Article

Can the Excessive Fines Clause Mitigate the LFO Crisis? An Assessment of the Caselaw

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The nation's increasing use of fees, fines, forfeiture, and restitution has resulted in chronic debt burdens for millions of poor and working-class Americans. These legal financial obligations (LFOs) likely entrench racial and socioeconomic divides and contribute to the breakdown of trust in the police and courts in disadvantaged communities. One possible source of restraint on LFOs may be the Excessive Fines Clause of the Eighth Amendment. Largely ignored by courts and commentators for two centuries, the Clause has in recent years been the subject of a burgeoning volume of litigation and scholarship. The U.S. Supreme Court has decided a handful of Excessive Fines Clause cases but has left a great many questions about the Clause's reach unanswered. Lower courts are now regularly grappling with these open questions, giving rise to an ever-growing body of caselaw. This Article offers the first systematic survey and evaluation of the caselaw on what counts as a "fine" for Eighth Amendment purposes, particularly in relation to the major categories of LFOs. Based on an assessment of nearly 200 cases, important interjurisdictional variations are apparent. In a few states, expansive understandings of the Clause's reach are becoming established, which may create a foundation for robust constitutional regulation of LFOs. In most states, though, the precedent is either less favorable or simply still too undeveloped to see a clear trajectory. The Article further identifies seven key, open doctrinal questions

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that cut across the LFO categories and will likely determine the extent to which the full range of LFOs will be subject to the Clause.

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INTRODUCTION

Americans who break the law—or, in some cases, are even just accused of breaking the law—may face a bewildering array of financial obligations. Fines are, of course, a familiar, long-established legal sanction, but fines are now increasingly complemented by restitution requirements, forfeitures of property, and all manner of fees, surcharges, assessments, and the like.[1] The amount of legal financial obligations, or "LFOs"—in many cases, just a few hundreds or thousands of dollars[2]—may not seem large to the legal professionals who are responsible for their imposition and enforcement, but the obligations may prove a crushing burden to the disadvantaged individuals who find themselves disproportionately targeted by police and prosecutors.[3] Indeed, the person who struggles to pay on schedule may fall into

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1. *See infra* Part I (detailing these categories of required payments).

2. *See, e.g.*, Mathilde Laisne et al., *Past Due: Examining the Costs and Consequences of Charging for Justice in New Orleans*, VERA INST. OF JUST. 12 (2017), https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf [https://perma.cc/DD27-6NB4] (finding, in New Orleans, average fine and fee burden of $1,125 in felony cases and $228 in misdemeanor and municipal violation cases); Bryan L. Adamson, *Debt Bondage: How Private Collection Agencies Keep the Formerly Incarcerated Tethered to the Criminal Justice System*, 15 NW. J.L. & SOC. POL'Y 305, 306 (2020) (noting that felony defendants in Washington face average LFO burdens of $2,540); Jeffrey T. Ward & Nathan W. Link, *Financial Sanctions in Pennsylvania: An Examination of Assessed Amounts and Repayment by Indigent Status*, 34 FED. SENT'G REP. 166, 168–70 (2022) (in study of Pennsylvania cases from 2018, finding median fine was $500, average fees were $1,519, and median restitution was $774, for defendants with private attorneys).

3. *See* Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, U.S. DEP'T OF JUST. 1 (Nov. 29, 2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/6546-NLXW] (finding that eighty-two percent of felony defendants in large urban counties had court-appointed counsel, implying they were too poor to afford a lawyer). Formerly incarcerated individuals, who are likely to have LFOs still hanging over them at the time of their release, are apt to find these debts especially challenging; many can only manage $25 per month or less for LFO payments, at which rate a debt of a few hundred dollars might take years to pay off. *See* Adamson, *supra* note 2, at 307. Yet, even among those not dealing with the special difficulties posed by incarceration, many households cannot easily handle an unanticipated expense of even $400. *See, e.g.*, *Economic Well-Being of U.S. Households in 2021*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. 35 (May 2022), https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf [https://perma.cc/RPZ6-TYF3] (based on national survey, finding that nearly one-third of adults facing a $400 expense would have to go into debt or sell a possession, or would not be able to cover the expense at all).

a seemingly endless cycle of missed payments, penalties for missed payments that exacerbate the person's underlying economic difficulties, and then yet more missed payments and sanctions.[4]

The collective burden of LFOs in the United States has reached staggering levels. For instance, in 2019, the value of the fees, fines, and forfeitures that were actually collected by state and local governments added up to about $16 billion.[5] The amount of *unpaid* outstanding LFO debt is likely many times higher.[6]

Fueled in part by the desire of fiscally challenged state and local governments to shift the costs of the carceral state to

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4. *Infra* Part I.E.

5. Aravind Boddupalli & Livia Mucciolo, *Following the Money on Fines and Fees: The Misaligned Incentives in Speeding Tickets*, URB. INST. 1 (Jan. 13, 2022), https://www.urban.org/sites/default/files/publication/105331/following-the-money-on-fines-and-fees_final-pdf.pdf [https://perma.cc/G27S-3JVH]. For its part, the federal government collected more than $2.5 billion in criminal debt in Fiscal Year 2019. *U.S. Attorneys' Annual Statistical Report Fiscal Year 2019* U.S. DEP'T OF JUST. 35 (2019), https://www.justice.gov/media/1072721/dl?inline [https://perma.cc/6KGX-2JLN].

6. *See, e.g.*, Wesley Dozier & Daniel Kiel, *Debt to Society: The Role of Fines & Fee Reform in Dismantling the Carceral State,* 54 U. MICH. J.L. REFORM 857, 863 (2021) (discussing Tennessee study finding about seventy percent of court-ordered debt in the state went uncollected). Comprehensive national data on unpaid LFOs is not available. One recent study was only able to obtain complete information from fourteen states and partial information from an additional eleven. *See* Briana Hammons, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?*, FINES & FEES JUST. CTR. 5–7 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [https://perma.cc/3M9U-9JGU] (providing full data on the amount of court debt in Washington, Oregon, California, Texas, South Dakota, Minnesota, Iowa, Kentucky, Florida, Alabama, Virginia, Pennsylvania, and Vermont, and partial data for the court debt owed in Utah, Rhode Island, Oklahoma, North Dakota, New York, New Hampshire, Missouri, Hawaii, Colorado, Arkansas, and Alaska). In just these states, the researchers documented $27.6 billion in outstanding fines and fees. *Id.* at 4. Note that the researchers did not include unpaid restitution in their count; nor did they attempt to count LFOs imposed administratively outside the court system or judicially in the federal system. *See id.* at 2. Some research indicates that unpaid restitution debt may constitute the great majority of all unpaid criminal legal debt in the United States. *See, e.g.*, Cortney E. Lollar, *Punishment Through Restitution*, 34 FED. SENT'G REP. 98, 98 (2022) (noting that in federal system alone there was $110 billion in outstanding restitution debt at the end of Fiscal Year 2016).

putative wrongdoers,[7] the nation's burgeoning reliance on LFOs has drawn much criticism in recent years from academics and activists alike.[8] Because of their disproportionate imposition on the economically disadvantaged, LFOs likely exacerbate economic and racial inequalities in the United States and increase tensions between police and marginalized communities.[9] Additionally, some evidence suggests that LFOs tend to heighten recidivism risk for some individuals.[10] Nor, ironically, is it clear

7. *See* Boddupalli & Mucciolo, *supra* note 5, at 1. Although smaller cities in high-poverty areas tend to be the jurisdictions that are most reliant on LFOs, Chicago derived nearly four percent of its budget in 2019 from fines, fees, and forfeitures. *See id.* at 3–4. Hundreds of smaller jurisdictions rely on LFOs for twenty percent or more of their general revenue funds. Amy Ciardiello, *Prohibiting the Punishment of Poverty: The Abolition of Wealth-Based Criminal Disenfranchisement*, 54 U. MICH. J.L. REFORM 917, 924 (2021). Troublingly, some research finds that cities with higher Black populations tend to rely more heavily on LFOs. Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POLITICS 1090, 1090 (2017).

8. *See, e.g.*, Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 5 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/2HNX-66TJ] ("It is time to reconsider the wisdom of turning persons with criminal convictions into debtors. As this report demonstrates, the hidden costs of imposing and collecting user fees and other forms of criminal justice debt are profound."); ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR, at xix (2016) ("[T]he imposition of fines and fees creates a two-tiered system of punishment: one for those with financial means and one for those who are poor."); Boddupalli & Mucciolo, *supra* note 5, at 1; Laisne et al., *supra* note 2, at 12; Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 518 (2011) (discussing how "unpaid legal debt" and the "threat of criminal sanctions" may destabilize the lives of convicted individuals); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175 (2014) (examining the adverse effects of legal financial obligations for offenders).

9. *Infra* Part I.E.

10. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1782–83, 1785 (2010) (noting instances of defendants committing crimes to try to pay off economic sanctions); Alex R. Piquero & Wesley G. Jennings, *Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Juvenile Offenders*, 15 YOUTH VIOLENCE & JUST. 325, 333–34 (2016) (finding association between imposition of economic sanctions on juveniles and increased recidivism). *But cf.* Nathan W. Link, *Is There a Link Between Criminal Debt and Recidivism in Reentry?*, 34 FED. SENT'G REP. 188, 188–89 (2022) (reviewing available research on LFO-recidivism links and finding it "less conclusive than many may believe").

that LFOs generate substantial net fiscal benefits for the criminal-legal system as a whole once enforcement costs are taken into account.[11]

A smattering of jurisdictions have adopted reforms in response to such concerns.[12] On the whole, however, legislatures have not proven particularly responsive to LFO criticisms, which is perhaps to be expected given both the politically marginalized status of the individuals who are most vulnerable to LFOs,[13] and the economic reliance of many government agencies on these payments.[14]

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11. For instance, one study in Washington State found that, over a two-year time period, $21.6 million in fines and other legal financial obligations were collected, but at a direct cost of $16 million. Beckett & Harris, *supra* note 8, at 527–28. One county alone had seven full-time employees working on collections. Moreover, the researchers pointed out, there were a variety of additional indirect costs that could not be assessed, such as the cost of jailing individuals for nonpayment. *See id.*; *see also* Michael Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, BRENNAN CTR. FOR JUST. 5 (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/A3EJ-WB8E] (finding, in study of a half-dozen counties in New Mexico and Texas, that local governments spent an average of $0.41 on collection for each dollar collected; figure excludes various additional costs that could not be effectively measured, including costs of probation and parole agencies and police time spent on warrant enforcement).

12. *See, e.g.*, *Policy Reforms Can Strengthen Community Supervision*, PEW CHARITABLE TRUSTS 39–43 (Apr. 2020), https://www.pewtrusts.org/-/media/assets/2020/04/policyreform_communitysupervision_report_final.pdf [https://perma.cc/4GKC-CCU5] (describing reforms recently adopted in San Francisco and Alameda Counties, Texas, Mississippi, and the District of Columbia); Adamson, *supra* note 2, at 313–14 (describing and critiquing 2018 legislative reforms in Washington); Jeffrey Selbin, *Juvenile Fee Abolition in California: Early Lessons and Challenges for the Debt-Free Justice Movement*, 98 N.C. L. REV. 401, 410 (2020) (describing California's 2018 elimination of authority for counties to assess fees in juvenile system).

13. Even beyond the general marginalization of the poor, it is important to appreciate that LFOs are often tied to a criminal conviction, which may simultaneously result in temporary or permanent disenfranchisement in forty-eight states. Christopher Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT 5 tbl.1 (Oct. 30, 2020), https://www.sentencingproject.org/app/uploads/2022/08/Locked-Out-2020.pdf [https://perma.cc/S3LR-7NWX]. Notably, for present purposes, thirty states condition re-enfranchisement on payment of LFOs. Ciardiello, *supra* note 7, at 921.

14. Local governments, in particular, may perceive few revenue-raising alternatives to LFOs in light of state public-finance rules. *See* Boddupalli & Mucciolo, *supra* note 5, at 4 ("Many states do not authorize their localities to levy

If the national LFO crisis is to be ameliorated, constitutional litigation in the courts may have an important role to play as a complement to, and catalyst for, legislative reform.[15] In particular, in recent years, scholars and activists have looked to a once-obscure component of the Eighth Amendment that prohibits the imposition of "excessive fines."[16] The Excessive Fines Clause

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income taxes, limit sales tax rates, and may also impose stringent tax revenue and expenditure limits."). Additionally, reform may be opposed by private parties with a stake in the LFO status quo, including debt-collection agencies and contractors who provide correctional services that are fee-supported. *See, e.g.*, Adamson, *supra* note 2, at 322 (describing high fees charged by private agencies that collect legal debts).

15. A model might be the Eighth-Amendment litigation over prison overcrowding in California in the 2000s; the resulting decarceration order from the federal courts stimulated the adoption of an important set of far-reaching policy changes in the state. MICHAEL O'HEAR, THE FAILED PROMISE OF SENTENCING REFORM 178–90 (2017).

16. *See, e.g.*, Beth A. Colgan, *The Burdens of the Excessive Fines Clause*, 63 WM. & MARY L. REV. 407 (2021) (examining the due process doctrine as it applies to assessing the fairness of legal procedural practices); Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65 (2020) (discussing factors courts may consider when determining the excessiveness of fines imposed on criminal defendants); Wayne A. Logan, Timbs v. Indiana*: Toward the Regulation of Mercenary Criminal Justice*, 32 FED. SENT'G REP. 3 (2019) (discussing the significance of *Timbs* in regulating excessive fees imposed by the government on criminal defendants); David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 545–47 (2017) (examining when a civil forfeiture may be deemed excessive). Although the remainder of this Article focuses on the Excessive Fines Clause, it might be noted that a few other constitutional doctrines could also potentially impose significant constraints on the use of LFOs. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 535 (1927) (limiting the extent to which judges may derive personal or institutional benefits from economic sanctions they impose); S. Union Co. v. United States, 567 U.S. 343, 353 (2012) (establishing right to jury trial for fact-finding used to determine maximum fine amount); Hester v. United States, 139 S. Ct. 509, 509 (2019) (Gorsuch, J., dissenting from denial of certiorari) (arguing that Supreme Court should consider extending *Southern Union* to restitution); Cortney E. Lollar, *The Costs of the Punishment Clause*, 106 MINN. L. REV. 1827, 1834 (2022) (arguing that Congress should use its power under the Thirteenth Amendment to regulate LFOs).

Of some particular interest for present purposes might be an aspect of Fourteenth Amendment doctrine that imposes limits on the ability of the state to incarcerate impoverished defendants for their inability to pay a fine. *See, e.g.*, Tate v. Short, 401 U.S. 395, 399 (1971) (preventing states from imprisoning indigent traffic violators); Williams v. Illinois, 399 U.S. 235, 244 (1970) (requiring "the statutory ceiling placed on imprisonment for any substantive offense [to] be the same for all defendants irrespective of their economic status."). However,

(EFC) has been interpreted by the Supreme Court on only a handful of occasions, but these few pronouncements establish a jurisprudential framework that could *potentially* provide a basis for significant constitutional constraints on the use of LFOs.[17] Most recently, in 2019, the Court held for the first time in *Timbs v. Indiana* that the EFC is incorporated into the Fourteenth Amendment, and binds the states.[18] It seems likely that this holding will result in an increasing number and variety of EFC challenges to state LFOs.[19]

Yet, notwithstanding its promising features, the Supreme Court jurisprudence remains sparse and in many key respects ambiguous. Depending on how lower courts interpret and apply the relevant caselaw, the EFC may or may not become a meaningful constraint on LFOs.[20]

Against this backdrop, this Article offers the first systematic survey and evaluation of the U.S. Supreme Court and lower court caselaw (state and federal) on the vitally important threshold question of what counts as a "fine" for EFC purposes. If a required payment is not considered a "fine," there is no "excessiveness" inquiry—the payment simply lies beyond the Clause's regulatory reach. The Supreme Court has made clear that the EFC regulates more than just those payments that have been legislatively labeled as "fines,"[21] but has also indicated that there are limitations to the Clause's coverage—not *every* state exaction

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a 1983 decision by the Supreme Court disappointed hopes raised by earlier decisions and left the doctrine largely ineffective in practice. *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983) ("If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority."); William R. Maurer, *How the Rational Basis Test Protects Policing for Profit*, 54 U. MICH. J.L. REFORM 839, 847–48 (2021) (critiquing *Bearden*).

17. The cases are summarized in Part III below.

18. 139 S. Ct. 682, 687 (2019).

19. *See, e.g.*, City of Seattle v. Long, 493 P.3d 94, 109 (Wash. 2021) (challenging vehicle towing and storage fees); State v. Tatum, 514 P.3d 763, 767–68 (Wash. Ct. App. 2022) (challenging DNA collection fee).

20. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 961–65 (2016) (offering examples of lower courts adopting narrowing interpretations of ambiguous Supreme Court precedents).

21. Austin v. United States, 509 U.S. 602, 622 (1993) (holding that civil forfeiture under federal statute is subject to the EFC).

should be treated as a fine.[22] Beyond these two well-established principles, much remains uncertain.

A review of nearly 200 lower court EFC cases reveals divides on several important questions, including whether restitution and certain types of forfeiture are covered by the EFC and how to conceptualize the nature of fees.[23] Other important questions have been addressed by very few, if any, lower courts, but are likely to be raised more frequently and pointedly in the post-*Timbs* environment.[24] In the end, given the inconsistencies and uncertainties in the caselaw, it is hard to predict with any confidence what effect EFC litigation will have on LFOs nationally. However, a few jurisdictions seem to be embracing expansive views of the EFC that may prove genuinely consequential.[25]

Based on the extant caselaw, the Article identifies seven key, open doctrinal questions that will likely determine the extent to which the full range of LFOs will be subject to EFC regulation. The Article further outlines the main arguments that have been made or might be made on both sides of these questions. The analysis thus supplies a sort of roadmap for activist lawyers of the points that must be won for the EFC to have maximum reach.

Although the seven questions are conceptually distinct from one another, they suggest a more general, overarching question: should EFC coverage depend more on the government's *intention* in creating a given LFO, or on the LFO's *impact* on the person who must pay it? The tension between intent- and impact-based rights is a familiar one in other areas of constitutional jurisprudence, most prominently in the equal protection cases.[26] The tension has also figured in the application of another component of the Eighth Amendment, the Cruel and Unusual Punishments

22. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989) (holding that EFC does not cover punitive damages awarded in civil litigation between private parties).

23. *See infra* Part IV.

24. Important examples include the application of the EFC to low-level, high-volume civil fines (e.g., parking and speeding tickets), *infra* Part IV.B, and to the multitude of fees that are commonly imposed on criminal defendants, *infra* Part IV.A.

25. *See infra* Parts IV.A (fees), IV.B (civil fines), & IV.D (restitution).

26. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

Clause.[27] In general, intent-based approaches lead to weaker rights; in litigation, the government can frame its intentions in the most favorable light, and courts often seem reluctant to scrutinize these self-serving representations by a co-equal branch of government with much rigor.[28] With the EFC jurisprudence still in a largely inchoate state, the precise roles of impact and intent in the EFC analysis remain uncertain. How the tension is resolved will go a long way toward determining whether the EFC will prove an effective check on excessive LFOs.

The Article proceeds as follows. Part I provides a more detailed description of the major categories of LFOs and their effect on poor individuals and families. Part II discusses the history of the Federal EFC and provides an overview of the Clause's state constitutional counterparts. Part III assesses the Supreme Court's bare handful of EFC cases. Part IV surveys the lower court caselaw, both state and federal. Part V unpacks the seven key, open doctrinal questions that will determine the EFC's reach. Part VI concludes with a few thoughts on the overarching impact-versus-intent tension.

I. LFOS: CATEGORIES AND CONSEQUENCES

Fees, fines, forfeitures, and restitution constitute the major categories of LFOs. As we will see, nuances in form and function may affect whether a given LFO is covered by the EFC. With that in mind, each of the four categories is described briefly below, followed by a consideration of the practical impact of LFOs.

A. FEES

As understood here, "fees" encompass all of the vast array of exactions by which the state attempts to shift the costs of some specific aspect of government operations to particular groups of individuals based on their use or receipt of government services.[29] Typically, in this context, the costs relate to the courts,

27. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that prisoner claiming that he received inadequate medical care in violation of the Cruel and Unusual Punishments Clause must show that there was a "deliberate indifference to serious medical needs").

28. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 105–06 (1986) (Marshall, J., concurring).

29. *See* Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 519 (2021) ("Distinct from fines (which seek to punish) and

law enforcement, or corrections. Fees are labeled in a variety of different ways, including "assessments," "surcharges," and "costs."

Considered in isolation, fees are often small in size, but an individual criminal defendant may face a dozen or more in a single case, potentially adding up to a quite substantial sum. For instance, in one case from Pennsylvania, a defendant faced twenty-six different fees totaling $2,464.91.[30] The exactions included, among many others:

- $5 automation fee
- $50 sheriff's fee
- $24.50 judgment fee
- $5 for firearm training and education fund
- $250 for DNA lab
- $100 for police transport
- $50 for substance abuse education[31]

Fees such as these are often standardized assessments based on an individual's offense, with the amount bearing little or no relationship to the actual costs of the services received by the individual.[32]

Fees are often imposed by a judge but may also be assessed administratively outside the courtroom context.[33] It is

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restitution (which seeks to make victims whole), criminal justice *fees* seek to raise revenue. These fees reimburse government for the cost of running the criminal justice system by offloading expenses onto system users.").

30. Bannon et al., *supra* note 8, at 9.

31. *Id.*

32. It is not uncommon for fees to be assessed that have nothing to do with the payor's offense or the legal system's response to it. For instance, in Kentucky, individuals who receive speeding tickets are also required to pay $10 to support a behavioral health jail triage system and $10 to support the Kentucky Internet Crimes Against Children Task Force. Boddupalli & Mucciolo, *supra* note 5, at 9. Similarly, in California, every criminal conviction results in a $4 fee for Emergency Medical Air Transportation. *Ten Guidelines on Court Fines and Fees*, A.B.A. 10 n.3 (Aug. 2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf [https://perma.cc/J49G-ZY5Z]. Such charges stand in tension with the theoretical justification of fees as a way to shift law-enforcement costs to the people whose actions occasioned those costs.

