How Much Is Too Much?
A Test to Protect Against Excessive Fines

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Fines are the most common form of punishment in the United States and are disparately imposed against poor people of color. The stories of fines ruining lives abound. Yet until last year, in most state courts, it was not clear whether a person could challenge financial punishment imposed against them as unconstitutional. That changed when the Supreme Court held in Timbs v. Indiana *that the Eighth Amendment's Excessive Fines Clause applies to the states.*

Despite the fact that all state and federal courts must now be equipped to decide whether financial punishment violates the Eighth Amendment, the Supreme Court has not provided a concrete test for deciding whether a fine is constitutionally excessive. It has only said that a fine is excessive if it is "grossly disproportional" to the gravity of the offense.

This Article provides the guidance lacking in the Court's case law by supplementing the "grossly disproportional" test. After examining the Court's Eighth and Fourteenth Amendment jurisprudence, it offers four factors for courts to consider when deciding whether a fine is excessive: (1) whether the defendant is able to pay the fine; (2) whether fines are a significant revenue source in the sentencing jurisdiction; (3) whether other jurisdictions impose similar fines for similar crimes; and (4) whether the sentencing jurisdiction disproportionately imposes fines against minority defendants.

As many courts decide for the first time whether fines are excessive, this Article serves as a roadmap to help guide the analysis.

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TABLE OF CONTENTS

I. INTRODUCTION

Harriet Cleveland, a grandmother from Missouri, was unable to pay her traffic tickets; she was arrested for nonpayment while at home feeding her grandson and spent ten days in jail.[1] Megan Sharp, a mother of three from Ohio, was fined hundreds of dollars for driving with a suspended license; when she could not make her monthly payments, she was forced to leave her home and to move in with family members.[2] Damian Stinnie, a twenty-four-year-old from

[1] Joe Otterson, *John Oliver Reveals How Traffic Tickets Can Ruin People's Lives*, WRAP (Mar. 23, 2015), https://www.thewrap.com/john-oliver-explains-out-how-traffic-tickets-can-ruin-peoples-lives-video/ [https://perma.cc/TEA3-NML4] (including a link to a video of John Oliver's segment on the devastating effects of fines).

[2] AM. CIVIL LIBERTIES UNION OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES 15 (Apr. 2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf [https://perma.cc/8ZED-DKG2].

Virginia recently diagnosed with lymphoma, owed $1000 in traffic fines; his debt forced him into homelessness.[3]

Fines are the most common form of punishment levied in the United States.[4] Make no mistake, fines ruin lives. They can create a perpetual cycle of poverty. What starts as a citation for a minor offense can end in jail time,[5] missed medical treatments,[6] joblessness,[7] and even homelessness.[8] Up until February 2019, in most state courts, it was not even clear whether a person could challenge a fine as unconstitutional, no matter how disastrous its effect. That changed when the Supreme Court held in *Timbs v. Indiana* that states, by virtue of the Fourteenth Amendment's Due Process Clause, are bound by the Eighth Amendment's Excessive Fines Clause,[9] which plainly proclaims excessive fines shall not be imposed.[10]

In the 1998 case, *United States v. Bajakajian*, the Supreme Court for the first time announced a test for deciding whether a fine is excessive in violation of the Eighth Amendment: if a fine is "grossly disproportional to the gravity of the defendant's offense," it violates the Eighth Amendment.[11] It is far from clear what it means for a fine to be "grossly disproportional" to an offense, and the Supreme Court has not provided any further guidance.[12]

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[3] Justin Wm. Moyer, *Lawsuit on Va. License Suspension Is Revived*, HOUS. CHRON. (May 24, 2018), https://www.houstonchronicle.com/news/article/Lawsuit-on-Va-license-suspension-is-revived-12941768.php [https://perma.cc/L8W9-TGUR].

[4] Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIMINOLOGY 471, 472 (2018).

[5] *See* Jessica Brand, *How Fines and Fees Criminalize Poverty: Explained*, APPEAL (July 16, 2018), https://theappeal.org/fines-and-fees-explained-bf4e05d188bf/ [https://perma.cc/YU89-W5VU].

[6] *Id.*

[7] *Id.*

[8] Editorial, *States Across the Nation Are Criminalizing Poverty*, WASH. POST (May 27, 2018), https://www.washingtonpost.com/opinions/states-across-the-nation-are-criminalizing-poverty/2018/05/27/4637b048-5df6-11e8-a4a4-c070ef53f315_story.html?noredirect=on&utm_term=.5fc8e1ade86d [on file with *Ohio State Law Journal*].

[9] Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019). Some Justices have suggested that it is the Privileges or Immunities Clause that incorporates the Bill of Rights against the states. *See id.* at 691 (Gorsuch, J., concurring) (opining that the Privileges or Immunities Clause may be the appropriate clause for incorporation); *id.* at 691 (Thomas, J., concurring) (opining that the Privileges or Immunities Clause incorporates the Excessive Fines Clause).

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

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

[12] *See, e.g.*, Collins v. SEC, 736 F.3d 521, 527 (D.C. Cir. 2013) (lamenting the fact that "*Bajakajian* hardly establish[ed] a discrete analytic process"); David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 543 (2017) (explaining that the *Bajakajian* "standard has not proven to be a very useful guide for lower courts"); Matthew C. Solomon, *The Perils of Minimalism:* United States v. Bajakajian *in the Wake of the Supreme Court's Civil Double Jeopardy Excursion*, 87 GEO. L.J. 849, 884 (1999) (noting that *Bajakajian* "provides only limited guidance to future parties and the lower courts about the scope and applicability of the Excessive Fines Clause").

Given the lack of concrete guidance from the Supreme Court, federal courts have been preoccupied with defining gross disproportionality, divining their own Excessive Fines Clause tests by extrapolating from *Bajakajian*.[13] As a result, there is no uniform measure for deciding whether financial punishment violates the Eighth Amendment.

The need for guidance in this area is more important now than it has ever been before—*Timbs* made the question of what constitutes an "excessive fine" constitutionally relevant in all fifty states.[14] State courts need to know how to determine the constitutionality of financial punishment because now, in every state across the country, defendants can challenge fines imposed against them as violating the Constitution.[15]

Exacerbating the need for guidance is the fact that today, fines are the most common form of punishment.[16] And there are reasons to be skeptical about whether fines are being constitutionally meted out, given that a number of state and local governments rely on fines to satisfy budgetary needs.[17] Given the fact that jurisdictions are using financial punishment as a way to fund government, there is a real incentive to over-police and over-punish minor crimes.[18]

Not only that, jurisdictions across the country are disproportionality assessing fines against poor people of color.[19] The United States Commission

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[13] *See, e.g.*, Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 845–46 (2013) ("[E]ach circuit has had to develop its own version of the *Bajakajian* . . . multi-factor 'gross disproportionality' test, with the 'gross disproportionality' determination often characterized as an inherently fact-intensive inquiry.").

[14] *See Timbs*, 139 S. Ct. at 686–87.

[15] *See id.*

[16] *See* Martin et al., *supra* note 4, at 472 (noting that "[m]onetary sanctions are the most common form of punishment imposed by criminal justice systems across the United States").

[17] *See* Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1174–75 (2017) [hereinafter Colgan, *Lessons from Ferguson*]; DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 2 (2d ed. Nov. 2015), http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf [https://perma.cc/E4RA-YFUE].

[18] *See generally Developments in the Law—Policing*, 128 HARV. L. REV. 1706, 1723 (2015) (arguing that fees are a source of oppression for the poor); CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 1 (Sept. 2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf [https://perma.cc/XN2Q-CEZJ] [hereinafter CONFRONTING CRIMINAL JUSTICE DEBT] ("In many jurisdictions, court costs and surcharges fund the agencies responsible for imposing fees and fines on individuals.").

[19] U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS & CONSTITUTIONAL IMPLICATIONS 3 (Sept. 2017), https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf [https://perma.cc/GDC7-FXWU] ("Municipalities that rely heavily on revenue from fines and fees have a higher than average percentage of African American and Latino populations relative to the demographics of the median municipality.") [hereinafter TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR]; REBECCA VALLAS ET AL., CTR. FOR AM. PROGRESS,

on Civil Rights found that the one demographic most common among the jurisdictions that frequently impose fines was a large African American population.[20] This phenomenon is the outgrowth of other well-documented racial disparities in the criminal legal system, including racial disparities in who is stopped, arrested, prosecuted, and found guilty.[21] The disparate punishment of minorities raises more constitutional concerns about how fines are imposed today.

In the face of evidence that fines are being overused and abused, this Article provides guidance that has so far been lacking. The Article puts some much needed meat on the Supreme Court's barebones "grossly disproportional" test, and implores courts to consider, in addition to the gravity of the offense, the following four factors when deciding whether a fine is constitutionally excessive:

1. Whether the defendant is able pay the fine.
2. Whether fines are a significant revenue source in the sentencing jurisdiction.
3. Whether other jurisdictions impose similar fines for similar crimes.
4. Whether the sentencing jurisdiction disproportionately imposes fines against minority defendants.[22]

As the Article explains, these four factors guard against arbitrary and discriminatory sentencing. The factors ensure fines are meted out in furtherance of a legitimate penal purpose, not just to raise revenue. And while the four-factor test is novel, each factor fits squarely within existing Eighth and Fourteenth Amendment jurisprudence and is consistent with the Amendments' purposes.

The Article unfolds in three parts. First, it briefly lays out the modern-day realities of financial punishment. Second, it examines the Supreme Court's Excessive Fines Clause jurisprudence, including its decisions in *Bajakajian* and *Timbs*, and then discusses how lower courts have grappled with the Court's Excessive Fines Clause case law. And finally, the Article lays out the four factors and shows how they should be applied.

FORFEITING THE AMERICAN DREAM: HOW CIVIL ASSET FORFEITURE EXACERBATES HARDSHIP FOR LOW-INCOME COMMUNITIES AND COMMUNITIES OF COLOR 5–8 (Apr. 2016), https://cdn.americanprogress.org/wp-content/uploads/2016/03/31133144/032916_CivilAssetForfeiture-report.pdf [https://perma.cc/4HZY-TTAT] (detailing a number of jurisdictions that have marked racial disparities in terms of how forfeiture is used).

[20] *See* TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR, *supra* note 19, at 23.

[21] *See, e.g.*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4–5 (Mar. 2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf [https://perma.cc/5PKU-XNE5] [hereinafter FERGUSON REPORT] (explaining the racial disparities in the imposition of fines in Ferguson, Missouri).

[22] The test uses the word "fine" to track the language of the Eighth Amendment. As explained later, *see infra* Part III.A, criminal forfeitures are also a "fine" for Eighth Amendment purposes; they are therefore included within the test.

At bottom, the Article argues that courts should consider all four factors when deciding whether a defendant's financial punishment is constitutional, no matter how trivial the fine may seem at first blush. Whether it be a fifty dollar fine or one million dollar forfeiture, the same multi-faceted analysis should occur. Because, as the stories in the beginning show, what starts off as a "small" fine for a "minor" crime can, without exaggeration, devastate a person's life.

II. THE MODERN-DAY REALITIES OF FINES AND FORFEITURES

The Eighth Amendment to the United States Constitution forbids three things: "excessive bail," "excessive fines," and "cruel and unusual punishments."[23] The Supreme Court decided that the "cruel and unusual punishments" clause of the Eighth Amendment applies to the states by way of the Fourteenth Amendment over fifty years ago.[24] Since then, especially in the death penalty context, the Court has frequently opined on whether certain punishments are "cruel and unusual" in violation of the Constitution.[25]

This past Term, the Supreme Court ruled in *Timbs v. Indiana* that the Eighth Amendment's "excessive fines" clause also applies to the states.[26] This means that a "fine" levied by the state is subject to certain constitutional parameters—it cannot be "excessive."[27] Before discussing the present lay of the land, it is important to understand what is, what may be, and what is not, covered by the Excessive Fines Clause. First, to fall within the ambit of the Eighth Amendment, any sum of money that a defendant is ordered to pay must be ordered as a form of punishment payable to the government.[28] This covers fines as they are generally understood, i.e., a person violates the law and then they are fined a certain dollar amount as punishment. But it also covers criminal forfeitures, i.e., "[a] governmental proceeding brought against a person to seize property as punishment for the person's criminal behavior."[29] And forfeitures can happen as a part of a defendant's criminal proceedings, meaning the government takes property while charges are pending or after a conviction,[30] or they can be civil, where the government initiates separate proceedings and proves that the

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

[24] *See* Robinson v. California, 370 U.S. 660, 667 (1962). In dicta, the Supreme Court said that the Excessive Bail Clause is also incorporated against the states. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

[25] *See, e.g.*, Madison v. Alabama, 139 S. Ct. 718, 722–23 (2019); Bucklew v. Precythe, 139 S. Ct. 1112, 1117 (2019); Glossip v. Gross, 135 S. Ct. 2726, 2727 (2015).

[26] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

[27] *See id.*

[28] *See* Austin v. United States, 509 U.S. 602, 609–10 (1993).

[29] *Criminal Forfeiture*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

property was used to facilitate a crime.[31] In both instances, the Excessive Fines Clause applies.[32]

But there is much criminal justice debt people face that the Supreme Court has not decided one way or another whether it would be covered by the Excessive Fines Clause. This unaccounted for money that defendants are often ordered to pay includes court costs and fees associated with complying with punishment.[33] For example, the cost to rent an ankle monitor, the price of court-required drug testing, or supervision fees paid to private probation companies.[34] These costs can run thousands of dollars.[35] The answer to whether these costs would be covered by the Excessive Fines Clause is murky, because it turns on whether they are considered solely remedial, i.e., only designed to recoup costs, in which case they would not be covered, or whether they are partly punitive, in which case they would be covered.[36]

Although the law in this area is far from comprehensive, the Supreme Court has left no doubt that criminal fines and forfeitures are covered by the Excessive Fines Clause.[37] And courts' ability to determine whether fines and forfeitures are constitutionally excessive is exceedingly important given that, over the past few decades, jurisdictions across the country have increasingly used fines and forfeitures as punishment.[38] Governments, looking for ways to fund their

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[31] *See, e.g.*, *Austin*, 509 U.S. at 602.

[32] *See id.* at 609. At least one federal court of appeals has held that mandatory restitution orders are covered by the Excessive Fines Clause. *See* United States v. Dubose, 146 F.3d 1141, 1144 (9th Cir. 1998) (holding that mandatory restitution imposed under the Mandatory Victims Restitution Act is covered under the Eighth Amendment). Restitution is defined as "full or partial compensation paid by a criminal to a victim . . . ordered as part of a criminal sentence." *Restitution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[33] *See* Ray v. Judicial Corr. Servs., Inc., 270 F. Supp. 3d 1262, 1310 (N.D. Ala. 2017).

