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The Excessive Fines Clause: Challenging the Modern Debtors' Prison

Beth A. Colgan

ABSTRACT

In recent years, the use of economic sanctions—statutory fines, surcharges, administrative fees, and restitution—has exploded in courts across the country. Economic sanctions are imposed for violations as minor as jaywalking and as serious as homicide, and can range from a few dollars to millions. When a person is unable to immediately pay off economic sanctions, "poverty penalties" are often imposed, including interest and collections fees and probation. Failure to pay economic sanctions can result in serious consequences, including prohibitions on obtaining or suspensions of driver's and occupational licenses, restrictions on public benefits, and even incarceration. Even when poverty penalties are not employed, an inability to pay off criminal debt means that the punishment imposed, even for very minor offenses, can effectively be perpetual. Desperate to avoid these repercussions, people go to extremes to pay. In an alarming number of cases people report having to forego basic necessities like food, housing, hygiene, or medicine, in order to pay what little they can, even if just a few dollars at a time. These and countless other stories of people trapped in persistent debt are becoming ubiquitous, and have raised the specter that current practices amount to modern day debtors' prisons.

Constitutional challenges to such practices have primarily focused on the narrow window of the post-sentencing collections context, relying on a series of Fourteenth Amendment cases prohibiting the automatic conversion of economic sanctions to incarceration where a debtor has no meaningful ability to pay. While these challenges can provide an important post hoc protection against the use of incarceration as a penalty for the failure to pay, they do not address the financial instability exacerbated by and ongoing threat of incarceration raised by debt from unmanageable economic sanctions.

A separate, albeit underdeveloped, constitutional provision that may be better suited to addressing the debtors' prison crisis lies in the Eighth Amendment's Excessive Fines Clause, which provides protection at sentencing. To date, the United States Supreme Court has only determined that criminal and civil forfeitures constitute fines. This Article examines the key concerns underlying those determinations, explicating the Court's interest in treating economic sanctions as fines where they are used by the government to punish—evidenced by a link to prohibited conduct or treatment of economic sanctions like other recognized forms of punishment—as well as the Court's desire that the Clause serve as a bulwark against the risk that the prosecutorial power will be abused due to the revenue generating capacity of economic sanctions. Applying these core concerns supports the conclusion that common forms of economic sanction (including statutory fines, surcharges, administrative fees, and restitution) constitute fines for purposes of the Clause.

In addition, this Article examines the meaning of excessiveness, arguing that one's ability to pay is relevant to the question of whether a fine is constitutional. The Court has adopted the Cruel and Unusual Punishments Clause's gross disproportionality test for measuring excessiveness. Attending to financial circumstances in the excessiveness inquiry is in harmony with key principles animating the proportionality doctrine: equality in sentencing, comparative proportionality between offenses of different seriousness, the expressive value of punishment, concern for the criminogenic effect of and other social harms caused by punishment, and the prohibition on punishments that unreasonably infringe on human dignity.

AUTHOR

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INTRODUCTION

In 2010, police in Orange County, Florida, arrested Larry Thompson for driving with a suspended license,[1] which had been indefinitely suspended as a result of his failure to pay previously imposed traffic fines that he had no meaningful ability to pay.[2] Mr. Thompson, who had no income, benefits, or savings at the time, attempted to apply for a public defender,[3] but he could not pay the mandatory $50 application fee.[4] He remained in jail for 59 days, ultimately pleading no contest to the charge and obtaining his release based on a sentence of time served.[5] The court also sentenced Mr. Thompson to pay a litany of surcharges and fees totaling $548[6]—some mandatory and some discretionary—including $100 for the public defender who entered his plea,[7] $100 in prosecution costs,[8] a $225 surcharge for the "Local Government Criminal Justice Trust Fund,"[9] as well as surcharges that seemingly had nothing to do with his offense, such as the $50 he was charged for Florida's crime victim

1. *See* Complaint at 1, State v. Thompson, No. 2010-CF-005330-A-O (Fla. Orange Cty. Ct. Apr. 17, 2010); *see also* Elyssa Cherney, *OPD Arrested Hospice Patient for Failing to Pay Court Fees, Records Show*, ORLANDO SENTINEL (Aug. 7, 2015, 7:52 PM), http://www.orlandosentinel.com/news/breaking-news/os-hospice-arrest-court-fees-20150807-story.html [http://perma.cc/2334-L7UJ?type=image]. Police also initially charged Mr. Thompson with providing false identification, but that charge was later dropped. *See* Complaint, *supra*, at 1; Order (Plea/Sentencing/Release), *Thompson*, No. 2010-CF-005330-A-O (Fla. Orange Cty. Ct. June 14, 2010).
2. Complaint, *supra* note 1, at 6–7 (showing entries on June 17, 2004 and May 3, 2005 noting that Mr. Thompson's license was "SUSP-INDEF" on the basis of "FAILED TO PAY TRAFFIC FINE (PENALTY)").
3. *See* Application for Criminal Indigent Status, *Thompson*, No. 2010-CF-005330-A-O (Fla. Orange Cty. Ct. Apr. 18, 2010).
4. *See* Ryan Grenoble, *Florida Judge Scraps Policy of Arresting People Who Fail to Pay Court Fines*, HUFFINGTON POST (Sept. 18, 2015, 1:29 PM). http://www.huffingtonpost.com/entry/orange-county-florida-court-fee-arrest_us_55faee45e4b00310edf616d1 [http://perma.cc/TS5K-JFJZ]. Since the 1990s, it is increasingly common for courts to charge a fee for applying for indigent defense representation. *See* Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2046, 2052–53 (2006).
5. Order (Plea/Sentencing/Release), *supra* note 1.
6. Charge/Costs/Fees, *Thompson*, No. 2010-CF-005330-A-O, (Fla. Orange Cty. Ct. June 14, 2010); Notice of Fines and Costs, Required Status Hearings and Order Requiring Defendant's Personal Appearance at Collection Court, *Thompson*, No. 2010-CF-005330-A-O (Fla. Orange Cty. Ct. June 14, 2010) [hereinafter Notice of Fines and Costs].
7. Charge/Costs/Fees, *supra* note 6; *see also* FLA. STAT. § 938.29 (2017); DNA Inquiry Addendum to Plea of Guilty or No Contest, *Thompson*, No. 2010-CF-005330-A-O (Fla. Orange Cty. Ct. June 14, 2010) (sentencing form signed by defense counsel).
8. Charge/Costs/Fees, *supra* note 6; *see also* FLA. STAT. § 938.27.
9. Charge/Costs/Fees, *supra* note 6; *see also* FLA. STAT. § 938.05.

compensation fund,[10] and the $3 the then-56-year-old[11] was required to pay to fund "Teen Court."[12] The court also imposed a $5 per month partial payment fee, which would accrue until the debt was paid in full.[13] At various times, the court imposed additional $10 fees for nonpayment,[14] and ultimately issued an arrest warrant for the failure to pay.[15] Florida police located Mr. Thompson in 2015—by which time he was a hospice patient suffering from chronic obstructive pulmonary disease and HIV[16]—and placed him under arrest for failure to pay his economic sanctions.[17] The arrest procedure triggered two additional administrative fees—one fee for the processing of the warrant and the other for the arrest itself—adding an additional $230 to his debt[18] and raising it to $885.[19] Explaining his frustration at being arrested, Mr. Thompson stated:

> I can't see them keep arresting me over and over to take me back to jail, to charge me $250 more dollars that I have to agree to or else I'm sitting in jail, when I can't get oxygen in jail like I need it. So they're actually issuing me a death sentence.[20]

What is perhaps most striking about Mr. Thompson's story is how ordinary it is.[21] In recent years, the use of economic sanctions—statutory fines, surcharges,

10. Charge/Costs/Fees, *supra* note 6; *see also* FLA. STAT. § 938.03.
11. *See* Complaint, *supra* note 1, at 1.
12. Charge/Costs/Fees, *supra* note 6; *see also* FLA. STAT. § 938.19.
13. *See* Notice of Fines and Costs, *supra* note 6.
14. *See id.*; Docket, State v. Thompson, No. 2010-CF-005330-A-O (Fla. Orange Cty. Ct. Apr. 17, 2010).
15. Writ of Attachment, *Thompson*, No. 2010-CF-005330-A-O (Fla. Orange Cty. Ct. Aug. 17, 2012).
16. Cherney, *supra* note 1.
17. *See id.*; ICJIS Warrant Arrest Affidavit, *Thompson*, No. 2010-CF-005330-A-O (Fla. Orange Cty. Ct. 15 Aug. 4, 2015).
18. *See* Notice of Fines and Costs, *supra* note 6 (describing the possible use of a $20 fee for issuance of a writ of bodily attachment and a $210 fee upon arrest); Docket, *supra* note 14 (documenting the imposition of a $210 fee on August 5, 2015 and a $20 fee on August 17, 2012).
19. Docket, *supra* note 14 (indicating in the "Financials" section of the docket that Mr. Thompson owed a total of $885).
20. *65-Year-Old Man Arrested for Failing to Pay Court Costs*, ORLANDO SENTINEL, http://www.orlandosentinel.com/news/84167284-132.html [https://perma.cc/LR7A-EF9D].
21. In just Orange County, Florida, there were 21,000 arrest warrants pending for failure to pay economic sanctions at the time of Mr. Thompson's arrest. *See* Grenoble, *supra* note 4; *see also* Robin Fitzgerald, *Debtors Prison Claim Looms Over Biloxi*, SUNHERALD (Nov. 21, 2015, 9:48 PM), http://www.sunherald.com/latest-news/article45843155.html [http://perma.cc/V29K-KJ2R] (reporting that courts in Biloxi, Mississippi issued over 1,500 arrest warrants between September 2014 and June 2015 for the failure to pay economic sanctions, part of a scheme that contributed to the generation of $1.27 million in revenue in the previous year); Randal Seyler, *Local ACLU Chapter Seeks Jail Oversight Committee*, SILVER CITY SUN-NEWS (July 6, 2015, 7:08 AM), http://www.scsun-news.com/story/news/local/2015/07/06/local-aclu-

administrative fees, and restitution—has exploded in courts across the country.[22] Economic sanctions are imposed for violations as minor as jaywalking and as serious as homicide,[23] and can range from a few dollars to millions.[24] When a person is unable to immediately pay off economic sanctions, "poverty penalties"[25] are often imposed, including interest and collections fees,[26] such as the monthly collection fee imposed on Mr. Thompson.[27] In many jurisdictions, defendants who cannot pay at sentencing are placed on probation that otherwise would not have been imposed and which may result in even more fees.[28] Default can also result in a prohibition on obtaining, or suspension of, government-issued driver's

chapter-seeks-jail-oversight-committee/71601486 [https://perma.cc/24UY-WAPH] (reporting that in Grant County, New Mexico, a quarter of jail inmates are incarcerated solely due to inability to pay fines).

22. *See* ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7 (2010); COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL 3 (2015); Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1736–38 (2015).
23. *See, e.g.*, IND. CODE ANN. § 9-21-17-1 to -24 (2017) (describing forms of jaywalking and setting violation as a class C infraction); IND. CODE ANN. § 34-28-5-4(c) (setting maximum fine for class C infraction at $500); WASH REV. CODE § 9A.32.030(2) (2016) (listing homicide as a class A felony); WASH REV. CODE § 9A.20.021(1)(a) (setting maximum fine for a class A felony at $50,000).
24. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 285 (2014).
25. *See* CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 15 (2016), http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf [http://perma.cc/4VNQ-QGNX] [hereinafter CONFRONTING DEBT].
26. *See* Colgan, *supra* note 24, at 283.
27. *See* Notice of Fines and Costs, *supra* note 6; *see also supra* text accompanying note 13.
28. *See, e.g.*, ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADM'RS, 2015–2016 POLICY PAPER—THE END OF DEBTORS' PRISONS: EFFECTIVE COURT POLICIES FOR SUCCESSFUL COMPLIANCE WITH LEGAL FINANCIAL OBLIGATIONS 16 (2016), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx [http://perma.cc/ZLH7-KPC3]; *see also, e.g.*, HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY 39 (2014), http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [http://perma.cc/4PS3-TA8B] (describing the practice of judges who asked defendants, "Can you pay that today?" and summarily placed anyone who said no on probation). Placement on probation for inability to pay—colloquially known as "pay-only probation," can result in the imposition of supervision fees that can prevent people with limited incomes from reaching the criminal debt's principal. *See, e.g.*, HUMAN RIGHTS WATCH, *supra*, at 24–25 (describing private probation fees of $35 to $40 per month). Supervision fees are also typical where a defendant is sentenced to serve a portion of a sentence in the community, as is the case for parole or standard probation, and can vary from state to state, in some cases adjusted based on a defendant's income. *See, e.g.*, N.M. STAT. ANN. § 31-20-6 (2016) (capping suspended and deferred sentence supervision fees at $1800 to be paid at $25 to $150 per month); TEX. CODE CRIM. PROC. ANN. art. 42A.652(a) (West Supp. 2017) (setting supervision fees at $25 to $60 per month for the term of probation); WIS. STAT. 304.074(2) (2015–16 & Supp. 2017) (requiring only that supervision fees be "reasonable").

and occupational licenses, and public benefits such as Social Security Income, food stamps, and public housing.[29] At the most extreme, jurisdictions incarcerate those who are unable to pay, as the Orlando court did to Mr. Thompson,[30] and do so without any meaningful consideration of whether the failure to pay is willful or due to poverty.[31]

Even when poverty penalties are not employed, an inability to pay off criminal debt[32] means that the punishment imposed, even for very minor offenses, can effectively be perpetual.[33] Desperate to avoid these repercussions, people go to extremes to pay. In an alarming number of cases people report having to forego basic necessities like food,[34] housing,[35] hygiene,[36] or medicine,[37] in order to pay what little they can, even if just a few dollars at a time.[38] These and countless other stories of people trapped in persistent debt are becoming

29. *See* CONFRONTING DEBT, *supra* note 25, at 15–16; ALEX BENDER ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 9–20 (2015); Colgan, *supra* note 24, at 292–93.

30. *See* Writ of Attachment, *supra* note 15 and accompanying text.

31. *See* Michelle Chen, *What Kind of Justice Can There Be When Judges Have to Find Defendants Guilty to Keep Their Court Open?*, NATION (July 6, 2016), http://www.thenation.com/article/what-kind-of-justice-can-there-be-when-judges-have-to-find-defendants-guilty-to-keep-their-court-open [http://perma.cc/UT3V-VHQV].

32. Unlike other areas of constitutional law, the question of whether a sanction is civil or criminal in nature is irrelevant in the excessive fines context. *See infra* note 87. For ease of reference, however, throughout this Article I use the term "criminal debt" to refer to any outstanding obligation to pay statutory fines, surcharges, administrative fees, or restitution regardless of whether the sanctions were imposed in criminal or nominally civil settings.

33. *See* Colgan, *supra* note 24, at 291.

34. *See, e.g.*, April Warren, *Rebuilding a Life: Huge Court Costs, Fees Leave Some Scrambling*, OCALA STARBANNER (May 2, 2015, 10:52 PM), http://www.ocala.com/article/LK/20150502/News/604143113/OS [http://perma.cc/8973-3EY5] (reporting that people sell food stamps to secure cash to pay fines and fees); *cf.* KATHRYN J. EDIN & H. LUKE SHAEFER, $2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 105–08 (Mariner Books 2016) (discussing the sale of food stamps among the "$2-a-day poor" to obtain needed cash).

35. *See, e.g.*, ACLU OF LA., LOUISIANA'S DEBTORS PRISONS: AN APPEAL TO JUSTICE 6 (2015) (detailing a pregnant, single mother's use of money needed to pay rent to avoid incarceration for unpaid fines).

36. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 28, at 34–35; Colgan, *supra* note 24, at 293.

37. *See, e.g.*, FOSTER COOK, JEFFERSON CTY.'S CMTY. CORR. PROGRAM, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 10 (2014) (reporting that approximately 31 percent of survey respondents forewent the payment of medical bills and approximately 27 percent forewent purchasing prescription medication in order to pay toward criminal debt); HUMAN RIGHTS WATCH, *supra* note 28, at 31.

38. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 28, at 31 (documenting that of the 1,200 people on probation in Greenwood, Mississippi's municipal court, many "had been making payments of only $5 or even $10 at a time").

ubiquitous, and have raised the specter that current practices amount to modern day debtors' prisons.[39]

Constitutional challenges to such practices have largely focused on the narrow window of the post-sentencing collections context.[40] These challenges are centered on a series of Fourteenth Amendment cases in which the United States Supreme Court prohibited the automatic conversion of unpayable economic sanctions into incarceration.[41] Most prominently, in *Bearden v. Georgia*,[42] the Court held that the revocation of probation for the failure to pay statutory fines and restitution without a determination that the failure was willful, rather than as a result of poverty, violated both the Equal Protection and Due Process Clauses.[43] While this line of cases provides an important post-hoc protection against the use of incarceration and perhaps other poverty penalties[44] in response to the failure to pay fines in jurisdictions that adhere to *Bearden*'s requirements,[45] it does not protect against the difficulties that arise from the imposition of unmanageable economic sanctions in the first instance. In many cases, interest, collections costs, and payment fees are sufficiently high that even when people make regular payments they cannot reach the principal debt, keeping them perpetually in the shadow of the punishment.[46] For example, had Mr. Thompson been able to pay $5 a month out of a budget that already made it difficult for him to meet his basic needs,[47] he would have merely broken even each month as a result of the $5 monthly payment fee.[48] Even for those who are able to reach the principal, the minimal

39. *See, e.g.*, Kate Gibson, *Poor Defendants Say They Face Modern-Day Debtors' Prison*, CBS MONEYWATCH (Aug. 23, 2016, 5:15 PM), http://www.cbsnews.com/news/poor-defendants-say-they-face-modern-day-debtors-prison [http://perma.cc/52QA-GPLH].
40. *See* Beth A. Colgan, *Lessons From Ferguson on Individual Defense Representation as a Tool of Systemic Reform*, 58 WM. & MARY L. REV. 1171, 1233 n.345 (2017) (listing examples of class action lawsuits raising Fourteenth Amendment challenges).
41. *See* Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).
42. 461 U.S. 660 (1983).
43. *Id.* at 665, 667, 672–73.
44. *See, e.g.*, Temporary Restraining Order, Robinson v. Purkey, No. 3:17-cv-1263 (M.D. Tenn. Oct. 5, 2017) (determining that plaintiffs' *Bearden*-based challenge to revocation of drivers' licenses for failure to pay was likely to succeed on the merits). *But see* Fowler v. Johnson, No. 17-11441, 2017 WL 6379676 (E.D. Mich Dec. 14, 2017) (determining that plaintiffs, whose driver's licenses were revoked for failure to pay economic sanctions, were unlikely to succeed on the merits of a claim seeking the extension of the *Bearden* line of cases beyond the poverty penalty of incarceration).
45. For descriptions of jurisdictions failing to adhere to *Bearden*, see HUMAN RIGHTS WATCH, *supra* note 28, at 41–42; Colgan, *supra* note 40, at 1199–1205; and Chen, *supra* note 31.
46. *See* State v. Blazina, 344 P.3d 680, 684 (Wash. 2015).
47. *See infra* notes 264–265 and accompanying text.
48. *See* Notice of Fines and Costs, *supra* note 6; *see also supra* text accompanying note 13.

amounts those living with financial instability can pay each month toward criminal debt can have serious repercussions for their health and welfare.[49] As one person struggling to pay explained, even "$10 doesn't sound like a lot, but it is a lot when you're living on $300 a month."[50] Further, those who miss or are likely to miss a payment live under the threat of further punishment, even though the choice to pay is illusory.[51] *Bearden*'s post-hoc protection, which is triggered upon the imposition of further punishment for the failure to pay, does not provide protection in any of these scenarios.

A separate, albeit underdeveloped, constitutional provision that may be better suited to protecting people like Mr. Thompson, lies in the Eighth Amendment's Excessive Fines Clause, which provides protection at sentencing.[52] The Eighth Amendment states: "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted."[53] The Supreme Court has rarely addressed the Clause, interpreting it only four times in total.[54] With respect to the threshold question of what constitutes a fine, the Court has determined that both criminal and civil forfeitures are fines,[55] but that punitive damages awarded in private litigation are not.[56] Therefore, the Court has yet to have an opportunity to resolve whether the myriad forms of economic sanction that have become commonplace today, including those imposed against Mr. Thompson, constitute "fines." The meaning of "excessive" is even less well-developed. In the sole case to interpret excessiveness, *United States v. Bajakajian*,[57] the Court explained: "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality . . . ."[58] It then adopted the Cruel and Unusual Punishment

49. *See, e.g.*, *infra* notes 342–348, 361–368 and accompanying text.
50. KATHERINE A. BECKETT ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 42 (2008), http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf [http://perma.cc/S444-4XK8].
51. For example, due to Mr. Thompson's inability to pay, he was at risk that the court would issue an arrest warrant for failure to pay from the time of his sentencing, a risk that increased upon the issuance of a warrant in 2012, and persisted until his arrest in 2015. *See, e.g.*, *supra* notes 1–20 and accompanying text.
52. *See* People v. Ingham, 453 N.Y.S.2d 325, 327 (Rochester City Ct. 1982) ("The constitutional injunction against excessiveness operates *at or before the time of imposition of sentence*.").
53. U.S. CONST. amend. VIII (emphasis added).
54. *See* Colgan, *supra* note 24, at 281–82.
55. *See* Austin v. United States, 509 U.S. 602 (1993) (civil forfeitures); Alexander v. United States, 509 U.S. 544 (1993) (criminal forfeitures).
56. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
57. 524 U.S. 321 (1998).
58. *Id.* at 334.

Clause's gross disproportionality test, which weighs the seriousness of the offense against the severity of the punishment.[59] In the opinion, the Court focused on aspects of the excessiveness inquiry related to measuring offense seriousness, leaving open the question of whether a person's financial condition is relevant to a fine's constitutionality.[60]

The underdevelopment of the Excessive Fines Clause is not limited to the Supreme Court. While the lower courts have occasionally waded into these waters,[61] excessive fines cases have remained heavily focused on resolved issues, with most cases involving forfeitures and focusing on the offense seriousness rather than the punishment severity side of the gross disproportionality test.[62] Like the doctrine, literature offering an in-depth examination of the Clause has been scant.[63] While these accounts are generally supportive of a protective

59. *Id.* at 336–37.

60. *See infra* notes 251–255 and accompanying text.

61. *See, e.g.*, United States v. Levesque, 546 F.3d 78, 83–84 (1st Cir. 2008) (holding that to assess the excessiveness of a forfeiture, a court must consider the effect on a defendant's livelihood); People *ex rel.* Lockyer v. R.J. Reynolds Tobacco Co., 124 P.3d 408, 420–21 (Cal. 2005) (requiring consideration of ability to pay in assessing excessiveness).

62. *See, e.g.*, United States v. George, 779 F.3d 113, 122–24 (2d Cir. 2015) (assessing the excessiveness of the forfeiture by considering the nature of the crime and harm caused by it, whether the defendant engaged in activity meant to be captured by the statute, and the value of the forfeiture as compared to the maximum statutory prison term and fine); State v. Zubiena, 796 S.E.2d 40, 49 (N.C. Ct. App. 2016) (assessing excessiveness by weighing the dollar value of the fine, without consideration of ability to pay, against the nature of the offense); State v. Bergquest, 641 N.W.2d 179, 183 (Wis. Ct. App. 2002) (considering only "(1) the nature of the offense; (2) the purpose of enacting the statute; (3) the fine commonly imposed upon similar situated offenders; and (4) the harm resulting from the defendant's conduct").

63. There has been some attention to the relationship between the Excessive Fines and Cruel and Unusual Punishments Clauses. *See, e.g.*, 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 (arguing that the gross disproportionality test, while appropriate in the cruel and unusual punishments context, is overly deferential in the excessive fines context); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 729–30 (2005) (incorporating the *Bajakajian* opinion into a broader analysis of the Eighth Amendment's proportionality cases). The literature also includes examinations of the effects of the doctrine on forfeiture practices or punitive damages cases. *See, e.g.*, Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L.J. 949 (2008); Melissa A. Rolland, Case Comment, *Forfeiture Law, the Eight Amendment's Excessive Fines Clause, and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371 (1999). Finally, the literature includes investigations of the historical use of economic sanctions in light of the Court's reliance on an originalist method of interpretation in the Excessive Fines Clause cases. *See, e.g.*, Colgan, *supra* note 24; *see also id.* at 282 nn.20–21 (listing literature that briefly describes historical fine and forfeiture practices); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013); James S. McDonald, Note,

interpretation of the Clause,[64] a need to further develop the bounds of the Clause's protections remains.

This Article argues that, despite the dearth of analysis, the Supreme Court has laid the groundwork for a robust and protective interpretation of the Excessive Fines Clause. As detailed herein, examination of the principles that have animated the Court's Eighth Amendment jurisprudence reveals how the Excessive Fines Clause may provide a doctrinal intervention into the modern debtors' prison crisis. That crisis has been driven in large part by a desire by lawmakers to use economic sanctions as a tax substitute as well as a form of punishment, leading to the creation of more and greater sanctions,[65] and in some jurisdictions to policing targeted at offenses from which revenue can be generated.[66] Though there is healthy skepticism regarding the idea that constitutional claims can create meaningful structural change,[67] were the Court to follow the doctrinal path it has laid out, it would effectively reduce the space in which lawmakers can use punishment to generate revenue by curtailing the power to impose unmanageable economic sanctions. In other words, the development of the Excessive Fines Clause jurisprudence offers a potential

Excessive Fine and the Indigent—An Historical Argument, 42 MISS. L.J. 265, 267–69 (1971); sources cited *infra* note 68.