33. Extrajudicial fees may be assessed either pre- or post-conviction. As an illustration of the former, some states authorize prosecutors to charge fees for participation in pre-charging diversion programs. *See, e.g.*, Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 456 (2022)

estimated, for instance, that jail inmates in Virginia are charged an average of about $1,700 for canteen sales, telephone fees, work release fees, booking fees, and medical co-pays.[34] In more than forty states, incarcerated individuals can be charged room and board costs.[35] Likewise, in more than forty states, defendants can be billed for public defender representation.[36]

Judges and other fee-imposing officials may or may not have any discretion to waive or reduce fees based on ability to pay or other equitable considerations.[37]

As their use has grown heavier in recent years, fees have become controversial.[38] In addition to the basic criticisms that pertain to all LFOs (exacerbation of socioeconomic disparities, harm to innocent family members, impediments to rehabilitation and reintegration), fees also raise structural and conflict-of-interest concerns. As Professors Wayne Logan and Ronald Wright put it,

> When the tax-paying public is not asked to fund criminal justice, it gets a distorted message about the real costs of enforcement. While requiring offenders to internalize the costs associated with their wrongdoing can be justified in principle (for instance, by promoting an offender's acceptance of responsibility), doing so weakens one of the key moderating influences in public safety politics. As one commentator has observed, a "government that can fob off costs on criminals has an incentive to find criminals everywhere."[39]

In its recently adopted *Model Penal Code: Sentencing*, the American Law Institute recommends the abolition of fees,

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(summarizing the costs and benefits of diversion programs). As an illustration of the latter, individuals who are on probation or parole may be charged supervision fees by the supervising agency (sometimes a for-profit firm), with enhanced fees for such services as GPS monitoring or supervision of community service. Logan & Wright, *supra* note 8, at 1193–94.

34. Boddupalli & Mucciolo, *supra* note 5, at 4.

35. *Id.* at 11.

36. *Id.*

37. Judges in New Orleans, for instance, "have the authority to impose dozens of discretionary fees. . . . [F]ees to cover 'court costs' can be as high as $2,500 in felony cases . . . ." Laisne et al., *supra* note 2, at 12. However, Louisiana "also requires courts to impose certain mandatory fees that have specific beneficiaries," e.g., a $45 fee for the public defender's office. *Id.*

38. *See* Kleiman, *supra* note 29, at 526 (discussing growing size and scope of fees).

39. Logan & Wright, *supra* note 8, at 1178 (quoting Kevin Baker, *Cruel and Usual: Why Prisoners Shouldn't Pay Their Way*, AM. HERITAGE MAG. (June/July 2006), https://www.americanheritage.com/cruel-and-usual [https://perma.cc/9FKZ-PEUE]).

asserting that "convicted offenders are poor candidates for designation as special taxpayers to make up shortfalls in appropriations for correctional programming."[40] Although no states have yet come close to heeding the ALI's call, a few local jurisdictions, including San Francisco and Alameda Counties in California, have acted to sharply reduce their imposition of fees.[41] A few states have also enhanced opportunities for relief from fees based on inability to pay.[42]

B. FINES

Where *fees* aim to shift the costs of government services to the individuals who use the services or otherwise cause the services to be needed, *fines* are explicitly intended to punish and deter undesirable conduct.[43] Thought to be the most common form of punishment in use today,[44] fines may be imposed through either criminal or civil proceedings.

A great many noncriminal fines relate to the use of motor vehicles—parking tickets, speeding tickets, tickets for problems with licensure or registration, and so forth.[45] Although such fines may seem a routine aspect of car usage in the United States, they can present substantial hardships to poor and working-class individuals—individuals who, ironically, may be especially likely to receive tickets due to police profiling practices and/or an inability to pay the underlying expenses required for lawful driving and parking (e.g., insurance, emissions testing, garage fees).[46]

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40. MODEL PENAL CODE: SENTENCING § 6.10 cmt. b (AM. L. INST. 2023).

41. *Policy Reforms Can Strengthen Community Supervision*, *supra* note 12, at 39.

42. *Id.* at 40–41.

43. The fine/fee distinction is somewhat clearer in theory than in practice. For instance, states sometimes earmark particular streams of "fine" revenue, in whole or in part, for designated court or law enforcement funds. Boddupalli & Mucciolo, *supra* note 5, at 5–6. In such circumstances, fines may be functionally indistinguishable in many respects from fees.

44. Harawa, *supra* note 16, at 67.

45. Low-level traffic offenses such as speeding are considered criminal in some jurisdictions and civil in others. *See* Virginia R. Smercina et al., *Costs and Consequences of Traffic Fines and Fees in Nevada*, 34 FED. SENT'G REP. 196, 196 (2022) (noting that thirteen states handle minor traffic violations as criminal matters).

46. *See* Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U.

Of course, fines are also commonly authorized as punishment in criminal cases. After a defendant is convicted, the sentencing judge typically has the discretion to select a fine amount from within a statutorily authorized range. In exercising this discretion, the judge may take ability to pay into account but is not normally required to do so.[47] Researchers in several jurisdictions have found "ability-to-pay" hearings to be rare.[48] Even when there is an effort to determine ability to pay, critics charge that it is often done poorly.[49]

Like fees, fines raise conflict-of-interest concerns. Depending on local circumstances, the agencies involved in law enforcement—police, prosecutors, and court personnel—can have compelling economic incentives to maximize fine revenue.[50] As some readers may recall, such a dynamic helped to fuel public anger against the authorities in Ferguson, Missouri, which exploded into widespread protests following the 2014 killing of Michael Brown.[51]

REV. L. & SOC. CHANGE 175, 194 (2019) (discussing research showing that Black drivers are stopped more frequently by police than white drivers are).

47. *See* MODEL PENAL CODE: SENTENCING § 6.07 cmt. h (AM. L. INST. 2023) (noting that some but not all states require judges to "consider the defendant's financial circumstances when fashioning a restitution order"). However, such an assessment may be required before sanctions for nonpayment are imposed. Bearden v. Georgia, 461 U.S. 660, 672 (1983).

48. *See, e.g.*, Menendez et al., *supra* note 11, at 9 ("From watching more than 1,000 court proceedings in seven jurisdictions, the authors found that judges rarely hold ability-to-pay hearings.").

49. *See* Zhen, *supra* note 46, at 178 ("Ability-to-pay determinations often happen daily behind closed doors or in unmonitored courtrooms where there is no oversight or regulation. They can occur in front of an audience with no intimate understanding of the devastating conditions of poverty . . . ."); *id.* at 180 ("[T]he very players that are implementing ability-to-pay determinations have a vested interest in collection that increases their propensity to assess more rather than less . . . .").

50. *See* Logan & Wright, *supra* note 8, at 1203.

51. As one commentator puts it:

> Many residents saw Ferguson police as a "collection agency," felt regarded "less as constituents to be protected than as potential offenders and sources of revenue," and feared venturing outside for risk of being targeted and arrested due to a single missed payment. To generate revenue, police issued massive numbers of summons for alleged municipal code violations such as "Manner of Walking in the Roadway" and "Failure to Comply" with police, with revenue for the resulting LFOs allocated to local budgets (not the state, which would be required if parallel state provisions were utilized). The [U.S.] Department [of Justice]

C. FORFEITURE

A forfeiture order extinguishes a person's ownership of a specific item of property based on the item's connection to an illegal activity. Forfeitable property falls into one of three categories: (1) contraband, i.e., property whose possession is per se unlawful regardless of the use to which it is put; (2) proceeds of illegal activity, e.g., the money obtained by a drug trafficker from illegal drug sales; and (3) instrumentalities of illegal activity, e.g., a private plane used to smuggle illegal drugs into the United States.[52] The third category is the most controversial because it can lead to the forfeiture of property that has only an incidental connection to crime but that is critically important to a person or family's economic well-being, such as a car or home.[53]

> concluded that aggressive targeting of Ferguson's residents, who were predominantly poor and African-American, was not intended to provide better services or promote public safety but to secure more revenue, resulting in widespread distrust and dislike of police.

Wayne A. Logan, *What the Feds Can Do to Rein in Local Mercenary Justice*, 2018 U. ILL. L. REV. 1731, 1741 (footnotes omitted); *see also* U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–10 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/G2PE-NFEB].

52. Pimentel, *supra* note 16, at 545–47.

53. Consider, for instance, the facts of *State v. Timbs*:

> Timbs was addicted to opiates after being prescribed hydrocodone in 2007, leading him to buy drugs on the street. In January 2013, Timbs received life insurance proceeds after his father passed, with which he purchased a Land Rover. Timbs spent the remainder of the proceeds—about $30,000—on heroin, and the majority of the miles Timbs put on the vehicle were from out-of-town trips to buy drugs. Later, an acquaintance contacted Timbs and asked if he would sell some heroin. Timbs agreed; and the acquaintance arranged for Timbs to meet the buyer, who was an undercover officer. The officer bought heroin from Timbs twice. Timbs drove the Land Rover to the first buy, selling two grams for $225; Timbs walked to the second buy and sold the officer another two grams for $160. While driving the vehicle to the third planned buy, police pulled Timbs over, arrested him, and seized the vehicle, which was worth at least $35,000 at the time.
>
> . . . [A]t the time of his arrest, Timbs was unemployed and "broke," with the Land Rover as his only asset. Following his plea agreement, Timbs successfully completed his house arrest, avoided any probation violations, committed no crimes, participated in treatment programs, and assisted with drug task forces. Timbs has also held down several jobs. But being without his vehicle made it harder for Timbs to earn a living and reintegrate into society. His current position is a one-hour

Forfeiture may be accomplished either through the criminal prosecution of a person who committed an offense or through a civil proceeding. Depending on the type of forfeiture and the law of the relevant jurisdiction, civil forfeiture is sometimes formally structured as a lawsuit against the property itself ("in rem" forfeiture, as opposed to "in personam"), resulting in odd-looking case names like *United States v. Mercedes-Benz 2000 Model S400*,[54] or *United States v. $23,000 in U.S. Currency*.[55] However structured, civil forfeiture has drawn particular criticism for bypassing the heightened procedural protections that are afforded to criminal defendants.[56]

Like fees and fines, forfeiture can supply law-enforcement agencies with troubling incentives for overly aggressive enforcement. In all but six states, the police department that seizes forfeitable property gets to keep most or all of what it takes.[57] Even in states that do not permit this practice, state and local agencies are often able to accomplish much the same result by referring the matter to federal authorities; if the forfeiture is accomplished under federal law, federal agencies are authorized to share up to eighty percent of the proceeds with cooperating non-federal agencies.[58]

In fiscal year 2020, the federal government distributed nearly $244 million in forfeiture-derived payments to state and local agencies, while placing more than $2 million in forfeited assets into federal law-enforcement service, including vehicles, firearms, and electronic equipment.[59] An additional fifty-eight

> drive from his home; and during the years the State seized his Land Rover, he has had to borrow his aunt's car to get to work and fulfill other obligations, as there is no public transportation system operating from his home to work.

169 N.E.3d 361, 371 (Ind. 2021).

54. 84 F. App'x 652 (7th Cir. 2003).

55. 356 F.3d 157 (1st Cir. 2004).

56. *See, e.g.*, Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 315–16 (2017).

57. Jefferson E. Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 277 (2011) (finding that twenty-six states gave 100% of forfeiture proceeds to law enforcement; in remaining states, amount for law enforcement varied from 0% to 95%).

58. Boddupalli & Mucciolo, *supra* note 5, at 15.

59. *See* U.S. DEP'T OF JUST., FY2020 ASSET FORFEITURE FUND REPORTS TO CONGRESS (2022), https://www.justice.gov/afms/fy2020-asset-forfeiture-fund

vehicles were turned over to local police departments and sheriff's offices.[60] Forfeitures under state law may also be a lucrative source of revenue for law enforcement. For instance, in 2018, Florida's agencies—said to lead the nation in forfeitures—garnered $266 million through property seizures, of which $246 million came through state forfeiture proceedings.[61]

In its *Model Penal Code: Sentencing*, the American Law Institute authorizes criminal forfeiture, but invites states to reconsider their use of civil forfeiture.[62] Congress and several states have adopted various civil forfeiture reforms since 2000, but without going so far as eliminating the civil option entirely.[63]

Notably, the Supreme Court has rejected claims that the Double Jeopardy Clause is violated when the government both prosecutes a person criminally and also seeks a civil forfeiture based on the same underlying offense.[64] This is because civil forfeiture is not considered "punishment" for double jeopardy purposes.[65] Oddly, as we will see, the Court has reached a contrary conclusion in relation to the Excessive Fines Clause.[66]

-reports-congress [https://perma.cc/G6MV-HMVW] [https://perma.cc/3BUD-F5R7] (featuring links to two tables, "Equitable Sharing Payments Summary" and "Justice Assets Placed into Official Use by Federal Agencies Summary table," archived at the permalinks above).

60. *See id.* [https://perma.cc/GN2S-ZB9M] (featuring links to table, "Property Transferred to Non-Federal Agencies by Type," archived at the permalink above).

61. Monivette Cordeiro, *Florida Leads Nation with $266M in Property Seizures by Law Enforcement, Study Finds*, ORLANDO SENTINEL (Dec. 18, 2020), https://www.orlandosentinel.com/2020/12/18/florida-leads-nation-with-266-million-in-property-seizures-by-law-enforcement-study-finds [https://perma.cc/EZ6G-AK7P].

62. MODEL PENAL CODE: SENTENCING § 6.09 cmt. a (AM. L. INST. 2023) ("Most fundamentally, the Code recommends that criminal conviction should be a prerequisite for most forms of asset forfeiture, with exceptions for stolen property and contraband. The Code thus disapproves of the laws in many American jurisdictions that authorize 'civil' forfeiture based on assets' alleged connection to criminal activity, in the absence of charges and convictions of owners for the predicate crimes.").

63. Pimentel, *supra* note 16, at 542 n.11 ("Both [New Mexico and Montana] require a criminal conviction before [a] forfeiture [proceeding] can be effected . . . .").

64. United States v. Ursery, 518 U.S. 267, 278 (1996).

65. *Id.* at 290–91 (discussing how forfeiture has non-punitive goals).

66. *Infra* Part III.B.1.

D. RESTITUTION

Restitution, for present purposes, is a payment required of a convicted defendant to a victim of the defendant's crime in order to compensate the victim for his or her losses.[67] Restitution is thus akin to an award of compensatory damages in a civil lawsuit.[68] Although a prosecutor is normally involved in asserting and providing evidentiary support for a restitution claim, the money ultimately goes to the victim, not the state (unless, of course, the state itself is a victim).[69] Despite this difference in beneficiary between restitution and fines, restitution obligations are enforceable in the same manner as other criminal LFOs.[70]

Restitution has been less controversial than fees, fines, and forfeiture, in part because it presents much less of a conflict-of-interest problem for law enforcement agencies. Additionally, it is thought that paying restitution may further a defendant's rehabilitation by providing the defendant with a deeper appreciation of the harmful consequences of his or her criminal conduct.[71]

As an aspect of criminal sentencing, restitution was long a discretionary matter for the judge,[72] but, as the victims' rights

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67. In civil litigation, restitution has a somewhat different meaning, referring to disgorgement of unlawful gains. *See* Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 100 (2014). Civil restitution has not played any apparent role in the LFO crisis and is not considered further here.

68. Although conceptually similar to civil damages, it should be appreciated that criminal restitution does not necessarily provide compensation for everything that would be compensable in tort. MODEL PENAL CODE: SENTENCING, § 6.07 cmt. g (AM. L. INST. 2023) ("The majority approach is to limit amounts recoverable at sentencing to liquidated out-of-pocket losses that may be readily ascertained by the sentencing court. For other kinds of damages, including punitive damages, lost profits, and pain and suffering, victims must pursue their civil remedies.").

69. *See, e.g.*, Lollar, *supra* note 67, at 95 (providing an example of a case in which a police department was awarded restitution for damage to a patrol car that occurred during response to a defendant's crime). Sometimes, the restitution mechanism is even used to require the defendant to reimburse the state for the costs of investigating and prosecuting his case. *Id.* at 103.

70. *Id.* at 98.

71. Douglas N. Evans, *The Debt Penalty: Exposing the Financial Barriers to Offender Reintegration*, JOHN JAY COLL. CRIM. JUST. 4 (Aug. 2014), https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf [https://perma.cc/FAB3-Y483] ("Requiring offenders to pay restitution compels them to take responsibility for their offense and to actively participate in compensating their victim(s).").

72. Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 UCLA L. REV. 52, 57–58 (1982).

movement grew in political influence in the late twentieth century, restitution was made mandatory in the federal system,[73] and in more than half the states.[74] Some restitution laws expressly preclude the sentencing judge from taking into account the defendant's ability to pay when determining the size of a restitution award,[75] which leads to many restitution awards that are unlikely ever to be paid.[76]

Indeed, the overall amount of unpaid restitution in the United States is thought to be far larger than the amount of other categories of unpaid LFOs, with outstanding restitution debt in the tens of billions of dollars.[77] However, the fact that paying restitution is not feasible for a defendant does not necessarily save the defendant from suffering legal sanctions and other adverse consequences as a result of nonpayment—consequences that, ironically, may make it harder for the defendant even to make *partial* payment.[78]

E. ADVERSE EFFECTS OF LFOS ON INDIVIDUALS AND FAMILIES

LFOs can lock disadvantaged individuals and families into long-term positions of economic stress and privation. A substantial and growing research literature documents the socioeconomic impact of LFOs,[79] and space permits only a brief recapitulation of a few key points. Consistent with the extant research, I focus here on LFOs resulting from criminal prosecution.

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73. Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1687 (2009).

74. R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1792 (2015).

75. *See, e.g.*, 18 U.S.C. § 3664(f)(1)(A).

76. *See* R. Barry Ruback, *The Abolition of Fines and Fees: Not Proven and Not Compelling*, 10 CRIMINOLOGY & PUB. POL'Y 569, 575 (2011) (noting research suggesting that only about half of victims get the full amount of restitution that is ordered).

77. Evans, *supra* note 71, at 4.

78. *See* Lollar, *supra* note 67, at 124–28 (describing potential consequences to defendant of nonpayment).

79. *See, e.g.*, Bannon et al., *supra* note 8, at 5; Laisne et al., *supra* note 2, at 12; Beth M. Huebner et al., *The Price of a Sex Offense Conviction: A Comparative Analysis of the Costs of Community Supervision*, 60 CRIMINOLOGY 159 (2022) (discussing how monetary sanctions can serve as a form of carceral control over criminal defendants).

However, it should be recalled that civil fines and forfeiture can also present important difficulties.

Large majorities of convicted defendants—at both felony and misdemeanor levels—are now subject to LFOs,[80] and large majorities of these convicted individuals faced substantial economic challenges in their lives even without the added burden of legal debt.[81] One recent study based on 2017 data concluded that formerly incarcerated individuals earned an average of only $6,700 per year; individuals with a felony conviction but no prison sentence, $23,000 per year; and individuals with a misdemeanor conviction, $26,900 per year.[82] By way of reference, the Federal Department of Health and Human Services defined the poverty line in 2017 as $12,060 for a lone individual and $24,600 for a family of four.[83]

National data on the average amount of LFOs imposed per criminal case is not available, but research on specific jurisdictions suggests that misdemeanor convictions often result in LFOs in the hundreds of dollars, and felony convictions often result in LFOs in the low four figures.[84] Moreover, LFOs can stack up well beyond these levels for the many individuals who face multiple charges over time. For instance, one 2008 study of 500 randomly selected individuals with LFO debt in Washington State found that they had been assessed an average of $11,471 in LFOs over their lives by the courts.[85] As the researchers noted, this figure likely understated the actual burden of LFOs on these individuals because the study did not take into account interest, late fees, or fees assessed by non-court agencies (e.g., room and board charges for jail stays or public-defender fees).[86]

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80. Beckett & Harris, *supra* note 8, at 515.

81. *See, e.g.*, *id.* at 516 (noting that more than eighty percent of individuals charged with crimes qualify for indigent defense, while nearly two-thirds of incarcerated individuals lack a high-school diploma).

82. Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. 15 (Sept. 15, 2020), https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf [https://perma.cc/YR4F-5AL5].

83. Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 8831, 8832 (Jan. 26, 2017), https://www.govinfo.gov/content/pkg/FR-2017-01-31/pdf/2017-02076.pdf [https://perma.cc/9KHT-5SQN].

84. *See* sources cited *supra* note 2.

85. Beckett & Harris, *supra* note 8, at 516.

86. *Id.*

To an individual or family scraping by, an LFO of even a few hundred or thousand dollars may seem an overwhelming challenge. Although payment plans are often available to help spread out the pain, these plans sometimes result in additional fees and/or interest charges,[87] and may entail an extension of the term of community supervision, with all of its attendant burdens and risks, such as the risk of revocation and incarceration.[88] In any event, for the indigent, even a seemingly modest monthly payment of $50 or $100 can present a substantial hardship. As two leading researchers observe, LFO payments "compel[] people living on tight budgets to choose between food, medicine, rent, and child support."[89]

Beyond the pain of the payments themselves, the financial liability—perhaps carried over many years—creates its own difficulties.[90] "Like other types of debt, legal debt reduces access to housing, credit, and employment; it also limits possibilities for improving one's educational or occupational situation."[91] Moreover, unpaid debt may result in extended criminal-legal supervision, entailing regular court dates and/or meetings with probation officers that are apt to be inconvenient and intrusive.[92]

87. Bannon et al., *supra* note 8, at 17–18 (describing states that charge defendants collection fees for overdue debts and fees for entering into payment plans).

88. Zhen, *supra* note 46, at 200 ("In some instances, a person's inability to pay court-ordered debt in full results in incarceration—a modern-day form of debtors' prisons.").

89. Beckett & Harris, *supra* note 8, at 517.

90. *See, e.g.*, Ward & Link, *supra* note 2, at 168 ("[T]he typical [Pennsylvania public defender] client still has an outstanding balance on cases that were disposed ten years ago. Thus, half of all PD clients owe at least $95 on the fine debt from a decade ago.").

91. Beckett & Harris, *supra* note 8, at 517. The enforcement of LFOs through garnishment of wages may interfere with employment due to the reluctance of some employers to deal with the paperwork involved with garnishment. *Id.* at 518. In general, criminal debts are not dischargeable in bankruptcy. Andrea Bopp Stark & Geoff Walsh, *Sentenced to a Life of Debt: It Is Time for a Reassessment of How Bankruptcy Law Intersects with Fines and Fees to Keep People in Debt*, 34 FED. SENT'G REP. 128, 128 (2022).

92. *See* HARRIS, *supra* note 8, at 3 ("[Legal debtors] are required to report regularly to the court, explain their living and employment circumstances, and give court clerks and judges the details of their budgets.").

