EIGHTH AMENDMENT & 18 U.S.C. § 982—EXCESSIVE FINES CLAUSE—A PUNITIVE FORFEITURE VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT IF THE AMOUNT IS GROSSLY DISPROPORTIONAL TO THE MAGNITUDE OF THE CRIME IT IS INTENDED TO PUNISH—*United States v. Bajakajian*, 524 U.S. 321 (1998).

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Money launderers will rejoice to know they face forfeitures of less than five percent of the money transported, provided they hire accomplished liars to carry the money for them.[1]

I. INTRODUCTION

The Eighth Amendment proclaims: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] Although the Supreme Court has never specifically applied the Excessive Fines Clause, and has only rarely interpreted its meaning, the Court has had occasion to explain that a "fine" is a payment made to a sovereign as punishment for some crime or offense.[3] The Court has further stated that the purpose of the Excessive Fines Clause was to limit the power of the government to extract payments from citizens as punishment for an offense.[4] A forfeiture, or payment in kind, is con-

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[1] United States v. Bajakajian, 524 U.S. 321, 354 (1998) (Kennedy, J., dissenting).

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

[3] *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989). This definition was derived by the Court after an examination of the limited legislative history regarding the Excessive Fines Clause and several sources from the period in which the Constitution was drafted and ratified. *See id.* For example, fines for offenses are defined as, "amends, pecuniary punishment, or recompence for an offense committed against the King and his laws, or against the Lord of a manor." 2T Cunningham, A NEW AND COMPLETE LAW DICTIONARY (unpaginated) (1771)). In *Browning-Ferris*, the Court held that the Excessive Fines Clause does not limit the amount of punitive damages awarded to a party in a civil action when the government has not prosecuted the action and has no claim to receive a share of the award. *See Browning-Ferris*, 492 U.S. at 265.

[4] *See* Austin v. United States, 509 U.S. 602, 609-610 (1991) (holding that the Excessive Fines Clause applies to drug related forfeitures of property to the government under 21 U.S.C. §§ 881(a)(4) (1999) and 881 (a)(7) (1999)).

sidered to be a fine within the meaning of the Eighth Amendment, if effectuated as punishment for an offense.[5]

The issues described and analyzed herein rely on subtle distinctions that are often not apparent at first blush. The issues will be presented in a fairly simple manner by examining the two-part fictional story of a man named "Dave,"[6] derived from the facts and analysis of two major forfeiture cases.[7] Dave's story is as follows:

Dave and his family, planning a vacation in his native country, traveled to the airport to board a flight bound for Europe. While passing through customs, an inspector approaches and informs them that they are required to report any amount of currency they are carrying in excess of $10,000. Dave tells the customs agent that he is carrying around $8,000 and his wife is carrying approximately $9,000. As such, Dave states that they have nothing that needs to be declared. Nonetheless, customs agents search the family's luggage and discover that they were attempting to leave the country with approximately $250,000.

When customs agents inquire about the source of the money, Dave gives several conflicting responses. First, he claims that the money is a loan from a friend with which he intends to pay off a debt he owes in his native country. Upon checking with Dave's "friend," who supposedly gave him the loan, the "friend" denied ever having made a loan to Dave and claims to be unaware of the actual source of the funds. Confronted by this information, Dave then tells the customs officials that the money is "his." Later Dave tells the agents that the money is actually a loan from another "friend," and that he had been mistaken about the other explanations. While attempting to verify this version of Dave's story, his second "friend" informs customs that he did not give Dave a loan. Additionally, the second friend tells customs agents that Dave called him and asked him to lie if questioned. Although the government never managed to link the cash to any crime, Dave could not offer a substantiated explanation.

Dave is charged with willfully transporting more than $10,000 in currency out of the country. The penalties for this offense include possible jail time, a fine and forfeiture of all the currency. Dave strikes a deal with the government and pleads guilty to failing to report the currency. He is sentenced to three years probation and a $5,000 fine.

The government asserts that the entire amount of the currency is subject to

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[5] *See Bajakajian*, 524 U.S. at 325.

[6] The use of the name "Dave" is purely for clarity and does not reference any actual person, living or dead.

[7] This story is loosely based on the facts and holding of *Bajakajian*, the principle case, as well as *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972).

forfeiture under the statute. After a bench trial[8] on the issue, the trial court judge concludes that although the statute requires it, forfeiture of the entire amount would be extraordinarily harsh. The judge notes that he believes Dave failed to report that he was taking the currency out of the country because of fear, stemming from cultural differences and a general fear of the government. Although forfeiture of the entire amount is mandated by statute, the judge reduces the amount of the forfeiture to approximately ten percent of the total, which he feels is commensurate with the offense of failing to report the money.[9] The government appeals the trial court decision, which is eventually upheld by the United States Supreme Court on the basis that forfeiture of the entire amount would violate the Excessive Fines Clause.

After the legal ordeal is over, Dave finally manages to leave the country, this time reporting the currency as required by the statute. While he is abroad, Dave uses the rest of his money to buy diamonds that he intends to take back to the United States and sell at a profit. Upon entering the country, Dave is informed that he is required to fill out a customs form declaring what, if anything, he is bringing in to the country. He fills out the form and declares that he is bringing back some liquor, cigarettes and a few personal items. A subsequent search reveals that he is carrying the diamonds. Dave explains that he was tired and merely forgot to declare that he was carrying the diamonds.

He is charged with willfully smuggling the diamonds into the country and intending to defraud the United States. After a bench trial,[10] he is acquitted of all charges. The judge notes that while he believes Dave knew that he should have reported the diamonds and intentionally did not, he is not convinced beyond a reasonable doubt that he intended to defraud the United States.

Although he has been acquitted of all charges against him, the government commences a forfeiture action seeking all of the diamonds, pursuant to another provision in the law that provides for civil forfeiture against items smuggled into the country. The government succeeds in winning forfeiture of all the diamonds. Because Dave has already been prosecuted for smuggling the diamonds, he appeals on double jeopardy grounds.[11] The Court informs him that an acquittal for

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[8] A bench trial is a trial held before a judge sitting without a jury. *See* BLACK'S LAW DICTIONARY 156 (6th ed. 1990).

[9] Because the government is not able to link the money to any other crime, the judge finds it to be "clean."

[10] *See supra* text accompanying note 8.

[11] The Fifth Amendment to the United States Constitution provides that no "person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

the underlying offense is no bar to the forfeiture action.[12] Next, Dave claims that the forfeiture constitutes an excessive fine. The Court holds that the forfeiture of the diamonds is actually not a punishment but merely a remedial measure, and therefore, the protections of the Eighth Amendment are not applicable.

It is hard to reconcile these two very different outcomes. In one instance, after a guilty verdict was entered, the Excessive Fines Clause limited the amount that could be forfeited by the Government, to ten percent of the currency involved. However, in the second instance, the Eighth Amendment offered no protection from forfeiture of the full amount even though the owner of the goods was acquitted of all charges stemming from the incident. Herein lies the problem. The protections guaranteed by the Constitution should apply to all circumstances equally, they should not be rigidly dependent on ancient doctrine or *legal fiction*.[13]

II. ORIGIN AND HISTORY OF THE EIGHTH AMENDMENT

The Eighth Amendment reads in its entirety: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[14] The underlying principle of the Excessive Fines Clause and the

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This guarantee, also enforceable against the states because it is incorporated by the Fourteenth Amendment, protects against a second prosecution for the same offense following either a conviction or acquittal, and against multiple punishments for the same offense. *See* North Carolina v. Pearce, 395 U.S. 711 (1969) (holding that a criminal defendant, who successfully set aside a prior conviction and received a new trial, could not be held to serve a longer sentence after re-conviction than the original sentencing).

[12] *See* United States v. Ursery, 518 U.S. 267, 271-272 (1996) (holding that a civil forfeiture action is not considered to be punishment for double jeopardy purposes).