64. In a prior work, for example, I examined the Court's engagement with a notably limited historical record to establish the Clause's meaning at ratification, which the Court used in the excessive fines cases as a key component in interpreting the Clause's bounds. *See* Colgan, *supra* note 24, at 300–02, 310–11. I conducted a significantly more detailed examination of colonial and early American statutes and court records, and concluded that the historical record supports an interpretation of "fines" as constituting a deprivation of anything of economic value as punishment for an offense against the public, *see id.* at 310–19, 340–43, and "excessive" as involving an expansive consideration of both the nature of the offense and the culpability of the offender, while also attending to the financial effect of the fine on the offender and her family, *see id.* at 319–36, 343–47. While that further examination of the historical record gives grounding for a protective interpretation of the Clause, the record is inconclusive, *see id.* at 337–50, leaving open a need for further examination.

65. *See, e.g.*, Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 60, 65 (2017) (describing the increased reliance on economic sanctions to fund courts, law enforcement, and a wide variety of public programs that would otherwise have to be eliminated or funded through increased taxes); *see also, e.g.*, COUNCIL OF ECON. ADVISORS, *supra* note 22, at 3–4 (regarding the increased use of various types of economic sanction); Paul Vitello, *The Taxman Hits, in the Guise of a Traffic Cop*, N.Y. TIMES, July 15, 2007, at C4 (describing the use of traffic fines to avoid tax increases in several jurisdiction, including Virginia's decision to raise certain traffic fines to $1,050 in order to address a $500 million gap in the state's transportation budget) *infra* notes 114–124, 185–192 and accompanying text.

66. *See, e.g.*, Colgan, *supra* note 40, at 1183–1205, 1211–12.

67. *See, e.g.*, Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

method for achieving structural change, as well as individual protection for financially vulnerable people who are subjected to economic sanctions.

This Article, therefore, identifies the core principles that animate the Court's limited assessment of the Clause to date, as well as the Eighth Amendment more broadly, and then applies those principles to key questions raised by the modern debtors' prison crisis.[68] It does so through an in-depth exploration of the Court's excessive fines cases, as well as the cruel and unusual punishments doctrine upon which the Court has heavily relied in interpreting the Excessive Fines Clause.

With respect to the threshold question of whether an economic sanction constitutes a fine, the Court has established an expansive test—that fines need only be partially punitive—which reveals the Court's interest in capturing a broad array of economic sanctions within the Clause's scope. As detailed in Part I, the Court has provided straightforward means of ascertaining intent to punish, via a link to prohibited conduct or treatment of economic sanctions like other recognized forms of punishment.[69] The Court has also expressed a desire that the Clause serve as a bulwark against the risk that the government will abuse the prosecutorial power to take advantage of the revenue generating capacity of fines.[70] Part I also examines the Court's suggestion that it may abandon a second requirement, in which economic sanctions constitute fines only when the payee is the sovereign. The to-a-sovereign restriction severs the link between fines and punitive intent, and allows the government to make an end run around the Clause's protections against partisan fiscal interest, and therefore the requirement is incompatible with the animating features of the partially punitive test.[71] Part I concludes by applying the partially punitive test to several types of economic sanction used routinely today: statutory fines and surcharges, administrative fees, and restitution. With the limited exception of administrative fees imposed without a determination that prohibited conduct occurred and provided the full protections of civil debt, each of these common forms of sanction are employed where punitive intent is evident and where the

68. In doing so, I add to a limited literature examining the application of the Clause to specific forms of economic sanction. *See, e.g.*, Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21 (2016); Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319 (2014); Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 152–54 (2014). I also add to a few contributions noting that ability to pay may be relevant to the excessiveness determination. *See, e.g.*, Colgan, *supra* note 40, at 1196–99; *Developments in the Law: Policing*, 128 HARV. L. REV. 1706, 1742–45 (2015).

69. *See infra* Part I.A.

70. *See infra* notes 111–113 and accompanying text.

71. *See infra* Part I.B.

risk of prosecutorial abuse for fiscal gains is high, and thus constitute fines for purposes of the Excessive Fines Clause.[72]

Of course, to have purchase in a case like Mr. Thompson's, it is not enough that an economic sanction passes the threshold inquiry and constitutes a fine—it must also be excessive. Because this is the first Article to systematically examine whether the principles undergirding existing Eighth Amendment doctrine support an interpretation of excessiveness as requiring consideration of one's ability to pay, it does not give full treatment to all issues related to financial capacity. For example, this Article does not robustly consider how to best determine one's ability to pay.[73] Rather, it takes as a given that for some people economic sanctions will be unmanageable, and that the level of fine that leads to financial difficulty will vary depending on the financial condition of the person against whom it is imposed. Nor does the Article examine whether the Court should read into the Clause a specific method for graduating economic sanctions according to ability to pay. Instead, that phrase is used here to refer to a reduction in economic sanctions to reflect the defendant's financial condition. Further, because this Article focuses on the relevance of financial condition where economic sanctions are unmanageable, either because the defendant does not have the capacity to pay or because doing so would lead to significant hardship, it leaves open the question of whether the Clause would provide protection to, for example, a person who could easily pay an economic sanction by using a college savings account held for a child, but in doing so would face a more burdensome punishment than if the same economic sanction were imposed on someone with extreme wealth.[74] Finally, it does not address the use of economic sanctions in juvenile court. Though practices and abuses are often similar in the juvenile system,[75] due to the unique nature of punishment in the juvenile context, as well as the implications of mandatory school and labor laws on the capacity of juveniles' ability to pay, the constitutionality of the use of economic sanctions in juvenile court is outside of the scope of this Article.[76]

72. *See infra* Part I.C.

73. For a discussion of the graduation of economic sanctions to account for a defendant's ability to pay from the perspective of policy and institutional design, see generally Colgan, *supra* note 65.

74. My thanks to my colleague Noah Zatz for this example.

75. *See* JESSICA FEIERMAN ET AL., JUVENILE LAW CTR., DEBTORS' PRISON FOR KIDS?: THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 4 (2016).

76. This Article also leaves aside an examination of whether the Excessive Fines Clause has been incorporated against the states given the likelihood that the Court will incorporate the Clause. Indiana has declined to apply the Clause until the Supreme Court explicitly determines that the Clause is incorporated, *see* State v. Timbs, 84 N.E.3d 1179, 1182–84 (Ind. 2017), though the majority of states that have addressed the issue have treated the

What this Article provides is an explication of five core principles from the Eighth Amendment doctrine, which support the conclusion that financial condition is relevant to excessiveness. The Court adopted the gross disproportionality test for measuring excessiveness from the Cruel and Unusual Punishments Clause.[77] By the Court's own admission, that doctrine has lacked clarity and consistency,[78] and the bulk of its sentencing cases appear at first glance to offer little insight into the relevance of financial condition to excessiveness.[79]

Clause as incorporated. *See, e.g.*, Phillips v. Dep't of Commerce, 397 P.3d 863, 873–74 (Utah 2017) ("[T]he Eighth Amendment unquestionably places upper limits on the [state agency's] power to impose a fine . . . ."). The Court has not yet had a need to reach the question of incorporation. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989) (declining to reach the question in light of its determination that punitive damages did not constitute fines); *see also* McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) (noting that the Court has not yet incorporated the Excessive Fines Clause). As Justice O'Connor has explained, however, because the remaining two clauses of the Eighth Amendment—the Excessive Bail Clause and Cruel and Unusual Punishments Clause—have been incorporated, there is no apparent reason to treat the Excessive Fines Clause differently. *Browning-Ferris*, 492 U.S. at 283–84 (O'Connor, J., concurring in part and dissenting in part) ("I see no reason to distinguish one clause of the Eighth Amendment from another for purposes of incorporation, and would hold that the Excessive Fines Clause also applies to the States.").

In addition, a question remains regarding why litigation of these issues in the lower courts has been limited despite the widespread use of economic sanctions. I have previously posited that a significant limitation on such litigation stems from the Court's restriction of the Sixth Amendment right to counsel in cases involving economic sanctions, as well as political decisions not to afford access to counsel above that constitutional floor, both of which have left defendants in fine-heavy courts without representation. *See* Colgan, *supra* note 40, at 1196–99, 1244–52. Further, others, including most predominantly Alexandra Natapoff and Jenny Roberts, have thoroughly documented how structural aspects of criminal justice systems promote plea bargaining, which in turn results in limitations on doctrinal development, particularly in misdemeanor courts where economic sanctions are routine. *See, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013). The lack of attention to such a promising and protective Clause is worthy of further study.

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

78. *See* Graham v. Florida, 560 U.S. 48, 86–87 (2010) (Roberts, C.J., concurring) (describing the Court as having "struggled" with the application of the Cruel and Unusual Punishments Clause and noting that it has "'not established a clear or consistent path for courts to follow' in applying the highly deferential 'narrow proportionality' analysis" (quoting Lockyer v. Andrade, 538 U.S. 63, 72 (2003)); Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (describing the doctrine as "still in search of a unifying principle"); Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (describing *Solem v. Helm*'s, 463 U.S. 277 (1983), interpretation of the Cruel and Unusual Punishment's Clause as "scarcely the expression of clear and well accepted constitutional law"); *Kennedy*, 544 U.S. at 996, 998 (Kennedy, J., concurring) (noting that "our proportionality decisions have not been clear or consistent in all respects" and that the "precise contours" of the proportionality principle are "unclear").

79. The sentencing cases focus primarily on four issues. One issue is the constitutionality of sentencing procedures or the manner of execution in capital cases. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153

Yet, just as the excessive fines cases laid the groundwork for further interpretation of the meaning of fines, the principles espoused by the Court in the cruel and unusual punishments doctrine provides a foundation for engaging that question.

The five principles from the proportionality doctrine are examined in Part II. First, in the proportionality cases, the Court has sought to promote equality in sentencing, and has done so in ways that support prizing the substantive equality of financial consequence over the formal equality of a fine's dollar value.[80] Second, the failure to adjust economic sanctions according to financial capacity results in a flattening of punishment, which undermines the Court's interest in promoting comparative proportionality between offenses of different seriousness.[81] Third, the failure to account for ability to pay leads people to see the court system as valuing revenue generation over fairness, and overstates the degree of community condemnation for the underlying offense, both of which undermine the Court's interest in attending to the expressive value of punishment.[82] Fourth, the Court has exhibited concern for the criminogenic effects of, and other harms caused by, punishment. Yet there is increasing evidence that criminal debt can push people into criminal activity in order to pay, and increases social and financial insecurity of both debtors and their families.[83] Finally, the imposition of unmanageable economic sanctions contradicts the Court's prohibition on punishments that unreasonably infringe upon human dignity. The use of unmanageable economic sanctions violates that dignity demand by preventing people from meeting basic human needs, restricting their ability to

(1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam); Wilkerson v. Utah, 99 U.S. 130 (1878). Another issue is whether particular crimes are sufficiently egregious to be death-eligible. *See, e.g.*, *Kennedy*, 554 U.S. 407; Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584 (1977). A third issue is how and whether to apply proportionality to term-of-years sentences of incarceration. *See, e.g.*, *Lockyer*, 538 U.S. 63; Ewing v. California, 538 U.S. 11 (2003); *Harmelin*, 501 U.S. 957; *Solem*, 463 U.S. 277; Hutto v. Davis, 454 U.S. 370 (1982); Rummel v. Estelle, 445 U.S. 263 (1980). Finally, the sentencing cases additionally address whether the Cruel and Unusual Punishments Clause creates a categorical bar on death or life without parole sentences for people with certain characteristics. *See, e.g.*, Miller v. Alabama, 567 U.S. 460 (2012) (juveniles); *Graham*, 560 U.S. 48 (juveniles); Roper v. Simmons, 543 U.S. 551 (2005) (juveniles); Atkins v. Virginia, 536 U.S. 304 (2002) (people with mental retardation); Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion) (juveniles under the age of 16); Ford v. Wainwright, 477 U.S. 399 (1986) (people who are insane at the time of execution).

80. *See infra* Part II.A.
81. *See infra* Part II.B.
82. *See infra* Part II.C.
83. *See infra* Part II.D.

participate in the democratic community, and keeping them in the shadow of the criminal justice system solely due to their financial condition.[84]

I. THE SCOPE OF FINES

Though the court that sentenced Larry Thompson ordered him to pay nine different forms of economic sanction,[85] not one was nominally entitled a "fine." As noted above, whether this and other common forms of economic sanctions are fines remains an open question.[86] The Court has, however, provided important guidance. In addition to expressly stating that, unlike other provisions of the constitution, a legislative designation of a sanction as "civil" is irrelevant,[87] the Court also provided a test under which an economic sanction is a

84. *See infra* Part II.E.

85. *See* Notice of Fines and Costs, *supra* note 6 (ordering $5.00 per month payment fee until all costs are paid); Charge/Costs/Fees, *supra* note 6 (ordering imposition of fees and surcharges).

86. To date the Court has only determined that two types of forfeitures constitute fines and that punitive damages awarded between private parties do not. *See* Austin v. United States, 509 U.S. 602 (1993) (civil forfeitures); Alexander v. United States, 509 U.S. 544 (1993) (criminal forfeitures); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (punitive damages); *supra* notes 55–56 and accompanying text.

87. *See Austin*, 509 U.S. at 609–10 ("[T]he question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment."). While some courts have interpreted *United States v. Bajakajian*, 524 U.S. 321 (1998), as confirming *Austin*'s holding that civil penalties that are partially punitive constitute fines—see, for example, *City and County of San Francisco v. Sainez*, 92 Cal. Rptr. 2d 418, 431 (Ct. App. 2000)—extensive dicta in *Bajakajian* regarding the historical use of civil forfeitures has confused some lower courts. *See, e.g.*, United States v. Ahmad, 213 F.3d 805, 812–13 (4th Cir. 2000) (describing the conflict between *Austin*'s holding and *Bajakajian*'s dicta); United States v. Lippert, 148 F.3d 974, 978 (8th Cir. 1998) (noting the "strong conflicting signal[s]" between *Austin* and *Bajakajian* and stating it was "not certain how the Supreme Court will resolve" the disagreement); United States v. 1866.75 Bd. Feet, 587 F. Supp. 2d 740, 755 (E.D. Va. 2008) (including a description of the *Bajakajian* dicta as "unworkable and pointless"), *aff'd*, 332 F. App'x 882 (4th Cir. 2009); United States v. Kruse, 101 F. Supp. 2d 410, 413 (E.D. Va. 2000) (struggling with the application of the partially punitive restriction and noting that *Bajakajian*'s discussion involved "impressionistic conclusions").

Though in a footnote *Bajakajian* reaffirmed *Austin*'s holding, in dicta the opinion claimed that as a historical matter, the fact that *in rem* forfeitures were imposed in civil proceedings meant that they would not have been understood at the time of ratification to be punishment. *Bajakajian*, 524 U.S. at 330–34, 331 n.6, 334 n.9, 341–44, 343 n.18. As I have previously written, that claim is dubious. *See* Colgan, *supra* note 24, at 318–19 (documenting the use of civil procedures to recover fines at the time of Eighth Amendment's ratification); *see also Bajakajian*, 524 U.S. at 345 (Kennedy, J., dissenting) ("In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses whether a fine is excessive with whether it is a punishment."). Further, in a 2017 opinion, Justice Thomas—who authored *Bajakajian*—stated that modern forfeiture practices, including the civil asset forfeiture at issue in the case, were clearly designed to be partially punitive. *See* Leonard v. Texas, 137 S. Ct. 847, 847 (2017).

fine so long as it is at least partially punitive.[88] The following explores that test, as well as the Court's suggestion that it may abandon a second restriction[89] that would limit fines to economic sanctions made payable to the "sovereign."[90] This Part concludes by applying the roadmap for what constitutes a fine laid out by the Court to several of the most common forms of economic sanctions today: statutory fines and surcharges, administrative fees, and restitution.[91]

A. Explication of the Partially Punitive Requirement

In *Austin v. United States*,[92] the Court held that to constitute a fine an economic sanction need only be partially punitive.[93] Its discussion setting out that test laid the groundwork for identifying punitive intent in two ways: where economic sanctions are employed in response to prohibited conduct and where they are treated like other recognized forms of punishment. Regarding the former, the *Austin* Court determined that a civil forfeiture of property used in the commission of a crime constituted a fine by examining the historical link between civil forfeitures and a property owner's culpability for wrongful, and therefore prohibited, conduct.[94] In doing so, the Court paid close attention to cases in which the owner of the property was not directly implicated in the

Beyond confusion arising out of the *Bajakajian* dicta, the question of whether civil penalties constitute economic sanctions has rarely arisen, with some courts merely treating civil penalties as fines within the Clause's purview without any analysis, *see, e.g.*, State v. WWJ Corp., 980 P.2d 1257, 1261–62 (Wash. 1999) (en banc), and at least one court treating civil penalties as outside of the Clause's scope after relying on a prior case that pre-dated *Austin*'s rule and itself had no analysis, Ojavan Inv'rs, Inc. v. Cal. Coastal Comm'n, 62 Cal. Rptr. 2d 803, 817 (Ct. App. 1997).

88. *See Austin*, 509 U.S. at 609–10.

89. *See* Paroline v. United States, 134 S. Ct. 1710, 1726 (2014).

90. *See Browning-Ferris*, 492 U.S. at 265, 267.

91. Criminal forfeiture and civil forfeiture that follows a criminal conviction are also commonly used forms of economic sanction, but the Court has already determined that they constitute fines for purposes of the Clause. *See supra* note 55 and accompanying text. An additional form of forfeiture that the Court has yet to consider in an excessive fines case is civil asset forfeiture obtained without a prior criminal conviction and often without charges being filed. *See* Beth A. Colgan, *Fines, Fees, and Forfeitures*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 206–07, 207 n.7 (Erik Luna ed., 2017). Civil asset forfeitures are widely criticized in part because they do not require the government to provide proof of criminal activity beyond a reasonable doubt. *See id.* at 231–32. To obtain such a forfeiture, however, the government must provide evidence linking the property or property owner to prohibited activity, and that link is sufficient to bring civil asset forfeitures under the Excessive Fines Clause's umbrella. *See infra* notes 93–97 and accompanying text; *see also infra* note 250.

92. 509 U.S. 602.

93. *See id.* at 609–10.

94. *See id.* at 616–19.

criminal activity.[95] Though civil forfeitures were based on the fiction that the property was the guilty party, the Court noted that underlying that fiction was the notion that the property owner was complicit in wrongful conduct, revealing a legislative intent to use civil forfeiture to punish those involved in prohibited acts.[96] Because the modern forfeiture statute at issue in *Austin* also focused on the property owner's culpability for prohibited conduct, governmental intent to punish at least in part was evident, and thus the Court held that the forfeiture constituted a fine subject to the Clause.[97]

In addition to determining that punitive intent can be discerned by a link to prohibited conduct, the *Austin* Court also suggested that treating an economic sanction like other forms of punishment can evidence punitive intent.[98] The *Austin* Court's discussion of such treatment is more truncated than its discussion of prohibited conduct, perhaps in part because of the clear link to prohibited conduct in the statute under review,[99] and because the Court has traditionally associated prohibited conduct with punitive intent.[100] On two occasions, however, the *Austin* Court pointed to the relationship between economic sanctions and other traditional forms of punishment as additional evidence of punitive aim. First, the Court noted the fact that forfeitures were "listed alongside the other provisions for punishment" in an early American customs statute, providing evidence of punitive intent.[101] Second, in describing the legislative history surrounding the modern forfeiture statute at issue, the Court noted Congress's recognition that forfeiture would supplement statutory fines and

95. *See id.*
96. *See id.*
97. *Id.* at 619–22.
98. *See id.* at 613–614, 620.
99. *Id.* at 619–22.
100. The link between prohibited conduct and punitive intent predated the *Austin* decision—see, for example, *United States v. La Franca*, 282 U.S. 568, 572 (1931), which states that "a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"—and the Court has subsequently continued to rely on that link. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564–68 (2012) (linking punishment to unlawful acts); *id.* at 662–63 (Scalia, J., dissenting) (stating that a penalty is imposed in response to an unlawful act, "[s]o the question is, quite simply, whether the exaction here is imposed for violation of the law"); S. Union Co. v. United States, 567 U.S. 343, 348–49 (2012) (holding that to be compatible with the Sixth Amendment, a jury must decide all facts that would result in an increase in the maximum possible fine because "fines, like . . . other forms of punishment, are penalties inflicted by the sovereign for the commission of *offenses*" (emphasis added)); United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996) ("[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission . . . .").
101. *Austin*, 509 U.S. at 614.

imprisonment.[102] In other words, a second form of evidence of punitive intent can be found where lawmakers associate economic sanctions with other forms of punishment.

Establishing punitive intent through an economic sanction's link to prohibited conduct or association with other forms of punishment is particularly useful in the context of economic sanctions, because doing so avoids complications that reliance on a sanction's dollar value would create given its inherently regressive nature. Joel Feinberg has argued, for example, that a link to prohibited activity is critical for an economic sanction to constitute punishment,[103] but also expressed concern that a "light" fine cannot adequately convey that the conduct is prohibited.[104] If fines were instead "heavy," according to Feinberg, it would be indicative of the government's intent to punish.[105] While the size of a penalty may provide some evidence of such intent,[106] Feinberg's proposition is workable only if what renders a fine "light" or

102. *Id.* at 620.

103. *See* JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 96–97 (1970) (distinguishing between license fees and punishments on the basis that the latter is intended as a response to prohibited activity); *see also* R A DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 81 (2007) ("Criminal convictions and punishments do not merely penalise; they condemn. A tax may be intended to discourage the conduct taxed, but it does not condemn that conduct; a fine, by contrast, when imposed as a punishment, condemns the act as wrongful.").

104. FEINBERG, *supra* note 103, at 113.

105. *Id.*

106. *See* Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 780 (1994) (explaining that a high tax rate leading to a "remarkably high tax" could be "consistent" with a finding of governmental intent to punish because the amount of the penalty may have deterrent value, but finding that the dollar value is not dispositive); United States v. Constantine, 296 U.S. 287, 295 (1935) (explaining that the fact that a tax was forty times as great as other taxes contributed to a determination that it operated as a punishment). The Court's partially punitive test leads to a question of its application to taxes, which may also be used to deter undesirable conduct and raise revenue, and which may be imposed on illegal activity. *See Kurth Ranch*, 511 U.S. at 778–80. Of course, even if a tax met the partially punitive test and thus constituted a fine, it would still be constitutional so long as it was not excessive. The partially punitive test does suggest, however, that some taxes will be fines subjected to the excessiveness inquiry. Taxes imposed on activity that the government wishes to merely regulate rather than prohibit, such as cigarette use, *see id.* at 782–83, as well as activity the government may wish to promote, such as employment, *cf. Constantine*, 296 U.S. at 293, would not qualify as fines, at least so long as they are not treated like other forms of punishment. In contrast, a tax that is imposed on prohibited activity would meet the definition of a fine, and fall within the Clause's scope, and be subject to review for excessiveness. *Cf. Kurth Ranch*, 511 U.S. at 781–83 (holding that a tax on illegal possession of marijuana was sufficiently punitive to trigger the protections of the Double Jeopardy Clause); United States v. Sanchez, 340 U.S. 42, 45 (1950) (holding that a tax did not constitute an unconstitutional penalty in part because it was not conditioned on the commission of a crime); *Constantine*, 296 U.S. at 295 (holding that a tax constituted a punishment in part because it was triggered by criminal conduct).

"heavy" is not the dollar value, but the effect.[107] Take, for example, a parking violation sanctioned at $63 in the city of Los Angeles.[108] It is likely true that for many, and perhaps most people who receive parking tickets in Los Angeles, $63 is an inconvenience; but for those who have limited means, it can be a significant part of their monthly budget[109] and in fact operates as a "heavy" fine.[110] Were the signaling function of the dollar value dispositive of the intent to punish, a $63 parking fine would not constitute punishment for some defendants and—simultaneously—would constitute punishment for others, depending only on the financial condition of the defendant. Focusing instead on whether the government prohibits the underlying activity or treats the economic sanction like other recognized forms of punishment avoids that problem.

Further, the requirement that a fine need only be partially punitive—where punitive intent is evident from its link to prohibited conduct or treatment like other forms of punishment—is consistent with the Court's desire for the Excessive Fines Clause to serve as a bulwark against the abuse of prosecutorial power that may accrue where fines are used "for the purpose of raising revenue."[111] In the only case in which the Court concluded that a financial penalty—punitive damages—did not constitute a fine, the Court relied in part on the fact that the government received no financial benefit from punitive damages awarded solely to a private party, and therefore the award did not create an incentive for governmental abuse.[112] As Justice Scalia once noted in discussing the protections of the Eighth Amendment, "it makes sense to scrutinize

107. For a discussion of how the substantive equality captured by measuring effect versus the formal equality of a fine's dollar amount relates to the excessiveness inquiry, see *infra* Part II.A.

108. *See* Alice Walton, *Los Angeles Increases Penalties on Parking Tickets*, 89.3 KPCC (July 3, 2012), http://www.scpr.org/blogs/news/2012/07/03/6901/los-angeles-increases-penalties-parking-tickets [http://perma.cc/8AR6-FKG5].

109. *See generally* EDIN & SHAEFER, *supra* note 34 (detailing the difficulties of meeting basic needs for the 1.5 million American households in which people live on less than $2 of cash income per person per day).

110. FEINBERG, *supra* note 103, at 113.

111. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989).

112. *Id.* at 270–72 (describing Magna Carta as "aimed at putting limits on the power of the king" to use amercements—a predecessor to statutory fines—as "a source of royal revenue," a concern that does not exist in litigation between private parties); *see also* Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (Scalia, J.) ("We relied upon precisely the lack of this incentive for abuse in holding that 'punitive damages' were not 'fines' within the meaning of the Eighth Amendment." (citing *Browning-Ferris*, 492 U.S. at 271–76)).

governmental action more closely when the State stands to benefit,"[113] as it does due to the revenue generating power of economic sanctions.

