

Note

Pressing Charges: Criminal Fees and the Excessive Fines Clause

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Millions of people owe money to the government as a consequence of a criminal charge. But while some of that debt is tied to fines or restitution, much of it is levied as fees, or payments owed to the government for the administration of a defendant's criminal proceedings. Criminal fees can include costs assessed for pretrial detention, a public defender, a jury, a court appearance, filing a document, electronic monitoring, and more. They are assessed at every stage of a criminal case and for all types of offenses. While state and local governments claim that criminal fees are necessary to fund the administration of justice, most defendants cannot pay, bringing a slew of additional consequences.

*This Note suggests that the Excessive Fines Clause of the Eighth Amendment, recently revived by the U.S. Supreme Court in *Timbs v. Indiana*, prohibits the assessment of criminal fees. Financial penalties imposed as punishment for a criminal charge, without regard for the cost incurred by the government or the defendant's ability to pay, are both punitive and excessive. Many fees infringe on criminal defendants' other constitutional rights—the very problem the Excessive Fines Clause intended to remedy.*

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Federal and state courts have been slow to meaningfully implement Timbs. This Note critiques those courts' post-Timbs decisions and advocates for a different approach to Excessive Fines Clause claims. In the meantime, this Note proposes that state legislatures take up the mantle of reform to bridge the gaps left by the courts. Some state legislatures have already begun eliminating criminal fees over the last few years without undercutting their budgets. This Note surveys and compares state laws and offers suggestions on implementation. By continuing to identify and remove excessive fees, states can prioritize the fair administration of justice, from policing to prosecution.

INTRODUCTION

Lori Mathes was arrested in Iowa for possession of two grams of marijuana at fifty-six years old.¹ Unable to afford her own representation, she received a court-appointed lawyer.² After two years, the prosecutor dropped her case, but Mathes still owed \$3,000 to repay her attorney's fees.³ She must choose between paying her debt and paying her electric bill.⁴

Rick Dempsey's teenage son was summoned to juvenile court in Indiana for marijuana use.⁵ Dempsey was liable for the criminal fees associated with his son's case, including a \$176 initial court fee, a \$90 informal adjustment fee, a \$100 initial probation user fee, a \$25-per-month probation fee, and a \$110-per-day detention fee.⁶ After three years of driving his son to drug court programming, which could sometimes be five days per week, Dempsey, a union heavy equipment operator, was arrested for being unable to keep up with payments on the fees.⁷ He spent a night in jail.⁸

Eileen DiNino faced truancy fines as her teenage children accrued school absences in Pennsylvania.⁹ Each truancy fine was \$75, but additional court fees, including \$8 for a "judicial

1. Lauren Gill & Weihua Li, *If You Can't Afford an Attorney, One Will Be Appointed. And You May Get a Huge Bill*, MARSHALL PROJECT (Feb. 12, 2024), <https://www.themarshallproject.org/2024/02/12/miranda-rights-indigent-defense-iowa> [https://perma.cc/PTT4-MQ97] (describing the high cost of court-appointed attorneys' fees in Iowa, especially in rural areas without public defender's offices).

2. *Id.*

3. *Id.*

4. *Id.*

5. Claire Reid & Peter Breen, *Juvenile Injustice: 'Everything to Do with Getting Money Off of the Parent'*, INDIANAPOLIS STAR (Apr. 23, 2024), <https://www.indystar.com/story/news/investigations/2024/04/23/juvenile-injustice-fines-and-fees-differ-widely-by-county-in-indiana/73217848007> [https://perma.cc/N9V3-HBKJ] (analyzing the fees collected from parents whose children are involved in Indiana's juvenile justice system).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Mom Jailed over Truancy Died from Heart Failure*, ASSOCIATED PRESS (Aug. 14, 2014), <https://apnews.com/26529cd62c0f42939ee4c2c00026e051> [https://perma.cc/78PU-MHQK] (documenting the institutional factors that led to Ms. DiNino's incarceration and stating that Ms. DiNino's sentencing judge "complained about a broken system that punishes impoverished parents and questioned laws criminalizing such lapses as truancy or failing to pay trash bills").

computer project,” \$60 for county constables, and \$10 for post-age, accumulated over time.¹⁰ Eventually, she was ordered to spend two days in county jail for her failure to pay the \$2,000 total she owed to the county.¹¹ In jail, DiNino died of heart failure, exacerbated by her high blood pressure.¹²

Mathes, Dempsey, and DiNino are not outliers. Up to ten million people in the United States owe a collective \$50 billion in court debt.¹³ A 2021 survey of individuals with court debt found that over 40% owed over \$1,000, with approximately 20% owing over \$5,000.¹⁴ These individual costs, while small compared to budgets for law enforcement and courts,¹⁵ can be daunting for many.¹⁶ Almost 60% of Americans could not afford to pay \$1,000 if an emergency arose.¹⁷ That statistic is likely even

10. *Id.*

11. *Id.*

12. *Id.*

13. Arjun Kaushal et al., *Financial Health and Criminal Justice: The Impacts of Involvement*, FIN. HEALTH NETWORK 19 (2021), https://cfsi-innovation-files-2018.s3.amazonaws.com/wp-content/uploads/2021/05/26150028/FSL_CriminalJustice_Quant_Report_2021.pdf [<https://perma.cc/MLM3-YPNU>].

14. *Id.* at 20 (explaining that, of the 78% of survey respondents who had court debt, 29% owed between \$1,000 and \$5,000, and 15% owed \$5,000 or more). These figures do not distinguish between different types of court debt but rather group together fines, fees, and restitution.

15. See *Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST. (Apr. 26, 2024), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures> [<https://perma.cc/8YG9-3XHV>] (“In 2021, state and local governments spent \$135 billion on police . . . and \$52 billion on courts.”). But see Beth A. Colgan, *Revenue, Race, and the Potential Unintended Consequences of Traffic Enforcement Reform*, 101 N.C. L. REV. 889, 921 (2023) [hereinafter Colgan, *Revenue, Race, and Unintended Consequences*] (“[W]hile in 2012 only fifteen percent of law enforcement budgets came from fines and fees, one in ten agencies relied on these revenues for a third or more of their budgets.”).

16. See Mary Pattillo & Gabriela Kirk, *Pay Unto Caesar: Breaches of Justice in the Monetary Sanctions Regime*, 4 UCLA CRIM. JUST. L. REV. 49, 62 (2020) (“Many people [with criminal debt] were facing monetary sanctions that equaled a whole month’s earnings, if not more. Hence, relatively small payments could be daunting.”); Ndjuoh MehChu, *Nickels and Dimes? Rethinking the Imposition of Special Assessment Fees on Indigent Defendants*, 99 N.C. L. REV. 1477, 1507 (2021) (arguing that when courts decide that a defendant can’t pay any money, it indicates more broadly that even small economic sanctions can seriously hurt poor defendants and their families).

17. Anne Marie D. Lee, *Most Americans Can’t Afford a \$1,000 Emergency Expense, Report Finds*, CBS NEWS: MONEYWATCH (Jan. 23, 2025), <https://www.cbsnews.com/news/saving-money-emergency-expenses-2025> [<https://perma.cc/8F8S-4FKW>].

higher among individuals charged with criminal offenses, an overwhelmingly low-income population.¹⁸

Criminal fees, for the purposes of this Note, include payments owed to the state to repay the cost of investigating, prosecuting, and detaining a defendant.¹⁹ Criminal fees can include

18. See, e.g., CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/6GWA-7KWQ>] (finding that eighty-two percent of criminal defendants in the country's largest counties were represented by public defenders); Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/W3DL-KBRF>] (similarly stating that “[r]oughly four out of five criminal defendants are too poor to hire a lawyer”). For some, poverty was the driving force behind committing a criminal act. See, e.g., Pattillo & Kirk, *supra* note 16, at 59 (quoting an Illinois woman with a misdemeanor theft conviction as explaining that “the reason why I done this is my kids was hungry and there was just no other option”).

19. Legal scholarship in the area of the Excessive Fines Clause and criminal debt often groups together various forms of what are together called “legal financial obligations” (LFOs), including fines, fees, forfeitures, and restitution. For an analysis of each and the differences between them, see Michael O’Hear, *Can the Excessive Fines Clause Mitigate the LFO Crisis? An Assessment of the Caselaw*, 108 MINN. L. REV. 1171 (2024). This Note targets criminal fees because, unlike fines and restitution, their amount and imposition are not dependent on the facts of the offense. Beth Colgan, one of the leading scholars on the Excessive Fines Clause, defines criminal fees as “administrative fees—such as court costs, warrant fees, indigent defense fees, and the like.” Beth Colgan, *The Burdens of the Excessive Fines Clause*, 63 WM. & MARY L. REV. 407, 417 n.27 (2021) [hereinafter Colgan, *Burdens*]. On a broader scale, Ariel Jurow Kleiman uses “fee” to refer to a “government charge that bears a direct relationship to a service provided to an identifiable and separable beneficiary,” which, in the criminal legal system, includes “any criminal justice charge imposed on system users—whether found guilty or not—that seeks to reimburse government for the cost of running the criminal justice system.” Ariel Jurow Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 525 (2021). Criminal fees are also called costs, assessments, or surcharges. See Briana Hammons, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?*, FINES & FEES JUST. CTR. 2 (2021), https://finesandfeesjusticecenter.org/wp-content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [<https://perma.cc/2ENU-JH77>]. This Note specifically uses the modifier “criminal” to distinguish the fees that are the subject of this Note from other government-imposed fees, like driver’s license fees, that exist outside of the criminal legal sphere. In addition, this Note uses the term “defendant” to refer to the individual who is required to pay a criminal fee. Not all who are charged a fee are actually convicted of the offense for which they were prosecuted; in fact, some have to pay fees even when the criminal charges are dropped. See, e.g., Garrett Epps, *Can States Make People Pay Even When Their Convictions Are Overturned?*, ATLANTIC (2017), <https://www.theatlantic.com/politics/archive/2017/01/can-states-make-people-pay-even-when-their-convictions-are>

costs assessed for pretrial detention,²⁰ a public defender,²¹ a jury,²² a court appearance,²³ filing a document,²⁴ electronic monitoring,²⁵ and more.²⁶ Those fees accrue interest.²⁷ Failing to pay criminal fees can land an individual on probation, which adds a host of other fees.²⁸ Even paying off fees can itself incur more

-overturned/512360 [https://perma.cc/C75F-TK2L]. “Defendant” was chosen to encompass all who were charged with a crime and subsequently picked up fees.

