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Addressing Disproportionate Forfeitures: Refining The Bajakajian Analysis

Part Two of a Two-Part Article

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In Part One of our article (last month; http://bit.ly/2I7YIhf), we discussed the public concern over unfairness in asset forfeiture and analyzed the Supreme Court case — *United States v. Bajakajian*, 524 U.S. 321 (1998) (http://bit.ly/2IFwiuO) — that looked to the Excessive Fines Clause to limit the government's authority to forfeit property. We also explained that in the years since *Bajakajian* was decided, the decision has been invoked by the Circuit Courts of Appeal only rarely to block the government's forfeiture claim. Why are there so few successful challenges to forfeiture under *Bajakajian*?

It is possible that this is due to the government's judicious use of its forfeiture powers, but the ongoing criticism of excessive or unfair forfeiture makes this unlikely. It is more likely that individuals who have a possible claim of disproportionality choose to enter into settlement agreements with the government, agreeing to forfeit a portion of the asset or a specified amount rather than risking the loss of the entire asset. For example, in the context of the failure to properly report foreign bank accounts, statutory forfeiture provisions permit the government to seize up to half the value of an unreported account *for each tax year*, regardless of whether the assets were lawfully obtained. 31 U.S.C. §5321(a)(5)(C). It is not surprising that many defendants have elected to settle rather than fight when the risks of losing are so high and when courts have not been more open to challenges based on proportionality. In Part Two, we consider possible reforms that would allow defendants to challenge forfeitures as disproportionate under a fairer and more appropriate analysis.

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Proposals for Reform

Certain U.S. circuit court decisions since *Bajakajian*, as well as recent legal scholarship, have suggested three possible fixes to proportionality analysis. One asks the federal courts to consider expressly the defendant's wealth or livelihood when deciding whether a forfeiture is grossly disproportionate. *Bajakajian* indirectly raised this issue, noting that the defendant did not contend that "his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood." *Bajakajian*, 524 U.S. at 340 n.15.

Picking up on this footnote, at least three circuits have concluded that the impact on the defendant's livelihood should be relevant in some fashion to proportionality analysis. In *United States v. Jose*, 499 F.3d 105 (1st Cir. 2007), the First Circuit ruled that "it is appropriate to consider whether the forfeiture in question would deprive [the defendant] of his livelihood." *Id*. at 113; *see also*, *United States v. Levesque*, 546 F.3d 78, 84 (1st Cir. 2008) ("[R]uinous monetary punishments are exactly the sort [of punishment] that motivated the 1689 *Bill of Rights* and, consequently, the Excessive Fines Clause."). The First Circuit explained that this determination is an independent hurdle for the government to clear, distinct from the test for gross disproportionality required by *Bajakajian*. *See*, *Levesque*, 546 F.3d at 85.

The Second Circuit reached a similar conclusion when it held that "the proportionality determination required by *Bajakajian* is sufficiently flexible to permit [] consideration" of whether a forfeiture "would destroy a defendant's future livelihood." *United States v. Viloski*, 814 F.3d 104, 111-12 (2d Cir. 2016). In a summary order, the Ninth Circuit suggested that this was an optional part of the requisite *Bajakajian* analysis. *See*, *United States v. Hantzis*, 403 F. App'x 170, 172 (9th Cir. 2010) (holding that there was "no evidence that a fine would 'deprive him of his livelihood'" (quoting *Bajakajian*, 524 U.S. at 335)). However, most circuits have either rejected or ignored the relevance of this factor. *See*, *e.g.*, *United States v. Dicter*, 198 F.3d 1284, 1292 n. 11 (11th Cir. 1999) (rejecting relevance of "the personal impact of a forfeiture on the specific defendant"); *United States v.*

Wagoner, 278 F.3d 1091, 1101 (10th Cir. 2002) (identifying nine possible factors, none of which related to the defendant's livelihood or ability to pay).

