addressed this issue in *one* case from the 1970s, creating a precedent that would now be inconsistent with the U.S. Supreme Court's interpretation of civil asset forfeiture (that civil asset forfeitures are not punitive).[134]

In *Commonwealth v. One 1970, 2 Dr. H.T. Lincoln Automobile*, *Identification Number OY89A826833*[135] (*Lincoln Automobile*), Lindenstruth was driving without a permit when a Virginia State Trooper stopped him for expired tags.[136] Lindenstruth was convicted, fined $100, sentenced to ten days in jail, and his driving license was revoked for sixty additional days.[137] In addition to the criminal proceeding, the Commonwealth instituted a forfeiture action against the car Lindenstruth was driving when he was stopped.[138] In this case, the court found that the forfeiture action did not constitute a penalty, punishment, or a criminal offense, so the Excessive Fines Clause of the U.S. and Virginia Constitutions did not apply.[139]

In the decades since *Lincoln Automobile* was decided, the Supreme Court found asset forfeitures to be at least partially punitive,[140] which subjects civil asset forfeiture to the Excessive Fines Clause of the Eighth Amendment.[141] Further, in *Bajakajian*, the Supreme Court held that forfeiture is unconstitutional under the Excessive Fines Clause if the forfeiture is "grossly disproportional to the gravity of [the] offense."[142]

---

[130] VA. CODE ANN. § 19.2-386.10 (West 2016) (amending VA. CODE ANN. § 19.2-386.10 (West 2015)).

[131] *Id.*

[132] Commonwealth v. One 1970, 2 Dr. H.T. Lincoln Auto., Identification No. OY89A826833, 186 S.E.2d 279, 281 (Va. 1972) (finding that the forfeiture of an automobile, regardless of the expense of the automobile, is allowed under the forfeiture statute and does not constitute an excessive fine).

[133] *See id.*

[134] *Id.* at 280.

[135] 186 S.E.2d 279 (Va. 1972).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 281.

[140] *See* Austin v. United States, 509 U.S. 602, 621–22 (1993).

[141] *Id.* at 622.

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

Virginia courts have not articulated a test that determines when civil asset forfeitures violate the Excessive Fines Clause by being grossly disproportionate. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[143] Virginia's Constitution echoes this in article I, section 9, stating "excessive bail ought not to be required, nor excessive fines imposed[.]"[144] Because the U.S. Supreme Court has determined that civil asset forfeiture is subject to the Excessive Fines Clause,[145] and that the Eighth Amendment requires that the forfeiture be proportional to the underlying offense, the only existing precedent in Virginia is suspect. Virginian's constitutional rights are vulnerable to violation in the absence of a defined Excessive Fines Test.

Virginia Courts can protect against Excessive Fines violations by articulating a factor-based test that considers (1) the gravity of the offense compared with the harshness of the forfeiture, and any punishment received for the underlying offense; (2) whether the property was an integral part of the commission of the crime and whether there has been a conviction or acquittal for the underlying crime; (3) the nature and extent of the criminal activity; (4) the owner of the defendant property and the owner's knowledge and approval of the criminal use of the property; and (5) the harm caused by the charged crime.[146] While no court has articulated this test, it combines aspects of tests currently used by courts to provide more constitutional protection to citizens whose assets have been seized.[147]

III. EXISTING EXCESSIVE FINES TESTS

After the Court declined to articulate an Excessive Fines Test in *Austin*,[148] lower courts developed different Excessive Fines Tests in civil asset forfeiture cases.[149]

---

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

[144] VA. CONST. art. I, § 9.

[145] *See Austin*, 509 U.S. at 622.

[146] *See* Melissa A. Rolland, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause, and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371 (1999); Skorup, *supra* note 11, at 427.

[147] *See* Skorup, *supra* note 11, at 431, 440.

[148] 509 U.S. at 622–23 (stating that Austin asked the court to "establish a multifactor test for determining whether a forfeiture is constitutionally 'excessive[,]'" but declining that invitation because the Court of Appeals had "no occasion to consider what factors should inform such a decision" and "[p]rudence dictate[d] that we allow the lower courts to consider that question in the first instance").

[149] United States v. 221 Dana Ave., 81 F. Supp. 2d 182, 190 (D. Mass. 2000) ("Since *Austin*, three tests have emerged for determining whether a forfeiture violates the Excessive Fines Clause: 1) the 'instrumentality' or 'nexus' test which focuses on whether a substantial connection exists between the alleged wrongs and the property being subjected to forfeiture; 2) the 'proportionality' test which compares the harshness of the forfeiture with the severity of the crime; and 3) the hybrid 'instrumentality-proportionality' test which first utilizes an instrumentality test and then applies a proportionality analysis.").

