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Take a Drink Lose a Car: The Constitutionality of the New York City Forfeiture Statute, as Applied to First-Time DWI Offenders, in the Wake of Recent Excessive Fines and Double Jeopardy Jurisprudence

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Take A Drink, Lose A Car:  
The Constitutionality of the New York City Forfeiture Policy, as Applied to First-Time DWI Offenders, in the Wake of Recent Excessive Fines and Double Jeopardy Clause Jurisprudence

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Pursuant to a policy announced in February, 1999, the New York City Police Department has been seizing the automobiles of individuals suspected of driving while intoxicated. This new policy uses a provision in the city code that was designed and has long been used to forfeit the property of drug dealers. Under that provision, the police are authorized to seize any property that is suspected of having been used as a means of committing a crime. The city may then keep any such property permanently if it can prove in a civil forfeiture proceeding that the property was used as an instrumentality of crime.

Although the new policy has survived one constitutional challenge, this is likely not the last word. The policy comes in the wake of a recent line of United States Supreme Court cases in which civil forfeitures have implicated the Double Jeopardy and Excessive Fines Clauses of the United States Constitution. After reviewing these cases, this note concludes that while the Double Jeopardy Clause is no bar to enforcement of the New York City policy, the Excessive Fines Clause, as interpreted in United States v. Bajakajian, renders the policy unconstitutional as applied to first-time driving-while-intoxicated offenders.

INTRODUCTION

Russian immigrant Pavel Grinberg and his wife were returning home from a birthday party on the evening of February 21, 1999 when they were pulled over by a New York City (NYC) Police Officer.¹ The officer, noticing that Mr. Grinberg was not wearing a seatbelt, investigated further and concluded that Grinberg demonstrated signs of alcohol consumption.² Grinberg agreed to take a breathalyzer examination, and the results indicated a .11 of one percent blood alcohol content,³ only slightly higher than the .10 level required for a driving

* The Ohio State University College of Law, Class of 2001. I would like to dedicate this note to my wife Monica whose influence and support directly contributed to its publication. I would also like to thank my parents, Jack and Sue, for instilling in me an appreciation for the value of knowledge and for providing me with the tools, desire, and discipline to pursue that knowledge.

¹ Gregory Beals, Rudy Takes the Keys, NEWSWEEK, Mar. 8, 1999, at 28.
³ Id.
while intoxicated (DWI) charge in the state of New York. As one might expect, Mr. Grinberg was arrested and charged with DWI. And although he had no previous DWI arrests, police seized Mr. Grinberg's 1988 Acura for forfeiture under a policy announced one day earlier by NYC Police Commissioner Howard Safir. This new policy uses a provision in the city code that was designed and has long been used to forfeit the property of drug dealers. Under the provision, the police are authorized to seize any property that is suspected of having been used as a means of committing a crime. The police must then place the property into the custody of the NYC Police Department Property Clerk, who may refuse to return the property to its owner if the clerk has reasonable cause to believe that the property was the instrumentality or the proceeds of a crime. The city may keep any such property permanently, or in other words, obtain forfeiture, if it can prove by a preponderance of the evidence that the property was used as a means of committing a crime.

In Mr. Grinberg's case, the Supreme Court of New York, 694 N.Y.S.2d at 319, and this is the provision discussed in this comment.

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4 N.Y. VEH. & TRAF. LAW § 1192(2),(3) (McKinney 1999) (making it “per se” unlawful to “operate a motor vehicle while such person has .10 of one per centum or more by weight of alcohol in the person’s blood”). In addition to the per se rule, New York has a “driving while ability impaired” offense, which makes it unlawful for an individual to “operate a motor vehicle while the person’s ability to operate such motor vehicle is impaired by the consumption of alcohol,” N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 1999), and a “driving while intoxicated” offense, making it illegal for an individual “to operate a motor vehicle while in an intoxicated condition.” N.Y. VEH. & TRAF. LAW § 1192(3) (McKinney 1999). Unlike the per se rule, the latter two offenses focus on the condition of the suspect and operate regardless of the suspect’s blood alcohol content. Mr. Grinberg was arrested under the “Driving while intoxicated; per se” provision,

5 Beals, supra note 1; see also Grinberg, 694 N.Y.S.2d at 319–20.

6 Beals, supra note 1, at 28 (explaining that Mr. Grinberg had never been arrested for DWI until the day after the forfeiture policy commenced).

7 N.Y. CITY, N.Y., CODE § 14-140(b) (1999). Critics of the policy have argued that the provision was “never intended for first-time DWI offenders,” but was instead “meant for the most vicious drug dealers.” Beals, supra note 1, at 28 (quoting former Queens District Attorney Dino Lombardi).

8 N.Y. CITY, N.Y., CODE § 14-140(b) (1999). The provision applies to inter alia “[a]ll property suspected of having been used as a means of committing crime or employed in aid or in furtherance of crime . . . .” Id.

9 N.Y. CITY, N.Y., R. & REGS. § 12-36 (1999). The property clerk may refuse to return the property if he or she “has reasonable cause to believe that property was unlawfully obtained or was the proceeds or instrumentality of a crime.” Id.

10 N.Y. CITY, N.Y., CODE § 14-140(b) (1999). The provision actually states that where property has “been used as a means of committing crime or employed in aid or in furtherance of crime or held, used, or sold in violation of law . . . a person . . . who so used . . . any such property . . . shall not be deemed to be the lawful claimant entitled to any such property.” Id. The city must then simply bring a declaratory action and obtain a declaration of rights in the
York County held that the city forfeiture law could be applied to DWI cases, agreeing with the city's proposition that an automobile is the "quintessential instrumentality" of the crime of DWI.12

Enforcement of the new policy has attracted much attention because of its radical approach to drinking and driving.13 While thirty-three states authorize the forfeiture of automobiles for repeat DWI offenders, the NYC statute is the only one in the United States that provides for the forfeiture of automobiles belonging to first time DWI offenders.14 Given that city DWI related fatalities and arrests were down in 1998 immediately before the policy was implemented, the plan has been attacked as unnecessarily excessive.15 Additionally, many critics of the vehicle, or in other words, a declaration that the property has satisfied the requirements of forfeiture. See Grinberg, 694 N.Y.S.2d at 322. Such action must be brought within twenty-five days after a request for return of the property has been made by the owner. See N.Y. CITY, N.Y., R. & REGS. § 12-36(a) (1999). If the city prevails in the forfeiture proceeding, the automobile is either auctioned off or used by the city. See Alice McQuillan, Lose Car for DWI, Safir Sez, N.Y. DAILY NEWS, Jan. 22, 1999, at 7.

11 In the New York judicial system, the Supreme Court is not a court of appellate jurisdiction as the name may imply. See ELLEN M. GIBSON, NEW YORK LEGAL RESEARCH GUIDE 132 (1988). Each county in New York has a Supreme Court, and it is essentially a trial court, having original jurisdiction over any criminal or civil action. See id.

12 Grinberg, 694 N.Y.S.2d at 320. The court stated that the "[p]erformance of a motor vehicle is a necessary element of DWI" and characterized the automobile as the "sine qua non without which the crime could not have been committed." Id. This decision was affirmed on appeal by New York’s Supreme Court Appellate Division, First Department. Grinberg v. Safir, 698 N.Y.S.2d 218, 219 (N.Y. App. Div. 1999). In New York, the Appellate Divisions are intermediate appellate courts and receive their appeals from the Supreme Courts. GIBSON, supra note 11, at 129. See id. The Appellate Division’s opinion in the Grinberg appeal is minimal, occupying slightly less than two pages of space. See Grinberg, 698 N.Y.S.2d at 219. Unlike the Supreme Court’s relatively thorough treatment, the Appellate Division’s decision contains only one sentence addressing Mr. Grinberg’s argument that the forfeiture of his automobile violated the Excessive Fines and Double Jeopardy Clauses. See id. Because these arguments are the subject of this comment, the Supreme Court decision will receive greater discussion than the appellate court decision.

13 See McQuillan, supra note 10, at 7 (collecting opinions from supporters and opponents of the policy).

14 See id.

15 See id. The policy was prompted by New York City Mayor Rudolph Guliani. See Beals, supra note 1, at 28. At least one critic of the policy has expressed his opinion that the policy stems from the mayor's "authoritarianism." Beals, supra note 1, at 28 (quoting former Queens District Attorney Dino Lombardi). However, it is probable that the mayor implemented the policy simply to gain political popularity. In recent years, tough measures on drinking and driving have gained widespread public acceptance. See E. John Wherry, Jr., The Rush to Convict DWI Offenders: The Unintended Constitutional Consequences, 19 U. DAYTON L. REV. 429, 429 (1994). Professor Wherry describes in the United States "a rush to convict those accused of drinking-and-driving violations." Id. He explains that "[t]his urgency is fueled
policy have pointed to the potential economic cost involved in depriving individuals of their ability to travel to work. New Yorkers were also surprised to learn that officials were not going to return automobiles to their owners, even if they were acquitted on the DWI or pleaded guilty to a lesser charge. Instead, because the forfeiture proceeding is civil, owners must successfully defend themselves in court to reacquire their automobiles. A final concern expressed is that police may target certain "fancy" cars, thereby subjecting their owners to a greater risk of DWI arrest.

Despite these concerns, the city continues to seize over one hundred automobiles a month from motorists charged with DWI. Furthermore, officials from other large cities, including Atlanta, Los Angeles, Chicago, Philadelphia, Houston, and Cincinnati, have expressed an interest in adopting a DWI forfeiture policy similar to that in NYC. The problem with following the city's lead, however, is that the NYC policy, as applied to first-time DWI offenders, may well be constitutionally infirm. Although the NYC policy did survive Mr. Grinberg's constitutional attack, this is likely not the last word.

by, among other factors, the public attitudes and the proselytizing of public interest groups such as Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD). Professor Wherry warns, however, that this rush has had adverse consequences, including the enactment of potentially unconstitutional DWI laws. See id. at 469.

See Beals, supra note 1, at 28 (identifying victim of policy who may lose his job); New York City's Car-Seizure Measure for First D UI Ignores Constitution, SUNDAY PATRIOT-NEWS, Mar. 7, 1999, at B10 (criticizing policy for "depriving an individual of his means of transportation, his ability to get to work").

The statute requires the property clerk to initiate a "civil forfeiture proceeding" against a claimant who has demanded the return of his or her automobile. See N.Y. CITY, N.Y., R. & REGS. § 12-36(a) (1999).

As discussed supra, the city must only prove by a preponderance of the evidence that the automobile was used as a means of committing a DWI. See supra note 10 and accompanying text.

Bad Car, ASIAN WALL ST. J., Feb. 26, 1999, at 10 (criticizing the policy as a "way to make some money for the city").

See The Week in Review, NAT'L L.J., May 31, 1999, at A6 (explaining that over 405 motorists have had their cars seized in the first four months of the forfeiture policy).

See Beals, supra note 1, at 28 (pointing out that officials from these other large cities have spoken with Mayor Rudolph Giuliani about the policy); see also Bad Car, supra note 20, at 10 (identifying Philadelphia as a city interested in the policy); Mark Curnutte, 5 Dead Since Friday: Cries Louder for DUI Curbs, CIN. ENQUIRER, Mar. 2, 1999, at A1 (considering forfeiture policy similar to NYC in Cincinnati after serious DWI accident); Matt Schwartz, Councilman Proposes Seizing Autos of Those Accused of DWI, HOUSTON CHRON., Mar. 5, 1999, at 31 (contemplating the adoption of a forfeiture policy in Houston).

Several legal commentators have expressed their concern that the NYC forfeiture law may well be unconstitutional. See Beals, supra note 1, at 28 (citing former Queens District
The policy comes at an interesting time, right on the heels of a recent line of Supreme Court cases in which civil forfeitures and penalties have implicated the Double Jeopardy and Excessive Fines Clauses of the United States Constitution. Several of these cases decided by the Court in the late 1980s and early 1990s appeared to provide defendants in civil forfeiture proceedings broad protections. In particular, United States v. Halper held that a civil sanction may constitute punishment for double jeopardy purposes, and Austin v. United States held that a civil forfeiture is a fine for purposes of the Excessive Fines Clause if it serves as punishment for an offense. These protections were greatly restricted, however, at least in the Double Jeopardy Clause context, by two subsequent decisions. In United States v. Ursery and Hudson v. United States, the Court held that the Double Jeopardy Clause only prevents the government from imposing multiple criminal punishments. To the extent that a forfeiture is civil, therefore, the Double Jeopardy Clause is not even implicated. While these cases eviscerated important double jeopardy protections previously afforded to civil forfeiture defendants, the Court recently mitigated the impact of these cases in United States v. Bajakajian, in which it held that a punitive forfeiture is constitutionally excessive if it is grossly disproportional to the gravity of the defendant's offense.

This comment undertakes to evaluate whether the NYC forfeiture policy is constitutional in the wake of recent Supreme Court double jeopardy and Attorney Dino Lombardi as stating that the forfeiture may be unconstitutional because the "penalty [is] grossly out of proportion to the crime"); Alice McQuillan & Patrice O'Shaughnessy, Rudy OK's DWI Plan, N.Y. DAILY NEWS, Jan. 23, 1999, at 2 (relaying criminal defense lawyer Stephen Singer's opinion that the automobile forfeiture is disproportional to the DWI crime); Schwartz, supra note 22, at 31 (explaining that South Texas College of Law professor Peter Lewis believes that the forfeiture provision is subject to attack because it is "disproportionate to the gravity of the crime").


25 See Schwartz, supra note 22, at 31 (citing professor Lewis' belief that the issue "probably will go to the Supreme Court because of its national importance because other states will pick up on it").

27 Id. at 448–49.
29 Id. at 618.
34 Id. at 334.
excessive fines jurisprudence. Part I briefly explores the nature and origin of civil forfeiture and civil penalty laws in the United States and their historical relationship to the Double Jeopardy and Excessive Fines Clauses of the Constitution. Part II discusses the recent Supreme Court cases that have implicated these clauses in a civil forfeiture context. Finally, Part III applies these recent cases to the radical approach that New York City has employed to deal with drinking and driving. It concludes that while the Double Jeopardy Clause is no bar to enforcement of the NYC policy, the Excessive Fines Clause as interpreted today renders the policy unconstitutional as applied to first time DWI offenders.

I. CIVIL FORFEITURES AND PENALTIES, DOUBLE JEOPARDY, AND THE EXCESSIVE FINES CLAUSE

"Forfeiture is the divestiture of property without compensation, in consequence of a default or offense, and is a method deemed necessary by the legislature to restrain the commission of the offense and to aid in its prevention."\(^35\) Both civil and criminal forfeiture statutes exist.\(^36\) Civil forfeiture proceedings may be brought \textit{in rem} or \textit{in personam}.\(^37\) A civil \textit{in rem} forfeiture requires that a court have jurisdiction over the property by exercising actual or constructive possession of the property.\(^38\) \textit{In rem} proceedings are used to establish the ownership of a particular piece of property\(^39\) and are brought against the property itself.\(^40\)

Civil \textit{in personam} forfeitures and criminal forfeitures are brought \textit{in personam} against the defendant.\(^41\) \textit{In personam} proceedings are brought directly against the defendant, and the court must have jurisdiction over the person before

\(^{35}\) 36 AM. JUR. 2D Forfeitures & Penalties § 1 (1968).


\(^{37}\) In contrast, a criminal forfeiture action must be brought \textit{in personam} against the defendant. \textit{See} Lieske, \textit{supra} note 36, at 271.