[34] *See, e.g.*, *id.* For example, one district court has held that probation fees are not covered. *See id.* On the other hand, a few state courts have held that similar types of costs are sufficiently punitive to bring them within the ambit of the Eighth Amendment. *See* Colgan, *Lessons from Ferguson*, *supra* note 17, at 1196 n.120 (collecting cases from Illinois, Louisiana, and Missouri and holding that various fees related to criminal prosecution fall within the ambit of the Eighth Amendment's Excessive Fines Clause).

[35] *See* Brand, *supra* note 5.

[36] Some circuits have multi-factor tests to determine whether criminal justice costs are at least partly punitive and therefore covered by the Eighth Amendment. *See, e.g.*, United States v. Mayberry, 774 F.2d 1018, 1021 (10th Cir. 1985) (considering whether a cost "places an additional burden or penalty upon the defendant"; whether it "can be imposed only following conviction of a crime or offense"; and whether it "imposes a higher assessment on those persons convicted of felonies than on those convicted of misdemeanors"); *accord* United States v. King, 824 F.2d 313, 316–17 (4th Cir. 1987); United States v. Smith, 818 F.2d 687, 689–90 (9th Cir. 1987).

[37] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

[38] *See* Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST. L. & SOC'Y 22, 22 (2017) ("The use of fines, fees, and forfeitures of cash and property are long-standing practices that have boomed in recent years as lawmakers have sought to fund an expanding criminal justice system without raising taxes." (internal citations omitted)); Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal*

expanding justice systems and to make up for budgetary shortfalls, have turned to fines and forfeitures as a significant revenue source.[39] Indeed, a 2019 report found that revenue from fines and forfeitures "account for more than 10 percent of general fund revenue in nearly 600 U.S. jurisdictions," and these jurisdictions are spread across at least thirty states.[40] Given this reality, courts must be equipped to ensure fines and forfeitures comport with the Constitution.[41]

A. *The Ubiquity of Financial Punishment*

While much of the recent scholarly dialogue surrounding the criminal legal system has focused on mass incarceration,[42] a 2015 report issued by the United States Department of Justice (DOJ) in the wake of the tragic killing of Michael Brown, an unarmed Black teenager in Ferguson, Missouri, exposed the ways in which financial punishment is being used and abused all over America.[43] The Ferguson Report ignited a critical conversation about the perverse relationship between punishment and profit.[44]

Code (Second), 99 MINN. L. REV. 1735, 1737 (2015) ("Since the Model Penal Code (First) was approved in 1962, there has been steady growth in fine amounts, asset forfeitures, and a congeries of costs, fees, and assessments levied against criminal offenders.").

[39] *See* Mike Maciag, *Addicted to Fines*, GOVERNING (Sept. 2019), https://www.governing.com/topics/finance/gov-addicted-to-fines.html [https://perma.cc/Y7BJ-24D8].

[40] *Id.*

[41] Other issues relating to criminal justice debt that have received attention both in scholarship and litigation include state practices of jailing people for not paying criminal justice debt and state practices of making wealth-based pretrial detention decisions. *See, e.g.*, Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 235 (2017); Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 ALB. L. REV. 1063, 1064 (2018/2019). Challenges to these systems are often brought under the Fourteenth Amendment's Due Process Clause, and the Supreme Court's line of cases holding that it is unconstitutional to jail someone for failure to pay if the failure is not willful. *See* Bearden v. Georgia, 461 U.S. 660, 668–69 (1983).

[42] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 16 (rev. ed. 2012); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 2–3 (2017); *see also* Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J. F. 791, 800 (2019) (noting that "[l]egal scholarship focused on mass incarceration and criminal justice reform exploded after . . . *The New Jim Crow*"); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 261 (2018) (noting that "a growing body of legal scholarship [has] popularized 'mass incarceration'").

[43] *See* FERGUSON REPORT, *supra* note 21, at 2.

[44] *See* Ta-Nehisi Coates, *The Gangsters of Ferguson*, ATLANTIC (Mar. 5, 2015), https://www.theatlantic.com/politics/archive/2015/03/The-Gangsters-Of-Ferguson/386893/ [https://perma.cc/KL3W-4VM4].

As other scholars have recounted in greater depth,[45] the Ferguson Report revealed how criminal fines and forfeitures were being abused in Ferguson.[46] The Report concluded that "Ferguson's law enforcement practices [were] shaped on the City's focus on revenue rather than by public safety needs."[47] The Report found that Ferguson was generating "a significant and increasing amount of revenue" from fines.[48] For that reason, "[c]ity, police, and court officials for years ha[d] worked in concert to maximize revenue at every stage of the enforcement process."[49]

The Ferguson Report also concluded that the emphasis on revenue generation shaped the Ferguson Police Department's approach to policing.[50] It was revealed that "[p]atrol assignments and schedules [were] geared toward aggressive enforcement of Ferguson's municipal code" with little thought given as to whether the "enforcement strategies promote[d] public safety or unnecessarily undermine[d] community trust and cooperation."[51] Because Ferguson's municipal code governed almost every aspect of a person's life, officers were easily able to find infractions to cite people for violating.[52] And Ferguson's Black residents bore the brunt of the city's fining practices; while Ferguson is only sixty-seven percent African American, ninety percent of the citations issued by the Ferguson Police Department were to Black people.[53]

But as then-Attorney General Eric Holder cautioned at the release of the Report, although the Report was focused on Ferguson, its findings were "not confined to any one city, state, or geographic region. They implicate[d] questions about fairness and trust that are national in scope."[54] Indeed, in September 2017, the United States Commission on Civil Rights released a follow up to the Ferguson Report, and found that although the data at the time was scant, at least thirty-eight cities including Ferguson "received 10 percent or

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[45] For more in-depth discussions of the Ferguson Report, see, e.g., Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 196–99, 201–05 (2016); Neil L. Sobol, *Lessons Learned from Ferguson: Ending Abusive Collection of Criminal Justice Debt*, 15 U. MD. L.J. RACE RELIGION GENDER & CLASS 293, 295–309 (2015).

[46] FERGUSON REPORT, *supra* note 21, at 2.

[47] *Id.*

[48] *Id.* at 9.

[49] *Id.* at 10.

[50] *Id.* at 2.

[51] *Id.*

[52] FERGUSON REPORT, *supra* note 21, at 7 ("Ferguson's municipal code addresses nearly every aspect of civic life for those who live in Ferguson, and regulates the conduct of all who work, travel through, or otherwise visit the City.").

[53] *Id.* at 64.

[54] Press Release, U.S. Dep't of Justice, Attorney General Holder Delivers Update on Investigation in Ferguson, Missouri (Mar. 4, 2015), http://www.justice.gov/opa/speech/attorney-general-holder-delivers-update-investigations-ferguson-missouri [https://perma.cc/7QU9-JG27] [hereinafter Holder Press Release].

more of [their] revenue from fines and fees."[55] And Ferguson was not unique in its targeting of African Americans, because, as the update to the Ferguson Report also found, the "one demographic that was most characteristic of cities that levy large amounts of fines on their citizens: a large African American population."[56] The update concluded that the "[u]nchecked discretion [and] stringent requirements to impose fines or fees can lead [and have led] to discrimination and inequitable access to justice."[57]

The Ferguson Report started a national conversation on how financial punishment is unfairly wielded, often against poor people of color, as a way to fund government.[58] It exposed the underbelly of a justice system that at the time was not often discussed: it revealed that punishment went hand-in-hand with revenue generation, and detailed for the first time on the national stage how such a system can corrupt the administration of justice.[59] The Ferguson Report caused people to contemplate how, and more importantly, why, financial punishment was being imposed in jurisdictions across the country.[60]

Much has developed since DOJ released the Ferguson Report. As a start, much more information has been gathered about how and why jurisdictions impose financial punishment.[61] And the picture is bleaker than that painted by the Ferguson Report and its update.[62] A 2019 study found that fines "account for more than 10 percent of general fund revenues in nearly 600 jurisdictions."[63] "In at least 284 of those governments," fines account for "more than 20 percent" of general fund revenues.[64] Some jurisdictions are almost exclusively funded by fines revenue; for example, 92 percent of Georgetown, Louisiana's general fund is comprised of money made from fines.[65] And "[w]hen fine and forfeiture revenues in all funds are considered, more than 720 localities reported annual revenues exceeding $100 for every adult resident."[66]

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[55] TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR, *supra* note 19, at 21.

[56] *Id.* at 23 (quoting Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://priceonomics.com/the-fining-of-black-america/ [https://perma.cc/TV58-AUGL]).

[57] *Id.* at 71.

[58] *See, e.g.*, Matthew Menendez, *Fines and Fees Justice Center Launches New Clearinghouse Featuring Brennan Center Work*, BRENNAN CTR. FOR JUST. (Jan. 8, 2019), https://www.brennancenter.org/blog/fines-fees-justice-center-launches-new-clearinghouse-featuring-brennan-center-work [https://perma.cc/YT2P-3WCX].

[59] *Id.*

[60] *See, e.g.*, *id.* ("Since the unrest in Ferguson, Missouri, in 2014, public awareness of the harms of fees and fines has grown substantially, along with an understanding of the large scope of the problem.").

[61] *See* Maciag, *supra* note 39.

[62] *See id.*

[63] *See id*. The report found some states are particularly bad offenders, including Arkansas, Georgia, Louisiana, Oklahoma, Texas, and New York. *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

But with exposure has come progress. Since the release of the Ferguson Report, significant steps have been taken to mitigate the overuse and abuse of financial punishment.[67] For example, in March 2016, DOJ issued a "Dear Colleague" letter to state administrators and chief justices of each state, emphasizing the need for courts to "safeguard against unconstitutional practices," including the jailing of defendants for their inability to pay fines.[68] DOJ also helped establish a National Task Force on Fines, Fees, and Bail Practices, managed by the Conference of State Court Administrators and the Conference of Chief Justices.[69] This task force drafted model statutes and compiled best practices for dealing with financial punishment,[70] and has published a bench card to be used in local courtrooms that admonishes courts to consider a defendant's economic circumstances before imposing a fine and gives guidance on how to calculate a defendant's ability to pay.[71] And lawmakers were prompted to action, including the Missouri legislature, which passed a bill that capped the amount of money cities like Ferguson can collect from fines.[72] In short, while there is still much work to be done, there has been

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[67] *See, e.g.*, Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, & Lisa Foster, Dir., Office of Access to Justice, U.S. Dep't of Justice, Civil Rights Div., to Colleagues (Mar. 14, 2016), https://finesandfees justicecenter.org/content/uploads/2018/11/Dear-Colleague-letter.pdf [https://perma .cc/F3PJ-XGTK] [hereinafter Dear Colleague Letter].

[68] *See id.*

[69] *See* News Release, Lorri Montgomery, Nat'l Ctr. for State Courts, Top National State Court Leadership Associations Launch National Task Force on Fines, Fees and Bail Practices (Feb. 3, 2016), https://www.ncsc.org/Newsroom/News-releases/2016/Task-Force-on-Fines-Fees-and-Bail-Practices.aspx [https://perma.cc/3EUE-EP4Q].

[70] *Id.*; *see also* NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES 1 (Dec. 2017), https://www.ncsc.org/~/media/ Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.ashx [https://perma .cc/5UDG-HV2J].

[71] *See* NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES, https://www.ncsc.org /~/media/Files/PDF/Topics/Fines%20and%20Fees/format%20revisions/BenchCard% 20reformatted%203%2013%2019.ashx [https://perma.cc/46PB-BQH6]. A number of states and local jurisdictions have adopted bench cards for courts to use to assess a defendant's ability to pay a fine. *See, e.g.*, CITY OF BILOXI, BENCH CARD: BILOXI MUNICIPAL COURT PROCEDURES FOR LEGAL FINANCIAL OBLIGATIONS & COMMUNITY SERVICE, https://biloxi.ms.us/wp-content/uploads/2016/03/BenchCard.pdf [https://perma.cc/SYL2-HPXQ]; THE SUPREME COURT OF OHIO, COLLECTION OF COURT COSTS & FINES IN ADULT TRIAL COURTS, https://www.supremecourt.ohio.gov/Publications/JCS/finesCourtCosts.pdf [https://perma.cc/ZLP7-N3VR]; TEXAS OFFICE OF COURT ADMIN., BENCH CARD FOR JUDICIAL PROCESSES RELATING TO THE COLLECTION OF FINES AND COSTS, http://www.txcourts.gov/media/1440393/sb-1913-justice-municipal.pdf [https://perma.cc/B48N-U7H2].

[72] *See* S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015) (enacted) (inserting § 479.359); *see also* Jo Mannies & Donna Korando, *Nixon Signs Bill Mandating Municipal Court Changes and Setting Standards*, ST. LOUIS PUB. RADIO (July 9, 2015),

a real effort across the country to examine and change the ways in which financial punishment is imposed.

B. *The Consequences of Financial Punishment*

When people started examining how fines and forfeitures are being imposed in America, one thing became clear: fines and forfeitures can be incredibly damaging to a person's life. Assessing a fine that a person cannot pay risks setting off a devastating chain of events. First, if a defendant is late paying a fine, there are often late fees or collections fees that are assessed, and that same person who could not make the payment in the first place may then be charged interest for every day their payment is late, compounding the problem by deepening the debt.[73] Then, in some jurisdictions, courts will issue arrest warrants for failing to pay fines, and people can spend days, if not weeks, in jail,[74] despite the fact that the Supreme Court has held that it is unconstitutional to imprison someone for failing to pay a fine if they are indigent.[75]

While a person is in jail, they obviously cannot report to work, and they thus risk losing their job, which, again, would mean that they cannot pay their debt.[76] And after a person loses their job, that often means they can no longer pay the bills they need to pay to keep the water running, the electricity on, or a roof over their head,[77] let alone pay the fine they owe.

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https://news.stlpublicradio.org/post/nixon-signs-bill-mandating-municipal-court-changes-and-setting-standards#stream/0 [https://perma.cc/L7EY-93XW].

[73] *See* Brand, *supra* note 5.

[74] *See, e.g.*, Kate Giammarise & Christopher Huffaker, *Modern-Day Debtors' Prisons? The System That Sends Pennsylvanians to Jail over Unpaid Court Costs and Fines*, PITT. POST-GAZETTE (Feb. 16, 2018), https://newsinteractive.post-gazette.com/blog/modern-day-debtors-prisons-lead-to-hundreds-jailed-each-year-in-pa-for-inability-to-pay-court-costs/ [https://perma.cc/89LC-NVFG]; *Poor People in Alabama Continue to Be Jailed Because They Cannot Pay Fines*, EQUAL JUST. INITIATIVE (June 23, 2016), https://eji.org/news/alabamians-too-poor-to-pay-fines-are-jailed [https://perma.cc/75BK-XNY2]; Sarah van Gelder, *Yes, Lots of People Go to Jail Because They Can't Pay a Fine*, YES! MAG. (Feb. 2, 2018), https://www.yesmagazine.org/peace-justice/yes-lots-of-people-go-to-jail-because-they-cant-pay-a-fine-20180202 [https://perma.cc/JNK5-F9VX]; *see also* Martin et al., *supra* note 4, at 476.