[13] A *legal fiction* is a situation contrived by the law to allow a court to dispose of a matter. *See* BLACK'S LAW DICTIONARY 804 (5th ed. 1979).

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

The first ten amendments to the Constitution of the United States were proposed to the legislatures of the several States by the First Congress on September 25, 1789. (This date represents the date of final Congressional action.) They were ratified by the following States, on the dates shown, and the notifications by the Governors thereof of ratification were communicated by the President to Congress: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; and Virginia, December 15, 1791. Ratification was completed on December 15, 1791.

Eighth Amendment in general, that punishment should be proportionate to the crime, is deeply rooted in early common law.[15] The *Magna Carta*[16] contained several clauses requiring that *amercements*[17] not be excessive.[18] Further, a clause essentially identical to the Excessive Fines Clause was included in the English Bill of Rights in 1689.[19] However, the Supreme Court has noted that the Eighth Amendment, including the ban on excessive fines, was based directly upon a clause found in the 1776 Virginia Declaration of Rights.[20]

As the Eighth Amendment, and specifically the Excessive Fines Clause, received little debate by the First Congress,[21] the legislative history is of little use in determining exactly how the prohibition should be applied.[22] The Supreme

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CONSTITUTION, JEFFERSON'S MANUAL AND THE RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED THIRD CONGRESS 86 (U.S. Government Printing Office, ed., 1993).

[15] *See* Solemn v. Helm, 463 U.S. 277, 284 (1983) (holding that a life sentence without the possibility of parole was grossly disproportionate to the non-violent offense committed by the defendant and thus, violated the Eighth Amendment prohibition on cruel and unusual punishment).

[16] Magna Charta, 9 Hen. III, ch 14 (1225), 1 Stat. at Large 6-7 (1762 ed.) Magna Carta (the great charter) is the name of the constitutional enactment granted by King John of England on June 15, 1215. See BLACK'S LAW DICTIONARY, 951-952 (6th ed. 1990). Henry VIII and Edward I confirmed the Magna Carta in Parliament. *See id.* The Magna Carta is, "justly regarded as the foundation of English constitutional liberty." *See id.* at 952. This charter contains among many other things, provisions guaranteeing the individuals right to personal liberty and property, limits on taxation and the administration of justice. *See id.*

[17] An *amercement* was the most common criminal sanction imposed by the courts of England during the Thirteenth Century. *See* 2F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 513-515 (2d ed. 1909). It is essentially the same as a modern day fine. *See id.*

[18] *See* Magna Charta, 9 Hen. III, ch 14 (1225), 1 Stat. at Large 6-7 (1762 ed.)

[19] *See Solemn*, 463 U.S. at 285 (citing 1 Wm. & Mary, sess. 2, ch. 2 (1689)). "[E]xcessive baile ought not to be required nor excessive Fines imposed nor cruel and unusual punishment inflicted." *Id.*

[20] *See id.* at 285 n.10. The language of the 1776 Virginia Declaration of Rights appears to be taken verbatim from the earlier 1689 English Bill of Rights. *See id.*

[21] *See supra* text accompanying note 14. The First Congress of the United States passed the Eighth Amendment on September 25, 1789. *See id.*

[22] *See* David B. Sweet, *Supreme Court's Construction and Application of Excessive Fines Clause of Federal Constitutions Eighth Amendment*, 106 L. ED. 2d 729 (1997).

Court has explained that when the framers of the Eighth Amendment adopted the language found in the English Bill of Rights, they also intended to adopt the English principle of proportionality.[23] Furthermore, the Court, for more than a century, has recognized the principle of proportionality in constitutional analysis.[24] In *Weems v. United States,*[25] the Supreme Court formally adopted the principle of proportionality for Eighth Amendment analysis, by announcing, "it is a precept of justice that punishment for a crime should be graduated and proportional to the offense."[26] While the Court has had far greater opportunity to engage in a proportionality analysis examining cases under the Cruel and Unusual Punishment and Excessive Bail Clauses, rather than the Excessive Fines Clause, a similar analysis appears to be appropriate.[27]

III. STATEMENT OF THE CASE

In *United States v. Bajakajian,*[28] the United States Supreme Court applied the protections of the Excessive Fines Clause of the Eighth Amendment for the first time.[29] In doing so, the Court determined that a fine violates the Excessive Fines Clause of the Eighth Amendment whenever the amount is grossly disproportional to the offense, which it was intended to punish.[30] This standard appears to have been largely adopted from the Court's prior analysis of the Cruel and Un-

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[23] *See Solemn*, 463 U.S. at 285-286. "Although the precise scope of this provision is uncertain, it at least incorporated the long-standing principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." *See id.* at 285 (quoting R. PERRY, SOURCES OF OUR LIBERTIES 236 (1959)).

[24] *See* O'Neil v. Vermont, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting) The dissenting Justice recognized that the Eighth Amendment provides protection from all punishments that are greatly disproportional to the offense committed.

[25] 217 U.S. 349 (1910).

[26] *See id.* at 367. The defendant in *Weems* had been sentenced to fifteen years *cadena temporal,* imprisonment that included hard labor and a permanent loss of certain liberties, for falsifying a public document. *See id.* The Court held that this sentence violated the Eighth Amendment. *See id.* at 377.

[27] *See* United States v. Bajakajian, 524 U.S. 321, 327 (1998).

[28] 524 U.S. 321 (1998).

[29] *See id.* at 325.

[30] *See id.* at 334.

usual Punishment Clause of the Eighth Amendment.[31] While this newly articulated standard fits well within the history and purpose of the protections afforded by the Eighth Amendment, by significantly narrowing its application to certain classifications of fines, the Court's decision may have the effect of weakening the protection it provides.

On June 9, 1994, Hosep Krikor Bajakajian ("respondent"), his wife and their two daughters attempted to board an Alitalia Airways flight from Los Angeles International Airport to Rome, Italy.[32] Using a canine trained to detect the smell of currency, customs agents discovered approximately $230,000 concealed in luggage that had been checked by the family.[33] Subsequently, customs personnel approached the Bajakajians and informed them that under federal law they were required to report all currency, either in their possession or contained in baggage, in excess of $10,000.[34] Respondent told customs inspectors that he was carrying $8,000 and his wife was carrying an additional $7,000 and therefore had nothing to declare.[35] A search of the Bajakajians' wallets, carry-on bags and purse revealed far more.[36] In fact, customs agents discovered that the family was attempting to leave the country with a total of $357,144.[37] Customs officials seized the cash and took the respondent into custody.[38]

A federal grand jury[39] returned an indictment[40] against the respondent on

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[31] *See* Solemn v. Helm, 463 U.S. 277, 284 (1983).

[32] *See Bajakajian*, 524 U.S. at 324.

[33] *See id.*

[34] *See id.*

[35] *See id.* at 324-325.

[36] *See id.* at 325.

[37] *See id.* at 324-325.

[38] *See Bajakajian*, 524 U.S. at 325.

[39] A jury of inquiry summoned to each session of the criminal courts, which is charged with receiving complaints or accusations in criminal cases, hearing the evidence as presented by the state and voting bills of indictment in cases where they determine that a trial should be held. *See* BLACK'S LAW DICTIONARY 855 (6th ed. 1990).

[40] A formal written accusation originating with a prosecutor and issued by a grand jury against a party charged with a crime. *See* BLACK'S LAW DICTIONARY 772 (6th ed. 1990).

three counts.[41] The first count charged the respondent with willfully failing to report that he was transporting more than $10,000 outside the United States in violation of 31 U.S.C. §§ 5316(a)(1)(A) and 5322(a).[42] Count two charged respondent with violating 18 U.S.C. § 1001 due to the fact that the respondent made a false, material statement to the United States Customs Service.[43] The third count of the indictment, and the one at the center of this case, was the government's attempt to forfeit the seized $357,144 through the use of 18 U.S.C. § 982(a)(1).[44] Respondent plead guilty to count one of the indictment, the failure to report.[45] The government dropped count two of the indictment.[46] A bench trial was held in district court[47] concerning the forfeiture in count three.[48]

The district court determined that the entire amount of $357,144 was subject to forfeiture because the currency was involved in the offense.[49] Disregarding

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[41] *See Bajakajian*, 524 U.S. at 325.