20. *E.g.*, Steven Hale, *Pretrial Detainees Are Being Billed for Their Stay in Jail*, APPEAL (July 20, 2018), <https://theappeal.org/pretrial-detainees-are-being-billed-for-their-stay-in-jail> [https://perma.cc/SF2K-ZTJE] (describing the practice of several states that charge daily fees to pretrial detainees).

21. *E.g.*, Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929 (2014) [hereinafter Colgan, *Paying for Gideon*] (describing, *inter alia*, the effects of attempting to collect indigent defense fees from defendants).

22. *E.g.*, Chris Mai, *The High Price of Using Justice Fines and Fees to Fund Government in Virginia*, VERA INST. OF JUST. 2 (2021), <https://www.justice4all.org/wp-content/uploads/2021/10/the-high-price-of-using-justice-fines-and-fees-virginia.pdf> [https://perma.cc/7B5N-ZK28] (outlining Virginia’s fee structure for jury trials).

23. *E.g.*, *Illinois Court Assessments: Findings and Recommendations for Addressing Barriers to Access to Justice and Additional Issues Associated with Fees and Other Court Costs in Civil, Criminal, and Traffic Proceedings*, ILL. STATUTORY CT. FEE TASK FORCE 1 (2016), https://www.illinoiscourts.gov/Resources/4b970035-98ba-4110-86fc-60e02b6a126b/2016_Statutory_Court_Fee_Task_Force_Report.pdf [https://perma.cc/KMY7-CUFH] (describing significant increases in fees assessed for court appearances in Illinois).

24. *E.g.*, *id.*

25. *E.g.*, *Electronic Monitoring Fees: A 50-State Survey of the Costs Assessed to People on E-Supervision*, FINES & FEES JUST. CTR. 1 (2022), <https://finesandfeesjusticecenter.org/wp-content/uploads/2022/09/FFJC-Electronic-Monitoring-Fees-Survey-2022.pdf> [https://perma.cc/Y664-M8JF] (“[F]ees imposed for electronic monitoring (EM) can be among the most costly [of the fees in the criminal legal system] . . .”).

26. *E.g.*, Jeremiah Mosteller & Emily Reina Dindial, *Hidden Taxes Don’t Belong Anywhere, Least of All in Our Justice System*, END JUST. FEES (Oct. 15, 2022), <https://endjusticefees.org/news/hidden-taxes-dont-belong-anywhere-least-of-all-in-our-justice-system> [https://perma.cc/H6F3-3264] (“Fees exist at every stage of the justice system — warrant fees, booking fees, pretrial supervision fees, diversion program fees, prosecution fees, probation fees, fees for medical care, phone calls and more during incarceration, and parole fees, among countless others.”).

27. *See, e.g.*, 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) (stating that in Washington State, a twelve percent statutory interest on legal financial obligations begins to accrue upon sentencing).

28. Colgan, *Revenue, Race, and Unintended Consequences*, *supra* note 15, at 904–05.

fees.²⁹ They are imposed for virtually any type of transgression, from parking tickets and civil code violations³⁰ to first-degree murders,³¹ and, at all points of the system, from arrest to adjudication to supervision.³² While most jurisdictions³³—and debtors³⁴—don’t distinguish between fines, fees, and restitution in

29. See Beth Colgan & Jean Galbraith, *The Failed Promise of Installment Fines*, 172 U. PA. L. REV. 989, 1047 (2024) (“[S]ome jurisdictions charge defendants an additional fee every time a payment is made.”); Adrienne DiTommaso, Criminal Justice Contact and Credit, Debt, and Financial Coping Outcomes 44 n.29 (2023) (Ph.D. dissertation, The Ohio State University) (OhioLINK), https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=osu1692569541114873 [<https://perma.cc/B4RT-TSYB>] (explaining that for some criminal debtors in Ohio, “payment plans for criminal legal debts are available, but there is a fee to establish these and they must be approved by a judge”).

30. See Kleiman, *supra* note 19, at 529 (describing these types of infractions as “not typically considered criminal or, if technically criminal, . . . rather innocuous in nature”).

31. See, e.g., *Indiana Trial Court Fee Manual*, IND. SUP. CT., OFF. OF CT. SERVS. 1–2 (2024), <https://www.in.gov/courts/iocs/files/courtmgmt-pubs-trial-court-fee-manual.pdf> [<https://perma.cc/WQ3A-DATR>] (listing various fees required in criminal cases, irrespective of the type of case).

32. See Kleiman, *supra* note 19, at 519.

33. See Hammons, *supra* note 19, at 5 (noting a lack of consistent oversight of collection procedures and record-keeping in a majority of states); Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 982 (2021) (noting the difficulty in obtaining data on fines and fees collected by municipal courts). Some jurisdictions don’t collect data on criminal debt or the use of monetary sanctions at all. Natapoff, *supra*; Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIMINOLOGY 471, 482 (2018). Failing to do so prevents advocates and lawmakers alike from understanding the magnitude of the impact criminal debt has on marginalized communities. See, e.g., Caroline Cohn et al., *The High Cost of a Fresh Start: A State-by-State Analysis of Court Debt as a Bar to Record Clearing*, NAT’L CONSUMER L. CTR. 25–26 (2022), <https://www.nclc.org/wp-content/uploads/2022/08/Report-High-Cost-of-Fresh-Start.pdf> [<https://perma.cc/4BM5-PX8Q>] (calling for states to collect and report data related to monetary barriers that prevent an individual from clearing their criminal record); Marea Beeman et al., *At What Cost? Findings from an Examination into the Imposition of Public Defense System Fees*, NAT’L L. AID & DEF. ASS’N 78 (2022), https://www.nlada.org/sites/default/files/NLADA_At_What_Cost.pdf [<https://perma.cc/FRC9-NN3J>] (recommending that jurisdictions implement uniform data collection and reporting requirements for public defense fees).

34. For individuals who owe criminal debt, the distinction is irrelevant; fines, fees, and restitution are all payments that must be made to the court, regardless of the reasons for each. See, e.g., *Under Pressure: How Fines and Fees Hurt People, Undermine Safety, and Drive Alabama’s Racial Wealth Divide*, ALA. APPLESEED CTR. FOR L. & JUST. 44–52 (2018), <https://alabamaappleseed.org/underpressure> [<https://perma.cc/JD7H-WRTT>] (featuring the testimony of ten Alabamians who struggle with the consequences of their total

reporting, the amount of administrative fees assessed for a single criminal offense often exceed the punitive fine imposed for that offense, indicating that fees make up a large proportion of the nation's collective criminal debt.³⁵ In Alabama, for instance, the average cost levied on a felony defendant is almost \$4,000—over half of which consisted of court fees.³⁶

Criminal fees have ballooned in size and scope since the 1980s.³⁷ Yet they came under little scrutiny until 2014, when the death of Michael Brown in Ferguson, Missouri, at the hands of local police prompted an investigation into policing-for-profit.³⁸ In Ferguson, and in many other jurisdictions across the nation, prosecutors, judges, and law enforcement officers have to raise their own funds—typically by attempting to recoup costs spent

criminal debt, irrespective of the division between fines and fees); *see also* DiTommaso, *supra* note 29, at 165 (explaining that the effect of fees is indistinguishable from that of fines because the total debt burden is what drives consequences).

35. *See, e.g.*, Colgan & Galbraith, *supra* note 29, at 1056 (“The use of fees and surcharges has become so prevalent that in many cases, the add-on charges can far outpace the amount of fines imposed.”). The limited data available on criminal fees, distinct from other debt, affirms the hypothesis that criminal fees make up a large part of court debt. As an example, Californians owed \$16 billion to county governments for criminal fees before state legislation forgave county-imposed criminal fee debt in 2021. Hammons, *supra* note 19, at 3–4 n.2.

36. Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 311 (2017).

37. Colgan & Galbraith, *supra* note 29, at 1042.

38. *Cf.* Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement> [<https://perma.cc/8GV7-SMJY>] (describing the growth of the Black Lives Matter movement and its rapid spread after Brown's death).

on law enforcement and prosecution.³⁹ Unsurprisingly, the burdens of these practices fall disproportionately on low-income and minority communities.⁴⁰

While criminal fees are pervasive and dangerous, this Note argues that a solution already exists. The Excessive Fines Clause, a long-overlooked provision in the Eighth Amendment of the U.S. Constitution, prohibits the imposition of excessive fines.⁴¹ With *Timbs v. Indiana* in 2019, the U.S. Supreme Court finally incorporated the Clause's protections against the states, potentially opening a new avenue for individuals seeking to challenge their criminal debt.⁴²

This Note proceeds in three Parts. Part I provides an overview of modern criminal fees, including the harms that they perpetuate on debtors and their communities. Part I also traces the history of criminal fees from English common law, to post-Civil War Black Codes, to the tough-on-crime policies of the 1980s, to show how that history informs today's analysis of criminal fees. Part II explains the Supreme Court's holding in *Timbs* and then connects its requirements to criminal fees. First, criminal fees are fines because of their punitive nature; second, those fees are excessive because they bear no proportionate relationship to the offense, the government's cost, or the defendant's financial state; and, third, the history and purpose of the Excessive Fines Clause discourages revenue-based policing. Part III then discusses how

39. See *Investigation of the Ferguson Police Department*, U.S. DEPT OF JUST., C.R. DIV. 2 (2015) [hereinafter *Ferguson Report*], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [https://perma.cc/8RGZ-FCVN] ("Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community. Further, Ferguson's police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes.").

40. *Id.* at 62–63 ("Despite making up 67% of the population, African Americans accounted for 85% of FPD's traffic stops, 90% of FPD's citations, and 93% of FPD's arrests from 2012 to 2014. . . . These disparities are not the necessary or unavoidable results of legitimate public safety efforts. In fact, the practices that lead to these disparities in many ways undermine law enforcement effectiveness.").

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

42. See *infra* Part II.B.

either courts or legislative bodies could eliminate criminal fees, with an emphasis on fees that infringe on defendants' constitutional protections. Ultimately, Part III focuses on state legislatures as the most promising ground for criminal fee reform.

I. THE DEVELOPMENT OF MODERN CRIMINAL FEES

Criminal fees exist today at every step of a defendant's criminal proceeding. They don't end after conviction: With parole supervision fees, collection fees, and a jungle of collateral consequences, criminal fees are hard to escape. They're even harder to escape when police or private debt collectors hound defendants, even threatening illegal action, to recover costs that defendants often simply cannot pay.⁴³

This Part will provide a brief overview of criminal fees and their development. Section A traces the evolution of criminal fees, from Reconstruction to the present. Section B identifies types of criminal fees and illustrates the speed with which they accrue. Section C draws a connection to the long-lasting harms fees perpetuate, especially against minority and low-income defendants. Finally, Section D describes how fees are extracted and to what ends, connecting criminal fees to a broader problem of over-policing and underfunding.