[75] The Supreme Court has held that "jailing an indigent for failing to make immediate payment of any fine" violates the Fourteenth Amendment. Tate v. Short, 401 U.S. 395, 398 (1971). The Court later extended this holding to rule that the Constitution similarly bars a state from revoking an indigent defendant's probation for failure to pay a fine. *See* Bearden v. Georgia, 461 U.S. 660, 661 (1983). After DOJ released the Ferguson Report, civil rights organizations began suing jurisdictions that jailed indigent people for failing to pay their criminal justice debt. *See* Joseph Shapiro, *Lawsuits Target 'Debtors' Prisons' Across the Country*, NPR (Oct. 21, 2015), https://www.npr.org/2015/10/21/450546542/lawsuits-target-debtors-prisons-across-the-country [https://perma.cc/86K5-DGPH].

[76] *See, e.g.*, Brand, *supra* note 5.

[77] *Id.*

But the devastating effects of fines go beyond the fact that people are locked up for not paying and the vicious cycle that then emerges. Beyond being jailed, there are additional collateral consequences that result from the failure to pay a fine that can send someone's life into a tailspin.[78] For example, at least nine states allow for driver's licenses to be suspended for unpaid fines, hampering employment and childcare options.[79] In thirty states, a person loses her right to vote for missing a payment related to a felony conviction, and in eight additional states, a person loses the right to vote for missing payments related to a misdemeanor conviction.[80] And people are often reported to credit agencies for unpaid fines, hurting credit scores, which in turn can affect a person's ability to secure housing, credit cards, cars, and jobs, and to the extent a person can secure credit, they are only able to do so at much higher interest rates, perpetuating the cycle of poverty.[81] Wages can be garnished and liens placed on property for nonpayment.[82] Some people even face the dilemma of having to forgo necessary medical treatment in order to pay their fines.[83]

Forfeitures can be equally damaging. As with fines, state forfeiture practices also often "target the poor and other groups least able to defend their interests in forfeiture proceedings," i.e., communities of color.[84] This is why most forfeitures involve small dollar amounts from comparatively less culpable actors (for example, targeting drug users for forfeitures and not drug suppliers).[85] And because forfeitures are so important to government funding, states are "edging ever closer to abusing forfeiture laws, confiscating individuals' property with

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[78] *See* Jerjian, *supra* note 41, at 252 (explaining that criminal justice debt "creates additional barriers . . . in terms of housing, employment, public benefits, and even civil rights").

[79] Martin et al., *supra* note 4, at 475.

[80] *Id.*

[81] *Id.*; VALLAS ET AL., *supra* note 19, at 6; *see also* State v. Blazina, 344 P.3d 680, 684 (Wash. 2015) (explaining the collateral consequences of criminal justice debt).

[82] Rebecca Vallas & Roopal Patel, *Sentenced to a Life of Criminal Debt: A Barrier to Reentry and Climbing Out of Poverty*, 46 J. POVERTY L. & POL'Y 131, 133 n.26 (2012), https://csgjusticecenter.org/wp-content/uploads/2013/04/Sentenced-to-a-Life-of-Criminal-Debt.pdf [https://perma.cc/3TCN-DHTU] (noting a study that found at least fifteen states "permitted the use of civil collection methods to collect criminal debts, such as garnishment of wages, attachment of bank accounts, and liens on property").

[83] *See, e.g.*, Lily Gleicher & Caitlin Delong, *The Cost of Justice: The Impact of Criminal Justice Financial Obligations on Individuals and Families*, ILL. CRIM. JUST. INFO. AUTHORITY (Aug. 1, 2018), https://icjia.illinois.gov/researchhub/articles/the-cost-of-justice-the-impact-of-criminal-justice-financial-obligations-on-individuals-and-families [https://perma.cc/5KXW-8LDE].

[84] Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

[85] *See* Radley Balko, Opinion, *Chicago Civil Asset Forfeiture Hits Poor People the Hardest*, WASH. POST (June 13, 2017), https://wapo.st/2PFgyvz [on file with *Ohio State Law Journal*]. The Alabama Supreme Court observed that "forfeiture laws are being used more frequently to punish users like [petitioner, who used drugs] rather than to punish those higher up the drug distribution chain." *Ex parte* Kelley, 766 So. 2d 837, 839 (Ala. 1999).

no thought or proof of whether the items [they] are taking are actually the fruits of illegal[lity]."[86] People are losing objects both big and small in the forfeiture process.[87] For example, in a startling report out of Chicago, it was revealed that law enforcement "seized items from residents ranging from a cashier's check for *34 cents* to a 2010 Rolls Royce. They also seized Xbox controllers, televisions, nunchucks, *12 cans of peas*, a pair of rhinestone cufflinks, and a bayonet."[88] In the forfeiture process, people can lose all of their worldly belongings, from their food, cash, cars, to even their homes.[89]

This is why the Excessive Fines Clause must be taken seriously; because fines and forfeitures can dramatically affect people's lives. And the issues with fines and forfeitures are not confined to a small segment of the population; they are imposed as a criminal sanction for all kinds of crimes, from the most minor infractions to the most serious felonies. Given this fact, along with the evidence that many jurisdictions impose fines and forfeitures against minorities at disparate rates,[90] the question of whether a fine or forfeiture violates the Eighth Amendment should be one that is asked often and is contemplated carefully.

This question becomes even more important when one considers the perverse incentives at play. State and local governments, including police departments, which are funded from local coffers, have a vested interest in arresting or ticketing as many people as possible, and in fact, are sometimes expressly directed to do so.[91] And courts have an incentive to impose fines or order forfeitures at the greatest rate possible to ensure budgetary needs are met.

Put another way, in many places across the country, the people in charge of administering justice have a personal stake in the punishment. As a thought experiment, if a judge sentenced someone to serve time in a prison in which he had a personal financial stake, the urgency of the problem would be obvious. In fact, there is no need to wonder—we have seen this problem before.

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[86] *Kelley*, 766 So. 2d at 839 (quotation marks omitted).

[87] *See* C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, REASON (June 13, 2017), https://reason.com/2017/06/13/poor-neighborhoods-hit-hardest-by-asset/ [https://perma.cc/7HTK-GGUN] (emphasis added).

[88] *Id.* (emphases added).

[89] CARPENTER ET AL., *supra* note 17, at 8; *see also* Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2387 (2018).

[90] *See, e.g.*, AM. CIVIL LIBERTIES UNION OF PA., GUILTY PROPERTY 10 (June 2015), http://bit.ly/ 2PFet3s [https://perma.cc/ZA2P-8H7W]; BACK ON THE ROAD CAL., STOPPED, FINED, ARRESTED: RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA 1, 10–19 (Apr. 2016), http://ebclc.org/wp-content/uploads/2016/04/Stopped_Fined_Arrested_BOTRCA.pdf [on file with *Ohio State Law Journal*]; ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010), http://bit.ly/2MS7TIm [https://perma.cc/ZP3X-29QA]; VALLAS ET AL., *supra* note 19, at 5.

[91] *See, e.g.*, Terrence McCoy, *Ferguson Shows How a Police Force Can Turn into a Plundering 'Collection Agency,'* WASH. POST (Mar. 5, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/ferguson-shows-how-a-police-force-can-turn-into-a-plundering-collection-agency/?utm_term=.e2c31fbfe295 [on file with *Ohio State Law Journal*].

In the early 2000s, Mark Ciavarella, a judge on the Luzerne County Court of Common Pleas in Pennsylvania, was sentenced to twenty-eight years in prison after a federal jury found him guilty of a host of crimes relating to a scheme of accepting money in return for imposing harsh sentences on juvenile defendants to increase occupancy at a for-profit juvenile detention center.[92] The scheme came to be known as the "Kids for Cash" scandal.[93] The sensation of this scandal captivated the nation. It has been the subject of a full-length documentary,[94] the centerpiece of a popular podcast,[95] and similar schemes have been featured on numerous hit TV shows.[96]

Most would agree that locking kids up for personal financial gain is monstrous. But it is not all that different from what happens every day in courts across the country.[97] We know that police officers are pressured into arresting poor people of color for minor crimes for financial reasons, and that judges are imposing exorbitant financial punishment for said crimes because they operate in systems in which that financial punishment is critical to a fully funded government—the same government that pays their salaries. One former judge on Fresno, California's Superior Court explained that he "was under pressure to collect fines and fees. When counties stopped funding the courts and the state took over, the budget was cut and there was a struggle to find revenue sources."[98] This judge "saw firsthand how excessive fines, fees and penalties can negatively impact peoples' [sic] lives."[99] This caused him to be "concerned

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[92] *See* United States v. Ciavarella, 716 F.3d 705, 713–17 (3d Cir. 2013). *See generally* Walter Pavlo, *Pennsylvania Judge Gets 'Life Sentence' for Prison Kickback Scheme*, FORBES (Aug. 12, 2011), https://www.forbes.com/sites/walterpavlo/2011/08/12/pennsylvania-judge-gets-life-sentence-for-prison-kickback-scheme/#261eece54aef [https://perma.cc/9J56-P57M]. Judge Michael Conahan pleaded guilty to a racketeering conspiracy for his role in the scheme. *See Ciavarella*, 716 F.3d at 717. Some of Ciavarella's convictions were subsequently overturned after Ciavarella successfully raised an ineffective assistance of counsel claim. *See* United States v. Ciavarella, 765 F. App'x 855 (3d Cir.), *cert. denied*, 140 S. Ct. 282 (2019).

[93] *Ciavarella*, 716 F.3d at 713.

[94] KIDS FOR CASH (2013).

[95] *The Judges (Kids for Cash)*, SWINDLED (Apr. 14, 2018), http://swindledpodcast.com/podcasts/season-1/episode-10-the-judges/ [https://perma.cc/AC4X-SP3B].

[96] Shows include Law & Order, CSI: New York, The Good Wife, and For the People. *See Law & Order: Special Victims Unit: Crush* (NBC television broadcast May 5, 2009); *CSI: New York: Crossroads* (CBS television broadcast Nov. 18, 2011); *The Good Wife: Lifeguard* (CBS television broadcast Dec. 15, 2009); *For the People: One Big Happy Family* (ABC television broadcast Apr. 4, 2019).

[97] The Kids for Cash scheme violated numerous federal laws, and it is not alleged here that the current system of imposing fines, while rife with conflicts, violates the law in the same way. The point is simply that optically, there are parallels that can be drawn between the two schemes.

[98] Robert J. Thompson, *Robert J. Thompson: Unreasonable Traffic Fines Violate Constitutional Rights*, FRESNO BEE (Aug. 24, 2015), https://www.fresnobee.com/opinion/op-ed/article32237655.html [https://perma.cc/6MGX-9BT5].

[99] *Id.*

about how these charges can harm people and, in [his] opinion, violate the Eighth Amendment to the U.S. Constitution's ban on excessive fines."[100]

Yet despite these serious constitutional concerns, the pervasive practice of using fines as a funding source does not garner nearly as much attention as it should. Instead, it is largely accepted as the status quo.[101] While such practices persist, as many states start to grapple with the Excessive Fines Clause for the first time,[102] the fact that in many jurisdictions there is a real incentive for courts to impose fines and forfeitures to generate revenue should be kept in mind.

Given that fines and forfeitures are so frequently used, courts need clear guidelines for determining whether financial punishment is excessive. This is especially so given that defendants do not have a constitutional right to counsel when the only punishment being imposed is financial.[103] Often, when people are being fined exorbitant amounts for minor infractions and risk losing their jobs, homes, and health, there is no lawyer to advocate that the punishment being imposed is unconstitutional.[104] Thus, courts should be vigilant in ensuring financial punishment abides by the Constitution. Unfortunately, it is hard for courts to undertake this task because the Supreme Court has yet to provide a sufficient guide for courts to use when deciding whether a fine comports with the Constitution.

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[100] *Id.*

[101] Some jurisdictions are starting to limit courts' ability to impose financial costs on criminal defendants. *See, e.g.*, Alex Kornya et al., *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV. 107, 117 (2019) (noting that "in 2018, San Francisco became the first jurisdiction to proscribe administrative fees in criminal cases").

[102] Prior to *Timbs*, fourteen state courts of last resort had held that the Eighth Amendment Excessive Fines Clause applies to the states. *See Ex parte* Kelley, 766 So. 2d 837, 840 (Ala. 1999); People *ex rel.* Lockyer v. R.J. Reynolds Tobacco Co., 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006); *In re* 1982 Honda, 681 A.2d 1035, 1039 (Del. 1996); Thorp v. State, 450 S.E.2d 416, 417 (Ga. 1994), *abrogated on other grounds by* Howell v. State, 656 S.E.2d 511 (Ga. 2008); Idaho State Police *ex rel.* Russell v. Real Prop. in Cassia, 156 P.3d 561, 564 (Idaho 2007); People *ex rel.* Waller v. 1989 Ford F350 Truck, 642 N.E.2d 460, 466 (Ill. 1994); Commonwealth v. Fint, 940 S.W.2d 896, 897–98 (Ky. 1997); Pub. Emp. Ret. Admin. Comm'n v. Bettencourt, 47 N.E.3d 667, 672 n.7 (Mass. 2016); Wilson v. Comm'r of Revenue, 656 N.W.2d 547, 557 (Minn. 2003); Levingston v. Washoe Cty., 916 P.2d 163, 169 (Nev. 1996), *opinion modified on reh'g on other grounds*, 956 P.2d 84 (Nev. 1998); State v. Hill, 635 N.E.2d 1248, 1256 (Ohio 1994); Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 162 n.7 (Pa. 2017); State v. Real Prop. at 633 E. 640 No., 994 P.2d 1254, 1256 (Utah 2000); Vanderbilt Mortg. & Fin. v. Cole, 740 S.E.2d 562, 570 n.10 (W. Va. 2013). The Supreme Court of Indiana in *Timbs* joined two state courts of last resort that had refused to treat the Excessive Fines Clause as being incorporated against the states. *See* One (1) Charter Arms, Bulldog 44 Special v. State *ex rel.* Moore, 721 So. 2d 620, 623 (Miss. 1998); State v. 2003 Chevrolet Pickup, 202 P.3d 782, 783 (Mont. 2009).

[103] In Scott v. Illinois, 440 U.S. 367, 373–74 (1979), the Supreme Court held "that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment." Alabama v. Shelton, 535 U.S. 654, 657 (2002).

[104] BANNON ET AL., *supra* note 90, at 12.