\(^{38}\) \textit{See} 36 AM. JUR. 2D Forfeitures & Penalties § 28 (1968). A court has actual possession of the property when the property is before the court. \textit{See id.} Constructive possession occurs where property has been lawfully seized by the party seeking forfeiture, and that party seeks to ascertain and enforce its right of forfeiture. \textit{See id.}

\(^{39}\) ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 1.01[3], at 1–10 (2d ed. 1991). If the government is a successful plaintiff in such an action, the title to the property becomes vested in the government. \textit{See id.}

\(^{40}\) \textit{See} 36 AM. JUR. 2D Forfeitures & Penalties § 17 (1968).

\(^{41}\) \textit{See} Lieske, \textit{supra} note 36, at 271.
it can bind a defendant “to do, or refrain from doing, some specific act or to pay a sum of money.”

In addition to forfeitures, governmental entities also bring actions to impose penalties upon individuals. A penalty is a “punishment by way of a pecuniary exaction from the offender . . . and imposed and enforced by the state for a crime or offense against its laws.” Like in personam forfeitures, the imposition of penalties are also frequently brought in civil actions and the proceedings require jurisdiction over the defendant.

Forfeiture dates back to pre-Judeo-Christian practices. At English common law, there were three types of forfeiture: deodand, forfeitures of estate, and statutory forfeitures. Deodand was the common law practice of requiring an individual to forfeit any inanimate object that caused the accidental death of a King’s subject. In the law’s view, it was the article that was the accused, not the owner. Forfeitures of estate resulted in the forfeiture of a convicted felon’s chattels and land. The felon’s chattels were given to the King and the felon’s land was returned to the lord. The basis of forfeiture of estate was the belief that convicted felons had no right to own land because they had breached the King’s peace.

Finally, statutory forfeitures were provided for by early English law, particularly for violation of customs and revenue laws. Actions for statutory forfeiture were generally brought in rem against the property of the offender. Of the three types of forfeitures, only statutory forfeitures became a part of

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42 CASAD, supra note 39, § 1.01[2], at 1–7.
44 36 AM. JUR. 2D Forfeitures & Penalties § 2 (1968).
45 See id.
47 See id. at 681–82.
48 See id. at 680–81.
49 See id. at 681.
50 Id. at 682.
51 Id.
52 See id.
53 Austin v. United States, 509 U.S. 602, 612 (1993) (describing the English Navigation Acts of 1660, which mandated that goods be delivered in English vessels; a violation of the Acts “resulted in the forfeiture of the illegally carried goods as well as the ship that transported them”).
54 See supra notes 38–40 and accompanying text (explaining characteristics and requirements of in rem forfeiture).
55 See Austin, 509 U.S. at 612.
Like the deodand, statutory forfeiture rests on the assumption that it is the property that “is held guilty and condemned as though it were conscious instead of inanimate and insentient.” Because it is the property that is condemned rather than the owner, this theory of forfeiture is referred to as the “guilty property” theory.

The use of civil forfeiture actions by the government has increased dramatically in recent years for several reasons. First, because the inquiry is on the guilt of the property, rather than on the owner, it was thought that certain constitutional protections afforded in personam defendants, such as the bar against double jeopardy, could be “circumvented.” Thus, today it is not uncommon for state and federal governments to pursue a criminal sanction and a civil forfeiture against the same person. Furthermore, because civil forfeiture statutes generally provide that the government must prove only that “the property was connected with the commission of certain [statutorily] proscribed activity” by a preponderance of the evidence, these statutes require the government to sustain a lower burden of proof than their criminal counterparts. A criminal defendant can be acquitted of a criminal charge, yet lose his or her property in a civil forfeiture action.

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56 See Calero-Toledo, 416 U.S. at 683.
58 See id.; see also Austin, 509 U.S. at 615, 616 (describing the “guilty-property fiction” as a theory to justify forfeiture).
59 See Lieske, supra note 36, at 266–67 (explaining that in 1991 “more than two billion dollars worth of property was forfeited to the federal government”); Michele M. Jochner, 87 ILL. B.J. 78, 79 (explaining that federal agencies obtained forfeiture of “over $2.7 billion worth of cash, stocks, homes, cars, boats, and airplanes” between 1990 and 1996).
60 See Lieske, supra note 36, at 267 (explaining that because of the guilty property theory, “constitutional protections traditionally afforded the individual have been circumvented”).
61 See id. at 267 (explaining that the federal government has increasingly relied on civil forfeiture statutes to achieve its criminal enforcement objectives); see also Charmin Bortz Shiely, 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, 1633 n.10 (1999) (noting that civil forfeiture proceedings are commonly brought after criminal prosecution); Josh Getlin, Tough Policy on Drunk Driving Has N.Y. Wary, L.A. TIMES, Feb. 24, 1999, at A1 (explaining that the New York City civil forfeiture proceeding will be in addition to any criminal action).
62 See Lieske, supra note 36, at 271 (explaining that the “property is guilty if the government sustains its low burden of showing merely that there is probable cause the property was connected with the commission of certain proscribed activity”).
63 New York City officials, including Mayor Giuliani, find this characteristic of the new DWI policy particularly attractive, calling it the “O.J. Simpson” approach, whereby defendants who are acquitted may still lose under the preponderance of evidence standard. See Getlin, supra note 61, at A1.
Historically, the Supreme Court consistently held that the Double Jeopardy Clause of the Fifth Amendment applies only to criminal actions and not to actions that provide for a civil sanction. The Court was specifically unwilling to provide double jeopardy protection to defendants in civil forfeiture proceedings. Along with the distinction made between civil and criminal actions, a further rationale that the Court used was that a civil forfeiture proceeding is not brought against the individual, but instead against the property. Because it was the property that was viewed as being punished, a forfeiture was not considered an additional punishment to the owner.

Unlike Double Jeopardy Clause jurisprudence, there have been few cases concerning the Excessive Fines Clause of the Eight Amendment in the context

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64 The Double Jeopardy Clause provides in part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.
65 See, e.g., United States v. Hess, 317 U.S. 537, 548 (1943) (holding that an action brought by United States against defendants for defrauding the government after defendants were already indicted and pleaded guilty to criminal charge for same conduct is not double jeopardy because second action was a "civil, remedial action brought to protect the government from financial loss" and double jeopardy applies only in "actions intended to authorize criminal punishment to vindicate public justice"); Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956) (holding that government action brought under the Surplus Property Act of 1944 is civil in nature, and even if brought after defendant pleaded guilty to criminal charge for same offense, the Double Jeopardy Clause is not invoked).
66 For example, in One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 232 (1972), the defendant was acquitted of willfully and knowingly smuggling into the United States emerald stones and a ring. Id. Following the acquittal, the United States brought a forfeiture action against the jewelry. Id. at 233. The Court focused primarily on the civil and remedial nature of the forfeiture action in rejecting the argument that it was barred by double jeopardy. See id. at 235 (explaining that "[i]f for no other reasons, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments"). More recently, in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984), the defendant was acquitted of knowingly engaging in the business of dealing firearms without a license. Id. at 355-56. In a subsequent forfeiture proceeding against the firearms, the Court held that double jeopardy did not apply because the forfeiture was a civil sanction. Id. at 366.
67 See, e.g., Various Items of Pers. Prop. v. United States, 282 U.S. 577 (1931). In Various Items, the defendant corporation and its officers had already been convicted of defrauding the government. Id. at 579. Subsequently, the United States brought a civil proceeding to forfeit the distillery, warehouse, and denaturing plant of the defendant corporation. Id. at 578. The Court held that the second action against the defendants was not double jeopardy because "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." Id. at 581.
68 See id. (explaining "guilty property" forfeiture theory).
69 The Excessive Fines Clause provides that "excessive fines [shall not be] imposed." U.S. CONST. amend. VIII.
of civil forfeitures or otherwise. In fact, the Excessive Fines Clause was first interpreted by the Supreme Court in 1989. However, the scope of protection that the Excessive Fines Clause affords to individuals was not decided in that case, and it was unclear whether it even applied to civil sanctions imposed by the government. These issues were not addressed until 1993 when *Austin v. United States* was decided.


Beginning in 1989, with *United States v. Halper*, the Supreme Court decided two cases that placed restrictions on the government’s power to impose civil sanctions. *Halper* achieved this result by extending double jeopardy protections to civil sanctions, and *Austin v. United States* held that forfeitures obtained by the government are subject to the Excessive Fines Clause if they serve, in part, as punishment for an offense. However, the double jeopardy protections provided in *Halper* were for the large part eviscerated in two subsequent cases, *United States v. Ursery* and *Hudson v. United States*, where the Court retreated to its historical understanding that the Double Jeopardy Clause applies only to criminal punishment. The loss of these protections, however, was partially offset by the Court’s interpretation of the Excessive Fines Clause in *United States v. Bajakajian*.

A. Expanding Constitutional Protections

1. United States v. Halper

In *United States v. Halper*, the defendant Halper had been criminally convicted for submitting false Medicare benefits claims for which he received a

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73 See id. at 448.


75 See id. at 618.


Following this conviction, the United States brought a civil action against him under the federal False Claims Act. The statute mandated a penalty equal to $2,000 per false claim. Halper had submitted sixty-five false claims and therefore faced potential penalties of over $130,000, even though his fraudulent claims cost the government only $16,000. Because Halper had already received a prison sentence, he argued that the imposition of such a penalty would violate the Double Jeopardy Clause.

In its opinion, the Court first noted that the Double Jeopardy Clause has the purpose of preventing three abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. The Court focused on the last of the three abuses, and the issue became whether the civil penalty prescribed by the False Claims Act constituted a punishment for which Halper had already been convicted. In a unanimous opinion, the Court held that a civil sanction may constitute punishment for Double Jeopardy purposes when it “cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes.”

In reaching its holding, the Court rejected the government’s assertion that punishment can occur only in a criminal proceeding. The Court, in providing guidance to determine whether a particular civil sanction serves the goals of punishment, focused on the proportionality of the sanction to the damages that the offender has caused. Specifically, the Court instructed that a civil sanction likely is punishment if it bears no rational relationship to the goal of compensating the government for its

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80 Id. at 437.
82 Halper, 490 U.S. at 428 (citing 31 U.S.C. § 3729 (1982 & Supp. II)). The Act was amended by the False Claims Amendment Act of 1986, which increased the civil penalty. Id. at 438 n.3.
83 Halper, 490 U.S. at 439.
84 See id. at 438.
85 Id. at 440.
86 Id. at 440–41.
87 Id. at 448.
88 Id. at 447 (“In making this assessment, the labels ‘criminal’ and ‘civil’ are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals . . . .”).
89 The Court stated that double jeopardy would bar a civil proceeding against a defendant already punished in a criminal prosecution where the civil sanction “subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.” Id. at 449.
Ultimately, the Court agreed with the trial court that the government’s costs and expenses of $16,000 were sufficiently disproportionate to Halper’s $130,000 liability that he was being punished multiple times for the same offense.91

2. Austin v. United States

In Austin v. United States,92 Austin pleaded guilty to possessing cocaine with intent to distribute and received a prison sentence under South Dakota’s drug laws.93 Shortly thereafter, the United States filed an in rem action under a federal drug forfeiture statute94 seeking Austin’s mobile home and auto body shop, the locations where the incriminating drug activities took place.95 Austin argued that the forfeiture constituted a fine under the Excessive Fines Clause and that it was excessive.96

After a historical discussion of the Eighth Amendment, the Court rejected the government’s argument that the Excessive Fines Clause applies only to criminal punishment.97 Citing Halper for the proposition that punishment can derive from a civil proceeding as well as a criminal proceeding,98 the Court held that a civil forfeiture serves as punishment where it “can only be explained as also serving either retributive or deterrent purposes.”99 Finding that statutory forfeitures have historically been understood to, at least in part, impose punishment on the offender, the Court found that forfeitures could be considered fines for purposes of the Excessive Fines Clause.100 Analyzing the particular drug forfeiture statute at issue, the Court found that it partly served the purpose of punishment, because it provided an “innocent owner defense”101 and the

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90 Id. The Court compared this analysis to determining whether a liquidated damages clause was a reasonable approximation of damages. Id. at 446.
91 See id. at 452.
93 Id. at 604.
95 Austin, 509 U.S. at 604.
96 Id. at 606.
97 Id. at 609–10.
98 Id. at 610 (affirming Halper’s statement that “[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law”).
99 Id. (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).
100 Id. at 618.
101 Id. at 619. The innocent owner defense provided support for a punitive purpose finding because it excepted from forfeiture the property of an owner who had no knowledge or consent of the offense, see 21 U.S.C. § 881(a)(7) (1994), thus negating the argument that the
legislative history of the statute indicated that it was designed to serve a deterrent effect.\textsuperscript{102} Although the Court concluded that the forfeiture was subject to the Excessive Fines Clause, it left to the lower courts the question of whether a fine is excessive.\textsuperscript{103}

Thus, after \textit{Austin}, it was clear that forfeitures were subject to the Excessive Fines Clause if they served in part to punish. And although not explicitly stated, there appeared to be no reason that forfeitures were not subject to the Double Jeopardy Clause as well. After all, \textit{Halper} held that civil penalties may constitute punishment for double jeopardy purposes,\textsuperscript{104} and \textit{Austin} established that civil forfeitures could constitute punishment for the Excessive Fines Clause.\textsuperscript{105} There did not appear to be a principled reason that forfeitures should not be considered punishment for double jeopardy purposes as well.

\textbf{B. Restricting the Halper Double Jeopardy Protections}

It was this type of reasoning that led the Sixth Circuit to reverse Guy Ursery's criminal conviction for manufacturing marijuana.\textsuperscript{106} Before Ursery's criminal conviction, the United States had brought an \textit{in rem} forfeiture proceeding against Ursery's house.\textsuperscript{107} The Sixth Circuit relied on \textit{Halper} and \textit{Austin} to hold that the forfeiture of Ursery's property constituted punishment for purposes of the Double Jeopardy Clause, and that he therefore could not be subsequently prosecuted for his drug offense.\textsuperscript{108}

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statute was purely remedial, in which case the culpability of the innocent owner would be wholly irrelevant.\textsuperscript{102} See id. at 620.
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\textsuperscript{103} Id. at 622. Although Austin requested the Court to develop a "multifactor test" for determining excessiveness, the Court refused to do so. Id. Justice Scalia, while concurring that a civil forfeiture may constitute a fine, argued that a fine is excessive only "if it applies to property that cannot be properly regarded as an instrumentality of the offense." Id. at 627-28 (Scalia, J. concurring). The majority recognized that the relationship between the property and offense may be considered by the courts in the excessiveness inquiry, but instructed also that other considerations may be relevant. See id. at 623 n.15. In particular, the Court did not criticize the lower court’s concern that the penalty levied against Austin was too great in relation to Austin’s offense, suggesting that proportionality analysis similar to \textit{Halper} would be appropriate.
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\textsuperscript{104} Halper, 490 U.S. at 448.
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\textsuperscript{105} Austin, 509 U.S. at 618.
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\textsuperscript{106} United States v. Ursery, 59 F.3d 568, 576 (6th Cir. 1995)
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\textsuperscript{107} Id. at 570.
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\textsuperscript{108} Id. at 575.
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1. United States v. Ursery

The Supreme Court reversed the Sixth Circuit in United States v. Ursery. The Ursery Court held that *in rem* civil forfeitures do not constitute punishment for purposes of the Double Jeopardy Clause. The Court explained that as a historical matter, civil *in rem* forfeitures were not typically regarded as imposing punishment on the offender because of the legal fiction that "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.... The forfeiture is no part of the punishment for the criminal offense." The Court distinguished Halper on the basis that Ursery involved a civil forfeiture rather than an *in personam* civil penalty. The Court noted that the latter could, under some circumstances, be regarded as punishment for purposes of double jeopardy because of the historical distinctions between the two types of civil consequences. The Court distinguished Austin on the grounds that Austin, while involving a civil *in rem* forfeiture, arose in the context of the Excessive Fines Clause. The Court found that nothing in its recent civil forfeiture jurisprudence disrupted the historical understanding that *in rem* civil forfeiture proceedings do not constitute punishment under the Double Jeopardy Clause.