Missed payments, which are common,[93] compound the difficulties. Late fees may be imposed, and interest may accrue.[94] The judge may issue an arrest warrant, potentially resulting in the arrestee's detention pending his or her appearance in court.[95] Moreover, convicted individuals who are subject to LFOs are commonly on some form of community supervision, with payment of financial obligations made a condition for remaining free in the community.[96] Missed payments may thus subject a person to any of a number of court-imposed sanctions, from community service, to more intensive supervision, to revocation and incarceration.[97] Such sanctions can prove highly disruptive to a person's employment and family responsibilities, and, perversely, *increase* the difficulty of the person's economic situation and make it *even harder* for future payments to be made. The suspension of a person's driver's license, another possible sanction in some states,[98] may prove similarly counterproductive.

The challenges facing incarcerated and formerly incarcerated individuals are particularly dire. With prison work typically paying about $1 per hour or less,[99] an inmate is not likely to make much progress toward paying off LFOs while behind bars. After release, formerly incarcerated individuals tend to struggle with finding employment, due in part to the stigma of incarceration and the formal barriers to work that often result from a

93. *See, e.g.*, Laisne et al., *supra* note 2, at 12 (finding that sixty-two percent of people convicted in New Orleans municipal court in 2015 had still made no payments as of August 2016).

94. In one study of fifteen states, researchers found that thirteen charged interest or late fees in cases of late payment. Bannon et al., *supra* note 8, at 17. Additionally, some states referred delinquent cases to private collection agencies that charged collection fees of thirty to forty percent of the money owed. *Id.* at 17–18.

95. *See, e.g.*, Laisne et al., *supra* note 2, at 14 (finding that about one-third of people sentenced to pay fees or fines in New Orleans in 2015 were subject to arrest warrants for nonpayment by August 2016).

96. *See, e.g.*, 18 U.S.C. § 3563(a) (requiring, as mandatory conditions of federal probation, that defendant make restitution, pay assessment, and pay fine or adhere to "court-established installment schedule").

97. As indicated above, constitutional doctrine prohibits the state from incarcerating individuals for nonpayment unless it is willful. *See supra* note 16 and accompanying text. However, this prohibition has been circumvented in a variety of ways, e.g., the adoption of a low bar for what counts as "willful." Beckett & Harris, *supra* note 8, at 524–25.

98. Bannon et al., *supra* note 8, at 24.

99. *See* Craigie et al., *supra* note 82, at 16.

criminal conviction.[100] Unemployment rates one year after release may be upwards of fifty percent.[101] Not surprisingly, then, formerly incarcerated individuals often carry LFO debt that is equal to fifty percent or more of their annual income.[102]

There may also be an important racial dimension to the LFO crisis. It is likely that Black individuals and families are disproportionately affected by LFOs, given the realities of racial disparities more generally in the criminal-legal system,[103] as well as the greater economic vulnerability of Black households.[104]

II. EXCESSIVE FINES CLAUSE(S): HISTORY AND BACKGROUND

In its sparse jurisprudence on the Excessive Fines Clause, the Supreme Court has often drawn on its understanding of the historical purposes of the Clause. This Part briefly reviews the relevant history and then discusses the status of state EFCs, which may potentially provide a useful alternative to the Federal Clause in LFO litigation.

A. EFC HISTORY

The EFC's historical roots date back to the time of Magna Carta in England (1215).[105] Prominent among the complaints of the barons who forced King John to agree to the "Great Charter"

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100. *Id.* at 13.

101. *See, e.g.*, NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 233 (Jeremy Travis et al. eds., 2014) (examining how serving time in prison affects subsequent employment outcomes).

102. Beckett & Harris, *supra* note 8, at 516.

103. *See, e.g.*, Boddupalli & Mucciolo, *supra* note 5, at 4 ("Investigations into Chicago . . . have revealed that aggressive ticketing practices, especially in neighborhoods with higher shares of low-income Black residents, have trapped thousands of households in cycles of debt and bankruptcy."); Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1138–47 (2017) (discussing evidence of racial disparities in civil forfeiture); Smercina et al., *supra* note 45, at 196 (in study of Las Vegas Municipal Court, finding that "Black individuals make up 44.7% of those who have open warrants, even though they make up only 13.1% of the Clark County population").

104. Craigie et al., *supra* note 82, at 6 ("The net worth of a typical white family . . . is 10 times that of a typical Black family.").

105. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

was the King's abuse of his "amercement" power.[106] An amercement was a payment to the Crown required of individuals who committed any of a broad range of offensive acts; in return, the subject expected to receive the King's mercy.[107] However, since the King had broad discretion in setting the amount of the amercement, a vindictive or unscrupulous sovereign could use the amercement system to ruin political enemies or as a substitute for other, less convenient means of raising revenue.[108] Magna Carta aimed to limit these practices in various ways, including "by requiring that the amount of the amercement be proportioned to the wrong [and] by requiring that the amercement not be so large as to deprive [the payor] of [their] livelihood."[109]

Over time, the fine supplanted the amercement as the preferred English financial sanction.[110] However, the fine proved no less tempting than the amercement for misuse by the Crown.[111] Moreover, the fine was held to lie beyond the limitations imposed by Magna Carta on the use of amercements.[112] Thus, in the wake of the Glorious Revolution that ended the reign of the Stuart monarch James II, Parliament decided to establish limitations on fines as part of the English Bill of Rights (1689).[113] More specifically, Parliament declared that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."[114] Almost a century later, amid another revolution on the other side of the Atlantic, nearly identical

106. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 270–71 (1989).

107. *Id.* at 287–88 (O'Connor, J., concurring in part and dissenting in part).

108. *See id.* at 272 (majority opinion) (citing 2 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 214 (4th ed. 1936)).

109. *Id.* at 271.

110. *Id.* at 290.

111. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

112. *Browning-Ferris*, 492 U.S. at 290 (O'Connor, J. concurring in part and dissenting in part) (citing John Hampden's Case, 9 State Tr. 1054, 1126 (K.B. 1684)).

113. *Timbs*, 139 S. Ct. at 688.

114. *Id.* (quoting 1 WM. & MARY, ch. 2, § 10, in 3 Eng. Stat. at Large 441 (1689)).

language was incorporated into the Virginia Declaration of Rights,[115] and then later into the Federal Eighth Amendment.[116]

At the time of its adoption in the American Bill of Rights, the EFC was not controversial and, indeed, received minimal public discussion or debate.[117] As a result, the Supreme Court has tended to look back to the older English history to illuminate the Clause's original intent. As the Court has put it, "[t]he Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 [English] Bill of Rights."[118]

B. STATE COUNTERPARTS

Forty-seven of fifty state constitutions echo the Federal Constitution in explicitly banning "excessive fines."[119] To seemingly much the same effect, a forty-eighth mandates that "all fines shall be proportioned to the offences."[120] Finally, the remaining two state constitutions contain somewhat more broadly

115. *Id.*; VA. DECLARATION OF RIGHTS § 9 (1776), https://www.archives.gov/founding-docs/virginia-declaration-of-rights [https://perma.cc/BJQ5-VR8C] ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

116. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

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

118. *Id.* at 267.

119. *See, e.g.*, ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 15; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; CONN. CONST. art. I, § 13; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, ¶ XVII; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST., Bill of Rights, § 9; KY. CONST., Bill of Rights, § 17; ME. CONST. art. I, § 9; MD. CONST., Declaration of Rights, art. 25; MASS. CONST. pt. I, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, pt. II, § 21; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. I, art. 33; N.J. CONST. art. I, § 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 23; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14.

120. VT. CONST. ch. 2, § 39.

worded restrictions on penal severity that would presumably cover fines along with other forms of punishment.[121]

If interpretations of the Federal EFC's protections prove stingy, state EFCs may supply a more helpful basis for constitutional regulation of LFOs. To be sure, in the extant caselaw, when state courts have expressly addressed the question, they have generally indicated that their state EFCs are merely coextensive with—that is, equivalently protective as—the Federal Clause.[122] Nonetheless, in cases dealing with some of the many EFC issues not yet addressed by the U.S. Supreme Court, a few state courts have adopted quite expansive views of EFC protections that are not necessitated by federal precedent. This may suggest a willingness to go beyond minimal federal requirements as the parameters of the federal law become clearer.[123] Moreover, there is well-established precedent for state courts to interpret state-law analogs of a different part of the Eighth Amendment more expansively than the federal version: that is, the Cruel and Unusual Punishments Clause.[124]

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121. *See* ILL. CONST. art. I, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."); LA. CONST. art. I, § 20 ("No law shall subject any person . . . to cruel, excessive, or unusual punishment.").

122. *See, e.g.*, Howard County v. One 1994 Chevrolet Corvette, 704 A.2d 455, 460 (Md. Ct. Spec. App. 1998); Grinberg v. Safir, 694 N.Y.S.2d 316, 327 (N.Y. 1999); State v. Sanford Video & News, Inc., 553 S.E.2d 217, 219 (N.C. Ct. App. 2001); Dep't of Pro. & Occupational Regul. v. Abateco Servs., Inc., 534 S.E.2d 352, 357 (Va. Ct. App. 2000); City of Seattle v. Long, 493 P.3d 94, 107 (Wash. 2021). There are also many decisions that implicitly suggest the same approach, either by analyzing state and federal EFC claims together, *see, e.g.*, Proctor v. Saginaw Cnty. Bd. of Comm'rs, 985 N.W.2d 193, 201–03 (Mich. Ct. App. 2022); State v. Webb, 856 N.W.2d 171, 174–76 (S.D. 2014); State v. Ortho-McNeil-Janssen Pharms., Inc., 777 S.E.2d 176, 205 (S.C. 2015), or by relying on federal cases in adjudicating a state EFC claim, *see, e.g.*, Emmett County v. $2,200.00 in U.S. Currency (*In re* Forfeiture of 5118 Indian Garden Rd.), 654 N.W.2d 646, 649 (Mich. Ct. App. 2002); OTR Media Grp., Inc. v. City of New York, 83 A.D.3d 451, 454 (N.Y. App. Div. 2011). *See also* Schmitz v. N.D. State Bd. of Chiropractic Exam'rs, 974 N.W.2d 666, 675 (N.D. 2022) ("[W]e apply federal precedent to the Eighth Amendment claim and consider it persuasive in applying the state clause.").

123. For instance, some state courts have interpreted the EFC excessiveness analysis to include consideration of ability to pay. *See* cases cited *supra* note 16.

124. *See, e.g.*, Conner v. State, 626 N.E.2d 803, 806 (Ind. 1993) (noting that Indiana's "proportionate penalties" clause "goes beyond the protection against cruel and unusual punishment contained in the Eighth Amendment to the U.S. Constitution"); State v. Bartholomew, 683 P.2d 1079, 1085 (Wash. 1984) ("We

III. SUPREME COURT JURISPRUDENCE

Although the EFC has been part of the Federal Constitution since 1791, the Supreme Court said very little about the Clause until *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* in 1989.[125] Since then, the Court has decided four more EFC cases, plus a fifth statutory case that included some intriguing dicta about the Clause.

When it comes to the question of principal concern here—that is, whether a given payment counts as a "fine" for EFC purposes—the Court in *Browning-Ferris* adopted a general definition of that key term: "a payment to a sovereign as punishment for some offense."[126] This formulation, which continues to structure the EFC analysis to this day, is comprised of two prongs ("payment to a sovereign" and "punishment for some offense") that are considered separately below. This Part also reviews what the Court has said about what it means for a fine to be "excessive" and the incorporation of the EFC into the Due Process Clause in 2019.

A. "PAYMENT TO A SOVEREIGN": *BROWNING-FERRIS* AND *PAROLINE*

Among the Supreme Court's EFC cases, only *Browning-Ferris* turned squarely on the "payment to a sovereign" requirement.[127] In this decision, the Court held that a civil punitive damages award in favor of a private plaintiff lay beyond the coverage of the EFC.[128] In deciding that the EFC regulated only payments to a sovereign, the Court invoked the "purposes and concerns of the [Eighth] Amendment, as illuminated by its history."[129] As the paradigmatic illustration of the evil targeted by the EFC, the Court cited the abuses of the seventeenth-century Stuart kings, including the partisan use of heavy fines

note that our interpretation of the due process and cruel punishment clauses of our state constitution is not constrained to the Supreme Court's interpretation of the Eighth and Fourteenth Amendments."). *See generally* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1213–40 (2020) (providing state-by-state description of varying approaches to the interpretation of state analogs).

125. 492 U.S. 257 (1989).

126. *Id.* at 265.

127. *Id.*

128. *Id.* at 260.

129. *Id.*

against enemies of the Crown.[130] The civil punitive damages at issue in *Browning-Ferris* were distinguishable from these historical abuses and outside the scope of EFC protection because "the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[131]

The Court's reasoning here implicitly raised (and left unanswered) an important question. If the *Browning-Ferris* payment was not a fine because it lacked both of two attributes—(1) underlying action prosecuted by the government, and (2) government has a claim to some or all of the proceeds[132]—what about situations where one attribute is present, but not the other? Of particular importance for present purposes, what if the government prosecutes the action but does not receive the proceeds? This is, of course, precisely the situation with criminal restitution.[133]

A quarter-century later, the Court returned to the "to a sovereign" requirement in an intriguing bit of dicta in *Paroline v. United States*.[134] In that case, the Court considered whether the victim of a child pornography offense was statutorily entitled to restitution for the full amount of her damages from a single defendant who had been only one of thousands of possessors of her images.[135] In holding to the contrary, the Court noted that the EFC might be implicated by a restitution award that went so far beyond the amount of harm specifically caused by the individual defendant. The Court observed, "while restitution . . . is paid to a victim, it is imposed by the Government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime."[136] Thus, "despite the differences between restitution and a traditional fine," the Court found that "restitution still implicates 'the prosecutorial powers of government.'"[137] If the *Paroline*

130. *Id.* at 267.

131. *Id.* at 264.

132. *Id.*

133. *See, e.g.*, 18 U.S.C. § 3664(f)(1)(A) ("In each order of restitution, the court shall order restitution *to each victim* in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." (emphasis added)).

134. 572 U.S. 434, 456 (2014).

135. *Id.* at 439.

136. *Id.* (quoting United States v. Bajakajian, 524 U.S. 321, 328 (1998)).

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

dicta can be relied on, it appears that a payment may be construed as a "fine" if it results from government prosecution—without regard to whom the payment is made.

B. "PUNISHMENT FOR AN OFFENSE"

In the decade following *Browning-Ferris*, the Court issued the two decisions that remain its leading pronouncements on the "punishment for an offense" prong of the EFC, *Austin v. United States*[138] and *United States v. Bajakajian*.[139]

1. *Austin*

At issue in *Austin* were the federal civil forfeiture provisions of 21 U.S.C. §§ 881(a)(4) and (a)(7).[140] Under these provisions, the government may take ownership of real property and conveyances that were used in the commission of certain drug offenses.[141] (This would be an "instrumentality" forfeiture, to use the language from Part I.[142]) Although forfeiture under these provisions is accomplished through a civil lawsuit, the government is the plaintiff and ultimately the recipient of the property that is taken. Therefore, extending the EFC to these types of forfeiture did not violate *Browning-Ferris*'s "payment to a sovereign" requirement.[143] How about the "punishment for an offense" requirement?

The Court attributed no particular significance to the civil form of the forfeiture proceedings.[144] Rather, as the Court saw it, the real question was not one of form, but whether the forfeiture statutes at issue had a punitive *purpose*.[145] The Court

138. 509 U.S. 602 (1993).

139. 524 U.S. 321 (1998).

140. *Austin*, 509 U.S. at 604 ("In this case, we are asked to decide whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U. S. C. §§ 881(a)(4) and (a)(7).").

141. 21 U.S.C. §§ 881(a)(4), (a)(7) (outlining a list of property subject to forfeiture, including "[a]ll conveyances" and "[a]ll real property," respectively).

142. *See supra* Part I.C (discussing types of forfeitures).

143. *See supra* Part III.A (discussing the "payment to a sovereign" requirement derived from *Browning-Ferris*).

144. *See Austin*, 509 U.S. at 607–08 (declining to limit application of the Eighth Amendment to only criminal proceedings).

145. *See id.* at 610 ("Thus, the question is not, as the United States would have it, whether forfeiture under [21 U.S.C.] §§ 881(a)(4) and (a)(7) . . . is civil or criminal, but rather whether it is punishment.").

articulated the test this way: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[146]

In determining that the forfeiture provisions at issue had a punitive purpose, the Court relied on several considerations, including (1) the historical assumption in civil forfeiture that the property owner had been at fault in permitting misuse of the property;[147] (2) the structure of early U.S. forfeiture statutes, which listed forfeiture alongside fines and other clearly penal consequences for the same unlawful conduct;[148] (3) the availability of an "innocent owner" defense, which "serve[d] to focus the provisions on the culpability of the owner in a way that makes them look more like punishment, not less";[149] (4) the fact that forfeiture was tied to the commission of a criminal drug offense;[150] and (5) statements in the legislative history that revealed a desire to punish and deter drug crimes.[151]

Notably, the Court was unpersuaded by the government's argument that forfeitures are a sort of liquidated damages for the societal harms of the drug trade and the government's law-enforcement costs.[152] That argument was defeated by the "dramatic variations" in the value of conveyances and real property forfeitable under the law, which had no correlation to the actual damages sustained.[153]

2. *Bajakajian*

The Supreme Court's only other extended discussion of "punishment for an offense" came in *Bajakajian*,[154] which

146. *Id.* (quoting United States v. Halper, 490 U.S. 435, 448 (1989), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997)).

147. *Id.* at 612–13.

148. *Id.* at 614.

149. *Id.* at 619.

150. *Id.* at 620.

151. *Id.*

152. *Id.* at 621 ("The Government's second argument about the remedial nature of this forfeiture is no more persuasive.").

153. *Id.*

154. I discount here the *Paroline* dicta and a rather Delphic pronouncement by the Court in *Alexander v. United States*. 509 U.S. 544 (1993). In *Alexander*, the Court considered the constitutionality of the criminal forfeiture of a

involved a criminal forfeiture under 18 U.S.C. § 982(a)(1) for a currency reporting violation.[155] Criminal forfeiture differs from civil inasmuch as it requires a criminal conviction as a prerequisite; the criminal forfeiture then becomes part of the sentence.[156] Section 982(a)(1) may be triggered by a defendant's conviction of any of a number of offenses, including, at the time of *Bajakajian*, a conviction for failing to report a movement of more than $10,000 in currency outside the United States.[157] Since § 982(a)(1) requires forfeiture of all property "involved" in the offense, the government contended that the unreported currency is subject to forfeiture.[158]

In determining that § 982(a)(1) forfeitures are "fines" under the EFC, the Court emphasized that the forfeiture was "imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a . . . reporting violation."[159] The Court's analysis thus reflects a formalistic approach in which particular connections between a given exaction and the criminal litigation process may usually (or always?) serve as a dispositive indicator of punitive purpose. The approach contrasts markedly with that of *Austin*, in which the Court ascribed little importance to the civil form of the forfeiture.[160] Yet, *Bajakajian* did not in any way purport to overturn or limit *Austin*.

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defendant's businesses, which had been found to be involved in certain racketeering activities, and of the proceeds of those activities. *Id.* at 548. As to whether these forfeitures were subject to the EFC, the Court simply observed, "Unlike *Austin,* this case involves *in personam* criminal forfeiture not *in rem* civil forfeiture, so there was no threshold question concerning the applicability of the Eighth Amendment." *Id.* at 559 n.4. The Court's language here arguably implies that criminal forfeitures should be regarded categorically as "fines" for EFC purposes, although it is far from clear that such a holding was intended.

155. United States v. Bajakajian, 524 U.S. 321, 324 (1998).

156. *See, e.g.*, FED. R. CRIM. P. 32.2(b)(4) ("Upon a party's request in a case in which a jury returns a verdict of guilty, the jury shall determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.").

157. *Bajakajian*, 524 U.S. at 324 ("Federal law also provides that a person convicted of willfully violating this reporting requirement shall forfeit to the Government 'any property . . . involved in such offense.'" (quoting 18 U.S.C. § 928(a)(1))).

158. *Id.* at 325.

159. *Id.* at 328.

160. *See supra* note 144 and accompanying text.

3. Implications

Putting *Austin* together with *Bajakajian*, it becomes clear that the formalities of a criminal conviction are not *necessary* for an exaction to be considered punitive, but it is possible they may be *sufficient*. Broadly speaking, two major questions are raised.

First, if an exaction is *not* conditioned on a conviction (e.g., as in *Austin*), under what circumstances would it nonetheless be considered "punishment for an offense"?[161] *Austin* tells us that if an exaction's purpose is *in any part* punitive (that is, aiming at deterrence or retribution), that would suffice—but how is one to determine the purposes of a given exaction? *Austin* indicates that the analysis is categorical; in other words, the focus is on legislative purpose, not the case-specific intentions of a judge or prosecutor.[162] *Austin* also indicates that an important consideration is whether liability is premised in some sense on fault, e.g., whether personal innocence serves as a defense to liability, as with the civil forfeiture statutes at issue in *Austin*.[163] If liability is premised on fault, that would (perhaps dispositively?) point in the direction of a punitive purpose. On the other hand, if a required payment plausibly functions as compensation for harm—possibly including the government's costs in investigating and prosecuting an underlying criminal offense—then the payment might be regarded as remedial and hence nonpunitive. However, *Austin* also indicates that a compensatory aim may be discounted if there is not a sufficiently close correlation between the value of the required payment and the actual losses suffered.[164]

Second, if a required payment *is* conditioned on a conviction, what circumstances, if any, would nonetheless warrant treating the payment as nonpunitive? In places, *Bajakajian* seems to treat criminal form as a dispositive factor.[165] Elsewhere, the

161. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989).

162. Austin v. United States, 509 U.S. 602, 620 (1993) ("The legislative history of [the civil forfeiture statute] confirms the punitive nature of these provisions."); *see supra* note 154 and accompanying text.

163. *Austin*, 509 U.S. at 614.

164. *Id.* at 621 (rejecting an argument that forfeiture merely compensates the government for their expenses considering the disproportionate value of the forfeited items).

165. For instance, in response to the government's attempt to analogize the forfeiture in question to types of civil forfeiture that have long been considered

opinion seems to rely on other considerations. For instance, the Court took pains to reject the government's contention that the forfeiture at issue served as compensation for the government's loss of information about the unreported currency.[166] The discussion may imply that an exaction more closely calibrated to actual losses could be treated as nonpunitive despite a criminal form. If this is indeed the Court's position, then restitution and many fees might fall outside EFC coverage.