A. Instrumentality Test

Following *Austin*, many Excessive Fines Tests drew from Justice Scalia's concurrence[150] where he stated that the question in determining if a fine is excessive "is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense."[151] This test was referred to as the "instrumentality test" and generally considered "(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property from the remainder [of the nonguilty property.]"[152]

In *United States v. Chandler*,[153] the government seized a thirty-three acre property in North Carolina after finding that the owner distributed small amounts of cocaine to pay employees for work on the farm and sold bales of marijuana from a farmhouse and barn.[154] The court applied an instrumentality test and found that there was a substantial nexus between the property and the offense, citing the need for seclusion that the property provided, the improvement of the property using proceeds from illegal sales, and the fact that the farmhouse and barn were not easily separated from the entire thirty-three acres.[155]

However, the Supreme Court's articulation of the proportionality test in *Bajakajian* made it unclear if the instrumentality test would continue to be valid.[156] The Fourth Circuit exemplified this confusion, adopting the grossly disproportional analysis from *Bajakajian* in one case,[157] while another case resulted in a three-way, split opinion, with one judge in favor of continued use of the instrumentality test, one judge noting that the instrumentality test was weak after *Bajakajian*, and one judge believing that a proportionality review was required after *Bajakajian*.[158]

1. Flaws of the Instrumentality Test

The instrumentality test's legitimacy has been called into question by the Court's ruling in *Bajakajian*, which indicated that a proportionality test was needed in order to determine if an excessive fine is being imposed by the government.[159] Because the

---

[150] Skorup, *supra* note 11, at 440 (citing *Austin*, 509 U.S. at 623–28 (Scalia, J., concurring)).
[151] *Austin*, 509 U.S. at 628.
[152] United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994).
[153] 36 F.3d 358 (4th Cir. 1994).
[154] *Id.* at 360–61.
[155] *Id.* at 365–66.
[156] United States v. Bajakajian, 524 U.S. 321, 333–34 (1998).
[157] United States v. Ahmad, 213 F.3d 805, 814 (4th Cir. 2000).
[158] United States v. Brunk, 11 Fed. App'x 147, 148–49 (4th Cir. 2001) (per curiam).
[159] *Bajakajian*, 524 U.S. at 334 ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality[.]").

Supreme Court clearly dictated that a proportionality standard be used,[160] a pure instrumentality test will not satisfy the constitutionally required standard of proportionality.

B. The Grossly Disproportional Test

The grossly disproportional test has been adopted by many federal circuit courts.[161] As laid out by the Supreme Court in *Bajakajian*, the "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality[.]"[162] The Court considered whether the forfeiture was grossly disproportionate to the gravity of the offense.[163] In its decision, the Court recognized that judgments about the appropriate punishment for an offense belong first to the legislature and require deference to that body, and that any judicial determination "will be inherently imprecise."[164]

While lower courts have adopted variations of this test, the Court in *Bajakajian* considered (1) if the crime was related to any other illegal activities; (2) if Bajakajian fit into the class of persons for whom the statute was principally designed; (3) the maximum penalties that could have been imposed under the sentencing guidelines; and (4) the harm that was caused.[165] While the specific factors of the test vary from court to court, courts will generally look to the criminal penalties (fines and jail time) a claimant would have faced if convicted of the underlying crime and compare this to the extent of the forfeiture in order to determine excessiveness.[166]

The Fourth Circuit recently articulated a test similar to the *Bajakajian* grossly proportional test in *United States v. Blackman*.[167] Here, the court analyzed four factors to determine if a punitive forfeiture violates the Eighth Amendment's Excessive Fines Clause: "(1) 'the amount of the forfeiture and its relationship to the authorized penalty;' (2) 'the nature and extent of the criminal activity;' (3) 'the relationship between the crime charged and other crimes;' and (4) 'the harm caused by the charged crime.'"[168]

---

[160] *Id.*

[161] Skorup, *supra* note 11, at 444 (noting that the First, Sixth, Seventh, Ninth, and Eleventh Circuits have adopted the grossly disproportionate test).

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

[163] *Id.*

[164] *Id.* at 336 (citing Solem v. Helm, 463 U.S. 277, 290 (1983); Gore v. United States, 357 U.S. 386, 393 (1958)). The proportionality analysis used with the Excessive Fines Clause is fact-intensive. This makes it difficult to apply inflexible rules in a proportionality context. The flexibility that is required when undertaking a proportionality analysis contributes to the variations in the proportionality factor tests seen in different courts. *Id.*

[165] It is important to note that *Bajakajian* was not a civil forfeiture case, but a criminal forfeiture case. *Id.* at 337–39.