Despite it representing the minority position, several legal scholars have concluded that the First Circuit's rule "is significantly more faithful to the history and purpose of the Excessive Fines Clause" than the rule in other circuits. *See*, Nicholas M. McLean, "Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause," 40 Hastings Const. L. Q. 833, 835 (Summer 2013) (http://bit.ly/2I5PSR5); *see also*, Pimentel, at 564-65; Beth Colgan, "Reviving the Excessive Fines Clause," 102 Cal. L. Rev. 277, 322-24 (Apr. 2014) (http://bit.ly/2I7URRl) ("[T]he ratifying generation would have considered the fine's effect on the offender and his family when analyzing a sentence's fairness … fines that serve to impoverish would be prohibited[.]"). Given the circuit split and the historical record, this issue seems ripe for Supreme Court review.

A second possible approach calls for courts to consider the Supreme Court's jurisprudence in the area of punitive damages, which considers the ratio between compensatory and punitive damages. Pimentel, at 568-77; *see*, *BMW v. Gore*, 517 U.S. 559, 574-75 (1996) (setting forth a three-factor test for whether punitive damages are grossly excessive that includes considering "the ratio of the compensatory damages awarded" to the punitive damages awarded). The Supreme Court's rulings on punitive damages are premised on the Due Process Clause rather than the Excessive Fines Clause (*BMW*, 517 U.S. at 562), but both are animated by the notion that some forms of punishment are not permitted under the Constitution. Why should there be distinct doctrinal lines of authority for forfeiture proportionality and for punitive damages when both are meant to restrict the ability of courts to punish individuals?

Inspired by the Supreme Court's punitive damages rulings, one law review article sketches out a proposal that would translate the "months of imprisonment" aspect of the Sentencing Guidelines "into monetary figures that would be meaningful in assessing the constitutionality of a fine or forfeiture under the Eighth Amendment." Pimentel at 577. Under this approach, only the most serious offenses would justify the most punitive asset forfeitures. This type of approach would protect mildly culpable defendants from immense forfeitures and could also be structured in a way to take into account the defendant's ability to pay. *Id*. at 579-80. Given the complexity and novelty of this proposal, the idea is better suited to legislative reform than judicial rule-making. Still, the article's suggestions would create a fairer system than the current one.

Finally, given the increasing emphasis on the prosecution of corporations in recent years, the Supreme Court should clarify that the Excessive Fines Clause applies in the context of corporations. The Supreme Court reserved this question in *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 276 n. 22 (1989). Commentators have explained that the nature, history, and purpose of the Eighth Amendment support its application to corporations. *See*, *e.g.*, Note, "The Case for Applying the Eighth Amendment to Corporations," 49 Vand. L. Rev. 1313, 1333-35 (Oct. 1996) (http://bit.ly/2I7J8lK). More than 100 years ago, the Supreme Court held that an excessive fine can constitute a taking of a corporation's property without due process of law, in violation of the Fourteenth Amendment. *See*, *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909). Now that this legal interest is understood to be protected by the Excessive Fines Clause rather than the Due Process Clause, it is sensible to clarify that corporations remain just as protected as natural individuals. In addition, consistent with the principles discussed above, when a forfeiture threatens the future "livelihood" of a corporation, it should be rejected as disproportionate.

Conclusion

The Supreme Court's decision in *Bajakajian* represented a potential opportunity to stem law enforcement's growing reliance on forfeitures, but in practice *Bajakajian* has served this function only in the most clear-cut cases of overzealous prosecution. In *United States v. Abair*, 746 F.3d 260, 268 (7th Cir. 2014), for example, where the Seventh Circuit reversed and remanded a criminal forfeiture award, even the dissenting opinion expressed "serious misgivings about the wisdom of th[e] prosecution" and suggested that the most just result would likely be for the government to decline to pursue the case on remand. 746 F.3d at 272 & n.2 (Sykes, J. dissenting). Given the expansion of asset forfeiture since *Bajakajian*, the subject is ripe for further review by the Supreme Court. Adding the "livelihood" factor to the other *Bajakajian* factors would focus courts' attention on the size of the forfeiture, rather than solely on the severity of the defendant's conduct. The recent scholarship comparing the law of punitive damages and disproportionality analysis could be used to advocate for harmonizing these areas of law. Finally, the uncertainty about whether corporations are covered by *Bajakajian* should be clarified.

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