The *Paroline* dicta might also be considered in this context. In indicating that a restitution award may implicate the EFC, the Court observed that "[t]he primary goal of restitution is remedial or compensatory, but it also serves punitive purposes," citing a pair of earlier decisions that had discussed restitution in a general way as having punishment, deterrence, and rehabilitative aims.[167] On the one hand, nothing in the Court's brief discussion suggested that the criminal form of restitution was dispositive in establishing restitution as punitive. On the other hand, a quite expansive view of EFC coverage is suggested by the Court's indication that even a clearly secondary non-remedial purpose would suffice to make an exaction a "fine." This approach might exclude few, if any, exactions in criminal cases.

C. EXCESSIVENESS: *BAJAKAJIAN*

Although this Article is primarily concerned with the threshold question of which exactions are subject to EFC regulation, something about the substance of that regulation must also be said. After all, if state exactions are never found to be "excessive," it would hardly matter whether LFOs are subject to the EFC's excessiveness ban.

Bajakajian, in addition to offering an important analysis of the threshold question, also provided the Court's only extended discussion of the meaning of "excessive." The Court held that the

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nonpunitive, the Court brushed aside the argument with the simple observation that the government here "sought and obtained a criminal conviction of respondent personally," rather than using a civil forfeiture process. United States v. Bajakajian, 524 U.S. 321, 332 (1998).

166. *Id.* at 329 ("Although the Government has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government's confiscation of respondent's $357,144.").

167. Paroline v. United States, 572 U.S. 434, 456 (2014) (citing Pasquantino v. United States, 544 U.S. 349, 365 (2005); Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986)).

forfeiture of the full amount of the unreported currency ($357,144) would violate the EFC.[168] At the outset, the Court stated, "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[169] However, the Court acknowledged that neither the text nor the history of the Clause provided much guidance as to the measure of proportionality.[170]

In order to give the standard more content, the Court emphasized two considerations. First, the Court stated, "[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."[171] Second, the Court observed, "[A]ny judicial determinations regarding the gravity of a particular offense will be inherently imprecise."[172] In light of these considerations, the Court adopted the same deferential "gross disproportionality" standard that it already used in applying the Cruel and Unusual Punishments Clause to prison sentences, in lieu of a more rigorous "strict proportionality" standard.[173]

In finding the forfeiture at issue in *Bajakajian* grossly disproportionate, the Court emphasized several considerations, including (1) the technical nature of the defendant's crime ("solely a reporting offense");[174] (2) the fact that the money had been lawfully obtained by Bajakajian and was intended to pay a lawful debt, thus removing Bajakajian from "the class of persons for whom the statute was principally designed" (i.e., money launderers, drug traffickers, and tax evaders);[175] (3) under the federal sentencing guidelines, the maximum sentence for the defendant

168. *Bajakajian*, 524 U.S. at 344 ("[T]he full forfeiture of respondent's currency would violate the Excessive Fines Clause.").

169. *Id.* at 334.

170. *Id.* at 335 ("The text and history of the Excessive Fines Clause . . . provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be 'excessive.'").

171. *Id.* at 336.

172. *Id.*

173. *Id.*

174. *Id.* at 336–37 ("In applying this standard, the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination *de novo*, must compare the amount of the forfeiture to the gravity of the defendant's offense.").

175. *Id.* at 338.

was six months and a fine of $5,000 (a much smaller sum than the government was seeking in forfeiture);[176] and (4) the harm caused by Bajakajian was minimal.[177]

Bajakajian's emphasis on deferring to legislative judgments and adoption of the gross disproportionality test stand as significant obstacles to any more substantial use of the EFC against LFOs. Indeed, these aspects of *Bajakajian* have been cited in numerous post-*Bajakajian* lower court decisions that (often summarily) uphold state exactions against EFC challenges.[178]

There are nonetheless several reasons to think that the EFC jurisprudence might develop in ways that will give the excessiveness inquiry some real bite. First, *Bajakajian* left open whether a person's inability to pay can be taken into account as an excessiveness factor,[179] and a few lower courts have recently indicated that this would indeed be appropriate.[180] If the U.S. Supreme Court embraces this view, or if current trends in the lower courts otherwise continue, then the EFC could serve as an important check against the imposition of LFOs that cause extreme economic hardship. This might, in effect, revive the Magna Carta's

176. *Id.*

177. *Id.* at 339.

178. *See, e.g.*, United States v. Carpenter, 941 F.3d 1, 10–11 (1st Cir. 2019) (citing *Bajakajian* in dismissing EFC challenge); State v. Cotton, 198 So. 3d 737, 741–44 (Fla. Dist. Ct. App. 2016); Black Hills Trucking, Inc., v. N.D. Indus. Comm'n, 904 N.W.2d 326, 334 (N.D. 2017); State v. Living Essentials, LLC, 436 P.3d 857, 875 (Wash. Ct. App. 2019).

179. *See Bajakajian*, 524 U.S. at 340 n.15 (1998) (noting that neither Bajakajian nor the lower court had raised ability-to-pay concerns, and not commenting on them further).

180. For a list of cases discussing a person's inability to pay a forfeiture as a factor in evaluating application of the EFC, see, for example, United States v. Chin, 965 F.3d 41, 58 (1st Cir. 2020); United States v. Viloski, 814 F.3d 104, 107 (2d Cir. 2016); People v. Kopp, 250 Cal. Rptr. 3d 852, 895 (Cal. Ct. App. 2019); Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101 (Colo. 2019); One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558, 565–66 (D.C. 1998); Emmett County v. $2,200.00 in U.S. Currency (*In re* Forfeiture of 5118 Indian Garden Rd.), 654 N.W.2d 646, 649 (Mich. Ct. App. 2002); State v. Yang, 452 P.3d 897, 904 (Mont. 2019); Prince v. City of New York, 966 N.Y.S.2d 16, 21 (N.Y. App. Div. 2013); State v. Sanford Video & News, Inc., 553 S.E.2d 217, 220 (N.C. Ct. App. 2001); State v. Goodenow, 282 P.3d 8, 17 (Or. Ct. App. 2012); Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 188–89 (Pa. 2017); City of Seattle v. Long, 493 P.3d 94, 113 (Wash. 2021). *Cf.* United States v. Lessner, 498 F.3d 185, 206 (3d Cir. 2007) (noting possibility that defendant's hardship might be a proper EFC consideration).

ideal that exactions "not be so large as to deprive [a person] of his livelihood."[181]

Second, in finding the forfeiture at issue in *Bajakajian* to be excessive, the Court's emphasis on the technical character of the defendant's legal violation and the lack of real harm to anyone suggests that EFC challenges may find some success when directed against penalties for minimally harmful misconduct. To be sure, low-harm violations typically result in relatively low-magnitude exactions (e.g., parking tickets), which might normally be hard to characterize as grossly disproportionate. But, as *Bajakajian* itself illustrates, the exactions in low-harm cases are not always low-magnitude[182]—and all the more so if ability to pay is factored into the excessiveness calculus.

Third, in cases involving offenses committed by more than one person, the EFC may require that LFOs be proportioned to the payor's particular role in the offense and contribution to the harm caused. This was, after all, precisely the thrust of the Supreme Court's *Paroline* dicta.[183] A constitutional role-in-the-offense limitation might provide important protections for defendants who made only small contributions to a group offense but who nonetheless face substantial mandatory LFOs.[184]

Fourth, in cases involving instrumentality forfeitures, a substantial body of lower court jurisprudence now indicates that the EFC requires not only a proportionate relationship between the seriousness of the offense and the value of seized property, but also a sufficiently close relationship between the property

181. State v. Timbs, 139 S. Ct. 682 (2019) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)). For an influential originalist argument that the excessiveness analysis should include consideration of ability to pay, see Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013).

182. *Bajakajian*, 524 U.S. at 324 (1998) (noting that the forfeiture at issue was $357,144).

183. *See supra* notes 134–37 and accompanying text.

184. *See, e.g.*, Pimentel, *supra* note 16, at 557 (citing United States v. Jalaram, Inc., 599 F.3d 347, 355 (4th Cir. 2010)) (noting that EC might be violated if "a 'mule' in a large drug distribution ring . . . is ordered to 'forfeit' the entire profits of the drug conspiracy, even though this individual never saw more than the modest payment she received for carrying drugs across the border").

and the commission of the offense.[185] If the Supreme Court endorses the nexus requirement, or at least if it remains widely accepted by the lower courts, this aspect of the excessiveness analysis may provide an important limitation on instrumentality forfeitures.

Fifth, given the Court's tendency when interpreting the EFC to look back to the Clause's English historical roots, including, in particular, the historical concern with abusive revenue-raising practices by English monarchs,[186] the EFC jurisprudence may develop to impose especially rigorous limitations on LFOs that are designed or implemented primarily for revenue-raising purposes. Indeed, Professor Daniel Harawa has proposed that the constitutional excessiveness test should explicitly include consideration of whether the exaction at issue is a "significant revenue source" in the jurisdiction.[187]

D. INCORPORATION: *TIMBS*

The Supreme Court offered its most recent statement on the EFC in *Timbs v. Indiana* in 2019.[188] *Timbs* did nothing to clarify the ambiguities created by the Court's earlier decisions on either the threshold question or the excessiveness inquiry, but importantly did hold that the EFC was incorporated into the Fourteenth Amendment and binds the states.[189] Incorporation resulted from the Court's conclusion that the EFC's protections were "fundamental to our scheme of ordered liberty," and deeply rooted in our "history and tradition."[190]

For tea-leaf readers, two aspects of *Timbs* may be of note in relation to the LFO crisis. First, in observing that the historical concerns that originally motivated the EFC were "scarcely

185. *See, e.g.*, United States v. 6380 Little Canyon Rd., 59 F.3d 974, 982–83 (9th Cir. 1995) (conspiring the relationship between the property subject to forfeiture and the offense in evaluating an EFC challenge); Wojnar v. City of Tarpon Springs (*In re* Forfeiture of 1990 Chevrolet Blazer), 684 So. 2d 197, 199 (Fla. Dist. Ct. App. 1996); $137,325.00 in U.S. Currency v. State, 204 So. 3d 317, 324 (Miss. Ct. App. 2016) (state EFC); *1997 Chevrolet*, 160 A.3d at 184.

186. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) (discussing historical origins of EFC).

187. Harawa, *supra* note 16, at 97.

188. 139 S. Ct. 682 (2019).

189. *Id.* at 687.

190. *Id.* at 686–87 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

hypothetical" today, the Court pointed to the increasing reliance of state and local governments on fines and fees as a source of general revenue.[191] This passage may lend support to the application of the EFC to fees, which is not a use of the EFC that the Court has otherwise addressed. The passage may also support the view that the use of LFOs for revenue-generation purposes ought to trigger especially close EFC review. Indeed, in the same passage, *Timbs* quoted an opinion by Justice Scalia in an earlier case asserting that "it makes sense to scrutinize governmental action more closely when the State stands to benefit."[192]

Second, in reviewing the relevant history, the Court included a discussion not just of Magna Carta and the Stuart kings, but also of Reconstruction in the American South after the Civil War, including the congressional backlash against the South's harshly discriminatory Black Codes.[193] Viewing this history as pertinent to contemporary understandings of the EFC provides some validation for the Clause's use as a safeguard against the entrenchment of racial and socioeconomic disadvantage.[194]

IV. LOWER COURT JURISPRUDENCE

This Part provides an overview of the evolving lower court caselaw on the EFC threshold question (i.e., what is a "fine"). The overview reflects systematic research into published appellate decisions regarding the EFC in all fifty states, the District of Columbia, and all twelve geographically defined federal

191. *Id.* at 689.

192. *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., concurring)).

193. *Id.* at 688–89. This does indeed seem an appropriate history to take into account, at least when considering the application of the EFC to state policies and practices. *See* Jamal Greene, *Fourteenth Amendment Originalism,* 71 MD. L. REV. 978, 979 (2012) ("An originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of the rights protected by the Bill of Rights should, in adjudicating cases under incorporated provisions, be concerned primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the rights at issue.").

194. *Cf.* Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 70–71 (2019) (interpreting the Reconstruction Amendments in light of their "constitutional imperatives to end enslaving systems, provide equal protection against state and private violence, and install full citizenship.").

circuits between 2010 and 2022, plus numerous older decisions that were identified as potentially significant based on citations in other cases or in the secondary literature.[195] In all, 64 federal and 117 state cases were analyzed. The cases reviewed include decisions that adjudicate Federal EFC claims and state analog claims. Since no state has (yet) explicitly chosen to interpret its EFC as more protective than the Federal Clause, and since state cases interpreting state analogs routinely cite and attempt to parse the same handful of U.S. Supreme Court decisions that govern the Federal EFC analysis, state cases should be of some national interest regardless of whether they are based on the Federal EFC or a state analog.[196]

The analysis below is organized around the same LFO categories that were described in Part I.

A. FEES

The Supreme Court has not yet directly addressed the applicability of the EFC to fees, but lower courts have handled fee questions on several occasions. Fees that have been challenged on EFC grounds include the following: monitoring fees for sex offenders,[197] towing and storage fees for impounded vehicles,[198] court operations and facilities funding assessments,[199] DNA collection fees,[200] fees to support a victim and witness services

195. A few older cases were also included in the analysis so as to ensure that there was at least one case from each state. Only one state, Hawaii, seems to lack any published EFC caselaw whatsoever.

196. In the footnotes in this Part, I indicate parenthetically in the first citation to each case whether the EFC claim was brought under a state EFC; if there is no such indication, then the claim was based solely on federal law. As will be apparent through a perusal of the footnotes, the great majority of the cases analyzed here were decided based on the Federal Clause, not a state analog.

197. *See, e.g.*, United States v. Leone, 813 F. App'x 665, 670 (2d Cir. 2020).

198. *See, e.g.*, Shandor v. City of Eastpointe, No. 20-1385, 2021 WL 4775190, at *1 (6th Cir. Oct. 13, 2021); City of Seattle v. Long, 493 P.3d 94, 107 (Wash. 2021) (considering claim brought under both federal and state EFCs).

199. *See, e.g.*, People v. Aviles, 252 Cal. Rptr. 3d 727, 739 (Cal. Ct. App. 2019).

200. *See, e.g.*, State v. Clement, No. 82476-7-I, 2022 WL 831998, at *1 (Wash. Ct. App. Mar. 21, 2022) (state); State v. Tatum, 514 P.3d 763, 767–68 (Wash. Ct. App. 2022) (state and federal).

program,[201] prosecution costs,[202] court costs,[203] incarceration fees ("pay-to-stay"),[204] replanting fees for trees that were unlawfully removed,[205] and bail bond fees.[206]

Because they are framed as compensation for the costs incurred by government agencies, fees are typically defended as purely remedial in nature and hence beyond the reach of the EFC. Often, these arguments are accepted.[207]

The decision of the Washington Court of Appeals in *State v. Clement* is illustrative. Washington—until July 2023—required that individuals convicted of any of a broad range of offenses provide a DNA sample to the state and that the sentence imposed on such individuals include a $100 DNA collection fee.[208]

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201. *See, e.g.*, *Tatum*, 514 P.3d at 767–68.

202. *See, e.g.*, State v. Warner, 274 So. 3d 72, 84 (La. Ct. App. 2019); State v. Polley, 2 S.W.3d 887, 894–95 (Mo. Ct. App. 1999) (state and federal).

203. *See, e.g.*, *Warner*, 274 So. 3d at 88.

204. *See, e.g.*, Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 420–21 (3d Cir. 2000); *In re* Metcalf, 963 P.2d 911, 918–21 (Wash. Ct. App. 1998). For an argument that pay-to-stay fees should be covered by the EFC, see Kristen M. Haight, Note, *Paying for the Privilege of Punishment: Reinterpreting Excessive Fines Clause Doctrine to Allow State Prisoners to Seek Relief from Pay-to-Stay Fees*, 62 WM. & MARY L. REV. 287 (2020).

205. *See, e.g.*, F.P. Dev., LLC v. Charter Township of Canton, 16 F.4th 198, 208–09 (6th Cir. 2021).

206. *See, e.g.*, People v. Lovelace, 104 N.E.3d 532, 539 (Ill. App. Ct. 2018) (state).

207. *See, e.g.*, *F.P. Dev., LLC*, 16 F.4th at 209 (holding that tree replanting fees are do not violate the EFC as they are remedial); Shandor v. City of Eastpointe, No. 20-1385, 2021 WL 4775190, at *5 (6th Cir. Oct. 13, 2021) (holding that towing and storage fees are do not violate the EFC as they are remedial); United States v. Leone, 813 F. App'x 665, 669–70 (2d Cir. 2020) (holding that sex offender monitoring fees are reimbursements and not punishments and therefore do not violate the EFC); *Lovelace*, 104 N.E.3d at 547 (holding that bail bond fees do not violate the EFC as they are remedial); State v. Clement, No. 82476-7-I, 2022 WL 831998, at *1 (Wash. Ct. App. Mar. 21, 2022) (holding that DNA collection fees do not violate the EFC as they are remedial). In *Tillman v. Lebanon County Correctional Facility*, the Third Circuit also seemed to find this view persuasive, but ultimately rested its rejection of the plaintiff's EFC claim on an excessiveness analysis. 221 F.3d at 420.

208. State v. Clement, 2022 WL 831998, at *2 ("RCW 43.43.7541, which authorizes the DNA collection fee, states in relevant part: 'Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction.'" (quoting An Act Relating to Legal Financial Obligations, ch. 269, § 18, 2018 Wash. Sess. Laws 1633 (current version WASH REV. CODE § 43.43.7541 (2023)))).

Following his conviction of a qualifying offense, Clement argued that the fee violated the EFC because it was imposed without consideration of a defendant's ability to pay.[209] On appeal, however, the court concluded the fee was not a fine because it was not punitive.[210] The court emphasized the fee's use to support the maintenance and operation of DNA databases, which in turn serve a number of purposes, including the detection of "recidivist acts."[211] The court did not, however, consider the potential significance of the procedural formalities of the collection fee—it is imposed only on those convicted of a crime and is part of the sentence. Under *Bajakajian*, this alone may arguably suffice to make the fee punitive for EFC purposes.[212] Nor did the court consider whether the underlying crime-fighting purposes of the fee (detecting—and hence presumably punishing and deterring—recidivist acts) would make the fee at least "punitive in part," which would also suffice to make the fee a "fine."[213]

Few cases hold a fee to be punitive.[214] The most notable decision is probably the 2021 ruling of the Washington Supreme Court in *City of Seattle v. Long*. Long, who lived in his truck, overstayed his welcome in a Seattle-owned parking lot.[215] The city towed his truck and demanded that he pay towing and storage fees in order to get it back.[216] Long challenged these fees as excessive fines, and the Washington Supreme Court agreed.[217]

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209. *Id.* at *3.

210. *Id.* at *4.

211. *Id.* at *2 (quoting State v. Brewster, 218 P.3d 249, 251 (Wash. Ct. App. 2009)).

212. *See* United States v. Bajakajian, 524 U.S. 321, 344 (1998) (holding that full forfeiture violates EFC).

213. *Id.* at 329 n.4 (articulating the possibility of a "fine" being both punitive and remedial).

214. *See, e.g.*, People v. Aviles, 252 Cal. Rptr. 3d 727, 741 (Cal. Ct. App. 2019) (holding that fines, fees, and assessments related to a conviction were punitive); Schmitz v. N.D. State Bd. of Chiropractic Exam'rs, 974 N.W.2d 666, 674–75 (N.D. 2022) (state and Federal EFC) (finding fines and fees punitive); City of Seattle v. Long, 493 P.3d 94, 109 (Wash. 2021) (holding that charging a defendant for impoundment of a vehicle was partially punitive). Additionally, a Louisiana court has held, in rather conclusory fashion, that the imposition of prosecution costs on a defendant violated the defendant's rights under a different portion of the Eighth Amendment, the Cruel and Unusual Punishments Clause. State v. Warner, 274 So. 3d 72, 90 (La. Ct. App. 2019).

215. *Long*, 493 P.3d at 99.

216. *Id.*

217. *Id.* at 115.

Although the fees were intended to reimburse the city for its towing and storage costs, the court observed that "they did not exist in isolation."[218] The fees needed to be considered in relation to the purpose for which they were incurred.[219] Because vehicle impoundment had a partly punitive purpose (as the impoundment law made clear in its text), the associated costs also had to be viewed as partly punitive.[220] The court's maneuver here of looking through a reimbursement purpose to the underlying reason why government incurred the cost might have dramatic implications for extending the EFC's coverage to other fees, too.[221]

Although the extant fees caselaw focuses on the "punishment for an offense" prong of the threshold inquiry, some fees may also implicate the "payment to a sovereign" prong.[222] More specifically, there might be a question about whether fees that are payable to a private agency should count as a payment to a sovereign. Examples would include a "pay to stay" fee imposed by a private prison or a collection fee imposed by a private debt-collection agency to which delinquent LFOs are referred. The question would turn, at least to some extent, on the ambiguity in *Browning-Ferris*'s two-part "payment to a sovereign" test: is it *necessary*, or merely *sufficient*, for the government to have a right to the proceeds?[223]

The cases also provide little discussion of whether the amount of the fees in question represented a reasonable approximation of the actual costs incurred as a result of the defendant's actions. Such reasonability is arguably necessary under *Austin*

218. *Id.* at 109.

219. *Id.*

220. *Id.*

221. A California court has made a similarly bold analytic maneuver in holding that court assessments should be regarded as punitive based on "the 'potentially devastating consequences' suffered by indigent persons unable to pay those amounts." People v. Aviles, 252 Cal. Rptr. 3d 727, 740 (Cal. Ct. App. 2019) (quoting People v. Dueñas, 242 Cal. Rptr. 3d 268, 276 (Cal. Ct. App. 2019)). This approach seems to get away from government intentions entirely, putting the focus solely on impact, which might be a welcome turn in the EFC jurisprudence. *See infra* Part V.

222. *See supra* Part III.A (discussing the "payment to a sovereign" prong).

223. *See supra* text accompanying note 133 (discussing implications of the ambiguity of the *Browning-Ferris* test).

and *Bajakajian* for an exaction to be treated as compensatory instead of punitive.[224]

B. FINES

Fines, for obvious textual reasons, present the easiest case for EFC coverage. Although criminal fines plainly rest at the core of what the Clause regulates, there have sometimes been questions raised about the applicability of the EFC to *civil* fines.