The test that the Court used to determine whether the drug forfeiture constituted punishment for double jeopardy purposes focused on whether the legislature intended the proceedings to be criminal or civil, and if civil, whether "the proceedings are so punitive in fact" that they cannot be considered civil in nature, despite the legislature's intent. Finding that the statute authorized forfeiture of Ursery's property through an *in rem* proceeding, which has historically been viewed as civil, the Court concluded that Congress intended the

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110 Id.
111 Id. at 275 (citing Various Items of Pers. Prop. v. United States, 282 U.S. 577, 581 (1931) (omission in original)). Along the same lines, the Court stated that "[i]n rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause." Id. at 278.
112 Id. at 282.
113 Id. at 283–284 (explaining that "[c]ivil penalties are designed as a rough form of 'liquidated damages' for the harms suffered by the Government as a result of a defendant’s conduct").
114 Id. at 286.
115 Id. at 287.
116 Id. at 288.
proceedings to be civil.\textsuperscript{117} The Court also found that Ursery failed to establish by the "clearest proof" that the forfeiture proceedings were "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary."\textsuperscript{118}

2. Hudson v. United States

Only a year later, in \textit{Hudson v. United States},\textsuperscript{119} the Court returned to the Double Jeopardy Clause in the context of an \textit{in personam} civil penalty. Hudson was a controlling shareholder and chairman of two banks.\textsuperscript{120} The Office of the Comptroller of the Currency brought administrative actions against Hudson and two other officers for their actions in making loans to Hudson in violation of federal banking laws.\textsuperscript{121} These actions were resolved when the three officers entered into an agreement to pay an assessment and to refrain from participating in the banking industry.\textsuperscript{122} Several years later, the officers were indicted on criminal charges stemming from the same transactions.\textsuperscript{123} The officers argued that this subsequent prosecution constituted double jeopardy.\textsuperscript{124}

The Court, in "disavow[ing]" \textit{Halper},\textsuperscript{125} held that the Double Jeopardy Clause applied only to criminal punishment.\textsuperscript{126} Therefore the analysis turned on whether the punishment was criminal or civil. The Court adopted the \textit{Ursery} test, which inquired as to whether the legislature intended the proceedings to be criminal or civil, and if civil, whether "the statutory scheme was so punitive either in purpose or effect to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'"\textsuperscript{127} On the second prong, the Court again required the defendant to prove the punitive purpose or effect by the "clearest proof."\textsuperscript{128} The Court found that Congress intended the penalties arising from

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\item[117] Id. at 289.
\item[118] Id. at 290.
\item[119] 522 U.S. 93 (1997).
\item[120] Id. at 96.
\item[121] Id.
\item[122] Id. at 97.
\item[123] Id. at 97–98.
\item[124] Id. at 98.
\item[125] Id. at 101–02 (explaining that "\textit{Halper}'s deviation from longstanding double jeopardy principles was ill considered").
\item[126] Id. at 99.
\item[127] Id. (citing Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).
\item[128] Id. at 99–100. In determining whether the penalty is so punitive to be considered criminal, the Court listed seven factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it
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violation of the banking laws to be civil.\textsuperscript{129} Furthermore, the Court held that the second prong of the test was not met by the clearest proof.\textsuperscript{130}

Although the Court greatly restricted the application of the Double Jeopardy Clause, it commented on the \textit{Halper} Court's concern regarding the abuses inhering in allowing the government to impose civil sanctions that bear no correlation to the government's injuries.\textsuperscript{131} The Court commented that these abuses may be offset by other constitutional provisions, such as the Excessive Fines Clause.\textsuperscript{132}

C. \textit{Defining the Scope of the Excessive Fines Clause}

1. United States v. Bajakajian

The Court effectuated \textit{Hudson}'s contemplation that the Excessive Fines Clause would provide a mechanism to prevent civil sanctions that bore no relation to the government's damages in \textit{United States v. Bajakajian}.\textsuperscript{133} In \textit{Bajakajian}, a criminal indictment was brought against Bajakajian for failing to report that he was transporting more than $10,000 outside the United States in violation of federal law.\textsuperscript{134} A finding that a person willfully violated this statute required a court to order the forfeiture of all property involved in the offense.\textsuperscript{135} The government sought forfeiture of the entire $357,144 that Bajakajian attempted to transport from the United States.\textsuperscript{136} In invalidating a fine for the

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\item applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. \textit{Id.}
\item \textsuperscript{129} \textit{Id. at 103} (opining that placing the authority upon an administrative agency to bring the proceeding is prima facie evidence that the legislature intended a civil sanction).
\item \textsuperscript{130} \textit{Id.} The Court found that money penalties and debarment have historically been understood as civil sanctions, penalties and debarment are too much unlike imprisonment to constitute a disability or restraint, scienter is not required to apply the assessment, the fact that the conduct is also criminal is of little weight, and, citing \textit{Ursery}, the presence of a deterrent function does not render the penalty criminal, especially where the sanction is necessary to "promote the stability of the banking industry." \textit{Id. at 104}.
\item \textsuperscript{131} Recall that the \textit{Halper} Court focused on the proportionality of the sanction to the damages that the offender has caused in determining whether a particular civil sanction serves the goals of punishment. United States v. Halper, 490 U.S. 435, 449 (1989). \textit{Halper} concluded that a sanction is likely punishment if it bears no rational relationship to the goal of compensating the government for its damages. \textit{Id. at 446}.
\item \textsuperscript{132} \textit{Hudson}, 522 U.S. at 103.
\item \textsuperscript{133} 524 U.S. 321 (1998).
\item \textsuperscript{134} \textit{Id. at 321} (citing 31 U.S.C. § 5316(a)(1)(A) (1994)).
\item \textsuperscript{135} \textit{Id.} (citing 18 U.S.C. § 982(a)(1) (1994)).
\item \textsuperscript{136} \textit{Bajakajian}, 524 U.S. at 325.
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first time under the Excessive Fines Clause, the Court held that full forfeiture of the currency would be constitutionally excessive. In arriving at its conclusion, the Court cited Austin to hold that a forfeiture is a fine if it is "punishment for an offense" and that a sanction must be only partly punitive to constitute punishment.

The Court had "little trouble concluding that the forfeiture of currency" mandated by the statute constituted punishment, because the defendant was subjected to forfeiture only after the conclusion of a criminal proceeding and only if convicted of the felony. The Court also found significant the deterrent purpose of the statute.

The test adopted for determining whether a forfeiture is constitutionally excessive was derived from the Cruel and Unusual Punishment Clause of the Eight Amendment: A punitive forfeiture is constitutionally excessive if it is "grossly disproportional" to the gravity of the offense. The Court applied several factors in its determination that the forfeiture of Bajakajian's currency was grossly disproportionate to the gravity of his offense.

Thus, Bajakajian held that a forfeiture obtained in a criminal in personam action may constitute a fine for purposes of the Excessive Fines Clause if it is, at least in part, punishment for an offense. Less clear is whether this standard applies to civil in rem forfeitures as well. There is some language in the opinion

137 Id. at 344 (Kennedy, J., dissenting).
138 Id.
139 Id. at 328. The Court further reinforced its conclusion by recognizing that criminal forfeitures have historically been treated as punishment. See id.
140 Id. (observing that under 18 U.S.C. § 982(a)(1), forfeiture "cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a § 5316 reporting violation").
141 "Deterrence, however, has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss." Id. at 329.
142 Id. at 337.
143 The Court recognized that the offense was solely a reporting violation, that if reported, would otherwise be a legal activity. Id. at 337–38. The offense "was unrelated to any other illegal activities," and Bajakajian was not one of the persons "for whom the statute was principally designed" (money launderers, drug traffickers, and tax evaders). Id. at 338. Furthermore, the maximum sentence under the sentencing guidelines was only six months and a $5,000 fine, indicating a "minimal level of culpability." Id. at 339. The Court also found that Bajakajian caused relatively little harm because "[t]here was no fraud on the United States, and [Bajakajian] caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived of the information that $357,144 had left the country." Id. The Court also found that the forfeiture "bears no . . . correlation to any injury suffered by the Government." Id. at 340. Finally, the Court noted, but did not apply, the factor of whether the forfeiture would deprive [the defendant] of his livelihood." Id. at 340 n.15.
that suggests that the two types of proceedings may be treated differently.\footnote{144} However, because of the \textit{Bajakajian} Court’s extensive reliance on \textit{Austin} (an \textit{in rem} forfeiture case), the punishment threshold appears to be the same for \textit{in rem} and \textit{in personam} forfeitures.\footnote{145} Thus, a forfeiture is subject to the Excessive Fines Clause if it serves, in part, to punish,\footnote{146} and is excessive if it is grossly disproportional to the gravity of the defendant’s offense.\footnote{147}

\footnote{144}The rationale of \textit{Bajakajian} is that a forfeiture may constitute punishment, and therefore, a fine. Yet, the Court also opined that “[t]raditional \textit{in rem} forfeitures were . . . not considered punishment against the individual for an offense. Because they were viewed as nonpunitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause.” \textit{Id.} at 331. Adding to this ambiguity is that the Court recognized that because of this historical understanding, defendants in \textit{in rem} forfeitures proceedings are not protected by the Double Jeopardy Clause. \textit{Id.}

\footnote{145}The \textit{Bajakajian} Court stated that:

\textit{It does not follow, of course, that all modern civil \textit{in rem} forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause. Because some recent federal forfeiture laws have blurred the traditional distinction between civil \textit{in rem} and criminal \textit{in personam} forfeiture, we have held that a modern statutory forfeiture is a ‘fine’ for Eight\textsuperscript{h} Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled \textit{in rem} or \textit{in personam}. \textit{Id.} at 331 n.6.}

\footnote{146}There is one important caveat to this conclusion, the impact of which remains uncertain. Some academic commentators have found dicta in \textit{Bajakajian} that suggests that the Excessive Fines Clause is inapplicable when the instrumentality of a crime is the subject of a civil \textit{in rem} forfeiture. See Charmin Bortz Shiely, United States v. Bajakajian: \textit{Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis}, 77 N.C.L. REV. 1595, 1626 (1999); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.10 (2d ed. 1999). The reason for this interpretation is that the United States, in \textit{Bajakajian}, argued that the forfeiture of Bajakajian’s currency was constitutional because the currency was an instrumentality of the reporting violation. \textit{Bajakajian}, 524 U.S. at 333. The government’s argument relied on the “guilty property” theory, reasoning that instrumentalties have historically been treated as a form of “guilty property,” and that the forfeiture of an instrumentality, therefore, was not considered punishment against the individual for an offense. \textit{See id.} at 333–34. The Court did reject this argument under the particular circumstances because the United States proceeded \textit{in personam} against Bajakajian, rather than \textit{in rem} against the “guilty property,” making it “irrelevant whether respondent’s currency is an instrumentality.” \textit{Id.} at 333. However, the Court did not explicitly or implicitly reject the government’s underlying “guilty property” theory that the Excessive Fines Clause has no application where the government brings a civil \textit{in rem} forfeiture proceeding directly against the instrumentality of a crime. Because the Court also clarified its definition of “instrumentality” and concluded that the currency was not an instrumentality anyway, \textit{see id.} at 333 n.8, an inference may exist that “had the Court disagreed with the government’s instrumentality threshold test for civil forfeiture, it would have said so.” Shiely, \textit{supra}, at 1626. If such an inference is correct, the Excessive Fines Clause is inapplicable if the government proceeds \textit{in rem} directly against the instrumentality of a crime.
On the other hand, at least one commentator has concluded that such a reading of Bajakajian is not consistent with other language in the opinion. See Jochner, supra note 59, at 82 (1999). This conclusion is based on language in the opinion that mandates that once a court determines that "the forfeiture is punitive . . . , the test for the excessiveness of a punitive forfeiture involves solely a proportionality determination." Bajakajian, 524 U.S. at 333–34. This conclusion is obviously the most consistent with Austin, in which the Court held that the Excessive Fines Clause is applicable to a civil in rem forfeiture solely upon a determination that the forfeiture serves, in part, to punish, and found that civil forfeitures have historically been understood to impose punishment. See supra text accompanying notes 99–100. Furthermore, the Austin Court rejected Justice Scalia's assertion that the sole inquiry for excessiveness purposes was whether the property was the instrumentality of the offense. See Austin, 509 U.S. at 623. If property being the instrumentality of a crime were a bar to an excessive fines defense, then the threshold issue in Austin would have been whether Austin's property was the instrumentality of the narcotics violation, a discussion completely absent from the majority opinion. Because of the Bajakajian Court's heavy reliance on Austin, see Bajakajian, 524 U.S. at 326–36, most post-Bajakajian appellate court decisions have held that the Excessive Fines Clause applies to civil forfeitures, regardless of whether the property is an instrumentality. See, e.g., United States v. 415 E. Mitchell Ave., 149 F.3d 472, 478 (6th Cir. 1998) (assuming that Bajakajian grossly disproportional standard applies to civil in rem forfeiture of defendant's house and not discussing whether the house was an instrumentality of defendant's narcotics violation); cf. San Huan New Materials High Tech, Inc. v. Internal Trade Comm'n, 161 F.3d 1347, 1364 (Fed. Cir. 1998) (holding that civil penalty imposed by International Trade Commission, resulting from defendant's patent infringing activities, is constitutional because not "grossly disproportional," with no instrumentality analysis); United States v. Lippert, 148 F.3d 974, 977–78 (8th Cir. 1998) (relying on Bajakajian's citation to Austin as support for the proposition that the grossly disproportionate standard applies to civil penalties and forfeitures that are "punitive in nature" even if partly remedial). But see United States v. 3814 NW Thurman St., 164 F.3d 1191, 1195–98 (9th Cir. 1999) (holding that the government's in rem forfeiture of defendant's property resulting from defendant's false statements made on a loan application was "grossly disproportional to the gravity of the defendant's offense," but only after first concluding that the property was not an instrumentality of defendant's offense). Hence, while it is clear that in personam forfeitures are subject to the Excessive Fines Clause, it will not be certain that the Excessive Fines Clause applies to civil in rem forfeiture actions brought directly against the instrumentality of crime until the Supreme Court addresses the issue.