III. *UNITED STATES V. BAJAKAJIAN* AND THE CONFUSION LEFT IN ITS WAKE

The Eighth Amendment was ratified in 1791.[105] It took the Supreme Court 198 years to first opine on the Excessive Fines Clause and, to date, the Supreme Court has discussed the Clause only five times.[106] In those five decisions, the Supreme Court has provided little guidance on what renders a fine constitutionally excessive. In the wake of the Supreme Court's silence, lower courts have been left to come up with their own tests to decide whether financial punishment violates the Constitution. Unsurprisingly, courts have come up with different tests. Despite the diverging tests, when the Court took up the Excessive Fines Clause last Term in *Timbs*, it still did not provide further guidance on what factors courts should consider when deciding whether a fine or forfeiture violates of the Eighth Amendment.

A. *The Supreme Court's Excessive Fines Clause Jurisprudence and the Evolution of the "Grossly Disproportional" Standard*

The Supreme Court first interpreted the Excessive Fines Clause in its 1989 decision, *Browning-Ferris Industries v. Kelco Disposal, Inc.*[107] There, the Court held that the Clause does not apply to civil damages awards.[108] The Court gave three reasons for its ruling in light of the "purposes and concerns" of the Eighth Amendment "as illuminated by its history."[109] First, the Court noted that the "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."[110] Second, history showed that the "Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government. . . . [T]he primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power . . . ."[111] Finally, the Court reasoned that the Eighth Amendment was based on the English Bill of Rights of 1689;[112] the British adopted this provision "to curb the excesses of English judges" at a time when fines were becoming "even more excessive and partisan, and some opponents of the King were forced

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[105] *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

[106] *See id. See generally* United States v. Bajakajian, 524 U.S. 321 (1998); Austin v. United States, 509 U.S. 602 (1993); Alexander v. United States, 509 U.S. 544 (1993); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

[107] *Browning-Ferris*, 492 U.S. at 262.

[108] *Id.* at 264.

[109] *Id.*

[110] *Id.* at 265.

[111] *Id.* at 265–66.

[112] The Court had previously noted that "the Eighth Amendment was 'based directly on Art. I, § 9, of the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.'" *Id.* at 266 (quoting Solem v. Helm, 463 U.S. 277, 285 n.10 (1983)).

to remain in prison because they could not pay the huge monetary penalties that had been assessed."[113] These facts led the Court to conclude that the "Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[114]

Four years later, the Court handed down two cases dealing with the Excessive Fines Clause: *Alexander v. United States*[115] and *Austin v. United States*.[116] In *Alexander*, the Court held that the Excessive Fines Clause applies to "*in personam* criminal forfeiture"—where the government indicts "the property used or derived from the crime along with the defendant"[117]—because that is "a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"[118] Then, in *Austin*, the Court decided that *in rem* civil forfeitures—civil actions brought by the government directly against property involved in criminal activity[119]—are also governed by the Eighth Amendment.[120]

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[113] *Browning-Ferris*, 492 U.S. at 267.

[114] *Id.* at 268.

[115] Alexander v. United States, 509 U.S. 544 (1993).

[116] Austin v. United States, 509 U.S. 602 (1993).

[117] *Types of Federal Forfeiture*, U.S. DEP'T JUST. (Feb. 1, 2017), https://www.justice.gov/afp/types-federal-forfeiture [https://perma.cc/ZG9V-A8NT].

[118] *Alexander*, 509 U.S. at 558–59. In *Alexander*, the Petitioner, who was convicted of violating federal obscenity and racketeering laws in connection with his running more than a dozen adult stores and theaters, argued that the almost nine million dollar forfeiture that was assessed for his crimes was unconstitutionally excessive. *Id.* at 547–49. After finding that the forfeiture was covered by the Eighth Amendment's Excessive Fines Clause, the Court remanded the case back to the court of appeals to decide in the first instance whether the forfeiture was excessive. *Id.* at 559. The Court said nothing about how the lower court was supposed to undertake this inquiry. *See id.*

[119] *Types of Federal Forfeiture*, *supra* note 117.

[120] *Austin*, 509 U.S. at 604. In *Austin*, the federal government commenced forfeiture proceedings in district court, seeking forfeiture of Austin's mobile home and auto body shop after Austin was convicted of drug-related offenses in state court. *Id.* at 604–06. Austin argued the forfeiture violated the Excessive Fines Clause, whereas the government argued that the Clause does not apply to the civil proceedings. *Id.* at 605–07. The Court found that the forfeiture in question was subject to the Eighth Amendment's prohibition against excessive fines because historically, government forfeitures were considered punitive, and here, the forfeiture statute was only implicated if the property sought to be seized was "use[d] to facilitate the commission of a drug-related crime punishable by more than one year's imprisonment." *Id.* at 618–20. Austin then advocated for the Court to apply a "multifactor test for determining whether a forfeiture is constitutionally 'excessive,'" but the Court instead sent the case back to the "lower courts to consider that question in the first instance." *Id.* at 622–23. The "multi-factor" test that Austin proposed was that the Court should consider:

> 1. Whether the property seized constitutes the owner's livelihood or means to earn a living.
> 2. Whether the property seized is the owner's homestead.

It was not until its 1998 decision in *Bajakajian* that the Supreme Court announced a test for determining whether a fine is constitutionally excessive.[121] And in announcing the test, the Court for the first time found that a financial punishment violated the Eighth Amendment.[122]

Hosep Bajakajian was at Los Angeles International Airport awaiting his flight when customs agents found $230,000 in his checked luggage; between him and his wife, customs officials found $357,144.[123] Mr. Bajakajian did not declare on his customs forms that he had that much money.[124] He was therefore charged with and pleaded guilty to the federal crime of failing to report.[125] The government thereafter sought forfeiture of the full $357,144.[126]

The district court found that the full amount was subject to forfeiture because it "was involved in" the offense, but concluded full forfeiture would be "'extraordinarily harsh' and 'grossly disproportionate to the offense in question,' and that it would therefore violate the Excessive Fines Clause."[127] The court ordered Mr. Bajakajian to forfeit only $15,000.[128] The government appealed the forfeiture order all the way to the Supreme Court.[129]

Deciding whether forfeiture of the full amount would violate the Excessive Fines Clause, the Court noted that it "had little occasion to interpret, and [it had] never actually applied, the Excessive Fines Clause."[130] Indeed, the only clear rule from the Court's cases up until that point was that a fine or forfeiture must be "punishment for an offense" to fall within the ambit of the Eighth

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3. The degree to which the owner's property has been involved in drug activity, and whether the property has been purchased or obtained through the proceeds of drug activity.

4. Whether or not the owner has been convicted of a crime related to the forfeiture, the severity of the crime, and the severity of the criminal sentence imposed upon the owner of the property—i.e. the total punishment imposed on the owner, including the forfeiture.

5. The extent of the criminal behavior of the owner of the property and the need for deterrence.

6. The extent to which the government necessarily expended its funds to interdict drug activity involving this property.

Brief for Petitioner at 47–48, Austin v. United States, 509 U.S. 602 (1993) (No. 92-6073), 1993 WL 347335, at *47–48.

[121] United States v. Bajakajian, 524 U.S. 321, 322–23 (1998).

[122] *Id.* at 337.

[123] *Id.* at 324–25.

[124] *Id.*

[125] *Id.* at 325.

[126] *Id.*

[127] *Bajakajian*, 524 U.S. at 326.

[128] *Id.* The district court also sentenced Mr. Bajakajian to three years' probation and ordered him to pay a $5000 fine. *Id.*

[129] *Id.* at 321. The Ninth Circuit affirmed the district court's decision. *See* United States v. Bajakajian, 84 F.3d 334, 335 (9th Cir. 1996), *aff'd*, 524 U.S. 321 (1998).

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

Amendment.[131] Here, the Court had "little trouble concluding that the forfeiture of currency" constituted punishment, thus falling within the Eighth Amendment's reach, because it was imposed at the "culmination of a criminal proceeding and require[d] conviction of an underlying felony."[132]

After finding the forfeiture was subject to the Eighth Amendment's bar against excessive fines, the Court turned to the question of whether forfeiture of the full $357,144 would be constitutionally excessive.[133] The Court, recognizing it had "not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive," began by emphasizing that the "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."[134] The Court then looked to the text and history of the Excessive Fines Clause and found that they provided "little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be 'excessive.'"[135] This is so, the Court found, because the term "excessive" is a truism—it says nothing about how to measure excessiveness.[136] And the Excessive Fines Clause was barely discussed in the "debates over the ratification of the Bill of Rights," so there was nothing that the Court could find there to help guide its analysis.[137]

The Court was thus left to "rely on other considerations in deriving a constitutional excessiveness standard," finding two "particularly relevant."[138] The first was that the Court drew from its Cruel and Unusual Punishments Clause cases to assert that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature,"[139] meaning that if a punishment is within the range set by the legislature, there is a presumption of constitutionality.[140] The second was that the Court believed that any "judicial determination regarding the gravity of a particular criminal offense" was bound to be "inherently imprecise."[141] The Court therefore concluded that both of these principles "counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense."[142] Instead, the Court adopted "the standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents."[143]

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[131] *Id.* at 328.
[132] *Id.*
[133] *Id.* at 334.
[134] *Id.*
[135] *Id.* at 335.
[136] *See Bajakajian*, 524 U.S. at 335.
[137] *Id.*
[138] *Id.* at 336.
[139] *Id.*
[140] *See id.* (synthesizing from previous decisions, including *Solem v. Helm* and *Gore v. United States*, that the legislature deserves substantial deference in the punishment context).
[141] *Id.*
[142] *Bajakajian*, 524 U.S. at 336.
[143] *Id.*

Applying this standard to Mr. Bajakajian's case, the Court held that the forfeiture of the full $357,144 would be constitutionally excessive.[144] Two facts compelled the Court's conclusion. First, the Court noted that the money was the proceeds of *legal* activity; Mr. Bajakajian was guilty only of a reporting offense, the maximum fine for which was only $5000.[145] To the Court, this confirmed that the legislature believed this to be a crime that had "a minimal level of culpability."[146] Second, the Court looked at the harm caused by Mr. Bajakajian and found it to be "minimal"—his failure to report the full amount of currency affected only the government "in a relatively minor way" in that the government was "deprived only of the information that $357,144 had left the country."[147] Thus, said the Court, "[c]omparing the gravity of [Mr. Bajakajian]'s crime with the $357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the gravity of his offense."[148]

Bajakajian was the first and last time the Supreme Court applied the "grossly disproportional" standard in an Excessive Fines Clause case.[149] Without further guidance, courts have been left to divine their own tests to determine whether fines are grossly disproportional.[150] This lack of guidance has created somewhat of a mess.[151]

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[144] *Id.* at 337.
[145] *Id.* at 337–38.
[146] *Id.* at 339.
[147] *Id.*
[148] *Bajakajian*, 524 U.S. at 339–40.
[149] *See id.*
[150] Professor Barry Johnson provides a robust critique of the *Bajakajian* decision. *See generally* Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461 (2000). Professor Johnson concludes that the "grossly disproportional" standard that the Court announced in *Bajakajian* "is inconsistent with the language, history, and purposes of the Excessive Fines Clause and may serve as a significant barrier to meaningful constitutional limitations on forfeiture." *Id.* at 465. Professor Beth Colgan has also strongly critiqued the Supreme Court's Excessive Fines Clause jurisprudence. *See generally* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014) [hereinafter Colgan, *Reviving the Excessive Fines Clause*]. After performing an extensive review of sources contemporaneous to the ratification of the Bill of Rights, Professor Colgan labeled the Court's "narrow interpretation" of the Excessive Fines Clause as "both methodologically and substantively suspect." *Id.* at 283.
[151] One scholar identifies three areas of "doctrinal uncertainty" after *Bajakajian*: "(1) how to conceptualize a penalty's harshness for constitutional purposes, (2) how to determine the severity of a given offense for the purposes of the disproportionality analysis, and (3) how to determine the point at which the relationship between a given penalty and a given offense becomes unconstitutionally disproportionate." McLean, *supra* note 13, at 845.

B. *The Lower Courts Flesh Out the "Grossly Disproportional" Standard*

After *Bajakajian*, courts began to create tests to determine whether a fine is "grossly disproportional." Most of the federal courts of appeals, after examining *Bajakajian*, derived multifactor tests to answer this question. Absent Supreme Court guidance, it is not surprising that different courts have come up with different tests.

Most circuits—the Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits—consider the following four factors when determining whether a fine is constitutionally excessive:

> (1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct.[152]

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[152] United States v. Mora, 644 F. App'x 316, 317 (5th Cir. 2016) (considering "(a) the essence of the defendant's crime and its relationship to other criminal activity; (b) whether the defendant was within the class of people for whom the statute of conviction was principally designed; (c) the maximum sentence, including the fine that could have been imposed; and (d) the nature of the harm resulting from the defendant's conduct"); *see also* United States v. Young, 618 F. App'x 96, 97 (3d Cir. 2015) ("In assessing the proportionality of a fine, we consider (1) the nature of the offense or offenses; (2) whether the defendant falls into the class of persons for whom the statute was designed—e.g., money launderers, drug dealers, or tax evaders; (3) the maximum fine authorized by statute and the sentencing guidelines which are associated with the offense or offenses; and (4) the harm caused by the defendant's conduct."); United States v. Malewicka, 664 F.3d 1099, 1104 (7th Cir. 2011) (considering: "(1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant's conduct."); United States v. Zakharia, 418 F. App'x 414, 422 (6th Cir. 2011) ("Relevant factors to consider include the nature of the offense and its relation to other criminal activity, the potential fine under the advisory Guidelines range, the maximum sentence and fine that could have been imposed, and the harm caused by the defendant's conduct."); United States v. Jalaram, Inc., 599 F.3d 347, 355–56 (4th Cir. 2010) (considering: "(1) the amount of the forfeiture and its relationship to the authorized penalty. . . . ; (2) the nature and extent of the criminal activity. . . ; (3) the relationship between the crime charged and other crimes. . . . ; and (4) the harm caused by the charged crime."); United States v. Varrone, 554 F.3d 327, 331 (2d Cir. 2009). The Tenth Circuit has acknowledged that the *Bajakajian* Court considered these factors but considered "[o]ne of the most important" factors to be "Congress's judgment about the appropriate punishment for the owner's offense." *See* United States v. Wagoner Cty. Real Estate, 278 F.3d 1091, 1100 (10th Cir. 2002). The D.C. Circuit has used the factors as articulated by the Second Circuit when conducting an Excessive Fines Clause analysis. *See* Collins v. SEC, 736 F.3d 521, 526–27 (D.C. Cir. 2013).