Economic sanctions are a billion-dollar industry in the United States, allowing federal, state, and local governments to avoid raising taxes by generating revenue through punishment.[114] Perhaps the most prominent example of using economic sanctions for revenue generation arose in Ferguson and other municipalities in the St. Louis County region of Missouri, which were discovered to be using fines and fees as a critical component of municipal budgets.[115] Missouri, however, is not unique. Across the country, many lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services,[116] with some lawmakers even including increases in ticketing in projected budgets.[117]

The importance of treating the various forms of economic sanction employed today as within the Clause's scope is particularly critical in light of the

113. *Harmelin*, 501 U.S. at 979 n.9.

114. *See supra* note 65 and accompanying text; *see also infra* notes 185–192 and accompanying text.

115. *See generally* Colgan, *supra* note 40.

116. *See, e.g.*, COUNCIL OF ECON. ADVISORS, *supra* note 22, at 3 (reporting that between 1986 and 2004, the use of fines increased from 12 percent to 37 percent for people who were also incarcerated; when fees were included the number jumped to 66 percent of inmates); M. Scott Carter & Clifton Adcock, *Prisoners of Debt: Justice System Imposes Steep Fines, Fees*, OKLA. WATCH (Jan. 31, 2015), http://oklahomawatch.org/2015/01/31/justice-system-steeps-many-offenders-in-debt [http://perma.cc/H5V2-CLB5] (describing the rise in the number of criminal justice fees since Oklahoma voters limited the legislature's ability to raise taxes in 1992); Fitzgerald, *supra* note 21 (reporting that in Biloxi, Mississippi the "city's portion of general-fund revenue from fines and forfeitures has increased 26 percent" between 2008 and 2015); Warren, *supra* note 34 (describing how the drop in state funding for courts in Florida, which now spends "less than 1 percent of its total state budget on the court system," has led to increased use of economic sanctions). In several jurisdictions, judges have expressed frustration over lawmakers' refusal to raise taxes in order to fund court systems, placing judges in the position of having to raise money through sanctions. *See, e.g.*, Sydney Brownstone, *Leaked Email: What a King County Superior Court Judge Really Thinks About Raising the Cost of Traffic Ticket Fines*, STRANGER (May 21, 2015 at 11:52 AM), https://www.thestranger.com/blogs/slog/2015/05/21/22255032/leaked-e-mail-what-a-king-county-superior-court-judge-really-thinks-about-raising-the-cost-of-traffic-ticket-fines [https://perma. cc/27DQ-82VA] (quoting an email written by Judge Ronald Kessler stating that the District and Municipal Court Judges Association and Superior Court Judges Association in Washington State "deplored" using economic sanctions to fund the court system but agreed to the policies due to the need for funds).

117. *See, e.g.*, Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 72 (2009) (quoting city officials in Milwaukee, Houston, and Washington, D.C. discussing reliance on traffic tickets for revenue generation, and noting that in 2006 Nashville's mayor "actually included a 33 percent increase in traffic ticket revenue in his proposed budget").

way in which such practices target the politically vulnerable.[118] The Court based its understanding of the Clause as a means of protecting against partisan abuse on its historical pedigree. The prohibition on excessive fines in the English Bill of Rights—upon which the Excessive Fines Clause is based—arose out of James II's imposition of heavy fines on his enemies.[119] The concern undergirding this attention to abuse of power and revenue generation in the excessive fines context is that punishment will become too partisan, and in particular that it will serve to target those who are most politically vulnerable.[120] It has long been recognized that criminal defendants have little voice in the political system.[121] Increasing evidence suggests that may be especially true with respect to economic sanctions, where natural allies within the political process—indigent defense agencies—may in many cases be reliant on the imposition of fees for their own budgets.[122] Further, a recent study showed that the impetus to use criminal systems as mechanisms for revenue generation can be directly linked to political vulnerability: In jurisdictions where the electorate is politically weak, the rate of increase in ticketing is greater than where the electorate has political power.[123] The political vulnerability of many of those subjected to economic sanctions is particularly heightened in jurisdictions in which the ability to vote for or against lawmakers setting such policies may be dependent upon the full payment of all economic sanctions owed.[124]

In short, in announcing the partially punitive test, the Court provided not only a broadly protective understanding of the Clause, but also suggested a workable method[125] for ascertaining punitive intent: If the government imposes

118. *See infra* notes 122–124 and accompanying text.
119. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266–67 (quoting Ingraham v. Wright, 430 U.S. 651, 664 (1977)).
120. *See id.* at 266–67 (explaining that the Excessive Fines Clause was based on the English Bill of Rights, which was intended to provide protection against abusive punishments imposed by the Stuart Kings against their enemies).
121. *See, e.g.*, *Criminal Justice Act: Hearing on H.R. 4816 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 88th Cong. 32 (1963) (statement of Robert F. Kennedy, U.S. Attorney Gen.) ("The poor man charged with crime has no lobby."); *cf.* Richard M. Re, *"Equal Right to the Poor"*, 84 U. CHI. L. REV. 1149, 1173, 1197–98 (2017) (describing the discrepancy in political power between the poor and wealthy).
122. *See, e.g.*, Wright & Logan, *supra* note 4, at 2047, 2055–60, 2069.
123. Garrett & Wagner, *supra* note 117, at 86 (providing an empirical analysis of the increased use of traffic tickets during economic downturns and finding that "marginal increases in political activity or strength of the county's population leads to a reduction in the growth rates of tickets issued").
124. *See* Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PA. ST. L. REV. 349 (2012).
125. In most, and perhaps all, cases punitive intent will be discernible using traditional methods of statutory review. *See* Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 781–82

the economic sanction upon a determination that the person committed prohibited activity,[126] or links the economic sanction to other recognized forms of punishment, the economic sanction constitutes a fine for the purposes of the Excessive Fines Clause.

B. Incompatibility of the To-a-Sovereign Restriction

Jurisdictions across the country are increasingly using private companies for administrative fee-based services related to case processing and punishment. For hundreds of thousands of people each year,[127] that can result in the imposition of fees payable to private entities for pre- and post-trial incarceration, probation and collections, electronic monitoring, mandated chemical dependency and mental health services, and more.[128] Even indigent defense representation may be privatized in some jurisdictions, particularly in rural areas where private attorneys contract or are conscripted

(1994) (engaging in textual analysis of the statute); Austin v. United States, 509 U.S. 602, 619–22 (1993) (engaging in textual analysis of the statute, a comparison to similar statutes previously interpreted, an assessment of legislative history, and a consideration of penal purposes to assess legislative intent); *cf.* Flemming v. Nestor, 363 U.S. 603, 616–21 (1960) (relying on the text and legislative history of a statute excluding deportees from old-age benefits to determine whether the exclusion constituted punishment).

126. I refer to this as a "determination" rather than a "conviction" intentionally. A determination that the government may treat a person as if a prohibited act occurred may, of course, be reached through conviction. But it may also be reached through diversion programs, an increasingly prevalent practice in which economic sanctions are imposed without securing a conviction. For example, prosecutorial diversion programs involve an agreement by prosecutors not to formally prosecute a person who is alleged to have committed a prohibited act so long as the person agrees to, among other things, pay sums that operate effectively as statutory fines, surcharges, administrative fees, and restitution. *See* Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), http://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reformdiversion.html; *see also* Michael Gordon, *Yes, Rich People Have a Better Chance of Getting Off in Court, Public Defender Says*, CHARLOTTE OBSERVER (Sept. 21, 2017, 6:45 PM), http://www.charlotteobserver.com/news/politics-government/article17470 7216.html [http://perma.cc/L5LC-VQRK] (describing a deferred prosecution program for which defendants are only eligible if they are capable of paying full restitution). Though there may be no adjudication of guilt, these programs operate as a substitution for conviction, in which the commission of the prohibited act is presupposed, much like an *Alford* plea, and economic sanctions are imposed in response. *See* Dewan & Lehren, *supra*. Therefore, the link between the sanctions and the prohibited activity is sufficient to meet the partially punitive test.

127. *See* HUMAN RIGHTS WATCH, *supra* note 28, at 16.

128. *See, e.g.*, *id.* at 33–37 (describing the use of private probation companies to collect criminal debt as well as to provide electronic monitoring, blood alcohol monitoring, drug testing, and classes such as moral recognition therapy, all at significant expense to the defendant).

to serve as indigent defense counsel.[129] If the Court retains the restriction that fines must be paid to a sovereign government,[130] none of these fees would constitute fines even if they met the partially punitive test.

As noted above, the Court has signaled an interest in abandoning the to-a-sovereign restriction that puts economic sanctions paid to private entities out of the Clause's reach.[131] The restriction is on shaky ground, as the Court propounded it on the basis of a notably cursory review of the historical use of fines leading up to the ratification of the Eighth Amendment.[132] That review did not account for significant historical evidence that, in that period, fines were routinely distributed in part or in their entirety to nongovernmental entities such as crime victims and their families, or to private actors serving a role in court processes, such as jurors and doctors.[133] In light of such poor historical footing, the to-a-sovereign restriction may be validly overturned on those grounds alone.[134] But, even if that were not the case, or if that history were not relevant due to other intervening legal and cultural changes,[135] the restriction's continued validity is doubtful.

The Court has questioned the viability of the to-a-sovereign restriction due to its inconsistency with the concerns driving the partially punitive test.[136] As it

129. *See, e.g.*, Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 268–69, 280, 290–300 (2010) (documenting the use of contract attorneys in rural counties in Arizona).

130. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264–65 (1989).

131. *See* Paroline v. United States, 134 S. Ct. 1710, 1726–27 (2014); *see also supra* text accompanying notes 89–90.

132. *See* Colgan, *supra* note 24, at 302–10.

133. *See id.* at 300–10; *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 38 (1993) (describing early practices relating to the use of fines as punishment).

134. *See* United States v. Dixon, 509 U.S. 688, 704–05 (1993) (overturning a case because it "lack[ed] constitutional roots" as compared to another case with "deep historical roots," and noting the "minimal antecedents" that supported its result); *see also* Payne v. Tennessee, 501 U.S. 808, 834–35 (1991) (Scalia, J., concurring) (arguing that *Booth v. Maryland*, 482 U.S. 496 (1987), should be overturned in part due to the fact that it was not grounded in "historical practice").

135. *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 23–38 (2017) (arguing that contemporary privatization hawks' appeals to historical privatization are inapposite).

136. *See Paroline*, 134 S. Ct. at 1726 (suggesting the possible abandonment of the to-a-sovereign restriction by explaining that restitution serves a punitive function in response to a conviction for prohibited conduct, and therefore: "'That may be 'sufficient to bring [it] within the purview of the Excessive Fines Clause.'" (alteration in original) (quoting United States v. Bajakajian, 524 U.S. 321, 329 n.4 (1998))). The inconsistency with the partially punitive test has led several lower courts to simply ignore the to-a-sovereign requirement and treat economic sanctions as fines even if they were not payable to the government. *See, e.g.*, State v. Day, 447 S.E.2d 576, 582 (W. Va. 1994) (treating restitution as a fine). Other courts have relied on the to-a-sovereign restriction. *See, e.g.*, *infra* notes 149–151 and accompanying text. The inability of the lower courts to consistently interpret and apply the

noted in the excessive fines cases, the Court conceives of the Clause as protecting against government overreach that stems from the use of gratuitous punishment.[137] The Clause affords that protection by prohibiting fines that are disproportionate to the underlying offense.[138] If the to-a-sovereign restriction is employed, any economic sanctions made payable to a private entity would not constitute fines; as a result, they would not be accounted for in the proportionality review. By excluding those economic sanctions from review, it would artificially reduce the measured severity of the total economic sanctions imposed, making it more likely that the fines paid to the sovereign would be deemed proportionate to the offense. The person upon whom the sanctions are imposed, therefore, loses the benefit of the Clause in part as it applies to economic sanctions paid to the government and in full as to economic sanctions paid to private entities. This would be the case despite evidence of governmental intent to punish at least in part, in light of the link between those economic sanctions and prohibited conduct or their treatment like other recognized forms of punishment.[139]

In addition to ensuring that economic sanctions are treated as fines where governmental intent to punish is evident, abandoning the to-a-sovereign restriction better aligns the Clause with the Court's conception of

restriction provides separate grounds for overturning it. *See, e.g.*, *Payne*, 501 U.S. at 830 (noting that stare decisis is intended to promote predictability and consistency in the law, and that where a precedent leads to differing judicial interpretations, it "demonstrates the uncertainty of the law," and therefore provides justification for overturning the precedent (quoting State v. Huertas, 553 N.E.2d 1058, 1070 (Ohio 1990) (Moyer, C.J., concurring))); Swift & Co. v. Wickham, 382 U.S. 111, 124–25 (1965) (finding a rule unworkable in part because "lower courts have quite evidently sought to avoid dealing with its application or have interpreted it with uncertainty" (footnote omitted)).

137. *See* Austin v. United States, 509 U.S. 602, 609 (1993) (describing the Eighth Amendment as designed to "limit the government's power to punish" (citing Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266–67, 275 (1989)).

138. *See supra* note 77 and accompanying text.

139. Privatization scholars have explored the possibility of designing contracts to replicate protections that would otherwise be afforded via the Constitution. *See, e.g.*, Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1317 (2003). Improved contractual terms could remedy a number of issues plaguing the current use of private probation including its lack of flexibility for courts to waive and set fees, a dearth of restrictions on the private company's authority in setting probation terms, a lack of transparency, and a need for greater governmental oversight. *See* HUMAN RIGHTS WATCH, *supra* note 28, at 5–6, 23–24, 32, 50, 53–54, 56–61, 63–64. Contractual terms cannot fix the problem created by the to-a-sovereign exception, however, because the benefit of the Clause depends on the inclusion of all economic sanctions constituting fines within the disproportionality analysis. *Cf.* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 478–80 (2005) (questioning the ability to design private prison contracts to adequately protect against abuses related to the provision of prisoners' basic human needs).

it as a safeguard against abuses stemming from the government's fiscal self-interest.[140] At first blush, the risk of partisan abuse appears nonexistent in the context of privatization, because the government is not itself receiving fees related to those services. However, the state stands to accrue fiscal benefits from privatization in two key ways.[141]

One benefit privatization may afford the state results from the promise of increased revenues for the government. This is, in fact, a key selling point pitched by private companies for taking over probation and collections activities. For example, Judicial Correction Services, Inc. (JCS), a key player in the private probation industry, promotes its services as providing "a boost in the [sic] fine collections,"[142] and includes on its website testimonials of court staff and municipal officials touting the increased revenues collected as a result of JCS's practices.[143] At times public and private entities even partner to create new opportunities for revenue generation. For example, the town of Mountlake Terrace, Washington, contracted with Offender Management Service (OMS)

140. *See supra* notes 111–113 and accompanying text; *see also* Jon D. Michaels, *Privatization's Pretentions*, 77 U. CHI. L. REV. 717, 763–64 (2010) (explaining concerns expressed in the literature that privatization allows the government to use contractors to side step constitutional and other public norms); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1268 (2003) ("[C]onstitutional values are meant to guard against self-dealing or other conflicts of interest that arise when private parties are entrusted with public duties.").

141. In addition to improper pecuniary interests, the privatization literature also includes a concern about whether privatization is improper in the criminal justice context because community norms require that punishment be maintained as a purely state function. *See, e.g.*, Minow, *supra* note 140, at 1234 (arguing that privatization "may jeopardize the legitimacy of government action because the public may suspect that private profit-making—rather than public purposes—is being served"); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151 (2010) ("Punishment under law is a profound exercise of state power the meaning and justification of which depend on the social and political institutions that authorize it. . . . The delegation of punishment through prison privatization attenuates the meaning of punishment in a liberal state and undermines the institution of criminal justice."). While this concern does not fall within the principles underlying the Court's assessment of what constitutes a fine because it is neither relevant to governmental intent to punish nor to the risk of abuse of prosecutorial power related to fiscal self-interest, the Court has treated the expressive nature of punishment as relevant to the question of whether a punishment is disproportionate and thus excessive. *See infra* Part II.C.

142. JUD. CORRECTION SERVS., INC., http://web.archive.org/web/20120706165939/http://www.judicialservices.com [http://perma.cc/4ZUB-CSAL]; *see also Probation Services*, SENTINEL OFFENDER SERVS., http://www.sentineladvantage.com/probation-services [http://perma.cc/ 6GKG-7BRN] (advertising probation services that will "enhanc[e] collection of court ordered fines, fees, and restitution payments").

143. *Testimonials*, JUD. CORRECTION SERVS., INC., http://web.archive.org/web/20120706170008/http://www.judicialservices.com/testimonials [http://perma.cc/K6WZ-K9BC].

to provide electronic monitoring of people released pending trial; OMS rents the monitoring equipment to the city for $5.75 per person subject to monitoring, but the city charges each person $20 per day for that monitoring, netting additional revenues for the city of approximately $50,000 to $60,000 annually.[144]

An additional benefit to the state from privatization is that it relieves the government of the need to expend tax dollars for privatized services.[145] As with improved collections, the ability to offset government expenditures comes purportedly at no cost to the government,[146] while the companies make profits off of fees imposed on the defendant that courts are contractually obligated to impose.[147] This leads companies, such as Sentinel Offender Services, to advertise their programs as a "funding model [that] removes the cost associated" with such services, and thus "reduce[s] an agency's financial burden for a selected program."[148] A case from the District of Connecticut shows how the to-a-sovereign requirement operates to promote governmental self-interest in this regard.[149] After Thomas Parsons pled guilty to two prohibited acts—making a false statement on an application for a pilot's license and again on an application to purchase a firearm—the court sentenced him to a period of supervised release in which he was required to attend psychiatric counseling

144. Eric Markowitz, *Electronic Monitoring Has Become the New Debtors Prison*, NEWSWEEK (Nov. 23, 2015, 12:23 PM), http://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html [http://perma.cc/549N-ZZUG].

145. *See generally* HUMAN RIGHTS WATCH, *supra* note 28 (describing the use of private probation companies to relieve courts from the task of collecting fees and fines, as well as the provision of other probation related requirements); *see also* Keith Clines, *Morgan County Towns Divided on Using For-Profit Company to Collect Municipal Court Fines*, DECATUR DAILY (Aug. 17, 2015), http://www.decaturdaily.com/business/ morgan-county-towns-divided-on-using-for-profit-company-to/article_464fc4c2-0af5-576d-93a7-e30501018271.html [http://perma.cc/3H9M-LBYY] (citing an attorney representing several municipalities as explaining the interest in contracting with a private company because it would be "providing a free service the city would otherwise have to use taxpayer money to hire and pay a probation officer to do"). Further, as detailed below, restitution made payable to crime victims offsets governmental expenses related to public benefits and services. *See infra* notes 244–249 and accompanying text; *cf.* Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1080–84 (2013) (arguing that some government agencies have been willing to sign away greater sovereignty to private companies who run toll roads and parking lots in order to generate greater revenues).

146. Private probation companies' claims that they operate at no expense to the public is undermined where collection practices lead to incarceration for failure to pay in jails maintained at public expense. *See* HUMAN RIGHTS WATCH, *supra* note 28, at 53–54.

147. *See id.* at 23.

148. *Offender-Funded Programs*, SENTINEL OFFENDER SERVS., http://www.sentineladvantage.com/offender-funded-programs [http://perma.cc/E5PJ-2UFV].

149. Parsons v. Pond, 126 F. Supp. 2d 205 (D. Conn. 2000), *aff'd*, 25 F. App'x 77 (2d Cir. 2002).

sessions.[150] The court determined that the fees for those sessions did not constitute "fines" solely because "the money appear[ed] to have been paid [to the psychiatrist] and not the government."[151] But for the use of a private physician, which in some instances may be the only available option,[152] the government would have to have supplied psychiatric counseling services at its own expense.

In other words, far from protecting against the abuse of prosecutorial power, the to-a-sovereign restriction allows the government to entrench its fiscal interests and make an end run around the Excessive Fines Clause,[153] leaving those subjected to economic sanctions without an avenue for redress that would be available but for the privatization.[154] This serves to aggrandize the power of the government by eliminating an important check,[155] while also bolstering political power through tax avoidance[156] through what one judge dubbed a "judicially sanctioned extortion racket."[157]

150. *Id.* at 209.
151. *Id.* at 222. For a discussion on why administrative fees of this type constitute fines, see *infra* Part I.C.2.
152. *See, e.g.*, Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611, 1613–15 (2001) (describing the privatization of public mental health services in Tucson, Arizona).
153. *See, e.g.*, State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000) ("We do not believe the State can make an end run around the Excessive Fines Clause by simply making a punishment payable to a victim."); *see also* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1462–63 (2003) (arguing that privatization "is often undertaken in lieu of direct government involvement, which suggests that governments may be evading constitutional requirements simply by changes in form rather than substance").
154. *Cf.* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397 (1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."); West v. Atkins, 487 U.S. 42, 56 (1988) ("Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.").
155. Jon Michaels has written about how "workarounds" made possible through privatization can aggrandize executive branch power by allowing the executive to contract "in a way that substantively alters (or temporally ossifies)" policies in favor of executive authority. Michaels, *supra* note 140, at 719, 731, 746–47. The phenomenon Michaels identifies with respect to executive authority is similar to the broad aggrandizement of political power that privatization of fees affords to all three branches of government, as the executive, legislative, and judicial branches all share an interest in revenue generation. *Cf.* Dolovich, *supra* note 139, at 505 (arguing that when the state stands to save money through the use of private prisons it will be less likely to engage in meaningful oversight of private contractors).
156. *See infra* notes 185–192, 244–246 and accompanying text.
157. Order at 1, Burdette v. Town of Harpersville, No. CV-2010-900183, 2012 WL 2995326, at *1 (Ala. Cir. Ct. July 11, 2012); *see also* Ethan Bronner, *Judge in Alabama Halts Private Probation*, N.Y. TIMES (July 13, 2012), http://www.nytimes.com/ 2012/07/14/us/judge-in-alabama-halts-private-probation.html (quoting Judge Hub Harrington as stating: "Most

Furthermore, the Court's concern that prosecutorial abuse related to the revenue generating capacity of fines will fall hardest on the politically vulnerable[158] may be exacerbated by the to-a-sovereign restriction. A risk of privatization is that it will result in reduced political accountability,[159] and undermine the generation of public values that would otherwise result from "collective deliberation and mutual persuasion over time."[160] Private companies' profit models are dependent upon generating fees for services, and they are lobbying lawmakers to allow increases in fees and expansion of their services to a broader array of offenses,[161] as well as to adopt new forms of punishment linked to additional administrative fees, such as electronic monitoring.[162] For example, when a Georgia court interpreted a statute to prohibit the extension of probation terms—something that would cut into private probation companies' profits from monthly probation fees—a private company successfully lobbied for statutory amendments that not only eliminated caps to privation probation fees, but also undid the court's ruling by allowing for indefinite extensions of probation.[163] In sharp contrast, people who are often subjected to economic sanctions—poor

distressing is that these abuses have been perpetrated by what is supposed to be a court of law. Disgraceful.").

158. *See supra* notes 118–120 and accompanying text.

159. *See, e.g.*, Freeman, *supra* note 139, at 1329–30.

160. Minow, *supra* note 140, at 1261; *cf.* Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1509 (2001) (noting that privatization raises issues related to the ability of the people to influence political decisionmaking).

161. *See, e.g.*, ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 63 (2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf [http://perma.cc/3NG2-57JK]; Celia Perry, *Probation Profiteers: In Georgia's Outsourced Justice System, a Traffic Ticket Can Land You Deep in the Hole*, MOTHER JONES (July/Aug. 2008), http://www.motherjones.com/politics/2008/07/probation-profiteers [http://perma.cc/X6YU-P3T4].

162. *See* Markowitz, *supra* note 144 (describing expenditures of $2.5 million dollars in lobbying in 2014 by The Geo Group, Inc., in part in relation to its electronic monitoring program). There has been a debate as to whether there is sufficient evidence that private prison corporations are actually lobbying for increased sentence lengths to bolster company profits—see, for example, Dolovich, *supra* note 139, at 524–25, 529–30, which notes that there is little concrete evidence of lobbying but that profit motives invite it—or are merely riding the coattails of public actors such as corrections unions, see, for example, Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1220–30 (2008). As detailed herein, the lobbying efforts of private probation companies in particular, have been much more public.

163. *See* Lauren Gambino, *Georgia Bill Would Protect Controversial For-Profit Probation Industry*, GUARDIAN (Apr. 16, 2014, 7:30 AM), http://www.theguardian.com/money/2014/apr/16/ georgia-probation-private-contractors-court-protection [http://perma.cc/S39T-M7XN]; *cf.* PEPIN, *supra* note 28, at 18–19 ("It can be dangerous to create a profit motive for lengthening the period and cost of supervision.").

communities and communities of color who are heavily policed[164]—are generally recognized to be politically vulnerable.[165] It is not impossible for those subjected to economic sanctions to have an effective political voice,[166] some lawmakers may resist these lobbying efforts,[167] and some judges may refrain from assigning debtors cases to private companies.[168] But the risk that the imbalance of political power between government actors partnered with private companies on the one hand and impoverished communities caught up in punitive processes on the other, renders the to-a-sovereign restriction incompatible with the Court's desire that the Clause serve as a protection against abusive practices related to economic sanctions.

To be clear, the elimination of the to-a-sovereign restriction and inclusion of fees related to privatized services as fines does not preclude privatization, but instead ensures consistency with the Court's understanding of the Clause as providing protection against excessive punishments. Nor does it suggest that

164. *See generally* Devon A. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (describing the frequency of police contact with African Americans in heavily policed communities); Colgan, *supra* note 40 (detailing the lack of political influence of poor, and particularly black, residents of Ferguson, Missouri resulting in and from policing targeted at those communities); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000) (conducting an empirical evaluation of stop and frisk practices in New York City and concluding that policing was targeted at poor neighborhoods and poor people). Nicholas Parrillo has documented the shift in the 1890s from a fee-based system whereby prosecutors were paid fees charged to convicted defendants to a system whereby prosecutors served as salaried government employees. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 272–94 (2013). As he explains, behind this shift was an intention by legislators to eliminate the way in which conviction fees incentivized prosecutors to pursue charges for even technical violations, which might serve to delegitimize lawmakers' efforts to expand the substantive criminal law into politically unpopular areas, such as liquor and tobacco offenses. *Id.* In other words, the switch to salaries was intended to enhance prosecutorial discretion not to charge. *Id.* While this may initially have benefitted poor communities of color—for example, by reducing prosecutions of businesses for technical violations of racial segregation mandated by Jim Crow laws, see *id.* at 291—over time, prosecutorial discretion has been linked to disproportionate enforcement against poor communities and communities of color. *See, e.g.*, Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013) (examining the way in which prosecutorial discretion results in racial disparities in the criminal justice system).