Again, the conclusion that the grossly disproportional test applies to in rem forfeitures is based on the Bajakajian Court's extensive reliance on Austin. In devising its excessiveness test, the Court relied on Austin (an in rem forfeiture case) to state that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." Bajakajian, 524 U.S. at 334. Because the Excessive Fines Clause applies to both types of forfeitures, see supra note 146, and the excessiveness test was devised in part from Austin, a civil in rem forfeiture is unconstitutional if it is grossly disproportional to the gravity of the offense.
III. APPLICATION OF RECENT CIVIL FORFEITURE JURISPRUDENCE TO THE CONSTITUTIONALITY OF THE NEW YORK CITY DWI FORFEITURE POLICY

Because of the distinction maintained by the Court, the initial inquiry must be whether the city brings an action under the forfeiture law in rem or in personam against the defendant.\textsuperscript{148} In the \textit{Grinberg} case, Mr. Grinberg argued that the forfeiture action was brought in personam.\textsuperscript{149} The New York Supreme Court, however, characterized the forfeiture action as in rem because forfeiture actions for the instrumentalities of crime were traditionally brought in rem against the "guilty property"\textsuperscript{150} and the city law requires a seizure of the automobile prior to the action,\textsuperscript{151} a typical characteristic of an in rem forfeiture.\textsuperscript{152} However, as discussed \textit{supra}, the United States made a similar argument in \textit{Bajakajian} that the Court should treat the currency forfeiture as in rem because the currency was an instrumentality of the crime.\textsuperscript{153} The Court rejected this argument for the simple reason that the government did not proceed against the currency itself, but rather directly against Bajakajian.\textsuperscript{154} By rejecting the government's contention that forfeiture actions directed towards the instrumentality of a crime are in rem, the Court concluded that the determinative factor as to whether a forfeiture proceeding is in rem or in personam is solely whether the action is brought against the property or directly against the defendant.\textsuperscript{155}

The New York City forfeiture law requires the city to initiate a plenary action against the individual defendant, and the city must personally serve the defendant.\textsuperscript{156} Thus, the city brings the forfeiture action directly against the defendant, not the automobile itself. It logically follows that the \textit{Grinberg} Court's reliance on the nature of the automobile as an instrumentality of the

\textsuperscript{148} For a discussion of how the New York City forfeiture law operates, see \textit{supra} notes 8–10.

\textsuperscript{149} \textit{Grinberg} v. Safir, 694 N.Y.S.2d 316, 321 (Sup. Ct. 1999).

\textsuperscript{150} \textit{Id}. at 321–22.

\textsuperscript{151} Specifically, the automobile must be in the possession of the New York City Police Department Property Clerk. \textit{See} \textit{N.Y. CITY, N.Y., R. & REGS.} § 12-36 (1999); \textit{supra} text accompanying note 9.

\textsuperscript{152} \textit{See Grinberg}, 694 N.Y.S.2d at 322.


\textsuperscript{154} \textit{Id}.

\textsuperscript{155} \textit{See id}. This is in traditional conformance with the understanding of in personam actions, in which the action must be brought directly against the defendant and the court must have jurisdiction over the person before it can bind a defendant "to do, or refrain from doing, some specific act to pay a sum of money." CASAD, \textit{supra} note 39, at § 1.01[2], 1–7.

\textsuperscript{156} \textit{See Grinberg}, 694 N.Y.S.2d at 322; \textit{N.Y.C.P.L.R.} § 3001 (McKinney 1999); \textit{N.Y.C.P.L.R.} § 3012 (McKinney 1999).
crime of DWI is misplaced in characterizing the action as an in rem forfeiture. Such reliance ignores the Bajakajian Court’s statement that where the “government has sought to punish [a defendant] by proceeding against him . . . in personam, rather than proceeding in rem against the [property] . . . [i]t is irrelevant whether [the defendant’s property] is an instrumentality.”157 Because an action brought directly against the defendant is in personam, and actions brought under the New York City forfeiture law proceed against the defendant rather than his or her automobile, the forfeiture statute authorizes a civil in personam forfeiture, not an in rem forfeiture.

A. Double Jeopardy as a Defense

The characterization of the forfeiture action brought by the city as in rem or in personam has little significance in the context of double jeopardy because the restrictive standard set out by the Court in Ursery and Hudson applies to both types of proceedings. Ursery held that in rem civil forfeitures do not constitute punishment for purposes of the Double Jeopardy Clause,158 and Hudson, decided in the context of an in personam civil penalty a year later, established that the Double Jeopardy Clause applies only to criminal punishment.159 Accordingly, the test adopted in Ursery and Hudson focuses on whether a particular sanction is criminal or civil. Under the two part test in this determination, the first inquiry focuses on whether the legislature intended the proceedings to be criminal or civil and, if civil, the second inquiry ascertains whether “the statutory scheme is so punitive either in purpose or effect to transform what was clearly intended as a civil remedy into a criminal penalty.”160

In his constitutional challenge to the city forfeiture provisions, Grinberg argued that because a criminal DWI action was pending against him,161 the city was barred by double jeopardy from bringing a civil proceeding to forfeit his car.162 In support of his argument, Grinberg relied only on Austin for the proposition that a civil forfeiture can constitute punishment, and the additional civil sanction constitutes multiple punishment for the same offense in violation of the Double Jeopardy Clause.163 The court correctly dismissed this argument,

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157 Bajakajian, 524 U.S. at 333.
158 See supra text accompanying note 110.
159 See supra text accompanying note 126.
160 Hudson v. United States, 522 U.S. 93, 99 (1997); see supra text accompanying note 127.
162 Id. at 321.
163 See id.
recognizing that Austin had no application in the double jeopardy context.\textsuperscript{164} Grinberg apparently did not argue that the forfeiture was criminal under the Ursery/Hudson standard, as there is no discussion in the opinion to that effect.

Nevertheless, such an argument would likely prove futile because "Ursery and Hudson made clear that it will be nearly impossible for defendants to successfully challenge 'civil' sanctions as 'punishment' for double jeopardy purposes."\textsuperscript{165} From the analysis of the Ursery and Hudson opinions, several considerations emerge that make it doubtful that the "punishment" doled out by the NYC provision would constitute criminal punishment for purposes of double jeopardy. With respect to the first prong of the test, whether the legislature intended the proceedings to be criminal or civil, both Courts attached significance to the "civil" designation given to the proceedings.\textsuperscript{166} Such language is present in the NYC statute, authorizing the property clerk to initiate a "civil forfeiture proceeding or other similar civil proceeding" before or after a "claimant makes a demand to the property clerk for the return of the property."\textsuperscript{167} Additionally, the Ursery Court found that certain procedural mechanisms, particularly the burden of proof required for the government to effectuate a forfeiture, indicated that the forfeiture statute authorized a civil proceeding rather than a criminal proceeding.\textsuperscript{168} The NYC forfeiture statute also possesses distinctly civil procedural mechanisms, providing that the property clerk "shall bear the burden of proving by a preponderance of the evidence" that the clerk is justified to retain the property.\textsuperscript{169} Finally, Ursery suggests that a forfeiture action designated by the legislature as civil, as opposed to criminal, is

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\item \textsuperscript{164} Id. As previously discussed, the Supreme Court in Ursery and Hudson held that the Double Jeopardy Clause applies only to multiple criminal punishments and limited Austin's punishment threshold to the Excessive Fines Clause context. See supra text accompanying notes 110, 126.
\item \textsuperscript{166} See United States v. Ursery, 518 U.S. 267, 288 (1996) (finding significant the fact that the forfeiture statutes are entitled "Civil forfeiture"); Hudson v. United States, 522 U.S. 93, 103 (1997) (observing that statutes authorizing money penalties "expressly provide that such penalties are 'civil'").
\item \textsuperscript{167} N.Y. CITY, N.Y., R. & REGS. § 12-36 (1999).
\item \textsuperscript{168} See Ursery, 518 U.S. at 289 (finding that the forfeiture statute "provides that once the Government has shown probable cause that the property is subject to forfeiture, then 'the burden of proof shall lie upon the claimant.' In sum, 'by creating such distinctly civil procedures for forfeitures . . . , Congress has indicated clearly that it intended a civil, not a criminal sanction.'") Like the forfeiture at issue in Ursery, the NYC government may refuse to return the property "where the property clerk has reasonable cause to believe that property . . . was the proceeds or instrumentality of a crime." N.Y. CITY, N.Y., R. & REGS. § 12-36 (1999).
\item \textsuperscript{169} N.Y. CITY, N.Y., R. & REGS. § 12-36(b) (1999).
\end{itemize}
presumptively not subject to double jeopardy.\textsuperscript{170} As the foregoing demonstrates, the NYC forfeiture action is clearly designated as civil in nature.

Thus, it is readily apparent that the forfeiture of an automobile under the NYC scheme will not be deemed criminal punishment based on the first prong of the \textit{Ursery/Hudson} test. As a result, there exists a presumption that the forfeiture is a civil penalty and the Double Jeopardy Clause does not apply. While this presumption can be overcome by proving that “the statutory scheme is so punitive either in purpose or effect to transform what was clearly intended as a civil remedy into a criminal penalty,” \textit{Ursery} and \textit{Hudson} illustrate the difficulty of such a task, as this prong must be satisfied by the “clearest proof.”\textsuperscript{171} Furthermore, the \textit{Ursery} and \textit{Hudson} Court applied this second inquiry narrowly, attaching significance to those factors that tended to negate a finding of criminal punishment, while disregarding the factors that tended to indicate that the punishment was criminal in nature. As a result, the prospect of a successful challenge to the NYC forfeiture scheme on the second prong seems equally as pessimistic as prevailing on the first prong of the \textit{Ursery/Hudson} test.

The \textit{Hudson} decision illustrated the difficulty of satisfying the second prong of the test, implying that for a punishment designated as civil to be deemed criminal, the punishment would have to border on imprisonment.\textsuperscript{172} Accordingly, in both \textit{Hudson} and \textit{Ursery}, the Court meticulously ran down a list of factors, applying those that favored a finding of civil punishment and disregarding those that tended to demonstrate that the sanction was criminal. The factors that the Courts found significant suggest that the NYC forfeiture is not punishment as that term applies to the Double Jeopardy Clause. For example, as a threshold matter, both Courts opined that a sanction may have punitive aspects without losing its status as civil, so long as the sanction also serves nonpunitive, remedial goals.\textsuperscript{173} Specifically, the Court determined that a deterrent purpose, a traditional goal of criminal punishment, does not render the statute punitive

\textsuperscript{170} \textit{Ursery}, 518 U.S. at 289 n.3. The Court explained, though, that the presumption could be overcome if the second prong of the inquiry was satisfied by the "clearest proof." \textit{Id.}

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} In rejecting the argument that the civil sanction of prohibiting the defendants from further participation in the banking industry constituted criminal punishment, the Court explained that “this is ‘certainly nothing approaching the infamous punishment’ of imprisonment.” \textit{Hudson}, 522 U.S. at 104 (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

\textsuperscript{173} See \textit{Ursery}, 518 U.S. at 290; \textit{Hudson}, 522 U.S. at 105. In \textit{Ursery}, the Court found that the property forfeitures at issue did have punitive aspects but at the same time, emphasized the nonpunitive aspects of discouraging participation in the drug trade, see \textit{Ursery}, 518 U.S. at 290, while \textit{Hudson} recognized that the penalties at issue did serve as deterrence but also served to “promote the stability of the banking industry.” \textit{Hudson}, 522 U.S. at 105.
because it may serve civil, remedial goals as well as criminal goals.\textsuperscript{174} Concededly, the NYC statute, while containing a punitive aspect,\textsuperscript{175} also serves the remedial purpose of removing from society the instrumentality of the crime of DWI.\textsuperscript{176} Furthermore, the \textit{Ursery} Court found that the property forfeitures resulting from narcotics violations served Congress’ remedial goal of encouraging property owners to prevent illegal uses of their property.\textsuperscript{177} At least one court has applied similar logic to DWI automobile forfeitures, finding that forfeitures serve the remedial purpose of discouraging owners from using their automobiles to drive while intoxicated.\textsuperscript{178}

Both Courts also found it significant that the statutes under review did not require the government to demonstrate that the offender acted with scienter,\textsuperscript{179} a fact tending to negate a finding that the sanction is criminal punishment. The NYC statute does not demand the government to prove scienter either, requiring only that the property be suspected of “having been used as a means of committing crime or employed in aid or furtherance of crime.”\textsuperscript{180} And while one could infer that the NYC forfeiture is criminal punishment because it is triggered only by criminal activity,\textsuperscript{181} the Supreme Court has stated that “though [the statute is] tied to criminal activity, . . . this fact is insufficient to render the statute[] punitive.”\textsuperscript{182}

The NYC forfeiture provision has an “innocent owner” provision,\textsuperscript{183} a factor that indicates a punitive purpose.\textsuperscript{184} However, the \textit{Ursery} Court disregarded a

\begin{itemize}
\item \textsuperscript{174} See \textit{Ursery}, 518 U.S. at 292; \textit{Hudson}, 522 U.S. at 105.
\item \textsuperscript{175} Grinberg v. Safir, 694 N.Y.S.2d 316, 327 (N.Y. Sup. Ct. 1999).
\item \textsuperscript{176} See \textit{id.} at 328, 328 n.19 (finding a remedial purpose exists by taking away automobile of DWI driver because of the societal impact that DWI causes, including 50 deaths and over two thousand injuries annually in the city); \textit{see also} Lukkason v. 1993 Chevrolet Extended Cab Pickup, 590 N.W.2d 803, 808 (Minn. Ct. App. 1999) (finding that automobile forfeiture of DWI offenders serves remedial purpose in dealing with the “well-documented dangers of intoxicated drivers on streets and highways . . . who continue to expose the public to these dangers”). \textit{But see} City of New Hope v. 1986 Mazda 626, 546 N.W.2d 300, 305 (Minn. Ct. App. 1996) (Randall, J., dissenting) (arguing that the purported remedial purpose is hollow because a DWI offender may continue to drive a vehicle by borrowing or driving second vehicle).
\item \textsuperscript{177} \textit{Ursery}, 518 U.S. at 290.
\item \textsuperscript{178} See \textit{City of New Hope} v. \textit{1986 Mazda 626}, 546 N.W.2d 300 (Minn. Ct. App. 1996).
\item \textsuperscript{179} \textit{Ursery}, 518 U.S. at 291; \textit{Hudson}, 522 U.S. at 104–05.
\item \textsuperscript{180} N.Y. CRRY, N.Y., CODE § 14-140(b) (1999).
\item \textsuperscript{181} See \textit{supra} text accompanying note 180.
\item \textsuperscript{182} \textit{Ursery}, 518 U.S. at 292; \textit{see also} \textit{Hudson}, 522 U.S. at 105 (explaining that the mere fact that the civil penalties target conduct that is also criminal is “insufficient to render the sanctions . . . criminally punitive”).
\item \textsuperscript{183} See Grinberg v. Safir, 694 N.Y.S.2d 316, 327 (N.Y. Sup. Ct. 1999); N.Y. CRRY, N.Y., CODE § 14-140(c), (e), (f).
\end{itemize}
similar provision in the forfeiture statute at issue, explaining that such a provision, in the absence of greater legislative intent to punish, is irrelevant to the question of whether a statute is punitive for double jeopardy purposes. Finally, the presumption that applies to the first prong of the test, that a forfeiture action designated by the legislature to be civil is not punishment for purposes of the Double Jeopardy Clause, is equally applicable to the second prong as well.

In sum, certain characteristics of the NYC forfeiture statute that indicate a punitive and criminal character, such as the partially deterrent purpose, the "innocent owner" provision, and the fact that the statute is triggered only upon the occurrence of criminal conduct, are characteristics that the Court in Ursery and Hudson largely disregarded as insufficient to render the civil sanction punishment for double jeopardy purposes. On the other hand, such characteristics that the Court found significant in its criminal/civil determination, such as the lack of scienter requirement and the partially remedial purpose, exist in the NYC forfeiture statute. Thus, it seems clear that the NYC forfeiture scheme, by the Court's standard, is not by the clearest proof "so punitive either in purpose or effect as to ‘transform[ ] what was clearly intended as a civil remedy into a criminal penalty.’" The forfeitures resulting from the scheme, therefore, do not constitute punishment for purposes of the Double Jeopardy Clause.