[166] *Id.* at 336–37.

[167] 746 F.3d 137, 144 (4th Cir. 2014).

[168] *Id.* (quoting United States v. Jalaram, 599 F.3d 347, 355–56 (4th Cir. 2010)).

1. Flaws of the Grossly Disproportional Test

Much as the instrumentality test alone does not satisfy the grossly disproportional standard for excessive fines, the proportionality test alone does not meet the constitutional standard required in a civil asset forfeiture case (versus a criminal asset forfeiture). The grossly disproportional standard for excessive fines was first articulated in *Bajakajian*, where the Court recognized that "[t]he forfeiture in this case does not bear any of the hallmarks of traditional civil *in rem* forfeitures[,]"[169] and was instead a criminal asset forfeiture.

The difference between civil and criminal forfeiture seems trivial, but both types of forfeiture are derived from distinct legal histories and purposes, and the procedures used in each type of forfeiture are significantly different.[170] Civil forfeitures are in rem proceedings, or proceedings against property,[171] while criminal forfeitures are in personam.[172] Criminal forfeitures provide more protections for defendant property owners than do civil forfeitures,[173] so while a proportionality test may be appropriate in the context of a criminal asset forfeiture, the use of a proportionality test alone in civil asset forfeiture cases is inappropriate.

Criminal forfeitures are considered a part of a criminal prosecution, and therefore were always considered punitive and subject to the Excessive Fines Clause.[174] In criminal forfeiture cases, the burden is on the government to first prove that the defendant is guilty, beyond a reasonable doubt, of an underlying crime.[175] After this has been established, an asset forfeiture analysis takes place after the conviction, again with the government bearing the initial burden of proving that property should be forfeited either "beyond a reasonable doubt" or by "a preponderance of evidence."[176]

---

[169] *Bajakajian*, 524 U.S. at 331; *id* at 328 (describing the procedures used in *Bajakajian* to pursue a criminal forfeiture and pointing out that forfeiture is imposed at the culmination of a criminal proceeding and required conviction of an underlying felony).

[170] *See* Terrance G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. SCH. L. REV. 255, 257 (1994).

[171] *See Bajakajian*, 524 U.S. at 330 ("Historically, the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime.").

[172] *See id.* at 332; Libretti v. United States, 516 U.S. 29, 39–40 (1995); United States v. Casey, 444 F.3d 1071, 1075 (9th Cir. 2006).

[173] *See* Blumenson & Nilsen, *supra* note 24, at 47–48; Skorup, *supra* note 11, at 434.

[174] *Bajakajian*, 524 U.S. at 332 ("[I]n personam, criminal forfeitures . . . have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law."). Criminal forfeiture was explicitly rejected by the First Congress and was banned in the United States until the 1970s, when Congress brought back the practice with the Organized Crime Control Act of 1970 and the Comprehensive Drug Control and Prevention Act of 1970. *Id.* at 332 n.7.

[175] *See* Reed, *supra* note 170, at 267.

[176] *Id.*

Civil asset forfeiture cases are in rem, or against the property, not a person.[177] A conviction is not required in order to commence a civil asset forfeiture action, and, as it is not considered a criminal punishment, the burden of proof is easier to meet in civil cases (clear and convincing evidence in Virginia)[178] and is shifted from the government to the defendant owner of the property.[179] The legal fiction of "guilty property" is still valid in civil asset forfeiture.[180]

Interestingly, in Virginia, a civil asset forfeiture proceeding can be brought prior to a conviction of an underlying crime for money laundering and illegal drug transactions, but *cannot* be brought prior to a conviction for other types of crimes including abduction, kidnapping, extortion, prostitution, sex trafficking, and cruelty and injuries to children.[181]

The type of property seized in civil asset forfeiture cases in Virginia can be anything—from property used directly in the commission of a crime to property gained from profits of a crime.[182] Property that is not directly engaged in a crime is considered to be an instrumentality.[183] It is not illegal to possess these instrumentalities (e.g., it is not illegal to possess a car, house, boat, jewelry, or sneakers) like it is illegal to possess contraband (e.g., kinder eggs, counterfeit money, or child pornography).[184] "Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings."[185]

In order to determine if instrumentalities are "guilty" and may be forfeited to the State, the court must look to the connection between the property and the underlying criminal offense.[186] This is why a proportionality test alone cannot be applied to civil asset forfeiture cases; because civil forfeitures are in rem, the court *must* connect property to an underlying crime, requiring that a nexus analysis be made.[187] If an instrumentality analysis is not made, the court is essentially performing an in personam analysis, which ignores the property and does not consider that civil forfeiture does

---

[177] *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14–15 (1827) ("The thing here is primarily considered as the offender. . . . [T]he proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*."); Charmin Bortz Shiely, Note, United States v. Bajakajian*: Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis?*, 77 N.C. L. REV. 1595, 1606–07 (1999).