A. HISTORY OF CRIMINAL FEES IN THE UNITED STATES

Monetary sanctions—and their limitations—were meted out under English common law long before the ratification of the Eighth Amendment in 1781. Magna Carta, issued in 1215, condoned economic punishments that were proportioned to the offense and not unduly burdensome.⁴⁴ Undeterred, the Stuart kings of the seventeenth century frequently levied large fines to raise revenue and quash political enemies.⁴⁵ The English Bill of Rights, passed in 1689, reaffirmed Magna Carta by explicitly

43. *See Developments in the Law—Policing*, 128 HARV. L. REV. 1707, 1726–33 (2015) (describing examples where police have used an inability to pay criminal fees as an excuse to harass defendants for payment).

44. *Timbs v. Indiana*, 139 S. Ct. 682, 687–88 (2019) (discussing the history of Magna Carta and excessive fines in England); *see* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1259–64 (1987) (explaining that Magna Carta speaks of amercements and distinguishing between the latter and fines).

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

providing that “excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.”⁴⁶

It was this language that the Framers of the U.S. Constitution appropriated in the Eighth Amendment.⁴⁷ The Excessive Fines Clause was “adopted with the particular intent of placing limits on the powers of the new Government.”⁴⁸ It was accepted with little discussion or debate.⁴⁹ By that time, the constitutions of eight states already prohibited excessive fines.⁵⁰

Throughout its early history, the Clause remained in the constitutional shadows, fully accepted but rarely explored.⁵¹ When the Fourteenth Amendment was ratified in 1868, the constitutions of thirty-five of thirty-seven states mirrored the Federal Constitution in forbidding excessive fines.⁵² But despite the apparent consensus among states that “the right guaranteed by the Excessive Fines Clause was fundamental,” it was, in practice, a right reserved only for white Americans.⁵³

After the Civil War, Black Codes in the South dictated harsher punishments for Black people than for white people.⁵⁴

46. *Id.* (quoting Bill of Rights 1689, 1 W. & M. c. 2, § 10).

47. U.S. CONST. amend. VIII; see Massey, *supra* note 44, at 1243 (“[T]he lineage of the excessive fines clause is so obviously and directly traceable to the 1689 English Declaration of Rights . . .”).

48. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989).

49. *Id.* at 264 (noting that “the Excessive Fines Clause received even less attention” than the meager discussion on cruel and unusual punishment); see *Timbs*, 139 S. Ct. at 696 (Thomas, J., concurring) (“Early commentary on the Clause confirms the widespread agreement about the fundamental nature of the prohibition on excessive fines.”).

50. *Timbs*, 139 S. Ct. at 688 (citing Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition*, 85 S. CAL. L. REV. 1451, 1517 (2012)).

51. See, e.g., Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 833 (2013) (“For much of this nation’s history, the Excessive Fines Clause of the Eighth Amendment received little attention from courts or scholars.”).

52. *Timbs*, 139 S. Ct. at 698 (Gorsuch, J., concurring) (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition*, 87 TEX. L. REV. 7, 82 (2008)).

53. *Id.* at 688.

54. See generally *Black Codes*, JIM CROW MUSEUM, <https://jimcrowmuseum.ferris.edu/links/misclink/blackcode.htm> [https://perma.cc/QH9N-GRX3] (explaining the history of Black Codes).

Among those punishments were “draconian fines” for minor offenses like vagrancy.⁵⁵ Newly freed slaves were unable to pay and were consequently incarcerated.⁵⁶ Then, states authorized prisons to “lease” prisoners to private industries, including agricultural labor on plantations.⁵⁷ Employers paid prisoners’ debts in exchange for the cheap labor, with funds going to support public services.⁵⁸ This peonage system functionally returned the South to the slavery status quo.⁵⁹

Debtors’ prisons, convict leasing, and public-private partnerships in the criminal law persisted well into the twentieth century.⁶⁰ In the 1980s came the racially motivated “tough-on-crime” movement, which necessitated more funding to expand systems of law enforcement, adjudication, and incarceration.⁶¹ Simultaneously, the small government movement and accompanying tax cuts reduced the funding available to federal and state governments.⁶² By 1986, nearly all states were charging fees in felony, misdemeanor, and traffic courts for a variety of purported

55. *Timbs*, 139 S. Ct. at 688 (delineating the abuses perpetrated by southern states on newly freed slaves).

56. Carrie Leonetti, *Pinkerton Guards and Debtors’ Prisons: The Historical Precursors to the Modern Practice of Restitution Exploitation*, 58 HARV. C.R.-C.L. L. REV. 273, 282 (2023).

57. *Id.* at 283.

58. Cortney Sanders & Michael Leachman, *Step One to an Antiracist State Revenue Policy: Eliminate Criminal Justice Fees and Reform Fines*, CTR. ON BUDGET & POL’Y PRIORITIES 2 (2021), <https://www.cbpp.org/sites/default/files/9-17-21sfp.pdf> [https://perma.cc/8DQ8-P722].

59. *Timbs*, 139 S. Ct. at 689; see Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 681 (2003) (“The authors of the Black Codes tried to replicate, as much as possible, a system of involuntary servitude.”).

60. Leonetti, *supra* note 56, at 284 (“Southern Black men continued to be ensnared in exploitative peonage and sharecropping arrangements into the 1940s.”). See generally Adamson, *supra* note 27, at 316–17 (arguing that the facilitation of private profit from those subjected to criminal punishment has been a staple of the American economy for centuries).

61. See Sanders & Leachman, *supra* note 58, at 3–4; Colgan & Galbraith, *supra* note 29, at 1042 (suggesting that “offender-funded justice” was an opportunity for state legislators to appear both tough-on-crime and anti-tax); Nino C. Monea, *A Constitutional History of Debtors’ Prisons*, 14 DREXEL L. REV. 1, 63 (2022) (“As part of the War on Drugs, many states became addicted to court-ordered fees, and failure to pay them could result in imprisonment.”).

62. Colgan & Galbraith, *supra* note 29, at 1042; see Adamson, *supra* note 27, at 317 (describing the simultaneous rise of the “smaller government” ideology and the movement towards defunding local court and incarceration systems).

expenditures: “paper processing, indigent defense representation, prosecution costs, trial-related expenses, and more.”⁶³

In 1986, just 12% of individuals who were incarcerated for a crime were also ordered to pay a financial penalty.⁶⁴ By 2014, that number had increased to 66%.⁶⁵ Where criminal fees were once considered a progressive alternative to incarceration for poor defendants, they are now a *de facto* requirement for government actors across the country.⁶⁶ As a result, American courts operate on a “two-tiered system of justice” in which low-income defendants face harsher punishments than their wealthier counterparts.⁶⁷

Today’s criminal costs are a direct descendant of the post-Civil War peonage system.⁶⁸ State and local governments created crimes for acts that had, in the past, been dealt with individually by slaveowners and adopted statutes expanding the power of police and private security forces.⁶⁹ Criminal justice veered towards harsher punishments, including insurmountable financial penalties, that disproportionately targeted people of color.⁷⁰ Without meaningful fee restraints from state or federal courts, along with significant revenue incentives, public officials

63. Colgan & Galbraith, *supra* note 29, at 1043.

64. Lauren Jones, *Ability to Pay: Closing the Access to Justice Gap with Policy Solutions for Unaffordable Fines and Fees*, 51 FORDHAM URB. L.J. 1593, 1602 (2024).

65. *Id.*

66. Colgan & Galbraith, *supra* note 29, at 1043 (“[Since the 1980s] lawmakers and courts significantly expanded the use of fees as well as surcharges to fund courts, law enforcement, jails and prisons, probation, and other public works projects unrelated to penal systems—essentially piling fines on top of fines.”).

67. Glenn H. Reynolds & Penny J. White, *The New Due Process: Fairness in a Fee-Driven State*, 88 TENN. L. REV. 1011, 1023 (2021) (blaming “courts’ newfound vigor in assessing and collecting” criminal fees).

68. See Tamar R. Birkhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1595–96 (2015) (drawing parallels between post-Civil War peonage and modern fines and fees).

69. See Leonetti, *supra* note 56, at 284 (“There is a direct line between the punitive post-emancipation treatment of the formerly enslaved to the modern practices of criminalization and sentencing.”).

70. *Id.* (describing “the imposition and severe enforcement” of criminal costs as “another tool, along with Black Codes, restrictive zoning ordinances, redlining, stop-and-frisk policing, mass evictions, and debt-collection lawsuits, to keep Black Southerners in check”).

have used their power to increase fee revenue independent of public safety needs.⁷¹

B. MODERN CRIMINAL FEES

Criminal fees are costs charged to criminal defendants, before and after the conclusion of their criminal case, ostensibly to recover the administrative costs of their criminal justice contact or create revenue for the jurisdiction.⁷² Criminal fees accrue at each step of a defendant's criminal case.⁷³ They are imposed for a wide range of offenses, from traffic offenses, to misdemeanors, to felonies.⁷⁴ Many jurisdictions impose criminal costs explicitly as a means to defray the costs of operating the criminal legal system: police, jails, courts, prosecutors, and public defenders.⁷⁵

Pretrial detention fees are an example of an early-stage fee. In 2014, all but nine states charged defendants for "room and board" in jail.⁷⁶ Since those defendants are in jail *because* they cannot pay bail (excepting the few who are not eligible for pretrial release because of the severity of their offense⁷⁷), pretrial

71. See Kleiman, *supra* note 19, at 547 (suggesting that resources are being over-allocated to fee-funded criminal services, "which may contravene public wellbeing").

72. See *supra* note 19 and accompanying text. But see *infra* Part I.D (explaining that fees are insufficient to recover these costs, in large part because defendants cannot afford to pay).

73. Martin et al., *supra* note 33, at 474–75 (explaining that as a result, most felony defendants have financial penalties imposed at sentencing).

74. *Id.* (noting that this "significantly broadens" the scope of monetary sanctions).

75. See, e.g., Ferguson Report, *supra* note 39, at 10 ("City and police leadership pressure officers to write citations, independent of any public safety need, and rely on citation productivity to fund the City budget."); Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/YG7N-ARRN>] ("[T]he costs of the criminal justice system in the United States are paid increasingly by the defendants.").

76. See *State-By-State Court Fees*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees> [<https://perma.cc/6XG6-UQEE>]. Consequently, the number of individuals detained pre-trial has increased 433% between 1970 and 2015. *The Civil Rights Implications of Cash Bail*, U.S. COMM'N ON C.R. 22 (2022), <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf> [<https://perma.cc/E433-Z69G>].