B. Excessive Fines as a Defense

Unlike in the double jeopardy analysis, the nature of the city action as in rem or in personam could make a difference in the excessive fines context. Bajakajian has been read to suggest that the Excessive Fines Clause is inapplicable to in rem forfeitures brought directly against the instrumentality of crime under the "guilty property" theory. Furthermore, automobiles subject to forfeiture under the city forfeiture provision would almost certainly be properly deemed an instrumentality of crime. However, as Bajakajian demonstrates,

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184 See Austin v. United States, 509 U.S. 602, 619 (1993). An innocent owner provision excepts from forfeiture the property of an owner who had no knowledge of the offense, giving rise to an inference that the statute is not purely remedial, in which case the culpability of the innocent owner would be wholly irrelevant. See supra note 110.

185 Ursery, 518 U.S. at 292.

186 See id.

187 Hudson, 522 U.S. at 99 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

188 See supra note 146.

189 See Bennis v. Michigan, 516 U.S. 442, 450, 453 (1995) (upholding forfeiture of an automobile as an instrumentality of crime where automobile was used to facilitate the solicitation of prostitution). Thus, the Grinberg court properly found that Grinberg's automobile, driven at the time of the alleged DWI, was an instrumentality of the crime, "the
the nature of the property as an instrumentality is irrelevant when the government proceeds in personam against the defendant, rather than directly against the “guilty property” in rem.190 Because the NYC law authorizes the property clerk to bring a forfeiture action against a defendant in personam,191 the instrumentality analysis is inapplicable, making it for the most part irrelevant for excessive fines purposes whether the vehicle was an instrumentality of the DWI offense.192 With the instrumentality analysis aside, the determination of whether an automobile under the NYC law is constitutionally excessive rests solely on the Bajakajian test: A forfeiture is constitutionally excessive if it (1) serves, at least in part, as punishment for an offense,193 and (2) is “grossly disproportional to the gravity” of the offense.194

1. The Punitive Purpose of the NYC Forfeiture Provision

The NYC forfeiture provision clearly serves in part as punishment, thereby satisfying the first prong of the Bajakajian test. In both Austin and Bajakajian,

sine qua non without which the crime could not have been committed.” Grinberg v. Safir, 694 N.Y.S.2d 316, 320 (N.Y. Sup. Ct. 1999). See also City of New Hope v. 1986 Mazda 626, 546 N.W.2d 300, 304 (Minn. Ct. App. 1996) (finding that forfeiture automobile was an instrumentality because “the vehicle was essential to the underlying criminal offense of driving while under the influence”).

190 See Bajakajian, 524 U.S. 321, 333 (1998) (holding that it is “irrelevant whether [defendant’s property] is an instrumentality” when the government brings a forfeiture action in personam against the defendant); see also supra note 146.

191 See supra text accompanying notes 156-57 (explaining that the city law authorizes a civil in personam action because the proceeding is brought directly against the defendant and requires personal service upon the defendant).

192 The fact that the city’s forfeiture provision authorizes civil in personam actions makes it unnecessary for purposes of this comment to determine whether Bajakajian actually made the Excessive Fines Clause inapplicable to forfeitures resulting from civil in rem proceedings directly against property found to be the instrumentality of crime, as some commentators have suggested. See supra note 146. However, many other county and city governments have expressed an interest in adopting a policy similar to the one in operation in NYC. See supra note 22 and accompanying text. These governmental entities could presumably establish a statutory scheme that authorizes a civil in rem forfeiture proceeding brought directly against the instrumentality (automobile) of the “drinking and driving” offense. If the aforementioned interpretation of Bajakajian is correct, the Excessive Fines Clause would be inapplicable to such forfeitures. However, although the issue remains unresolved, Austin and the great weight of post-Bajakajian authority supports the proposition that the Excessive Fines Clause is applicable to both civil in personam and in rem forfeitures solely upon a determination that the forfeiture serves in part to punish. See supra note 146. Therefore, the excessive fines analysis of the NYC civil in personam forfeiture is likely equally applicable to a forfeiture authorized by another governmental entity, but fashioned as an in rem proceeding.

193 See Bajakajian, 524 U.S. at 327–28; supra text accompanying note 139.

194 Bajakajian, 524 U.S. at 334; supra text accompanying note 142.
the Court identified several characteristics of the forfeiture statutes at issue that indicated a punitive purpose.\textsuperscript{195} As an initial matter, both opinions explained that forfeitures in general have traditionally been understood as imposing punishment.\textsuperscript{196} Furthermore, both Courts found that the innocent owner exceptions contained in the statutes indicated the presence of a punitive purpose.\textsuperscript{197} Similarly, the NYC forfeiture provision also contains an innocent owner exception,\textsuperscript{198} supporting a finding that the statute is not purely remedial, in which case the culpability of the innocent owner would be wholly irrelevant.\textsuperscript{199} Additionally, both Courts partially based their findings of a punitive purpose on the fact that the forfeitures were tied "directly to the commission of [criminal offenses]."\textsuperscript{200} Likewise, the NYC statute is also directly tied to criminal activity because property is subject to forfeiture only if it is "suspected of having been used as a means of committing crime or employed in aid or furtherance of crime."\textsuperscript{201} Finally, both Courts also found significant the lack of correlation between the forfeited property and the "damages sustained by society or to the cost of enforcing the law."\textsuperscript{202} For example, in \textit{Austin}, such a correlation was found to be lacking based on the "dramatic variations in the value of... property" forfeitable under the drug forfeiture statute.\textsuperscript{203} Because all

\textsuperscript{195} Recall that \textit{Austin} found that a federal drug forfeiture statute partly served the purpose of punishment, see \textit{Austin} v. United States, 509 U.S. 602, 620 (1993), and that \textit{Bajakajian} found that the forfeiture of defendant's currency under federal law constituted punishment. See \textit{Bajakajian}, 524 U.S. at 328.

\textsuperscript{196} \textit{Austin}, 509 U.S. at 618 (finding that "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment"); \textit{Bajakajian}, 524 U.S. at 332 (explaining that "forfeitures have historically been treated as punitive").

\textsuperscript{197} See \textit{Austin}, 509 U.S. at 619 (recognizing that the innocent owner exemption "[focuses] the provisions on the culpability of the owner in a way that makes them look more like punishment"); \textit{Bajakajian}, 524 U.S. at 328 (relying on \textit{Austin} to support its conclusion that the currency forfeiture statute is punitive because it "provides an innocent owner' defense" (citing \textit{Austin}, 509 U.S. at 619)).

\textsuperscript{198} N.Y. CrrY, N.Y. CODE § 14-140(c), (e), (f) (1999).

\textsuperscript{199} See supra note 101 (explaining why an innocent owner exception demonstrates a statute's punitive purpose).

\textsuperscript{200} \textit{Austin}, 509 U.S. at 620 (holding that the property is forfeitable only if used in connection with "the commission of a drug-related crime"); see also \textit{Bajakajian}, 524 U.S. at 328 (observing that forfeiture "requires conviction of an underlying felony").

\textsuperscript{201} N.Y. CITY, N.Y., CODE § 14-140(b) (1999).

\textsuperscript{202} \textit{Austin}, 509 U.S. at 621 (citing \textit{United States v. Ward}, 448 U.S. 242, 254 (1980)); see also \textit{Bajakajian}, 524 U.S. at 339 (disagreeing with the government's contention that there is a "correlation between the amount forfeited and the harm that the Government would have suffered had the crime gone undetected").

\textsuperscript{203} \textit{Austin}, 509 U.S. at 621.
property used in connection with a narcotics offense was subject to forfeiture, without regard to the resulting law enforcement costs resulting from the offense, the Court found lacking a correlation between the forfeiture and the government’s damages. The Court therefore rejected the government’s argument that the statute was purely remedial. Again, the NYC provision shares this attribute with the statutes confronted in Austin. Instead of being tailored to compensate the government for enforcement costs, the NYC statute subjects all property to forfeiture, without regard to the value of the forfeited property or to the city’s DWI related enforcement costs. Under a DWI automobile forfeiture statute, the government may obtain forfeiture of a “1996 Mazda, or a 1996 Cadillac, or a 1996 Rolls-Royce,” ranging in values from “$500 to $5,000 to $50,000.” The NYC forfeiture statute, therefore, subjects property of dramatically varying values to forfeiture for the same offense, and thereby lacks a correlation between the forfeited property and the “damages sustained by society or to the cost of enforcing the law.”

Thus, the NYC statute shares all the characteristics that Austin and Bajakajian found persuasive in concluding that the forfeiture statutes at issue served, at least in part, as punishment. For these reasons, the trial court in the Grinberg case found that the NYC forfeiture provision is punitive for Excessive Fines Clause purposes.

2. NYC DWI Automobile Forfeitures—Grossly Disproportional to the Gravity of the Defendant’s Offense

A forfeiture statute may be deemed punitive on its face, thus eliminating the need to determine whether the statute constitutes punishment in subsequent
challenges to the statute. However, the question of whether a particular forfeiture is excessive is determined by looking at the particular forfeiture imposed by the statute. Thus, while the NYC forfeiture provision is certainly punitive, its excessiveness must be determined under the second prong of the Bajakajian test by considering whether a particular forfeiture under the statute is grossly disproportional to the gravity of the defendant’s offense. Because a particular forfeiture under the NYC provision must be identified, the Grinberg case provides a good starting point for excessiveness analysis.

As discussed above, Mr. Grinberg was arrested and charged with DWI after a breathalyzer examination revealed that he possessed a .11 percent blood alcohol content, slightly above the .10 level required for a DWI charge. As a result, Grinberg’s 1988 Acura was seized so that the property clerk could conduct a forfeiture proceeding under the NYC provision. The property clerk commenced a forfeiture proceeding against Grinberg shortly thereafter, seeking a judgment declaring the vehicle forfeited. Grinberg estimated that the Acura was worth $2000, and the court assumed the correctness of this estimate. In his constitutional challenge to the NYC policy, Grinberg argued that the forfeiture of his automobile, resulting from his first DWI offense, violated the Excessive Fines Clause.

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201 See Bajakajian, 524 U.S. at 328 (finding that the currency forfeiture statute at issue constituted punishment, without considering its particular application to the defendant Bajakajian); Ronald J. Nessim & Elizabeth A. Newman, Using the Eighth Amendment to Attack Civil False Claims Act Penalties in Health Care Fraud Cases, 14 CRIM. JUST. 20, 22 (Fall 1999) (explaining that the punitive character of a forfeiture statute is determined by looking “to the... statute on its face”); United States v. Lippert, 148 F.3d 974, 977 n.2 (8th Cir. 1998) (concluding that “facial analysis of whether a purported civil penalty is punishment for Excessive Fines Clause purposes is desirable” while construing civil penalty under federal Anti-Kickback Act).

202 See supra notes 1–5 and accompanying text.

203 See Grinberg v. Safr, 694 N.Y.S.2d 316, 325 (N.Y. App. Div. 1999). The Grinberg court also found that the initial seizure served the further purpose of preventing an arrestee who is “legally and physically incapable of driving” from driving. Id.

204 Id. at 320.

205 Id. at 328.

206 Id. at 326 n.27.
The court rejected Grinberg’s argument, holding that the forfeiture was not constitutionally excessive. The court supported its holding by comparing the $2000 forfeiture to the criminal penalties prescribed for first and second DWI convictions to the societal impact caused by DWI offenses. From these findings, the court ultimately concluded that “[g]iven the severity of the available sentence, forfeiture of a used car valued at twice the maximum fine is not grossly disproportionate.”

Thus, the Grinberg court held that the forfeiture of the automobile was not grossly disproportionate to the gravity of the DWI offense, primarily because the value of the vehicle did not greatly exceed the maximum criminal sanction for the offense and because DWI has an adverse societal impact. However, although Bajakajian has been regarded by some as a minimalist decision, the Court did not treat the forfeiture as purely remedial.

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217 Id. at 328. The court used three tests for determining whether the forfeiture was excessive: a proportionality test, an instrumentality test, and a mixed instrumentality-proportionality test. Id. at 327. However, as discussed supra, an instrumentality inquiry is inappropriate because the city proceeds in personam against the defendant, rather than in rem directly against the property. See supra note 146 (explaining that the Bajakajian Court held that when the government proceeds in personam, it is irrelevant whether the forfeiture is an instrumentality and that once the court determines that a forfeiture is punitive, the test for excessiveness involves solely a proportionality determination). The nature of the forfeited property as an instrumentality is relevant in the determination of whether a forfeiture is punishment because the forfeiture of some property will be deemed purely remedial, such as “where contraband is forfeited and dangerous and illegal items are removed from society,” and the second prong of the Bajakajian test will not even be invoked. See Jochner, supra note 59, at 83 (expressing opinion that the Bajakajian test is a “refreshing, common sense approach” to Excessive Fines Clause jurisprudence because it requires government to exact forfeitures in relation to the gravity of the offense but also preserves the “government’s right to full forfeiture where the forfeiture is purely remedial”). Therefore, once the Grinberg court determined that the forfeiture, at least in part, serves as punishment, the only remaining determination should have been whether it was proportional to the gravity of the offense. Nevertheless, the Grinberg opinion remains useful because the court did analyze whether the forfeiture was proportional to the gravity of Grinberg’s DWI offense. See Grinberg, 694 N.Y.S.2d at 328.

218 Id. (finding that as a first offense, DWI is a misdemeanor “with a maximum sentence of one year jail, a fine of $1,000 and three years’ probation, or a combination,” and a subsequent DWI is a felony “with up to four years’ possible imprisonment”).

219 Id. (describing DWI as a “crime which injures and kills, and is an unparalleled public menace” (citing Property Clerk v. Waheed, 630 N.Y.S.2d 644 (N.Y. Sup. Ct. 1995))).

220 Id.

221 Minimalism is “the concept that courts should decide cases as narrowly as possible and avoid creating broad rules.” Solomon, supra note 160, at 850. The goal of minimalism is to prevent courts from deciding issues unnecessary to the resolution of a particular case, thereby preserving the role of the legislature “to make decisions of great public import.” Id. Solomon argues that Bajakajian is a minimalist decision and criticizes the Court for failing to provide greater guidance to lower courts in determining whether a particular civil sanction is constitutionally excessive. Id. at 877.
recognize several factors in its "grossly disproportional" determination that were not even considered by the Grinberg court. In order to effectuate the Hudson Court's contemplated goal that the Excessive Fines Clause will address "some of the ills at which Halper was directed," namely civil sanctions that bear no relationship to the government's actual damages, these factors should be considered by courts in making a reasonable "grossly disproportional" inquiry. Hudson contemplates that the Excessive Fines Clause may be a valuable tool in addressing the government's power to forfeit property that bears no relationship to the government's damages. Courts, therefore, should look at potentially mitigating factors relevant to the gravity of the defendant's offense.

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222 See supra note 143 (identifying other factors used by the Bajakajian Court in its disproportionality analysis).

223 Hudson v. United States, 522 U.S. 93, 102 (1997). Recall that Halper held that the imposition of a $130,000 civil penalty following defendant's criminal conviction for submitting false Medicare claims would constitute multiple punishment, thereby violating the Double Jeopardy Clause. See United States v. Halper, 490 U.S. 435, 447-48 (1989). The Halper Court adopted the liberal standard that a civil sanction may constitute punishment when it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." Id. at 448; see also supra text accompanying note 87. The Court adopted this standard to prevent governmental imposition of civil sanctions that were disproportionate to the government's damages and that bore no rational relationship to the goal of compensating the government for such damages. See Halper, 490 U.S. at 449; supra text accompanying notes 90-91. Although Hudson greatly restricted the application of the Double Jeopardy Clause to civil sanctions, supra text accompanying note 126, the Court remained concerned that the government would continue to attempt to impose disproportionate sanctions that bore no relationship to the government's damages. The Court contemplated that these "ills at which Halper was directed [could be] addressed by other constitutional provisions," such as the Excessive Fines Clause. Hudson, 522 U.S. at 102-03.