Of course, as the Supreme Court established in *Austin*, a civil form is not controlling.[225] And, indeed, numerous lower court decisions treat civil money penalties as subject to the EFC.[226] Of particular note, the Ninth Circuit has recently held that parking and other municipal fines are covered by the EFC.[227] However, in a small number of contrasting cases, civil fines have been found nonpunitive because they purportedly aim "to compel compliance with the law prospectively, not to punish past behavior."[228] This is an odd line of reasoning. After all, the

224. *See supra* Part III.B.3 (discussing implications of the holdings of *Austin* and *Bajakajian*).

225. *See supra* note 144 and accompanying text.

226. *See, e.g.*, Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1308 (11th Cir. 2021) ("[T]he Excessive Fines Clause applies only to payments imposed by the United States (or the States) and payable to it (or them)."); United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 387–90 (4th Cir. 2015) (finding civil penalties as subject to the EFC when punitive); United States v. Aleff, 772 F.3d 508, 512 (8th Cir. 2014); Collins v. SEC, 736 F.3d 521, 526 (D.C. Cir. 2013); State v. Cotton, 198 So. 3d 737, 743 (Fla. Dist. Ct. App. 2016) (state and Federal EFC); State v. Spilton, LCSW, 315 S.W.3d 350, 358–59 (Mo. 2010) (state and Federal EFC); Schmitz v. N.D. State Bd. of Chiropractic Exam'rs, 974 N.W.2d 666, 675–76 (N.D. 2022) (state and Federal EFC); Black Hills Trucking, Inc., v. N.D. Indus. Comm'n, 904 N.W.2d 326, 334 (N.D. 2017) (state EFC); Di-Prete v. Morsilli, 635 A.2d 1155, 1164 (R.I. 1994) (state EFC); State *ex rel.* Wilson v. Ortho-McNeil-Janssen Pharms., Inc., 777 S.E.2d 176, 205 (S.C. 2015) (state and Federal EFC); Phillips v. Dep't of Com., 397 P.3d 863, 873 (Utah Ct. App. 2017); Vt. Nat'l Tel. Co. v. Dep't of Taxes, 250 A.3d 567, 588 (Vt. 2020); Dep't of Pro. & Occupational Regul. v. Abateco Servs., Inc., 534 S.E.2d 352, 357 (Va. Ct. App. 2000) (state and Federal EFC); Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 100 (Colo. 2019) (reading *Austin* as establishing that civil penalties are subject to the EFC).

227. Pimentel v. City of Los Angeles, 974 F.3d 917, 922 (9th Cir. 2020).

228. City of Lewiston v. Verrinder, 275 A.3d 327, 335 (Me. 2022) (state and Federal EFC). *See also* Little v. Comm'r, 106 F.3d 1445, 1454 (9th Cir. 1997) ("The additions to tax at issue in the present case are purely revenue raising because they serve only to deter noncompliance with the tax laws by imposing a financial risk on those who fail to do so."); OTR Media Grp., Inc., v. City of

Supreme Court has identified deterrence as a punitive purpose,[229] which seems to rule out the lower courts' prospective/retrospective distinction.

C. FORFEITURE

Although *Bajakajian* could reasonably be read to subject all *criminal* forfeitures (that is, those forfeitures imposed as part of a criminal sentence after the property owner's conviction) to EFC excessiveness limitations, that view would still leave open questions about *civil* forfeitures. Of course, *Austin* makes clear that at least *some* civil forfeitures are fines for EFC purposes,[230] but the Court's analysis did not seem broadly categorical, which has left room for lower courts to place certain types of civil forfeiture beyond the EFC's reach. The clearest divide has emerged with respect to "proceeds" forfeiture. The constitutional status of some "instrumentality" forfeitures has also occasionally been questioned.[231]

New York, 920 N.Y.S.2d 337, 340 (N.Y. App. Div. 2011) ("Because the penalties serve only a remedial purpose and are intended to secure compliance, the Excessive Fines Clause is inapplicable.") (state EFC).

Little is one of a line of cases that hold that particular penalties framed as *taxes* lie beyond the reach of the EFC. 106 F.3d at 1454. *See also* Kitt v. United States, 277 F.3d 1330, 1337 (Fed. Cir. 2001); Louis v. Comm'r, 170 F.3d 1232, 1236 (9th Cir. 1999); McNichols v. Comm'r, 13 F.3d 432, 434–45 (1st Cir. 1993). *But see* Wilson v. Comm'r of Revenue, 656 N.W.2d 547, 552–54 (Minn. 2003) (state and federal) (distinguishing federal tax cases and finding particular tax penalty to be punitive). *Kitt*, which addressed the early withdrawal penalty for individual retirement accounts, suggested that the key feature that removed the penalty from EFC regulation was the fact that early withdrawal "violated no law." 277 F.3d at 1337. This position begs the question of what it means for an act to violate the law. Surely, at some point, a money penalty can become so severe (say, as an extreme, a 100% early withdrawal penalty) that the law is plainly taking a prohibitory stance toward the act in question.

Recently, the First Circuit relied on the tax cases in holding that a civil penalty imposed for nonreporting of a foreign bank account was not a "fine." United States v. Toth, 33 F.4th 1, 15–19 (1st Cir. 2022).

229. *See, e.g.*, Austin v. United States, 509 U.S. 602, 610 (1993) ("[A] civil sanction that . . . can only be explained as also serving either retributive or deterrent purposes, is punishment." (quoting United States v. Halper, 490 U.S. 435, 448 (1989), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997))).

230. *See supra* notes 146–48 and accompanying text.

231. Very few cases address the third major forfeiture category, contraband. In *In re 1650 Cases of Seized Liquor*, the Vermont Supreme Court held that what it characterized as a forfeiture of contraband lay beyond the reach of the EFC. 721 A.2d 100, 108 (Vt. 1998). As the Vermont court noted, *Austin* observed

1. Proceeds

Several lower courts have taken the position that forfeiture of the proceeds of a crime is not punishment.[232] Notably, and despite the arguably categorical analysis of *Bajakajian*, this position has even been taken in some criminal forfeiture cases.[233] The basic view of these courts is that "[f]orfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity,"[234] which is characterized as a remedial

in passing that "the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society." *Id.* (quoting *Austin*, 509 U.S. at 621). It is not clear, however, that the liquor at issue in *1650 Cases* was properly characterized as contraband in this sense intended by *Austin*; it appears that the basis for its seizure was not any inherent illegality or dangerousness of the liquor but rather certain paperwork deficiencies in relation to its transportation through Vermont. Nor is it clear that the Vermont Supreme Court meant to adopt a categorical rule that contraband forfeitures are not "fines." For instance, the court seemed to rely in part on the absence of an innocent-owner defense in the forfeiture statute at issue. *Id.* For additional cases holding a contraband forfeiture to be remedial and outside the scope of the EFC, see, for example, United States v. Droganes, 728 F.3d 580, 593 (6th Cir. 2013); United States v. Davis, 648 F.3d 84, 96–97 (2d Cir. 2011). My research did not uncover any cases holding a contraband forfeiture to be punitive.

232. *See, e.g.*, United States v. $11,500.00 in U.S. Currency, 869 F.3d 1062, 1073 n.6 (9th Cir. 2017) (noting that forfeiture of illicit proceeds is not subject to EFC because it cannot be considered punishment); United States v. Betancourt, 422 F.3d 240, 250 (5th Cir. 2005) (holding that forfeiture of drug proceeds does not constitute punishment and is not subject to EFC analysis); United States v. Lot 41, Berryhill Farm Ests., 128 F.3d 1386, 1395 (10th Cir. 1997) (holding that forfeiture of drug proceeds under state law was remedial rather than punitive); State v. Eighteen Thousand Two Hundred Thirty-Five Dollars in U.S. Currency, 184 P.3d 1078, 1085 (Okla. 2008) (finding that a nonpunitive forfeiture is not subject to EPC); *cf.* Fla. Med. Ctr. of Clearwater, Inc. v. Sebelius, 614 F.3d 1276, 1281–82 (11th Cir. 2010) (holding that Medicare recoupment, which seems analogous to proceeds forfeiture, is not punitive and outside reach of EFC). *But cf.* $27,877.00 Current Money v. State, 331 S.W.3d 110, 121–22 (Tex. App. 2010) (noting that status of proceeds forfeiture under EFC is an open question in Texas law).

233. *See, e.g.*, *Betancourt*, 422 F.3d at 250 (holding that proceeds obtained from unlawful conduct are subject to criminal forfeiture but not to EFC, because forfeiture does not constitute punishment.); United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994) ("Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity.").

234. *Alexander*, 32 F.3d at 1236. Many proceeds cases involve drug trafficking, and a somewhat different explanation for why forfeiture should not be regarded as punitive has been offered in this context:

purpose. These courts tend not to consider whether proceeds forfeitures must still be treated as punishment under *Austin* because they have punitive *in addition to* remedial purposes.

Other courts take a contrary position.[235] Some cases rely on the formality of criminal conviction, implicitly suggesting that civil proceeds forfeiture might be treated differently.[236] Others

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> The forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combating the allure of illegal drugs, caring for the victims of the criminal trade when preventative efforts prove unsuccessful, lost productivity, etc.

Berryhill Farm Ests., 128 F.3d at 1395 (quoting a double jeopardy case, United States v. Tilley, 18 F.3d 295, 299 (5th Cir. 1994)). However, precisely the same argument was rejected by the Supreme Court in *Austin* in relation to instrumentality forfeitures, and it is not clear how proceeds forfeitures function any more persuasively as compensation for the costs of drug enforcement and the social harms of drug trafficking. 509 U.S. at 620–21 (noting that the legislative history of 21 U.S.C. § 881 confirms the punitive nature of forfeiture).

235. *See, e.g.*, United States v. Viloski, 814 F.3d 104, 109 (2d Cir. 2016) (reasoning that the proceeds forfeiture at issue "fit[] easily within the definition of punitive forfeitures . . . just expounded: it was imposed at the culmination of a criminal proceeding that required a conviction of the underlying felony, and it could not have been imposed upon an innocent party" (quotation marks and citation omitted)); United States v. Browne, 505 F.3d 1229, 1281–82 (11th Cir. 2007) ("The [proceeds] forfeiture order in question, which was 'imposed at the culmination of a criminal proceeding and require[d] conviction of an underlying felony,' constituted punishment for an offense and was thus a 'fine.'" (alteration in original) (citations omitted) (quoting United States v. Bajakajian*,* 524 U.S. 321, 328 (1998))); United States v. Corrado, 227 F.3d 543, 552 (6th Cir. 2000) (indicating that amount of proceeds forfeiture could be reduced "so as not to violate the Eighth Amendment prohibition against 'cruel and unusual punishment' or 'excessive fines'"); United States v. 3814 NW Thurman St., 164 F.3d 1191, 1197 n.2 (9th Cir. 1999), *opinion amended on denial of reh'g*, 172 F.3d 689 (9th Cir. 1999), *superseded by statute on other grounds*, 18 U.S.C. § 983(d) (indicating that proceeds forfeiture was fine because not limited to property that was used as instrumentality of offense and because statute provided for innocent owner defense); *cf.* United States v. Bates, 784 F. App'x 312, 340 (6th Cir. 2019) (assuming, *arguendo*, that proceeds forfeiture at issue was an EFC "fine").

236. *See, e.g.*, United States v. Beecroft, 825 F.3d 991, 999–1002 (9th Cir. 2016) (noting because the forfeiture order was imposed against the defendant personally "upon conviction" it was necessarily punitive and therefore must be proportionate to the crime to withstand EFC scrutiny); United States v. Sepúlveda-Hernández, 752 F.3d 22, 36–37 (1st Cir. 2014) (same); *Browne,* 505 F.3d at 1281–82 (requiring that forfeiture be proportionate to the underlying crime) (citations omitted); State v. Goodenow, 282 P.3d 8, 16 (Or. Ct. App. 2012) (noting that "*in personam* [] criminal forfeitures" are often "imposed as

take the view that civil proceeds forfeitures might also be punitive, but only if they provide an innocent owner defense.[237] Still others simply assume that proceeds forfeitures are "fines" without giving the question any explicit attention.[238]

Perhaps the most extensive analysis was provided by the Federal Fourth Circuit in *United States v. Jalaram, Inc.*[239] As the court read *Austin* and other Supreme Court cases, the *type* of property at issue (e.g., proceeds versus instrumentalities) "was irrelevant to the issue of whether the forfeiture constituted punishment. Instead, the Court consistently focused on whether the forfeiture stemmed, at least in part, from the property owner's criminal culpability."[240] That test was satisfied in the case at hand because it arose from a *criminal* forfeiture requiring the property owner's conviction.[241] The court acknowledged that in most cases, the forfeiture of proceeds would not be excessive, giving rise to an "understand[able] . . . desire . . . to simplify the analysis by holding such forfeitures exempt from constitutional scrutiny in the first instance."[242] However, the court observed, this "shortcut may work a grave injustice in cases

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punishments" (quoting *Bajakajian*, 524 U.S. at 332–34)). The civil-criminal distinction seems especially clear in the Second Circuit. *Compare Viloski*, 814 F.3d at 109 (holding that criminal proceeds forfeiture was covered by EFC), *with* United States v. Sum of $185,336.07 U.S. Currency Seized from Citizen's Bank Account L7N01967, 731 F.3d 189, 194 (2d Cir. 2013) (holding that civil proceeds forfeiture not covered by EFC).

237. *See, e.g.*, *3814 NW Thurman St.*, 164 F.3d at 1197 n.2. The Arizona cases indicate that civil, in personam proceeds forfeitures are remedial and hence outside the EFC's reach unless the defendant was not personally involved in the criminal activity that generated the proceeds. *See* State *ex rel.* Goddard v. Gravano, 108 P.3d 251, 256–59 (Ariz. Ct. App. 2005) (holding that proceeds forfeiture was remedial and distinguishing State v. Leyva, 985 P.2d 498 (Ariz. Ct. App. 2005)).

238. United States v. Blackman, 746 F.3d 137, 144–45 (4th Cir. 2014) (discussing whether a forfeiture violates EFC without evaluating whether it is a fine); United States v. Fogg, 666 F.3d 13, 17–20 (1st Cir. 2011) (assuming a forfeiture is subject to EFC); United States v. Smith, 656 F.3d 821, 828–29 (8th Cir. 2011); People v. Estes, 161 Cal. Rptr. 3d 690, 695 (Cal. App. Dep't Super. Ct. 2013) ("A forfeiture constitutes an unconstitutional fine in violation of the Eighth Amendment if the amount of the forfeiture is grossly disproportionate to the gravity of the defendant's offense." (citing *Bajakajian*, 524 U.S. at 336–37)); Mikell v. State, 766 S.E.2d 233, 236 (Ga. Ct. App. 2014).

239. United States v. Jalaram, Inc., 599 F.3d 347, 352–55 (4th Cir. 2010).

240. *Id.* at 354.

241. *Id.*

242. *Id.* at 355.

involving joint and several liability. In such cases, some defendants inevitably disgorge more money than they received from the conspiracy, thus forfeiting property that they obtained lawfully in order to satisfy the forfeiture judgment."[243]

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243. *Id.* The court thus seemed to assume that, as suggested in Part III.C, *infra*, the excessiveness analysis might limit the LFO liability of individual defendants involved in group crime.

Another, more recent lower court decision suggests the potential applicability of the reasoning in an intriguing non-EFC Supreme Court case. In *SEC v. Metter*, the Second Circuit considered an EFC challenge to a court order requiring the defendant to disgorge all of the profits from a stock fraud scheme—an order that was functionally very similar to proceeds forfeiture. 706 F. App'x 699 (2d Cir. 2017). The Second Circuit assumed without deciding that the disgorgement order should be treated as a "fine" in light of the Supreme Court's decision in *Kokesh v. SEC*. *See Metter*, 706 F. App'x at 703 (citing Kokesh v. SEC, 137 S. Ct. 1635, 1642–44 (2017)).

Kokesh, in turn, considered whether a different disgorgement order violated a particular statute of limitations, which depended on whether disgorgement was considered a "penalty." 137 S. Ct. at 1639. The Court held that a disgorgement of profits sought by the Securities and Exchange Commission *is* punitive for three reasons: (1) "disgorgement is imposed by the courts as a consequence for violating . . . public laws"; (2) "the primary purpose of disgorgement orders is to deter violations of the securities laws"; and (3) "in many cases, SEC disgorgement is not compensatory. . . . Some disgorged funds are paid to victims; other funds are dispersed to the United States Treasury." *Id.* at 1643–44. The reader will note that these three factors might also be said to characterize proceeds forfeiture.

The *Kokesh* Court further noted that SEC disgorgement

> sometimes exceeds the profits gained as a result of the violation. . . . Individuals who illegally provide confidential trading information have been forced to disgorge profits gained by individuals who received and traded based on that information—even though they never received any profits. And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit.

Id. at 1644 (citations omitted). Similarly, as to proceeds forfeiture, "[t]he government typically does argue for the forfeiture of gross *revenues*, disregarding costs, which goes beyond merely disgorging the unjust enrichment." Pimentel, *supra* note 16, at 558.

Although *Kokesh* considered whether disgorgement was a "penalty" for statutory purposes, and not a "punishment" for Eighth Amendment purposes, the Court's reasoning closely paralleled that of its EFC cases, and, indeed, explicitly cited both *Bajakajian* and *Austin*. *Kokesh*, 137 S. Ct. at 1643–45. It seems reasonable to infer from *Kokesh* that the Court would have deemed disgorgements—and, arguably by extension, proceeds forfeitures—to be EFC "fines" if the question had come up. *Cf.* Liu v. SEC, 140 S. Ct. 1936, 1942 (2020) (considering character of disgorgement for different statutory purposes, holding

2. Instrumentalities

Since *Austin* itself had found that an instrumentality forfeiture was an EFC "fine,"[244] it might be thought that instrumentality forfeitures would generally be recognized as "punishment for an offense." Yet, as noted above, the *Austin* Court relied in part on the existence of an innocent owner defense in the specific forfeiture statute at issue, which is not always a feature of civil forfeiture laws.[245] This has led to some questioning of whether civil instrumentality forfeitures are necessarily "fines" in the absence of such a defense.[246] However, in the federal system at least, this question was largely mooted by the adoption of the Civil Asset Forfeiture Reform Act in 2000,[247] which added an innocent owner defense to virtually all federal civil forfeiture provisions.[248]

Meanwhile, at the state level, a great many decisions treat instrumentality forfeitures as "fines," often without devoting any particular attention to the threshold question.[249] However, on

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that disgorgement is not "punitive sanction" if limited in amount to "net profits" and awarded to victims).

244. Austin v. United States, 509 U.S. 602, 604 (1993).

245. *Id.* at 619.

246. *See* United States v. 3814 NW Thurman St., 164 F.3d 1191, 1197, 1197 n.2 (9th Cir. 1999), *opinion amended on denial of reh'g*, 172 F.3d 689 (9th Cir. 1999), *superseded by statute on other grounds*, 18 U.S.C. § 983(d) (noting that both 21 U.S.C. § 881(a)(4)(C) and 18 U.S.C. § 981(a)(2) contain an innocent owner defense). *Bajakajian* itself cast some doubt on how broadly *Austin* should be read in treating civil forfeitures as EFC "fines." *See supra* text accompanying notes 159–60.

247. Civil Asset Forfeiture Reform Act (CAFRA) of 2000, 18 U.S.C. § 983.

248. *See id.* § 983(d); United States v. Ferro, 681 F.3d 1105, 1112 (9th Cir. 2012) (noting that CAFRA created a uniform innocent owner defense that applies to virtually all civil *in rem* forfeiture proceedings). The Ninth Circuit has accordingly concluded that all federal forfeitures, including instrumentality forfeitures, are covered by the EFC, with only the possible exception of contraband forfeitures. *Id.* at 1114. The Ninth Circuit's questioning of whether even contraband forfeitures escape EFC review is unusual. *See supra* note 231.

249. *See, e.g.*, Hitchcock v. State, 106 So. 3d 896, 900 (Ala. Civ. App. 2012) (analyzing forfeiture as a fine under EFC); *In re* 3567 E. Alvord Rd., 473 P.3d 353, 357–58 (Ariz. Ct. App. 2020); *In re* 319 E. Fairgrounds Drive, 71 P.3d 930, 934–36 (Ariz. Ct. App. 2003) (finding forfeiture statute at issue to be punitive, in part because of its protection for innocent owners); One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558, 564 (D.C. 1998) (noting that the legislative history of the forfeiture statute, in addition to its inclusion of an innocent owner exception, "compels the conclusion that the statute has at least

rather dubious grounds, at least one state appellate court has recently ruled that civil instrumentality forfeitures are not "fines."[250]

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some punitive aspect and, as such, comes within the protection of the Excessive Fines Clause"); Agresta v. City of Maitland, 159 So. 3d 876, 876 (Fla. Dist. Ct. App. 2015); Buchanan v. State, 737 S.E.2d 321, 323 (Ga. Ct. App. 2013); Nez Perce Cnty. Prosecuting Att'y v. Reese, 136 P.3d 364, 369 (Idaho Ct. App. 2006) (finding forfeiture statute at issue to be punitive, in part because of its protection for innocent owners); People v. One 2005 Acura RSX, 77 N.E.3d 783, 787 (Ill. App. Ct. 2017); State v. Timbs, 169 N.E.3d 361, 365 (Ind. 2021) (same); State v. Black 1999 Lexus ES300, 244 P.3d 1274, 1277 (Kan. Ct. App. 2011) (same); Emmett County v. $2,200.00 in U.S. Currency (*In re* Forfeiture of 5118 Indian Garden Rd.), 654 N.W.2d 646, 649 (Mich. Ct. App. 2002) (same); One Hundred Thirty-Seven Thousand Three Hundred Twenty-Five Dollars in U.S. Currency v. State *ex rel.* Pelahatchie Police Dep't, 204 So. 3d 317, 324 (Miss. Ct. App. 2016); Howard County v. One 1994 Chevrolet Corvette, 704 A.2d 455, 459–60 (Md. Ct. Spec. App. 1998) (finding that "a forfeiture action is a civil in rem proceeding subject to an 'excessive fines' analysis" (quoting Aravanis v. Somerset County, 664 A.2d 888, 891 (Md. 1995))); Levingston v. Washoe County *ex rel.* Sheriff of Washoe Cnty., 916 P.2d 163, 169 (Nev. 1996), *opinion modified on reh'g on other grounds*, 956 P.2d 84 (1998) (same); Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 291 (Pa. 2017) (same); State v. O'Malley, 206 N.E.3d 662, 673 (Ohio 2022) (finding forfeiture statute to be punitive because it is formally structured as in personam forfeiture); State v. Luong, 977 N.E.2d 1075, 1083 (Ohio Ct. App. 2012) (holding that EFC analysis is necessary because "the forfeiture of property is a form of punishment for a specified offense and thus is a 'fine' for purposes of the United States and Ohio Constitution"); Medlock v. One 1985 Jeep Cherokee, 470 S.E.2d 373, 377 (S.C. 1996) (concluding that forfeiture of instrumentality was not an excessive fine); State v. One 2011 White Forest River XLR Toy Hauler, 857 N.W.2d 427, 430–31 (S.D. 2014) (same); Tellevik v. 6717 100th St. S.W., 921 P.2d 1088, 1091 (Wash. Ct. App. 1996) (analyzing forfeiture under EFC); Dean v. State, 736 S.E.2d 40, 48 (W. Va. 2012) (same); State v. One 2013, Toyota Corolla/S/LE Four-Door, 872 N.W.2d 98, 102 n.5 (Wis. Ct. App. 2015) ("The State does not dispute that the Excessive Fines Clause is applicable to this case."); State v. Bergquist, 641 N.W.2d 179, 182–83 (Wis. Ct. App. 2002) (finding forfeiture statute at issue to be punitive, in part because of its protection for innocent owners).