77. See THOMAS H. COHEN & BRIAN A. REAVES, NCJ 214994, U.S. DEP'T OF JUST., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 5 (2007), <https://bjs.ojp.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/8D3N-BYWR>]. Crimes for which defendants are least likely to be released pre-trial are murder (45% denied bail), robbery (10%), rape (9%), and assault (7%). *Id.* at 3.

detention fees are overwhelmingly billed to poor defendants.⁷⁸ These fees are often waived or refunded if the defendant's charge is dismissed or if they are acquitted.⁷⁹ However, if the defendant is convicted but still released, he or she is left with the bill for their stay.⁸⁰ In Kentucky, detainees can be charged up to \$50 per day; in Shelby County, Tennessee, people are charged \$38 per day.⁸¹

Many defendants take a plea deal to end their case quickly and be released from jail.⁸² Others choose to exercise their constitutional right to a jury trial.⁸³ Either path brings its own financial perils. In Pennsylvania, defendants pay a fee just to plead guilty.⁸⁴ State law requires a plea fee between \$20 and \$75, but county courts have the discretion to increase it periodically, resulting in fees of several hundred dollars being assessed against defendants across the state.⁸⁵ Conversely, Pennsylvanians who demand a jury trial must also pay hundreds of dollars, with amounts varying by county.⁸⁶ Over a dozen states similarly impose additional charges for jury trials, with varying prices depending on the defendant's choice of jury size and how long the

78. See Hale, *supra* note 20 ("On any given night, it is estimated that nearly half a million people who haven't been convicted of a crime are sleeping in local jails. The vast majority remain behind bars because they can't afford to pay bail."); *The Civil Rights Implications of Cash Bail*, *supra* note 76, at 23–24 (noting that pretrial detainee populations increased, from 1991 to 2013, even though crime dropped significantly, in part, because local jurisdictions imposed more financial conditions for release).

79. Hale, *supra* note 20.

80. *Id.*

81. See *id.* (also examining state-level pretrial detention fees in Virginia and North Carolina).

82. Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023), <https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice> [<https://perma.cc/XW9C-5KXX>].

83. U.S. CONST. amend VI ("In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.").

84. Joshua Vaughn, *In Pennsylvania, Defendants Pay a Fee Just to Plead Guilty*, APPEAL (Aug. 29, 2018), <https://theappeal.org/in-pennsylvania-defendants-pay-a-fee-just-to-plead-guilty> [<https://perma.cc/E3AJ-9P8W>].

85. *Id.*

86. See, e.g., *Fee Schedule*, WESTMORELAND CNTY., PA., <https://www.westmorelandcountypa.gov/270/Fee-Schedule> [<https://perma.cc/H4LG-35R7>] (listing \$238.35 for a jury trial); *Filing Fees*, YORK CNTY. PA., <https://yorkcountypa.gov/192/Filing-Fees> [<https://perma.cc/2PGN-6ZC8>] (showing \$250.10 for a jury trial).

trial lasts. Virginia defendants must pay \$30 per juror per day;⁸⁷ Washington charges double for defendants who choose a traditional twelve-person jury over a smaller panel of six.⁸⁸

Perhaps the one aspect of a criminal proceeding in which an indigent defendant would expect not to have to pay would be for their public defender. In issuing the well-known “*Miranda* warning,” police must inform an individual in custody that they have the right to an attorney and that one will be appointed if the defendant cannot afford to hire their own representation.⁸⁹ What is often left unspoken is the expectation that the defendant will somehow, while battling their criminal charges, find the funds to repay the cost of an attorney.⁹⁰ Over forty states bill defendants for their public defender, mostly after the conclusion of their case.⁹¹ A large majority of state felony defendants have a public defender, but, without federal money, state governments spend millions annually to fulfill their constitutional obligations.⁹² To fund public defense, states shifted the costs back to the “consumers”—the defendants.⁹³ Some states recoup the

87. *Criminal Court Costs*, LEGAL AID JUST. CTR., <https://www.justice4all.org/what-we-do/criminal-legal-system/fines-and-fees-2/criminal-court-costs> [<https://perma.cc/E6RV-4YG5>].

88. John D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. 561, 579 (2019) (also listing, among states with this practice, Colorado, Delaware, Illinois, Mississippi, Missouri, Montana, Nevada, Ohio, Oklahoma, Texas, Virginia, West Virginia, and Wisconsin).

89. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“Prior to any questioning, the person must be warned . . . that he has a right to the presence of an attorney, either retained or appointed.”).

90. For instance, defendants in Texas often report that they weren’t told that they may be liable for the cost of their court-appointed lawyer and didn’t find out until they received the bill. *See* Shannon Najmabadi, *He Thought He Had a Free Court-Appointed Lawyer. Then He Got a Bill for \$10,000*, TEX. TRIB. (Nov. 14, 2017), <https://www.texastribune.org/2017/11/14/texas-court-appointed-lawyers-arent-always-free> [<https://perma.cc/FWU9-JJZE>]. In Iowa, defendants who apply for a public defender must sign an acknowledgement that they *may* have to repay the state for their attorney. Gill & Li, *supra* note 1. But some defendants have reported they did not realize that payment would actually be required, were never told how much it would cost, and ultimately believed that they didn’t have any other option. *Id.*

91. *See* Beeman et al., *supra* note 33, at 15 (examining the imposition of public defense fees).

92. *See* King, *supra* note 88, at 571 (characterizing public defense leaders as “reconciling themselves to support such fees as better than the alternative”).

93. *See id.* at 568 (contextualizing the shift in states’ struggle to pay for the vast number of appointed attorneys needed to defend the increasing number of criminal defendants).

costs of a public defender at the end of a defendant's case, while others impose a fixed sum at the time of appointment.⁹⁴ In Minnesota, for instance, a defendant must pay \$75 for the services of a public defender, but a person represented by appointed counsel can be assessed the actual cost of their representation.⁹⁵ Defendants may also be charged for costs related to their defense, like investigations and experts, which "are necessary for the right to counsel to be meaningful."⁹⁶

Criminal fees don't stop accruing when the judge signs the sentencing order. Probation supervision, parole supervision, and electronic monitoring generate fees long after a defendant is sentenced.⁹⁷ With approximately one in every seventy-five adults currently on probation, the reach of these fees is vast.⁹⁸ While some advocates celebrate electronic monitoring as an alternative to incarceration, it merely expands the carceral state⁹⁹ and creates yet another offense—failure to pay—that can lead to sanctions.¹⁰⁰ Thirty-eight states charge monthly probation supervision fees, and thirty-three states charge monthly parole supervision fees, in addition to fees set by local jurisdictions.¹⁰¹ When governments outsource probation and parole to private companies, fees soar. One Tennessee resident was required to

94. Beeman et al., *supra* note 33, at 10–11 (distinguishing between upfront fees and recoupment fees).

95. Compare MINN. STAT. § 611.17(c) (2025), with MINN. STAT. § 611.35 (2025).

96. Colgan, *Paying for Gideon*, *supra* note 21, at 1931 n.5.

97. See Kleiman, *supra* note 19, at 526 (listing types of criminal fees); *50 State Survey: Probation and Parole Fees*, FINES & FEES JUST. CTR. REFORM ALL. 8 (2022), <https://finesandfeesjusticecenter.org/wp-content/uploads/2022/05/Probation-and-Parole-Fees-Survey-Final-2022-.pdf> [<https://perma.cc/5QW9SEP9>] (describing the prevalence of parole supervision costs).

98. *50 State Survey*, *supra* note 97, at 2.

99. See Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 655 (2019) (arguing that probation is an intensive form of criminal justice surveillance that will not end social stratification).

100. See *50 State Survey*, *supra* note 97, at 6 ("[Thirty-two] states allow for probation revocation and/or extension if fees are not paid.").

101. See *id.* at 5, 8.

pay \$35 to \$45 per month for supervision and \$20 for every random drug test.¹⁰² She struggled to pay for both probation and basic necessities on her monthly disability check.¹⁰³

And then there are a multitude of miscellaneous administrative fees. Even when the offense is minor, fees can swallow the amount imposed for fines and restitution.¹⁰⁴ For instance, a ticket for speeding on a South Dakota highway comes with a \$39 fine and \$78.50 to pay for “law enforcement training, court automation, 911 telecommunicator training, court-appointed attorneys, and public defenders,” most of which are not used for a traffic stop.¹⁰⁵ Many jurisdictions, both state and local, add mandatory fees to cover general “court costs” or directed towards specific beneficiaries. One Alabama resident was issued a \$42 traffic ticket but had to pay an additional \$162 in administrative fees to the county.¹⁰⁶ Defendants in New Orleans are required to pay the state’s mandatory fees of at least \$50 “to support drug education and treatment” and \$5 for a “judicial expense fund” along with the city’s general “court costs,” which even vary between judges.¹⁰⁷

As fees accrue from arrest to appeal, criminal defendants have to make difficult decisions about the cost of exercising their rights. One Iowa defendant said that even though her court-appointed lawyer obtained a successful outcome that allowed her

102. Komala Ramachandra, *“Set Up to Fail”: The Impact of Offender-Funded Private Probation on the Poor*, HUM. RTS. WATCH (Feb. 20, 2018), <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor> [https://perma.cc/2XXN-J6TZ].

103. *Id.*

104. *See, e.g., id.* (explaining that one person in Kentucky faced probation costs that were more than three times the amount they owed in fines and restitution).

105. Aravind Boddupalli & Kim S. Reuben, *Inequitable Criminal Legal Fines and Fees Are Ripe for State Reforms*, URB. INST.: URB. WIRE (Oct. 11, 2022), <https://www.urban.org/urban-wire/inequitable-criminal-legal-fines-and-fees-are-ripe-state-reforms> [https://perma.cc/697P-NMMC].

106. Ralph Chapoco, *The Fee Trap: Why Alabama’s Local Governments Can’t Shake Fines and Charges*, ALA. REFLECTOR (Sept. 12, 2023), <https://alabamareflector.com/2023/09/12/the-fee-trap-why-alabamas-local-governments-cant-shake-fines-fees-and-charges> [https://perma.cc/Y6XT-K26P].

107. 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://vera-institute.files.svdcn.com/production/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf> [https://perma.cc/B3R4-2X4K].

to regain custody of her children, she would have chosen to represent herself had she known that she would have to pay over \$5,000 in attorney and debt collection fees.¹⁰⁸ The risk of a conviction, and the ensuing collateral consequences, might not outweigh the accumulated financial penalties.