224 See Bajakajian, 524 U.S. at 336-37 n.10, 11 (deciding whether sanction was grossly disproportionate considering "the facts of a particular case"); United States v. 3814 NW Thurman St., 164 F.3d 1191, 1197 (9th Cir. 1999) (methodically applying all applicable Bajakajian factors to conclude that forfeiture of property was grossly disproportional to gravity of defendant's offense). Furthermore, the Bajakajian test mandates that a punitive forfeiture is excessive if it is grossly disproportional to the gravity of the defendant's offense, implicitly recognizing that the gravity of the defendant's offense includes other considerations besides the maximum criminal penalty for the offense. If otherwise, the test would be that a forfeiture is constitutionally excessive if it is grossly disproportional to the maximum criminal penalty prescribed for a particular offense.

225 See supra note 225; see also Bajakajian, 524 U.S. at 328 (explaining that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense"); Austin v. United States, 509 U.S. 602, 609 (1993) (opining that the "purpose of the Eighth Amendment . . . was to limit the government's power to punish").
rather than elevating one factor as determinative, as did the Grinberg court. An analysis of these mitigating factors indicates that the forfeiture of Grinberg’s automobile is grossly disproportional to the gravity of his offense.

In invalidating a fine for the first time under the Excessive Fines Clause, the Bajakajian Court held that a punitive forfeiture is constitutionally excessive if it is “grossly disproportional” to the gravity of the defendant’s offense. A court reviewing a forfeiture for excessiveness, therefore, must “compare the amount of the forfeiture to the gravity of the defendant’s offense.” The Bajakajian Court first evaluated the gravity of Bajakajian’s currency reporting violation and, in this determination, focused on the culpability of the defendant and the harm that the defendant caused. Using objective factors, the Court found that the gravity of Bajakajian’s offense was slight because Bajakajian’s culpability and the harm that he caused were “minimal.” Many of the factors that indicated that the gravity of Bajakajian’s offense was minimal are equally applicable to the Grinberg forfeiture, yet were not considered by the Grinberg court.

a. The Culpability of a First-Time DWI Offender

First, with respect to the defendant’s culpability, the Bajakajian Court found it relevant that the defendant did not “fit into the class of persons for whom the statute was principally designed,” such as money launderers, drug traffickers, and tax evaders. The fact that Bajakajian’s violation was unrelated to any other

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226 Nessim, supra note 210, at 23 (recognizing that because of the Bajakajian’s Court’s willingness to entertain such factors, “both the government and the defense can and should argue aggravating and mitigating factors unique to the case to try to influence a court’s assessment of the gravity of the defendant’s offense”).

227 See supra text accompanying note 137.

228 See supra text accompanying note 142.

229 Bajakajian, 524 U.S. at 336-37.

230 Id. at 337-40; see also Nessim, supra note 210, at 22 (explaining that the Bajakajian Court looked at the defendant’s personal culpability and the harm caused by the defendant’s conduct in assessing the gravity of the offense).

231 Bajakajian, 524 U.S. at 338. See also supra note 143 (discussing factors that demonstrated a minimal level of culpability).

232 Bajakajian, 524 U.S. at 338. The Court found that the forfeiture statute was directed primarily towards individuals whose motivation for failing to report currency was connected to other illegal activities: money launderers, drug traffickers, and tax evaders. See id.
illegal activity\textsuperscript{233} to which the statute was directed supported a finding of minimal culpability.\textsuperscript{234}

Similarly, neither Grinberg, nor any other DWI offender, is an individual to which the NYC forfeiture provision was directed. The statute was designed to enable city officials to obtain forfeiture of property that was used in, or the proceeds of, narcotics violations and other more "serious crimes."\textsuperscript{235} There is no evidence that Grinberg was engaged in any activity that the statute was originally designed to reach.\textsuperscript{236} This fact is "highly relevant"\textsuperscript{237} in demonstrating that the gravity of Grinberg’s offense was minimal, as compared to a hypothetical drug dealer, whose transactions are the subject of the forfeiture provision’s original intent.

In measuring the culpability of the defendant, the \textit{Bajakajian} Court also considered the penalty that could have been imposed for the defendant’s offense. An issue arose, however, as to which penalty should be applied in this evaluation: the maximum penalty authorized by statute for the reporting offense, or the fine actually imposed under the Federal Sentencing Guidelines. The

\textsuperscript{233} \textit{See id.} at 326 (finding that defendant’s failure to report currency stemmed from "cultural differences" and "distrust for the Government").

\textsuperscript{234} \textit{See id.} at 337–38.

\textsuperscript{235} \textit{See Beals, supra} note 1, at 1. The article quotes former Queens District Attorney Dino Lombardi’s assertion that the forfeiture provision "was never intended for first-time DWI offenders," but instead, was "meant for the most vicious drug dealers." Because first time DWI offenders are being subject to the same forfeiture provisions as narcotics violators, Lombardi expressed his concern that these offenders will receive "a penalty grossly out of proportion to the crime." \textit{See id; c.f.} Property Clerk v. Small, 582 N.Y.S.2d 932, 935 (1992) (explaining, but finding irrelevant, that the forfeiture statute was directed towards more "serious crimes" than misdemeanor prostitution offenses); Vergari v. Lockhart, 545 N.Y.S.2d 223, 227 (1989) (finding that the purpose of forfeiture provision, at least in part, is to allow the city to cause forfeiture of proceeds of drug transactions).

\textsuperscript{236} In accord is \textit{Kelley v. State}, 1999 WL 378606 (Ala. June 11, 1999), where the Supreme Court of Alabama reviewed the forfeiture of an automobile that was authorized under a provision similar to the NYC forfeiture statute. \textit{See id.} at *4. The automobile was subject to forfeiture after authorities found controlled substances inside the car. The court held the forfeiture excessive after finding that "the intention of the statute was to remove financial reward derived from the sale of drugs," and not to impose a fine for mere possession. \textit{Id.} at *4. Similarly, one of the purposes of the NYC forfeiture provision is to prevent individuals from profiting from their illegal conduct, \textit{see supra} note 231 and accompanying text, which Grinberg obviously did not do. Because Grinberg did not engage in conduct that the legislature originally contemplated was serious enough to warrant forfeiture, an inference can be drawn that the gravity of Bajakajian’s offense was minimal.

\textsuperscript{237} \textit{Bajakajian}, 524 U.S. at 337–38 n.12 (noting that the lack of relationship between Bajakajian’s offense and other illegal activity is "highly relevant to the determination of the gravity of [Bajakajian’s] offense"; \textit{see also} United States v. 3814 NW Thurman St., 164 F.3d 1191, 1197 (9th Cir. 1999) (finding less culpability on the part of the defendant because the false statement violation was not related to any other illegal activity).
government argued that culpability should be determined in light of the maximum fine that Congress authorized for the offense. Because the maximum statutory penalty for willfully violating the reporting requirement was a $250,000 fine plus five years imprisonment, the government suggested that Congress "did not view the reporting offense as a trivial one." The Court, although considering the maximum fine relevant, nonetheless rejected the government's argument and opted to focus on the penalty prescribed under the Sentencing Guidelines in weighing the defendant's culpability. The Court recognized that while the maximum fine under the statute was considerable, the maximum fine that could be imposed under the Sentencing Guidelines, which took into account the particular facts of Bajakajian's offense, consisted of six months imprisonment and a maximum fine of $5,000. The Court concluded that "such penalties confirm a minimal level of culpability."

By adopting the Sentencing Guidelines as the appropriate measure of culpability, the Bajakajian Court implicitly directed lower courts to consider the maximum statutorily authorized penalty for an offense in light of the particular circumstances of an offense, specifically such mitigating factors that may be relevant. These directives were seemingly not followed by the New York Court in Grinberg's challenge to the city forfeiture provision.

Id.
Id.
Id. See id. (explaining that government's argument that culpability is determined by maximum authorized fine is "undercut" by much lesser fine imposed under Sentencing Guidelines). The Sentencing Guidelines were created in November 1987 to achieve uniformity in the sentencing of individuals convicted for federal crimes. See Steven F. Poe, Civil Forfeiture and the Eighth Amendment: The Constitutional Mandate of Proportionality in Punishment in the Wake of Austin v. United States, 70 CHI.-KENT L. REV. 237, 257. The Sentencing Guidelines take into consideration the specific level of culpability of the offender and prescribe punishment accordingly. Id. at 258 (explaining that proportional sentences are prescribed under the guidelines because they "take into account both the seriousness of the offense, including relevant offense characteristics, and important information about the offender, such as the offender's role in the offense and prior record"). The Court found that the penalty prescribed under the guidelines is the more appropriate measure in weighing culpability because it itself incorporates factors relevant to the defendant's culpability. While the maximum statutorily authorized penalty may apply to other "potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers," it did not apply to the defendant Bajakajian, and is therefore, not indicative of his personal culpability. Bajakajian, 524 U.S. at 339 n.14.

Bajakajian, 524 U.S. at 338.
Id. at 339.
The Sentencing Guidelines consider the circumstances of a particular offense by incorporating certain characteristics of the offense and the defendant into the sentencing determination. Poe, supra note 241, at 258. By adopting the guidelines as the appropriate
To be sure, the Grinberg Court did undertake to measure the culpability of the defendant by looking to the maximum criminal penalty that could be imposed on Grinberg for his offense. However, the court also reinforced its conclusion that the gravity of Grinberg’s offense was great by considering the maximum sentence prescribed for a subsequent DWI violation. In light of Bajakajian’s mandate that culpability be determined under the circumstances of a particular offense, the Grinberg court’s reliance on an entirely different offense is clearly misplaced. Grinberg did not commit a subsequent DWI violation, and the penalty that should have been considered by the court, therefore, should have been solely the penalty prescribed for first offense DWI offenders. That penalty, a misdemeanor with a maximum sentence of one year jail and a fine of $1000, is substantially less than the one that Bajakajian found indicative of a minimal level of culpability. Such penalty, therefore, confirms that Grinberg possessed a “minimal level of culpability.”

Furthermore, the Grinberg court did not consider potentially mitigating factors relevant to Grinberg’s culpability. As discussed above, the Bajakajian Court rejected the maximum statutorily authorized penalty as a measure of culpability in favor of the penalty imposed under the Sentencing Guidelines. Because the penalty imposed under the Sentencing Guidelines already took into

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246 See id. A first time New York DWI offender is subject to a maximum sentence of one year jail and a fine of $1000. N.Y. VEH. & TRAF. LAW § 1193(b) (1999).
247 A subsequent DWI conviction within ten years of the first conviction carries with it a minimum fine of $1000, a maximum fine of $5000, and up to four years possible imprisonment. Grinberg, 694 N.Y.S.2d at 327–28; N.Y. VEH. & TRAF. LAW § 1193(c) (1999).
248 See supra note 241 and accompanying text.
249 Recall that Bajakajian was subjected to a maximum penalty of six months imprisonment and a fine of $5000. See supra text accompanying note 237. The maximum fine in Bajakajian, therefore, was five times larger than the maximum fine that could be imposed on Grinberg.
250 Bajakajian, 524 U.S. at 339.
251 See supra note 241 and accompanying text.
consideration the mitigating factors relevant to the defendant's culpability, it was unnecessary for the Court to apply them individually to determine the defendant's personal culpability.

In the case of Grinberg's DWI offense, however, there are no sentencing guidelines, and the sentence imposed is left to the discretion of the trial court. The trial court (or sentencing court) may impose a fine anywhere between a minimum of $500 and a maximum of $1000, depending on the circumstances of a particular offense. Because the criminal action was still pending against Grinberg at the time of his constitutional challenge, the court did not have an opportunity to review the actual fine imposed on Mr. Grinberg. Nonetheless, Bajakajian makes it clear that the maximum statutorily authorized penalty for an offense is not determinative on the issue of culpability, and that the culpability of a defendant must be determined under the particular circumstances of an offense. The court, therefore, should have made an independent examination of any factors that would tend to mitigate Grinberg's culpability. In this case, such factors do exist.

For example, although Grinberg's status as a first time DWI offender is reflected in the penalty prescribed for such offense, the court should have considered this further in its inquiry into Grinberg's culpability. Several courts have upheld the forfeiture of automobiles for DWI primarily on the ground that the particular defendant's previous DWI convictions indicated a high level of culpability. Furthermore, numerous courts have invalidated forfeitures as

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252 These mitigating factors consider the nature of the offense and certain characteristics of the defendant, such as prior offenses. See Poe, supra note 241, at 258 (explaining that the guidelines consider the “seriousness of the offense, including relevant offense characteristics, and important information about the offender, such as the offender’s role in the offense and prior record”).


254 See N.Y. VEH. & TRAF. LAW § 1193(b) (1999).


256 Bajakajian, 524 U.S. 321, 339 n.14 (1998) (explaining that the Bajakajian Court refused to use the maximum statutorily authorized penalty as a measure of culpability because the penalty does not distinguish between more culpable defendants, such as tax-evaders and drug kingpins, and less culpable defendants like Bajakajian).

257 See id.

258 See, e.g., Hawes v. Wrangler, 602 N.W.2d 874, 887 (Minn. 1999) (holding that forfeiture of Jeep is not excessive where defendant was convicted of third driving under the influence (DUI)); Lukkason v. 1993 Chevrolet Extended Cab Pickup, 590 N.W.2d 803, 808–809 (Minn. App. Ct. 1999) (holding that the forfeiture of defendant’s truck “is not grossly disproportionate to the gravity of a repeat DWI violation” where “the particularly troubling problem of multiple DWI offenders continues to expose the public to these dangers”); City of

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excessive because the defendant had no previous offenses. The lack of previous DWI offenses demonstrates Grinberg's minimal culpability.

In addition, the nature of Grinberg's DWI indicates a minimal level of culpability. As discussed above, the trial court has discretion in sentencing a DWI offender. In choosing an appropriate penalty or sentence, trial courts generally look to several factors to gauge culpability. One of these factors is the blood alcohol concentration (BAC) of the defendant. In general, a higher BAC indicates a higher level of culpability, and therefore, a stiffer penalty. Grinberg's BAC at the time of his arrest was .11, only slightly higher than the .10 level required for DWI. Because he was subjecting the public to less risk than a DWI offender with a higher BAC, his level of culpability was reduced.

New Hope v. 1986 Mazda 626, 546 N.W.2d 300, 304 (Minn. Ct. App. 1996) (holding that forfeiture of fourth offense DWI offender's car is not grossly disproportional where the driver "has not heeded the warnings of previous [DWI] sentences" and where "those sanctions have failed").

See, e.g., Weldon v. State, 718 So.2d 52, 53 (Ala. Civ. App. 1997) (holding forfeiture of BMW resulting from possession of marijuana constitutionally excessive partly because the defendant had no previous convictions); Dent v. State, 714 So.2d 985, 987 (Ala. 1997) (holding forfeiture of van under state drug laws excessive partly because defendant lacked criminal record); Williams v. State, 712 So.2d 620, 625 (Miss. 1998) (holding forfeiture of automobile for possession of crack cocaine excessive partly because defendant had no previous felony convictions related to controlled substances); 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558, 566 (D.C. 1998) (holding that forfeiture of defendant's truck for soliciting prostitution was constitutionally excessive because it was defendant's first offense and he was "one individual who on one occasion attempted to retain a prostitute").