The Ninth Circuit considers a similar set of factors, the major difference being that it notes that the list of factors is not exhaustive.[153]

The Eleventh Circuit does not consider the "essence of the crime," but considers the other factors most circuits consider.[154] And the First Circuit considers the same three factors that the Eleventh Circuit considers, but also expressly considers a defendant's financial circumstances.[155] By contrast, the Eleventh Circuit has said that it will not take into account "the characteristics of the offender" when conducting an Excessive Fines Clause analysis.[156]

The Eighth Circuit has purposefully avoided announcing a definitive set of factors.[157] Instead, that court offered "relevant" considerations to whether a fine is unconstitutional.[158] These include: "the extent and duration of the criminal conduct, the gravity of the offense in comparison to the severity of the criminal sanction, and the value of the forfeited property."[159] In addition to these factors, the Eighth Circuit identified "other helpful inquiries such as an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability and . . . the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct."[160] And like the First Circuit, the Eighth Circuit also takes account of "the defendant's ability to pay."[161]

Like the federal courts of appeals, the state courts of last resort that have considered the issue have also derived varying multifactor tests, so there is not

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[153] United States v. $132,245.00 in U.S. Currency, 764 F.3d 1055, 1058 (9th Cir. 2014) (considering: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused").

[154] *See* United States v. Sperrazza, 804 F.3d 1113, 1127 (11th Cir. 2015) (quoting United States v. Browne, 505 F.3d 1229, 1281 (11th Cir. 2007)) ("We determine whether a fine is 'grossly disproportional' by considering '(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant.'").

[155] United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007) (taking into account whether the forfeiture "would deprive [defendant] of his livelihood"); United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) (considering: "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant").

[156] United States v. 817 Ne. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999); *see also* United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("[W]e do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment.").

[157] *See* United States v. Dodge Caravan Grand SE/Sport Van, 387 F.3d 758, 763 (8th Cir. 2004).

[158] *Id.*

[159] United States v. $63,530.00 in U.S. Currency, 781 F.3d 949, 957–58 (8th Cir. 2015).

[160] *Dodge Caravan*, 387 F.3d at 763 (internal quotations and brackets omitted). The Eighth Circuit further said that this list is not meant to be exhaustive. *Id.*

[161] United States v. Aleff, 772 F.3d 508, 512 (8th Cir. 2014).

a uniform approach among state courts either for determining whether financial punishment violates the Eighth Amendment.[162]

The problem with the different tests used by these courts is not that they are wrong[163]—they are useful guides to figuring out just what "grossly disproportional" means. Rather, the issue is that they are incomplete. In (understandably) focusing on formulating a way to decide whether a fine is "grossly disproportional," courts have lost sight of broader constitutional

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[162] For example, West Virginia uses the same test used by most circuits. *See, e.g.*, Dean v. State, 736 S.E.2d 40, 50 (W. Va. 2012) (considering: "(1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime"). Minnesota and Utah use the three-factor cruel and unusual punishment test the Supreme Court announced in *Solem v. Helm*, 463 U.S. 277 (1983). *See, e.g.*, Miller v. One 2001 Pontiac Aztek, 669 N.W.2d 893, 895 (Minn. 2003) (considering: "1) the gravity of the offense and the harshness of the penalty; 2) a comparison of the contested fine with fines imposed for the commission of the other crimes in the same jurisdiction; and 3) comparison of the contested fine with fines imposed for commission of the same crime in other jurisdictions") (citing *Solem*, 463 U.S. at 290–91); State v. Real Prop. at 633 E. 640 N., 994 P.2d 1254, 1258 (Utah 2000) (considering the same). The Illinois multi-factor test focuses on the relationship between the property sought to be seized and the crime in question. *See, e.g.*, People *ex rel.* Hartrich v. 2010 Harley-Davidson, 104 N.E.3d 1179, 1184 (Ill. 2018) (considering: "(1) the gravity of the offense against the harshness of the penalty, (2) how integral the property was in the commission of the offense, and (3) whether the criminal conduct involving the defendant property was extensive in terms of time and/or spatial use" (internal quotation marks omitted)). Georgia uses a multi-factor test with multiple subparts. *See, e.g.*, Howell v. State, 656 S.E.2d 511, 512 (Ga. 2008) (quoting von Hofe v. United States, 492 F.3d 175, 186 (2d Cir. 2007)) (considering: "(1) the harshness, or gross disproportionality, of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other criminal activity, (b) whether the claimant falls within the class of persons for whom the statute was designed, (c) the punishments available, and (d) the harm caused by the claimant's conduct; (2) the nexus between the property and the criminal offenses, including the deliberate nature of the use and the temporal and spatial extent of the use; and (3) the culpability of each claimant"). New York's test expressly considers the "economic circumstances of the defendant." *See, e.g.*, Cty. of Nassau v. Canavan, 802 N.E.2d 616, 622 (N.Y. 2003) (considering "such factors as the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged, and the economic circumstances of the defendant"). And South Dakota's and Pennsylvania's tests are different from the above. *See, e.g.*, State v. One 2011 White Forest River XLR Toy Hauler, 857 N.W.2d 427, 430 (S.D. 2014) (considering "the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited"); Commonwealth v. 1997 Chevrolet & Contents Seized from Young, 160 A.3d 153, 169 (Pa. 2017) (considering "the penalties that the legislature has authorized compared to those to which the defendant was subjected; whether the violation was isolated or part of a pattern of misbehavior; and the nature of the harm caused by the defendant").

[163] Except, arguably, for the Eleventh Circuit's refusal to consider a defendant's economic circumstances. *See infra* note 206.

principles at play, largely ignoring other areas of the Supreme Court's Eighth Amendment jurisprudence and the motivations behind the ratification and incorporation of the Excessive Fines Clause. In so doing, the tests do not adequately account for the breadth of protections the Excessive Fines Clause was designed to provide.

In short, although the *Bajakajian* Court announced a standard for determining whether a fine or forfeiture violates the Excessive Fines Clause, the standard created more questions than it provided answers. The Court had the occasion to clear up the confusion when it took up *Timbs v. Indiana*—a case that presented the question of whether the Excessive Fines Clause constricts the states.[164] Unfortunately, the Court did not take the opportunity to provide the much-needed clarity.

C. *The Supreme Court Revisits the Excessive Fines Clause in* Timbs

Before the October 2018 Term, the Supreme Court had not considered whether the Fourteenth Amendment incorporates the Excessive Fines Clause against the states.[165] The Court finally decided to answer that question in *Timbs*, after the Indiana Supreme Court held that the Excessive Fines Clause "constrain[ed] only federal action."[166] The facts of *Timbs* are straightforward: Mr. Timbs pleaded guilty to dealing heroin and conspiracy to commit theft.[167] For his crimes, the trial court sentenced Mr. Timbs to "one year of home detention and five years of probation," and assessed fees and costs against Mr. Timbs in the amount of $1203.[168] After Mr. Timbs was sentenced, Indiana initiated civil forfeiture proceedings and sought to seize Mr. Timbs' 2012 Land Rover that he had recently purchased for $42,000, arguing it was the vehicle Mr. Timbs had "used to facilitate violation of a criminal statute"—i.e., he used the SUV to ferry drugs across the state.[169] The trial court held that forfeiture of the Land Rover would be "grossly disproportional to the gravity of Timbs's offense, [and] hence, unconstitutional under the Eighth Amendment's Excessive Fines Clause."[170] Indiana's intermediate appellate court affirmed the trial court's judgment.[171] But the Indiana Supreme Court reversed, refusing to enforce the Excessive Fines Clause against the state given the fact that the Supreme Court

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[164] *See* Petition for Writ of Certiorari at 1, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 704837, at *1.

[165] *See* McLean, *supra* note 13, at 844–45 (noting that the confusion surrounding the Court's decision in *Bajakajian* "has been exacerbated by a lack of clarity even on the basic question of whether the Excessive Fines Clause has been incorporated against the states").

[166] Timbs v. Indiana, 139 S. Ct. 682, 686 (2019).

[167] *Id.*

[168] *Id.*

[169] *Id.*; *see* State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017), *vacated*, 139 S. Ct. 682 (2019), *remanded to* 134 N.E.3d 12 (Ind. 2019).

[170] *Timbs*, 139 S. Ct. at 686.

[171] *Id.*

had not "decide[d] the issue authoritatively."[172] The Supreme Court granted certiorari to decide the incorporation issue once and for all.[173]

The Supreme Court explained that the prohibition against excessive fines is deeply rooted in Anglo-American history.[174] The *Timbs* Court traced the history of the Excessive Fines Clause back to Magna Carta, which required that "economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive an offender of his livelihood.'"[175] The Court also explained that the adoption of the Excessive Fines Clause "resonated as well with similar colonial-era provisions" because in 1787, eight states had similar provisions in their constitutions.[176] The Court then fast-forwarded to 1868, when the Fourteenth Amendment was ratified, and noted that thirty-five of thirty-seven states "expressly prohibited excessive fines."[177] After conducting this historical review, the Court surmised that the "protection against excessive fines has been a constant shield throughout Anglo-American history," because without such protections, "[e]xcessive fines can be used, for example, to retaliate against or chill the speech of political enemies," or can be imposed "'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money.'"[178] The Court concluded, "[i]n short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming."[179]

Having decided that the Excessive Fines Clause is incorporated against the states, rather than deciding the issue itself, the Supreme Court remanded the case back to the Indiana Supreme Court for it to determine whether the state would violate Mr. Timbs's rights if it seized his Land Rover as punishment for his crimes.[180]

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[172] *Timbs*, 84 N.E.3d at 1183–84.

[173] The Court had previously said that the Fourteenth Amendment makes the Excessive Fines Clause applicable to the states. *See, e.g.*, Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433–34 (2001) ("[The Fourteenth Amendment] makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States."). However, the Court later clarified that this statement was dicta. *See* McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) ("We never have decided whether the . . . Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause.").

[174] *Timbs*, 139 S. Ct. at 689.

[175] *Id.* at 687–88 (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)) (brackets omitted).

[176] *Id.* at 688.

[177] *Id.*

[178] *Id.* at 689 (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991)).

[179] *Id.*

[180] *See, e.g.*, Order Inviting Amicus Curiae Briefing, State v. Timbs, 134 N.E.2d 12 (Ind. 2019) (No. 27S04-1702-MI-70) (noting that the Supreme Court "did not address whether forfeiture of Appellee's vehicle would violate the Excessive Fines Clause," and inviting briefing on the question).

In the *Timbs* opinion, the Court made no mention of the prolific use of fines and forfeitures as funding mechanisms.[181] Nor did the Court discuss the fact that fines and forfeitures are disproportionately imposed against people of color.[182] To be clear, that information was before the Court.[183] Amicus briefs from a wide range of groups highlighted these concerns.[184] For example, the NAACP Legal Defense Fund cited data that showed that state and local governments are "increasingly us[ing] fines to punish crime" "to fund local government" while at the same time "disparately imposing [] fines against Black Americans and other people of color."[185] The Drug Policy Alliance, along with other groups, presented the Court with information showing that state and local governments use forfeiture "proceedings as a mechanism for funding their operations—with assets seized predominantly from the poor and people of color."[186] And the ACLU, along with other groups, similarly explained that state and local governments use "fines, fees, and forfeitures to raise revenue," which "disproportionately harm communities of color for reasons that include the longstanding racial and ethnic wealth gap and higher rates of poverty and unemployment."[187]

Despite being presented with information detailing how fines and forfeitures are being abused across the country, the Supreme Court did not give any guidance on how courts should test whether financial punishment complies with the Eighth Amendment.[188] This is especially troubling given (a) the reality of how fines and forfeitures are imposed today; (b) the fact that, in light of

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[181] *See Timbs*, 139 S. Ct. at 682–98.

[182] *See id.*

[183] *See id.* at 697 (Gorsuch, J., concurring).

[184] *See, e.g.*, Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc. in Support of Petitioner at 19–20, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 4358109, at *19–20.

[185] *Id.*

[186] Brief of Amicus Curiae Drug Policy All. et al. in Support of Petitioner at 2, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No.17-1091), 2018 WL 4381212, at *2.

[187] Brief of Amicus Curiae Am. Civil Liberties Union et al. in Support of Petitioner at 20–21, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 4462202, at *11, 20–21 [hereinafter Brief of American Civil Liberties Union].

[188] The only time the *Timbs* Court uses the phrase "grossly disproportional" is when discussing the trial court's holding. *See Timbs*, 139 S. Ct. at 686. Granted, the test for measuring excessiveness was not the precise issue before the Court in *Timbs*. *Id.* at 687 (determining the incorporation of the Excessive Fines Clause). But in the past, the Supreme Court has given guidance to the lower court as to the analysis that it must perform on remand. *See, e.g.*, United States v. Booker, 543 U.S. 220, 267 (2005) (remanding the case and ordering "the District Court [to] impose a sentence in accordance with today's opinions"); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 678 (1989) ("Upon remand the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric. In assessing the reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject.").

Timbs, many courts will for the first time determine whether a fine or forfeiture violates the Eighth Amendment; and (c) the lower courts do not have a singular approach for deciding this important constitutional question. Thus, the Eighth Amendment's protections against excessive fines vary from jurisdiction to jurisdiction, with each jurisdiction free to apply its own test so long as it includes the phrase "grossly disproportional." The lack of guidance means that the lower courts have no clear roadmap to check against potential constitutional abuses.

To fill this void, the next section offers four factors, which gel with the Supreme Court's Eighth Amendment jurisprudence and the animating purpose of the Fourteenth Amendment, for courts to consider when deciding whether a fine or forfeiture is constitutionally excessive.

IV. A FOUR-FACTOR APPROACH TO AN EXCESSIVE FINES CLAUSE ANALYSIS

When announcing the "grossly disproportional" test in *Bajakajian*, the Supreme Court did not purport to set forward an exhaustive set of factors for lower courts to use when determining whether a fine is constitutionally excessive.[189] This lack of guidance has been a chief criticism of the *Bajakajian* opinion.[190]

But that does not mean there are not principles that can be gleaned from the Court's Excessive Fines Clause cases that can be used to craft a more concrete test. There are three defining aspects of the Court's Excessive Fines Clause jurisprudence that are instructive for determining what courts should consider when deciding whether a fine or forfeiture is constitutionally excessive. First, the Court has made clear that it will look to its Eighth Amendment Cruel and Unusual Punishments Clause jurisprudence when deciding how best to interpret and enforce the Excessive Fines Clause.[191] As evidence, the Court borrowed the "grossly disproportional" standard from its Cruel and Unusual Punishments

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[189] *See* United States v. Bajakajian, 524 U.S. 321, 336 (1998) (explaining that the Court finds two considerations to be "particularly relevant" in a constitutional excessiveness analysis, but not precluding the use of factors; further stating that lower courts must apply the "grossly disproportional" standard de novo).

[190] For example, one author lamented that *Bajakajian* "provokes more questions than it answers about the scope and application of the Excessive Fines Clause." Solomon, *supra* note 12, at 875. The article goes on to express frustration that "the *Bajakajian* Court made broad pronouncements about an emerging constitutional protection, yet issued a narrow holding and rationale that will likely limit the decision's precedential value to a narrow subset of cases." *Id*. Based on this author's review of the early case law applying *Bajakajian*, this author came to the conclusion that "the decision's constitutional import will confuse future parties and the lower courts as to the scope and applicability of the Excessive Fines Clause, and may unwittingly serve to weaken Excessive Fines Clause protections." *Id.*

[191] *See, e.g.*, *Bajakajian*, 524 U.S. at 336 (the Court calling its "cases interpreting the Cruel and Unusual Punishments Clause" "particularly relevant" "in deriving a constitutional excessiveness standard").