165. *See supra* notes 121–124 and accompanying text; *see also* Beermann, *supra* note 160, at 1534–44 (describing the imposition of administrative fees in criminal cases as fees that "appear to be imposed simply because the government can do so and the group upon whom the fee is imposed cannot use the political process to resist them").

166. *See, e.g.*, Beermann, *supra* note 160, at 1544 n.109 (describing efforts by community activists in Missouri to reduce onerous phone rates imposed on prisoners and their families).

167. *See* Freeman, *supra* note 139, at 1333.

168. *See* HUMAN RIGHTS WATCH, *supra* note 28, at 29–30.

privatization is necessarily more abusive than the practices employed by the government directly.[169] Rather, that inclusion merely restricts the quantity of such fees, along with any other sanctions which meet the partially punitive test, to an amount proportional to the offense. That limitation may lead some private providers to leave the market, particularly those used to practically unconstrained power to impose fees,[170] but it ensures that privatization is commensurate with constitutional checks on the government's power to punish.[171]

C. Application to Common Economic Sanctions

In the following, the Court's partially punitive test—where punitive intent is evidenced by a link to prohibited conduct or relationship to other recognized forms of punishment—is applied to commonly used forms of economic sanction: statutory fines and surcharges, administrative fees, and restitution. To fully employ that test, this Part presumes the Court will follow its suggestion that the to-a-sovereign restriction should be abandoned.[172]

1. Statutory Fines and Surcharges

Two common forms of economic sanctions are statutory fines, which are typically set out in statute at a given amount or range,[173] and surcharges. Fine-based surcharges are directly connected to the imposition of a statutory fine, operating as a flat amount added to,[174] or a percentage of,[175] the statutory fine

169. *Cf.* Dolovich, *supra* note 139, at 521–23 (noting that whether the entity accepting money out of self-interest is a county judge or private actor, in either case it renders the community "skeptical of the impartiality of the decisionmakers"); Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 147–54 (2012) (arguing that critiques related to limits on accountability, including those related to pecuniary interests, are legitimate but apply equally to public and private actors). *Compare* Colgan, *supra* note 40, at 1199–1205 (describing abusive collections practices by municipal employees in Ferguson, Missouri), *with* HUMAN RIGHTS WATCH, *supra* note 28, at 38–55 (describing similarly abusive collection practices by private probation companies).

170. *See* HUMAN RIGHTS WATCH, *supra* note 28, at 55–67 (describing the breadth of power many private probation companies have over the imposition of fees and conditions of probation).

171. *Cf.* Metzger, *supra* note 153, at 1460–63, 1479 (arguing that privatization is feasible so long as it occurs within a structure that limits the authority of private entities in a way that comports with constitutional requirements).

172. *See supra* Part I.B.

173. *See* Colgan, *supra* note 24, at 285.

174. *See, e.g.*, ALASKA STAT. § 12.55.039 (2010) (dictating that "[i]n addition to any fine or penalty prescribed by law" surcharges shall be imposed, the value of which depends on the severity of the underlying offense).

175. *See, e.g.*, GA. CODE ANN. § 15-21-73(a)(1) (2015) (requiring that for every fine imposed there "shall be imposed as an additional penalty a sum" of up to 20 percent of the fine).

imposed. For example, in Arizona, statutory fines are increased by 67 percent by a set of surcharges that apply to all criminal offenses, civil traffic and motor vehicle violations, violations of fish and game statutes, and local parking violations.[176] In many jurisdictions there is a second type of surcharge, a fund-targeted surcharge, which is not keyed to the underlying statutory fine, but rather is a standalone set amount that is used to populate particular funds for governmental expenditures, which may or may not have any relation to the underlying offense. For example, in Larry Thompson's case, the judge sentenced him to pay $225 for the Local Government Criminal Justice Trust Fund, $65 for the Criminal Ordinance Program, $3.00 to fund the Teen Court, and $50 to Florida's Crime Compensation Trust Fund.[177] As in Mr. Thompson's case, surcharges may and often do outweigh statutory fines.[178]

Both statutory fines and surcharges quite easily satisfy the partially punitive test, as they are only available for imposition upon a determination that prohibited behavior has occurred[179] and are often directly associated with other recognized forms of punishment.[180] In fact, though the Court has not had occasion to address the question in an excessive fines case,[181] in a separate context it has stated that statutory fines constitute punishment as evidenced by the link to prohibited activity.[182] Each of the surcharges imposed against Mr. Thompson, for example,

176. *See* ARIZ. REV. STAT. ANN. §§ 12-116.01(A), (B), 12-116.02 (2016).

177. *See* Charge/Costs/Fees, *supra* note 6.

178. *See, e.g.*, COURT SERVS. DIVISION, ARIZ. SUPREME COURT, VIOLATION REVIEW DATA DRIVEN RESULTS: MISDEMEANOR, CRIMINAL TRAFFIC AND CIVIL TRAFFIC BY DEFENDANT—FISCAL YEAR 2014 FILINGS 17, 42 (2016) (showing that for civil traffic assessments, statutory fines constitute $66.56, as compared to $123 in assessments and surcharges, and that for criminal traffic DUI statutory fines total $250 as compared to $1,341 in assessments and surcharges).

179. *See, e.g.*, MONT. CODE ANN. § 46-18-231 (2016); N.M. STAT. ANN. § 31-18-15 (2016); 18 PA. CONS. STAT. § 1101 (2015); *see also* State v. Beltran, 825 P.2d 27, 29 (Ariz. Ct. App. 1992) (interpreting surcharges to constitute a criminal punishment because of its direct link in the statute to punishment as a percentage of statutory fines).

180. *See infra* note 184 and accompanying text.

181. *See supra* note 86 and accompanying text. The Court was presented with an opportunity to consider whether statutory fines constituted fines for purposes of the Clause in 1970 when it accepted review of a case claiming that statutory fines were excessive because they were automatically converted to jail time if the defendant were unable to pay the fines in a lump-sum. *See* Brief for the Appellants at 27–28, Morris v. Schoonfield, 399 U.S. 508 (1970) (No. 782), 1970 WL 136501 at *27–28. As the case was pending, however, Maryland amended its statute, leading the Court to vacate and remand the judgment. *Morris*, 399 U.S. 508 (per curiam).

182 *See* S. Union Co. v. United States, 567 U.S. 343, 350 (2012) (noting that the term "punishment" "undeniably embrace[s statutory] fines"). The *Southern Union* Court was addressing statutory fines assessed in a criminal case where the link to prohibited activity was obvious. *See id.* at 346. The Court has held, however, that to constitute a "fine" an economic sanction may be civil in nature. *See* Austin v. United States, 509 U.S. at 609. Therefore, whether in a civil or quasi criminal setting, if the underlying activity was

could only be triggered by a conviction for criminal or delinquent conduct or traffic offenses.[183] Further, in many jurisdictions, the payment of a statutory fine or surcharge may be made a condition of probation or parole, which are only available upon a determination that prohibited activity has occurred, thereby inextricably intertwining those economic sanctions with an additional form of punishment.[184]

While there is nothing inherently improper with the government's use of revenue generated through statutory fines and surcharges, the extent to which many jurisdictions rely on such sanctions to fund an array of governmental services exemplifies the risk of prosecutorial abuse animating the excessive fines inquiry.[185] Mr. Thompson's case provides an example. A significant portion of the surcharges imposed upon him were used for governmental functions unrelated to his charge of driving with a suspended license, including the funding of a law library, civil legal aid, juvenile court practices,[186] the Teen Court diversionary program,[187] and services for crime victims.[188] In fact, the number of programs that statutory fines and surcharges are used to fund in Florida is so expansive that

prohibited as opposed to merely regulated, it would meet the partially punitive test. For example, the Los Angeles Municipal Code describes illegal parking as "prohibited." L.A., CAL., MUN. CODE ch. VIII, div. N, § 80.69 (1990); *see also Can I Park There?*, L.A. DEP'T TRANSP., http://ladot.lacity.org/what-we-do/parking/can-i-park-there [https://perma.cc/SK2S-HLUB]. In contrast, the same code includes a "parking occupancy tax," which cannot be linked to prohibited activity, and thus is not a fine, because it merely regulates the "privilege of occupying space in any parking facility" by imposing a 10 percent tax on the rented space. *See* L.A., CAL., MUN. CODE ch. II, art. 1.15, § 21.15.2 (2002).

183. *See* FLA. STAT. §§ 938.03, 938.05, 938.19, 938.27, 939.185(1)(a) (2017).

184. *See, e.g.*, MONT. CODE ANN. § 46-18-233 (2016) (probation); TEX. CODE CRIM. PROC. ANN. art. 42.037(h) (West Supp. 2017) (parole).

185. *See, e.g.*, COUNCIL OF ECON. ADVISORS, *supra* note 22, at 2. Some surcharges may arguably be used to recoup costs associated with the processing of a given case. For example, the court ordered Mr. Thompson to pay a surcharge for the Local Government Criminal Justice Trust Fund, *see* Charge/Costs/Fees, *supra* note 6, which is to be used "by the clerk of the circuit court in performing court-related functions," including the maintenance of Mr. Thompson's court file. *See* FLA. STAT. § 142.01 (2017); *see also*, Docket, *supra* note 14. The Supreme Court's test, however, allows fines to have remedial qualities, so long as they are at least partially punitive. *See Austin*, 509 U.S. at 610. Once that test is satisfied, the remedial qualities of a sanction are relevant only to the question of whether a fine is *excessive*, not whether it is a fine in the first instance. *See, e.g.*, People v. Hatchett, No. H024371, 2003 WL 21008765 (Cal. Ct. App. May 6, 2003) (holding that a "restitution fine" surcharge used to fund general victim services was not excessive in light of the nature of the offense and harm caused to the victim); *see also infra* notes 234–243 and accompanying text.

186. *See* FLA. STAT. § 939.185(1)(a)(1)–(4) (2017). Legal aid in Florida constitutes civil legal services. *See Legal Aid*, FLA. CTS., http://www.flcourts.org/resources-and-services/family-courts/family-law-self-help-information/legal-aid.stml [http://perma.cc/2UYR-GR6P].

187. *See, e.g.*, *Teen Court*, 17TH JUD. CIR. CT. FLA., http://www.17th.flcourts.org/index.php/court-administration/court-programs/teen-court [http://perma.cc/XY6D-GNUY].

188. *See* FLA. STAT. § 960.21.

its court staff must use a 105-page distribution guide to split up incoming criminal debt payments among myriad pots, including to a "nongame wildlife fund" and "a section labeled 'brain and spinal cord.'"[189] Florida is far from alone. For example, officials in Los Angeles, California quite intentionally use parking tickets as a major source of municipal revenue, generating approximately $165 million per year for a wide array of governmental services.[190] Other examples include Allegan County, Michigan, which uses such funds to pay for the county employees' fitness center,[191] and Oklahoma's use of surcharges to fund public schools, infrastructure projects like roads and bridges, and its Department of Tourism and Recreation.[192] The sheer quantity of revenue that would need to be generated through taxation or avoided through elimination of public services to replace these practices, makes plain the risk of prosecutorial abuse and the need to bring statutory fines and surcharges within the scope of the Clause's protections.

2. Administrative Fees

An additional form of economic sanction that is now ubiquitous is the administrative fee, which is at least nominally designed to recoup expenses related to the investigation of, adjudication of, or punishment for an offense. For example, Mr. Thompson was charged a $5.00 per month payment fee, which was ongoing until he paid all economic sanctions in full,[193] plus $5.00 in court costs,

189. Warren, *supra* note 34 (referring to FLA. COURT CLERKS & COMPTROLLERS, DISTRIBUTION SCHEDULE OF COURT-RELATED FILING FEES, SERVICE CHARGES, COSTS AND FINES, INCLUDING A FEE SCHEDULE FOR RECORDING (2015)).

190. *See* Laura J. Nelson, *L.A. City Council to Weigh Proposals to Slash Parking Fines*, L.A. TIMES (Nov. 3, 2015, 1:30 AM), http://www.latimes.com/local/cityhall/la-me-california-commute-20151103-story.html [http://perma.cc/7QLT-CB4J]. Like Los Angeles, many cities use statutory fines and surcharges to bolster municipal budgets. *See* CARL REYNOLDS & JEFF HALL, CONFERENCE OF STATE COURT ADM'RS, 2011–2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS 1 (2012), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Courts AreNotRevenueCenters-Final.ashx [http://perma.cc/C2VP-KF8D] ("In traffic infractions, whether characterized as criminal or civil, court leaders face the greatest challenge in ensuring that fines, fees, and surcharges are not simply an alternate form of taxation."); Nova Safo, *Police Fees Shore Up Budgets in Many Towns*, MARKETPLACE (Mar. 11, 2015, 11:50 AM), http://www.marketplace.org/2015/03/11/ business/police-fees-shore-budgets-many-towns [http://perma.cc/8X3R-TETS] (reporting that in Chicago, tickets stemming from the use of red light cameras alone generate approximately $70 million in fines per year).

191. *See* Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

192. *See* Carter & Adcock, *supra* note 116.

193. *See* Notice of Fines and Costs, *supra* note 6.

$100 in prosecution costs, and a $100 public defender fee,[194] as well as additional fees totaling $230 related to his arrest.[195] Like surcharges,[196] administrative fees can dwarf statutory fines at imposition,[197] at times reaching tens of thousands of dollars or more,[198] and also may accrue over time.[199] Administrative fees clearly serve a remedial goal—cost recoupment—and so the question becomes whether they are wholly remedial, or instead at least partially punitive and therefore fines.[200]

The notion that administrative fees are purely remedial, and therefore outside of the Clause's ambit, is evident in a narrative commonly employed by government officials in which administrative fees are couched as "user fees." The user fee concept centers around the idea that a person subjected to criminal justice processes should be accountable for remediating the costs of that system.[201] In that narrative, the criminal justice system is a set of services both

194. *See* Charge/Costs/Fees, *supra* note 6.
195. *See supra* notes 17–18 and accompanying text.
196. *See supra* note 178 and accompanying text.
197. *See, e.g.*, Sarah Geraghty, *Keynote Remarks: How the Criminalization of Poverty Has Become Normalized in American Culture and Why You Should Care*, 21 MICH. J. RACE & L. 195, 196–97 (2016) (describing fees of $700 to $800 in misdemeanor cases).
198. *See, e.g.*, Brett Kelman, *They Confessed to Minor Crimes. Then City Hall Billed Them $122K in 'Prosecution Fees'*, DESERT SUN (Nov. 15, 2017), http://www.desertsun.com/story/news/crime_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/ [https://perma.cc/3ZCC-7EM2]; Shannon Najmabadi, *He Thought He Had a Free Court-Appointed Lawyer. Then He Got a Bill for $10,000*, TEXAS TRIB. (Nov. 14, 2017, 12:00 AM), https://www.texastribune.org/2017/11/14/texas-court-appointed-lawyers-arent-always-free/ [https://perma.cc/TG8H-4284].
199. *See, e.g.*, *supra* text accompanying notes 13–14.
200. This question has perplexed some lower courts. *See, e.g.*, Tillman v. Lebanon Cty. Corr. Facility, 221 F.3d 410, 420 (3d Cir. 2000) (struggling with whether the cost recoupment aspects of post-conviction incarceration costs rendered the costs entirely remedial, and ultimately side-stepping the question by determining that, in any case, the costs were not excessive).
201. *See, e.g.*, Wright & Logan, *supra* note 4, at 2047 (describing potential support for the imposition of indigent defense fees by defense organizations' leadership because of the political value in being seen as imposing "a measure of personal responsibility among the client base"); Shapiro, *supra* note 191 (quoting Allegan County, Michigan circuit court administrator Michael Day as saying, "The only reason that the court is in operation and doing business at that time is because that defendant has come in and is a user of those services."); Sarah Stillman, *Get Out of Jail, Inc.: Does the Alternatives-to-Incarceration Industry Profit From Injustice?*, NEW YORKER (June 23, 2014), http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc [http://perma.cc/FBE9-PDTR] (quoting an Alabama prosecutor as saying, "private-probation companies serve a very useful purpose [since] they shift the cost of probation onto the person who was irresponsible in the first instance").

necessitated and used by only a small subset of people,[202] and therefore the imposition of fees related to such services operate not as a punishment, but as remediation for the costs of services rendered.[203]

The user fee narrative, however, is inherently based on the notion that the defendant has necessitated the use of court and law enforcement services due to her engagement in prohibited conduct,[204] an idea consistent with a determination

202. The characterization of administrative fees as user fees suffers from the fact that they are not prompted by each person who engages in a given behavior, as would be the case, for example, for all visitors to a state or national park who are required to pay an entrance fee. *See, e.g.*, *America the Beautiful Passes*, NAT'L PARK SERV., http://www.nps.gov/planyourvisit/passes.htm [http:// perma.cc/REJ4-YNZ3]. Only some people who engage in prohibited conduct that could result in economic sanctions are required to participate in the court process, and that depends in large measure on how heavily policed the community is in which one resides. *See generally* Colgan, *supra* note 40, at 1211–12, 1240–42. Policing routinely targets low-income communities and communities of color, making it more likely that people who live and work in those communities will be haled into court. *See id.*; *see also supra* note 164. But that does not mean that they are more responsible for engaging in prohibited behaviors than people in other, less policed communities, who engage in similar prohibited conduct but are not ticketed or arrested at the same rates. Further, the user fee narrative suggests that only the defendant upon whom they are imposed benefits from the system. Yet treating at least some user fees as related to a benefit obtained by the debtor—such as the fees related to Mr. Thompson's arrest, *see supra* note 18 and accompanying text—is clearly a contrivance. *See* Markadonatos v. Village of Woodridge, 760 F.3d 545, 551 (7th Cir. 2014) (en banc) (Posner, J., concurring) (regarding the imposition of a fee for arrest: "Being arrested is not a 'service' to the person arrested!"). But even setting that aside, punishment imposed by the government has long been understood to have broad societal benefits, including moral education and general deterrence. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion); *see, e.g.*, RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 8, 31–32 (2013). As the Conference of State Court Administrators recently explained: "The benefit derived from the efficient administration of justice is not limited to those who utilize the system for litigation, but is enjoyed by all those who would suffer if there were no such system—the entire body politic." REYNOLDS & HALL, *supra* note 190, at 9.

203. *See, e.g.*, Michelle M. Sanborn, *The Pay-to-Stay Debate: Inmates Must Take Financial Responsibility*, CORRECTIONS TODAY, Aug. 2003, at 22 ("One might ask why law-abiding citizens should be burdened with the cost of incarceration when they never use that service . . . ."); *cf.* Pat Nolan, *Inmate User Fees: Fiscal Fix or Mirage?*, CORRECTIONS TODAY, Aug. 2003, at 23 (quoting a report by the Georgia Department of Corrections as considering "the political necessity of assuring the public that inmates are not getting a free ride" when weighing the imposition of additional fees).

204. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 28, at 38 (quoting Lisa Hancock of private probation company AD Probation Services: "It's not our fault they're indigent and owe hundreds of dollars due to court and probation fees. . . . [T]hey have the right to decide whether to commit the crime or not."); John Schwartz, *Pinched Courts Push to Collect Fees and Fines*, N.Y. TIMES (Apr. 6, 2009), http://www.nytimes.com/2009/04/07/us/07collection.html (quoting Shannon Russell, supervisor of a court collections department in Florida as saying: "People come in and say, 'I can't pay this.' My answer is, 'You shouldn't have gotten arrested.'").

that administrative fees are partially punitive.[205] In fact, in most jurisdictions, the imposition of administrative fees is unavailable absent a determination that a prohibited act occurred,[206] thereby satisfying the partially punitive test.[207] The various administrative fees applied in Mr. Thompson's case, for example, could only be imposed upon conviction,[208] or in response to a failure to pay, itself a prohibited act.[209]

Further, like statutory fines and surcharges,[210] the payment of administrative fees may be a component of probation or parole,[211] intertwined with incarceration,[212] or otherwise affiliated with recognized forms of

205. *See supra* notes 93–97 and accompanying text.

206. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-116(A) (2016) (imposing a "time payment fee" of $20 on installment payments for any "court ordered penalty, fine or sanction, including parking penalties [and] restitution" imposed by a court where the defendant does not pay the economic sanction in full upon imposition); ARIZ. REV. STAT. ANN. § 13-801(A) (2010) (providing authority for the court to impose fines at sentencing for felony offenses); *id.* § 13-802(A) (same re: misdemeanor offenses); ARIZ. REV. STAT. ANN. § 13-804(A) (Supp. 2017) (providing authority for the court to order restitution upon "a defendant's conviction for an offense"); ARK. CODE ANN. § 16-10-305 (Supp. 2017) (setting out court costs to be imposed "upon each conviction [or] plea of guilty or nolo contendre"); IOWA CODE § 905.14(3) (2018) (requiring imposition of probation fees); *id.* § 907.1(5) (defining probation as a form of sentence allowed "upon conviction of a public offense"); MO. REV. STAT. § 559.100(1), (3) (Supp. 2017) (providing authority for courts to sentence a person "convicted of any offense" to pay restitution as a condition of probation and mandating imposition of collection fees for collection of restitution).

207. Some courts have determined that administrative fees do not constitute punishment for the purposes of the Ex Post Facto Clause. *See, e.g.*, State v. Weinbrenner, 795 P.2d 235 (Ariz. Ct. App. 1990); Commonwealth v. Martin, 63 N.E.3d 1107, 1112–13 (Mass. 2016). Unlike the requirement that fees be only partially punitive to constitute fines for excessive fines purposes, however, the ex post facto test requires a more exacting standard. *See infra* notes 234–243 and accompanying text.

208. *See* FLA. STAT. §§ 938.01, 938.15, 938.27, 938.29 (2017).

209. *See supra* notes 17–18 and accompanying text; *see also, e.g.*, Wemhoff v. City of Baltimore, 591 F. Supp. 2d 804, 809 (D. Md. 2008) (holding that late payment fee of $16 per month for failure to pay a traffic ticket "is clearly meant to punish" and therefore "is subject to the Excessive Fines Clauses").

210. *See supra* note 184 and accompanying text.

211. *See, e.g.*, MONT. CODE ANN. § 46-18-233 (2016) (probation); VA. CODE ANN. § 19.2-305(a) (2015) (probation); WIS. STAT. § 304.074 (2015–16 & Supp. 2017) (parole).

212. *See, e.g.*, Myrie v. Comm'r, 267 F.3d 251, 262 (3d Cir. 2001) (treating a 10 percent surcharge on the use of the prison commissary as a fine); Wright v. Riveland, 219 F.3d 905, 915–16 (9th Cir. 2000) (holding that a 5 percent deduction imposed on all monies sent into prisoner's accounts from outside sources and applied to a Crime Victim's Compensation Fund was punitive because "[e]xtracting payments from each and every inmate, without regard to the existence and extent of any injury to a victim is not remedial" and that a 20 percent cost of incarceration deduction imposed on all funds received by inmates from outside sources—e.g., family members sending in money for the inmate's account—was punitive and therefore a fine because it satisfies the goal of deterrence); United States v. Price, 65 F.3d 903, 908–09 n.7 (11th Cir. 1995) (treating costs of incarceration assessed

punishment,[213] another indicator of the government's punitive intent. While the fact that these various forms of administrative fees serve to recoup specific costs may lean in favor of a finding that they do not constitute *excessive* fines,[214] where they are available only upon a determination that a prohibited act occurred, or intertwined with other recognized forms of punishment, a governmental intent to punish at least in part is evident, rendering such fees as fines for purposes of the Clause.[215]

Though the vast majority of administrative fees, therefore, fall within the scope of Clause, a more complicated question exists in a handful of jurisdictions in which administrative fees may be imposed even where charges are dismissed or the defendant is acquitted. For example, in some jurisdictions, the government charges indigent defendants a fee for applying to obtain representation by a public defender, whether or not a conviction is obtained.[216] At first blush, this suggests that such fees are purely remedial. Whether they are, however, may depend on the way the fees are collected. If, for purposes of collection, the jurisdiction treats such debts as civil—providing all protections afforded in a civil setting—it would indicate an interest in constraining prosecutorial power. Therefore, even though such fees may be unconstitutional on other grounds,[217] there would be little evidence that the

before the term of incarceration had begun as fines because they were meant to "penalize their criminal actions, not to pay the bills as they accrue while in prison"). The Eastern District of Virginia has held that a $1 per day room and board fee was non-punitive because "the fee may be assessed against all state prisoners . . . regardless of the nature of their crimes or the length of their sentences." Waters v. Bass, 304 F. Supp. 2d 802, 809 (E.D. Va. 2004). In doing so, the court appears to have conflated whether the fee was at least partially punitive, given its inextricable tie to incarceration, with whether it is proportionate to the underlying offense or instead excessive. *See infra* notes 234–243 and accompanying text.

213. *See, e.g.*, MONT. CODE ANN. § 46-18-201(3)(a) (2016) (including costs among a list of other punishments that may be imposed as a component of a sentence upon conviction).

214. *See infra* notes 234–243 and accompanying text.

215. *See* Austin v. United States, 509 U.S. 602, 621–22 (1993) (rejecting the government's argument that a civil forfeiture's use as a form of liquidated damages for expenses related to the investigation and adjudication of the underlying criminal offense would render it non-punitive).