[178] VA. CODE ANN. § 19.2-386.10 (West 2016) (amending VA. CODE ANN. § 19.2-386.10 (West 2015)).

[179] *See* Reed, *supra* note 170, at 266.

[180] *Id.* at 277.

[181] VA. CODE ANN. § 19.2-386.35 (West 2016).

[182] FORFEITED ASSET SHARING PROGRAM MANUAL, *supra* note 18, at 1.

[183] *See* Skorup, *supra* note 11, at 448.

[184] *Id.*

[185] United States v. Bajakajian, 524 U.S. 321, 333 (1998).

[186] *Id.* at 333–34; Austin v. United States, 509 U.S. 602, 628 (1993) (Scalia, J., concurring).

[187] *See generally Bajakajian*, 524 U.S. 321.

not require a conviction of the owner of the property, but only requires the property to be guilty.[188]

Proportionality tests also usually require that a comparison be made between the forfeited asset and the sentence or fine imposed for the underlying crime.[189] This is problematic when dealing with civil asset forfeiture as there is not always an underlying conviction in civil asset forfeiture cases. To compare a civil asset forfeiture to the criminal sentence required for an underlying crime, a crime that the owner of the property has not been convicted of, necessarily results in an excessive fine.

Comparing the forfeited property to the sentence or fine imposed for the underlying crime may become problematic for reasons articulated in *Lincoln Automobile*: forfeiture of property that is more expensive could be considered "excessive" while forfeiture of the same type of property that has a lower value may not be considered excessive.[190] For example, a forfeited Ferrari may constitute an excessive fine when compared to the suggested fine for the underlying crime, while a forfeited Hyundai that participated in the same underlying crime may not constitute an excessive fine because the value of a Hyundai is so much less than a Ferrari. In this way, a strict proportionality analysis may discriminate against poor owners who own less expensive property that may be forfeited, while more expensive property may not be forfeited because it would violate the Excessive Fines Clause under a strict proportionality standard.

Further, the difference between the burden of proof required for criminal asset forfeiture (where it has been proven that a person committed a crime beyond a reasonable doubt) and civil asset forfeiture (preponderance of the evidence or clear and convincing evidence in Virginia),[191] indicates that property could be forfeited while there still may be some doubt regarding the use of the forfeited property to commit the underlying crime.[192]

C. The Hybrid Instrumentality-Proportionality Test

Under the hybrid instrumentality-proportionality test, the property seized must be both proportionate to the underlying crime and an integral party to the underlying crime.[193] The court will typically consider (1) the gravity of the offense compared with the harshness of the forfeiture; (2) whether the property was an integral part of

---

[188] *See* Skorup, *supra* note 11, at 448–49.

[189] *Id.* at 449–51.

[190] *See* Virginia v. One 1970, 2 Dr. H.T. Lincoln Automobile, Identification Number OY89A826833, 186 S.E.2d 279, 281 (Va. 1972).

[191] VA. CODE ANN. § 19.2-386.10 (West 2016) (amending VA. CODE ANN. § 19.2-386.10 (West 2015)).

[192] *See* Skorup, *supra* note 11, at 451–52.

[193] *See* United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 732 (C.D. Cal. 1994); Skorup, *supra* note 11, at 441.

the commission of the crime; and (3) whether the criminal activity involving the defendant property was extensive in terms of time and special use.[194]

The District Court for the Central District of California first applied this test in *United States v. 6625 Zumirez Drive*.[195] In this case, a property owner allowed his son to live in his house, where the son subsequently sold illicit drugs.[196] The property owner's son was charged and convicted of possession and sale of narcotics and a forfeiture action against the real property was initiated.[197] The property owner was charged with, but acquitted of, the same crimes.[198] When considering these factors, the court found that the harshness of the forfeiture outweighed the gravity of the offense, pointing out that the property owner was acquitted of all charges.[199] The court also found that the property was not an integral part of the commission of the crime, stating that the "Defendant Property is nothing more than a place at which drugs were sold. There is no other link between the property and the illegal activity."[200] Finally, the court found that the criminal activity was extensive in terms of spatial use of the Defendant Property, but as this was the only factor that weighed in favor of forfeiture, and the factors are not individually dispositive, the court found that the forfeiture of the Defendant Property would violate the Excessive Fines Clause.[201]