C. SOCIAL AND ECONOMIC HARMS OF CRIMINAL FEES

Fees and fines create and exacerbate insurmountable debt, incarceration, and institutional racism. In a 2015 survey, 48% of families said that they could not afford the costs associated with a conviction.¹⁰⁹ The average debt incurred by respondents was \$13,607, a staggeringly high amount for the many respondents who earned less than \$15,000 per year.¹¹⁰ In New Orleans, where the average fee for municipal or misdemeanor offenses was just \$228 in 2015, 62% of individuals convicted of those crimes were unable to make any payment within a year.¹¹¹ Criminal records make it much more difficult for debtors to obtain jobs that would enable them to pay off their fees.¹¹²

Combined with the racial disparities that already exist throughout the criminal justice system, monetary sanctions that accrue at each step serve to worsen vast racial wealth disparities.¹¹³ Among the fifty cities that levy the most fines and fees, the Black population is more than five times greater than the national median.¹¹⁴ Law enforcement officers and courts exploit

108. Gill & Li, *supra* note 1.

109. See Saneta deVunono-powell et al., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. FOR HUM. RTS. 9 (2015), <https://static.prisonpolicy.org/scans/who-pays%20Ella%20Baker%20report.pdf> [<https://perma.cc/5A8C-J8DA>] (also finding that 49% struggled to meet basic food needs).

110. *Id.*

111. Laisne et al., *supra* note 107, at 12.

112. See, e.g., *id.* at 13 (quoting one defendant with outstanding fines as saying, “I understand I gotta pay the money, but how can I pay the money if I’m a convicted felon and can’t get a job?”).

113. See Louis Fisher, Essay, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 112, 117 (2020) (explaining how criminal fines and fees implicate issues of racial justice).

114. Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), <https://priceonomics.com/the-fining-of-black-america> [<https://perma.cc/W85H-CHS2>].

minor infractions in communities of color to generate revenue.¹¹⁵ Women disproportionately shoulder the costs of criminal debt for family members.¹¹⁶ The disparity is even more pronounced among Black women.¹¹⁷

Criminal justice contact damages credit, decreases financial access, and increases financial distress.¹¹⁸ For individuals involved in the criminal legal system as young adults, criminal debt can contribute to more debt, as credit and consumer market debts increase for justice-impacted individuals.¹¹⁹ Transferring debt to private companies effectively extends criminal sentences through fee extraction.¹²⁰ Debt contributes to recidivism and lowers chances for successful reintegration.¹²¹ Most simply, fee increases from the criminal legal process reduce the net income that defendants draw on for other things, like food and shelter.¹²²

115. *Id.* See generally Katherine A. Beckett et al., *The Assessment and Consequences of Legal Financial Obligations in Washington State*, WASH. ST. MINORITY & JUST. COMM'N (2008), https://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf [<https://perma.cc/D2FZ-YCG3>].

116. See *Justice-Involved Individuals and the Consumer Financial Marketplace*, CONSUMER FIN. PROT. BUREAU 11 (2022) [hereinafter CFPB Report], https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf [<https://perma.cc/VNN9-4DQH>]; deVuono-powell et al., *supra* note 109, at 9 (“In 63% of cases, family members on the outside were primarily responsible for court-related costs associated with conviction. Of the family members primarily responsible for these costs, 83% were women.”).

117. See CFPB Report, *supra* note 116, at 41 (citing an Alabama survey finding that, of individuals paying court debt for other people, middle-aged Black women made up a greater share than any other demographic group).

118. See DiTommaso, *supra* note 29, at 20–21 (explaining that individuals with criminal legal debt are “impoverished with poor standing in credit markets”). These consequences are similar to those of civil enforcement actions. See Brendan M. Conner, *Fine-Tuning: The Emergent Order-Maintenance Architecture of Local Civil Enforcement*, 42 PACE L. REV. 138, 190–91 (2021) (also exploring the racial disparities produced by civil enforcement).

119. See Laura M. DeMarco et al., *The Accumulation of Disadvantage: Criminal Justice Contact, Credit, and Debt in the Transition to Adulthood*, 59 CRIMINOLOGY 545, 552 (2023) (noting that “legal costs take priority” over these other debts because “failure to pay . . . can result in continued involvement with the criminal justice system and even incarceration”).

120. See Adamson, *supra* note 27, at 308 (denouncing exorbitant debt collection costs).

121. See *id.* at 309–10.

122. See DiTommaso, *supra* note 29, at 9 (exploring the impact of legal financial obligations on consumption).

For individuals who can't pay, the alternative may be incarceration. Even though the United States ostensibly banned debtors' prisons under federal law in 1833, and even though the Supreme Court has repeatedly held unconstitutional the practice of imprisoning defendants who can't pay their fines and fees, thousands of Americans are still jailed each year for court debts.¹²³ The Mississippi Department of Corrections operates three "restitution centers" for individuals sentenced explicitly to stay in custody until they had made enough money to pay off their debts.¹²⁴ Alternatively, several states and counties allow defendants to "choose" jail time to pay off court debt.¹²⁵ Perhaps, unsurprisingly, some judges interpret these provisions to automatically commute fines to jail time if a defendant cannot pay.¹²⁶ Staying in jail can accrue new bills with debtors accruing fees for the cost of their incarceration.¹²⁷ Beyond financial penalties, even a short stint in jail can cause irreparable harm, such as was the case for Eileen DiNino in Pennsylvania.¹²⁸

D. EXTRACTING AND USING CRIMINAL FEES

Criminal fees are not just a statutory tool of punishment. They are a source of funding for courts, prosecutors, and law enforcement.¹²⁹ As a result, these actors have a perverse incentive to surveil, investigate, and punish defendants in order to extract their money.¹³⁰ This creates a profound conflict of interest, as

123. Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 2, 19 (2010), https://www.brennancenter.org/media/275/download/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf?inline=1 [<https://perma.cc/XEF9-4SPM>].

124. *Facilities Map*, MISS. DEPT OF CORR., https://www.mdoc.ms.gov/facilities?field_facility_type_target_id=13 [<https://perma.cc/X3UM-SLVZ>]; see Anna Wolfe & Michelle Liu, *Think Debtors Prisons Are a Thing of the Past? Not in Mississippi*, MARSHALL PROJECT (Jan. 9, 2020), <https://www.themarshallproject.org/2020/01/09/think-debtors-prisons-are-a-thing-of-the-past-not-in-mississippi> [<https://perma.cc/3WXB-758Q>].

125. Bannon et al., *supra* note 123, at 23.

126. *Id.*

127. *Id.*; see *supra* notes 71–76 and accompanying text (describing pretrial detention fees or the practice of charging defendants for their room and board in jail).

128. See *supra* notes 9–12 and accompanying text.

129. See, e.g., Reynolds & White, *supra* note 67, at 1029–30 (characterizing the judicial system as dependent on its users, including criminal defendants).

130. See *id.* at 1013 (describing courts as “not umpires, but rather participants” who are compromised by the revenues extracted in a fee-dependent system).

those entrusted with adjudicating cases and seeking justice have a financial incentive to arrest and convict.¹³¹

Government actors continue to impose criminal fees, even as empirical data makes clear that the debt will not be recovered.¹³² From 2012 to 2018, debtors in Florida paid just one-third of total fines and fees assessed, leaving an average of \$295 million uncollected per year.¹³³ Over the same period, Texas failed to collect an average of \$106 million per year.¹³⁴ The debt collection system used by courts is largely ineffective.¹³⁵ One county in New Mexico, for instance, spends \$1.17 in debt collection efforts for every dollar in criminal debt recovered, making it more expensive to collect fees than to simply not impose them at all.¹³⁶

Aggressive debt collection practices further exacerbate the harms caused by criminal fees.¹³⁷ States, counties, and municipalities often turn to private debt collection agencies, which

131. See *id.* at 1024 (“Entangling the administrative function of funding the courts with the judicial function of adjudicating cases based on the proof creates a financial incentive to convict, a temptation to disturb the balance in order to convict so as to impose the fines, fees, and costs. The conflict of interest that results when the judicial officer undertakes to both produce revenue and accomplish justice robs the court system of its fundamental core—judicial independence.”).

132. See Brian Highsmith, *Commercialized (In)Justice: Consumer Abuses in the Bail and Corrections Industry*, NAT’L CONSUMER L. CTR. 4–6 (2019), <https://www.nclc.org/wp-content/uploads/2022/09/report-commercialized-injustice.pdf> [<https://perma.cc/4NNK-TRQ8>] (explaining how private companies extract wealth from communities at each step of the punishment continuum).

133. Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. 27 (2019), https://www.brennancenter.org/media/5290/download/2019_10_Fees%26Fines_Final.pdf?inline=1 [<https://perma.cc/Q6WQ-KLE8>].

134. *Id.* at 25.

135. See Reynolds & White, *supra* note 67, at 1028 n.89 (citing a study that found that collection rates were 14% in Florida, 17% in Maryland, and 20% in Washington).

136. See Menendez et al., *supra* note 133, at 5, 10 (finding that criminal debt fails to prevent recidivism, improve public safety, or generate revenue).

137. See Bannon et al. *supra* note 123, at 5 (“Aggressive collection tactics can disrupt employment, make it difficult to meet other obligations like child support, and lead to financial insecurity—all of which can lead to recidivism.”); Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOCIO. REV. 367, 379 (2014) (finding that interaction with criminal debt collection reduces the likelihood that an individual will seek assistance in the future from other entities that conduct monitoring, like doctors’ visits).

raises two concerns.¹³⁸ First, government entities rarely monitor the costs-to-collection ratio, so it is impossible for them to know whether they are actually collecting more than they are spending on contracting with the private debt collection agency.¹³⁹ Taxpayers furnish the costs of these contracts that may be more expensive than just shouldering the costs of court administration and prosecution.¹⁴⁰ Second, private debt collectors use abusive—and illegal—practices to coerce debtors into repayment.¹⁴¹ For-profit debt collection companies often impose a surcharge or tax on the fees to be collected.¹⁴² In more extreme cases, they threaten debtors with incarceration for nonpayment,¹⁴³ an act which the Supreme Court has expressly prohibited.¹⁴⁴ Some research suggests that the impacts are psychological and social, as well: Individuals who have been subject to criminal debt collection are less likely to interact with “surveilling institutions,” including medical, financial, labor market, and educational institutions.¹⁴⁵

On the other hand, government entities may keep their debt collection practices in-house. That is, they rely on local law enforcement to track down debtors and seek repayment of criminal

138. See Adamson, *supra* note 27, at 307 (discussing how Washington has authorized courts to transfer non-incarcerated individuals' debts to private debt collection agencies).

139. See Reynolds & White, *supra* note 67, at 1029 (criticizing states for failing to consider the fiscal costs of collection).

140. See *id.*

141. See Highsmith, *supra* note 132, at 13–23, 26 (chronicling consumer abuses, including monopolies and financial incentives to corrections agencies); Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841, 858 (2017) (proposing a criminal law analog to consumer protection laws).