216. *See* Wright & Logan, *supra* note 4, at 2052–54; *see also* Grenoble, *supra* note 4; *cf.* PARRILLO, *supra* note 164, at 258–59, 267 (documenting how fees upon acquittal were abandoned by most colonies between 1780 and 1810 because "many colonists thought it 'contrary to natural justice,'" and lawmakers understood them to be unjust (quoting 2 LAWS OF THE ROYAL COLONY OF NEW JERSEY 378 (Bernard Bush ed., 1977)).

217. *Cf.* Nelson v. Colorado, 137 S. Ct. 1249, 1255–58 (2017) (holding that the reversal of conviction on appeal means that the government has no property interest in monies paid prior to reversal toward costs, fees, and restitution and so retention of those monies violates due process). In addition to potentially being unconstitutional on due process grounds, the imposition of fees upon acquittal also undermines the presumption in the user fee narrative that fees are justified where the defendant is responsible for having necessitated the services

governmental intent was partially punitive, and therefore such fees would not constitute fines.[218]

If, instead, the jurisdiction were to treat fees imposed upon acquittal or dismissal in the same manner as other recognized forms of punishment, including economic sanctions that meet the partially punitive test, it would constitute an alarming display of punitive power subject to the Clause's protections.[219] In such cases, a determination has been made that no prohibited conduct upon which the government could reasonably respond has occurred (acquittal) or the government has acknowledged that it cannot be proven (dismissal). It would be nonsensical if the Clause protected defendants from government overreach only in cases where the government met its burden of showing prohibited conduct occurred, but allowed the government to treat defendants in a punitive manner when it failed to do so. Thus, because such fees are treated like other recognized forms of punishment, they would meet the partially punitive test and constitute fines.[220]

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in question by participation in prohibited behavior. As one retired judge from New Orleans explained: "It is wrong to use people who come into the system to pay for the system itself even when some people haven't done anything wrong . . . . You have to remember a lot of people who came before me were innocent. Not all of them, or even most of them, but many were." ACLU, *supra* note 161, at 26 (quoting Interview with Judge Calvin Johnson, Chief Judge (retired), Orleans Parish Criminal Dist. Court (Apr. 22, 2010)).

218. *Cf.* James v. Strange, 407 U.S. 128 (1972) (holding that a Kansas statute that allowed recovery of indigent defense fees through a nominally civil process, but excluded those fees from protections afforded to other forms of civil debt, violated the Equal Protection Clause).

219. If the Supreme Court were to determine that, despite its treatment in the same fashion as other recognized forms of punishment, an administrative fee imposed upon acquittal was not punitive, it would raise several other constitutional questions. For example, if a defendant is subject to incarceration as a poverty penalty for the failure to pay an economic sanction, it would violate the Equal Protection and Due Process Clauses. *See* Williams v. Illinois, 399 U.S. 235, 239 (1970) ("[N]either [nonpayment of a fine nor nonpayment of court costs] can constitutionally support the type of imprisonment imposed here, but we treat the fine and costs together because disposition of the claim on fines governs our disposition on costs."); *supra* notes 40–43 and accompanying text. Similarly, the use of poverty penalties in relation to fees for indigent defense representation likely violates the Sixth Amendment. *See* Beth A. Colgan, *Paying for* Gideon, 99 IOWA L. REV. 1929 (2014); *see also* State v. Tennin, 674 N.W.2d 403, 410 (Minn. 2004) (holding mandatory fee for indigent defense services violated the Sixth Amendment). Further, jurisdictions would be precluded from using community service as a means of paying off any economic sanction found not to be punishment, because only penal labor is excluded from the prohibition against involuntary servitude. *See* U.S. CONST. amend. XIII, § 1; *cf.* Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 929 (2016) (arguing that "Thirteenth Amendment jurisprudence should go to high alert" where community service or other labor mandates are imposed in relation to criminal debt, probation, and child support enforcement).

220. The treatment of administrative fees as a form of punishment without a determination that prohibited conduct occurred would also necessarily be excessive, as there would be no

3. Restitution

Another prevalent form of economic sanction is restitution, a monetary award to a victim harmed by an offense.[221] While the Supreme Court has yet to assess whether restitution constitutes a fine,[222] several lower courts that have applied the partially punitive test have determined that restitution, while serving to compensate victims, also serves "deterrent, rehabilitative, and retributive purposes" of punishment,[223] and therefore "is not separate from the offender's punishment but is an aspect of it."[224] Further, both lower court judges and

offense against which to balance the severity of the punishment, thereby rendering the fees disproportionate. *See generally supra* Part II.

221. *See, e.g.*, CONN. CONST. art. 1, § 8(b); ALA. CODE § 15-18-65 to -66 (2011); ALASKA STAT. § 12.55.045(a) (Supp. 2017); ARIZ. REV. STAT. ANN. § 13-804 (Supp. 2017); ARK. CODE ANN. § 5-4-205 (2015); CAL. PENAL CODE § 1202.4(f) (2015 & Supp. 2017); COLO. REV. STAT. § 18-1.3-603 (2017); DEL. CODE ANN. tit. 11, § 4106 (2017); D.C. CODE § 22-3227.04 (2017); FLA. STAT. § 775.089 (2017); GA. CODE ANN. § 17-14-3 (2015); HAW. REV. STAT. § 706-605(7) (Supp. 2017); IDAHO CODE § 18-6106 (2017); 725 ILL. COMP. STAT. § 120/4.5(12) (Supp. 2018); IND. CODE § 35-50-5-3 (2017); IOWA CODE § 905.14(3) (2018); IOWA CODE § 915.100(2)(a) (2018); KAN. STAT. ANN. § 21-6702 (Supp. 2017); KY. REV. STAT. ANN. § 431.200 (West 2006); KY. REV. STAT. ANN. § 533.030(3) (West 2016); LA. CODE CRIM. PROC. ANN. art. 895.1(a)(1) (Supp. 2018); ME. STAT. tit. 15, § 1702(2)(B) (2017); MD. CODE ANN. CRIM. PROC. § 11-603 (Supp. 2017); MASS. GEN. LAWS ch. 276, § 87A (2017); MICH. COMP. LAWS § 780.766 (Supp. 2017); MINN. STAT. § 611A.04 (2016); MISS. CODE ANN. § 99-37-3 (2013); MO. REV. STAT. ANN. §§ 556.218, 558.019 (Supp. 2017); NEB. REV. STAT. § 29-2280 (2016); NEV. REV. STAT. § 176.033(1)(c) (2015); N.H. REV. STAT. ANN. § 651:63 (2016); N.J. STAT. ANN. § 2C:43-3 (2016); N.M. STAT. ANN. § 1-17-1 (2017); N.Y. PENAL LAW § 60.27 (Supp. 2017); N.C. GEN. STAT. § 15A-1340.34 (2017); N.D. CENT. CODE § 12.1-41-09 (2015); OHIO REV. CODE ANN. §§ 2929.18, .28 (Supp. 2017); OKLA. STAT. tit. 22, § 991(f) (2011); OR. REV. STAT. § 137.106 (Supp. 2017); 18 PA. STAT. AND CONS. STAT. ANN. § 1106 (West 2015); 12 R.I. GEN. LAWS § 12-19-32 (2009); S.C. CODE § 17-25-322 (2016); S.D. CODIFIED LAWS § 23A-28-1 (2016); TENN. CODE ANN. § 40-20-116 (2016); TEX. CODE CRIM. PROC. ANN. art. 42.037 (West Supp. 2017); UTAH CODE ANN. § 77-38A-301 (LexisNexis Supp. 2017); VA. CODE ANN. § 19.2-305.1 (Supp. 2017); WASH. REV. CODE §§ 9.94A.750, 9.94A.753 (2016); W. VA. CODE ANN. § 61-11A-4 (LexisNexis 2014); WIS. STAT. § 973.20 (2015–16 & Supp. 2017); WYO. STAT. ANN. § 7-9-102 (2017).

222. *See* Paroline v. United States, 134 S. Ct. 1726–27 (2014) (noting in dicta that it would likely determine that restitution constituted a fine).

223. United States. v. Dubose, 146 F.3d 1141, 1144 (9th Cir. 1998); *see also* State v. Izzolena, 609 N.W.2d 541, 548 (Iowa 2000) (holding that restitution constituted a fine in part because it serves a rehabilitative aim by "instill[ing] responsibility in criminal offenders" who have committed prohibited acts).

224. State v. Good, 100 P.3d 644, 649 (Mont. 2004) (interpreting the state constitutional provision prohibiting excessive fines as identical to the Eighth Amendment's Excessive Fines Clause); *see also, e.g.*, S.D. CODIFIED LAWS § 23A-27-1 (allowing restitution to be ordered upon a "determination of guilt" following a presentencing hearing in which defense counsel has an opportunity to present mitigating evidence regarding his culpability for the prohibited conduct); WYO. STAT. ANN. § 7-9-102 ("In addition to any other punishment prescribed by law the court shall, upon conviction for any misdemeanor or felony, order a defendant to pay restitution to each victim . . . ."); *Izzolena*, 609 N.W.2d at 548-49 (holding that restitution

legislators often note that a key goal of restitution is to punish for prohibited conduct when arguing that restitution is a valid component of criminal sentencing.[225]

The understanding of restitution as at least partially punitive is in keeping with the Supreme Court's repeated statements that restitution serves a punitive function in response to prohibited conduct.[226] The Court has emphasized that restitution constitutes an effort to "mete out appropriate criminal punishment for [the offending] conduct,"[227] and that in doing so it serves the "penal and rehabilitative interests of the State."[228] In other words, restitution meets the

constitutes a fine for purposes of the Excessive Fines Clause because it has "punitive elements" including retributive, deterrent and rehabilitative qualities). As Cortney Lollar has noted, some courts have interpreted federal restitution statutes to allow for the imposition of restitution even for acquitted conduct. *See* Lollar, *supra* note 68, at 131. These interpretations, however, have required a link between the prohibited conduct that is the subject of the conviction and all restitution imposed. *See id.* at 130 (noting that restitution is allowed if it relates to the "scheme, conspiracy, or pattern" of the acts for which a defendant is convicted (quoting 18 U.S.C. § 3663(a)(2) (2012)); *see also, e.g.*, United States v. Reifler, 446 F.3d 65, 120–21 (2d Cir. 2006) (interpreting the Mandatory Victims Restitution Act's allowance for imposition of restitution for a "scheme, conspiracy, or pattern of criminal activity" as precluding an order to "pay restitution to any person who was not a victim of the offense *of which the defendant was convicted*." (emphasis added)). Therefore, even though facts establishing the restitution award may not be proven by a jury beyond a reasonable doubt, the restitution is still triggered by a determination that prohibited conduct occurred. Plea processes in several states similarly allow restitution orders stemming from prohibited conduct absent a conviction. *See, e.g.*, NEB. REV. STAT. § 29-2280 (allowing order of restitution from uncharged or dismissed conduct upon consent of the parties); VT. STAT. ANN. tit. 13, § 7043(e)(3) (Supp. 2016) (allowing a defendant to enter into a plea agreement for one offense, which includes restitution for losses to a victim stemming from prohibited activity for a separate offense for which a plea of guilty is not entered).

225. *Cf.* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937 & nn.48–49 (1984) (providing examples of legislative and judicial pronouncements on the rehabilitative value of restitution).

226. *See Paroline*, 134 S. Ct. at 1726–27 (discussing the Excessive Fines Clause and noting that restitution "serves punitive purposes"); Pasquantino v. United States, 544 U.S. 349, 365 (2005) (holding that the imposition of restitution under the Mandatory Victim Restitution Act was not barred by the common law revenue rule); Kelly v. Robinson, 479 U.S. 36, 53 (1986) (upholding statute barring restitution from being subject to discharge in Chapter 7 bankruptcy proceedings due to its penal nature); *see also* Bearden v. Georgia, 461 U.S. 660, 667 (1983) (treating restitution and statutory fines as equivalent for purposes of a Fourteenth Amendment challenge).

227. *Pasquantino*, 544 U.S. at 364; *see also Paroline*, 134 S. Ct. at 1726–27; R.A. DUFF, TRIALS AND PUNISHMENTS 284 (1991) (explaining that while punishment and compensation serve separate purposes, a restitution award can serve both ends at the same time).

228. *Kelly*, 479 U.S. at 53; *see also Paroline*, 134 S. Ct. at 1724; *cf.* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 520–21 (Robert Campbell ed., 4th ed. 1873) (describing an understanding that restitution may serve the utilitarian goal of crime prevention). Paul Cassell and James Marsh have criticized the *Paroline* Court's reference to *Kelly* as support for the conclusion that restitution is punishment by distinguishing the statute at issue in *Kelly*, which was "not

partially punitive test due to its link to prohibited activity, and thereby constitutes a fine for purposes of the Excessive Fines Clause.

In addition to the direct link to prohibited conduct in its own right, restitution also is often intertwined with or treated like other recognized forms of punishment. In many jurisdictions courts are mandated or have the authority to make payment of restitution a condition of probation,[229] and parole boards may also be required or allowed to set restitution payment as a condition of release.[230] Further, the treatment of restitution during collections is often commensurate with,[231] and at times even more punitive than,[232] the treatment of statutory fines, surcharges, and administrative fees.[233]

Yet, while remedial purposes and punitive aims are not mutually exclusive[234] and need not be for the purposes of the Excessive Fines Clause,[235] some

tailored to victims' losses." Paul G. Cassell & James R. Marsh, *Full Restitution for Child Pornography Victims: The Supreme Court's* Paroline *Decision and the Need for a Congressional Response*, 13 OHIO ST. J. CRIM. L. 5, 22 n.120 (2015). This, however, confuses the question of whether restitution is partially punitive and therefore a fine, with whether it is excessive. *See infra* text accompanying notes 234–243.

229. *See, e.g.*, COLO. REV. STAT. § 18-1.3-205 (2017) ("[R]estitution shall be ordered by the court as a condition of probation."); N.C. GEN. STAT. § 15A-1343(b)(9) (2017) (making payment of restitution a regular condition of probation); WYO. STAT. ANN. § 7-9-108 (2017) (mandating that restitution ordered by the court be a probation condition).

230. *See, e.g.*, KY. REV. STAT. ANN. § 439.563(1) (West 2006 & Supp. 2017) ("[T]he Parole Board shall order the defendant to pay restitution as a condition of parole."); NEV. REV. STAT. § 213.126(1), (6) (2015) ("Unless complete restitution was made while the parolee was incarcerated, the Board shall impose as a condition of parole, in appropriate circumstances, a requirement that the parolee make restitution . . . ").

231. *See, e.g.*, ALASKA STAT. § 12.55.100(2)(A)–(B) (Supp. 2017) (granting courts discretion to make both fines and restitution conditions of probation); ARIZ. REV. STAT. ANN. § 13-810(A)–(B) (2010 & Supp. 2017) (creating a show cause hearing that may result in treatment as contempt or issuance of arrest if a person fails to pay fines, fees, or restitution).

232. *See, e.g.*, VA. CODE ANN. § 19.2-305(A)–(C) (2015) (allowing courts to make payment of fines and costs or restitution a condition of probation, but providing protection against the extension of the probation term upon a failure to pay fines and costs only).

233. Debt stemming from restitution may also be increased as a result of interest and collection fees. Take, for example, Rosalind Hall, who was sentenced to pay restitution in relation to a set of bad checks written in 2008 totaling just over $100. *See* Nicholas Kristof, *Is It a Crime to Be Poor?*, N.Y. TIMES (June 11, 2016), http://www.nytimes.com/2016/06/12/opinion/sunday/is-it-a-crime-to-be-poor.html?_r=1. Despite putting $40 of her monthly income of $50 toward the restitution, by 2016 the various collections fees stacked up so significantly that it left her owing $1,200. *Id.*

234. As R.A. Duff has noted:

> If I compensate my victim I am trying directly to repair, even if I cannot annul, the material harm which I caused him, whereas in undergoing punishment I am receiving the condemnation of my community and expressing my repentance to the community. But the same activity—making a financial payment, or providing some material assistance—could serve both purposes . . . .

DUFF, *supra* note 227, at 284.

lower courts have determined that restitution does not constitute a fine based on an improper substitution of more restrictive tests for punitiveness used to determine the applicability of the Double Jeopardy and Ex Post Facto Clauses.[236] Unlike the excessive fines test, in the double jeopardy and ex post facto contexts, the Supreme Court has held that the relevant inquiry is whether a penalty is so punitive that it overwhelms any remedial goal so as to exhibit a legislative intent that the penalty be criminal in nature despite the fact that the penalty is nominally civil.[237] The *Austin* Court explicitly rejected the application of this stricter standard in favor of the partially punitive test.[238] Further, as the Court explained in *United States v. Ursery*,[239] the stricter standard is "wholly distinct" from the partially punitive test in the excessive fines context.[240] Unlike the double jeopardy and ex post facto inquiries:

> It is unnecessary in a case under the Excessive Fines Clause to inquire at a preliminary stage whether the civil sanction imposed in that particular case is totally inconsistent with any remedial goal. [This is] because the second stage of inquiry under the Excessive Fines Clause asks whether the particular sanction in question is so large as to be "excessive" . . . .[241]

In other words, excessiveness is measured by a gross disproportionality test under which the harm that restitution serves to remediate is a component of the inquiry.[242] Therefore, "a preliminary-stage inquiry that focused on the

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

236. *See, e.g.*, State v. Cottrell, 271 P.3d 1243, 1251–53 (Idaho Ct. App. 2012) (relying on ex post facto test and cases including *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) and *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) when evaluating whether to characterize restitution as punitive or compensatory). In some cases, even with the stricter test, courts have deemed restitution sufficiently punitive to trigger the Ex Post Facto Clause. *See, e.g.*, United States v. Schulte, 264 F.3d 656, 662 (6th Cir. 2001); United States v. Siegel, 153 F.3d 1256, 1259 (11th Cir. 1998).

237. *See* Smith v. Doe, 538 U.S. 84, 92 (2003) (ex post facto); United States v. Ursery, 518 U.S. 267, 280 (1996) (double jeopardy).

238. *Austin*, 509 U.S. at 610 n.6.

239. 518 U.S. 267.

240. *Id.* at 287.

241. *Id.*

242. *See infra* notes 252–253 and accompanying text. There will be some defendants who cannot pay any economic sanctions, including restitution, due to poverty. *See generally* Colgan, *supra* note 65. But for most defendants, the extent of the victim's loss as well as the defendant's economic condition are relevant to ascertaining the scope of punishment, including reasonable payment terms. *See infra* Part II. Cassell and Marsh suggest that a system that required full payment of restitution to make a victim whole even beyond an individual's level of culpability would not be excessive if it included an opportunity for a defendant to file an action for contribution to seek reimbursement for overpayment from co-defendants or others responsible for the harm to the victim. *See* Cassell & Marsh, *supra* note

disproportionality of a particular sanction would be duplicative of the excessiveness analysis that would follow."[243]

Further, while at first glance restitution made payable to a victim does not raise the type of partisan concerns regarding tax avoidance that arises with other forms of economic sanction because the government is not the direct beneficiary, victim restitution does reduce the need for tax increases and government expenditures, and may in fact add money to government coffers. Crime victims are, more often than not, poor.[244] A physical injury or the loss of property or income resulting from a crime may lead to higher reliance on public benefits such as public health services, housing and transportation services, or other benefits intended to serve as cash substitutes, such as food stamps.[245] A payment of restitution helps the government avoid those expenses and the tax increases necessary to accommodate them. Further, in some jurisdictions, the government receives a direct benefit from the collection of restitution, either through retention of interest on collected amounts or through the application of collections costs, which in some jurisdictions are taken off the top of any

228, at 31–32. They justify this argument in part on the grounds that people with insufficient means would not be burdened by the need to seek contribution, because they would not pay the restitution ordered due to poverty. *Id.* This, of course, neither accounts for the requirement that in assessing proportionality, the determination of offense seriousness requires consideration of the defendant's degree of culpability for the offense, *see infra* notes 252–253 and accompanying text, nor the unjustifiably punitive effects of the imposition of economic sanctions on those who cannot pay with or without the use of poverty penalties. *See generally infra* Part II.

243. *Ursery*, 518 U.S. at 287.

244. *See, e.g.*, ERIKA HARRELL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION, 2008–2012, at 1 (2014), http://www.bjs.gov/content/pub/pdf/hpnvv0812.pdf [http://perma.cc/35PE-N26E] (finding that people living below the federal poverty level were more than twice as likely to be the victim in violent crimes than people at higher incomes); DANIELLE SERED, VERA INST. OF JUSTICE, YOUNG MEN OF COLOR AND THE OTHER SIDE OF HARM: ADDRESSING DISPARITIES IN OUR RESPONSES TO VIOLENCE 5 (2014), http://storage.googleapis.com/vera-web-assets/downloads/Publications/young-men-of-color-and-the-other-side-of-harm-addressing-disparities-in-our-responses-to-violence/legacy_downloads/men-of-color-as-victims-of-violence-v3.pdf [http://perma.cc/T3QU-RRS8] (citing to studies showing that young men of color are disproportionately likely to be crime victims and to be poor); Benjamin H. Harris & Melissa S. Kearney, *The Unequal Burden of Crime and Incarceration on America's Poor*, BROOKINGS INSTITUTION (Apr. 28, 2014), http://www.brookings.edu/blog/up-front/2014/04/28/the-unequal-burden-of-crime-and-incarceration-on-americas-poor [http://perma.cc/7UA6-7TCS] (reporting that in 2008 "the victimization rate for all personal crimes among individuals with family incomes of less than $15,000 was over three times the rate of individuals with family incomes of $75,000 or more").

245. *See* Harris & Kearney, *supra* note 244 (reporting that victims of violent crimes "often suffer from emotional harm and subsequent lost earnings").

restitution monies received before the remainder is distributed to the victim.[246] In one extreme example, investigative reporters in Texas uncovered a state account containing $22 million in unpaid victim restitution.[247] Probation staff tasked with locating victims owed the money expended minimal effort, apparently because the jurisdiction was able to generate interest off of unpaid amounts.[248] The failure to distribute the funds also allowed them to take advantage of a state law that permitted the jurisdiction to retain a portion of unpaid funds where the victim had not been identified within five years.[249] In other words, though restitution separately satisfies the prohibited conduct test, the risk that can be created by an unchecked system for restitution also justifies its treatment as a fine.

II. EXCESSIVENESS AND PROPORTIONALITY

Having considered the threshold question of what constitutes a fine, this Part examines the question of what renders a fine "excessive."[250] In applying the gross disproportionality test, the *United States v. Bajakajian*[251] Court focused on the offense seriousness side of the proportionality scale, examining the nature of the offense, the harm created by it,[252] the defendant's culpability, and evidence of Congress's understanding of the offense's seriousness.[253] The Court also hinted that on the other side of the proportionality scale—punishment

246. *See, e.g.*, 204 PA. CODE § 29.405(1)(A) (2017).
247. *See* Brian Collister & Joe Ellis, *State Sitting on $22 Million Owed to Crime Victims*, KXAN (June 8, 2016, 12:38 PM), http://kxan.com/investigative-story/state-sitting-on-millions-owed-to-crime-victims [http://perma.cc/QH35-3UD9].
248. *See id.*
249. *Id.*
250. Though this Article has focused on criminal debt resulting from economic sanctions, rather than on forfeitures of money or property, the financial implications of forfeitures are also relevant to the severity of the punishment, and therefore its excessiveness. *See* Colgan, *supra* note 91, at 213. This is particularly important as many forfeitures result in the loss of family homes, means of transportation, or even one's life savings. *See, e.g.*, Joline Gutierrez Krueger, *DEA to Traveler: Thanks, I'll Take That Cash*, ALBUQUERQUE J. (May 6, 2015, 12:05 AM), http://www. abqjournal.com/580107/dea-agents-seize-16000-from-aspiring-music-video-producer.html [http://perma.cc/T9B3-ZRUL] (describing the seizure of the life savings of a traveler on an Amtrak train; when the man told the DEA agents that if they took the money he would have no means of surviving, they responded "that it was [his] responsibility to figure out how [he] was going to do that").
251. 524 U.S. 321 (1998).
252. *Id.* at 337–39 (noting that the crime was "solely a reporting offense," "unrelated to any other illegal activities" and caused "minimal" harm).
253. *Id.* at 338–39 (considering available penalties beyond forfeiture and noting that "[w]hatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader").

severity—the financial effect on the defendant would be relevant.[254] That question remained unresolved, however, as Mr. Bajakajian never raised the issue.[255]

Though the Court's articulation of how to measure proportionality is a jumble,[256] five key principles emerge from the proportionality cases of the Cruel and Unusual Punishments Clause from which the excessiveness test is borrowed: a desire for equality in sentencing; the need for comparative proportionality of sentencing based on offense seriousness; the importance of harnessing the expressive function of punishment; a concern for the potential criminogenic effect of, and other social harms created by, punishment; and a constraint that punishment not unreasonably undermine basic concepts of human dignity.[257] An examination of those principles supports the conclusion that a defendant's financial condition is relevant to assessing the severity of punishment for use in weighing its proportionality.[258]

Before examining each of these principles, a note on terminology. Due to the myriad forms of economic sanction that may be imposed, it can be difficult to keep track of what sanctions are imposed when, and how that relates to the

254. *See id.* at 339, 340 n.15.

255. *Id.* at 340 n.15.

256. *See, e.g.*, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 572–75 (2005).

257. The Court often speaks of the equality, comparative proportionality, and expressive principles as components of retributivism, and the criminogenic and social harms concerns as utilitarian in nature. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 71–74 (2010). It also has at times struggled with the relationship between its understanding of retributivism, utilitarianism, and the dignity constraint. *See infra* note 354. The parameters of and justifications for retributive and utilitarian punishment theories are the subject of a significant and longstanding debate. *See generally, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968) (examining retributive and utilitarian justifications for punishment). I do not attempt to resolve that debate here, nor do I examine how the Court's interpretation of these theories falls within punishment theory broadly. Rather, I mine the underlying principles that animate the Court's proportionality decisions for guidance on whether the Court would find financial condition relevant to excessiveness.