[42] *See id.* The statutory reporting requirement of § 5316(a)(1), in pertinent part accords: "a person shall file a report . . . when knowingly transports, is about to transport, or has transported, monetary instruments of more than $10,000 at any one time . . . from a place in the United States to or through a place outside of the United States." 31 U.S.C. § 5316(a)(1) (1999).

Section 5322(a) states that the penalty for the willful violation of the reporting requirement of § 5316, will be subject to a fine of not more than $250,000 or up to a maximum of five years imprisonment, or both. *See* 31 U.S.C. § 5322(a) (1999).

[43] *See Bajakajian*, 524 U.S. at 325.

[44] *See id.* Section 982(a)(1) provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of . . . § 5316 . . .of title 31 . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1999).

[45] *See Bajakajian*, 524 U.S. at 325.

[46] *See id.*

[47] United States District Court for the Central District of California, John G. Davies, District Judge, Presiding.

[48] *See Bajakajian*, 524 U.S. at 325.

[49] *See id.* at 325-326. In addition, the district court found that the money carried by respondent was not connected to any crime (other than failure to report). Moreover, the court found that the failure to report stemmed from the fact that he was a member of the Armenian minority in Syria and had a general "distrust for the government" due to fear caused by "cultural differences." *Id.*

the mandate of § 982(1), which requires the sentencing court to forfeit the full amount, the district court concluded that a total forfeiture would be "grossly disproportionate to the crime in question" and therefore, violative of the Excessive Fines Clause.[50] Following this reasoning, the court sentenced the respondent to three years probation, a fine of $5,000[51] and forfeiture of an additional $15,000.[52]

The United States appealed the ruling, seeking forfeiture of the full amount as provided for by § 982(a)(1).[53] The Court of Appeals for the Ninth Circuit reviewed the decision of the district court *de novo*[54] and affirmed.[55] The court applied a two-part test to determine whether the forfeiture in question would violate the Excessive Fines Clause.[56] The court reasoned that for any forfeiture to be upheld in this case, the money must be both an instrumentality of the crime and an amount proportional to the owner's culpability.[57] Relying on Supreme Court precedent and its own recent decisions, [58] the Ninth Circuit reasoned that, "there is simply not an instrumentality relationship between the currency and the crime to satisfy the instrumentality prong of the Excessive Fines test."[59] Conse-

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[50] *See Bajakajian*, 524 U.S. at 326 (citing Record at 63).

[51] $5,000 is the maximum fine allowed by the sentencing guidelines for the offense. *See id.* at 324.

[52] *See Bajakajian*, 524 U.S. at 326. The district court judge determined that while forfeiture of the full amount would be "too harsh," the maximum fine allowed was "too little," and tailored the amount forfeited to "make up for what I think a reasonable fine should be." *See id.*

[53] *See id.*

[54] *See* United States v. 1980 Lear Jet, 38 F.3d 398, 400 (9th Cir. 1994) (holding a district court's interpretation of federal forfeiture law is reviewed *de novo*).

[55] *See* United States v. Bajakajian, 84 F.3d 334 (9th Cir. 1996).

[56] *See id.* at 336 (citing United States v. Real Property Located in El Dorado County, 59 F.3d 974, 982 (9th Cir. 1995)). For a forfeiture to be constitutional under the "*El Dorado*" test, the forfeited property must: (1) be an instrumentality of the crime; and (2) the value of the property must be proportional to the culpability of the owner. *See id.*

[57] *See id.*

[58] *See id.* at 336-337 (citing United States v. $69,292 in U.S. Currency, 62 F.3d 1161 (9th Cir. 1995); Austin v. United States, 509 U.S. 602 (1993) (rejecting an expansive definition of instrumentality)).

[59] *Id.*, 84 F.3d at 338.

quently, the appellate court opined that it was improper for the district court to order the respondent's forfeiture of the $15,000 in addition to the original fine.[60] However, because the respondent failed to file a cross appeal,[61] the court had no jurisdiction to set aside the order.[62] If left unmodified, the decision of the Ninth Circuit appeared to prohibit forfeiture based on a willful failure to report currency as required by 31 U.S.C. § 5316.[63]

Although Judge Wallace concurred with the majority,[64] he reached the same result relying on wholly different logic.[65] The Circuit Judge relied on *United States v. $145,139*[66] and the concurrence in *Austin v. United States*[67] to determine that a sufficient nexus existed between the crime and currency to find that it was an instrumentality.[68] Judge Wallace opined that the majority's inquiry re-

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[60] *See id.*

[61] An appeal by the appellee. *See* BLACK'S LAW DICTIONARY 375 (6th ed. 1990).

[62] *See Bajakajian*, 84 F.3d at 338. An appellee must file a cross-appeal if he wishes to have the order of the district court modified. *See id.* "Unless he files a cross-appeal, the appellee may not attack the district court's decree with a view to either enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Id.* (citing United States v. One 1964 MG, 584 F.2d 889, 890 (9th Cir. 1978) (quoting United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924))).

[63] *See id.*

[64] The majority of the Ninth Circuit included Judge Thomas G. Nelson and Presiding Judge John G. Davies. *See id.*

[65] *See id.* at 338 (Wallace, J., concurring). Judge Wallace stated that the majority was wrong to rely on what he termed dicta from *U.S. v. $69,292* to hold that the currency at issue can not be an instrumentality of the crime as is required under the *El Dorado* test. *See Bajakajian*, 84 F.3d at 338. He suggested that any inquiry into the source of the funds should be wholly separate from the instrumentality prong and therefore, should be examined as part of the proportionality inquiry. *See id.* at 339.

[66] 18 F.3d 73,75 (2nd Cir. 1994), *cert. denied*, 115 S.Ct 71 (1994) (holding that the currency was an instrumentality of the crime because no crime could have been committed with out the currency, thereby rendering it the *sine qua non* of the offense).

[67] 509 U.S. 602, 627-28 (1993) (Scalia, J., concurring) The proper inquiry in determining whether something is an instrumentality is whether it has been tainted by unlawful use. *See id.* "The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense." *Id.*

[68] *See Bajakajian*, 84 F.3d at 339 (Wallace, J., concurring).

garding the source of the funds,[69] during the instrumentality prong of the *El Dorado* test was misplaced.[70] Rather, the source of the currency at issue should be part of the proportionality inquiry.[71] Since the judge determined that currency was an instrumentality of the crime and therefore the entire amount was subject to forfeiture, he next examined the district court's ruling based on proportionality.[72] Judge Wallace concluded that no clear error had been committed.[73] The concurring judge asserted that the additional forfeiture of $15,000 was roughly proportional to the respondent's culpability in this case.[74] Therefore, the judge concluded that the forfeiture was neither violative of the Excessive Fines Clause nor clearly erroneous, and affirmed the ordered amount.[75]

The United States Supreme Court granted *certiorari*[76] because the Ninth Circuit's ruling held that the forfeiture of currency under § 982[77] was "*per se* unconstitutional."[78] In a five-to-four split, affirming the decision of the Ninth Cir-

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[69] And the subsequent finding that the currency was not connected to any other crime. *See id.*

[70] *See id.*

[71] *See id.* (citing United States v. Real Property Located in El Dorado County, 59 F.3d 974, 985-986 (9th Cir. 1995)). Judge Wallace concluded that the source of the funds, whether or not they were derived from legitimate sources, should be examined and factored in to the determination made as to the culpability of the owner. *See id.* Presumably, if this logic is followed, a person not reporting legitimate currency would have a lower excessive fines threshold than a person committing the same offense where the currency was illegally obtained. *See id.*

[72] *See id.* at 339-340.