Clause cases.[192] Second, the Court has emphasized that the historical motivations behind the ratification of the Eighth and Fourteenth Amendments are important when deciding how best to construe the scope of the Excessive Fines Clause.[193] Third, the Court has reminded throughout its Eighth Amendment cases that any punishment that a government imposes must serve legitimate penological goals.[194]

With these three aspects of the Supreme Court's Eighth Amendment jurisprudence in mind,[195] in addition to considering whether a fine is grossly disproportional to the gravity of the offense, courts should consider these four factors when deciding whether a fine violates the Constitution:

1. Whether the defendant is able to pay the fine.
2. Whether fines are a significant revenue source in the sentencing jurisdiction.
3. Whether other jurisdictions impose similar fines for similar crimes.
4. Whether the sentencing jurisdiction disproportionally imposes fines against minority defendants.

Each factor is discussed in turn.

A. *Whether a Defendant is Able to Pay the Fine*

The first factor courts should consider when deciding whether a fine or forfeiture is constitutionally excessive is the effect of the punishment on the defendant considering their personal circumstances. The Supreme Court in *Bajakajian* expressly left open the question of whether this factor should be considered in an Excessive Fines Clause analysis.[196] The history of the Eighth Amendment compels an answer of "yes."

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[192] *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (concluding "that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment").

[193] *See, e.g.*, *Timbs*, 139 S. Ct. at 687–89 (exploring the "venerable lineage" of the Excessive Fines Clause, including the history around when the Eighth Amendment and Fourteenth Amendments were ratified).

[194] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 71 (2010) (explaining that the "penological justifications for the sentencing practice are also relevant to [an Eighth Amendment] analysis"); *see also Timbs*, 139 S. Ct. at 689 ("[F]ines may be employed in a measure out of accord with the penal goals of retribution and deterrence . . . ." (internal quotation marks omitted)).

[195] It is important to recognize that in the Cruel and Unusual Punishments Clause context, scholars have lamented that the "grossly disproportional" test is effectively toothless; it "has not prevented what were on any measure extremely harsh sentences on particular offenders." Anthony Gray, *Mandatory Sentencing Around the World and the Need for Reform*, 20 NEW CRIM. L. REV. 391, 406 (2017).

[196] *See Bajakajian*, 524 U.S. at 340. In *Timbs*, the Court described *Bajakajian* as "taking no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine." *Timbs*, 139 S. Ct. at 688 (citing *Bajakajian*, 524 U.S. at 340 n.15).

As *Timbs* explained, since Magna Carta it has been uncontroverted that fines "should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood."[197] Thus, since at least 1215,[198] it has been an established Anglo-Saxon legal principle that criminal fines should not be exorbitant to the point of being debilitating.

The Court then noted that the language of the Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689."[199] This provision of the English Bill of Rights was understood to "formalize[] a longstanding prohibition on disproportionate fines."[200] William Blackstone, in his *Commentaries*, maintained that English law had a longstanding principle that "no man shall have a larger [fine] imposed upon him, than his circumstances or personal estate will bear."[201] Thus, the compact from which the Excessive Fines Clause derives its language also was understood to mean that a defendant should not be ruined by a fine.

If a court were to stay true to the Excessive Fines Clause's history, it would consider a defendant's economic circumstances when deciding whether a fine or forfeiture is constitutional. Given the fact that the Supreme Court has repeatedly pointed to this history when determining the scope of the Excessive Fines Clause,[202] this history similarly should guide courts to consider whether a fine or forfeiture is excessive in light of the defendant's personal circumstances.[203]

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[197] *Bajakajian*, 524 U.S. at 335; *Timbs*, 139 S. Ct. at 687–88. The Magna Carta provided that "[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." *Id.* (quoting § 20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225)). "Amercements were payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown. Those acts ranged from . . . minor criminal offenses, such as breach of the King's peace with force and arms, to 'civil' wrongs against the King, such as infringing a 'final concord' made in the King's court." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 269 (1989) (citing 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 519 (2d ed. 1905)).

[198] *Timbs*, 139 S. Ct. at 687.

[199] *Bajakajian*, 524 U.S. at 335.

[200] *Timbs*, 139 S. Ct. at 693. For a longer discussion of the history of the Excessive Fines Clause, see *id.* at 687–89.

[201] 4 WILLIAM BLACKSTONE, COMMENTARIES 372 (1769). The Supreme Court has labeled Blackstone's *Commentaries* the "definitive summary of [English] common law." Washington v. Glucksberg, 521 U.S. 702, 712 (1997).

[202] Indeed, the Supreme Court's major Excessive Fines Clause cases all prominently feature a discussion of the history of the Excessive Fines Clause. *See Timbs*, 139 S. Ct. at 687–89; *Bajakajian*, 524 U.S. at 335–37; *Browning-Ferris*, 492 U.S. at 264–68.

[203] Beth Colgan, after conducting an exhaustive review of the history of the Excessive Fines Clause, explained that "although the mixed record indicates that the principle that fines should not prevent defendants from securing a livelihood, was inconsistently applied, the idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment." Colgan, *Reviving the Excessive Fines Clause*,

Moreover, some courts already consider a defendant's ability to pay when conducting an Excessive Fines Clause analysis. For example, the First Circuit has said that courts should "consider whether forfeiture would deprive the defendant of his or her livelihood," calling the consideration "deeply rooted in the history of the Eighth Amendment."[204] The Eighth Circuit has also held that it is a relevant consideration,[205] and the Ninth Circuit has strongly intimated the same.[206] And even before the Supreme Court decided *Timbs*, several state supreme courts had held that the Excessive Fines Clause applies to the states, and already considered a defendant's ability to pay as part of an Excessive Fines Clause analysis.[207]

Outside of courts performing Excessive Fines Clause analyses, the Conference of Chief Justices and Conference of State Court Administrators has opined that courts should consider a defendant's ability to pay when imposing

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supra note 150, at 334–35. Nicholas McLean also conducted a thorough review of the Excessive Fines Clause's history and concluded that "the Excessive Fines Clause of the Eighth Amendment can appropriately be understood as encoding two complementary, but distinct, constitutional principles: (1) a proportionality principle, linking the penalty to the offense, and (2) an additional limiting principle linking the penalty imposed to the offender's economic status and circumstances." McLean, *supra* note 13, at 836.

[204] United States v. Levesque, 546 F.3d 78, 83–84 (1st Cir. 2008).

[205] *See* United States v. Lippert, 148 F.3d 974, 978 (8th Cir. 1998) ("Finally, in the case of fines, as opposed to forfeitures, the defendant's ability to pay is a factor under the Excessive Fines Clause.").

[206] *See* United States v. Hantzis, 403 F. App'x 170, 172 (9th Cir. 2010) (concluding that a criminal fine did not violate the Eighth Amendment because "there was evidence that Hantzis was very wealthy, and as he refused to submit a financial affidavit, there was no evidence that a fine would deprive him of his livelihood" (internal brackets and quotation marks omitted)). There is a circuit split on the issue, however, as the Eleventh Circuit has expressly refused to consider a defendant's economic circumstances when conducting an excessive fines analysis. *See* United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("More important, we do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment."). The Eleventh Circuit reached this conclusion by citing to its decision in *United States v. 817 Ne. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304 (11th Cir. 1999), where the court claimed that: "The Supreme Court, however, has made clear that whether a forfeiture is 'excessive' is determined by comparing the amount of the forfeiture to the gravity of the offense and not by comparing the amount of the forfeiture to the amount of the owner's assets." *Id.* at 1311 (internal citation omitted). However, given that the Supreme Court has since made clear it did not rule one way or the other on whether courts should consider a defendant's economic circumstances when considering the constitutionality of a fine or forfeiture, see *Timbs*, 139 S. Ct. at 688, the Eleventh Circuit's decision on this point is therefore misguided.

[207] *See, e.g.*, Commonwealth v. 1997 Chevrolet & Contents Seized from Young, 160 A.3d 153, 188 (Pa. 2017) (considering "whether the forfeiture would deprive the [defendant] of his or her livelihood"); Cty. of Nassau v. Canavan, 802 N.E.2d 616, 622 (N.Y. 2003) (considering "the economic circumstances of the defendant").

fines,[208] and a number of courts expressly require this type of assessment.[209] Moreover, courts already take into account a party's economic circumstances in various other contexts, including when calculating a sentence under the federal guidelines,[210] and when assessing bail,[211] civil penalties,[212] tax liens,[213] and sanctions.[214] To the extent a court is hesitant about considering a defendant's economic circumstances as part of an Excessive Fines Clause analysis, it has already been done by courts in this context and is routinely done by courts in other contexts.

Finally, consideration of a defendant's ability to pay is consistent with the "touchstone" principle of proportionality that undergirds the Eighth Amendment.[215] As one scholar observed, taking into account a defendant's economic circumstances ensures a fine or forfeiture is "tailored to serve the ends of punishment as opposed to one that is unnecessary or gratuitous."[216] Put differently, it would be grossly disproportional for a court to assess a fine that will have devastating effects for a crime that is relatively benign. For example, if a court imposes a $300 fine against a defendant for jaywalking,[217] and it turns out that the fine would be ruinous for the defendant, a court should find that the fine is grossly disproportional to the crime in light of the defendant's personal circumstances.

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[208] *See* Dear Colleague Letter, *supra* note 67, at 3.

[209] *See, e.g.*, *id.* at 4.

[210] *See* U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (U.S. SENTENCING COMM'N 2018).

[211] *See, e.g.*, Caliste v. Cantrell, 329 F. Supp. 3d 296, 312 (E.D. La. 2018) ("To satisfy the Due Process principles articulated by Supreme Court precedent, [a judge] must conduct an inquiry into criminal defendants' ability to pay prior to pretrial detention.").

[212] *See, e.g.*, United States v. J. B. Williams Co., 498 F.2d 414, 438 (2d Cir. 1974) (noting that in the context of a challenge to a penalties award for violations of the Federal Trade Act, "[a]s the court below recognized, the size of the penalty should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay").

[213] *See, e.g.*, Mathews v. Comm'r of Internal Revenue, 110 T.C.M. (RIA) 483 (T.C. 2015) (noting that I.R.S. regulations set forth the relevant considerations for determining ability to pay).

[214] Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 749 (7th Cir. 2009) ("A district judge therefore should take the sanctioned party's resources into account when setting the amount of a Rule 11 sanction.").

[215] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.").

[216] Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1896 (2018).

[217] This is not outside the range of possibilities, as this is an example of a fine that DOJ found was imposed in Ferguson. *See* FERGUSON REPORT, *supra* note 21, at 52.

Taken together, these arguments paint a compelling picture for why courts should take stock of a defendant's economic circumstances when deciding whether a fine is constitutionally excessive.[218]

B. *Whether Fines and Forfeitures Are a Significant Source of Revenue in the Sentencing Jurisdiction*

The second factor courts should consider when conducting an Excessive Fine Clause analysis is whether the imposing jurisdiction uses fines and forfeitures as a significant revenue source. Consideration of this factor helps guarantee that fines and forfeitures serve a legitimate penal purpose and guards against state and local governments abusing their power, which is especially important considering how widely fines and forfeitures are used today.

In *Harmelin v. Michigan*,[219] Justice Scalia cogently explained why courts need to carefully review the imposition of financial punishment: "[F]ines are a source of revenue . . . it makes sense to scrutinize governmental action more closely when the State stands to benefit."[220] Justice Scalia elaborated that when a jurisdiction stands to benefit from a punishment, as is the case with fines, there is a much greater risk that it "will be imposed in a measure out of accord with the penal goals of retribution and deterrence."[221] This is different from incarceration and even capital punishment, because those forms of punishment "cost a State money."[222] And as the Supreme Court recognized in *Timbs*, the concern that fines or forfeitures will be imposed for non-penological purposes "is scarcely hypothetical"[223]—"because they are politically easier to impose

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[218] Courts around the country have held that money bail systems that don't take into account a defendant's ability to pay are unconstitutional under the Fourteenth Amendment. *See* O'Donnell v. Harris Cty., 251 F. Supp. 3d 1052, 1052 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *aff'd as modified sub nom*., 892 F.3d 147 (5th Cir. 2018); Buffin v. City & Cty. of San Francisco, No. 15-CV-04959-YGR, 2018 WL 424362, at *1 (N.D. Cal. Jan. 16, 2018); Schultz v. State, 330 F. Supp. 3d 1344, 1348 (N.D. Ala. 2018); Pierce v. City of Velda City, No. 4:15-cv-570, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015).

[219] Harmelin v. Michigan, 501 U.S. 957 (1991). *Harmelin* involved an Eighth Amendment challenge to a mandatory life without parole sentence for cocaine possession. *Id.* at 961–62. One of the arguments Harmelin made was that the sentence was "significantly disproportionate" to his crime. *Id.* at 961. The Supreme Court rejected the argument and affirmed his sentence. *Id.* at 996.

[220] *Id.* at 978 n.9. Indeed, Justice Scalia noted that the Court had at least twice before observed that governmental action must be more closely scrutinized when the government stands to financially benefit. *See id.* (citing U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 25–26 (1977); Perry v. United States, 294 U.S. 330, 350–51 (1935)).

[221] *Id.* The Supreme Court has also recognized that "[r]eformation and rehabilitation of offenders [are] important goals of criminal jurisprudence." Williams v. New York, 337 U.S. 241, 248 (1949). The Court has additionally said that "incapacitation [is] a legitimate penological goal." *See* Graham v. Florida, 560 U.S. 48, 72 (2010).

[222] *See Harmelin*, 501 U.S. at 979 n.9.

[223] Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).

than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and forfeitures as a source of revenue."[224] Indeed, some states collect hundreds of millions of dollars in fines a year,[225] and for some localities, fines revenue comprises over ninety percent of the local budget.[226]

The well-documented horror stories of jurisdictions (ab)using fines to raise revenue often feature municipal courts.[227] Certainly, the incentives for municipal courts to impose exorbitant fines is visceral. But the problems are not limited to municipal courts. State courts too have a financial incentive to impose fines as much as possible.[228]

The Bureau of Justice Statistics reported that "[a]t least 50% of trial courts received their primary funding . . . from state funding sources."[229] And according to the Council of State Governments, "two-thirds of the state court systems receive funding primarily from the state" and twenty percent are at least partially funded by the state, while only twenty percent of courts are funded primarily from local sources.[230] The data shows that fines are financially important to state-funded court systems—over twenty states reported to the

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[224] *Id.* (quoting Brief of American Civil Liberties Union, *supra* note 187, at 7).