250. *See* Ahmad v. State, 615 S.W.3d 496, 508 (Tex. App. 2020) ("Because the currency and property seized from Ahmad was seized as an instrumentality of the gambling offenses, and not as a fine intended to punish him, we need not reach the issue of proportionality."). Curiously, the court's EFC analysis in *Ahmad* seemed to rest entirely on Justice Scalia's concurring opinion in *Austin*. *Id.* at 507–08. Whereas the EFC Applicable law section in *Ahmad* cited *Robinson v. California*, 370 U.S. 660, 675 (1962) (applying EFC to states through the Fourteenth Amendment) and *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (discussing proportionality test), the analysis section did not cite, let alone discuss, any U.S. Supreme Court majority opinion. 615 S.W.3d at 506–08. Moreover, *Ahmad* seemed to misunderstand the point of Scalia's opinion, which

D. RESTITUTION

Lower courts have divided on the question of whether restitution is subject to the EFC.[251] Notably, this divide has persisted even following the favorable dicta in *Paroline*.[252]

Restitution presents difficulties for both the "payment to a sovereign" and the "punishment for an offense" prongs of the "fine" test. The first prong has gotten less attention in the lower courts, but a few cases hold, or at least suggest, that restitution lies beyond the EFC's reach because payment is made to a private party, rather than to the state.[253] By contrast, in one of the few cases explicitly holding to the contrary, the Iowa Supreme Court asserted, "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."[254] The court thus foreshadowed

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was to distinguish instrumentality forfeitures for purposes of excessiveness review, not for purposes of determining what constitutes a fine. *Compare* Austin v. United States, 509 U.S. 602, 623 (1993) (Scalia, J., concurring) ("I write separately to explain why I consider this forfeiture a fine, and to point out that the excessiveness inquiry for statutory *in rem* forfeitures is different from the usual excessiveness inquiry."), *with Ahmad*, 615 S.W.3d at 507 ("As Justice Scalia noted in his concurring opinion in Austin, 'to constitute a fine under the Eighth Amendment, [] the forfeiture must constitute punishment.'" (alteration in original) (quoting *Austin*, 509 U.S. at 623 (Scalia, J., concurring))). It might be noted that a different Texas appellate court recently rejected an EFC objection to a civil instrumentality forfeiture at the excessiveness stage of the analysis without explicitly commenting one way or another about whether the forfeiture was a fine for EFC purposes. 1812 Franklin St. v. State, 614 S.W.3d 179, 188–89 (Tex. App. 2020) (applying *Bajakajian* factors in forfeiture analysis).

251. *Compare, e.g.*, United States v. Dubose, 146 F.3d 1141, 1145 (9th Cir. 1998) (analyzing restitution under EFC), *and* State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000) (holding that because restitution serves both a remedial and punitive purpose, it is subject to EFC), *with* State v. Cottrell, 271 P.3d 1243, 1253–54 (Idaho Ct. App. 2012) (finding that because the primary purpose of restitution is remedial and not punitive, it is not subject to EFC).

252. *See, e.g.*, State v. Johnson, 430 P.3d 494, 501 (Mont. 2018) (holding that EFC does not apply to restitution); People v. Orbital Publ'g Grp., Inc., 193 A.D.3d 661, 661 (N.Y. App. Div. 2021).

253. *See, e.g.*, State v. DeAngelis, 747 A.2d 289, 296 (N.J. Super. Ct. App. Div. 2000) (holding that EFC does not apply where restitution is intended to remediate, not punish, defendants); Benton v. State, 711 A.2d 792, 799 (Del. 1998) (same); State v. Rey, 905 N.W.2d 490, 496 (Minn. 2018) (same); *cf.* United States v. Gozes-Wagner, 977 F.3d 323, 347–48 (5th Cir. 2020) (rejecting, in plain error review, defendant's claim that restitution award violated EFC).

254. *Izzolena*, 609 N.W.2d at 549.

Paroline's later suggestion that it would suffice if a payment were made at the state's behest, regardless of who the payee was.[255]

As for the second prong, a number of cases find restitution to be remedial and hence beyond the reach of the EFC.[256] The influential decision of the Idaho Court of Appeals in *State v. Cottrell* is illustrative.[257] Notably, the *Cottrell* court seems to have misunderstood or disregarded the Supreme Court's decision in *Austin*, which *Cottrell* only cited once in passing.[258] Rather than employing, or even quoting, the *Austin* test for what counts as "punishment" under the EFC (that is, does the payment "*solely* . . . serve a remedial purpose"?),[259] *Cottrell* framed the question as simply whether the payments at issue were "punitive or remedial"[260]—and, ultimately, whether restitution in the case was "*more* about victim assistance than it is about criminal punishment."[261] In adopting this approach, *Cottrell* effectively used the different, more restrictive test for "punishment" that the Supreme Court has adopted for purposes of the Double Jeopardy and *Ex Post Facto* Clauses.[262] Indeed, *Cottrell* explicitly relied in

255. Paroline v. United States, 572 U.S. 434, 456 (2014) (affirming that restitution, while different from traditional fines, still implicates "the prosecutorial powers of government" (quoting Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989))).

256. *See, e.g.*, *Benton*, 711 A.2d at 799 (concluding that restitution was not a "fine," because its purpose was remedial and compensatory rather than punitive); *Cottrell*, 271 P.3d at 1254 (same); *Rey*, 905 N.W.2d at 496–97 (same); *Johnson*, 430 P.3d at 501 (same); *DeAngelis*, 747 A.2d at 296 (same); *Orbital Publ'g Grp.*, 193 A.D.3d at 661 (rejecting EFC analysis for criminal restitution).

Additionally, several other cases reject EFC challenges to restitution awards on the ground that a restitution award based on a victim's losses is inherently proportional. *See, e.g.*, United States v. Beecroft, 825 F.3d 991, 997 (9th Cir. 2016); United States v. Newell, 658 F.3d 1, 35 (1st Cir. 2011); United States v. Arledge, 553 F.3d 881, 899 (5th Cir. 2008). Since these cases discuss proportionality, they seem to be reaching the excessiveness inquiry, although this is not made entirely clear in the opinions, and, in any event, the categorical nature of the holdings means that they are effectively threshold-level decisions.

257. In particular, the Montana Supreme Court cited *Cottrell* repeatedly in reaching a similar holding in *State v. Johnson*. *See* 430 P.3d at 500–01.

258. *Cottrell*, 271 P.3d at 1250.

259. Austin v. United States, 509 U.S. 602, 610 (1993) (emphasis added).

260. *Cottrell*, 271 P.3d at 1250 ("[T]he first step in any question regarding excessive fines is to determine whether payments are punitive or remedial.").

261. *Id.* at 1253 (emphasis added).

262. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (discussing Double Jeopardy and *Ex Post Facto* Clause tests).

its analysis on the Supreme Court's decision in *Hudson v. United States*, which was a double jeopardy case.[263]

In determining that the Idaho restitution statute had a remedial purpose, *Cottrell* emphasized various procedural aspects of the statute that gave it a civil character, such as the use of a preponderance of the evidence burden of proof and the victim's ability to enforce orders in the same way as an ordinary civil judgment.[264] Left unaddressed by the court was the fact that the forfeiture statute at issue in *Austin* was *entirely* civil in nature, but was still found to be punitive by the Supreme Court.[265] Moreover, despite the civil aspects noted by *Cottrell*, the Idaho statute made criminal conviction a precondition to restitution,[266] which arguably required a "punishment" finding under *Bajakajian*.[267]

Notably, *Cottrell* conceded that restitution orders "promote the rehabilitative and deterrent purposes of the criminal law."[268] Based on the teachings of *Austin* and *Bajakajian* about how to handle statutes with mixed remedial and punitive purposes, this concession should have been sufficient to bring the Idaho statute within the EFC's coverage. Yet, because the "*primary* purpose" of the statute was found to be remedial, the court denied the defendant's EFC claim without performing an excessiveness analysis.[269]

It might be observed that *Cottrell* is hardly unique among the lower court restitution cases in failing to engage persuasively (or sometimes at all) with the relevant Supreme Court decisions.[270]

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263. *Cottrell*, 271 P.3d at 1251–53 (citing Hudson v. United States, 522 U.S. 93 (1997)). The Supreme Court has made clear that the EFC and double jeopardy tests for what counts as "punishment" are different. *See* United States v. Ursery, 518 U.S. 267, 287 (1996) ("We acknowledged in *Austin* that our categorical approach under the Excessive Fines Clause was wholly distinct from the case-by-case approach of [an earlier double jeopardy case], and we explained that the difference in approach was based in a significant difference between the purposes of our analysis under each constitutional provision.").

264. *Cottrell*, 271 P.3d at 1253.

265. Austin v. United States, 509 U.S. 602, 620–22 (1993).

266. *Cottrell*, 271 P.3d at 1247.

267. *See, e.g.*, *supra* note 154 and accompanying text.

268. *Cottrell*, 271 P.3d at 1253.

269. *Id.* at 1253–54 (emphasis added).

270. *See, e.g.*, United States v. Gozes-Wagner, 977 F.3d 323, 347–48 (5th Cir. 2020) (citing *Paroline* as authority for the proposition that "the Supreme Court

Although several cases subject restitution awards to excessiveness analysis, few provide extended discussion of whether or how restitution satisfied the threshold "punishment for an offense" requirement.[271] One of the few cases to provide this analysis explicitly is the Iowa Supreme Court's opinion in *Izzolena*.[272]

Like *Cottrell*, *Izzolena* observed that restitution serves multiple purposes, including purposes that are typically associated with criminal punishment (that is, rehabilitation and deterrence).[273] Unlike *Cottrell*, *Izzolena* recognized that *Austin* required a payment to be treated as punishment for EFC purposes if it was punitive "at least in part."[274] *Izzolena* further explicitly rejected the more demanding double jeopardy test for "punishment" as inapplicable to EFC claims.[275]

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has never held that the Excessive Fines Clause applies to *restitution* awards," even though *Paroline* indicated that EFC would apply); State v. Rey, 905 N.W.2d 490, 496–97 (Minn. 2018) (holding that restitution is not a "fine" based on the legislature's use of "restitution" label, the fact that payments will be made to victims, and the "modest amount" involved; not discussing or citing *Austin* or *Paroline*); State v. Johnson, 430 P.3d 494 (Mont. 2018) (citing *Cottrell* repeatedly, but not citing or discussing either *Austin* or *Paroline*); People v. Orbital Publ'g Grp., Inc., 193 A.D.3d 661, 662 (N.Y. App. Div. 2021) (relying on *Browning-Ferris* and unpublished Eleventh Circuit opinion, but not citing or discussing *Austin*, *Bajakajian*, or *Paroline*).

271. *See, e.g.*, United States v. Lessner, 498 F.3d 185, 205 (3d Cir. 2007) (assuming, *arguendo*, that EFC applies to restitution and finding restitution award not excessive); United States v. Newsome, 322 F.3d 328, 342 (4th Cir. 2003) (applying excessiveness test to restitution award without discussing whether restitution was a "fine"). Additionally, another case has echoed the *Paroline* dicta in suggesting that there might be constitutional problems with requiring a "defendant to compensate the victim for injuries for which the defendant bears no responsibility." People v. Martinez, 394 P.3d 1066, 1071 (Cal. 2017).

In a similar vein, a California appeals court has indicated that "restitution fines" are subject to the EFC. People v. Aviles, 252 Cal. Rptr. 3d 727, 739–40 (Cal. Ct. App. 2019). Restitution fines differ from conventional restitution inasmuch as they are paid into a state victim compensation fund, rather than directly to a victim. CAL. PENAL CODE § 1202.4(e) (West 2022).

272. State v. Izzolena, 609 N.W.2d 541, 547–49 (Iowa 2000). For another relatively sustained analysis reaching the same conclusion, see United States v. Dubose, 146 F.3d 1141, 1144–45 (9th Cir. 1998).

273. *Izzolena*, 609 N.W.2d at 548.

274. *Id.*

275. *Id.* at 548 n.5. *Izzolena* also relied on various specific aspects of the particular restitution statute at issue in the case, including the nondischargeability in bankruptcy of restitution awards, which also pointed to a punitive purpose. *Id.* at 548–49.

E. SUMMARY

It is widely, albeit not quite universally, accepted in the lower court caselaw that instrumentality forfeitures and fines (both criminal and civil) count as "fines" for EFC purposes. However, a caveat is warranted as to civil fines. Few of the civil cases deal with high-volume exactions; most are in the nature of white-collar cases. The Ninth Circuit's recent *Pimentel* decision—holding that municipal parking tickets are EFC fines—thus represents a remarkable development that potentially threatens government coffers in a far more profound fashion than any earlier civil fine cases.[276] It remains to be seen whether any other jurisdictions will follow suit in bringing high-volume civil money penalties within EFC coverage.[277]

Restitution and proceeds forfeitures present a markedly different picture. As to both, there are now longstanding interjurisdictional divides, seemingly ripe for intervention by the United States Supreme Court. Restitution and proceeds forfeiture raise the question of whether to take at face value the Supreme Court's indications in *Austin*, *Bajakajian*, and *Paroline* that even a secondary punitive purpose suffices to make an exaction a fine. Restitution and *criminal* proceeds forfeiture also raise the question of how much weight to attach to criminal form. And, of course, restitution also tests the meaning of the "payment to a sovereign" prong of the threshold inquiry.[278]

Finally, fees present the greatest area of uncertainty. Although the lower courts have now addressed a substantial number of EFC challenges to fees, nearly every case deals with a different kind of fee, and the analysis in each is tied at least to some extent to the particular fee at issue.[279] This makes broad generalizations difficult. Moreover, with many thousands of distinctive types of fees in use in the United States today, the extant caselaw barely scratches the surface of potential EFC litigation. That said, lower courts have not proven especially receptive thus

276. Pimentel v. City of Los Angeles, 974 F.3d 917, 922 (9th Cir. 2020).

277. Familiar race and class dynamics suggest that EFC protections may prove less robust outside the white-collar domain. *Cf.* Russell M. Gold, *Power over Procedure*, 57 WAKE FOREST L. REV. 51, 56–57 (2022) (arguing that greater pretrial protections for civil than for criminal defendants can be explained by fact that civil defendants tend to be whiter and wealthier).

278. *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (setting forth "payment to a sovereign" prong).

279. *See supra* notes 197–206 and accompanying text.

far to challenges to fees. In particular, courts have shown little willingness to subject state representations of a nonpunitive purpose to critical analysis. Largely untested is the suggestion that fees must be reasonable in amount in order to be treated as nonpunitive.[280] Also still open is the question of whether fees payable to private government contractors may count as "fines." And, of course, many fees raise questions about the sufficiency of a criminal form. For those hoping to see more robust EFC regulation of fees, the most hopeful recent development may be the Washington Supreme Court's decision in *City of Seattle v. Long*,[281] which, as discussed above, applied the "punitive in part" test in an unusually aggressive way in holding that fees relating to vehicle impoundment were EFC fines.[282] However, this remains an outlier case.

V. MEANING OF "FINE": KEY DOCTRINAL QUESTIONS

Synthesizing the lower court caselaw, this Part identifies and discusses seven key doctrinal questions that will help to determine whether and to what extent the Excessive Fines Clause can serve as a meaningful limitation on LFOs.

A. MUST THE PAYMENT GO INTO GOVERNMENT COFFERS?

A penalty may be economically costly to a defendant without delivering any corresponding direct fiscal benefit to the government. Restitution provides the paradigmatic illustration. If a penalty must deliver such a fiscal benefit in order to count as a fine, then restitution generally lies beyond regulation by the EFC. Fees payable to private government contractors, such as probation supervision firms, might also be seen in the same light.

The Supreme Court's decision in *Browning-Ferris* sets the terms of the debate. In rejecting a claim that the EFC covered punitive damages awarded in litigation between private parties, the Court emphasized that "the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[283] This observation begs the question, what if the

280. *Supra* Part IV.A.

281. *Cf.* City of Seattle v. Long, 493 P.3d 94, 110 (Wash. 2021) (holding that impoundment fees were both remedial and punitive).

282. *See supra* Part IV.A.

283. *Browning-Ferris*, 492 U.S. at 264.

government *has* prosecuted the action—would that be sufficient to trigger EFC protections without regard to whether the government has a right to receive a share of the proceeds? Three decades later, in that brief, Delphic passage from *Paroline*, the Court seemed to answer in the affirmative.[284] Still, we lack a clear holding from the Court on this important question. In the absence of such a holding, some lower courts continue to take the position that payments to private parties lie categorically beyond the EFC's reach.[285]

The question might be answered by reference to the EFC's historical purpose or purposes. Borrowed from the English Bill of Rights, the Clause represented a backlash against perceived abuses of the Stuart kings.[286] Prominent among these abuses was the use of fines to raise revenue,[287] thereby bypassing normal legislative processes and political checks on taxation. To the extent that the EFC is seen as primarily concerned with maintaining the integrity and fairness of government revenue-generation processes, then it might make sense to limit the EFC to penalties that deliver a fiscal benefit to government.

On the other hand, the Stuart abuses also included the use of fines to harass political opponents and indefinitely detain those who were unable to pay.[288] Such misuse of government power for partisan ends does not necessarily entail any fiscal benefit to the government; indeed, setting a fine beyond the defendant's ability to pay *cannot* benefit the government in a fiscal sense.

If the relevant history is also seen to include that of the Fourteenth Amendment—which is, after all, the constitutional mechanism by which the Federal EFC is made binding on the states—then the case for a broader view of the EFC's reach becomes even stronger. As the Court pointed out in *Timbs*, the Fourteenth Amendment was, in part, a response to the post-Civil War Black Codes in the South, which, through a system of

284. *See* Paroline v. United States, 572 U.S. 434, 456 (2014) (finding restitution relies on the prosecutorial powers of the government).

285. *See* cases cited *supra* note 226.

286. *See Browning-Ferris*, 492 U.S. at 267 ("The Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights.").

287. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) ("The 17th century Stuart kings, in particular, were criticized for using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay.").

288. *Id.*

excessive fines and other oppressive measures, aimed "to subjugate newly freed slaves and maintain the prewar racial hierarchy."[289] The Fourteenth Amendment thus reflects an intent to protect the poor and marginalized from legal measures that would hold them indefinitely in a subjugated status. If seen in this liberationist light, the EFC would not be limited to regulating penalties that fiscally benefit the government; a penalty that imposes economic costs on individuals who are already poor will tend to cement their inferior socioeconomic status regardless of whether there is some corresponding economic benefit to the state.

Additionally, it should be noted that payments to private parties may deliver *indirect* fiscal benefits to the government. For instance, the fees paid by private parties to government contractors likely reduce the price the contractors demand of government for their services. More subtly, there may also be indirect fiscal benefits from *restitution*. As Professor Beth Colgan observes,

> Crime victims are, more often than not, poor. 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. A payment of restitution helps the government avoid those expenses and the tax increases necessary to accommodate them.[290]

If indirect fiscal benefits are taken into account, then the "payment to a sovereign" prong need pose no categorical barrier to EFC coverage of restitution and fees paid to private parties.

B. IS CRIMINAL FORM SUFFICIENT TO ESTABLISH PUNITIVE PURPOSE?

By extending EFC protections to civil forfeiture in *Austin*, the Court made clear that a criminal form is not *necessary* for an exaction to be regarded as punitive but left open whether a criminal form is *sufficient*. Some of the Court's analysis in *Bajakajian*

289. *Id.*

290. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 45 (2018) (footnotes omitted). Professor Colgan further notes that, in some jurisdictions, government agencies may receive direct benefits from restitution to the extent that they are permitted to retain interest on restitution amounts, impose collection fees, or retain restitution payments when the victim cannot be found. *Id.* at 45–46.

rather strongly implied an answer in the affirmative,[291] and many subsequent lower court decisions seem in the same spirit.[292] Nonetheless, the categorical sufficiency of a criminal form can hardly be regarded as a firmly established feature of EFC doctrine. Indeed, as we have seen, any number of lower court decisions do not view criminal form as dispositive.[293]

The sufficiency of criminal form has implications, in particular, for restitution, criminal forfeiture, and many fees. As to restitution, assuming the payment to a sovereign prong could be satisfied, EFC regulation would be assured if restitution's criminal form were sufficient. As to criminal forfeiture, lingering questions over whether proceeds forfeitures are punitive would be resolved in the affirmative. As to fees, many or all of those that are imposed in criminal cases would be established as punitive.

Treating form as controlling in these circumstances offers both the advantages and the disadvantages of legal formalism generally. The formalist approach obviates the need for time-consuming, unpredictable statute-by-statute explorations of legislative intent, thereby often providing relatively clear, straightforward answers about the EFC's reach.[294] However, formalism can seem wooden and clumsy, sometimes producing results that defy common sense. Indeed, treating restitution as punitive might strike some people as just such a counterintuitive result if the formalist approach were adopted. Yet, on the other hand, the clumsiness of formalism may be of less concern in this than in some other legal contexts. In particular, it should be recalled that treating an exaction as a fine does not assure the defendant of any relief, but merely opens the door for an excessiveness review—a review that might be more fully responsive to the equities of the situation (e.g., an injured victim's pressing need for compensation).