[73] *See id.* (citing United States v. Alvarez-Garcia, 79 F.3d 769, 772 (9th Cir. 1996) (holding that in forfeiture cases, factual determinations must be examined for clear error)).

[74] *See Bajakajian*, 524 U.S. at 340.

[75] *See id.*

[76] *See* United States v. Bajakajian, 520 U.S. 1239 (1997).

[77] 18 U.S.C. § 982(a)(1) (1999). Section 982(a)(1) provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of . . . § 5316 . . .of title 31. . . , shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1999).

[78] *See Bajakajian*, 524 U.S. at 327. A forfeiture under the section was *per se* unconstitutional because the currency failed to meet the instrumentality prong of the Eighth Amendment

cuit, the Court held that forfeiture of the entire amount of $357,144 in this case would violate the Excessive Fines Clause.[79] The Court went beyond the immediate case and offered the general proposition that a punitive forfeiture violates the Excessive Fines Clause of the Eighth Amendment if it is grossly disproportional to the offense for which it was intended to punish.[80]

IV. *UNITED STATES V. BAJAKAJIAN*: PUNITIVE FORFEITURES VIOLATE THE EXCESSIVE FINES CLAUSE IF THE AMOUNT FORFEITED IS GROSSLY DISPROPORTIONAL TO THE OFFENSE IT IS INTENDED TO PUNISH

A. THE MAJORITY'S ANALYSIS OF WHETHER THE FORFEITURE IS PROTECTED UNDER THE EIGHTH AMENDMENT EXCESSIVE FINES CLAUSE

Writing for the majority, Justice Thomas[81] began the Court's analysis by examining whether forfeiture can be considered a "fine" for Eighth Amendment purposes.[82] The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[83] Although the Court had never had occasion to apply the Excessive Fines Clause, the majority explained that a "fine" is a payment made to a sovereign as punishment for some crime or offense.[84] The Court further stated that

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Excessive Fines Clause analysis required under the *El Dorado* test. *See id.*

[79] *See id.* at 324. While it reached the same conclusion as the Ninth Circuit, the Supreme Court arrived at the result in a completely different manner. *See id.* at 333. The Court held that because the forfeiture in this case was punitive in nature, whether or not the currency was an instrumentality of the crime was irrelevant and used only a proportionality rationale in examining the Excessive Fines Clause issue. *See id.*

[80] *See id.* at 331.

[81] Justice Thomas delivered the opinion of the Court, in which Justices Ginsberg, Breyer, Stevens, and Souter joined. Justice Kennedy, joined by Chief Justice Rehnquist, Justice O'Connor and Justice Scalia, filed a dissenting opinion.

[82] *See Bajakajian*, 524 U.S. at 327-328.

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

[84] *See Bajakajian*, 524 U.S. at 325 (citing Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)). This definition is derived by the majority in *Browning-Ferris* after an examination of the limited legislative history regarding the Excessive Fines Clause and several sources from the period in which the Constitution was drafted

the purpose of the Excessive Fines Clause was to limit the power of the government to extract payments from citizens as punishment for an offense.[85] Next, the Court noted that a forfeiture, or payment in kind, is considered to be a fine within the meaning of the Eighth Amendment if effectuated as punishment for an offense, thereby punitive in nature.[86]

B. THE MAJORITY'S ANALYSIS OF WHETHER THE FORFEITURE IS PUNITIVE IN NATURE

The Court quickly concluded that forfeiture, ordered under § 982,[87] is punitive in nature.[88] Section 982 mandates that, in passing sentence upon a person convicted under the reporting requirement of § 5316,[89] a court will forfeit all property involved in or traceable to that offense.[90] The Court further noted that

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and ratified. *See id.* For example, fines for offenses are defined as, "amends, pecuniary punishment, or recompence for an offense committed against the King and his laws, or against the Lord of a manor." *Browning-Ferris,* 492 U.S. at 265 (citing 2T CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (unpaginated) (1771)).

In *Browning-Ferris*, the Court held that the excessive fines clause does not limit the amount of punitive damages awarded to a party in a civil action when the government has not prosecuted the action and has no claim to receive a share of the award. *See Browning-Ferris* 492 U.S. at 265.

[85] *See Bajakajian,* 524 U.S. at 328 (citing Austin v. United States, 509 U.S. 602, 609-610 (1991)). In *Austin*, the Court held that the Excessive Fines Clause applied to drug-related forfeitures of property to the government under 21 U.S.C. §§ 881(a)(4) and 881 (a)(7). *See Austin*, 509 U.S. at 604.

[86] *See Bajakajian*, 524 U.S. at 328.

[87] 18 U.S.C. § 982(a)(1) (1999). Section 982(a)(1) provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of . . . § 5316 . . .of title 31. . . , shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1999).

[88] *See Bajakajian*, 524 U.S. at 328.

[89] 31 U.S.C. § 5316(a). The statutory reporting requirement of § 5316(a)(1), in pertinent part accords: "a person shall file a report . . . when knowingly transports, is about to transport, or has transported, monetary instruments of more than $10,000 at any one time . . . from a place in the United States to or through a place outside of the United States." 31 U.S.C. § 5316(a)(1) (1999).

[90] *See Bajakajian*, 524 U.S. at 325.

the forfeiture must be considered punitive because it requires that the person be convicted of a felony and therefore, has a built-in "innocent owner defense."[91] Justice Thomas dismissed the government's argument that the forfeiture could not be considered fully punitive because is also had a significant remedial purpose.[92] The Court explained that a forfeiture is truly remedial in nature only if it is designed to compensate the government for a loss.[93] Justice Thomas specifically noted that simply because a forfeiture serves some remedial purpose does not necessarily mean that it will be considered non-punitive, and therefore escape scrutiny under the Excessive Fines Clause.[94]

C. THE MAJORITY'S ANALYSIS OF CIVIL *IN REM* FORFEITURES

The Court next examined the government's assertion that because the forfeiture in the instant case resembled those, which were historically associated with "tainted property," it should not fall under the purview of the Eighth Amendment.[95] Because the government's theory behind this class of forfeiture was that the action was taken directly against the property, or *in rem,*[96] and therefore non-

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[91] *See id.* (citing Austin v. United States, 509 U.S. 602, 619 (1991)). In *Austin*, the Court stated that there was nothing in the forfeiture provision that served to, "contradict the historical understanding of forfeiture as punishment." *See Austin*, 509 U.S. at 619. Further, the Court noted that the inclusion of an innocent owner defense in the statute evinces a congressional intent to punish only those involved in criminal activity. *See id.*

[92] *See Bajakajian*, 524 U.S. at 329 (citing Brief for Petitioner at 20, Bajakajian v. United States, 524 U.S. 321 (1998) (No. 96-1487)). The government contended that it had a sovereign interest in regulating goods and property that enter or leave the county. *See* Brief for Petitioner at 20-21. (citing United States v. Ramsey, 431 U.S. 606, 616-619(1977) (justifying searches that would violate the Fourth Amendment under normal analysis at border crossings)). The government further argued that the forfeiture of unreported funds serves as both a vital tool in investigating ongoing crime and an important deterrent function. *See* Brief for Petitioner at 21.

[93] *See Bajakajian*, 524 U.S. at 326. The Court stated that a remedial action is one brought for the purpose of compensation. *See id.* Further, the government asserted that, "loss of information" is not a loss that can be remedied through forfeiture. *See id.* (quoting BLACK'S LAW DICTIONARY 1293 (6th ed. 1990)).

[94] *See id.* at 329 n.4. The Justice pointed out that even if the government was to successfully argue that the forfeiture served some remedial purpose, it would still serve to punish the Respondent and thus be subject to review under the Eighth Amendment. *See id.*

[95] *See id.* at 329-330 (citing Brief for Petitioner at 16, Bajakajian v. United States, 524 U.S. 321 (1998) (No. 96-1487)).