[225] As the ACLU noted in its brief, states such as New Jersey and Arizona collected hundreds of millions of dollars in a single year in fines and fees alone from their municipal courts. *See id.* (citing N.J. COURTS, REPORT OF THE SUPREME COURT COMMITTEE ON MUNICIPAL COURT OPERATIONS, FINES, AND FEES 12 (June 2018), https://www.njcourts.gov/courts/assets/supreme/reports/2018/sccmcoreport.pdf [https://perma.cc/BB36-GFH4]; MARK FLATTEN, GOLDWATER INST., CITY COURT: MONEY, PRESSURE AND POLITICS MAKE IT TOUGH TO BEAT THE RAP 6–7 (Sept. 2017), https://goldwaterinstitute.org/wp-content/uploads/2017/09/City-Court-Policy-Paper-1.pdf [https://perma.cc/3PGY-C4X8]). And "[a]mong the 100 cities in the United States that generated the highest proportion of municipal revenue from fines and fees in 2012, between 7.2% and 30.4% of total municipal revenue was derived from fine and fee collection." *Id.* (citing Dan Kopf, *The Overlooked Reason Why Some Cities Have Strained Relationships with Cops*, BUS. INSIDER (July 11, 2016), https://www.businessinsider.com/reason-for-strained-relationship-with-police-2016-7 [https://perma.cc/KBE5-SBCP]).

[226] *See, e.g.*, *supra* note 40 and accompanying text.

[227] *See* FERGUSON REPORT, *supra* note 21, at 42; Brief of American Civil Liberties Union, *supra* note 187, at 4.

[228] MICHAEL D. GREENBERG & SAMANTHA CHERNEY, DISCOUNT JUSTICE: STATE COURT BELT-TIGHTENING IN AN ERA OF FISCAL AUSTERITY 5 (2017), https://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF343/RAND_CF343.pdf [https://perma.cc/2NPJ-SNSZ].

[229] RON MALEGA & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 2011, 8 (Nov. 2013), https://www.bjs.gov/content/pub/pdf/sco11.pdf [https://perma.cc/5NYE-TWF7].

[230] *See* Daniel J. Hall, *Funding Justice*, 60 CAPITOL IDEAS, 26, 26 (Mar.–Apr. 2017), https://www.csg.org/pubs/capitolideas/2017_mar_apr/images/CI_Mar_Apr_2017_Website.pdf [https://perma.cc/NZ5T-XURC].

National Center for State Courts that fines are a revenue source for their judiciaries,[231] and most of those jurisdictions do not have municipal courts.[232]

In light of this, courts must scrutinize fines and forfeitures—imposed by *all* levels of court—to ensure they are being imposed for a legitimate penal reason and that their primary purpose is not to raise revenue. Because, as the Supreme Court has made clear in the Cruel and Unusual Punishments Clause context, a punishment that goes beyond its penal purpose is constitutionally excessive.

As Justice Breyer, joined by Justice Ginsburg, said relatively recently, for a punishment to be constitutional, it must have a legitimate "rationale," whether it be "deterrence, incapacitation, retribution, or rehabilitation."[233] Justice White made this same point decades earlier, asserting a penalty that exceeds its penological purpose is "patently excessive."[234] Justices Stewart, Powell, and Stevens made the same point in yet another case, averring that a punishment that is untethered to a "penological justification . . . results in the gratuitous infliction of suffering."[235] In fact, in the Cruel and Unusual Punishments Clause context, it is uncontroverted that punishment is constitutionally "excessive if it

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[231] *Funds Dedicated to the Judicial Branch: Sources of Revenue and Retention of Dedicated Funds*, NAT'L CTR. FOR ST. CTS., http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM16 [https://perma.cc/958F-6FBG].

[232] For example, Arkansas, California, Connecticut, Maryland, New Hampshire, and Vermont all reported fines as a revenue source, and none of the states have municipal courts. *See id.* (listing the states that self-reported using fines as a revenue source); *State Court Structure Charts*, CT. STAT. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx [https://perma.cc/STE3-CQTA] (providing an interactive map of every state's court structure).

[233] *See* Glossip v. Gross, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting) ("The rationale for capital punishment, as for any punishment, classically rests upon society's need to secure deterrence, incapacitation, retribution, or rehabilitation."). *Glossip* involved a claim that the drug protocol used by Oklahoma risked severe pain in violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. *See id.* at 2731.

[234] Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring) ("A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."). *Furman* involved claims that the death sentences in one murder case and two rape cases were cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 239 (per curiam). The Court found that these sentences were unconstitutional. *Id. Furman* was responsible for a de facto moratorium on the death penalty. *See* Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the Eighth Amendment:* Furman *and* Gregg *in Retrospect*, 18 U.C. DAVIS L. REV. 927, 944 (1985) ("*Furman* was interpreted as having said that capital punishment had been abolished in America." (quotation marks omitted)).

[235] Gregg v. Georgia, 428 U.S. 153, 182–83 (1976) ("Although we cannot invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology, the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." (brackets and internal citation omitted)). *Gregg* ended the de facto moratorium on the death penalty established by *Furman*. *See* Zimring & Hawkins, *supra* note 234, at 944 ("[W]hen the Supreme Court announced its decision in *Gregg v. Georgia* it became clear that executions would indeed be resumed.").

goes beyond what is necessary to achieve the legitimate penological goals of punishment."[236]

As Justice Kennedy wrote for the Court in *Graham v. Florida*, "The penological justifications for [a] sentencing practice are also relevant to [an Eighth Amendment] analysis."[237] Thus, the same principle that the Court has applied in its Cruel and Unusual Punishment cases—that punishment is per se excessive if it goes beyond what's necessary to serve a legitimate penal purpose—should apply to Excessive Fines Clause cases. Because as *Graham* said, a sentence "lacking any legitimate penological justification is by its nature disproportionate to the offense."[238]

Additionally, as Justice Scalia explained in *Harmelin* and the Court recognized in *Timbs*, inquiry as to whether a punishment has a legitimate purpose is even *more* pressing in the Excessive Fines Clause context because there is a financial incentive for courts to impose fines and forfeitures without a legitimate penological purpose, which does not exist in the Cruel and Unusual Punishments Clause context.[239] Given the incentives at play, it is *more* likely that a fine or forfeiture will be divorced from a legitimate penological purpose because jurisdictions stand to profit. Put differently, jurisdictions may fine more than is penologically necessary as a way to raise revenue. Courts should therefore scrutinize the reasons *why* fines are being imposed given that "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power."[240]

Thus, consistent with established Eighth Amendment tenets, when presented with a claim that financial punishment is constitutionally excessive, courts should carefully consider how the jurisdiction in question uses fines and forfeitures to unearth the possibility that the fine or forfeiture was not truly imposed to punish, but was instead intended to fill the local piggybank.

C. *Whether Other Jurisdictions Impose Similar Fines for Similar Crimes*

In addition to considering whether the sentencing jurisdiction uses fines as a significant revenue source, courts should also consider whether other jurisdictions impose similar fines and forfeitures for similar crimes.[241] This

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[236] Ian P. Farrell, *Strict Scrutiny under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 904 (2013).

[237] Graham v. Florida, 560 U.S. 48, 71 (2010). *Graham* presented the question of whether the Eighth Amendment permits a juvenile to be sentenced to life without parole for a non-homicide crime. *Id.* at 52–53. The Court held that it does not. *Id.* at 82.

[238] *Id.* at 71.

[239] *See* Timbs v. Indiana, 139 S. Ct. 682, 689 (2019); Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991).

[240] Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 265–66 (1989).

[241] Professor Margaret Cordray advocates for the consideration of this factor when determining whether a contempt sanction is constitutionally excessive. *See* Margaret

inquiry helps guarantee proportionality across the country. It also would help root out any arbitrariness in the imposition of financial punishment, further ensuring fines are being imposed for legitimate penal reasons and not for financial gain.

In the Cruel and Unusual Punishments Clause context, to ensure punishment does not violate the Eighth Amendment's proportionality principle, the Supreme Court has said that it is appropriate to compare the punishment received by the defendant with the punishments received by defendants in other jurisdictions for similar crimes.[242] Specifically, in *Solem v. Helm*, the Court said that when determining whether a punishment is constitutionally excessive, lower "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions."[243] If other jurisdictions do not impose the same level of punishment for the same type of crime, that is an indication that the punishment may be constitutionally excessive.[244]

It would not be a stretch for courts to consider this factor when conducting an Excessive Fines Clause analysis because *Solem v. Helm* is a case from which *Bajakajian* derived the "grossly disproportional" standard.[245] And the Court in *Solem* clearly believed that comparing how the same crimes are punished in different jurisdictions was relevant to whether a punishment is grossly disproportional.[246] In fact, following *Solem*, at least two state supreme courts

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Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 460 (1998) (explaining that "it would be useful for courts to compare the coercive fine at issue with coercive sanctions threatened or imposed in similar cases"). Professor Cordray believes that "[t]his kind of comparative analysis should prove useful in the coercive contempt setting, because the judge generally has no statutory limit set on his or her sanctioning authority. In this unique context, the comparative analysis can serve as an important means of ferreting out a coercive contempt fine that reflects the distorting effects of an individual judge's overreaction or bias." *Id.* at 461.

[242] *See, e.g.*, *Graham*, 560 U.S. at 60; Solem v. Helm, 463 U.S. 277, 291 (1983).

[243] *Solem*, 463 U.S. at 291. *Solem* presented the issue of "whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony." *Id.* at 279. The Court held that Helm's sentence was "significantly disproportionate to his crime," and therefore was "prohibited by the Eighth Amendment." *Id.* at 303. In *Graham*, the Supreme Court clarified that only after there is "an inference of gross disproportionately" should a court "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." 560 U.S. at 60 (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)) (internal quotation marks omitted). The *Graham* Court continued, "[i]f this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.* (internal quotation marks and brackets omitted).

[244] *See Solem*, 463 U.S. at 291–92 (citing Enmund v. Florida, 458 U.S. 782, 791–92 (1982); Coker v. Georgia, 434 U.S. 584, 593–97 (1977); Weems v. United States, 217 U.S. 349, 380 (1910)).

[245] United States v. Bajakajian, 524 U.S. 321, 336 (1998).

[246] *Solem*, 463 U.S. at 303 (holding that Helm's life without parole sentence was unconstitutional in part because he had "been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State").

already consider this factor when conducting an Excessive Fines Clause analysis.[247]

Moreover, considering how other jurisdictions punish similar crimes goes together with the consideration of whether the imposing jurisdiction relies on fines as a significant source of revenue. If the imposing jurisdiction is one of the few in the country that imposes a hefty fine for a petty crime (for example, jaywalking), then there is reason to believe that the fine is not being imposed for a legitimate penological reason. This inference grows even stronger if that jurisdiction relies heavily on fines for revenue.

Finally, considering what other jurisdictions do ensures uniformity. If one jurisdiction is wildly out of step with another, that will be accounted for and checked by this factor. For example, in Ferguson, DOJ "found instances in which the court charged $302 for a single Manner of Walking violation; $427 for a single Peace Disturbance violation; $531 for High Grass and Weeds; $777 for Resisting Arrest; and $792 for Failure to Obey, and $527 for Failure to Comply."[248] If few jurisdictions imposed similarly exorbitant fines for such minor offenses, then that would be an indication that these fines were constitutionally excessive. This factor helps guarantee that the Eighth Amendment's protections will apply equally across the country, instead of varying from state to state or county to county.

In light of the fact that a case from which the Supreme Court explicitly derived the Excessive Fines Clause "grossly disproportional" test directly admonishes courts to compare the punishment in question to punishments imposed by other jurisdictions under similar circumstances, courts should perform a similar survey when deciding whether a fine is constitutionally excessive.

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[247] *See, e.g.*, Wilson v. Comm'r of Revenue, 656 N.W.2d 547, 556 (Minn. 2003) ("The third *Solem* factor invites us to compare the personal assessment with fines imposed for the commission of the same offense in other jurisdictions."); State v. Real Prop. at 633 E. 640 N., 994 P.2d 1254, 1259 (Utah 2000) (noting that for an Excessive Fines Clause analysis, one factor courts must consider is "the sentences imposed for commission of the same crime in other jurisdictions"). In her dissent in *Browning-Ferris*, Justice O'Connor, joined by Justice Stevens, explained that under the *Solem v. Helm* framework, when conducting an Excessive Fines Clause analysis, courts "should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct." Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1898) (O'Connor, J., dissenting). The majority did not opine on this one way or another because it held that the civil jury award in question was not covered by the Eighth Amendment's prohibition against excessive fines. *Id.* at 260 (majority opinion).

[248] FERGUSON REPORT, *supra* note 21, at 52.

D. *Whether the Sentencing Jurisdiction Disproportionately Imposes Fines Against Minority Defendants*

The final factor courts should consider when conducting an Excessive Fines Clause analysis is whether the jurisdiction has a history of disparately imposing fines or forfeitures against minorities. The consideration of this factor is appropriate because it accords with the history and purpose of the Fourteenth Amendment—the Amendment that incorporates the Excessive Fines Clause against the states.

When holding the Fourteenth Amendment's Due Process Clause incorporates the Excessive Fines Clause against the states, the Court in *Timbs* made sure to discuss the history surrounding the Fourteenth Amendment's ratification.[249] For the Court, this history shed light on which provisions of the Bill of Rights the Framers intended to enforce against the states.[250] A review of this history leaves no doubt that the Fourteenth Amendment's Framers intended for the Excessive Fines Clause to be incorporated against the states. One reason: to protect against the widespread abuse of formerly enslaved Black people.

One of the animating purposes of the Fourteenth Amendment was to "protect the rights of the former slaves."[251] While debating the Fourteenth Amendment, members of Congress repeatedly highlighted the concern of states using punishment to suppress Black people with no federal recourse. For example, Representative John Bingham—"The Father" of the Fourteenth Amendment[252]—said when closing the debates: "[C]ruel and unusual punishments have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none."[253]

The concerns of the Fourteenth Amendment's Framers about states imposing unjust punishment against Black people did not turn on what form the punishment took. In other words, the Framers did not exalt the Eighth Amendment's protection against "cruel and unusual punishments" over its protections against "excessive bail" or "excessive fines."[254] Instead, the Framers believed that all unjust punishment—especially punishment targeted at subordinating Black people—was abhorrent. Bingham did not mince words on this point, declaring "[i]t was an opprobrium to the Republic that for fidelity to

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[249] *See* Timbs v. Indiana, 139 S. Ct. 682, 688–89 (2019).

[250] *See generally id.*

[251] Paul Finkelman, *This Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & C.R. L. REV. 389, 401 (2004).

[252] Gerard N. Magliocca, *The Father of the 14th Amendment*, N.Y. TIMES: OPINIONATOR (Sept. 17, 2003), https://opinionator.blogs.nytimes.com/2013/09/17/the-father-of-the-14th-amendment/ [https://perma.cc/PU5U-VA37].