The nature of the offense is taken into consideration under the Sentencing Guidelines that the Bajakajian Court relied on in its culpability evaluation. See Poe, supra note 241, at 258 (explaining that the guidelines consider certain characteristics of the offense as well as characteristics of the defendant). Presumably, such considerations are also relevant in the absence of sentencing guidelines.

See supra text accompanying notes 253–254.

In addition, other factors that the courts consider in determining sentences are whether the defendant refused to submit to a breathalyzer examination and whether the defendant was speeding or driving recklessly. Grinberg is not implicated in either of these additional factors. He submitted to a breathalyzer examination, and he was pulled over for failing to wear his seat belt, not for speeding or reckless driving. See supra text accompanying notes 1–2. These facts also indicate that Grinberg possessed a minimal level of culpability.

See id. (explaining that a .20 BAC often results in a higher jail sentence).

See supra notes 3–4 and accompanying text. The formula for calculating BAC, as provided in BUREAU OF JUSTICE STATISTICS, ALCOHOL AND CRIME 32 (1998), is as follows:

\[ \text{BAC}(h) = \frac{A}{(r * p)/10} - (h * k) \]

where

- BAC = Blood Alcohol Concentration at time h
b. The Harm Caused by a First-Time DWI Offender

The other component of measuring the gravity of the offense—the harm that the defendant caused—is also minimal in Mr. Grinberg's case. Under a discretionary sentencing scheme, courts often impose higher penalties when the convicted DWI offender has caused certain harms. Such harms recognized in New York itself include DWI related property damage, personal injuries, and death. These harms are not present in Grinberg's case, indicating that he caused minimal harm.

\[
\begin{align*}
A &= \text{grams of ethanol consumed: which is equal to (liquid ounces of ethanol} \\ &\quad \times .82)/.035 \\
r &= \text{reduced body mass: which is .68 for males and .55 for females} \\
p &= \text{weight in kilograms: which is equal to weight in pounds}/2.2046 \\
h &= \text{hours drinking} \\
K &= \text{estimated rate at which the body metabolizes ethanol which is .015 grams per hour.}
\end{align*}
\]

Assuming that Grinberg weighs the same amount as the average adult male—173 pounds—and that he drank twelve-ounce beers with a 5% alcohol content for two hours prior to driving, he would have been legal to drive until he drank 4.9 beers (BAC = .099). He would have reached his reported BAC of .11 after consuming 5.4 beers (BAC = .112).

The risk of being involved in a fatal accident increases as the driver's BAC increases. See BUREAU OF JUSTICE STATISTICS, ALCOHOL AND CRIME 19 (1998). The average BAC of drinking drivers who are involved in a fatal accident is .16, considerably higher than Grinberg's BAC.

See supra note 230 and accompanying text.

See, e.g., State v. Ingham, 453 N.Y.S.2d 325, 326 (N.Y. Crim. Ct. 1982) (holding that sentence depends in part on property damage or personal injuries that defendant caused); Commonwealth v. Basinger, 592 A.2d 1363, 1366 (Pa. Super. Ct. 1991) (holding that death of pedestrian can be considered in sentencing DUI convict); VT. STAT. ANN. tit. 23 § 1210(e)-(f) (1999) (requiring sentencing judge to impose higher sentence for DUI resulting in death or injury).

See Ingham, 453 N.Y.S.2d at 326 (holding that property damage results in increased penalty); TAYLOR, supra note 262, § 2.0.2 (explaining that "the existence of property damage can trigger a more severe sentence").

See Ingham, 453 N.Y.S.2d at 326 (holding that personal injury would result in greater jail sentence); TAYLOR, supra note 262, § 2.0.2 (explaining that most jurisdictions enhance penalties for resulting personal injury).

See Ingham, 453 N.Y.S.2d at 326 (holding that death resulting from DWI would require greater jail sentence); Basinger, 592 A.2d at 1366 (recognizing that death of pedestrian can be considered in sentencing DUI convict); see TAYLOR, supra note 262, § 1.4.2 (explaining that most jurisdictions enhance penalties for resulting death). Of course, in many jurisdictions, death resulting from DWI is elevated to a separate felony status. Id., § 1.4.3.

In fact, there is no evidence that Grinberg came even close to causing any of these harms. He was not pulled over for driving dangerously, but instead because he was not wearing his seatbelt. See supra text accompanying note 2.
The Grinberg court did not identify any particular harm that Mr. Grinberg caused. Instead, it simply made the conclusory finding that DWI causes serious societal harm and imputed that harm to Mr. Grinberg. However, this practice of placing the full societal responsibility for the problems caused by an unlawful activity on a single defendant runs contrary to Bajakajian. In Bajakajian, the Court looked to the particular harm resulting from the defendant's reporting violation and concluded that such harm was much less than that caused "by a hypothetical drug dealer who willfully fails to report taking [currency] out of the country in order to purchase drugs." Rather than considering the societal impact of failing to report currency in general, the Court focused on the harm that the particular defendant caused. Several lower courts have followed Bajakajian to hold that the responsibility for societal problems resulting from an unlawful activity cannot be placed disproportionately on each individual defendant. Bajakajian and these lower court decisions demonstrate that it was inappropriate for the Grinberg court to put full responsibility for the societal problems caused by DWI on the shoulders of Mr. Grinberg. While DWI may be a serious societal problem in general, the harm caused by Mr. Grinberg himself was minimal.

As the preceding demonstrates, Grinberg's culpability was minimal because he was not an individual to which the NYC forfeiture provision was originally directed, the penalty prescribed for his offense was minimal, and the

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272 See Grinberg, 694 N.Y.S. 2d at 328, 328 n.19 (N.Y. Sup. Ct. 1999) (finding that "DWI is indeed 'a crime which injures and kills, and is an unparalleled public menace'" and that "DWI causes over 50 deaths and over 2,000 injuries").


274 In One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558 (D.C. 1998), the government brought a forfeiture proceeding against defendant's truck after he was arrested for soliciting prostitution. Id. at 559-60. The court held the forfeiture constitutionally excessive because defendant caused minimal harm. See id. at 565. The court, relying on Bajakajian, stated that the defendant "can not be made to bear grossly disproportionate responsibility for the problem of prostitution in the District[:] . . . he is, at bottom, one individual who on one occasion attempted to retain a prostitute." Id. at 566. Similarly, United States v. 6380 Little Canyon Road, 59 F.3d. 974 (9th Cir. 1994), involved an action brought by the government seeking forfeiture of property used in the defendant's marijuana cultivation. Id. at 978. In evaluating the harm that defendant caused, the court stated that it "must not put full responsibility for the 'war on drugs' on the shoulders of every individual claimant." Id. at 986 n.13 (citing United States v. 38 Whalers Cove Drive, 954 F.2d 29, 37 (2d Cir. 1992)). See also State v. 633 E. 640 N., 994 P.2d 1254, 1260 (Utah 2000) (holding that serious drug trafficking problem does not justify forfeiture of defendant's real property where defendant's "drug operation was small").

275 See supra text accompanying notes 267-69 (identifying objective factors that courts use to determine the amount of harm that a DWI offender caused).

276 See supra notes 235-37 and accompanying text.

circumstances of Grinberg’s offense provide for the application of mitigating factors that courts frequently use to measure culpability for sentencing purposes. Furthermore, the harm that Grinberg caused was also minimal, as Grinberg’s offense involved no property damage, personal injury, or death.

Under Bajakajian, therefore, the gravity of Grinberg’s offense was minimal.

c. Comparing the Amount of Forfeiture to the Gravity a First-Time DWI Defendant’s Offense

As the final step in the excessive fines analysis, the amount of Mr. Grinberg’s forfeiture must be compared to the gravity of his offense to determine if it is grossly disproportional. As a preliminary matter, the Grinberg court, as in Bajakajian, looked to the criminal penalties that could be imposed on the defendant to measure the gravity of his offense. The court held that the forfeiture of Mr. Grinberg’s car, valued at $2000, was not excessive because the “forfeiture of a used car valued at twice the maximum fine is not grossly disproportionate.” Thus, the Grinberg court compared the amount of the forfeiture to the maximum statutorily authorized fine for first offense DWI.

However, as discussed above, the Bajakajian Court explicitly rejected the government’s argument that the maximum statutorily authorized penalty should be used for this comparison. Instead, the Bajakajian Court compared the amount of the forfeiture to the criminal penalty actually imposed on the defendant under the Sentencing Guidelines, which took into account the

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278 See supra notes 259-65 and accompanying text (including first offense DWI status and low BAC).

279 See supra text accompanying notes 267-72 (explaining that the harms courts frequently consider for sentencing purposes, such as property damage, personal injuries, and death, are absent from the circumstances of Grinberg’s offense).

280 See supra text accompanying note 231 (explaining that the Bajakajian Court found that the gravity of the offense was minimal because the defendant’s culpability and the harm that he caused were minimal).

281 See supra text accompanying note 229 (explaining that grossly disproportional inquiry is made by comparing the amount of the forfeiture to the gravity of the defendant’s offense).

282 Grinberg v. Safir, 694 N.Y.S.2d 316, 327 (N.Y. Sup. Ct. 1999). Recall that the maximum fine authorized for first offense DWI in New York is $1000. See supra note 246 and accompanying text. The Grinberg court also held the forfeiture not grossly disproportional because it compared the $2000 automobile to the “societal impact” resulting from DWI offenses. Grinberg, 694 N.Y.S.2d at 328. However, as discussed supra, it was inappropriate for the court to impute all of the societal problems caused by DWI to Mr. Grinberg. See supra notes 274-75 and accompanying text. The court should have compared the forfeiture to the gravity of Grinberg’s offense, which is minimal. See supra Part III.2.a.

283 See supra notes 241-42 and accompanying text.
mitigating factors relevant to the defendant’s culpability. Because the Grinberg Court did not know the actual criminal fine that would be imposed on Mr. Grinberg, it should have estimated the fine that he would likely receive, taking into consideration the mitigating factors that the sentencing court would find relevant. In New York, first time DWI offenders who cause little or no harm generally receive the minimum fine. Under the circumstances of his case, therefore, Mr. Grinberg would have likely received the minimum fine of $500, and it is this amount that should have been compared to the amount of the forfeiture. The forfeiture is thus four times greater than the amount of the relevant criminal penalty, not two times as the court suggested.

While it is true that the forfeiture at issue in Bajakajian was considerably greater than four times the criminal penalty, the Court did not imply that a lesser forfeiture would be constitutionally acceptable. Furthermore, at least one court has held a forfeiture excessive even where the amount of the forfeiture was less than the criminal penalty for the offense, and other courts have held a forfeiture excessive where the forfeiture-to-criminal penalty ratio more nearly approximated the 4-to-1 ratio present in Grinberg. These cases illustrate that the criminal penalty imposed for a particular offense is only one measure of the defendant’s culpability and is not determinative as to whether the forfeiture is

284 See id.
285 See supra text accompanying note 255 (indicating that the criminal action was still pending at the time of Grinberg’s constitutional challenge to the forfeiture policy).
286 See State v. Ingham, 453 N.Y.S.2d 325, 326 (N.Y. Crim. Ct. 1982) (concluding that the court generally imposes the minimum penalty on those convicted of misdemeanor DWI and who have caused “no discernable property damage or personal injury”).
287 See supra note 254 and accompanying text.
288 The government sought forfeiture of the full $357,144 that Bajakajian failed to report, while the criminal fine that he received was only $5000. United States v. Bajakajian, 524 U.S. 321, 338 (1998). The forfeiture was therefore seventy times greater than the criminal penalty.
289 The Court in fact suggested that a $15,000 forfeiture could potentially be excessive, but refused to consider the issue because it was not addressed by the parties. See id. at 337 n.11.
292 See supra text accompanying notes 242–43 (explaining that Bajakajian employed the criminal penalty only as a measure of the defendant’s culpability and not as determinative of
grossly disproportional to the gravity of the defendant's offense. In fact, in several recent cases, the courts have not even considered the forfeiture-to-criminal penalty ratio after concluding that the gravity of the offense was so minimal that the forfeiture must be grossly disproportional. These cases arose in the drug context, where the gravity of the defendant's offenses were arguably greater than Mr. Grinberg's offense. In light of the preceding cases, and Bajakajian's narrow use of the criminal penalty as a consideration, it was inappropriate for the Grinberg court to justify the automobile forfeiture simply because it perceived the forfeiture to be only two times greater than the maximum statutorily authorized penalty for the offense. Given the minimal gravity of Grinberg's offense, the forfeiture of his automobile should have been found excessive regardless of its minimal value.

This conclusion is further supported by another factor that the Bajakajian Court mentioned—whether the forfeiture would deprive the defendant of his livelihood. The mention of this factor in Bajakajian is not surprising given the Court's persistent focus on the particular circumstances of a defendant. By considering the defendant's "wealth or income," this factor recognizes that even a forfeiture of small monetary value may be a "substantial one" to a particular defendant.

the ultimate issue of whether the forfeiture was grossly disproportional to the gravity of the offense).

See, e.g., Weldon v. State, 718 So.2d 52, 53 (Ala. Civ. App. 1997) (holding automobile forfeiture arising from marijuana possession excessive, without discussing potential criminal penalty, because defendant had no criminal record and only possessed small amount of marijuana); Williams v. State, 721 So.2d 620, 625 (Miss. 1998) (holding automobile forfeiture arising from cocaine possession excessive, without discussing value of automobile, because defendant lacked a prior drug felony conviction).

See supra note 286.

See supra text accompanying notes 242–43 (explaining that Bajakajian employed the criminal penalty only as a measure of the defendant's culpability and not as determinative of the ultimate issue of whether the forfeiture was grossly disproportional to the gravity of the offense).

See supra Part III.C.2.

See United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998). The Court suggested that it would consider this factor if Bajakajian had presented it to the court and if the District Court had made factual findings on the issue. See id.

See supra text accompanying note 211 (explaining Bajakajian's inclination to look at the particular forfeiture under the circumstances of the case in its excessiveness inquiry).


United States v. One Parcel of Prop. at Shelly's Riverside Heights Lot, 851 F.Supp 633, 638 (M.D. Pa. 1994) (finding that forfeiture of property valued at $7950 is monetarily minimal but nonetheless holding the forfeiture excessive because the property is "the only significant possession [the defendant] has").
Ironically, New York has judicially and legislatively recognized that a fine imposed for DWI may be excessive to a particular defendant where it deprives the defendant of his or her livelihood. To the extent that Austin and Bajakajian held that forfeitures are fines for excessive fines purposes, one would also expect that New York courts would consider the economic status of a defendant in determining whether the amount of a forfeiture is excessive. Furthermore, courts in other jurisdictions have considered whether a forfeiture would create an undue hardship on the defendant in the context of automobile forfeitures and otherwise.

Despite this authority, however, the Grinberg court failed to consider whether the forfeiture of Mr. Grinberg’s car would cause him undue hardship.

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301 In State v. Ingham, 453 N.Y.S.2d 325 (N.Y. Crim. Ct. 1982), the issue was whether a $350 fine imposed on the defendant for her DWI violation constituted an excessive fine. See id. at 327. The court stated that excessiveness must consider the “relationship between the amount of the fine and the economic resources of the defendant.” Id. at 329. The court held that the $350 fine was excessive because the defendant “has no economic resources presently available, or in reasonably near expectancy, with which to pay the fine of $350.00 mandated by law.” Id.

302 See N.Y. VEH. & TRAF. LAW § 1193(2)(e)(7)(e) (West 1999). This provision contained in New York’s DWI statute allows a sentencing judge to grant a “hardship privilege” to a convicted DWI offender. Id. The hardship privilege allows an individual whose driver’s license has been suspended as a result of a DWI conviction to operate a motor vehicle. Id. To be eligible for the hardship privilege, the court must find that the offender is unable “to obtain alternative means of travel to or from the licensee’s” place of employment, place of medical treatment, or place of educational enrollment. Id. Thus, the provision mitigates the penalty when such penalty would deprive the convicted DWI offender of his livelihood.