258. There is another potential argument for why the excessiveness inquiry mandates consideration of one's ability to pay that can be found in the status/conduct distinction drawn between *Robinson v. California*, 370 U.S. 660 (1962), in which the Court held that any punishment imposed for the status of narcotic addiction violated the Cruel and Unusual Punishments Clause, and *Powell v. Texas*, 392 U.S. 514 (1968), in which a plurality of the Court declined to extend *Robinson* to the crime of public intoxication, regardless of whether that conduct stemmed from addiction. Because, like addiction, poverty is a fluid concept that may be brought about voluntarily or involuntarily, it is possible that *Robinson* can be extended to support an interpretation of the Excessive Fines Clause as protective, particularly where punishment is imposed for behavior, such as the failure to pay, that constitutes an inextricable component of poverty.

excessiveness inquiry. The following terms are used for ease of reference: (1) "base fines" refers to statutory fines, surcharges, administrative fees, and restitution imposed at sentencing; (2) "immediate poverty penalties" refers to administrative fees that are imposed upon defendants who cannot pay in full at sentencing, such as monthly payment fees, collections costs, and interest, or probation fees where probation is imposed solely due to an inability to pay; and (3) "post-sentencing poverty penalties" refers to fees, surcharges, and other punishments imposed for the failure to pay during the payment term.

A. Equality in Sentencing

In the cruel and unusual punishments doctrine, the Court has exhibited a commitment to equality in sentencing, in which two people equally culpable for the same offense deserve, and therefore should receive, the same punishment.[259] The Court thus requires consideration of the seriousness of the offense, taking into account its gravity, including the nature of the crime and the harm caused, if any, and the defendant's culpability for it.[260] The key question remains whether,

259. *Cf. Graham*, 560 U.S. at 71 (explaining that juveniles are less culpable than adults for commission of offenses and that non-homicide offenses are less severe than homicide, and therefore juveniles convicted of non-homicide offenses cannot be subjected to a life without parole sentence even though an adult can because "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender" (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987))). In addition to the Court's interest, the literature contains significant discussion of the goal of equality in sentencing in which punishment is imposed equally where culpability is equal. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 461–63 (2000); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 119 (1976); Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1836 (2012); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 910–12 (2010); Michael Tonry, *Proportionality, Parsimony, and Interchangeability of Punishments*, *in* WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT 217, 220 (Michael Tonry ed., 2011).

260. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 800 (1982) (considering the defendant's "culpability" including what his "intentions, expectations, and actions were"); *see also, e.g.*, VON HIRSCH, *supra* note 259, at 69 ("When we speak of the seriousness of 'the crime,' we wish to stress that we are *not* looking exclusively to the act, but also to how much the actor can be held to blame for the act and its consequences."). The Court has emphasized this same type of attention to culpability of the defendant and gravity of the offense in the excessive fines context. *See Bajakajian*, 524 U.S. at 334 ("The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."); *id.* at 337 n.12 (describing the crime as a one-time reporting offense and discounting falsehoods the defendant told about his actions); *see also* Alexander v. United States, 509 U.S. 544, 559 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted . . . that the question whether the forfeiture was 'excessive' must be considered.").

Though there is some dispute in the literature about whether the amount of harm caused should be relevant in proportionality review—see, for example, Meghan J. Ryan, *Taking*

once defendants are determined to be equally culpable, equality of punishment should be measured formally by dollar amount or substantively according to financial effect.[261]

To make the relevance of financial condition concrete in considering equality of punishment, the following discussion compares the experience of Larry Thompson, who as detailed above was sentenced to $548 in base fines for driving with a suspended license, against John Smith, a hypothetical resident of Mr. Thompson's hometown, Orlando, Florida. For the discussion's purposes, Mr. Smith also was ordered to pay a $548 base fine for the identical offense. Mr. Smith makes a typical annual salary for a legal professional in that community of $66,160.[262] As a single adult, Mr. Smith's annual expenses including food, medical, housing, transportation, taxes, and other miscellaneous expenses amount to $23,945,[263] leaving him $42,215 per year, or over $3,500 per month in excess income, of which he saves a modest $500 per month. Mr. Thompson, in contrast, survived on $700 a month in public benefits, from which he had to meet all of his basic needs, and he had no savings.[264] As one expert on economic self-

Dignity Seriously: Excavating the Backdrop of the Eighth Amendment, 2016 U. ILL. L. REV. 2129, 2145 n.103—the Court has consistently taken the level of harm into consideration. *See, e.g.*, *Graham*, 560 U.S. at 69 (describing murder as the most serious injury to the victim and public); Kennedy v. Louisiana, 554 U.S. 407, 435–39 (2008) (discussing the harm caused by child rape but describing it as less harmful than homicide); *id.* at 467–69 (Alito, J., dissenting) (treating harm as relevant but disagreeing with the majority as to degree of harm for child rape); Harmelin v. Michigan, 501 U.S. 957, 1002–03 (1991) (Kennedy, J., concurring) (describing drug "[p]ossession, use, and distribution [as] 'one of the greatest problems affecting the health and welfare of our population,'" that may lead to more criminal activity in arguing that Michigan's mandatory drug sentencing laws were not cruel and unusual (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989)); *id.* at 1022–26 (White, J., dissenting) (treating the nature of harm as relevant to offense seriousness but disagreeing as to the extent to which drug possession is harmful); Solem v. Helm, 463 U.S. 277, 292 (1983) ("Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender."); Rummel v. Estelle, 445 U.S. 263, 295 (1980) (Powell, J., dissenting) (discussing limited harm caused by crimes totaling a loss to victims of only $230); Gregg v. Georgia, 428 U.S. 153, 197 (1976) (plurality opinion) (describing appropriateness of a Georgia death penalty statute's distinction between particularly harmful means of committing a homicide in restricting the use of capital punishment); *Powell*, 392 U.S. at 532 (noting the potential harm to health and safety linked to public intoxication).

261. For a discussion of how the federal judicial oath to "do equal right to the poor and to the rich" "might obligate federal judges to foster some measure of substantive equality by taking account of economic disparities," and therefore provides a basis for a canon of interpretation favoring substantive equality, see Re, *supra* note 121, at 102, 104.

262. *See Living Wage Calculation for Orange County, Florida*, LIVING WAGE CALCULATOR, http://livingwage.mit.edu/counties/12095 [http://perma.cc/EVC5-GN6K].

263. *See id.*

264. *See* E-mail from Faith Elizabeth Sills, Licensed Clinical Soc. Worker, to author (Apr. 18, 2017) (on file with author); *see also* Application for Criminal Indigent Status, *supra* note 3.

sufficiency has explained, even without economic sanctions, someone in Mr. Thompson's position is likely unable "to secure even the basic necessities with one's own resources, and [is] forced to sacrifice one need for another, e.g., not eat in order to pay for heat," and that such a meager budget "does not include 'recreation, entertainment, savings, debt repayment, or any other needs beyond the inescapable daily needs of human existence.'"[265]

The experiences of Messrs. Smith and Thompson reveal how the Court's concern regarding equality is undermined by the use of poverty penalties. While a $548 base fine is certainly an inconvenience, Mr. Smith can pay in full from his savings on the date of sentencing, and doing so will have little, if any, effect on his financial stability. In other words, Mr. Smith has a meaningful choice to avoid any penalties for nonpayment and the $548 base fine constitutes the extent of his punishment. In contrast, Mr. Thompson had no ability to pay toward the economic sanctions on the day of sentencing let alone pay them in full.[266] Therefore, unlike Mr. Smith, in addition to the $548 base fine, he was subjected to the immediate poverty penalty of a $5 per month partial payment fee.[267] Even setting aside Mr. Thompson's post-sentencing poverty penalties of incarceration and additional fees related to his failure to pay,[268] the monthly fee alone constitutes additional punishment unrelated to the offense of driving with a suspended license. In other words, despite being equally culpable for the same offense, Mr. Thompson receives unequal punishment triggered only by his financial condition.

Further, even if both immediate and post-sentencing poverty penalties were set aside, the punishment as imposed on Messrs. Smith and Thompson, though formally equal, would be substantively unequal. While Mr. Smith can pay the base fine in one day, even if Mr. Thompson paid a small amount toward the base fine that would stretch his meager budget—say, $5 per month[269]—it would mean that he was subjected to the punishment for over nine years.[270]

265. City of Richland v. Wakefield, 380 P.3d 459, 462 (Wash. 2016) (en banc) (describing the expert testimony of and quoting Dr. Diana Pierce, University of Washington School of Social Work, regarding a person who received a $710 public assistance award in a community with a self-sufficiency standard of $1,492 per month).

266. *See supra* notes 3–4 and accompanying text.

267. *See supra* note 13 and accompanying text.

268. *See supra* notes 13–14, 18 and accompanying text.

269. *See* HUMAN RIGHTS WATCH *supra* note 28, at 31 (regarding many defendants having the ability to pay only $5 to $10 at a time).

270. Though the idea that it would take nearly a decade to pay economic sanctions seems extraordinary, in reality, for people living with financial insecurity, it is quite common to struggle with criminal debt for decades. *See, e.g.*, ACLU OF WASH. & COLUMBIA LEGAL SERVS., MODERN-DAY DEBTORS' PRISONS: HOW COURT-IMPOSED DEBTS PUNISH POOR PEOPLE IN WASHINGTON 10 (2014) (estimating time for payment of principal and interest on one woman's case at 28.25 years); BECKETT ET AL., *supra* note 50, at 43 ("I figured out that like all

The ongoing nature of the punishment is substantively different than the punishment experienced by Mr. Smith, and due only to Mr. Thompson's limited resources.

The academic debate over whether substantive or formal equality should be employed in assessing proportionality has largely centered on the relevance of the subjective experience of incarceration and the collateral consequences thereof. Theorists favoring a subjective approach posit that accounting for individual characteristics that may make those experiences more or less punitive provides a more accurate assessment of punishment severity and therefore a better method for determining whether a sentence is proportionate to the offense.[271] For example, a person with claustrophobia suffers more acutely from incarceration in a small cell than a person without fear of enclosed spaces, and therefore a subjectivist result would entail a shorter term of incarceration for the same offense for the person with claustrophobia.[272] Theorists favoring the use of objective measurements of deprivation—for example, the length of incarceration regardless of the person's subjective experience during that term[273]—push back

the funds I owed, going on the current payment plans, I figure out I'll be paying till I'm past 30 years old. And I've been doing it [paying] since I was 18." (alteration in original) (quoting an individual concerned about making regular payments on criminal debt)); ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION 2 (2012) (describing the case of a 58-year-old man who had been struggling with criminal debt for over 30 years).

271. *See, e.g.*, John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1039 (2009) (arguing that under either retributive or utilitarian theories of punishment, "[i]n designing a system of punishment, scholars and policymakers need to account for the ramifications of hedonic adaptation to the extent that penal regimes should reflect the actual experience of punishment"); *see also* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 186–87, 189–92 (2009) (arguing that nominally equal sentences that do not account for the subjective experience of incarceration are actually unequal and therefore disproportionate to each other).

272. *See* Kolber, *supra* note 271, at 190–93; Josef Montag & Tomáš Sobek, *Should Paris Hilton Receive a Lighter Prison Sentence Because She's Rich? An Experimental Study*, 103 KY. L.J. 95, 97 (2014–15).

273. Both subjectivists and objectivists often agree that there may be some validity to subjective consideration of offender sensitivity in cases in which the use of a particular term of incarceration may be cruel or excessive as a result of age or serious medical condition. *See, e.g.*, Markel & Flanders, *supra* note 259, at 910 n.13 (regarding the objectivist argument); Montag & Sobek, *supra* note 272, at 97–98 (describing the subjectivist argument). Further, the debate about whether to consider subjective experiences of punishment or not is focused on the severity of punishment side of the scale, and therefore is distinct from whether unique characteristics of the defendant should alter perceptions of culpability with respect to offense seriousness—see, for example, *United States v. 5 Reynolds Lane*, 956 F. Supp. 2d 349, 354 n.3 (D. Conn. 2013), in which the lower court had taken into account a defendant's medical condition in a case involving marijuana for medicinal purposes in order to assess an excessive fines claim—including whether wealth or poverty should be relevant to understanding culpability. *See* ANDREW VON HIRSCH & ANDREW ASHWORTH,

against subjectivists by contending that to be consistent with a commitment to equality, the sentence must depend only upon the nature of and the defendant's blameworthiness for the offense, and therefore differentiation in punishment based on subjective experience would be unfair.[274]

Despite maintaining divergent positions with respect to incarceration, proponents of subjective and objective measurements for sentencing share common ground with respect to economic sanctions. While economic sanctions are typically mentioned only in passing in this debate, that appears to be because there is notable agreement in the two camps in favor of eliminating the "crude and unjustifiable . . . widespread current practice of imposing an invariant, one-size-fits-all criminal fine for a particular crime, without regard to the offender's wealth or income."[275]

One aspect of the debate that helps explain that commonality involves the objectivist concern that accounting for the subjective experience of punishment would exacerbate systemic racial and class inequalities by disproportionately benefiting people with wealth for whom the experience of incarceration is a greater deviation from their lifestyle.[276] The inherently regressive nature of economic sanctions, however, inverts that concern. For example, Mr. Smith, with comparatively higher means, receives one day of punishment with little fiscal impact, while Mr. Thompson receives nearly a decade of punishment that compromises his ability to meet his basic needs each month for the same offense, and due only to his financial circumstances. If, instead, the economic sanctions imposed in response to driving with a suspended license were graduated to account for Mr. Thompson's means, it would ensure that punishment is responsive only to his culpability for the offense—the primary aim of objective theorists—and not his inability to pay.[277]

PROPORTIONATE SENTENCING 62–65 (2005); Erik Luna, *Spoiled Rotten Social Background*, 2 ALA. C.R. & C.L. L. REV. 23 (2011); Tonry, *supra* note 259, at 230–31.

274. *See* Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 4–5 (2009); *see also* Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297, 311–13, 318–19 (1974) (arguing that comparative differences in sentencing are only relevant to the extent they reveal arbitrariness or unfairness).

275. Simons, *supra* note 274, at 6 n.11; *see also id.* at 6 (supporting an objective perspective and noting that ungraduated economic sanctions are "bias[ed] in favor of the wealthy"); *see also* Kolber, *supra* note 271, at 226 (supporting graduation of economic sanctions according to ability to pay from a subjective perspective).

276. *See* Markel & Flanders, *supra* note 259, at 915; Simons, *supra* note 274, at 6.

277. *See* Simons, *supra* note 274, at 6, 6 n.11 (arguing that the objective approach is preferable in the context of incarceration because subjective considerations veer too far from the focus on a defendant's culpability, but agreeing that adjustments for wealth in the context of economic sanctions are appropriate).

A second aspect of the debate around subjective or objective measurements of punishment severity involves methods of proving the experience of punishment, a task which is more onerous in the context of incarceration than it is for economic sanctions. Subjectivists acknowledge that measuring individual experiences with incarceration can be costly and difficult, but also contend that doing so is closely akin to pain and distress determinations in other arenas such as tort law,[278] that necessary evidence in some cases will be aligned with medical diagnoses,[279] and that such determinations are becoming less burdensome as diagnostic technologies improve.[280] Objectivists caution that the evidentiary difficulties a subjectivist approach would take to assess the experience of incarceration are more likely to be insurmountable.[281] Graduation of economic sanctions, in contrast, lends itself to much simpler forms of proof to discern effect. Unlike, say, determining whether interior designers will have "more difficulty coping in prison than most others" due to concerns "about their aesthetic surroundings,"[282] discerning a defendant's ability to pay is not a matter of assessing subjective taste, but objective measurements of well-being, such as income and basic living expenses.[283] The administrability of using these objective forms of proof is evident in multiple contexts within the criminal sphere, such as the assessment of ability to pay in setting bail or determining qualification for indigent defense representation and in pre-sentencing reports,[284] as well as in other arenas such as consumer bankruptcy, tax law, and public benefits.[285]

Finally, the support among subjectivists and objectivists for graduation of economic sanctions may also be grounded in the two camps' competing positions on where a state's responsibility for punishment begins and ends. Subjectivists have argued that the collateral consequences of having served a term of incarceration—and particularly difficulties obtaining employment and familial disruption that may occur even after release—should be factored into punishment severity.[286] These same consequences can accrue where economic sanctions are unmanageable.[287] Objectivists dispute the contention that such

278. *See* Kolber, *supra* note 271, at 219–20.
279. *See id.* at 221–22.
280. *See* Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 640 (2011); Kolber, *supra* note 271, at 222–23;.
281. *See, e.g.*, Simons, *supra* note 274, at 2 n.3.
282. Kolber, *supra* note 271, at 189–90.
283. *See* Markel & Flanders, *supra* note 259, at 956–57, 978–79.
284. *See* Colgan, *supra* note 65, at 62, 64, 69-70.
285. *See id.* at 81-96.
286. *See generally* Bronsteen et al., *supra* note 271.
287. *See infra* notes 336–348 and accompanying text. Bronsteen and his colleagues contend that behavioral psychology research regarding the loss of money outside of the criminal context

collateral consequences are relevant to assessing the severity of incarceration, primarily on the grounds that the state should not be accountable for punishment that is not "intended, authorized, or proximately caused" by the terms of incarceration, such as the independent acts of third party employers or family members.[288] Objectivists would, however, count as relevant to punishment severity the results of what accrue from the punishment itself.[289] While there may be reasonable disagreement as to the extent to which the collateral consequences of conviction are too disconnected from a prison term, the very same consequences often directly result from practices related to the imposition of economic sanctions. Take, for example, a lack of employment stability. It may be argued that difficulties in obtaining employment following release from prison are too tangential to incorporate into an assessment of the severity of incarceration,[290] but the loss of a driver's or occupational license imposed because of a failure to pay, or the inability to pay for transportation to and from employment as a result of the need to pay unmanageable economic sanctions, are directly related to the imposition of fines.[291] So too the effect on family disunification, which can be brought on, for example, by the inability to maintain housing resulting from the loss of income that would otherwise have been used for a family's shelter.[292] These harms are part and parcel of unmanageable economic sanctions, and thus a direct component of punishment severity.

supports the conclusion that people readily adapt to economic sanctions, thus reducing their punitive aspects. *See* Bronsteen et al., *supra* note 271, at 1037–38, 1045–46. The argument, however, relies on the notion that fines imposed are within one's ability to pay without placing a defendant or her family "below the level of subsistence," and therefore their assessment of post-incarceration collateral consequences remains relevant to the discussion here. *Id.* at 1045.

288. Markel & Flanders, *supra* note 259, at 968–72. Dan Markel and Chad Flanders also argued that the remedy for collateral consequences could be addressed through mechanisms other than the calibration of sentences, such as compensation or injunctive relief. *See id.* at 969. In the context of economic sanctions, however, monetary compensation would effectively be a method for graduating economic sanctions by providing funds to a person with limited means, and it is difficult to discern what injunction may issue that would not have the same outcome as requiring graduation in the first instance.

289. *See, e.g.*, *id.* at 968–69 (promoting a "communicative conception of retributive justice, [in which] that communication ends when the state stops speaking to the offender via state-sanctioned punishment" (emphasis omitted)).

290. *See id.* at 971.

291. *See infra* note 338 and accompanying text.

292. *See infra* notes 342–347 and accompanying text.

B. Comparative Proportionality

A second principle reflected in the proportionality doctrine involves a comparison of the available punishment for the offense at issue against punishments imposed for offenses of greater or lesser severity, to ensure that a defendant is not "treated more harshly" than people "who have committed more serious crimes."[293] In other words, if crime X is less serious than crime Y, the punishment for crime X should be less severe. While distinctions between punishments that reflect proper exercises in legislative judgment are tolerated, a distinction in severity of punishment that is not reasonably tied to the seriousness of the offense cannot withstand constitutional review.[294]

The comparative disproportionality of both immediate and post-sentencing poverty penalties is readily apparent because they are triggered by a defendant's inability to pay rather than her culpability for the underlying offense. For example, the Florida court imposed an immediate poverty penalty, in the form of a $5 monthly payment fee, because Mr. Thompson was unable to pay in full at sentencing, not because the offense of driving with a suspended license had somehow become more serious.[295] Post-sentencing poverty penalties are also imposed for the inability to pay; for example, when Mr. Thompson fell behind, the court assessed nonpayment fees, issued a warrant for his arrest, charged him $20 for the cost of issuing the warrant and a $210 fee for his arrest, and incarcerated him, albeit under guard at a hospital due to his failing health.[296] His failure to pay was effectively treated as a new offense. Any punishment for the failure to pay due to inability, however, would necessarily be treated too harshly in comparison to any other crime.

A distinct comparative proportionality problem arises where no poverty penalties are imposed, and a person with limited financial capacity is ordered to

293. Solem v. Helm, 463 U.S. 277, 303 (1983); *see also* Kennedy v. Louisiana, 554 U.S. 407, 442 (2008) ("In measuring retribution . . . it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape."); Weems v. United States, 217 U.S. 349, 380 (1910) (comparing the punishment imposed for falsifying a government document to other offenses and noting as evidence of disproportionality that, "[t]here are degrees of homicide that are not punished so severely"); Lee, *supra* note 63, at 711 (analyzing comparative proportionality).

294. *See Weems*, 217 U.S. at 380–81 (explaining that the punishment for the more serious crime of counterfeiting money was less severe than the punishment imposed for the less serious offense of falsifying a single public record and that the "contrast shows more than different exercises of legislative judgment. . . . It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice").

295. *See supra* note 13 and accompanying text.

296. *See supra* notes 14–18 and accompanying text.

pay an ungraduated base fine over time. This question is particularly important, as some lower courts have interpreted "excessiveness" as allowing for a payment plan with periodic amounts adjusted to the defendant's capacity to pay,[297] rather than requiring a reduction of the economic sanctions themselves.

The problem caused by extending base fines through an ongoing payment plan without graduation of the base fine for ability to pay, is that it effectively flattens offense seriousness. Take the crime for which Mr. Thompson was convicted. In Florida, driving with a suspended license is set at the lowest level of felony and carries a statutory maximum fine of $5,000.[298] In comparison, life felonies—determined by Florida's legislature to be the most serious offenses for which fines can be imposed, including crimes such as human trafficking and aggravated kidnapping—carry a maximum fine of $15,000.[299] On paper, this grading of economic sanctions according to the seriousness of the underlying offense is a prime example of comparative proportionality. But as applied, if those sanctions are not graduated to the defendant's financial condition, as well as the seriousness of the offense, that comparative proportionality is undermined. Mr. Thompson, of course, did not receive a statutory fine but rather a set of surcharges established elsewhere in the Florida code.[300] To illustrate the point, however, let us presume that the court sentenced Mr. Thompson to pay a quarter of the maximum fine, $1,250. If the Court interpreted excessiveness to require only the setting of a payment term within the defendant's reach, at best $5 per month for Mr. Thompson,[301] it would take him over 20 years to pay off the debt. If, instead, he had been convicted of a life felony, and again sentenced to pay a quarter of the maximum fine, $3,750, it would take him 62.5 years to pay the fine. Fifty-six at the time of sentencing, had Mr. Thompson lived to 75.6 years, the average life expectancy for African Americans as of the year 2014,[302] he would have paid neither debt in his lifetime, rendering the punishments identical at $5 per month. Any given defendant might be younger and penalties lower overall, but what this hypothetical shows is that attending to ability to pay only through a payment plan results in a flattening of the comparative distinction between offenses of different seriousness. The other extreme is equally problematic. If

297. *See, e.g.*, Wheatt v. State, 410 So.2d 479, 481 (Ala. Crim. App. 1982); State v. Wise, 795 P.2d 217, 219 (Ariz. Ct. App. 1990); State v. Klawonn, 609 N.W.2d 515, 518–19 (Iowa 2000).
298. *See* FLA. STAT. § 322.34 (2017); *id.* § 775.083(1)(c).
299. *Id.* § 775.083(1)(a).
300. *See supra* notes 6–12 and accompanying text.
301. *See supra* notes 269–270 and accompanying text.
302. *See* Sabrina Tavernise, *Black Americans See Gains in Life Expectancy*, N.Y. TIMES (May 8, 2016), http://www.nytimes.com/2016/05/09/health/blacks-see-gains-in-life-expectancy.html?r=0.

the Court were to interpret ability to pay as the only relevant consideration in assessing excessiveness, it would mean that the maximum fine in either case would be the amount Mr. Thompson could pay at sentencing, completely flattening the distinction between offenses of differing seriousness.

If instead, the Court were to treat financial condition as a component of the broader proportionality analysis along with offense seriousness, it would allow for a deeper form of comparative proportionality. For example, a jurisdiction might develop a system by which time limits are placed on payment terms based on offense seriousness, with the amount paid in each period dependent upon the defendant's means.[303]

C. Expressive Function of Punishment

In addition to sentencing equality and comparative proportionality, the Court has also attended to the ways in which the imposition of punishment expresses society's condemnation of the offense.[304] First, the Court has shown concern, in a limited set of cases to date, with the message punishment conveys to the defendant.[305] Second, the Court has separately sought to ensure that punishment is an accurate reflection of the degree to which the community condemns the offense at issue.[306] Both sets of concerns are undermined by the use of unmanageable economic sanctions.

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303. *See* VON HIRSCH, *supra* note 259, at 122 ("Being deprived of money is unpleasant. Depending on the proportion of the offender's assets taken, the sanction can range from lenient to fairly stringent—and that proportion could be prescribed in the sentencing standards, commensurately with the seriousness of the offense."). *See generally* Colgan, *supra* note 65.

304. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 72–73 (2010); *see also* DUFF, *supra* note 227, at 267 ("Punishment aims to express to her the condemnation which her crime warrants; to communicate to her a more adequate understanding of the nature and implications of her crime—the injury she has done to others and to herself; to persuade her to repent her crime, and to accept her punishment as a penance . . . ."); FEINBERG, *supra* note 103, at 118 (describing punishment as a "symbolic vehicle of public condemnation"); FRASE, *supra* note 202, at 8 ("[C]onveying deserved censure to offenders, and inviting an appropriate response from them, are viewed as good things for society to do whether or not any such response is obtained."). As others have noted:

> [W]hen the state creates institutions to communicate reprobation of the offender, the existence of these institutions signals that individuals' actions and interests matter to the state and its citizens. The expressive function of punishment (i.e., sending signals to the public), however, derives its legitimacy only when the state has properly achieved its primary communicative function to a culpable, competent offender.

Markel & Flanders, *supra* note 259, at 934.

305. *See infra* notes 307–310 and accompanying text.

306. *See infra* note 320 and accompanying text.

The Court has expressed an interest in how punishment conveys to a defendant the severity of the offense of conviction, though to date it has done so only in cases involving a person who is incompetent at the moment of execution, and therefore unable to rationally comprehend the reason for the punishment.[307] Though the Court's explication of its concern has been limited,[308] it has explained that the person subject to execution must be sufficiently competent to rationally understand the connection between the punishment and the defendant's crime.[309] In arguing that these decisions open the door for consideration of the message punishment conveys to a defendant in proportionality review of noncapital cases involving competent defendants, Dan Markel has explained that the Court should be understood as saying that "the message being communicated to an offender through his punishment must be consistent with and evocative of . . . his past wrongdoing, and not (simply) because doing so would be a useful vehicle, say, for promoting general deterrence."[310]

Were the Court to extend its concern that punishment communicate to the defendant a direct relationship between the punishment and the extent of the defendant's wrongdoing, current practices related to the imposition of unmanageable economic sanctions would be an ill-fit due to increasing evidence that people perceive such punishment as unrelated to their underlying offense and instead aimed primarily or even exclusively at revenue generation. As one person with criminal debt explained: "It seems like the only thing that matters to the court is money."[311] Though certainly many judges treat people who appear

307. *See* Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (holding that the execution of a person who is insane at the time of execution constituted cruel and unusual punishment because "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life"); *see also* Panetti v. Quarterman, 551 U.S. 930, 934, 956-60 (2007) (reaffirming *Ford*).

308. *See* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 N.W. U. L. REV. 1163, 1214 (2009) (describing the Court's reasoning as "undertheorized").

309. *Panetti*, 551 U.S. at 959 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it.").

310. *See* Markel, *supra* note 308, at 1214.

311. ACLU OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 270, at 16 (quoting an anonymous individual ordered to pay a $2,376 fine or be sentenced to jail); *cf.* ACLU, *supra* note 161, at 34–35 (quoting David Sutton, who was assessed over $1,300 in fines despite having a monthly income of $262 as saying, "I thought judges followed the rule of law. But—and it is a sad commentary on our justice system—that is not always so."); Dolovich, *supra* note 139, at 515–17 (arguing that to achieve parsimony, the "reason why a particular sentence was authorized" is critical and that therefore punishments should "not be imposed on some members of society in order that others might benefit financially").

before them fairly,[312] many courts refuse to consider a person's financial condition even when required to do so,[313] or at times reject attempts to explain dire financial circumstances such as homelessness, the needs of dependent children, and the like by explicitly stating that criminal debt must take priority over such concerns. As explained by David Ramirez, a father of four with medical issues that have resulted in his family's reliance on approximately $400 a month in public benefits:

> Sometimes, I have to choose between paying the electricity bill and paying [criminal debt], or between buying my kid a winter coat and paying [criminal debt]. The message the courts have sent to me over and over again is that if I don't pay in full every month, I'll go to jail and I'll lose everything. I've had judges tell me that they don't care what my other obligations are, [criminal debt] come[s] first. First before food and shelter. It doesn't matter what my family suffers, so long as the court gets paid.[314]

The goal of communicating the relationship between the punishment and the underlying offense is further hampered by the threat and use of poverty penalties in an attempt to prompt payment from people with limited means, because such practices may suggest that the state will behave unfairly, and even nonsensically, in the quest to obtain revenue. Mr. Thompson's incredulity that he was arrested and charged more for failure to pay in light of his desperate financial condition and deteriorating health is not unique.[315] To take another

312. *See, e.g.*, Ed Spillane, *Why I Refuse to Send People to Jail for Failure to Pay Fines*, WASH. POST: POSTEVERYTHING (Apr. 8, 2016), http://www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/?utm_term=.f3caeacbdfde [http://perma.cc/XX79-73T9].

313. *Compare* MO. REV. STAT. § 558.004 (Supp. 2017) ("In determining the amount and method of payment of a fine, the court *shall*, insofar as practical, proportion the fine to the burden that payment will impose in view of the financial resources of an individual." (emphasis added)), *with* Colgan, *supra* note 40, at 1196–99 (describing the failure of the Ferguson, Missouri municipal court to consider the financial resources of people prior to assessing fines).

314. ACLU OF WASH. & COLUMBIA LEGAL SERV., *supra* note 270, at 13–14; *see also id.* at 12 (quoting debtor Virginia Dickerson: "I've been locked up in the past for not paying court fines. It didn't matter that I was homeless at the time. The very clear message was that I needed to pay exactly what I was ordered, or I would go to jail. And I didn't have the money—so I went to jail.").

315. *See supra* text accompanying note 20; *see also* ACLU, *supra* note 161, at 29–30 (quoting Kawana Young, who was incarcerated after a judge refused to put her on a payment plan she could afford as saying, "I just need a chance to do right . . . . It doesn't make sense to jail people when they can't pay because they definitely can't pay while they're in jail."); ACLU OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 270, at 16 (quoting a person who lost a job due to incarceration for failure to pay as stating: "I want to pay my fines, but it doesn't make any sense to have me sit in jail if I could be working and getting the money to pay them."). The

example, in Michigan, a homeless veteran was ordered to pay $2,600 in statutory fines, restitution, and court costs after being convicted of climbing on the roof of an abandoned building while intoxicated.[316] When he appeared in court with only $25, rather than the $50 the court had ordered him to pay on the debt that month, the judge ordered him incarcerated despite his pleas that going to jail would cause him to lose the job he had finally secured at a steel factory.[317] As the young man sat in jail having lost the job, he explained:

> I tried telling the judge, throwing me in jail is going to do you no good . . . . You're not going to get your fines like you want. And I'm going to lose my job, and you're really not going to get your fines if I don't have a job. . . . It just baffled me.[318]

Not only does the imposition of unmanageable economic sanctions and the use of poverty penalties such as incarceration send the message to defendants that courts value money over fairness,[319] it may also implicate a separate concern of the Court's that punishment accurately express the community's condemnation for the underlying offense.[320] As stories like these have proliferated, public discontent over such practices has grown, suggesting that they fail to properly

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confusion people feel about economic sanctions can also stem from the nature of the sanctions themselves:

> When a person is arrested, they say that if you don't have the money to afford an attorney, one will be provided for you. They don't say that at the time of sentencing, that you're going to have to pay a court cost, attorney's fees, so on and so forth etc., and it's like at the end of it you're like well wait a minute, if I couldn't afford an attorney at the beginning, how can I afford the attorney now! And it's like, that part just has always evaded me, it's like, this doesn't make sense!

BECKETT ET AL., *supra* note 50, at 56 (quoting a person who was perplexed by public defender fees).

316. *See* Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014, 5:01 AM), http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons.

317. *See id.*

318. *Id.*

319. *See* PEPIN, *supra* note 28, at 9 (acknowledging that practices related to criminal debt create an appearance of impropriety).

320. As the *Kennedy* Court noted:

> In considering whether retribution is served, among other factors we have looked to whether capital punishment "has the potential . . . to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed."

Kennedy v. Louisiana, 554 U.S. 407, 442 (2008) (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007)).

express community condemnation.[321] As an expressive symbol it goes too far, for example, to either push Mr. Thompson toward homelessness and becoming even more entrenched in poverty or to impose nearly a decade of debt, because in either case it overreaches the degree of public condemnation for driving with a suspended license and instead condemns his poverty.[322] Conservative, liberal, and nonpartisan organizations have called for the elimination of poverty penalties and for the use of graduated economic sanctions, indicating broad support for the notion that the message conveyed by current practices conflict with community norms, thereby violating the expressive function of punishment.[323] As R.A. Duff has explained: "The amount of an offender's fine . . . should properly be relative to his means: for it is the impact of the fine on the offender himself which serves the purposes of both communication and penance; and that impact depends on his means."[324]

D. Criminogenic Effects of Punishment and Other Social Harms

An additional principle in the proportionality doctrine relates to the manner in which a punishment will deter future crime,[325] including through the rehabilitation of those who have committed offenses.[326] In undertaking this

321. *See* Sigler, *supra* note 141, at 173 ("[C]riminal punishment draws its meaning from the values of the community and its conventional forms of condemnatory expression."); *see infra* notes 406–409 and accompanying text.

322. *See* R.A. Duff, *Retrieving Retributivism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 3, 5–6 (Mark D. White ed., 2011) ("What does imprisonment, a fine, or a community service order say to the offender or to others about the offender and his crime; is it a message that punishment should convey?").

323. *See, e.g.*, NYU CTR. ON THE ADMIN. OF CRIMINAL LAW, DISRUPTING THE CYCLE: REIMAGINING THE PROSECUTOR'S ROLE IN REENTRY 11, 40 (2017); *see also, e.g.*, ACLU, *supra* note 161; CONFRONTING DEBT, *supra* note 25, at 16-20; *Resolution on Criminal Justice Fines and Fees*, AM. LEGIS. EXCHANGE COUNCIL (Sept. 12, 2016), http://www.alec.org/model-policy/resolution-on-criminal-justice-fines-and-fees [http://perma.cc/PR5X-23PW].

324. DUFF, *supra* note 227, at 283.

325. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 284 (1980).

326. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 73–74 (2010); Trop v. Dulles, 356 U.S. 86, 111 (1958) (plurality opinion) (Brennan, J., concurring) (describing the punishment of expatriation as "the very antithesis of rehabilitation" because it makes it more likely that the person upon whom it was imposed will "pursue further a career of unlawful activity"); *see also* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 119–20 (2006) (regarding rehabilitation as a form of specific deterrence focusing on reductions in recidivism); Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 791–92 (2014) (noting that the lack of recidivism is a potential indicator of rehabilitation).

The Court considers these principles to be commensurate with utilitarian aims. *See supra* note 257. While pure utilitarianism would allow even an extreme punishment of the innocent if it would result in deterring crime, *see* Ryan, *supra* note 260, at 2166–67, the Court has routinely rejected that view as inconsistent with proportionality. An oft-repeated

consideration, the Court has not insisted on specific evidence of deterrent or rehabilitative effects of the given punishment, instead it has looked for evidence to support the conclusion that at least some people are likely to be deterred by the threat of that punishment.[327] However, even where a deterrent effect might exist, the Court has been sensitive to the unintended consequences of over-deterrence on crime rates,[328] as well as broader social harms—what Jeremy Bentham called "derivative evils"[329]—created by the imposition of punishment.[330] Therefore, even if some level of deterrence may be achieved through punishment,

hypothetical employed by the Court is the example of a sentence of life imprisonment for the offense of overtime parking, pointed to as a likely example of a sentence unconstitutionally disproportionate to the offense. *See Rummel*, 445 U.S. at 274 n.11; *id.* at 288 (Powell, J., dissenting); *see also* Harmelin v. Michigan, 501 U.S. 957, 963–64, 986 n.11 (1991) (Scalia, J.); *id.* at 1009 (White, J., dissenting); Solem v. Helm, 463 U.S. 277, 310 n.2, 311 n.3 (1983) (Burger, C.J., dissenting); Hutto v. Davis, 454 U.S. 370, 377 (1982). Further, in the cruel and unusual punishments context, the Court also considers the goal of incapacitating people who pose a significant risk to society. *See, e.g.*, *Rummel*, 445 U.S. at 284–85. Despite its use as a form of poverty penalty, *see supra* notes 30–31 and accompanying text, the Court has already determined that once the government decides that an economic sanction is sufficiently punitive to address the seriousness of the offense, it disclaims its interest in incapacitation. *See* Bearden v. Georgia, 461 U.S. 660, 667, 672–73 (1983); Williams v. Illinois, 399 U.S. 235, 241–42 (1970). The theory of incapacitation may be stretched to include economic sanctions if the sanction itself would prevent the crime, such as where payment of the economic sanction would prohibit a person from engaging in public intoxication by removing her means of purchasing alcohol. *See* JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 62 (1975). There is little, if any, evidence that economic sanctions have "more than a negligible incapacitating effect," however, and therefore I adhere here to the more traditional understanding of incapacitation as involving physical incapacitation. *Id.* at 62.

327. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 184–86 (1976) (plurality opinion) (noting that statistical data regarding the deterrent effect of the death penalty "simply have been inconclusive," but that "[w]e may nevertheless assume safely" that those who kill in the heat of passion would not be deterred, and that people who kill in a calculated manner might be deterred by the threat of death); *see also Harmelin*, 501 U.S. at 1008 (Kennedy, J., concurring) ("The accounts of pickpockets at Tyburn hangings are a reminder of the limits of the law's deterrent force, but we cannot say the law before us has no chance of success and is on that account so disproportionate as to be cruel and unusual punishment."); Thompson v. Oklahoma, 487 U.S. 815, 837–38, 837 n.45 (1988) (plurality opinion) (explaining that excluding juveniles from the death penalty will not diminish its deterrent value because most juveniles do not engage in a cost-benefit analysis and if they are sufficiently cold-blooded enough to do so they will not be deterred anyway).

328. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 445–46 (2008) (discounting any deterrent effect of capital punishment in part because punishing child rape by death may incentivize rapists to kill their victims).

329. JEREMY BENTHAM, THEORY OF LEGISLATION 323 (R. Hildreth trans., 1904).

330. *See, e.g.*, *Kennedy*, 554 U.S. at 442–45 (explaining how capital punishment in child rape cases can harm victims by requiring them to relive the experience over a period of years as the case is litigated and adds to the risk that perpetrators will not be caught in cases where family members are victims who may be less likely to report due to the possible imposition of the death penalty).

if the Court concludes that the value of such deterrence is outweighed by other considerations, it weighs in favor of finding the punishment disproportionate to the offense.[331]

While economic sanctions have some deterrent value for many people,[332] unmanageable economic sanctions risk creating a significant unintended consequence already recognized by the Court: "[T]he perverse effect of inducing the [debtor] to use illegal means to acquire funds . . . ."[333] This criminogenic effect has been evident in recent studies. Research by sociologists Alexes Harris, Katherine Beckett, and their colleagues that included in-depth interviews of people with criminal debt indicates that unmanageable economic sanctions may undermine crime control aims by pushing those who do not have the ability to pay into criminal activity to obtain funds to pay the sanctions.[334] Similarly, in a

331. *See, e.g.*, *Graham*, 560 U.S. at 72 (rejecting the argument that sentencing juveniles to life without parole has a deterrent effect, noting, "[t]hat the sentence deters in a few cases is perhaps plausible, but '[t]his argument does not overcome other objections'" including the reduced culpability of juvenile offenders (second alteration in original) (quoting *Kennedy*, 554 U.S. at 441)).

332. *But see* Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 3 (2000) (regarding how the introduction of a fine for being late to pick up a child at child care increased the rate at which parents arrived late); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 888 (1979) (explaining that the study does not address unmanageable economic sanctions by posing the hypothetical that "absolute risk aversion [would] decrease[] with wealth and that the probability and fine cannot be made to depend on wealth," and suggesting that "any given probability and fine would be less likely to discourage a wealthy individual from engaging in the activity than a poor one").

333. Bearden v. Georgia, 461 U.S. 660, 671 (1983). This is not to say that there are no possible deterrent or rehabilitative effects of the use of economic sanctions. *See* Reitz, *supra* note 22, at 1742–44 (describing limited empirical evidence that economic sanctions offer rehabilitative effects as "not fantastical, but there is not much evidence in their favor"). *But see id.* (stating that there "is much inferential evidence that burdensome economic sanctions are at odds with the goals of rehabilitation, offender reintegration, crime-reduction, and public safety"); *id.* at 1744–45 (describing recent social science research in which unpayable economic sanctions are linked with the promotion of criminal activity). An example of the rehabilitative effect of an economic sanction might be that it spurs an individual who has the capacity and opportunity to find employment to do so to pay off the sanction when he otherwise might not have sought work. *See, e.g.*, G. Frederick Allen & Harvey Treger, *Fines and Restitution Orders Probationers' Perceptions*, FED. PROB., June 1994, 34, 36–37. Where one lacks capacity or opportunity to gain employment at all or at a high enough wage to make payment of economic sanctions feasible, however, there could be no corresponding rehabilitative effect. *Cf. Bearden*, 461 U.S. at 670–71 (acknowledging that requiring a probationer to pay restitution or else face revocation of their probation may "spur probationers to try hard to pay" but that "[r]evoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming").

334. *See, e.g.*, Alexes Harris et al., *Drawing Blood From Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1785 (2010) ("[F]rankly, I mean, I'm

University of Alabama survey of private probationers with criminal debt, 17 percent admitted that they had engaged in criminal activity, such as drug sales, prostitution, and theft, to obtain monies needed to pay economic sanctions.[335]

In addition to studies documenting the push toward criminal activity that can be caused by unmanageable economic sanctions, other studies suggest that such debt directly interferes with financial stability in ways that also may result in increased recidivism. For example, studies have shown that increases in earnings reduce future arrests.[336] Poverty penalties that directly restrict earning potential, or persistent debt that prevents people from clearing up their credit records, may also promote recidivism.[337] Depriving a person of a driver's license as a penalty

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not trying or wanting to do any crime, and I still can't quite commit myself to do prostitution, but I think about it sometimes . . . at least that way I could pay some of these damn fines."). Even studies examining the deterrent or rehabilitative effect of economic sanctions as a general matter, as opposed to the effect on those who are too poor to pay, show varying results. *Compare* Todd L. Cherry, *Financial Penalties as an Alternative Criminal Sanction: Evidence From Panel Data*, 29 ATLANTIC ECON. J. 450 (2001) (finding a significant deterrent effect), *with* Anne L. Schneider, *Restitution and Recidivism Rates of Juvenile Offenders: Results From Four Experimental Studies*, 24 CRIMINOLOGY 533 (1986) (finding that two of four studies showed improvements in recidivism rates and two indicated no reduction in recidivism when juveniles were sentenced to pay restitution as compared to incarceration or probation), *with* Steve Moffatt & Suzanne Poynton, *The Deterrent Effect of Higher Fines on Recidivism: Driving Offences*, CRIME & JUST. BULL., Mar. 2007, at 1 (finding limited deterrent effects from court-imposed fines on driving offenders in New South Wales, Australia), *and* Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 325, 334 (2017) (finding that in the juvenile context, the imposition of restitution, higher amounts of economic sanctions, and the continuation of debt upon case closing "all significantly increased the odds of a youth recidivating. . . . even after controlling for relevant youth demographics and case characteristic variables").

335. COOK, *supra* note 37, at 12; *see also* HUMAN RIGHTS WATCH, *supra* note 28, at 46 (quoting a debtor: "I know people selling drugs and paying [criminal debt] every month. They like, 'Hey, I'm doing what they told me, 'aint I?'"); Stillman, *supra* note 201 (reporting how a woman informed a private probation officer she had stolen money from her son to pay her criminal debt, to which the officer responded, "You do what you have to do").

336. *See, e.g.*, Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 305 (1991).

337. *See* Reitz, *supra* note 22, at 1743–45; *see also* Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 378, 397–99 (2005) (conducting a meta-analysis of empirical studies on crime prediction and finding that there is strong evidence that poverty and unemployment serve as significant predictors of criminal activity); Sam Levin, *Unfair Punishment Part Two: Sentenced to Poverty*, E. BAY EXPRESS (Mar. 12, 2014), http://www.eastbayexpress.com/oakland/unfair-punishment-part-two-sentenced-to-poverty/Content?oid=3861802&showFullText=true [http://perma.cc/7LCS-H5XL] (describing a young man in Oakland who found himself unable to pay a surcharge imposed for a misdemeanor conviction, which prohibited him from clearing his record and thereby hampered his ability to find work; frustrated with the

for not paying, for example, may make it more difficult for that person to seek or maintain employment by limiting transportation options.[338] The same is true for the denial of professional licenses and for the deprivation of public benefits that reduce access to housing, food, and basic necessities, all of which make the debtor's financial circumstances even more precarious, leading to the increased risk of recidivism.[339] Even without poverty penalties, the mere existence of criminal debt can be so detrimental to a person's credit, that it precludes employment and housing opportunities that might otherwise afford some degree of economic stability.[340] In short, by increasing financial instability, unmanageable economic

vicious cycle he was in, the man exclaimed, "What do we do? How do we make some money? Do we sit up here with a change cup? . . . Or . . . do we hire ourselves and buy a bundle of crack cocaine and go sell it? That'd be the easiest route.").

338. *See* ALAN M. VOORHEES TRANSPORTATION CENTER ET AL., MOTOR VEHICLES AFFORDABILITY AND FAIRNESS TASK FORCE: FINAL REPORT 38 (2006) (reporting that 42 percent of people with suspended licenses in New Jersey lost employment; of those, 45 percent could not find new employment; of those who found new employment, 88 percent experienced reduced income); PEPIN, *supra* note 28, at 5 ("[A]utomatic license suspension for failure to pay [criminal debt] without the option of a license to permit a defendant to work greatly reduces an offender's ability to work . . . ."); Harris et al., *supra* note 334, at 1789 (linking the inability to have a driver's license as a result of warrants issued for failure to pay economic sanctions to reduced employment opportunities); *cf.* MARGY WALLER, BROOKINGS INSTITUTION, HIGH COST OR HIGH OPPORTUNITY COST? TRANSPORTATION AND FAMILY ECONOMIC SUCCESS 3 (2005), http://www.brookings.edu/wp-content/uploads/2016/06/pb35.pdf [http://perma.cc/SA4U-Q3LM] (documenting limitations on the ability of people without access to cars to find employment because public transportation often does not go to job locations). In addition to creating problems for access to employment, the manner in which economic sanctions limit transportation options may also undermine a person's ability to comply with other aspects of a sentence. *See, e.g.*, ACLU, *supra* note 161, at 31 (reporting the story of a man who could not complete his community service requirement because he had no funds to pay for gas due to payments made on his criminal debt).

339. A lack of stable housing may undermine the ability to maintain employment, thereby increasing the risk of recidivism. *See, e.g.*, Joe Graffam et al., *Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals*, 40 J. OFFENDER REHABILITATION, no. 1–2, 2004, at 147, 165; *cf.* CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INST., TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY (2004) (describing housing-based reentry programs that also emphasize supportive services related to employment). Housing instability may also contribute to chemical dependency and mental health issues, undermining rehabilitative goals. *See, e.g.*, JOCELYN FONTAINE & JENNIFER BIESS, URBAN INST., HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 7–8 (2012) (summarizing literature on supportive housing programs that indicate that such programs create housing stability while addressing chemical dependency and mental health issues, and as a result reduce recidivism rates).

340. As the Washington Supreme Court explained:

> The court's long-term involvement in [debtors'] lives [during collections] inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their [criminal debt]. . . . This active record can have serious negative consequences on employment, on housing, and on finances. [Criminal] debt also impacts credit ratings, making it more difficult to find secure housing.

sanctions undermine deterrent and rehabilitative goals,[341] and may ultimately increase crime.

Beyond the unintended consequence of criminogenic effect, unmanageable economic sanctions have significant potential to create derivative evils, particularly by increasing the financial and social instability of members of the debtor's family.[342] Such practices have been linked, for example, to family disunification, which is also a significant predictor of criminal activity.[343] The poverty penalty of exclusion from housing benefits may disrupt the family unit by forcing innocent family members to either lose the benefit that is needed to prevent their homelessness or separate from the family member convicted of an offense and unable to pay the sanctions.[344] Families also may separate as a result of the stress caused by ongoing criminal debt and in particular the constant risk of rearrest of a loved one for failure to pay.[345] Criminal debt has also been linked to a loss of

State v. Blazina, 344 P.3d 680, 684 (Wash. 2015) (en banc) (citation omitted); ACLU, *supra* note 161, at 71 (quoting a person with criminal debt: "Well, for the most part, anybody who's renting doesn't want anything to do with anyone who has a criminal history. However, there are a few places that would accept me if I could get my credit in line, so having the poor credit [is] a bigger barrier than the criminal history." (alteration in original)); BECKETT ET AL., *supra* note 50, at 44 ("[R]ight now, for me to get my own apartment, chances of it are zero to none. 'Cause I can't get past the credit check.'").

341. *See* Pratt & Cullen, *supra* note 337, at 378, 397–99 (regarding empirical evidence linking resource deprivation to crime); *cf.* R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1781 (2015) (noting that poverty "is likely to adversely affect all of [a debtor's] important decisions because scarcity places extra cognitive demands that make rational decision making more difficult").

342. The way in which the mechanisms for imposing and collecting economic sanctions leads to the appearance that courts are more concerned with revenue generation than fairness, *see supra* Part II.C, may also be categorized as a derivative evil. For example, Jeremy Bentham noted:

> [I]t is an evil to inspire the public with a painful feeling by the establishment of an unpopular punishment. . . . The legislator, by despising public sentiment, imperceptibly turns it against himself. He loses the voluntary assistance which individuals lend to the execution of the law when they are content with it; the people, instead of being his assistants, are his enemies.

BENTHAM, *supra* note 329, at 339–40.

343. *See* Pratt & Cullen, *supra* note 337, at 378, 398–400 (regarding the strong empirical link between family disruption and criminal activity).