As is often the case with formalist approaches, a seemingly straightforward rule—if criminal in form, any financial exaction counts as an EFC "fine"—masks certain ambiguities that would

291. *See, e.g.*, discussion *supra* Parts III.B.2, III.C.

292. *See, e.g.*, cases cited *supra* note 180 and accompanying text.

293. *See, e.g.*, *supra* note 207 and accompanying text.

294. I use the term "formalism" here as synonymous with rule-based decision making. For a discussion of this understanding of formalism, see Thomas B. Nachbar, *Twenty-First Century Formalism*, 75 U. MIA. L. REV. 113, 126–30 (2020).

have to be resolved for application purposes. Consider the formulation in *Bajakajian*, the most formalist of the Court's EFC decisions. The Court professed to have "little trouble" finding the criminal forfeiture at issue to be punitive because it is "imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency, but only upon a person who has himself been convicted of a § 5316 reporting violation."[295] This language might reasonably be understood to establish three conditions that, if satisfied, categorically establish an exaction as punitive:

1) the exaction is imposed at the "culmination of a criminal proceeding";
2) the exaction is conditioned on a criminal conviction; and
3) the conviction was of the same person who is made to bear the exaction.

Upon reflection, the *Bajakajian* formulation begs numerous questions—broadly speaking, what exactly are the parameters of key terms like "criminal proceeding" and "conviction," and are *all* three conditions truly necessary in order for an exaction to be regarded as criminal in form? What, for instance, of a fee that is imposed during, but not at the "culmination," of a criminal proceeding, such as fees charged for pretrial jailing or an application fee for a public defender? What about fees imposed long after sentencing as part of the supervision process, such as the fees for electronic monitoring that are ordered as a sanction for supervision violations? Or fees imposed in the absence of criminal charges, but nonetheless very much in the shadow of an *anticipated* criminal case, such as fees for a pre-charge diversion program? What about quasi-criminal proceedings, such as those conducted in juvenile or traffic courts? Might a nominally civil proceeding (e.g., a civil forfeiture case) be regarded as criminal in form if the government must prove a set of elements that would also serve to establish a person's guilt of a crime?

To help answer such questions—and also, for that matter, the broader question of whether a criminal form *ought* to be regarded as categorically sufficient—it might help to have some working theory as to *why* the EFC's coverage is limited to

295. United States v. Bajakajian, 524 U.S. 321, 328 (1998).

exactions that constitute "punishment for some offense." In other words, why not subject *all* exactions by the state to the excessiveness review mandated by the Eighth Amendment? Aside from a few desultory citations to historical sources, the Supreme Court's sparse EFC jurisprudence nowhere directly addresses this question.[296] However, two possible answers readily suggest themselves.

First, exactions that are imposed through the criminal-legal system, in contrast to ordinary civil debts, place a person in jeopardy of incarceration for nonpayment.[297] The inherently higher stakes when such exactions are demanded by the state might be seen as warranting special constitutional protections through the EFC.[298] Moreover, to recognize categorical EFC coverage for

296. The "punishment for some offense" language comes from *Browning-Ferris*. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989). In support of this understanding of the EFC's reach, the Court cited four sources: Coke's *Institutes* and three law dictionaries published in 1771, 1836, and 1852. *Id.* at 265 n.6. All four sources were relied on for their definitions of "fine," but none supplied a principled reason for limiting Eighth Amendment protections to what was covered by these definitions. Moreover, the legal dictionaries employed a notably broader definition of "fine" than did the Court that relied on them: "*amends*, pecuniary punishment, *or recompence* for an offense committed against the King and his laws, or against the Lord of a manor." *Id.* (emphasis added) (quoting *Fines for Offences*, 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (2d ed. 1771) (unpaginated)) (noting that the same definition was used in the 1836 and 1852 dictionaries). This definition suggests that the tendency in some of the caselaw to draw a strict punishment-compensation dichotomy may not be in accord with the original understanding of "fine."

Citing other historical sources, Professor Colgan has argued that the punitive-purpose restriction is inconsistent with the original meaning of the Excessive Fines Clause. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 310–19 (2014). For present purposes, though, I will assume that the Court will continue to adhere to its "punishment for some offense" formula.

297. To be sure, ordinary civil debts were *historically* enforceable through incarceration—i.e., "debtors' prison"—but this recourse for ordinary debt was abolished in the United States through state constitutional amendments and statutory reforms in the nineteenth century. *See* Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1035–36 (2016) (noting that the "abolition" of debtors' prisons narrowly applied to civil debts arising under contract and did not encompass debtors evading payment or monetary obligations arising under tort or crime). Thus, sharper distinctions could be drawn today between monetary obligations that are or are not enforceable through incarceration.

298. In the same spirit, in holding that court fees constitute punishment for equal protection and due process purposes, a California appellate court has

all exactions that carry a risk of incarceration would resonate with the historical concern—noted by the Court—regarding the use by the Stuart kings of excessive fines to secure the incarceration of their political opponents.[299]

Second, since criminal convictions—and, indeed, even just criminal *charges*—often carry a heavy stigma in our society, exactions that result from a criminal conviction (or perhaps even a charge alone) might normally be expected to present special challenges for the obligor. For instance, the person's tainted reputation might adversely affect his or her employment, credit, business opportunities, housing, and the like.[300] Moreover, a person's entanglement in the criminal-legal system is apt to mean that the person will be regarded quite unsympathetically by the public, which undermines the effectiveness of the political checks that would normally help to keep state exactions within reasonable bounds.[301]

These two sets of concerns—incarceration risk and stigma—may justify special constitutional protections when exactions are imposed through the criminal-legal system. Thus, for exactions that are not formally part of a criminal sentence, we might focus on whether there are nonetheless incarceration risks or special stigma concerns when determining whether EFC protections should apply. This elaboration of *Bajakajian*'s formalistic approach would draw into EFC coverage not only the exactions that satisfy all three of the *Bajakajian* criteria, but also a host of additional exactions, especially fees, that have some connection to

observed that the "additional, potentially devastating consequences suffered only by indigent persons" for nonpayment, including "aggressive collection tactics" and the possibility of incarceration, "in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay." People v. Dueñas, 242 Cal. Rptr. 3d 268, 276–77 (Cal. Ct. App. 2019). Shortly thereafter, another California appellate court relied on this reasoning in holding that the same court fees were "fines" for EFC purposes. *See* People v. Aviles, 252 Cal. Rptr. 3d 727, 739–41 (Cal. Ct. App. 2019).

299. *See* Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

300. For a more detailed discussion of the impact of conviction-related stigma, see Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

301. *See, e.g.*, Jason Schnittker & Michael Massoglia, *A Sociocognitive Approach to Studying the Effects of Incarceration*, 2015 WIS. L. REV. 349, 359–64 (describing common stereotypes of incarcerated individuals).

the criminal-legal system even though not formally part of a criminal sentence.[302]

C. DID THE COURT MEAN WHAT IT SAID ABOUT MIXED PURPOSES (AND WILL LOWER COURTS PAY ATTENTION)?

To the extent that the courts do not embrace a formalistic EFC trigger—and, even if they do, for purposes of cases that do not fall within the formalistic rule—an alternative or supplemental *functional* test seems necessary. And, indeed, in *Austin* the Supreme Court expressly gave us such a test: "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[303] Then, in *Bajakajian*, the Court expressly reaffirmed that even if an exaction is "remedial in some way," it still comes "within the purview of the Excessive Fines Clause" if it is even "punitive in part."[304] The message seems clear: for exactions with multiple purposes, the exaction must be regarded as an EFC "fine" if *any* purpose is punitive, i.e., retributive or deterrent, in nature.[305]

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302. *See supra* text accompanying note 295 (identifying the *Bajakajian* criteria).

303. Austin v. United States, 509 U.S. 602, 610 (1993) (emphasis added) (quoting United States v. Halper, 490 U.S. 435, 448 (1989), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997)).

304. United States v. Bajakajian, 524 U.S. 321, 329 n.4 (1998).

305. Some uncertainty might be noted, however, with regard to the *methodology* used to identify the purpose or purposes of an exaction. In *Austin*, the Court provided lengthy discussion of the specific features of the forfeiture statute at issue and its legislative history. 509 U.S. at 619–20. This contrasts sharply with the broadly categorical assessment of the purposes of restitution in *Paroline*, which included no consideration of statutory specifics. Paroline v. United States, 572 U.S. 434, 456 (2014). Similarly, in *Bajakajian*, the Court found the forfeiture statute at issue to be punitive with little detailed consideration of statutory specifics and no discussion of legislative history. 524 U.S. at 328. One finds similarly divergent methodologies in the lower court cases. For illustrations of courts using a more statute-specific analysis, see, for example, State v. Izzolena, 609 N.W.2d 541, 548–49 (Iowa 2000) (restitution); One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558, 563 (D.C. 1998) (civil forfeiture). For a more broadly categorical treatment, see, for example, Benton v. State, 711 A.2d 792, 799 (Del. 1998) (restitution); Busbee v. State, Div. of Ret., 685 So. 2d 914, 918 (Fla. Dist. Ct. App. 1996) (forfeiture of retirement benefits).

The practical implications of what might be called the "mixed-purposes" or "partly punitive" test are striking. Read for all its worth, the test would bring within the EFC's coverage a vast range of exactions that are not normally regarded as criminal, since lawmakers frequently aim to deter undesirable behavior through civil penalties. Think, for instance, of the parking tickets at issue in *Pimentel*,[306] which were surely intended to deter parking violations. Moreover, even exactions that plainly have a compensatory purpose may still be at least "partly punitive," as the Iowa Supreme Court found with restitution in *Izzolena*.[307]

Despite the seeming clarity of the pronouncements in *Austin* and *Bajakajian*, lower courts have often struggled to recognize that a merely secondary punitive purpose suffices.[308] Notably, in EFC cases, lower courts often rely on double jeopardy cases without seeming to realize that the test for what counts as "punishment" under the Double Jeopardy Clause is more demanding than the EFC test.[309]

Truth be told, the U.S. Supreme Court may bear some responsibility for the confusion. After all, the EFC test adopted by the Court in *Austin* actually came from an earlier double jeopardy case, *United States v. Halper*.[310] The *Austin* Court simply seemed to assume—perhaps not unreasonably—that the concept of "punishment" would carry the same meaning across constitutional doctrines. However, just four years later, in *Hudson v. United States*, the Court rejected use of the *Halper* test for double jeopardy purposes.[311] The Court reasoned that the "partly punitive" test subjected too many penalties to the strictures of the Double Jeopardy Clause, for, the Court asserted, "*all* civil

306. Pimentel v. City of Los Angeles, 974 F.3d 917, 922 (9th Cir. 2020).

307. *See Izzolena*, 609 N.W.2d at 548 (acknowledging the test for whether a sanction is a fine under the Excessive Fines Clause relies at least in part on the sanction being punitive).

308. *See, e.g.*, *supra* Part IV.D (discussing State v. Cottrell, 271 P.3d 1243, 1253 (Idaho Ct. App. 2012)).

309. *E.g.*, *supra* text accompanying notes 262–63.

310. *See Austin*, 509 U.S. at 610 (quoting United States v. Halper, 490 U.S. 435, 448 (1989), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997)).

311. 522 U.S. 93, 101–02 (1997) ("We believe that *Halper*'s deviation from longstanding double jeopardy principles was ill considered. As subsequent cases have demonstrated, *Halper*'s test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable.").

penalties have some deterrent effect."[312] Yet, despite its sharp criticism of the *Halper* test, *Hudson* did not indicate that the test was improper to use in the *EFC* context. To the contrary, *Hudson* expressly stated that the EFC would still be available to address "some of the ills at which *Halper* was directed" (i.e., excessive civil sanctions), citing *Austin*.[313] And, of course, to whatever extent *Hudson* did cast doubt on *Austin*'s use of the *Halper* "partly punitive" test for EFC purposes, those doubts were laid to rest by *Bajakajian* the following year. However, it remains difficult to appreciate the nature of the divergence between the double jeopardy analysis and the EFC analysis without carefully reading the whole line of Supreme Court cases from *Halper* through *Bajakajian*. If the Court really meant what it said about the treatment of mixed-purpose scenarios in *Austin* and *Bajakajian*, the Court would do well in its next EFC case to highlight and more fully explain the divergence of its double jeopardy and EFC tests.

D. DO PUNITIVE PURPOSES ENCOMPASS ALL CRIME-PREVENTION PURPOSES?

As anyone with even a passing familiarity with punishment theory will recognize, there is an inherent ambiguity in the concept of a "punitive" purpose. On one longstanding view, the singular legitimate purpose of punishment is retribution—that is, imposing on the wrongdoer an adverse consequence that is proportionate in its severity to the wrongdoer's culpability in committing their criminal act.[314] This is a fundamentally backward-looking view of punishment. Other views—often labeled "utilitarian" or "hybrid" theories of punishment—permit or require punishment to aim for different, forward-looking objectives.[315] In particular, these views tend to emphasize crime-prevention as a dominant purpose of punishment.[316]

Against this backdrop, the Supreme Court's formulation of what counts as "punitive" seems a bit odd and in need of clarification. In *Austin*, the Court asserted, "'[A] civil sanction that . . .

312. *Id.* at 102 (emphasis added).

313. *Id.*

314. WAYNE A. LOGAN & MICHAEL M. O'HEAR, SENTENCING LAW, POLICY AND PRACTICE 22 (2022).

315. *Id.* at 4.

316. *Id.*

can only be explained as also serving *either retributive or deterrent purposes*, is punishment, as we have come to understand the term.'"[317] The reference to deterrent purposes indicates that the Court does not limit "punishment" to backward-looking sanctions. It is unclear, though, why the non-retributive purposes that qualify as punitive seem limited to deterrence. Classically, the forward-looking, crime-preventive purposes of punishment also include incapacitation and rehabilitation.[318] We are left to wonder, if a financial exaction is intended to achieve one of these purposes, should that exaction be regarded as punitive or not?

The question has implications for the status of restitution, which has been recognized to have a partly rehabilitative purpose.[319] Indeed, in its decision that restitution should be treated as a fine for EFC purposes, the Iowa Supreme Court cited, among other considerations, the restitution's rehabilitative aims.[320] In sharp contrast, an appellate court in New Jersey has determined that restitution is not a fine precisely because "restitution is not meant to punish, but rather to rehabilitate the criminal."[321] Likewise, the Third Circuit has indicated that "pay to stay" fees imposed on jail inmates are not EFC "fines" because they are "designed to teach financial responsibility" and are thus "imposed for rehabilitative and not punitive purposes."[322]

The question also has implications for the status of instrumentality forfeitures, which serve an incapacitative purpose by separating the prospective criminal from the means of

317. Austin v. United States, 509 U.S. 602, 610 (1993) (emphasis added) (quoting United States v. Halper, 490 U.S. 435, 448 (1989), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997)).

318. LOGAN & O'HEAR, *supra* note 314, at 5.

319. *See* Kelly v. Robinson, 479 U.S. 36, 49 n.10 (1986) ("Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.").

320. *See* State v. Izzolena, 609 N.W. 2d 541, 548 (Iowa 2000).

321. State v. DeAngelis, 747 A.2d 289, 296 (N.J. Super. Ct. App. Div. 2000).

322. Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 420 (3d Cir. 2000).

committing the crime.[323] Also at issue are the fees that are charged for rehabilitative programming.[324]

There might be some principled grounds for limiting the understanding of "punishment" to retribution, which could be seen as serving a more distinctive (and problematic[325]) legislative purpose than crime prevention. However, given the Supreme Court's repeated recognition that deterrence also counts as a punitive purpose, it is hard to see any good reason to exclude other equally well-established means of preventing crime from the punitive category.[326]

E. DOES "PUNISHMENT FOR AN OFFENSE" ENCOMPASS PUNISHMENT FOR ANY UNLAWFUL CONDUCT, OR ONLY CRIMINAL CONDUCT?

As discussed above, the view that civil money penalties are covered by the EFC seems broadly accepted in the lower courts.[327] However, the Ninth Circuit's recent *Pimentel* decision, which holds that parking tickets are EFC "fines," may put pressure on this position, potentially opening up to EFC litigation a vast range of routine, low-level civil penalties that are in some jurisdictions an important source of funding for local government. One possible focal point in future litigation may be whether proof of some *criminal* activity, as opposed to *unlawful* activity more broadly, must be the basis of an exaction for it to

323. For instance, taking from a small-time drug importer the speedboat that she used to bring drugs into the United States might prevent her from further smuggling.

324. *See, e.g.*, State v. Wilcenski, 827 N.W.2d 642, 646 (Wis. Ct. App. 2013) (discussing the requirement that defendants in drug and alcohol treatment programs must pay fees for their participation).

325. *See, e.g.*, James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 106 (2003) ("The very activity of 'blaming' tends to excite people, and indeed to bring out unexpectedly savage and vindictive impulses.").

326. It might be noted that, in a different Eighth Amendment context (that is, proportionality review under the Cruel and Unusual Punishments Clause), the Court has recognized the four purposes discussed here as the "goals of penal sanctions" that are "legitimate." *See* Graham v. Florida, 560 U.S. 48, 71 (2010) (referencing "retribution, deterrence, incapacitation, and rehabilitation").

327. *See supra* Part IV.B.

count as a fine. A few lower court decisions already seem to hold as much.[328]

Of course, *Austin* makes clear that a civil form does not necessarily preclude treating a payment as a fine. However, *Austin* involved a civil forfeiture statute that required some underlying criminal activity, and the Court seemed to give this fact some weight in its determination that the forfeiture did indeed count as a fine.[329]

There might be plausible grounds for requiring a criminal-law nexus in the EFC analysis. As noted earlier, the particular stigma associated with criminal involvement may make it especially difficult for the debtor to pay off the debt, while at the same time diminishing our confidence in the normal political checks on excessive penalties.[330]

On the other hand, these arguments rest only on loose associations between underlying criminality, burdensomeness of debt, and risk of abuse. Whether or not there is any underlying criminality, payments required of individuals who are poor will likely be highly burdensome to them and raise concerns about the shifting of the costs of government to people who are unable to defend themselves effectively through normal political processes. Rather than limiting EFC coverage based on rough proxies for burdensomeness and risk of abuse, it may be preferable to minimize the threshold requirements and permit these key concerns to be assessed in a more direct way through the excessiveness inquiry.[331]

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328. *See* Kitt v. United States, 277 F.3d 1330, 1337 (Fed. Cir. 2002) (holding that "penalty" for early withdrawal from retirement account was not EFC "fine," because the early withdrawal "was not a criminal offense"); Proctor v. Saginaw Cnty. Bd. of Comm'rs, 985 N.W.2d 193, 214–15 (Mich. Ct. App. 2022) (holding, in cases involving tax foreclosure sales, that retention by county government of surplus proceeds was not "fine" under state or Federal EFC because "the deprivation of property did not result from criminal activity").

329. *See* Austin v. United States, 509 U.S. 602, 620 (discussing how Congress tied the forfeiture at issue directly to the commission of drug-offenses).

330. *Supra* Part V.B.

331. If this broader view is taken, then "punitive" purposes would have to be understood to include not merely retribution for and prevention of *criminal* acts, but more broadly retribution for and prevention of *illegal* acts. This reframing might further require lines to be drawn between that which is truly illegal and that which is merely discouraged or disfavored. For instance, hefty "sin" taxes imposed on alcohol and tobacco sales could be thought of as a sort of penalty for indulging in the consumption of these substances, but such consumption is not

F. DOES "REMEDIAL" SIMPLY MEAN COMPENSATION FOR HARM?

In the EFC cases, punitive purposes are typically contrasted with remedial. Within this analytical framework, broader understandings of what counts as "remedial" will be associated with correspondingly narrower understandings of what is punitive and hence a fine.

Some language in *Bajakajian* suggests that remedial should be associated with "compensatory"—that is, a payment will be treated as remedial and nonpunitive if it is designed to compensate a person or entity for a particular injury or loss.[332] However, in other respects, *Bajakajian* muddied the waters. The government argued that the forfeiture in *Bajakajian* was not a fine because it belonged to a well-established American tradition of forfeiture of "property tainted by crime."[333] In rejecting this argument, the Court did not cast any doubt on the premise that traditional civil forfeitures of tainted property were immune from EFC review, but instead relied entirely on the formalist civil/criminal distinction; the forfeiture in *Bajakajian* used a criminal form, while the traditional "tainted-property" forfeitures used civil.[334] Implicitly, the Court seemed to accept that tainted-property forfeitures lay on the remedial side of the remedial/punitive divide so long as they were accomplished through traditional civil forms.

Uncertainty over whether the remedial category extends beyond simply the compensatory helps to explain ongoing divides over proceeds and instrumentality forfeitures. Such forfeitures

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typically thought of as "illegal" in the United States today. It is not clear, however, how to draw the illegality line in practice. In the end, it may be preferable to minimize administrative difficulties with the EFC threshold question by treating all exactions as EFC "fines," leaving it to the excessiveness inquiry to ensure that government retains the power to use appropriately limited financial disincentives in order to discourage harmful behavior.

332. United States v. Bajakajian, 524 U.S. 321, 329 (1998) ("[F]orfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss."); *id.* (noting that remedial actions are often initiated to obtain "compensation or indemnity" (quoting *Remedial Action*, BLACK'S LAW DICTIONARY (6th ed. 1990)); *id.* ("[M]onetary penalty provides 'a reasonable form of liquidated damages,' to the Government and is thus a 'remedial' sanction because it compensates Government for lost revenues." (quoting One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972))).

333. *Bajakajian*, 524 U.S. at 329.

334. *Id.* at 331–32 (discussing the distinction between civil and criminal forfeitures).

are difficult to characterize as compensatory because they are not paid to a victim and because the value of the property taken does not necessarily bear any relationship to the magnitude of the harm done. Yet, courts finding these forfeitures to lie beyond the EFC's reach treat them as remedial,[335] which seems to reflect the tainted-property view.

In thinking about whether *Bajakajian* implicitly places civil tainted-property forfeitures beyond the EFC's reach, one middle-ground possibility apparently not considered in the lower courts would be that the Supreme Court meant only to carve out specific types of forfeiture that were already in use in the United States at the time of the adoption of the Eighth Amendment. This originalist approach, which seems most consistent with the language in *Bajakajian*,[336] would shift focus from broad categories (proceeds, instrumentalities) to questions about how closely a specific forfeiture law at issue conforms to historical practices.

Alternatively, perhaps it is time for a rethinking of traditional practices that rest on strained characterizations of the moral status of property and disregard the practical impact of forfeiture on the owner. It is not clear why the historical pedigree of civil tainted-property forfeitures make them any less prone to excessiveness and abuse. In the absence of good reasons to preserve traditional practices from excessiveness review, it may be preferable to limit the remedial category to payments that are compensatory in nature.