In effect, the hybrid test combines the proportionality test and the instrumentality test. It follows the Supreme Court's dicta in *Bajakajian*, but also recognizes the importance of instrumentality in avoiding Excessive Fines violations.[202]

1. Flaws of the Hybrid Instrumentality-Proportionality Test

Out of the existing tests, the hybrid instrumentality-proportionality test provides the most protection against excessive fines in civil asset forfeiture cases. This test places a heavier burden on the government during civil asset forfeiture proceedings because both the proportionality and instrumentality tests must be satisfied in order for a forfeiture to be valid.[203] It is necessarily more difficult for the government to

---

[194] *See 6625 Zumirez Drive*, 845 F. Supp. at 732.

[195] 845 F. Supp. 725, 725 (C.D. Cal. 1994).

[196] *Id.* at 730.

[197] *Id.* (stating that 152 grams of cocaine, 4.7 grams of psilocybin, and one marijuana plant were removed from the Defendant Property, that the street value of the cocaine was $15,200, and that the Defendant Property was worth $925,000 and the owner had $625,000 in equity in that property).

[198] *Id.* at 736.

[199] *Id.*

[200] *Id.* at 738 (stating that the "forfeiture of the Defendant Property in this case does not rid society of the instrumentality of the crime or eliminate the resources of any criminal enterprise").

[201] *Id.*

[202] *See id.* at 737.

[203] *See generally* United States v. Milbrand, 58 F.3d 841 (2d Cir. 1995); United States v. 221 Dana Ave., 81 F. Supp. 2d 182 (D. Mass. 2000).

succeed with a civil asset forfeiture claim under this test, and therefore does more to protect both innocent and guilty owners from excessive fines.[204] However, the hybrid instrumentality-proportionality test still fails to consider important aspects inherent in civil asset forfeiture—like punishment already received for an underlying offense, whether there has been a conviction or acquittal for the underlying offense, an innocent owner defense, and the implication of victimless crimes on punishment—that should be considered in order to protect citizens from excessive fines.

IV. PROPOSED TEST

The Virginia Crime Commission has recognized that while the "Eighth Amendment does apply, and in theory would prohibit an excessive forfeiture for minor wrongdoing. . . . In practice, forfeitures are almost never found to have violated the Eighth Amendment."[205] In Virginia, courts can provide protection from excessive fines by articulating a factor-based test that considers (1) the gravity of the offense compared with the harshness of the forfeiture, and whether the property was an integral part of the commission of the crime; (2) whether there has been a conviction or acquittal for the underlying crime and any punishment already received for the underlying offense; (3) the nature and extent of the criminal activity; (4) the owner of the defendant property and the owner's knowledge and approval of the criminal use of the property; and (5) the harm caused by the charged crime.

This test is the most appropriate in consideration of Commonwealth laws that allow civil asset forfeiture cases to be concluded prior to any underlying criminal case. Commonwealth laws allow significant leeway for civil asset forfeiture and the Commonwealth needs a strong test to protect citizens from excessive fines and law enforcement from the temptation of using forfeiture as a source of revenue.

A. The Gravity of the Offense Compared with the Harshness of the Forfeiture and Whether the Property Was an Integral Part of the Commission of the Crime

An appropriate Excessive Fines Test for civil asset forfeitures *must* include consideration of proportionality *and* instrumentalities. In *Bajakajian*, the Court determined that the grossly disproportionate standard would be used to determine an excessive fine.[206] However, the question of disproportionality is not as straight forward in civil forfeiture cases. Civil forfeitures involve property, not people.[207] Because of this, the court must first determine whether the property can be considered "guilty" of an offense and can do so by asking whether the property was an integral part of the commission of the crime.

---

[204] *See generally Milbrand*, 58 F.3d 841; *221 Dana Ave.*, 81 F. Supp. 2d 182.

[205] *See* Va. State Crime Comm'n, *supra* note 125, at 33 (citing Austin v. United States, 509 U.S. 602 (1993)).

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

[207] *Id.* at 330.

After determining that the property is in fact "guilty," the court can meet the grossly disproportionate standard by comparing the gravity of the offense with the harshness of the forfeiture. Without first determining that the property is an instrumentality of the crime, the court cannot determine if the forfeiture is disproportionate.