344. S*ee also* ACLU, *supra* note 161, at 24 (describing the repeated incarceration of a man due to inability to pay court-ordered fines, leading to a loss of employment and housing that left both him and his girlfriend homeless); *cf.* Manny Fernandez, *Barred From Public Housing, Even to See Family*, N.Y. TIMES (Oct. 1, 2007), http://www.nytimes.com/2007/10/01/nyregion/01banned.html (describing public housing authorities' practices of banning the family members of public housing residents due to criminal justice involvement).

345. *See, e.g.*, ACLU OF OHIO, THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES 13 (2013), http://www.acluohio.org/wp-content/uploads/2013/04/TheOutskirtsOfHope2013_04.pdf [http://perma.cc/46NJ-KJ3B]

resources targeted at childhood well-being, and in particular to decreases in child support payments.[346] Further, the use of funds that would otherwise be used for basic necessities to pay down criminal debt instead does not just affect the debtor; decisions on whether to make a payment toward criminal debt or to instead buy food or medicine, pay rent or utilities, or satisfy basic hygiene needs applies to the family members of a person with debt as well.[347] As one mother explained:

> Well, you know, like I said I have three girls, and two are in high school, so [payments on criminal debt] would actually take away from them, cuz we do reduced lunch. So if I was to pay my fines every month, I wouldn't be able to pay for their reduced lunch. And then I would actually have to take off like $150 off of my grocery, or the hygiene that I put into the house. Cuz everything's on a budget, we live on a budget. And so with that budget, especially with me being the head of the household, I have to budget for everything . . . so I just can't pay my [criminal debt] right now.[348]

Placing people in such dire circumstances is unnecessary to achieve the government's punitive aims. In discussing the deterrent effect of economic sanctions, the Supreme Court has stated that it is the creation of a "pinch on the purse" that deters bad acts, and the degree to which the pinch is felt necessarily depends on the amount of coin in a given defendant's purse.[349] Returning to our hypothetical,[350] for Mr. Smith, $548 in base fines certainly creates a pinch. For Mr. Thompson, $548 in base fines, particularly when compounded by the immediate poverty penalty of payment fees, takes more than his whole purse or—if subject to a payment plan—reaches into it over and over again, exacerbating his financial instability and creating a risk of a criminogenic effect. The graduation of economic sanctions to account for one's ability to pay, in contrast, ensures a pinch on the purse still exists but also helps to avoid the unintended

(describing a mother whose child had to move to live with his grandparents due to stress caused by the ongoing threat of his mother's arrest for failure to pay).

346. *See* COOK, *supra* note 37, at 10; RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., REPAYING DEBTS 7–8 (2007), http://victimsofcrime.org/docs/default-source/restitution-toolkit/repaying_debts_full_report.pdf?sfvrsn=2 [http://perma.cc/ WQ4Y-N93A].

347. *See, e.g.*, *supra* text accompanying note 314.

348. BECKETT ET AL., *supra* note 50, at 44–45.

349. Bearden v. Georgia, 461 U.S. 660, 672 (1983) (quoting Williams v. Illinois, 399 U.S. 235, 265 (1970) (Harlan, J., concurring)).

350. *See supra* notes 262–265 and accompanying text.

consequences of increased criminal activity and the derivative social harms to the family of the person against whom economic sanctions are imposed.[351]

Whether as the result of the promotion of crime and financial instability that is linked to increased recidivism, or the derivative effects on innocent family members, the costs of unmanageable economic sanctions appear to outweigh the very limited benefits, if any, of their use, putting them in tension with the Court's proportionality doctrine.

E. Dignity

The Supreme Court has recognized that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[352] Though arising in the cruel and unusual punishments context, the Court has explicitly tethered this "essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes,"[353] to the protection against constitutionally "excessive" punishments.[354]

351. Bentham wrote in support of the idea that economic sanctions should be graduated to a person's financial condition, arguing that economic sanctions "should always be regulated by the fortune of the offender." BENTHAM, *supra* note 329, at 353; *see also id.* at 336 ("A fine fixed by law will never be a punishment equal to itself, on account of differences in fortune."); *id.* at 353 ("[I]t must be recollected that a pecuniary punishment, if the sum is fixed, is in the highest degree unequal.").

352. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); *see also, e.g.*, Brown v. Plata, 563 U.S. 493, 510 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."); Hudson v. McMillian, 503 U.S. 1, 11 (1992) (describing "the concepts of dignity, civilized standards, humanity, and decency" as "animat[ing] the Eighth Amendment" (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)); Gregg v. Georgia, 428 U.S. 153, 182 (1976) (plurality opinion) (describing human dignity as "at the core of the [Eighth] Amendment" (citing *Trop*, 356 U.S. at 100)); *Estelle*, 429 U.S.at 102 ("The [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which we must evaluate penal measures." (citation omitted) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir.1968)). Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 102 (2008) (positing that the cruel and unusual punishments cases include a "dignity model," by which retributive aims of punishment are constrained to ensure a minimum standard of decency); *see generally* Ryan, *supra* note 260 (examining the discussion of dignity in the cruel and unusual punishments cases and arguing that the doctrine supports individualized sentencing regardless, and that punishment cannot serve purely utilitarian aims).

353. Graham v. Florida, 560 U.S. 48, 59 (2010).

354. *Gregg*, 428 U.S. at 173 ("A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' This means, at least, that the punishment not be 'excessive.'" (citation omitted) (quoting *Trop*, 356 U.S. at 100)). At times the Court has treated dignity as distinct from proportionality review:

Further, the Court has tied the dignity demand directly to Magna Carta,[355] which it also recognizes as the historical antecedent of the Excessive Fines Clause.[356] While there is a debate about the meaning of "dignity," a question of increasing importance as the Court's reliance on dignity as a constitutional construct has risen,[357] there are three particular themes from the Court's discussion of dignity in the cruel and unusual punishments context that shed light on the ways in which the use of unmanageable economic sanctions violate the dignity principle and thus the Excessive Fines Clause.

First, the Court has recognized that the dignity requirement is violated through punishment that degrades through the deprivation of basic human needs such as food, shelter, health, and hygiene.[358] In *Hope v. Pelzer*,[359] for

> Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.

Trop, 356 U.S. at 99 (plurality opinion); *see also* Hutto v. Finney, 437 U.S. 678, 685 (1978) ("It prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" (citations omitted) (quoting *Estelle*, 429 U.S. at 102)); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 743 (2006) (describing *Gregg v. Georgia* as a case in which "the societal purposes of the statute, retribution and deterrence, outweighed the competing human dignity concerns"). The Court has treated the dignity constraint as either a measurement for proportionality or the goal of proportionality review. *See* Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) (explaining that the Eighth Amendment commitment to dignity would be contravened if a punishment could not be justified "under one or more of three principal rationales: rehabilitation, deterrence, and retribution" (quoting *Kennedy*, 554 U.S. at 420)); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (requiring that in capital cases proportionality review include assessment of offense and offender characteristics in order to comport with "the fundamental respect for humanity underlying the Eighth Amendment"); *Gregg*, 428 U.S. at 182–83 (plurality opinion) (engaging in proportionality review to assess whether the punishment at issue "comports with the basic concept of human dignity at the core of the [Eighth] Amendment"). In either case, the dignity constraint would be relevant to interpreting "excessiveness" for purposes of the Excessive Fines Clause.

355. *See Trop*, 356 U.S. at 100 (plurality opinion).

356. *See* United States v. Bajakajian, 524 U.S. 321, 335 (1998); *see also* Colgan, *supra* note 24, at 320, 320 n.218.

357. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171–76 (2011); Jonathan Simon, *The Second Coming of Dignity*, *in* THE NEW CRIMINAL JUSTICE THINKING 275, 283, 287, 296 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

358. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 511 (2011) ("[D]epriv[ing] prisoners of basic sustenance . . . is incompatible with the concept of human dignity and has no place in civilized society."). As the *Estelle* Court explained

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "it is but just that the public be required

example, the Court held that chaining a prisoner to a hitching post offended human dignity in part because it degraded the man by preventing him from using the bathroom, and "a deprivation of bathroom breaks . . . created a risk of particular discomfort and humiliation."[360]

Degradation through lost or reduced access to basic human needs is prolific among people who are saddled with unmanageable economic sanctions.[361] Part of Larry Thompson's consternation over being arrested for failure to pay involved the position payment would put him in with respect to his basic needs: "I never knew they would actually arrest a person in my condition for not being able to pay money. Because I have to pay rent."[362] A similar concern was expressed by Clifford Hayes, who survives on $700 per month in disability benefits.[363] As Mr. Hayes explained regarding his efforts to pay debt stemming from economic sanctions:

> Right now, I'm struggling. That little money I got, before I get it it's gone. I have to go to the soup kitchen to get food. I have to go to the thrift store to get clothes. But now that I'm getting some kind of income and have a place to live, you want me to give you *all my money*

to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."

Estelle, 429 U.S. at 103–04 (footnote omitted) (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926))); *cf.* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 122 (2011) (noting that when conceived of as a negative right, dignity "provides not only the moral justification to challenge government behavior that debases, degrades, or humiliates, but also the legal means to have that behavior curtailed absent extenuating circumstances"); Oscar Schacter, Editorial Comment, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 851 ("We are led more deeply into the analysis of human dignity when we consider its relation to the material needs of human beings . . . ."); *id.* at 852 (listing "[d]egrading living conditions and deprivation of basic needs" as antithetical to human dignity).

359. 536 U.S. 730 (2002).

360. *Id.* at 738, 745; *see also id.* at 738 n.8; *cf.* Dolovich, *supra* note 139, at 470 ("Inhumane punishments are those punishments imposed under conditions that degrade . . . . [These include] nontrivial deprivations of the basic necessities of human life—adequate food, clothing, shelter, medical care, and so on . . . .").

361. As one person has recounted:

> I take [payment for the debt] out of my social security check . . . I pay my rent, I pay my house fees, because there's a fee to pay at the house where I'm at, for toilet paper, laundry, soap, stuff like that, and then . . . I get the money orders for paying my [criminal debt]. But sometimes I don't have enough left over for food.

BECKETT ET AL., *supra* note 50, at 42; HUMAN RIGHTS WATCH, *supra* note 28, at 31 (quoting Wayne Self, Member of the Leflore County, Mississippi Board of Supervisors: "$40 a month is hard on a lot of people here. Some people might have to decide on not purchasing medication or some kind of household necessity.").

362. *See* Cherney, *supra* note 1.

363. *See* HUMAN RIGHTS WATCH, *supra* note 28, at 45.

> and be homeless again. But I refuse to do that. I refuse to be out on the street again. I've done that. I can't do that no more.[364]

Or take Thomas Barrett, who was sentenced to pay a $200 fine, an $80 "startup fee" to a private probation company, and monthly monitoring fees of $360 for the crime of stealing a $2 can of beer.[365] Mr. Barrett first attempted to pay off his debt by donating plasma to blood banks, but ultimately had to stop doing so because he was simultaneously skipping meals to avoid the expense of food, and became too weak to donate.[366] He then stopped buying basic hygiene items like toilet paper.[367] Because he was still unable to stay current on his payments, the court eventually incarcerated Mr. Barrett for failure to pay.[368] Unmanageable economic sanctions promote such calamitous circumstances in ways incompatible with the basic human dignity of those subjected to criminal debt.

Second, the Court has recognized that a punishment violates the dignity demand if it unjustifiably interferes with sociopolitical engagement. For example, in *Trop v. Dulles*,[369] the Court considered the constitutionality of the punishment of expatriation for the crime of wartime desertion from the armed services.[370] The Court determined that revocation of citizenship was not commensurate with the Eighth Amendment's dignity requirement because it constituted "the total destruction of the individual's status in organized society. It is a form of punishment [that] destroys for the individual [his] political existence . . . . In short, the expatriate has lost the right to have rights."[371] In other words, to

364. *Id.*
365. *See id.* at 20, 34–35; *see also* Shapiro, *supra* note 191.
366. *See* HUMAN RIGHTS WATCH, *supra* note 28, at 34 ("You can donate plasma twice a week so long as you're physically able to . . . . Basically what I did was, I'd donate as much plasma as I could and I took that money and I threw it on the leg monitor. . . . It wasn't enough." (quoting Telephone Interview with Thomas Barrett (Aug. 6, 2003)).
367. *See* HUMAN RIGHTS WATCH, *supra* note 28, at 34.
368. *See id.* at 35.
369. 356 U.S 86 (1958) (plurality opinion).
370. *Id.* at 87.
371. *Id.* at 101–02; *cf.* Schacter, *supra* note 358, at 849 (positing that references to respecting human dignity in various aspects of international law, such as the United Nations Charter, should be interpreted so that "a high priority [is] accorded in political, social and legal arrangements to individual choices in such matters as beliefs, way of life, attitudes and the conduct of public affairs"); John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 592 (2006) (arguing that the dignity demand involves protection of the "right to have rights").

comport with dignity, it is not sufficient to exist within society if a punishment unjustly precludes meaningful participation in it.[372]

While at first glance, unmanageable economic sanctions do not appear to fit within this conception of dignity as protective of participation in the democratic community, the inability to pay off criminal debt both increases political vulnerability as a general matter,[373] and can serve as a barrier to a fundamental form of civic participation: voting. In many jurisdictions, where people convicted of crimes are removed from voter rolls, the ability to restore one's voting rights is dependent upon full payment of criminal debt.[374] Though disenfranchisement is an allowable consequence of conviction,[375] the Court has recognized that it may contribute to rendering a punishment disproportionate in violation of the Eighth Amendment.[376] For people so denied the vote, disenfranchisement—which continues only because their poverty prevents them from paying off all outstanding criminal debt—can be a particularly painful form of social exclusion.[377] As one debtor explained, the loss of the franchise "is one piece of a much larger feeling of not being permitted to participate in society that I'm supposed to be adjusting to again."[378] For another: "That's really messed up

372. *See* Jeffrey Fagan, *Dignity Is the New Legitimacy*, *in* THE NEW CRIMINAL JUSTICE THINKING, *supra* note 357, at 308, 312 ("We assume our dignity because we belong, not simply because we exist.").

373. *See supra* notes 122–124 and accompanying text.

374. *See generally* Cammett, *supra* note 124.

375. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (upholding felon disenfranchisement under the Fourteenth Amendment). It remains an open question as to whether continuing disenfranchisement due to the inability to pay economic sanctions would survive constitutional review. *Cf.* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude [in striking down the poll tax] that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."); *supra* notes 41-44 and accompanying text.

376. *See* Weems v. United States, 217 U.S. 349, 364–66, 382 (1910) (holding that a punishment was cruel and unusual, in part because it resulted in disenfranchisement). For an argument that disenfranchisement is itself a punishment subject to review under the Cruel and Unusual Punishments Clause, see Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1166–69 (2004).

377. Indeed, one debtor notes:

> I can't vote because I owe [criminal debt] . . . I can't vote because of that. That is a really big thing for me as well. There is a lot of things that I do as far as what I believe as being a leader in the community. And so being a leader in the community and not being able to have particular things I can get involved in and voting is one of them.

ACLU, *supra* note 161, at 78; BECKETT ET AL., *supra* note 50, at 61 ("The thing that really hurts me is not having the ability to vote. . . . [F]or me, just being involved and active politically, it's something that I really value, and I don't have that right to vote.").

378. BECKETT ET AL., *supra* note 50, at 61.

that we can't vote. It makes me feel less of an American, that's what we have, is our right to vote."[379] The depth of pain caused by disenfranchisement due to financial condition is unsurprising. As the Court explained in striking down the poll tax, "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."[380]

Third, the Court has recognized that the dignity demand protects against punishment that "results in the gratuitous infliction of suffering,"[381] and in doing so "protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance."[382] In *Weems v. United States*,[383] the first case to explicate the dignity demand, the Court considered the constitutionality of a sentence of "cadena temporal" for the crime of defrauding the government by falsifying a cash book.[384] The punishment included a term of incarceration and a fine, which the Court suggested in and of themselves may not have constituted cruel and unusual punishment.[385] What rendered the punishment unconstitutional were the conditions of that incarceration—remaining shackled and "employed at hard and painful labor"—and post-incarceration penalties such as a deprivation of property and parental rights, disenfranchisement, and a life term of supervision.[386] In explaining why these conditions constituted cruel and unusual punishment, the Court wrote:

> He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate . . . . [H]e is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.[387]

The mechanisms by which unmanageable economic sanctions are imposed and enforced can also gratuitously inflict suffering. As detailed above, not only does ongoing criminal debt deprive people of basic necessities such as housing,[388]

379. *Id.*
380. *Harper*, 383 U.S. at 670.
381. Gregg v. Georgia, 428 U.S. 153, 182–83 (1976) (plurality opinion).
382. Ford v. Wainwright, 477 U.S. 399, 410 (1986); *see also* Henry, *supra* note 357, at 220–25 (describing "collective virtue" as a conception of dignity in which the dignity of society as a whole is diminished by the inhumane treatment of individuals).
383. 217 U.S. 349 (1910).
384. *Id.* at 362–63.
385. *See id.* at 358, 380–81.
386. *See id.* at 364–65, 381–82.
387. *Id.* at 366.
388. *See supra* notes 339–340 and accompanying text.

result in familial disruption[389] and disenfranchisement,[390] and cause perpetual involvement by the courts,[391] but the processes involved in systems that impose criminal debt can themselves be tormenting. Some judges sign off on arrest warrants for failure to pay with little to no review of the relevant documents[392] or place decisionmaking authority on post-sentencing poverty penalties in the hands of private contractors who benefit financially from the additional sanctions.[393] In some jurisdictions, courts even refuse defendants' attempts to make partial payments toward their debt, subjecting people to poverty penalties unless they have the ability to pay the full amount,[394] a practice that led one debtor to say "they judge you as a deadbeat before you even walk into the courtroom. You're done before you even open your mouth."[395] At other times courts publicly express contempt for poor debtors, refusing to hear arguments regarding ability to pay. For example, one debtor—who had sold her car and other property to pay her debts, attempted to borrow money from her church, and actively but unsuccessfully sought employment—tried to explain her predicament to the judge, but was met with derision.[396] As she recounted:

> I was standing there crying in a room full of people and the judge laughed at me . . . . If somebody is poor and actually sucking it up to go

389. *See supra* notes 342–348 and accompanying text.
390. *See supra* notes 374–380 and accompanying text.
391. *See supra* note 340.
392. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 28, at 58 (quoting a Mississippi judge describing the processing of requests made by private probation companies to incarcerate people in default as stating: "You get a lot of paperwork and you see it and they give their reasons there and you just sign it. You don't have time to scrutinize everything.").
393. *See* ACLU, *supra* note 161, at 59–60; *see also* HUMAN RIGHTS WATCH, *supra* note 28, at 50 (explaining that some judges sanction private probation companies' use of the threat of incarceration to prompt payment and quoting a debtor describing her experience with private probation: "They'd threaten me with jail and I said, 'Please don't throw me in jail. I don't want to lose my kid.' I'd be sitting there crying . . . and they'd just say, 'Ma'am, that's not our problem.'").
394. *See, e.g.*, Colgan, *supra* note 40, at 1202 (regarding Ferguson, Missouri's municipal court's refusal to accept partial payments); *see also* ACLU, *supra* note 161, at 6, 29–30 (regarding a Michigan court's refusal to place an indigent debtor on a payment plan, instead ordering her incarcerated). In some cases, partial payments are accepted, but courts still use incarceration to force an increased partial payment amount. *See* ACLU, *supra* note 161, at 21 (describing a court's refusal to accept a $60 payment on $298 owed, and ordering the debtor incarcerated but ultimately releasing him when his girlfriend was able to increase the partial payment to $100).
395. ACLU OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 270, at 16.
396. *See* ACLU OF OHIO, *supra* note 345, at 13.

> in front of the court to say, "I cannot do this. I don't have the money," don't just laugh at them.[397]

This treatment leads people subjected to criminal debt to feel as if their dignity is eviscerated; as one woman explained: "It is not right that people with authority can make other people feel like nothing—just nothing!"[398]

Even where court officials behave professionally—as most likely do—the existence of ongoing, and often perpetual, criminal debt still means people are "forever kept under the shadow of [the] crime,"[399] thereby subjecting "the individual to a fate of ever-increasing fear and distress."[400] The perpetual threat of arrest, of course, instills anxiety.[401] That threat even forces some people to disengage with the community; for example, debtors report hiding in their homes, or declining to call emergency services when they have no means of paying economic sanctions, out of fear of arrest.[402] The risk of incarceration and other post-sentencing poverty penalties aside, people suffer from the feeling of being

397. *Id.*; *see also* Marc Levin, *Cash-Strapped and Incarcerated: The Modern Debtor's Prison*, HILL (Nov. 23, 2016, 11:45 AM), http://thehill.com/blogs/pundits-blog/crime/307361-cash-strapped-and-incarcerated-the-modern-debtors-prison [http://perma.cc/56N8-P24V] (describing a hearing in which a debtor said incarceration for failure to pay was "nothing to [her]" because of the frequency with which she had been jailed, to which the judge responded that it was "nothing to [him]—job security").

398. ACLU, *supra* note 161, at 61; *cf.* William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47, 62 (Michael J. Meyer & William A. Parent eds., 1992) (asserting that dignity includes the right "not to be subject to or victimized by unjust attitudes or acts of contempt").

399. Weems v. United States, 217 U.S. 349, 366 (1910) (regarding the use of long-term punishments similar in many ways to the consequences of unmanageable debt described herein, including lifetime surveillance, restrictions on parental, marital, and property rights, work requirements, and disenfranchisement).

400. Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality opinion) (explaining that fear and distress caused by revocation of citizenship constituted cruel and unusual punishment); *see also* Ford v. Wainwright, 477 U.S. 399, 410 (1986) ("Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.").

401. *See, e.g.*, ACLU, *supra* note 161, at 32 (quoting a woman with lung disease, bipolar disorder, and depression whose probation, and therefore the threat of incarceration, was extended due only to continuing criminal debt as saying: "This is a nightmare . . . . I've been passed through the cracks and suffering all my life, but this just makes me sick."); PATEL & PHILIP, *supra* note 270, at 2 (quoting Harold Brooks, a veteran who was incarcerated multiple times for failing to pay his criminal debt, as saying: "In my life, I'd say I was in prison for court fines more than five times . . . enough that when I get a court date for a court fine and I know that I haven't got the funds to pay it, I get really shaky when it comes to that time." (quoting R.I. FAMILYLIFECTR., JAILING THE POOR: COURT DEBT AND INCARCERATION IN RI 2 (2008))).

402. ACLU OF LA., *supra* note 35, at 6.

trapped where, despite everything they try, they simply cannot get out from underneath the debt.[403] As one person explained:

> It[] seems like one of those challenges that are insurmountable. It's like a paraplegic trying to climb Mt. Everest. I mean it just seems that impossible. It's like an insurmountable barrier, that seems like, I'm gonna die with this debt hanging over my head. . . . [I]t just seems like this is, not only taking a part of me financially, but it's taken a piece of me spiritually, you know. It's taken a part of my soul.[404]

* * * *

Unmanageable economic sanctions effectively punish people for their poverty. This conflicts with each of the core principles that undergird the Cruel and Unusual Punishments Clause's proportionality doctrine, from which the excessiveness test was adopted. Therefore, an interpretation that would make the financial condition of the defendant relevant to the excessiveness inquiry would bolster the Court's determination that proportionality be the "touchstone of the constitutional inquiry under the Excessive Fines Clause."[405]

CONCLUSION

Not long after he was arrested for the failure to pay, Larry Thompson passed away in hospice care as a result of the obstructive pulmonary disease he suffered from at the time of his arrest.[406] Before he died, his criminal debt was paid in full by members of the community who learned of his case through media reports.[407] The public outrage over his treatment led the collections court in Orlando to

403. *See, e.g.*, ACLU OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 270, at 11 (quoting debtor Virginia Dickerson: "[I]t seems it doesn't matter if I've tried to pay or if I can't pay. If I miss a month or can't make a full payment, I'll get a warrant and go to jail. I'm trapped."); *id.* at 14 (quoting debtor David Ramirez: "I believe in America, you know? I love this country. I want to start a business and provide for my family. My kids are straight A students, and I want them to go to college. But right now, I feel like the fines keep me from getting up and breathing and being the person I want to be."); *id.* at 16 (quoting debtor Angela Albers: "I don't make any excuses for my past behavior, and I understand that paying a fine is part of the punishment. But it feels like a vicious cycle.").

404. ACLU, *supra* note 161, at 71–72.

405. United States v. Bajakajian, 524 U.S. 321, 334 (1998).

406. *See* Elyssa Cherney, *Hospice Patient Involved in Collections-Court Reform Dies*, ORLANDO SENTINEL (Dec. 3, 2015, 12:43 PM), http://www.orlandosentinel.com/news/breaking-news/os-larry-thompson-hospice-fines-dead-20151202-story.html [http://perma.cc/Q8LP-DXH3? type=image].

407. *See id.*

quash over 21,000 arrest warrants for failure to pay that were pending at the time of Mr. Thompson's arrest.[408] The public defender who represented him upon rearrest had this to say about Mr. Thompson's reaction: "He was so proud to have been our catalyst for change, our poster child to get thousands of collection writs discharged."[409]

For countless people struggling with criminal debt they have no meaningful ability to pay, the hope Mr. Thompson provided to thousands of people in Orlando may be most readily available through the Eighth Amendment's Excessive Fines Clause. Applied broadly to statutory fines, surcharges, administrative fees, and restitution, the Excessive Fines Clause has the promise of protecting politically vulnerable people like Mr. Thompson from abuses of prosecutorial power that leave them stranded in the shadow of the criminal justice system. In light of the ever-expanding use of economic sanctions, and the continued imposition of such sanctions in unmanageable amounts, the Excessive Fines Clause offers a powerful and necessary tool for criminal justice reform.

408. *See supra* note 21.
409. *See* E-mail from Robert Wesley, Public Defender, Ninth Judicial Circuit, Florida to author (Apr. 16, 2017) (on file with author).