142. See Adamson, *supra* note 27, at 308 (noting that collection fees are 40% in Florida and 30% in Alabama, Texas, and Illinois, as just a few examples).

143. Cf. Appellants' Consolidated Opening Brief at 9, *Carter v. City of Montgomery*, 108 F.4th 1334 (11th Cir. 2024) (No. 21-12468) (alleging similar practices applied against probationers after the city contracted with a for-profit probation company).

144. See *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (concluding that a state can only incarcerate someone for failing to pay a fine or restitution, if the sentencing court determines that the debtor willfully refused to pay or make efforts to pay).

145. See Brayne, *supra* note 137, at 383 (finding a “strong, robust negative relationship between criminal justice contact and involvement with surveilling institutions,” like hospitals, banks, workplaces, and schools).

fees.¹⁴⁶ Along with the threats also invoked by private debt collectors, police contact with individuals who have not met their financial obligations to the government, just like police contact with individuals perceived to have committed any crime, can turn deadly.¹⁴⁷ For instance, many traffic stops, especially of drivers of color, end in the drivers' deaths or serious injuries at the hands of law enforcement.¹⁴⁸ Chasing debtors provides law enforcement with an opportunity to add fees to their debt and boost the coffers.

Unfortunately, while criminal debt has the power to reshape lives and communities for the worse, it has done very little to improve public safety or generate revenue.¹⁴⁹ Criminal fees create and exacerbate poverty, racism, and violence—as they have since the Confederacy was quelled. But only in recent years has community activism and civil rights litigation challenged criminal fines and fees across the country.¹⁵⁰ That effort may be buoyed by *Timbs v. Indiana*, the first U.S. Supreme Court case to recognize that the Eighth Amendment's prohibition on excessive fines applies to state punishments.

II. THE UNCONSTITUTIONALITY OF CRIMINAL FEES

As fees became a ubiquitous feature of criminal punishment, their opponents had limited recourse.¹⁵¹ The Excessive Fines Clause of Eighth Amendment prohibits the imposition of “excessive fines,” but no consensus exists as to whether certain fees are either fines or excessive, let alone both.

This Part argues that criminal fees are inherently unconstitutional under the Excessive Fines Clause. Section A explains the Supreme Court's decision in *Timbs v. Indiana*, which, over 200 years after the ratification of the Eighth Amendment and

146. See, e.g., Ferguson Report, *supra* note 39, at 10 (detailing the Ferguson city government's instructions to the police department to rely on citations to fund the city budget).

147. See Colgan, *Revenue, Race, and Unintended Consequences*, *supra* note 15, at 890–93 (citing dozens of police killings during traffic stops).

148. Even in jurisdictions engaged in traffic enforcement reform, traffic stop use-of-force incidents persist. *Id.* at 895 & n.16.

149. See Menendez et al., *supra* note 133, at 9–10. (finding that criminal debt fails to prevent recidivism, improve public safety, or generate revenue).

150. See Fisher, *supra* note 113, at 114 n.20 (citing litigation against monetary sanctions by the U.S. Department of Justice, the ACLU, the NAACP Legal Defense and Educational Fund, and public defender offices across the country).

151. See CFPB Report, *supra* note 116 and accompanying text.

over 150 years after the ratification of the Fourteenth Amendment, finally incorporated the Excessive Fines Clause against state and local government actors. Section A also discusses *Timbs*' significance—or lack thereof—in developing the excessiveness doctrine and the historical underpinning of excessive fines jurisprudence. Then, Section B makes clear why *Timbs* requires the abolition of criminal fees. It first explains why fees are “fines” within the meaning of the Excessive Fines Clause, then explains why those fees are “excessive” within the meaning of the Clause, and finally explains how the historical analysis undertaken in deciding Excessive Fines cases should prohibit courts, prosecutors, defense attorneys, and law enforcement officers from using state power to extract money from defendants.

A. *TIMBS V. INDIANA*

The Eighth Amendment to the U.S. Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁵² But while the Cruel and Unusual Punishment Clause has been litigated extensively,¹⁵³ the Supreme Court has only seen fit to analyze the scope of the Excessive Fines Clause five times.¹⁵⁴ Moreover, it was not until 2019, more than two hundred years after

152. U.S. CONST. amend. VIII.

153. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958) (denationalization); *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty); *Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory life without parole for juvenile offenders); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (lethal injection).

154. John T. Holden, *Exploring the “Excess” in Excessive: Reimagining the Eighth Amendment’s Excessive Fines Clause in the Wake of Stars Interactive*, 65 ARIZ. L. REV. 877, 895 (2023). In *Waters-Pierce Oil Co. v. Texas*, the Supreme Court held that the Excessive Fines Clause did not operate against state legislatures. 212 U.S. 86, 111 (1909) (“The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the State.”). Instead, the Court allowed defendants to challenge their fines under the Due Process Clause: Federal courts can strike down legislation and judicial action if the fines are “so grossly excessive as to amount to a deprivation of property without due process of law.” *Id.*

Subsequent litigation of fines and fees followed *Waters-Pierce Oil* in focusing on the Fourteenth Amendment. In *Tate v. Short*, the Supreme Court held that it was a violation of the Equal Protection Clause to convert a fine to jail time simply because the sentenced person cannot pay the fine. 401 U.S. 395, 395 (1971). In *Fuller v. Oregon*, the Court held that a statute allowing for the recoupment of costs related to court-appointed defense counsel did not violate the Equal Protection Clause. 417 U.S. 40, 40 (1974). Finally, in *Bearden v. Georgia*, the Court held that a local government can only imprison or jail someone

the adoption of the Eighth Amendment, that the Clause's protections would apply to defendants in state courts.¹⁵⁵

Subsection 1 explains the background and holding of *Timbs v. Indiana*, the Supreme Court case that finally incorporated the Excessive Fines Clause. Then, Subsection 2 analyzes the case's significance for future Excessive Fines Clause challenges.

1. The Case

In 2018, the Court took up the case of Tyson Timbs.¹⁵⁶ A thirty-seven-year-old Indiana resident,¹⁵⁷ Timbs pled guilty to a minor drug sale and was sentenced to one year of house arrest, five years of probation, and a total of \$1,203 in fees and fines.¹⁵⁸ The state of Indiana, unsatisfied, also seized Timbs' Land Rover, worth \$42,000.¹⁵⁹

for not paying a fine if the government can show that the debtor could have paid it but "willfully" chose to not pay. 461 U.S. 660, 661–62 (1983).

Entities facing harsh monetary sanctions revived the Excessive Fines Clause towards the end of the twentieth century. The Supreme Court, drawing on the history of the Clause and its English predecessors, took the opportunity to clarify which costs were covered. In *Browning-Ferris Indus. v. Kelco Disposal*, the Court held that the Clause did not apply to awards of punitive damages in cases between private parties. 492 U.S. 257, 257 (1989). In *Austin v. United States*, the Court found that forfeiture of money or property to the government is a qualifying fine under the Excessive Fines Clause. 509 U.S. 602, 602 (1993). And in *United States v. Bajakajian*, the Court held that a punitive forfeiture is constitutionally excessive when it is "grossly disproportional to the gravity of [a defendant's] offense." 524 U.S. 321, 324 (1998). For a full discussion of how these factors apply to criminal fees, see *infra* Part II.B.

155. The Eighth Amendment was adopted, along with the rest of the Bill of Rights, in 1791. See John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 990 (2019). During oral argument in *Timbs*, Justice Gorsuch said to the Indiana Solicitor General who was arguing the state's case: "[H]ere we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really? Come on, General." Transcript of Oral Argument at 32–33, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091).

156. Adam Liptak, *He Sold Drugs for \$225. Indiana Took His \$42,000 Land Rover*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/politics/supreme-court-civil-asset-forfeiture.html> [https://perma.cc/CQ4H-NYGR].

157. *Id.*

158. *Timbs*, 139 S. Ct. at 686.

159. *Id.*

Timbs challenged the seizure under the Excessive Fines Clause.¹⁶⁰ While successful in county court and on appeal, the verdict was overturned by the Indiana Supreme Court, which held that the Excessive Fines Clause did not apply against the State.¹⁶¹ Timbs' appeal to the Supreme Court came as the nation began to reckon with the severity of financial penalties imposed upon criminal defendants.¹⁶² Entities across the traditional political spectrum united in support of Timbs' petition, with *amici* as ideologically diverse as the American Civil Liberties Union (ACLU),¹⁶³ the National Association for the Advancement of Colored People (NAACP),¹⁶⁴ the Cato Institute,¹⁶⁵ the Goldwater Institute,¹⁶⁶ and the Chamber of Commerce¹⁶⁷ submitting supporting briefs to the Court.

160. *Id.* This decision was, perhaps, strategic: Legal scholars had long pressed for the resuscitation of the Excessive Fines Clause, with little success. *See, e.g.,* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 283–84 (2014) (“[T]he colonial and early American experience [and] economic sanctions taken from statutes and court records . . . provide significant evidence that the ratifying generation would have understood the Clause’s terms much more generously than today’s Court. . . . A proper interpretation of the Clause demands contemporary understandings of an offense’s nature, how offender characteristics aggravate or mitigate, and the risk that a fine may impoverish an offender so as to render the punishment perpetual.”). But the landscape was shifting. Just one year before the Court accepted Timbs’ case, Justice Clarence Thomas authored an opinion urging his colleagues to look more critically at civil forfeiture laws. *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring). The Institute for Justice, which represented Timbs, had targeted municipal fines and fees for several years and called itself “the nation’s leading legal opponent of policing for profit.” *Pagedale Municipal Fines*, INST. FOR JUST., <https://ij.org/case/pagedale-municipal-fines> [<https://perma.cc/K9V2-WMVC>].

161. *Timbs*, 139 S. Ct. at 686 (citing *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017)).

162. *See supra* Part I (discussing the movement against criminal fines and fees).

163. *See* Brief of the American Civil Liberties Union et al. as Amici Curiae in Support of Petitioners, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

164. *See* Brief of Drug Policy Alliance et al. as Amici Curiae in Support of Petitioners, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

165. *See* Brief of DKT Liberty Project et al. as Amici Curiae in Support of Petitioners, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

166. *Id.*

167. *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, *Timbs*, 139 S. Ct. 682 (No. 17-1091).