[96] A technical term used to designate proceedings or actions instituted *against the thing.* BLACK'S LAW DICTIONARY 793 (6th ed. 1990) (emphasis in original).

punitive in nature, the Court rejected the theory.[97] The Justice further explained that the logic associated with an *in rem* proceeding is inapplicable to the present case because an *in rem* action involves a forfeiture, which can occur irrespective of any criminal prosecution and in the absence of any illegal activity by the owner of the property.[98] Further, due to the non-punitive nature of proceedings *in rem*, there is usually an absence of double jeopardy implications.[99] Accordingly, the Court rejected the government's characterization of this proceeding as an action *in rem*.[100]

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[97] *See Bajakajian*, 524 U.S. at 326-327 (citing Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931); R. WAPLES, PROCEEDINGS IN REM 13, 205-209 (1882)).

[98] *See id.* at 327. Justice Thomas provided an in depth explanation of how an *in rem* proceeding differs from the instant case, which involved a criminal prosecution and punitive forfeiture. Justice Thomas stated that "[t]he 'guilty property' theory behind *in rem* forfeiture can be traced back to the Bible, which describes property being sacrificed to God as a means of atoning for an offense." *Id.* at 330 n. 5 (citing 2 Kings Exodus 21:28).

The justice further explained that "[h]istorically, the conduct of the property owner was irrelevant; indeed, the owner of the forfeited property could be entirely innocent of any crime." *Id.* (quoting Origet v. United States, 125 U.S. 240, 246 (1888)). Finally, Justice Thomas opined that "[t]he thing is here considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum* [an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law—BLACK'S LAW DICTIONARY 960 (6th ed. 1990)], or *malum in se* [an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral and public law—BLACK'S LAW DICTIONARY, 959] . . . . The practice has been, and so this Court understands the law to be, that the proceeding *in rem* stands independent of, and totally unaffected by any criminal proceeding *in personam*." *Id.* (quoting The Palmyra, 25 U.S. 1, 14 (1827)).

[99] *See Bajakajian*, 524 U.S. at 331-332. As a result, after either a conviction or acquittal on criminal charges, and resulting forfeiture, a civil forfeiture proceeding against the property is not barred. *See id.* In a footnote, Justice Thomas stated, "[b]ecause some recent federal forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture, we have held that a modern statutory forfeiture is a "fine" for Eighth Amendment purposes if it constitutes punishment even in part, regardless whether the proceeding is styled *in rem* or *in personam*." *Id.* at 328 (citing Austin v. United States, 509 U.S. 602, 621-622 (1991)). Thus, even if the Court accepted the government's argument that the forfeiture was actually a proceeding *in rem*, it could still be subject to Eighth Amendment scrutiny. *See id.*

[100] *See Bajakajian*, 524 U.S. at 331-332. The Court concluded that the action at bar had none of the distinguishing marks of an action against the property because the law depends on a criminal conviction, serves no real remedial purpose, provides for an innocent owner defense and is aimed at punishing the miscreant. *See id.*

D. THE MAJORITY'S ANALYSIS OF CRIMINAL *IN PERSONAM* FORFEITURE

Justice Thomas next explained that a forfeiture, pursuant to § 982,[101] appears to have all of the pertinent characteristics of an *in personam* criminal forfeiture.[102] Although criminal forfeitures were an integral part of English common law, the Court noted that the concept was rejected in the United States until 1970, when the Organized Crime Control Act[103] and Comprehensive Drug Abuse Prevention and Control Act[104] were passed.[105] As the forfeiture provision of § 982[106] constitutes an element of the penalty for the offense, the Court characterized it squarely as a criminal proceeding *in personam*.[107]

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[101] 18 U.S.C. § 982(a)(1) (1999). Section 982(a)(1) provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of . . . § 5316 . . . of title 31. . . , shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1999).

[102] *See Bajakajian*, 524 U.S. at 332. *In personam* criminal forfeitures were historically part of the penalty levied against those convicted of treason and other felonies at common law starting in the Middle Ages. *See id.*

[103] 18 U.S.C. § 1963 (1999). This act is commonly known as the Racketeer Influenced and Corrupt Organizations Act or R.I.C.O for short.

[104] 21 U.S.C. § 848(a) (1999). This act is commonly referred to as the Continuing Criminal Enterprise or "Drug King Pin" act.

[105] *See Bajakajian*, 524 U.S. at 332, n.7. In the early history of the United States, criminal forfeiture was firmly rejected by Congress on several occasions. *See id.* The concept was resurrected to meet the unique challenges presented to law enforcement by large-scale drug trafficking and modern organized crime. *See id.* "Criminal forfeiture . . . represents an innovative attempt to call upon our common law heritage to meet an essentially modern problem." *See id.* (quoting S. Rep. No. 91-617, at 79 (1969)).

[106] 18 U.S.C. § 982(a)(1) (1999). Section 982(a)(1) provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of . . . § 5316 . . . of title 31 . . . , shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1999).

[107] *See Bajakajian*, 524 U.S. at 332.

E. THE MAJORITY'S ANALYSIS OF WHAT CONSTITUTES EXCESSIVENESS UNDER THE EIGHTH AMENDMENT

Examining the government's argument[108] and the Ninth Circuit's rationale,[109] Justice Thomas rejected both.[110] The Court declared it irrelevant whether or not the currency involved is deemed to be an instrumentality of the crime because ultimately the forfeiture is punitive.[111] The Justice explained that when a forfeiture is punitive, the correct test for excessiveness, as required by the Eighth Amendment, involves only a determination of proportionality.[112]

After noting the major role that the principle of proportionality plays in an analysis under the Excessive Fines Clause, the Court announced that a fine violates the Eighth Amendment if the amount is grossly disproportional to the transgression committed by the defendant.[113] Next, the Justice recognized that, while the text and legislative history of the Excessive Fines Clause require proportionality as a integral principle, they offer practically no aid in determining what lack of proportionality should be considered excessive.[114]

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[108] The government asserted that the currency at issue was an instrumentality of the crime and should therefore, be subject to forfeiture. *See* Brief for Petitioner at 20, Bajakajian v. United States, 524 U.S. 321 (1998) (No. 96-1487). The Court noted that traditionally an instrumentality has been something that has actually been used to perpetrate a crime. *See* Bajakajian, 524 U.S. at 333, n.8 (citing Austin v. United States, 509 U.S. 602, 627-628 (1991) (Scalia, J., concurring in part and concurring in the judgment)). Instrumentalities are guilty property that may be proceeded against *in rem*, when the government seeks to punish the offender, the forfeiture is subject to scrutiny under the Eighth Amendment. *See id.*

[109] See *supra* text accompanying notes 58-64.

[110] *See Bajakajian*, 524 U.S. at 333-334.

[111] *See id.*

[112] *See id.*

[113] *See id.* "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* (citing Austin 509 U.S. at 622-623).

[114] *See Bajakajian*, 524 U.S. at 335-336. The Court discussed the text and history of the Eighth Amendment at some length. First, the Court attempted to define the word excessive: "excessive means surpassing the usual, the proper, or a normal measure of proportion." *Id.* at 336 (citing 1 N. WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

Next, Justice Thomas noted that the Excessive Fines Clause was taken verbatim from the English Bill of Rights of 1689 and explained that it was adopted in reaction to abuses that had occurred in the past. *See id.* (citing Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266-267 (1989)). The majority then examined several recorded cases from

After reasoning that the text and history of the clause provide little guidance, the Court announced two principles, which must be employed in making the proper determination of proportionality.[115] The first principle, proclaimed by the Court, was that judgments regarding the gravity of punishment should be resolved by the legislature.[116] The Justice noted that a similar principle of deference has been used frequently by the Court while interpreting the Cruel and Unusual Punishment Clause of the Eighth Amendment.[117] As a second controlling principle, the Court declared that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise."[118] The majority then recognized that a requirement of strict-proportionality between the crime and the amount of the fines would be at odds with the two controlling principles.[119] The Court determined that the proper standard for examining forfeitures under the Excessive Fines Clause would be "gross disproportionality."[120] Accordingly, the Court reasoned, "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."[121]

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that period in an attempt to determine what sort of proportionality would be unacceptable. *See id.* Finally, the Court quoted from the Magna Carta:

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

See id. (quoting Magna Carta, 9 Hen. III, ch 14 (1225), 1 Stat. at Large 6-7 (1762 ed.)).