It may seem that requiring forfeited property to be an integral part of the *commission* of the underlying crime will weaken Virginia's legislation that allows the state to seize any property derived from illegal drug transactions. Currently, the Commonwealth must prove, by clear and convincing evidence, that the property is *substantially* connected to the crime.[208] By requiring that the Commonwealth tie the forfeiture of property to the property's *use* in the commission of the crime, it is not diminishing the legislation but making the legal concept of "guilty property" more legitimate. When property is actually used in the commission of a guilty act, the property can be viewed as guilty. If the property is not used to commit a criminal act, it is difficult to understand how the property can still be considered guilty under the concept of guilty property given to us in *The Palmyra*.[209]

B. Whether There Has Been a Conviction or Acquittal for the Underlying Crime and Any Punishment Already Received for the Underlying Offense

In *Austin*, the Supreme Court recognized that civil asset forfeiture was at least partially punitive.[210] Because it is partially punitive, it follows that the civil asset forfeiture is intended as part of the punishment for some criminal offense, and should therefore be considered against the backdrop of the entirety of the punishment. If a defendant is convicted of, or pleads to, a crime, the criminal justice system has developed sentencing guidelines to advise judges on the appropriate punishment for that crime. When determining a criminal fine or sentence, judges do not consider a pending civil forfeiture as part of the punishment.[211] Similarly, judges determining civil asset forfeiture do not always consider the punishment implemented by a criminal court for the same underlying crime that supports the civil forfeiture.[212] Though the Court has found that this does not violate the Double Jeopardy Clause,[213] an excessive fine could result from a situation where criminal fines have already been paid.

For example, consider a case where a defendant is charged with a minor drug crime, and both a substantial fine and jail time are imposed as punishment in the

---

[208] VA. CODE ANN. § 19.2-386.10 (West 2016) (amending VA. CODE ANN. § 19.2-386.10 (West 2015)).

[209] *See* 25 U.S. (12 Wheat.) 1 (1827).

[210] *See Austin*, 509 U.S. at 621–22.

[211] *See* United States v. Ursery, 518 U.S. 267, 292 (1996).

[212] *Id.*

[213] *See* United States v. Bajakajian, 524 U.S. 321, 331 (1998) ("Recognizing the nonpunitive character of such proceedings, we have held that the Double Jeopardy Clause does not bar the institution of a civil, *in rem* forfeiture action after the criminal conviction of the defendant."); *Ursery*, 518 U.S. at 292.

criminal proceeding. Then, a case against the defendant's property is pursued by the state and a large portion of property or high-value property (like real property) is seized. This should be considered excessive as the defendant has already been fined by the criminal court, and is being fined a second time for the same criminal conduct in the civil court. While the state would likely argue that as long as the total seizure, when both the criminal and civil courts are considered, is below the statutory maximum, then the forfeiture should not be considered excessive. However, if a criminal court determined an appropriate fine that falls within the sentencing guidelines, based on evidence available in a criminal proceeding, the increase in fine for the same underlying criminal conduct in a civil court should be evaluated for excessiveness.

Similarly, a conviction or acquittal for an underlying crime should be taken into consideration by the court when determining if a civil asset forfeiture is grossly disproportionate. At times, civil asset forfeiture may be used as a tool by prosecutors in order to punish a defendant who has been acquitted who they think is guilty, or to enact a harsher punishment than the courts were willing to give.[214] However, if the government pursues a forfeiture action against a property owner who has been acquitted of the underlying crime, the government is essentially pursuing a forfeiture in order to punish an owner who has not been proven guilty beyond a reasonable doubt. The traditional response to this argument would likely resort to the legal fiction that civil asset forfeiture is an action against guilty property, not an owner. However, since *Austin* determined that civil asset forfeiture is partially punitive, this argument is not valid.[215] The forfeiture is at least partially punishing the owner for the property's involvement in an underlying crime, even if the owner has not been convicted of, or has been acquitted of, the underlying crime. Any punishment of an innocent owner should be seen as grossly disproportionate to the underlying crime (since there is no underlying crime) and would be considered an excessive fine.

The conviction of a property owner of an underlying crime should be considered because the crime the defendant was convicted of will have a considerable impact on the determination of what is and is not considered proportionate. A conviction for drug distribution may have a heavier possible sentence than possession with intent, which may have a heavier sentence than simple possession. Further, the conviction of a crime will likely mean that criminal punishment has been imposed.

---

[214] *See* Craig Gaumer, *A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law*, U.S. ATT'YS' BULL., Nov. 2007, at 59, 67, http://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf [https://perma.cc/3EH5-5XSG] ("Federal civil forfeiture law is a prosecutor's secret weapon, a valuable tool used to guarantee that wrongdoers do not reap the financial benefits of criminal activity or continue to use the tools of their illegal trade." "Parallel civil forfeiture and criminal proceedings, if done properly, may serve as a valid and invaluable tool to preserve tainted property, where the government is not yet ready to indict the owner but does not want the property to be sold or otherwise transferred, damaged, dissipated, or hidden.").