The Court's judgment was unanimous: The Excessive Fines Clause applies to the states.¹⁶⁸ To reach this conclusion, Justice Ginsburg, writing for the majority, engaged in a historical survey of economic sanctions. First, "Magna Carta required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'"¹⁶⁹ The English Bill of Rights reaffirmed the principles of Magna Carta, providing that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."¹⁷⁰ Colonists brought English sensibilities with them: In 1787, when the Constitution was signed, eight state constitutions forbade excessive fines.¹⁷¹ By the time the Fourteenth Amendment was ratified in 1868, the consensus was even more pronounced, with thirty-five of thirty-seven states expressly prohibiting excessive fines.¹⁷²

The consensus among the states was clear by 2019. Every state had a constitutional protection against excessive fines, "either directly or by requiring proportionality."¹⁷³ Obviously, Justice Ginsburg wrote, this safeguard was "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition."¹⁷⁴ Excessive fines "undermine other constitutional liberties."¹⁷⁵

The Court also stressed the need for the Excessive Fines Clause to apply against the states because of the revenue-generating model of criminal punishment.¹⁷⁶ It cited the ACLU's *amicus* brief, which noted that state and local governments across

168. *Timbs*, 139 S. Ct. at 686–87. Justice Thomas did not join the majority opinion but concurred in the judgment, writing separately to express his belief that the Clause should be incorporated under the Privileges or Immunities Clause, rather than the Due Process Clause. *Id.* at 691 (Thomas, J., concurring).

169. *Id.* at 688 (alteration in original) (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)).

170. *Id.* (citing Bill of Rights 1689, 1 W. & M. c. 2, § 10).

171. *Id.* According to the Court, these states constituted 70% of the U.S. population at the time. *Id.*

172. *Id.* (citing Calabresi & Agudo, *supra* note 52, at 82).

173. *Id.* at 689.

174. *Id.* at 687 (citing *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)).

175. *Id.* at 689.

176. *Id.* ("Even absent a political motive, fines may be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money.'" (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991)).

the country are increasingly dependent on criminal defendants' fines and fees.¹⁷⁷

Ultimately, the Court took no position on whether the seizure of Timbs' Land Rover was an excessive fine.¹⁷⁸ It instead remanded the case to the Indiana Supreme Court, which found the forfeiture excessive in light of the severity of the offense.¹⁷⁹

2. *Timbs*' Significance

Some advocates celebrated *Timbs* as a victory for all Americans subject to disproportionate fines, fees, and forfeitures.¹⁸⁰ Others went even further, describing *Timbs* as "resuscitating" the Eighth Amendment.¹⁸¹

177. *Id.* (citing Brief of the American Civil Liberties Union et al. as Amici Curiae in Support of Petitioners at 7, *Timbs*, 139 S. Ct. 682 (No. 17-1091)). For a discussion of the prevalence of criminal fees, see *supra* Part I.

178. *See id.* at 691.

179. The Indiana Supreme Court first issued a decision defining excessiveness in the civil forfeiture context based on whether the property seized was an instrumentality of the crime and whether the seizure was proportionate to the offense. *State v. Timbs*, 134 N.E.3d 12, 28–39 (Ind. 2019). It remanded *Timbs*' case to the Grant County Superior Court, which found the seizure excessive under the new standard. Findings of Fact, Conclusions of Law and Judgment at 12, *State v. Timbs*, No. 27D01-1308-MI-92 (Grant Cnty. Superior Ct. Apr. 27, 2020). The state appealed, bringing the case back to the Indiana Supreme Court, which held for the last time that the seizure was indeed excessive. *State v. Timbs*, 169 N.E.3d 361, 377 (Ind. 2021). The majority opinion compared the saga to "Captain Ahab's chase of the white whale Moby Dick." *Id.* at 365.

180. *See, e.g.*, Brianne J. Gorod & Brian R. Frazelle, *Timbs v. Indiana: Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard?*, 2018 CATO SUP. CT. REV. 215, 217 (2018–2019) ("The resulting Supreme Court decision should add even more momentum to the movement against exploitive financial penalties. . . . *Timbs* is an important step toward the creation of a robust excessive fines jurisprudence capable of reining in a host of modern injustices."); Sam Gedge, *Timbs v. Indiana: The Fight Against Excessive Fines Five Years Later*, INST. FOR JUST. (Feb. 14, 2024), <https://ij.org/11/timbs-v-indiana-the-fight-against-excessive-fines-five-years-later> [https://perma.cc/Q8HZYDFE] ("The decision was a victory not only for . . . Tyson Timbs . . . but for all Americans facing fines and forfeitures disproportionate to their offense."). The Institute for Justice represented Timbs and continues to represent other individuals against exorbitant criminal costs. *Id.*

181. *See* Scott Bullock & Nick Sibilla, *The Supreme Court Resuscitates the Eighth Amendment*, ATLANTIC (Mar. 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/unanimous-supreme-court-decision-policing-profit/584506> [https://perma.cc/G3JP-EH3T].

Still, for some longtime opponents of criminal fines and fees, *Timbs* was only a modest victory.¹⁸² It was reticent on the definition of excessiveness, only answering the question of incorporation.¹⁸³ *Timbs* declined to either define “excessiveness” or clarify the Court’s prior holdings in that area.¹⁸⁴ Litigants and lower courts were left to rely on older tests for excessiveness—some coming from constitutional provisions beyond the Excessive Fines Clause.¹⁸⁵

That the Court undertook a historical analysis to reach its conclusion about the Excessive Fines Clause was unsurprising. The Court has often looked to the past, especially to the founding era, for instruction on incorporation.¹⁸⁶ What was unusual, and perhaps unexpected, about the *Timbs* opinion was its acknowledgement of the racial underpinnings of criminal costs. The Court pointed to Black Codes, which imposed “draconian fines” for “dubious offenses,” and the subsequent congressional debates over the Fourteenth Amendment that mentioned the use of fines to coerce involuntary labor, to conclude that the Due Process Clause was intended to ameliorate the racist application of criminal costs.¹⁸⁷ It was only the 17th time in the 150 years since the

182. See, e.g., Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeiture's Coffin*, AM. C.L. UNION (Mar. 15, 2019), <https://www.aclu.org/news/criminal-law-reform/supreme-court-didnt-put-nail-civil-asset> [<https://perma.cc/M5PU-T9KY>] (“[C]rucial questions remain about what practical difference the Supreme Court’s decision will make in ordinary people’s lives, particularly in the context of civil asset forfeiture.”); David B. Smith & Jed M. Silversmith, *Timbs v. Indiana: A Modest Victory and a Missed Opportunity*, FOR THE DEF., May 2019, at 6, 6 (“The decision is disappointing for what it did not say, given that there was ample opportunity to point out why Indiana’s drug civil forfeiture system is uniquely abusive and blatantly unconstitutional . . .”).

183. See, e.g., MehChu, *supra* note 16, at 1491 (describing this omission as “lamentable” especially in light of the increasing use of monetary sanctions).

184. Neither issue was before the Court.

185. See, e.g., Rachel J. Weiss, Note, *The Forfeiture Forecast After Timbs: Cloudy with a Chance of Offender Ability to Pay*, 61 B.C. L. REV. 3073, 3083 n.51 (2020) (comparing *United States v. Aguasvivas-Castillo*, 668 F.3d 7 (1st Cir. 2012), which required contemplation of whether a defendant constitutes an individual whom the statute was intended to reach, with *Von Hofe v. United States*, 492 F.3d 175 (2d Cir. 2007), which used a hybrid of factors).

186. See generally Jay S. Bybee, *The Congruent Constitution (Part One): Incorporation*, 48 BYU L. REV. 1 (2022).

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

end of the Civil War that the Court had addressed Black Codes.¹⁸⁸

Timbs' historical analysis, while rich in Plantagenet lore, failed to connect slavery and Black Codes with modern systems of financial punishment.¹⁸⁹ The Fourteenth Amendment did not prevent economic sanctions from being used to oppress Black Americans.¹⁹⁰ Today, from New York¹⁹¹ to New Orleans,¹⁹² people of color and people from low-income backgrounds are disproportionately targeted for criminal fees—and disproportionately unable to pay.¹⁹³

Timbs may have squandered an opportunity to recognize “the invidious ways race taints the criminal legal system”¹⁹⁴ or the historical role that the judiciary played in reinstituting wage slavery after the Civil War.¹⁹⁵ But it still teaches that history matters, in the context of the Excessive Fines Clause,¹⁹⁶ which illuminates this Note's analysis of criminal fees.¹⁹⁷

188. See Zamir Ben-Dan, *Deeply Rooted in American History and Tradition: The U.S. Supreme Court's Abysmal Track Record on Racial Justice and Equity*, 15 ALA. C.R. & C.L. L. REV. 45, 121 n.558 (2024).

189. *Id.* (placing *Timbs* on a continuum with *Dred Scott*, which employed originalism to cast aside Black Americans).

190. See *supra* Parts I.A, I.C.

191. See New York's *Ferguson Problem- How the State's Racist Fee System Punishes Poverty, Lacks Transparency, and Is Overdue for Reform*, FINES & FEES JUST. CTR. (Sept. 4, 2020), <https://finesandfeesjusticecenter.org/articles/new-yorks-ferguson-problem> [<https://perma.cc/CY4Y-68Y5>] (finding that New York State has created new local traffic fees while disproportionately targeting Black drivers in traffic stops).

192. See Sarah Calame & Aravind Boddupalli, *Fines and Forfeitures and Racial Disparities*, TAX POL'Y CTR. (Aug. 14, 2020), <https://taxpolicycenter.org/taxvox/fines-and-forfeitures-and-racial-disparities> [<https://perma.cc/M8J2-R26W>] (noting that New Orleans' Black residents were jailed for failing to pay fines fifty percent more often than white residents).

193. See deVuono-powell et al., *supra* note 109, at 9 (finding that the average annual income of survey respondents was \$15,000—barely higher than their average criminal debt of \$13,607).

194. Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 682 (2022).

195. Ben-Dan, *supra* note 188, at 121.

196. See Harawa, *supra* note 194, at 720 (positing that the Court's acknowledgement of the racist origins of financial punishments could lead to other reforms in areas like public order offenses, gun crimes, immigration-related crimes, and sex crimes that similarly rest on racist foundations).

197. See *infra* Part II.B.3 (describing the history of the Excessive Fines Clause and how it warns against unbridled criminal fees).

B. RECONSIDERING CRIMINAL FEES IN THE WAKE OF *TIMBS*

Before *Timbs*, constitutional efforts to abolish—or even limit—criminal fees relied on arguments about due process and equal protection.¹⁹⁸ These arguments typically fell on deaf ears.¹⁹⁹ But in the wake of *Timbs*, litigants and courts have the opportunity to reconsider criminal fees under the Eighth Amendment.²⁰⁰

A critical examination of the Excessive Fines Clause's requirements reveals the punitive nature of criminal fees and their disconnection from the nature of the offense—factors which place criminal fees firmly within the ambit of the Clause. Relying on case law, this Section proceeds in three Subsections: first, showing that criminal fees are “fines” within the meaning of the Excessive Fines Clause; then, demonstrating that criminal fees are inherently excessive; and, finally, arguing that criminal fees undermine the historical background and purpose of the Excessive Fines Clause, particularly by dissuading criminal defendants from exercising other constitutional rights.