[115] *See id.* at 336.

[116] *See id.*

[117] *See id.* (citing Solem v. Helm, 463 U.S. 277, 290 (1983) ("[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes")); *see also* Gore v. United States, 357 U.S. 386, 393 (1958) (holding that "[w]hatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy")).

[118] *See Bajakajian*, 524 U.S. at 336.

[119] *See id.*

[120] *See id.*

[121] *See id.* at 337.

F. THE MAJORITY'S APPLICATION OF THE NEWLY FORMULATED STANDARD TO THE FACTS OF THE CASE

Applying the Court's standard to the facts of the case, Justice Thomas specifically announced that the only question before the Court was whether a forfeiture of the entire amount of $357,144 would violate the Excessive Fines Clause.[122] Examining the respondent's level of culpability for the violation, the Court determined that his crime was only a reporting offense,[123] and the failure to report was not related to other criminal activity.[124] The majority then examined the sentencing guidelines for the offense.[125] The Court asserted that the respondent was only culpable at a minimal level.[126]

Subsequently, the majority calculated the amount of harm caused by respondent's failure to report that he was transporting the currency out of the country.[127] The Court found that the only party affected by the failure to report was

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[122] *See id.* at 337 n.11. The Court elaborated that the determination that forfeiture of the entire amount would be excessive "reflects no judgment" that a forfeiture of an intermediate amount would be excessive, nor does it affirm the lower court's judgment that a forfeiture of $15,000 is proportional. *See id.* The Justice further clarified that the decision of the Court in no way dictates whether a court may disregard the terms of a statute that requires a forfeiture. *See id.*

[123] *See id.* at 337. It was not illegal for the respondent to take the currency out of the county as long as he reported that fact to the proper authorities. *See id.* Under § 982(a)(1), only a "willful" violation of the reporting requirement facilitates forfeiture. *See* 18 U.S.C. § 982(a)(1) (1999). As a result, the essential crime was the failure to report the money to customs officials. *See Bajakajian*, 524 U.S. at 337. The Court elaborated that the suspicious circumstances surrounding the incident at the airport and the fact that the respondent "lied" to customs officials by offering differing accounts, has no bearing on determining the level of culpability. *See id.* at 337-338 n.12. The statute demands forfeiture for failure to report, not for lying to officials. *See id.*

[124] *See Bajakajian*, 524 U.S. at 338. The Justice accepted the lower court's determination that the currency was derived from a lawful source and the respondent had intended to use the money to repay a lawful debt. *See id.* The Court observed, "[w]hatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: he is not a money launderer, a drug trafficker, or a tax evader." *Id.*

[125] *See id.* The maximum sentence for the offense committed by respondent, not including the forfeiture provided by § 982, is six months imprisonment and/or a fine of not more than $5000. *See id.* The Court was careful to note that the maximum penalties available under the statute were up to five years imprisonment and a fine of up to $250,000, thereby illustrating the respondent's level of culpability under the statute. *See id.* at 339 n.14.

[126] *See id.* at 339.

[127] *See Bajakajian*, 524 U.S. at 339.

the government, and then only in a trivial manner.[128] Additionally, Justice Thomas concluded that there had been "no fraud on the United States" and "no loss to the public fisc."[129]

Weighing the magnitude of the offense committed by the respondent with the forfeiture of the full amount of $357,144, the Court determined that the amount would be "grossly disproportional" to the crime committed and thus unconstitutional.[130] If the entire amount were subject to forfeiture, the Court stated that the penalty imposed would bear "no articuable correlation to any injury suffered by the government."[131]

Justice Thomas next considered the government's argument that the forfeiture of the full amount was permissible based on customs laws passed by the First Congress.[132] The original laws required either forfeiture of the full amount, or fines equivalent to the full amount, for offenses.[133] The Court rejected this argument, finding that the forfeitures based on the early customs laws were proceedings *in rem* and therefore not analogous to the instant case.[134]

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[128] *See id.* The Court explained that, had this crime gone undetected, the only loss to the government would be the information that the currency had left the country. *See id.* The Court squarely rejected the government's contention that the amount of currency forfeited is somehow proportional to the value of the information of which the government would have been deprived. *See id.*

[129] *See id.*

[130] *See id.* at 339-340.

[131] *See id.* at 340.

[132] *See supra* text accompanying note 14.

[133] *See Bajakajian*, 524 U.S. at 340. The government contended that the passage of those measures during the same period that the Eighth Amendment was adopted, suggests that full forfeiture is proportional for a violations of customs laws, and should thus be held to comport with the Eighth Amendment. *See id.*

[134] *See id.* "Such forfeitures sought to vindicate the Government's underlying property right in customs duties, and like other traditional *in rem* forfeitures, they were not considered at the founding to be punishment for the offense . . . . They therefore indicate nothing about the proportionality of the punitive forfeiture at issue here." *Id.* The Court considered these historical forfeitures to be *in rem* regardless of whether they involved the forfeiture of the goods themselves or a fine of an equivalent amount. *See id.*

V. THE DISSENT

In a dissent written by Justice Kennedy,[135] four Justices strongly criticized the majority's analysis.[136] Additionally, the dissent denigrated the majority opinion by casting the decision as "disrespectful to the separation of powers."[137] Justice Kennedy further warned that the majority's decision might have the effect of narrowing the constitutional protection provided by the Excessive Fines Clause.[138] The dissent accused the majority of removing the entire class of *in rem* forfeitures from scrutiny under the Eighth Amendment.[139]

A. THE DISSENT'S ANALYSIS OF REMEDIAL VERSUS PUNITIVE FINES

The dissent began by examining the majority's conclusion that "remedial" penalties are not punitive in nature and therefore, not subject to Eighth Amendment scrutiny regardless of the amount forfeited.[140] Justice Kennedy explained that by giving so much weight to the classification of the fine, either as punitive or remedial, the Court confused the question of whether or not the fine is punishment with the proper question of whether the fine is excessive.[141] The Justice further highlighted the irony of the classification system adopted by the majority.[142] Under the majority's system of classification, a fine of far less than the amount of the goods or currency will be subject to constitutional scrutiny if it is

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[135] Justice Kennedy was joined in dissent by: Chief Justice Rehnquist, Justice O'Connor and Justice Scalia. *See id.* at 333 (Kennedy, J., dissenting).

[136] *See id.* at 334 (Kennedy, J., dissenting).

[137] *See id.*

[138] *See id.* at 345 (Kennedy, J., dissenting).

[139] *See Bajakajian*, 524 U.S. at 347 (Kennedy, J., dissenting).