If this view is accepted, another important question remains: should a payment be regarded as genuinely compensatory for EFC purposes if it is designed to compensate the *government* for the costs of law enforcement and corrections? The question has implications for EFC coverage of a vast swath of fees imposed on criminal defendants. At one level, fees that purport to reimburse the government for its expenses may appear

335. *See, e.g.*, United States v. Alexander, 32 F.3d 1231, 1236 (8th Cir. 1994) (indicating that it is "purely remedial" to "part[] the owner from the fruits of the criminal activity"); State *ex rel.* Campbell v. Eighteen Thousand Two Hundred Thirty-Five Dollars in U.S. Currency, 184 P.3d 1078, 1085 (Okla. 2008) (holding that, because proceeds forfeiture statute "disgorges illegally obtained monies from drug distribution, forfeitures under it are purely remedial and not subject to the Excessive Fines Clause under the United States Supreme Court's jurisprudence").

336. *See, e.g.*, *Bajakajian*, 524 U.S. at 331 n.6 (distinguishing between traditional and recent forfeiture statutes).

to be compensatory in nature.[337] On the other hand, if courts look deeper and consider the underlying punitive purposes for which the expenses were incurred, as the Washington Supreme Court did in *City of Seattle v. Long*,[338] then the fees' remedial character seems much less clear.

G. How Roughly Can Compensation Be Assessed and Still Count as "Remedial"?

Forfeitures in drug cases have sometimes been accepted as remedial on the grounds that they compensate government and/or society more broadly for the harms of drug trafficking writ large. For instance, in *United States v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates*, the Tenth Circuit asserted,

> The forfeiture of proceeds of illegal drug sales serves the wholly remedial purposes of reimbursing the government for the costs of detection, investigation, and prosecution of drug traffickers and reimbursing society for the costs of combating the allure of illegal drugs, caring for the victims of the criminal trade when preventative efforts prove unsuccessful, lost productivity, etc.[339]

Even assuming that reimbursement for law-enforcement expenses counts as remedial, the Tenth Circuit's approach in *Berryhill Farm* constitutes a remarkably crude way of determining what is compensatory. The court made no effort to assess the particular harms caused by the specific drug trafficking that occasioned the forfeiture or to ensure that the value of the property forfeited reasonably corresponded to those costs. If pushed to an extreme, this sort of approach—characterizing offense-based payments as compensation for the harms broadly caused by the type of offense at issue—might result in all or nearly all exactions being characterized as remedial and beyond the EFC's reach, including the traditional criminal fines that might

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337. A similar compensation theory was advanced by the government in support of the forfeitures at issue in *Austin* but rejected by the Supreme Court based on the poor fit between the amount of the government's losses and the value of the property subject to forfeiture. *See supra* Part III.B.1.

338. *See supra* Part IV.A.

339. United States v. Lot 41, Berryhill Farm Ests., 128 F.3d 1386, 1395 (10th Cir. 1997) (quoting United States v. Tilley, 18 F.3d 295, 299 (5th Cir. 1994)). For a similarly reasoned state case, see, for example, Goddard v. Gravano, 108 P.3d 251, 256–59 (Ariz. Ct. App. 2005) ("[T]he subject forfeiture is remedial, not punitive, and thus not a 'fine' under the Excessive Fines Clause . . . .").

otherwise have been thought to constitute an indisputable core of what the EFC regulates.

Even if not pushed to such an extreme, accepting a compensatory aim at face value in the absence of case-specific assessments of harm has implications for more than just forfeiture. Fees are, in general, conceptualized in the same compensatory fashion. Defendants must pay various standardized fees that, in the aggregate, are said to reflect the costs of administering this or that aspect of the criminal-legal system, but that are not tied in any specific way to the burdens imposed on the system by particular defendants. For instance, a defendant might be required to pay a standardized "court security" fee regardless of how many court appearances he or she made, whether there was a trial in the case, whether he or she drew a crowd of supporters to the courthouse, or any of the other variables that would determine the actual burdens imposed by the defendant on the court security system.

Similarly, mandatory minimum restitution statutes and laws requiring standardized payments to a crime victims' compensation fund purport to be compensatory in nature, but without individualized determinations of what compensation is owed.[340]

Without providing any specific guidance on how crudely designed a compensation scheme can be and still be considered remedial, the Supreme Court has indicated that the absence of a sufficiently close fit between the amount of a payment and the harm caused by the payor may support viewing the payment as punitive, rather than remedial. In *Austin*, the government advanced the same sort of compensation argument that the Tenth Circuit was later to accept in *Berryhill Farm*. However, the Supreme Court rejected the argument in light of "the dramatic variations in the value of conveyances and real property forfeitable"[341] under the statute at issue; the forfeiture was thus "a

340. *See, e.g.*, CAL. PENAL CODE § 1202.4(b)–(e) (West 2022) (requiring payment of "restitution fine" by defendants to state victim compensation fund; amount subject to statutory minimum and maximum with recommended formula for determination; victim losses only one factor to be considered); State v. Izzolena, 609 N.W.2d 541, 545–46 (Iowa 2000) (discussing mandatory minimum restitution statute in Iowa).

341. Austin v. United States, 509 U.S. 602, 621 (1993).

penalty that ha[d] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."[342]

Notably, in this part of *Austin*, the Court cited an earlier double jeopardy case, *One Lot Emerald Cut Stones v. United States*,[343] in which the Court "upheld the forfeiture of goods involved in customs violations as 'a *reasonable* form of liquidated damages.'"[344] *Austin* thus seems to suggest that the reasonableness with which a payment approximates the harm done may determine whether the payment can fairly be regarded as remedial. However, the Court has provided no insight into how this reasonableness analysis should be conducted.[345]

Requiring an individualized loss assessment for each "remedial" exaction would, of course, impose heavy burdens on the government. Indeed, the transaction costs in high-volume, low-loss cases might far exceed the compensation actually obtained.[346] In such cases, more crudely estimated, standardized exactions might thus be regarded as reasonable and hence genuinely remedial. With higher dollar amounts at issue, however, generic assessments may appear less reasonable and hence less fairly characterized as remedial. Any number of other factors may also bear upon the reasonableness of a compensation determination, such as the government's ability to reliably estimate actual damages on an individualized basis and whether, in the absence of compensation, losses are borne by economically vulnerable individuals or groups. In any event, in developing the EFC

342. *Id.* (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).

343. *See id.* (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972)).

344. *Id.* (emphasis added) (quoting *Emerald*, 409 U.S. at 237).

345. In an older double jeopardy case, the Court observed,

> The Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis. [The] cases do not tell us, because the problem was not presented in them, what the Constitution commands when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs, and rough justice becomes clear injustice.

United States v. Halper, 490 U.S. 435, 446 (1989), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997).

346. Parking or speeding tickets would be the quintessential illustration.

"reasonableness" jurisprudence beyond its current embryonic state, some recourse might be had to other related bodies of law, such as the more extensive jurisprudence on the reasonableness of liquidated damages provisions in private contracts.[347]

CONCLUSION: INTENT AND IMPACT

The concept of mens rea ("guilty mind") is familiar in criminal law: in general, when one person harms another—no matter how severely—there is no criminal liability unless the harm was intended or its possibility at least anticipated. Mens rea requirements help to ensure that those who stand condemned by the criminal-legal system truly deserve condemnation.[348]

Intent has similarly come to play a central role in the definition and enforcement of some individual constitutional rights. Perhaps most famously, equal protection rights turn on the existence of a discriminatory intent by a state actor; a disparate impact alone—no matter how severe—does not suffice to establish a constitutional violation.[349] Likewise, claims by prisoners invoking the Cruel and Unusual Punishments Clause must show "deliberate indifference" (prison conditions claim)[350] or a malicious and sadistic "purpose of causing harm" (excessive force

347. *See* Michael Pressman, *The Two-Contract Approach to Liquidated Damages: A New Framework for Exploring the Penalty Clause Debate*, 7 VA. L. & BUS. REV. 651 (2013) (providing a general discussion on penalty liquidated damages clauses). Bringing a more robust reasonableness analysis into the threshold inquiry seems necessary if there is to be any integrity in the punishment-compensation divide. Doing so, however, blurs the distinction between the threshold inquiry and the excessiveness analysis. In the end, it may be preferable to jettison the threshold inquiry entirely if it cannot be performed without getting into excessiveness factors. Part VI below includes some reflections on the desirability of either eliminating or fundamentally restructuring the threshold inquiry. *See also supra* note 271 (indicating that the threshold inquiry, at least as presently conceptualized, may be inconsistent with original understanding of the EFC).

348. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250–52 (1952) (discussing historical importance of mens rea in development of criminal law and noting that courts "have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.").

349. *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979) ("When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern.").

350. *See* Wilson v. Seiter, 501 U.S. 294, 303 (1991) (applying the deliberate indifference standard to a prison condition claim).

claim).[351] Similarly, prejudicial delays in the initiation of criminal litigation do not violate the due-process guarantee unless there is an improper motivation for the delay.[352] Likewise, when a prosecutor's egregious misconduct at trial forces the defendant to request a mistrial, the defendant is only protected from a retrial by the Double Jeopardy Clause if the prosecutor intended to goad the defendant into making the request.[353]

It is far from clear, however, that intentions *ought* to matter in the constitutional realm. After all, in contrast to criminal litigation, the purpose of constitutional litigation is not to condemn morally blameworthy conduct. Rather, it might be said, the point of constitutional rights is to ensure that the individual is able to maintain certain forms of dignity and autonomy vis-à-vis the collective and the various agencies and officials who act in the name of the collective.[354] Dignity and autonomy may surely be threatened when there is even just careless disregard of the individual—an intention to harm is not required, in other words, for state action to have importantly degrading and/or autonomy-reducing effects on the individual.[355]

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351. *See* Hudson v. McMillian, 503 U.S. 1, 6–7 (1992) (applying the "purpose of causing harm" to an excessive force claim).

352. *See* United States v. Lovasco, 431 U.S. 783, 790 (1977) (finding a prosecutors' decision to defer an indictment did not violate the due-process guarantee).

353. Oregon v. Kennedy, 456 U.S. 667, 676 (1982) ("Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.").

354. *See, e.g.*, Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2132 (observing that the Supreme Court has "woven dignity into its constitutional analyses—especially in the context of the Eighth Amendment" and that "Eighth Amendment dignity means the individuality of an offender must be respected and punishment of an offender cannot be used simply to achieve some other end, even if it is societally beneficial"); *cf.* Roberts, *supra* note 194, at 70–71 (arguing for constitutional interpretive methodology that "embraces the Reconstruction Amendments' constitutional imperatives to end enslaving systems, provide equal protection against state and private violence, and install full citizenship," and further that "[a]bolishing slavery meant guaranteeing everyone's human right to freedom—to be free from domination by state or private masters, to be able to control one's own life and labor").

355. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 116–17 (1976) (Stevens, J., dissenting) ("[W]hether the [Eighth Amendment] standard [for prison conditions] has been violated should turn on the character of the punishment rather

Intent-limited constitutional rights can create serious conceptual and practical problems for the courts that must determine the intent of the state. Indeed, structuring rights in this way may give rise to a variety of perverse incentives, including incentives for willful blindness on the part of state actors to the consequences of their actions and disingenuousness in representations about their true motives.[356] More fundamentally, a focus on intent necessarily takes attention away from impact and makes it more likely that policies and practices that do real damage will pass constitutional muster.[357]

For those who see current LFO laws as just the sort of damaging state action that ought to trigger constitutional constraints, intent may be a limiting factor of concern. The incorporation of intent into the EFC jurisprudence—recall that an LFO does not count as a "fine" unless it has a punitive intent—might suggest that the Clause will be of little assistance. In most cases, it seems an easy enough matter for the state to gin up a purportedly nonpunitive purpose for a challenged policy or practice, and

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than the motivation of the individual who inflicted it. Whether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman." (footnote omitted)); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 892 (2009) (arguing that prevailing Eighth Amendment test should be replaced with a negligence-type test that would impose on prison officials an affirmative "obligation to identify and mitigate risks to the health and safety of the people in prison").

356. *See, e.g.*, Snyder v. Louisiana, 552 U.S. 472, 485 (2008) (finding that prosecutor in murder trial had offered pretextual explanation for striking a Black prospective juror).

357. *See* Roberts, *supra* note 194, at 85–90 (critiquing use of discriminatory intent test for equal protection). At least implicitly recognizing the concerns, the Supreme Court does sometimes dispense with intent-based limitations. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262 (1971) (recognizing the defendant's constitutional right to prosecutor's performance of plea deal and noting "[t]hat the breach of agreement was inadvertent does not lessen its impact"); Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution*." (emphasis added)). Moreover, even in areas where the Supreme Court has adopted intent requirements, state constitutions have sometimes been interpreted to provide more robust protections that do not turn on intent. *See, e.g.*, State v. Kennedy, 666 P.2d 1316, 1325–26 (Or. 1983) (rejecting the federal "intentional provocation" test for double jeopardy protection after mistrial and noting that "punishment of the errant official is not the object of the guarantee against placing the defendant again in jeopardy for the same offense").

courts generally seem reluctant to subject such representations to rigorous scrutiny.[358]

Yet, perhaps surprisingly, the Supreme Court has developed the *EFC* intent test in ways that suggest it need not serve as a major impediment to the consideration of the impact of a challenged exaction (i.e., reaching the excessiveness inquiry). In particular, it is noteworthy that the Supreme Court has clearly indicated—notwithstanding the obtuseness of some lower courts—that the EFC punitive intent test is less demanding than the double jeopardy and ex post facto punitive intent tests.[359]

Doctrinal uncertainties remain. On several important questions, reasonable minds may differ as to the import of the bare handful of Supreme Court decisions that speak to the meaning of "fine" for EFC purposes. Depending on the answers to these questions, the EFC threshold inquiry—and especially the determination of whether a challenged exaction has a punitive purpose—may or may not categorically preclude courts from reaching the excessiveness inquiry for fees, restitution, civil fines, proceeds forfeitures, and perhaps even some instrumentality forfeitures.

I have highlighted seven questions of particular salience. Running through these questions are at least two broader jurisprudential themes. One, already noted above, is the classic formalism-functionalism divide: will bright-line rules (e.g., treat all exactions that depend on a criminal conviction as "fines") be favored for the seeming ease and predictability they offer in their administration, or disfavored for their clumsiness in resolving cases around the margins?[360]

Whether the threshold EFC inquiry is more formalist or functionalist does not, in itself, say anything about how easy or difficult it will be for claims to advance to the excessiveness inquiry; it all depends on the precise content given to the governing

358. The judicial tendency to defer to state representations of intent has been explicitly woven into doctrine in connection with some rights. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 92 (2003) (explaining that because the Court normally defers to the intent of the legislature in determining whether a retroactive law is punitive for ex post facto purposes, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty" (quoting Hudson v. United States, 522 U.S. 93, 100 (1997))).

359. *See supra* Part V.C.

360. *See supra* Part V.B.

rules or standards. For instance, a bright-line rule that classifies all conviction-dependent payments as punitive would *favor* EFC claims against restitution awards, but such claims would be *disfavored* by a bright-line rule that places all payments made to private parties outside the definition of "fine."

A second theme seems to have a closer, more inherent connection to the scope of the EFC's coverage. Although intent may be central to the EFC's threshold inquiry, the concept of "intent" is hardly self-defining. For instance, intent is sometimes thought of as a unitary phenomenon: what is "intended" by an action is whatever the actor consciously hoped to accomplish by the action. This limited, unitary conception of intent has, for instance, played an important role in the Court's equal protection jurisprudence.[361] Alternatively, intent might be conceptualized as a more complex, multifaceted phenomenon—encompassing not only an actor's overarching or primary objective but also all the consequences of the action that were at least anticipated and accepted by the actor.[362]

Whether the EFC threshold inquiry is framed as a search for *the* intent, or merely *an* intent, of a challenged LFO may have important implications for the dynamics of EFC litigation. If a court must find that *the* intent was punitive,[363] then the court must explicitly reject the state's assertion of a nonpunitive purpose—an awkward maneuver that may sit uncomfortably with the court's instincts about separation of powers and, in some cases, federalism. On the other hand, if the court need only find that there was *some* punitive purpose—perhaps only secondary or collateral to the nonpunitive purpose asserted by the state—the court need not reject the asserted purpose as dishonest or implausible. In short, with the multifaceted view of intent, a

361. *See, e.g.*, Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (citation omitted)).

362. I have in mind here something along the lines of the common law definition of intent. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.04(A)(1) (7th ed. 2015) (defining intent as the desire to cause a harm or acting with knowledge that a harm is virtually certain to occur as a result of the actor's conduct).

363. This approach is nicely illustrated by *State v. Cottrell*, 271 P.3d 1243, 1254 (Idaho Ct. App. 2012), as discussed in Part IV.D, *infra*.

more capacious EFC can coexist somewhat more comfortably with norms of inter-branch and inter-sovereign deference.

Expansively understood, this view of punitive intent might bring within the EFC's regulation all exactions that presuppose and depend upon some unlawful conduct on the part of the payor; in such cases a desire to deter the conduct—or at the very least an expectation and acceptance of deterrence effects—will always be inferable.[364] Similarly, a desire to express condemnation of the unlawful conduct—or at the very least an expectation and acceptance that a message of condemnation will be perceived—will always be inferable.

Of course, adopting such an expansive approach to the intent requirement is tantamount to eliminating the requirement. This might be seen as a welcome development. The EFC is more likely to serve as a robust constraint on LFOs if the threshold requirement is quickly and easily satisfied in most cases. On the other hand, courts might find themselves overburdened by a rising tide of EFC challenges, while legislatures might be discouraged from adopting, and executive agencies from enforcing, even restrained and appropriately targeted financial sanctions.

Functionally, the intent requirement serves to limit the volume and burden of EFC claims by categorically removing certain exactions from EFC regulation. This saves courts from having to engage in a case-by-case weighing of the various factors that play into the excessiveness analysis, such as the defendant's culpability and (perhaps) ability to pay. However, if the point of the EFC is understood as the prevention of certain undesirable social effects (prolonged deprivations of liberty resulting from inability to pay,[365] shifting the costs of government to the socially unpopular and marginalized,[366] suppression of dissent and chilling of

364. *Cf.* Hudson v. United States, 522 U.S. 93, 102 (1997) ("We have since recognized that all civil penalties have some deterrent effect. If a sanction must be 'solely' remedial (*i.e.*, entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause." (citations omitted)).

365. *See* Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) (reviewing historical origins of EFC and noting criticism of practice of Stuart monarchs to "indefinitely detain those unable to pay" large fines).

366. *Cf. id.* (reviewing historical origins of EFC, noting criticism of use of fines by Stuart monarchs as source of revenue); *id.* at 689 (discussing incentive for government to impose disproportionate fines for revenue-raising purposes).

speech,[367] entrenchment of race and class hierarchies[368]),then an intent-focused mechanism for screening claims seems arbitrary. Such a mechanism may block meaningful constitutional review of exactions with highly damaging effects merely because the state is able to concoct a plausible account of nonpunitive intent from a few brief, decontextualized phrases of statutory language and legislative history.

The broader approach to intent suggested by the Supreme Court may effectively address this concern if it is more widely recognized and embraced by lower courts. If *some* more robust mechanism for categorical threshold screening of EFC claims is thought to be necessary, the mechanism ought to be tied directly to the ultimate concern (i.e., impact) than to strained constructions of intent. In other words, a proxy or proxies might be identified that, when present, indicate a certain likelihood that the imposition of an LFO will in practice tend to result in the sorts of adverse consequences that the EFC exists to address. One such proxy, as suggested above, would be a crime nexus.[369] When an exaction is made to depend on an allegation or proof of a criminal act, the payor is, almost by definition, a person who stands in a stigmatized, politically vulnerable position. Moreover, the exaction is apt to be combined with an array of additional financial and other consequences (e.g., incarceration, community supervision, collateral consequences affecting employability) that can dramatically magnify its burdensomeness.[370] These crime-

367. *See id.* at 689 ("For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago.").

368. *See id.* at 688–89 (reviewing relevant history for determining that EFC should be regarded as fundamental and incorporated into the Due Process Clause, discussing Fourteenth Amendment as reaction to adoption of Black Codes in southern states after Civil War, which were intended "to subjugate newly freed slaves and maintain the prewar racial hierarchy," and noting that Black Codes included "draconian fines" for various "dubious offenses," with involuntary labor required of individuals who were unable to pay); *see also* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1655–62 (2015) (drawing parallels between current LFO system and system developed in post-Civil War South to maintain White control of Black labor).

369. *See supra* Part V.C.

370. *See, e.g.*, Chidi Umez & Joshua Gaines, *After the Sentence, More Consequences: A National Report of Barriers to Work*, JUST. CTR. (Jan. 2021), https://

related exactions, moreover, often involve the potential for incarceration and other highly coercive enforcement devices that would not be available for ordinary civil debts.[371]

The Excessive Fines Clause was permitted to live a life of quiet obscurity for two centuries. The contemporary LFO crisis has drawn the Clause into the arena of active constitutional debate and litigation. Although the sparse Supreme Court jurisprudence establishes some real potential for the Clause to play an important constraining role, the divided, but generally cautious, lower court caselaw casts doubt on whether the Clause will have much impact in practice. Of critical importance will be further development and clarification of the threshold inquiry, including answers to the seven doctrinal questions highlighted above and the more general, overarching question of whether and to what extent the constitutional analysis will be sidetracked by explorations of imagined legislative intent that have little to do with the harsh realities of LFO policies and practices.

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csgjusticecenter.org/publications/after-the-sentence-more-consequences/national-report [https://perma.cc/9G48-WRWP] (describing number, variety, and importance of collateral consequences affecting employment); NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *supra* note 101, at 202–59 (detailing research on adverse effects of incarceration on the incarcerated person); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1032–36 (2013) (describing burdensomeness of conditions of supervision).

371. *See, e.g.*, Laisne et al., *supra* note 2, at 14 (finding that about one-third of people sentenced to pay fees or fines in New Orleans in 2015 were subject to arrest warrant for nonpayment by August 2016); *see also* Graff v. Aberdeen Enterprizes, II, Inc., 65 F.4th 500, 509–11 (10th Cir. 2023) (summarizing allegations in class action lawsuit challenging legality of enforcement practices in Oklahoma, including routine issuance of arrest warrants and subsequent jailing if payment not forthcoming).