303 See supra text accompanying note 99 (explaining that Austin held that forfeitures are fines for Excessive Fines Clause purposes where they serve at least in part to punish); supra text accompanying note 139 (explaining that Bajakajian affirmed Austin and held that a forfeiture is a fine if it is punishment for an offense).

304 See, e.g., One 1995 Toyota Pick-up Truck v. District of Columbia, 718 A.2d 558, 566 (D.C. 1998) (holding forfeiture of truck excessive because “the vehicle played a significant role in the maintenance of [the defendant’s] livelihood”); City of New Hope v. 1986 Mazda 626, 546 N.W.2d 300, 306 (Minn. Ct. App. 1996) (Randall, J., dissenting) (recognizing that forfeiture of an automobile is harsh punishment “with the high to extremely high cost of even a modest car today”).

305 See United States v. 6380 Little Canyon Road, 59 F.3d 974, 985 (9th Cir. 1994) (holding that the “hardship to the defendant, including the effect of the forfeiture on defendant’s family or financial condition” should be considered in measuring proportionality, as well as the “subjective value of the property, e.g., whether it is the family home”); United States v. One Parcel of Property Located at Shelly’s Riverside Heights Lot, 851 F. Supp. 633, 638 (M.D. Pa. 1994) (holding forfeiture of defendant’s log cabin excessive partly because it “seem[s] to be the only significant possession [the defendant] has”).

306 Of course, the most relevant and binding authority is Bajakajian’s suggestion that the defendant’s livelihood should be taken into consideration in determining whether a forfeiture is excessive. See United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998).
Had it done so, it probably would have found that the forfeiture would deprive him of his livelihood. Mr. Grinberg owned only one automobile and needed it to travel to and from his place of employment at the New York Public Library.\footnote{See Beals, \textit{supra} note 1, at 1. Of course, the necessity of traveling to and from work is the rationale behind the legislature’s decision to permit judges to grant a “hardship privilege” to convicted DWI offenders. \textit{See supra} note 302. The hardship privilege exists so that the penalty of license suspension will not deprive convicted DWI offenders of their livelihood. \textit{See id.} However, if a convicted DWI offender’s automobile is forfeited as a result of DWI, the offender’s livelihood may still be deprived regardless of whether he or she is legally able to drive on a suspended license under the hardship privilege.} Mr. Grinberg reported that the forfeiture of his automobile might result in the “loss of his job as well as his car.”\footnote{See supra Part III.C.2 (explaining why the gravity of Mr. Grinberg’s offense was minimal).} Because the forfeiture may well deprive Grinberg of his livelihood, the amount of his forfeiture is indeed substantial to him, rendering it grossly disproportional to the minimal gravity of his offense.\footnote{Recall that the \textit{Bajakajian} Court found this lack of correlation relevant in deciding that the currency forfeiture at issue served as punishment for an offense. \textit{See supra} note 202 and accompanying text.}

Finally, the \textit{Bajakajian} factor, discussed above of whether the forfeited property bears any relation to the government’s damages reemerged in the Court’s grossly-disproportional analysis as well.\footnote{\textit{Bajakajian}, 524 U.S. at 340.} The Court held that the full forfeiture of $357,144 was grossly disproportional to the gravity of Bajakajian’s reporting offense partly because it bore “no articulable correlation to any injury suffered by the Government.”\footnote{\textit{See Austin}, 509 U.S. at 621 (describing civil forfeitures as a “reasonable form of liquidated damages” (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972))).} The Court’s consideration of this factor refers back to the \textit{Austin} proposition that a forfeiture must bear some relationship to the damages sustained by society or to the governmental cost of enforcing the law.\footnote{\textit{See id} (recognizing that the forfeiture “of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society”); \textit{Jochner, supra} note 59, at 83 (explaining that government has the right to full forfeiture where the forfeiture is purely remedial).} To be sure, \textit{Austin} explicitly recognized that forfeitures serving an entirely remedial purpose, such as that of removing contraband or other dangerous and illegal items from society, are not even subject to excessive fines scrutiny.\footnote{\textit{See supra} Part III.C.2 (explaining why the gravity of Mr. Grinberg’s offense was minimal).}

\footnote{\textit{See Beals, \textit{supra} note 1, at 1. Of course, the necessity of traveling to and from work is the rationale behind the legislature’s decision to permit judges to grant a “hardship privilege” to convicted DWI offenders. \textit{See supra} note 302. The hardship privilege exists so that the penalty of license suspension will not deprive convicted DWI offenders of their livelihood. \textit{See id.} However, if a convicted DWI offender’s automobile is forfeited as a result of DWI, the offender’s livelihood may still be deprived regardless of whether he or she is legally able to drive on a suspended license under the hardship privilege.}
remedial, the lack of correlation between the forfeiture and the injury suffered by the government is highly indicative that the forfeiture is excessive.  

The NYC forfeiture statute goes beyond a purely remedial purpose, serving in part as punishment for an offense. Although the Grinberg court failed to address the issue in the context of its grossly disproportional determination, it is clear that the NYC provision authorizes forfeitures that bear no correlation to any injury suffered by the government. Austin found such a correlation lacking because of the “dramatic variations in the value of property” that are subject to forfeiture even for the same offense. Bajakajian found the absence of such a correlation because the amount of property subject to forfeiture is the same regardless of the harm that the defendant caused to the government.

Similarly, both of these characteristics are present in the case of an automobile forfeiture under the NYC provision. The provision subjects automobiles of dramatically varying values to forfeiture for the same offense of DWI. Furthermore, a forfeiture obtained under the provision operates without regard to the harm that the defendant caused to the city. For example, while the


315 See supra text accompanying note 209 (explaining that even the Grinberg court conceded that the NYC forfeiture provision was partly punitive).

316 The Grinberg court acknowledged that the NYC forfeiture “lacks specific correlation between the property’s value and the crime’s social cost” in its determination that the policy is punitive. Grinberg v. Safir, 694 N.Y.S.2d 316, 327 (N.Y. Sup. Ct. 1999). However, given Bajakajian’s holding that a forfeiture is excessive if it “bears no articulable correlation to any injury suffered by the Government,” Bajakajian, 524 U.S. at 340, the Grinberg court should have considered this factor in its excessiveness analysis as well.

317 Austin, 509 U.S. at 621 (dismissing government’s argument that forfeiture provides a “reasonable form of liquidated damages” because property of varying values are subject to forfeiture for the same narcotics violation (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972))).

318 See Bajakajian, 524 U.S. at 339 (finding absence of correlation between forfeiture and governmental injury because forfeiture would be the same regardless of whether defendant failed to report in order to take money “out of the country in order to purchase drugs” or for some other harmless reason).

319 See supra text accompanying note 207 (explaining that under a DWI forfeiture policy, the government may obtain forfeiture of a “1996 Mazda, or a 1996 Cadillac, or a 1996 Rolls-Royce” for the same offense (citing City of New Hope v. 1986 Mazda 626, 546 N.W.2d 300, 305 (Minn. Ct. App. 1996))).
harm that Mr. Grinberg caused in committing his DWI offense is minimal.\(^\text{320}\) his automobile would have been equally subject to forfeiture had he caused greater harm by committing some of the injuries that courts recognize for sentencing purposes.\(^\text{321}\) The forfeiture of his car, therefore, “bears no articulable correlation to any injury suffered by the Government.”\(^\text{322}\) Under \textit{Bajakajian}, this fact further supports the conclusion that the forfeiture of Mr. Grinberg’s car was grossly disproportional to the gravity of his offense and therefore excessive.\(^\text{323}\)

d. \textit{The Severity of the NYC Provision as Applied to First-Time DWI Offenders}

There is one final consideration that is relevant to the question of whether a particular punishment is grossly disproportional to the gravity of the defendant’s offense: whether that punishment is comparable to the punishment prescribed in other jurisdictions for the same offense. This consideration is derived from the Supreme Court’s citation to \textit{Solem v. Helm}\(^\text{324}\) in \textit{Bajakajian}.\(^\text{325}\) In \textit{Solem}, the defendant Helm was convicted of uttering a “no account” check for $100.\(^\text{326}\) Under South Dakota’s recidivist statute, he received a sentence of life imprisonment without parole.\(^\text{327}\) Helm argued to the Supreme Court that his life sentence violated the Cruel and Unusual Punishment Clause of the Eight Amendment. The Court agreed and held that a given punishment must be

\^\text{320} \textit{See supra} note 271 and accompanying text (explaining that the harm that Mr. Grinberg caused was minimal).
\^\text{321} \textit{See supra} notes 268–71 (identifying harms that courts consider in imposing sentences on DWI defendants).
\^\text{322} \textit{Bajakajian}, 524 U.S. at 340.
\^\text{323} Of course, the emphasis that the \textit{Bajakajian} Court placed on the correlation between the forfeiture and the damages suffered by the government is hardly surprising. \textit{Hudson v. United States} contemplated that the Excessive Fines Clause would address some of the abuses resulting from civil sanctions that bore no relationship to the government’s damages. \textit{See supra} notes 131–32. \textit{Bajakajian}, by placing great emphasis on the correlation between the forfeiture and the government’s injury, effectuated \textit{Hudson’s} contemplated goal of the Excessive Fines Clause. \textit{See supra} text accompanying note 133.
\^\text{324} 463 U.S. 277 (1983).
\^\text{325} \textit{See Bajakajian}, 524 U.S. at 336 (citing \textit{Solem} for proposition that the grossly disproportional test is derived from “Cruel and Unusual Punishments Clause precedents”).
\^\text{326} \textit{Solem}, 463 U.S. at 281 (citing S.D. CODIFIED LAWS § 22-41-1.2 (Michie 1979)). A “no account” check is one that is passed “on a financial institution” where the defendant knows that he “does not have an account with such financial institution.” \textit{Id.} at 281 n.5 (citing S.D. CODIFIED LAWS 22-41-1.2 (Michie 1979)).
\^\text{327} \textit{Id.} at 281–82. Helm had previously been convicted of six nonviolent felonies. \textit{Id.} at 279. He was therefore subject to the South Dakota recidivist statute, which provided for life imprisonment after four felonies. \textit{See S.D. CODIFIED LAWS} § 22-7-8 (Michie 1979).
proportionate to the offense. In making such a determination, the Court instructed that a comparison should be made between the punishment imposed and the punishment that would have been imposed in other jurisdictions. Finding that no other state authorized as severe a penalty for Helm’s offense as South Dakota, the Court held that it was “significantly disproportionate” to his offense.

Because the grossly disproportionate test for excessive fines purposes was derived from Cruel and Unusual Punishment Clause jurisprudence, and because Bajakajian cited Solem, at least one court has recently held that it is necessary in the civil forfeiture context to compare the punishment imposed on a defendant with the punishment that would have been imposed in other jurisdictions to determine whether it is grossly disproportionate to the gravity of the offense. Austin and Bajakajian both held that forfeitures do constitute punishment, and, as discussed above, the NYC forfeiture provision constitutes punishment for excessive fines purposes. It follows, therefore, that in comparing the punishment imposed on a first offense DWI defendant in NYC with that of a first offense DWI defendant in other jurisdictions, the additional forfeiture punishment should be included in this calculation. To be sure, the criminal punishment imposed on New York first offense DWI convicts is comparable to that in other jurisdictions. However, in no other jurisdiction in

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328 Solem, 463 U.S. at 290.
329 Id. at 291.
330 Id. at 303.
331 See supra text accompanying note 142.
332 See supra text accompanying note 324.
333 See State v. 633 E. 640 N., 994 P.2d 1254, 1258 (Utah 2000) (holding that “the sentences imposed for commission of the same crime in other jurisdictions” should be considered because the Bajakajian factors “are those articulated in the United States Supreme Court’s Cruel and Unusual Punishment Clause precedents”).
334 See supra text accompanying notes 99–100 (explaining that Austin held that civil forfeitures were traditionally understood as constituting punishment where they serve, at least in part, to serve punitive goals); supra text accompanying note 139 (recognizing that Bajakajian reaffirmed Austin’s holding that forfeitures constitute punishment).
335 See supra notes 198–209 (identifying characteristics that make the NYC forfeiture punitive).
336 The criminal penalty for first offense DWI in the state of New York is a maximum jail term of one year, a minimum $500 fine, and a maximum $1000 fine. N.Y. VEH. & TRAF. LAW § 1193(1)(b) (West 1999); supra text accompanying note 248. This penalty is relatively comparable to the penalties prescribed for first offense DWI in neighboring states. See, e.g., CONN. GEN. STAT. § 14-227(h) (1999) (maximum six months imprisonment, minimum $500 fine, and maximum $1000 fine); MASS. GEN. LAWS ch. 90, § 24 (1999) (maximum two and one-half year imprisonment, minimum $500 fine, and maximum $5000 fine); VT. STAT. ANN. tit. 23 § 1210 (1999) (maximum two years imprisonment and maximum $750 fine); N.J. STAT.
the United States can a defendant have his car forfeited for a first offense DWI. The punishment imposed on a first offense DWI defendant in NYC, therefore, is much greater than the punishment imposed for the same offense in other jurisdictions. Under Solem, the fact that no other jurisdiction authorizes as severe a penalty for first offense DWI is strong evidence that the NYC forfeiture is grossly disproportionate to the gravity of the offense.

**CONCLUSION**

The government has increasingly relied on civil forfeitures to enforce its laws in recent years. While the Supreme Court has made it nearly impossible for civil forfeiture defendants to prove that a forfeiture is punishment for purposes of the Double Jeopardy Clause, it has contemplated that the Excessive Fines Clause will be an effective mechanism to prevent the injustices that result from forfeitures that bear no correlation to the injuries suffered by the government. *Bajakajian v. United States* effectuated this goal by recognizing that forfeitures do punish the property owner and by requiring that the amount of the forfeiture must be proportional to the gravity of the defendant’s offense. However, in order to fully realize this goal, courts must make a reasonable effort to assess the gravity of the defendant’s offense and recognize that a forfeiture of property may work a substantial hardship on the defendant.

The *Grinberg* court seemingly failed to make such an effort in its constitutional inquiry of the New York City forfeiture provision as applied to first time DWI defendants. To the extent that such a defendant is in a similar position to that of Mr. Grinberg, the gravity of the offense is minimal because, by objective standards, his culpability is minimal and the harm that he caused is minimal. On the other hand, the forfeiture of one of the defendant’s most valuable and essential possessions is great. The amount of the forfeiture is therefore grossly disproportional to the gravity of the offense, and thus excessive. The fact that the penalty in New York City for first offense DWI is extraordinarily more severe than in any other jurisdiction in the United States simply reinforces this conclusion. The policy is an obvious attempt to punish, and it operates by subjecting the automobiles of DWI offenders to forfeiture regardless of their value or the harm that the offender caused. Such forfeitures that bear no articulable correlation to the injuries suffered by the government, however, are exactly what the Excessive Fines Clause is designed to prevent.

ANN. § 39:4-50 (West 1999) (minimum twelve hour imprisonment, maximum forty-eight hour imprisonment, minimum $250 fine, and maximum $400 fine); 75 PA. CONS. STAT. § 3731 (1999) (minimum 48 hours imprisonment, maximum two years imprisonment, minimum fine of $300, and maximum fine of $5000).

337 See supra text accompanying note 14 (identifying NYC as the only jurisdiction in the United States that authorizes forfeiture of automobiles for first offense DWI).