[140] *See id.* at 344-345 (Kennedy, J., dissenting). "[T]he majority holds that customs fines are remedial and not at all punitive, even if they amount to many times the duties due on the goods." *Id.*

[141] *See id.* at 346 (Kennedy, J., dissenting). Justice Kennedy cited a long line of statutes and cases that support the idea that customs laws, through the use of forfeiture, often far exceed the value of the duty owed and therefore, can only be considered as punishment for violating the law. *See id.*

[142] *See id.* at 345 (Kennedy, J., dissenting).

characterized as punitive.[143] Conversely, a forfeiture of the entire amount could escape any scrutiny if characterized as merely remedial in nature.[144] In addition, the dissent asserted that the majority based its logic on the misguided assumption that all *in rem* forfeitures, in the customs context, are based on the failure to pay duties owed to the government.[145] The Justice continued, "[t]he majority nonetheless treats the historic penalties as non-punitive and thus not subject to the Excessive Fines Clause, yet they are indistinguishable from the fine in this case."[146]

Next, the dissent applied the Court's methodology to reach a different result.[147] Although the majority distinguished *One Lot Emerald Cut Stones v. United States,*[148] the dissent perceived no logical difference between a "remedial" fine for smuggling emeralds and a "punitive" fine for smuggling currency.[149] Justice Kennedy could not reconcile the failure to pay a small duty in one instance and the failure to report in the other, when both situations have such dramatically differing results under the reasoning of the Court.[150] The dissent then stated that "the majority, in short, is not even faithful to its own artificial category of remedial penalties."[151]

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[143] *See id.*

[144] *See id.*

[145] *See Bajakajian*, 524 U.S. at 346 (Kennedy, J., dissenting). Justice Kennedy cited numerous examples of offenses that did not require the payment of a duty and pointed out that these penalties were considered *in personam* and totally independent of any "loss to the government." *Id.* (citing Act of Mar. 3, 1863, § 1, 12 Stat. 783 (importing goods under false invoices); Act of Mar. 3, 1823, ch. 58, § 1, 3 Stat. 781 (failure to deliver ships manifest); Act of Mar. 2, 1799, § 28, 1 Stat. 648 (transferring goods from one ship to another); 5 Rich II, st. 1, ch. 2 (1381) (Eng.) (exporting gold or silver with out a license)).

[146] *See id.* at 346 (Kennedy, J., dissenting). The Justice further criticized the majority for speaking in terms of "non-punitive penalties." *See id.*

[147] *See id.*

[148] 409 U.S. 232 (1972) (holding that forfeiture of the smuggled goods, in addition to a fine, is remedial because it serves the purpose of reimbursing the government for the expenses associated with the enforcement and investigation of the crime).

[149] *See Bajakajian*, 524 U.S. at 347 (Kennedy, J., dissenting).

[150] *See id.* (citing Bollinger's Champagne, 70 U.S. 560, 564 (1866) (holding that the filing of a false customs form can justify forfeiture even when the discrepancies do not affect the amount of duty that is paid)).

[151] *See id.*

B. THE DISSENT'S INSTRUMENTALITY ANALYSIS

Justice Kennedy criticized the majority for holding that the currency involved is not an instrumentality of the crime.[152] Furthermore, the dissent did not agree with the proposition that the forfeiture of an instrumentality of a crime is not actually a fine when it occurs through a proceeding *in rem*.[153] The dissent disagreed with the Court's classification of the currency in the instant case as merely incidental to the offense versus a car, which is used to transport illegal material, as instrumental.[154] Justice Kennedy pointed out that logic dictates the opposite result, as the currency is essential for any currency smuggling offense, but contraband can certainly be transported without a car.[155] While the dissent failed to discern a material difference between incidental objects and instrumentalities, it chided the majority for reaching the wrong result when its own distinction was used.[156]

C. THE DISSENT'S ANALYSIS OF EXCESSIVENESS

While agreeing that the "gross disproportionality" test was a proper standard by which fines should be judged under the Excessive Fines Clause, the dissent disagreed with the majority's application of the test.[157] Specifically, Justice Kennedy stated that the crime of smuggling currency was serious and the violation was willful; therefore, the Justice criticized the majority for not explaining how a forfeiture of the full amount is grossly out of proportion to the crime.[158] While the Court announced that it was giving "substantial deference" to the

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[152] *See id.* The dissent proffered that the point of conducting an instrumentality inquiry is an attempt to distinguish between the objects that are merely incidental to a crime from those that "have a close enough relationship to the offense" to be termed instrumental. *See id.* (citing Austin v. United States, 509 U.S. 602, 628 (1991) (Scalia, J., concurring in part and concurring in the judgment)).

[153] *See id.*

[154] *See id.*

[155] *See Bajakajian*, 524 U.S. at 347-348 (Kennedy, J., dissenting).

[156] *See id.* at 348 (Kennedy, J., dissenting).

[157] *See id.* Justice Kennedy described the test annunciated by the majority as: "a defendant must prove a gross disproportion before a court will strike down the fine as excessive." *Id.*

[158] *See id.* at 349 (Kennedy, J., dissenting).

authority of the legislature, the dissent asserted that the majority's holding implies the opposite.[159] Justice Kennedy explained that the legislature made the crime punishable by a jail term, a substantial fine, and the forfeiture at issue.[160] However, the ruling affirmed by the majority subjected the respondent only to a small fine and a forfeiture of only ten percent of what the statute commands.[161]

The dissent next asserted that forfeiture of the full amount should pass constitutional scrutiny whenever there is a willful violation of the reporting requirement.[162] Justice Kennedy then used the facts of the instant case to illustrate the difficulty in linking smuggled currency to other crimes that would allow for enhanced penalties under the standard espoused by the majority.[163] The dissent explained that the aim of this statute[164] was to deter the efforts of drug dealers, tax evader's and money launderers.[165] Further, the justice stated that these offenses are often very difficult to prove, thereby reducing the amount of forfeiture because a link to other crimes which are less apparent will remove the teeth from

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[159] *See id.* at 340 (Kennedy, J., dissenting). The dissent was completely at odds with the majority's claim of legislative deference, and stated: "Congress deems the crime serious, but the Court does not." *Id.* Justice Kennedy then included information from the legislative history of the measure for the purpose of explaining the seriousness of the offense and the importance of the forfeiture provision. *See id.* (citing H.R. Rep. No. 91-975, at 12-13).

[160] *See id.* at 348.

[161] *See Bajakajian*, 524 U.S. at 348-349 (Kennedy, J., dissenting).

[162] *See id.* at 352.

[163] *See id.* at 352-353. The facts as reported by the dissent: the respondent purposefully lied to customs officials because after he was informed of his duty to report currency, the respondent failed to do so, telling customs inspectors that he and his wife had 15,000 between them which was about $342,000 shy of the actual amount. *See id.*

Respondent then told customs officials that a friend had lent him $200,000, whereafter the friend denied this. *See id.* A month later, respondent told officials that another friend had lent him $170,000 of the money, yet this friend also denied that he had made the loan and informed customs that respondent had asked him to lie. *See id.*

[164] 18 U.S.C. § 982(a)(1) (1999). Section 982(a)(1) provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of . . § 5316 . . . of title 31. . . , shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1) (1999).

[165] *See Bajakajian*, 524 U.S. at 351 (Kennedy, J., dissenting).

the statute.[166] The dissent stated that "[m]oney launderers will rejoice to know that they face forfeitures of less than 5% of the money transported, provided they hire accomplished liars to carry their money for them."[167] The dissenting Justices explained that Congress made an informed decision in determining the penalty for failure to report currency and the majority "is in serious error to set it aside."[168]

D. THE DISSENT'S WARNING OF FUTURE REPERCUSSIONS STEMMING FROM THE HOLDING OF THE MAJORITY

Justice Kennedy warned that the holding in the instant case could have the effect of undermining the original intention of the Eighth Amendment's prohibition on excessive fines.[169] Additionally, the dissent asserted that the decision declared that all *in rem* forfeitures are non-punitive and thus, outside the reach of the Eighth Amendment protection.[170] By limiting the amount subject to forfeiture in an *in personam* proceeding, the Justice explained that this decision will force the legislature to enact statutes providing solely for *in rem* forfeitures which will extend beyond scrutiny.[171] "By invoking the Excessive Fines Clause with excessive zeal, the majority may in the long run encourage Congress to cir-

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[166] *See id.* at 353-354 (Kennedy, J., dissenting). The Justices explained further that, although the respondent continually lied to the officials, the district court still found that a forfeiture of the full amount would be excessive. *See id.* Therefore, the dissent seemed to stand for the proposition that unless a clear link can be established between the currency and another crime, a forfeiture of the full amount will not pass constitutional scrutiny. *See id.*

[167] *Id.* at 354 (Kennedy, J., dissenting). The dissent illustrated that 5% is less than an amount that might be paid to a bank or brokerage house and will therefore, have very little deterrent effect. *See id.* "[T]he fine permitted by the majority would be a modest cost of doing business in the world of drugs and crime." *Id.*

[168] *See id.*

[169] *See id.* at 354-355 (Kennedy, J., dissenting). The dissent explained that the original purpose of the clause was to prevent the monarch from levying fines beyond an enemy's ability to pay and thus be able to imprison them indefinitely. *See id.* As a result of this decision, the legislature may enact longer jail sentences in lieu of forfeiture. *See id.* This would have a similar effect to what the Excessive Fines Clause was aimed at preventing. *See id.*

[170] *See id* at 355 (Kennedy, J., dissenting).