[253] CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. John Bingham) (internal quotation marks omitted).

[254] *See* U.S. CONST. amend. VIII.

the United States [citizens] could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law."[255] The Fourteenth Amendment repaired this injustice by "strik[ing] down those State rights and invest[ing] all power in the General Government."[256] The Amendment would prohibit all "practices that reduce groups to the position of a lower or disfavored caste."[257]

To be sure, financial punishment was a critical tool that white Southerners used to subordinate Black people. "Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy."[258] As the Supreme Court highlighted in *Timbs*, these laws included "draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses."[259] Then, when a formerly enslaved Black person could not pay the fine, "[s]tates often demanded involuntary labor instead."[260] Thus, southern states used fines, and formerly enslaved Black people's inability to pay them, to create a "new system of forced labor," reducing Black people "to a status somewhere between that of slaves (which they no longer were) and full free people (which most white Southerners opposed)."[261] Debates over the Fourteenth Amendment "repeatedly mentioned the use of fines to coerce involuntary labor."[262]

If one of the reasons the Court held the Excessive Fines Clause applies to the states is a history of concern that states would wield financial punishment to subordinate Black people, then that concern should feature in an Excessive Fines Clause analysis. A jurisdiction disproportionately imposing "draconian fines" for "dubious offenses" against Black people (or other minorities)—like those seen in Ferguson—is a chief evil that the Framers of the Fourteenth Amendment wanted to protect against. The Framers guarded against this evil by intending to incorporate the Excessive Fines Clause against the states.[263]

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[255] CONG. GLOBE, 39th Cong., 1st Sess. 2543 (1866) (statement of Rep. John Bingham) (internal quotation marks omitted).

[256] *Id.* at 2500 (statement of Rep. George Shanklin).

[257] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9–10, 10 n.5 (2003).

[258] Timbs v. Indiana, 139 S. Ct. 682, 688 (2019); *see also* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 43 (1995) (southern states passed "the infamous black codes, which imposed a second-class status just short of slavery on blacks"); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 55 n.62 (1995) ("The Black Codes represented a legalized form of slavery in which each southern state perpetuated the master-slave relationship by passing apprenticeship laws, labor contract laws, vagrancy laws and restrictive travel laws . . . denying African Americans civil rights and due process of law.").

[259] *Timbs*, 139 S. Ct. at 688.

[260] *Id.* at 689.

[261] Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 685 (2003).

[262] *Timbs*, 139 S. Ct. at 689 (citing CONG. GLOBE, 39th Cong., 1st Sess. 443 (1886)).

[263] The Fourteenth Amendment had a clear purpose: "to enforce the Bill of Rights." *See* Representative John A. Bingham, Speech in Support of the Proposed Amendment to Enforce

Therefore, whether a jurisdiction discriminatorily imposes fines against minorities should be a key factor that courts consider when deciding whether a fine is constitutionally excessive.

Accounting for whether a jurisdiction has a history of discriminatorily imposing financial punishment takes on special importance today because fines and forfeitures are disproportionately levied against people of color.[264] The stark racial disparities should give courts pause, especially when considering the collateral consequences that attend financial punishment.[265] The Ferguson Report "highlighted the way that police practices and routine courtroom procedures led African Americans to face higher fines, more warrants for failing to pay criminal justice debt, and greater exposure to the criminal justice system."[266] Essentially, Ferguson's fining practices led to the widespread subordination of the city's Black residents.

Given that the Fourteenth Amendment's Framers were particularly concerned with local and state governments using financial punishment as a means to relegate Black people to second-class citizens, consistent with the intent of the Framers, courts should consider any racial disparities in the imposition of financial punishment when deciding whether a fine or forfeiture is constitutionally excessive.

E. *Applying the Four Factors*

The four factors are designed to work together. As the Supreme Court said in *Solem v. Helm*—again, a case from which the Court borrowed the "grossly disproportional" standard—"no single criterion can identify when a sentence is so disproportionate that it violates the Eighth Amendment."[267] The factors inform each other. For example, if there is evidence that a jurisdiction relies heavily on fines as a source of revenue, that evidence undermines the presumption of legitimacy attached to the punishment and instead weighs in favor of the punishment being constitutionally suspect. The more financial importance fines have in a jurisdiction, the less likely it is that the jurisdiction

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the Bill of Rights 1 (Feb. 28, 1866) (transcript available at https://archive.org/stream/onecountryonecon00bing#page/n1 [https://perma.cc/RUY2-VGUG]).

[264] *See, e.g.*, Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari) (noting that forfeiture regimes "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings"); Colgan, *Lessons from Ferguson*, *supra* note 17, at 1175 (explaining that "fines were collected at rates more than fifteen times higher in one low-income, majority-black community than in a more affluent neighboring municipality"); Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1141 (2017) (collecting "an array of analyses conducted by media outlets and advocacy organizations [that] suggest[] that people of color are disproportionately impacted by civil asset forfeiture").

[265] *See supra* pp. 73–77.

[266] CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 18, at 2.

[267] Solem v. Helm, 463 U.S. 277, 290 n.17 (1983).

is imposing fines for legitimate penological reasons. Likewise, comparing how other jurisdictions punish similar crimes is not to say that if two jurisdictions fine differently, punishment imposed in the jurisdiction with the higher fines is unconstitutional. It just means that the reviewing court should again consider this disparity when deciding whether the fine in question is constitutionally excessive; if a jurisdiction is out of step with the rest of the country, then the answer leans towards yes. And if minorities are being disproportionately punished, that suggests at best an arbitrariness in the imposition of fines, and at worst, outright discrimination.[268] A court should therefore take stock of racial disparities in the imposition of punishment when deciding whether a fine or forfeiture is unconstitutional.

It is important to acknowledge some of the limitations of the proposed factors. One is that some of the factors will be less illuminating in certain contexts. For example, if a jurisdiction is majority Black, racial disparities may not be as relevant when deciding whether there has been a constitutional violation. Likewise, there may be anchoring issues—fines may be set too high across the board, thus comparing fines in different jurisdictions may not reveal much.[269] It is also important to acknowledge that some factors require robust data collection—for example, to compare fines across jurisdictions or to

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[268] The Supreme Court has held, in the context of the death penalty and the Cruel and Unusual Punishments Clause, that racial disparities alone are not enough to prove an Eighth Amendment violation. *See* McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (rejecting an Eighth Amendment challenge to a death sentence despite being presented with a "complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations"). The 5-4 decision has been derided by many as a stain on the Supreme Court. *E.g.*, Annika Neklason, *The 'Death Penalty's* Dred Scott*' Lives On*, ATLANTIC (June 14, 2019), https://www.theatlantic.com/politics/archive/2019/06/legacy-mccleskey-v-kemp/591424/ [https://perma.cc/8PDD-F7U2]. However, that *McCleskey* was a Cruel and Unusual Punishments Clause case means it is not binding in an Excessive Fines Clause context, and given the criticisms, it should not be extended, especially in light of the recognition by the Court that there are different concerns at play in the Excessive Fines Clause context. *See supra* p. 37. But even if *McCleskey* is held to apply in this context, because the proposed test is a multi-factored test, a constitutional violation does not rely on racial disparities alone and thus *McCleskey* should not be a barrier for relief. Moreover, the current Supreme Court has seemed particularly concerned with racism influencing the administration of justice. In just the past two years, the Supreme Court has found constitutional violations in cases where there was evidence of racial discrimination in jury deliberations, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017); jury selection, Flowers v. Mississippi, 139 S. Ct. 2228, (2019); and when discriminatory race-based evidence was presented to a jury, Buck v. Davis, 137 S. Ct. 759 (2017). The last example prompted Chief Justice Roberts to declare that "[o]ur law punishes people for what they do, not who they are." *Buck*, 137 S. Ct. at 778. Therefore, if there is evidence that race influenced punishment, then that should be taken into account when conducting a constitutional analysis.

[269] Scholars have written about issues with anchoring in sentencing, and how sentencing guidelines have normalized extreme prison sentences. *See, e.g.*, Melissa Hamilton, *Extreme Prison Sentences: Legal and Normative Consequences*, 38 CARDOZO L. REV. 59, 106 (2016).

examine racial disparities—and these factors cannot be fully operationalized until that data is collected.[270]

That said, here is a sketch of what an analysis would look like using the proposed four factors. As an initial matter, *Bajakajian* cannot be ignored, so a court would consider the "essence" of the crime and the "harm" caused by the defendant when determining whether the fine or forfeiture is "grossly disproportional."[271] For this, a reviewing court can look to tests established by state and federal courts.[272] Also following *Bajakajian*, the court would presume a fine or forfeiture within statutory guidelines is constitutional,[273] although the ultimate question of whether a fine violates the Constitution is one that the reviewing court would have to consider de novo.[274] It is here where the proposed factors kick in.

First, the court would consider the defendant's ability to pay, because while for some people a within-guidelines fine may be financially tolerable, another person may find that same fine ruinous. This would require the court to take full account of the defendant's economic circumstances to ensure, in the words of Blackstone, that the fine is no larger than "his circumstances or personal estate will bear."[275] The National Center for State Courts recommends that judges consider a defendant's income (if any); whether he receives public assistance; whether he has dependents; whether he has been recently incarcerated or homeless; whether he has any disabilities or mental health issues; and any other outstanding debts or financial obligations.[276] If, after taking a holistic view of the defendant's circumstances, a court finds that a defendant would be caused

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[270] Some organizations, like the Brennan Center for Justice at NYU School of Law and the Arthur Liman Center for Public Interest at Yale Law School, have already begun doing extensive work collecting data on fines and fees practices across the country.

[271] *See* United States v. Bajakajian, 524 U.S. 321, 337 (1998).

[272] *See supra* pp. 86–88.

[273] *See Bajakajian*, 524 U.S. at 336 ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature.").

[274] *Id.* at 336–37 n.10 ("The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous. But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." (internal citation omitted)).

[275] BLACKSTONE, *supra* note 201, at 372.

[276] NAT'L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, *supra* note 71. Some scholars have explored a "day-fine model"—"an economic sanction mechanism used in several European and Latin American Countries." *See, e.g.*, Schierenbeck, *supra* note 216, at 1874–76; Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 56 (2017). This model involves a "two-step process": First, offenses are assigned a penalty "that increase[s] with crime severity and [are] set without any consideration of a defendant's ability to pay." *Id.* at 56. Then, the court "establish[es] the defendant's adjusted daily income, in which income was adjusted downward to account for personal and familial living expenses." *Id.*

major hardship by a fine for a comparably minor crime, then that fine should be found excessive in violation of the Eighth Amendment.[277]

Second, when considering whether fines are an important revenue source for the sentencing jurisdiction, the reviewing court should consider how courts in the sentencing jurisdiction are funded. This would include inquiring into whether fines are earmarked as a funding source for courts or their judges, whether the courts in that jurisdiction have experienced budgetary deficits, and whether local law enforcement are directed or expected to issue a certain number of citations over a given period. If fines are a significant source of revenue in the jurisdiction, the reviewing court should view the fines with skepticism. The reviewing court should also consider whether there have been increases in fines that cannot be explained by market factors such as inflation. If there have been, that suggests that the fines are not being set to fit the punishment, but instead are being set to satisfy budgetary needs. And at the point a fine is set above the amount necessary to serve a penological purpose, that fine should be found unconstitutional.

Third, the reviewing court should compare the fine to fines imposed for similar crimes in other jurisdictions. And this comparison should not just be limited to surrounding jurisdictions. Courts should examine whether other jurisdictions across the country, especially those with different demographics and funding structures, impose similar fines. If they do not—for example, if few other jurisdictions are imposing $500 fines for overgrown grass, as was the case in Ferguson—that is a strong indication that the fine is excessive.[278]

Finally, even if a fine accords with how similar crimes are punished in other places if, in the sentencing jurisdiction, fines are disproportionately imposed against minorities, the fine may still be constitutionally suspect. And in the face of such disparities, the government should be forced to provide a race-neutral reason for why it is that minorities are being disproportionately punished.[279] If

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[277] Scholars have criticized ability-to-pay inquiries because they are often inaccurate and require the court to make subjective judgments. *See, e.g.*, Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 564 (2011). Other scholars have criticized ability-to-pay determinations as legitimizing an inherently discriminatory system. *See, e.g.*, Theresa Zhen, *(Color)blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 179 (2019). Both points are well taken. But as long as fines are on the books, the history of the Excessive Fines Clause compels the consideration of a defendant's economic circumstances when assessing monetary punishment. And short of abolishing fines, there are (more) thoughtful ways for courts to perform ability-to-pay determinations.

[278] For example, in the Cruel and Unusual Punishments Clause context, the Court found the life without parole sentence for the petitioner's crime unconstitutional, in part because he had been "treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State." Solem v. Helm, 463 U.S. 277, 303 (1983).

[279] In other contexts, when faced with evidence of discrimination in the administration of justice, the Supreme Court has required the government to provide race neutral

a jurisdiction cannot provide a satisfactory explanation—for example, if Ferguson could not explain why "African Americans accounted for 95% of Manner of Walking in Roadway charges, and 94% of all Failure to Comply charges" when they comprise only sixty-seven percent of Ferguson's population[280]—a court should find that race "was operating in the system in such a pervasive manner that it could be fairly said that system was irrational, arbitrary and capricious."[281] If that's the case, the reviewing court should sustain any Eighth Amendment challenge.

In the end, the four factors work to serve "the primary focus of the Eighth Amendment" by protecting against "the potential for governmental abuse of its prosecutorial power."[282]

V. CONCLUSION

As fines and forfeitures continue to be imposed at astonishing rates, and so long as they are disparately imposed against poor people of color, courts must be wary of rubberstamping the constitutionality of this ubiquitous form of punishment. The proposed four factors—(1) whether a defendant is able to pay the fine; (2) whether fines are a significant source of revenue in the sentencing jurisdiction; (3) whether other jurisdictions impose similar fines for similar crimes; and (4) whether the sentencing jurisdiction disproportionately imposes fines against minority defendants—give courts a roadmap to ensuring financial punishment does not violate the Eighth Amendment. Hopefully they will follow it.

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justifications for the racial disparities. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 97 (1986); Castaneda v. Partida, 430 U.S. 482, 498 (1977).

[280] FERGUSON REPORT, *supra* note 21, at 4.

[281] McCleskey v. Kemp, 753 F.2d 877, 891 (11th Cir. 1985) ("A successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious."), *aff'd*, 481 U.S. 279, 306–07 (1987) ("[A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation . . . ."). This is not to endorse *McCleskey*. It's to show that such irrational disparities would not survive constitutional scrutiny even under the standard announced in *McCleskey*.

[282] Browning-Ferris Indus., v. Kelco Disposal, Inc., 492 U.S. 257, 265–66 (1989).