[215] *See generally Austin*, 509 U.S. 602.

If criminal punishment is imposed, a civil forfeiture punishment should be considered in light of the criminal punishment to ensure that the combination of the two punishments does not violate the Excessive Fines Clause.

C. The Nature and Extent of the Criminal Activity

When the government seizes assets through civil forfeiture, the nature and extent of criminal activity should be considered when determining whether the forfeiture is excessive. The difficulty in defining excessiveness arises from the fact that the question is so fact specific; what may be excessive under one set of facts would not necessarily be considered excessive under another.

The nature of the crime is important in the statutory context of civil asset forfeiture.[216] The resurgence of civil asset forfeiture, at both the federal and state level, was a result of the "War on Drugs," and civil forfeiture has primarily been used as a tool to fight drug trafficking.[217] If a person is charged with a drug crime, it is more likely that civil asset forfeiture will be used against them because the legislature intended to prevent drug crimes when passing civil asset forfeitures laws and because the local police force is currently allowed to reap the rewards of their forfeitures.[218] This is shown in statutes that provide more protections for civil asset forfeitures deriving from abduction, kidnapping, extortion, prostitution, sex trafficking, and cruelty and injuries to children than the protections provided for drug related asset forfeitures.[219] Further, it is important to consider if the crime was a violent or non-violent crime, had victims or was victimless, and was intentional or unintentional. The nature of a crime speaks directly to the gravity of the offense, which is necessary to determine proportionality.

The extent of the crime should also be taken into consideration. A fine of $500,000 may be reasonable for a high-level drug trafficker, but would be inappropriate for a crime consisting of simple possession or one charge of intent to distribute. As the extent of the criminal operation increases, it is logical that the fine also increases. Under current civil asset forfeiture Excessive Fines Tests, the extent of the crime is not always considered.[220] In a criminal case, the extent of the criminal activity has not necessarily been proven beyond a reasonable doubt; only a certain charge (or charges) has been proven beyond a reasonable doubt. In a criminal case, a defendant may be found guilty of possession of ten grams of an illicit drug, when the prosecution

---

[216] *See* United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 733 (C.D. Cal. 1994).

[217] *See supra* Part I.

[218] *Austin*, 509 U.S. at 620 (stating that "Congress has chosen to tie forfeiture directly to the commission of drug offenses. . . . Congress recognized 'that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs.'"(quoting S. REP. No. 98-225, at 191 (1983))).

[219] VA. CODE ANN. § 19.2-386.35 (West 2016).

[220] *See supra* Part III.

really believes the defendant possessed ten kilograms of the drug, but could not prove it beyond a reasonable doubt. In civil asset forfeiture cases in Virginia, evidence that supports the forfeiture only has to be proven by clear and convincing evidence.[221] Because of this, it is possible that a fine would be excessive based on the charges proven in a criminal court, but not based on what is proven "by clear and convincing evidence" in the civil court.[222]

Considering the extent of the criminal enterprise should result in a higher bar for forfeitures of property that cannot be sufficiently connected to a crime or conspiracy, which will prevent the state from violating the Excessive Fines Clause by seizing innocent property. At the same time, considering the extent of the criminal enterprise should serve justice by resulting in more severe penalties for high-level traffickers. While the extent of the criminal activity should be considered, the extent of the criminal enterprise proven beyond a reasonable doubt in the criminal court should be the basis of this analysis.

D. The Owner of the Defendant Property and the Owner's Knowledge and Approval of the Criminal Use of the Property

For an innocent owner, any civil asset forfeiture of their property is an excessive fine. Innocent owners who have their property seized are not only penalized through forfeiture, but also through the costly legal process required to retrieve their property from the government.[223] Often, innocent owners choose to settle with the state and recover less than the full amount or value of property that was seized in order to avoid the protracted legal process.[224] Because these cases frequently settle, Virginia's protection for innocent owners—the payment of attorney's fees if the owner succeeds in proving the property is innocent[225]—does not provide much protection for innocent owners in reality. If the owner's knowledge and approval of the criminal use of the defendant property is consistently considered by the court when determining proportionality in excessive fines cases, innocent owners will be more likely to pursue cases and less likely to settle with the government. This will help prevent the unconstitutionally excessive permanent forfeiture of an innocent owner's property

---

[221] VA. CODE ANN. § 19.2-386.10 (West 2016) (amending VA. CODE ANN. § 19.2-386.10 (West 2015)).