[171] *See Bajakajian*, 524 U.S. at 355 (Kennedy, J., dissenting). The dissent explained that another future problem will result from the fact that an *in rem* proceeding provides fewer procedural safeguards, such as a requirement of willfulness or an innocent owner defense. *See id.* at 342-343 (Kennedy, J., dissenting).

cumvent it."[172]

VI. CONCLUSION

While many of the principles announced by the Majority are sound, the decision is flawed in two major respects. First, all fines imposed by the government on its citizens should be considered punishment for Eighth Amendment purposes. Second, deference given to the legislature in determining adequate punishment for offenses should be far greater than that shown by the Court.

A. ALL FORFEITURES SHOULD BE CONSIDERED PUNISHMENT AND THUS SUBJECT TO EIGHTH AMENDMENT SCRUTINY

It has been clearly established by the Court that a forfeiture can be considered a fine for Eighth Amendment purposes.[173] However, the Court has also inferred that, for a forfeiture to be protected by the Excessive Fines Clause, it must be "punitive" in nature.[174] The Court elaborated that for a forfeiture to be punitive, it must be levied as punishment for committing an offense.[175] In making this distinction, the Court appears to have removed the entire class of *in rem* forfeitures from scrutiny under the Amendment. Because *in rem* forfeitures are based on the legal fiction that the proceeding is against the guilty property itself, and not the owner, the Court explained that *in rem* forfeitures could not be deemed punitive.[176]

The distinction drawn by the Court is unsound. All fines and all forfeitures serve at least in part, to punish the owner of the property regardless of how the

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[172] *See id.* at 355 (Kennedy, J., dissenting). Justice Kennedy asserted that "[n]on-remedial fines may be subject to deference in theory but overbearing scrutiny in fact," and therefore, "[s]o-called remedial penalties, most *in rem* forfeitures, and perhaps civil fines may not be subject to any scrutiny at all." *Id.* at 356 (Kennedy, J., dissenting). Possibly as a result of similar concerns, on June 24, 1999 the U.S. House of Representatives enacted H.R. 1658 (roll no. 254). This measure, commonly referred to as the "Civil Asset Forfeiture Reform Act" requires, in part, that the government meet a higher burden of proof before a civil forfeiture action may be completed.

[173] *See Bajakajian*, 524 U.S. at 327.

[174] *See id.* at 332.

[175] *See id.*

[176] *See id.* at 330.

mechanism for effectuation is classified.[177] The aim of the Eighth Amendment Excessive Fines Clause was to protect citizens from the imposition of excessive fines by the government.[178] The protections guaranteed by the Eighth Amendment should not be sidestepped through the use of a legal fiction, regardless of how ancient its origin.[179]

B. THE COURT SHOULD GIVE GREATER DEFERENCE TO THE LEGISLATURE IN FORMULATING PUNISHMENT FOR OFFENSES

While the "gross disproportion" standard announced by the Court is sound, the Court significantly erred in its application to the present case. Congress made the determination that a willful violation of the reporting requirement was punishable by imprisonment, a fine and the forfeiture of all currency involved.[180] Regardless of the respondent's level of culpability under the statute,[181] all of the currency involved was subject to forfeiture. The duty of the district court was clear; it should have evaluated only the level of the respondent's culpability to determine the level of fine to impose and whether or not to sentence him to prison.

The district court should not have substituted its judgment for that of the legislature in determining whether or not the crime was "serious." The district court

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[177] It is hard to imagine that the owner of the property which is seized by the government will feel any less victimized if the mechanism for vesting permanent title to the government is considered civil rather than criminal. Either way, the government has taken the property.

[178] *See supra* text accompanying notes 12-27.

[179] Some scholars advance the view that civil forfeiture should be abandoned in favor of the use of substantially revised, purely criminal forfeiture actions. *See generally* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241 (1994).

[180] *See* 31 U.S.C. § 5322(a) (1999). Section 5322(a) states that the penalty for the willful violation of the reporting requirement of § 5316, will be subject to a fine of not more than $250,000 or up to a maximum of five years imprisonment, or both. *See id.*; *see also* 18 U.S.C. § 982(a)(1) (1999). Section 982(a)(1) provides in pertinent part: "The court, in imposing sentence on a person convicted of an offense in violation of . . . § 5316 . . . of title 31 . . . , shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." *Id.*

[181] The statute provides differing levels of punishment based on the circumstances of the offense. *See* 31 U.S.C. § 5322(a) (1999). Section 5322(a) states that the penalty for the willful violation of the reporting requirement of § 5316, will be subject to a fine of not more than $250,000 or up to a maximum of five years imprisonment, or both. *See id.*

judge's reasoning serves to greatly bolster this assertion.[182] The district court substituted its own judgment for that of the legislature, as to what an appropriate penalty should be.[183] This is repugnant to the separation of powers, regardless of whether constitutional terms are employed. The fact that this decision was in effect ratified by the United States Supreme Court makes the implications far worse.[184] Congress has the sole authority to make federal law.[185] Congress made the informed decision that removing large amounts of unreported currency from the United States was a serious enough offense to warrant forfeiture of all currency involved.[186] Therefore, the Court should give deference to the legislature's decision. This decision is analogous to the Court's utilization of the Cruel and Unusual Punishment Clause to determine that a 25-year prison sentence for murder is excessive when the murderer is a "good person" and the victim's death had no real harmful impact on society.

Justice Kennedy is correct in the assertion that "money launderers will rejoice" as a result of this decision.[187] The majority's holding sends a clear message that as long as the government cannot clearly connect the currency to other crimes, a forfeiture of the entire amount will violate the Eighth Amendment. This decision may have a serious impact on the government's ability to combat dangerous criminal activity.[188] The forfeiture at issue in this case was not of the

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[182] The district court judge concluded that the money came from legitimate sources even though the respondent was never able to give a substantiated explanation as to its source and purposefully mislead customs officials. Further the judge asserted that respondent failed to report the currency due to "cultural differences and a general distrust for the government." *See* United States v. Bajakajian, 524 U.S. 321, 324 (1998) (quoting Tr. Of Oral Arg. 30).

[183] *See* Bajakajian, 524 U.S. at 324. The district court determined that while forfeiture of the full amount would be "too harsh," the maximum fine allowed was "too little,' and tailored the amount forfeited to "make up for what I think a reasonable fine should be." *Id.*

[184] The Supreme Court stated that the only question before it was whether the forfeiture of the full amount would violate the Eighth Amendment. *See id.* However, by affirming the decision of the district court, the Court failed to send a message discouraging courts from ignoring the mandates of the federal law and fashioning penalties as they see fit.

[185] *See generally* U.S. CONST. art. I.

[186] *See* 31 U.S.C. § 5322(a) (1999). Section 5322(a) states that the penalty for the willful violation of the reporting requirement of § 5316, will be subject to a fine of not more than $250,000 or up to a maximum of five years imprisonment, or both. *See id.*

[187] *See Bajakajian*, 524 U.S. at 354 (Kennedy, J., dissenting).

[188] It is apparent that it will be often difficult to connect currency to other criminal activity. The reason cash is used in conducting nefarious enterprises is due to its anonymity. By

sort contemplated by the Framers in adopting the Eighth Amendment. In affirming this decision, the Court erred severely in its application of otherwise sound principles.

forfeiting the currency, which is being smuggled out of the country, the government prevents any future illegal use. Forfeited money will not return to this country in the form of drugs, weapons, or other dangerous substances.