[222] *Id.*; *see supra* Part III.

[223] *See* Chi, *supra* note 5, 1641–42 ("Claimants whose assets have been seized have a right to rebut the presumption of forfeitability at a hearing, but are generally not permitted to use those assets to retain a lawyer. Even when they cannot afford representation, they are not guaranteed a court-appointed attorney."(footnote omitted)); *NBC29 Special Report*, *supra* note 1.

[224] *See* Va. State Crime Comm'n, *supra* note 125, at 85; Michael Greibrok, *Settlement: Another Arrow in the Government's Civil Asset Forfeiture Quiver*, FREEDOMWORKS (June 12, 2015), http://www.freedomworks.org/content/settlement-another-arrow-government%E2%80%99s-civil-asset-forfeiture-quiver [https://perma.cc/5ZWK-MZZB].

[225] VA. CODE ANN. § 19.2-386.12(B) (West 2016).

by providing innocent owners with more options for recovery. The owner's knowledge and approval is an important consideration in civil asset forfeiture cases. In *6625 Zumirez Drive*, the son had the owner's approval to live in the house that was being forfeited, but the property owner may not have known or approved of the drug transactions occurring.[226] This same scenario can play out with vehicles, when a parent or associate allows another to use their vehicle without prior knowledge or approval of any criminal activity. Anecdotal evidence shows that these scenarios *do* occur in Virginia.[227]

E. Harm Caused by Crime (Victimless Crimes)

The Court in *Bajakajian* considered the harm caused by the crime and determined that a failure to report cash when leaving the country did not cause significant harm, as the money was legally obtained and would be used to pay a legal debt.[228] This indicates that the harm caused by the underlying crime should be considered when the excessiveness of a forfeiture is in question. It is arguable that certain crimes, such as prostitution, public drunkenness, gambling and drug use, are "victimless crimes" and as such the punishment for their fines should be less severe. If the criminal punishment for victimless crimes is less severe, it follows that the civil punishment should be less severe as well.

It is important to note that none of these factors should be considered individually dispositive, but rather should be balanced in order to reach the most equitable result. The factors chosen for this test were chosen because they combine considerations from the instrumentality test, the proportionality test, and the hybrid test, and include the consideration of innocent owners. The resulting test, while long, provides a higher barrier to the government, which stands to benefit from forfeitures. This helps protect citizens from unconstitutional forfeitures. In Virginia, a test is needed in order to protect citizens from unconstitutional forfeitures. The test proposed in this Note will protect citizens from unconstitutional, excessive forfeitures.

CONCLUSION

The overzealous use of civil asset forfeiture will likely continue as long as a revenue-raising incentive exists.[229] In the abstract, the official motive behind civil asset forfeiture is legitimate. It is unlikely that any law-abiding citizen supports the fact that drug dealers and criminals profit from their crimes. In practice however, the official motive is overshadowed by the revenue-raising incentives inherent in civil

---

[226] *See* United States v. 6625 Zumirez Drive, 845 F. Supp. 725, 736 (C.D. Cal. 1994).

[227] *See generally* Bowes, *supra* note 20; Bullock, *supra* note 15; *NBC29 Special Report*, *supra* note 1; Stillman, *supra* note 37.

[228] *See* United States v. Bajakajian, 524 U.S. 321, 339 (1998).

[229] *See* CARPENTER II ET AL., *supra* note 10, at 6.

asset forfeiture.[230] Constitutional issues arise when civil asset forfeitures begin to jeopardize the rights of innocent citizens and violate the Excessive Fines Clauses of the U.S. and Virginia Constitutions.

Virginia courts can protect both innocent and guilty property owners from excessive fines by increasing the burden on the Commonwealth in civil forfeiture actions. By instituting the proposed five-factor test that carefully considers all aspects and ramifications of a civil asset forfeiture, the government will face a higher bar in civil forfeiture cases. A standard that is more difficult to meet may dissuade the Commonwealth from instigating questionable civil forfeitures that have high profit incentives because they are more likely to be subject to the Excessive Fines Clause.

Perhaps, if this standard was in place when Mandrel Stuart was pulled over by police in Virginia, the officers would have thought twice about seizing his $17,000.[231] If the police had not seized his cash, perhaps Stuart would still be serving delicious BBQ to Virginians instead of having to close his restaurant because of the financial burden placed on him by the asset forfeiture process.[232] Unfortunately, because of civil asset forfeiture, we will never know.

---

[230] *See supra* Part I.

[231] *See NBC29 Special Report*, *supra* note 1.

[232] *See id.*