1. Criminal Fees as Fines

The Supreme Court, in *Austin v. United States*, defined a “fine” under the Eighth Amendment not by the type of cost assessed—civil or criminal, fine or forfeiture—but rather in the punitive nature of the cost.²⁰¹ To be punitive, a criminal cost must serve either retributive or deterrent punishments.²⁰² But even

198. See *supra* Part II.A.

199. See, e.g., *Fuller v. Oregon*, 417 U.S. 40, 54 (1974) (finding that a statute requiring defendants to repay the cost of their court-appointed defense lawyer was not a violation of the Equal Protection Clause because it only applied to formerly indigent defendants who later became able to pay). See *generally supra* note 154 and accompanying text (tracing the development of criminal fine and fee jurisprudence).

200. See O'Hear, *supra* note 19, at 1180 (“It seems likely that [*Timbs*] will result in an increasing number and variety of [Excessive Fines Clause] challenges to state LFOs.”).

201. *Austin v. United States*, 509 U.S. 602, 610 (1993) (rejecting the federal government's argument that a statutory *in rem* forfeiture of property was a civil assessment and therefore outside of the ambit of the Excessive Fines Clause). For a longer discussion of the Court's Excessive Fines jurisprudence, see *supra* Part II.A.

202. See *Austin*, 509 U.S. at 610 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)); see also *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (noting that the protection against excessive fines was important to protect against

the distinctions between retribution, deterrence, remediation, and revenue generation are tenuous. Economic sanctions frequently serve more than one purpose.²⁰³ Nevertheless, a cost that serves even *in part* to punish is still sufficiently punitive to be within the scope of the Excessive Fines Clause.²⁰⁴

According to government actors, the answer is clear: Criminal fees are purely remedial, only serving to repay the costs that the taxpayers paid to find the defendant guilty.²⁰⁵ Pretrial detention fees recoup the cost of housing a defendant;²⁰⁶ public defender fees recoup the cost of an attorney's work;²⁰⁷ court administrative fees recoup the cost of having the judge, bailiff, and clerk be present;²⁰⁸ jury fees recoup the cost of paying jurors for their attendance;²⁰⁹ and so on. The explosion of criminal fees is driven by the shift to a "user-funded" model of criminal proceedings.²¹⁰ In a pay-to-play criminal proceeding, government actors

costs imposed "in a measure out of accord with the penal goals of retribution and deterrence" (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991)).

203. *Austin*, 509 U.S. at 610 (holding that a forfeiture can both serve a remedial purpose and a punitive purpose—the latter placing it under the limitations of the Excessive Fines Clause). *But see Helvering v. Mitchell*, 303 U.S. 391, 391 (1938) (holding that a revenue-generating law was strictly remedial because it was provided "primarily" to protect revenue and reimburse the government for the cost of the investigation).

204. *See Austin*, 509 U.S. at 610.

205. *See KELLY LYN MITCHELL, UNDERSTANDING THE LANDSCAPE OF FINES, RESTITUTION, AND FEES FOR CRIMINAL CONVICTIONS IN MINNESOTA* 4 (Robina Inst. 2023) (explaining the general purpose of criminal fees as a method of recouping costs).

206. *See Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 250–51 (4th Cir. 2005).

207. *See Colgan, Paying for Gideon, supra* note 21. *See generally* Henry Rose, *The Constitutionality of Government Fees as Applied to the Poor*, 33 N. Ill. U. L. REV. 293 (2013) (exploring the history of Supreme Court decisions addressing the issue of the constitutionality of government fees as they apply to indigent persons and analyzing the coherence of the constitutional doctrine that arises from these decisions).

208. *See, e.g., People v. Cameron*, 900 N.W.2d 658, 671 (Mich. Ct. App. 2017) (upholding a statute imposing court costs on a criminal defendant).

209. *See Criminal Court Costs*, JUSTICE4ALL, <https://www.justice4all.org/what-we-do/criminal-legal-system/fines-and-fees-2/criminal-court-costs> [<https://perma.cc/9AG6-5UW3>] (explaining that defendants will be charged \$30 per juror to exercise their right to a jury).

210. *See supra* Part I.B.

argue, the fees are just repaying the state or city—and by extension, its taxpayers—for the costs expended.²¹¹ The popular discourse, too, drives the idea that criminal fees are solely remedial. Politicians²¹² and public officials²¹³ frequently claim that criminal fees are necessary to keep courts operational and law enforcement effective.

But, in practice, the alleged remedial nature of criminal fees is not so clear. In the end, “it matters not whether the scheme has a remedial purpose, even a predominantly remedial purpose.”²¹⁴ The Supreme Court in *Austin* held that as long as a criminal fee does not *solely* serve a remedial purpose, it is a fine for Eighth Amendment purposes.²¹⁵ This Subsection examines the various ways in which criminal fees serve non-remedial purposes.²¹⁶ First, they bear no correlation to the government’s expenditures; and second, they are imposed only as a consequence of being charged with a crime.

a. Correlation to Costs

First, criminal fees bear no correlation to the actual cost expended by the government in administering justice. Correlation

211. See MITCHELL, *supra* note 205, at 4.

212. See, e.g., Lawrence Mower, *Florida Could End Court Fees for Kids. Will Election-Year Politics Stop It?*, TAMPA BAY TIMES (Jan. 31, 2022), <https://www.tampabay.com/news/florida-politics/2022/01/31/florida-could-end-court-fees-for-kids-will-election-year-politics-stop-it> [https://perma.cc/6BKL33LK] (quoting then-Florida House Speaker Chris Sprowls, who opposed a proposal to eliminate fines on juvenile defendants, as saying, “If you ask the public, ‘Hey, this kid stole eight cars, do you want to pay for their electronic monitoring?’ I guarantee the answers [sic] going to be ‘No.’ . . . At the end of the day, look, someone’s going to be responsible for that”).

213. See, e.g., Mary Sanchez, *Missouri Amendment 6: Should Court Fees Fund Salaries and Benefits for Law Enforcement?*, KAN. CITY BEACON (Oct. 4, 2024), <https://www.stlpr.org/government-politics-issues/2024-10-04/missouri-amendment-6-court-fees-fund-salaries-benefits-law-enforcement> [https://perma.cc/N3H9-E6UB] (quoting the executive director of the Missouri Sheriffs’ Retirement System as saying, “We feel like the [proposed additional fee on guilty defendants to support salaries and benefits for sheriffs and prosecutors] is really a user fee of the court system”).

214. *Tyler v. Hennepin County*, 143 S. Ct. 1369, 1381 (2023) (Gorsuch, J., concurring).

215. *Austin v. United States*, 509 U.S. 602, 610–11 (1993).

216. This Note accepts the “not *solely* a remedial purpose” framework established by *Austin* and *Bajakajian*. However, some commentators (and Supreme Court Justice Neil Gorsuch) argue that a statutory penalty cannot escape the Excessive Fines Clause merely by being labeled “civil” or “remedial.” See, e.g., *Toth v. United States*, 143 S. Ct. 552, 553 (2023) (Gorsuch, J., dissenting).

is a necessary element of the fines inquiry because it bears directly on the question of whether the extraction is remedial. A financial sanction cannot be said to be remedial when it bears “no correlation to any damages sustained by society or to the cost of enforcing the law”²¹⁷ and “any relationship between the Government’s actual costs and the amount of the sanction is merely coincidental.”²¹⁸

By requiring “correlation” and a “relationship,” this test intrudes on the questions of proportionality and excessiveness, to be discussed further in Part II.B.2. But for an understanding of how it applies to the base question of whether a criminal fee is a fine, consider *Fuller v. Oregon*, the only instance in which the Supreme Court allowed a defendant to be charged for an administrative cost.²¹⁹ The Court declined to invalidate a recoupment statute that required repayment of the costs of a convicted person’s legal defense (if that person had the means to pay).²²⁰ Unlike the modern criminal fee statutes discussed in Part I, which bear no relationship to the costs incurred, Oregon’s 1974 law charged defendants for the actual cost of representation.²²¹ In fact, it specifically prohibited courts from charging defendants for “expenditures in connection with the maintenance and operation of government agencies that must be made by the public

217. *Austin*, 509 U.S. at 621 (quoting *United States v. Ward*, 448 U.S. 242, 254 (1980)).

218. *Id.* at 622, n.14. In the contexts of other government-imposed fees, like driver’s license fees or inspection fees, courts interpret the basic principle of proportionality to require that a fee bears a direct relationship to the good or service being provided by the government. That relationship is twofold: (1) The fee can only be imposed on the specific entity that is receiving the government’s benefit or burdening the government with a cost; and (2) the amount of the fee should not exceed the government’s cost to provide services to that entity. See Kleiman, *supra* note 19, at 524. For a more robust discussion of how criminal fees differ from other government-imposed user fees, see *infra* Part II.B.1.b.

219. 417 U.S. 40, 40 (1974). At the time, the Excessive Fines Clause had not yet been incorporated against the states, so Fuller brought suit under the Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 46–50. The Court ultimately held that the Equal Protection Clause was not violated because the statute only charged defendants who had been unable to pay at the time of their criminal proceeding but who later gained the ability to pay. *Id.* at 40.

220. *Id.* at 43.

221. OR. REV. STAT. § 161.665 (1974).

irrespective of specific violations of law.”²²² Today’s criminal fees provide no such safeguards.²²³

Modern criminal fee statutes fail the correlation test because they do not recoup the actual costs incurred by the state in prosecuting or defending the defendant. States often charge universal fees regardless of the facts, type, or severity of the alleged crime.²²⁴ In New Mexico, for instance, all individuals found guilty of a crime pay a \$5 “Domestic Violence Offender Treatment Fee” and a \$3 “Traffic Safety Fee,” even when they are not found guilty of domestic violence or a traffic offense.²²⁵ New Mexico also charges a \$10 public defender fee for all individuals who exercise their Sixth Amendment right to counsel, independent of the time expended by the attorney.²²⁶ By decoupling criminal fees from the recovery of any particular cost, states and counties unintentionally illustrate that fees are not solely remedial.

b. Imposition After Criminal Charges

A criminal conviction is not necessary for a court-imposed cost to be considered punitive under the Excessive Fines Clause, but it may be sufficient.²²⁷ In most jurisdictions, criminal fees are only imposed on defendants who are convicted of crimes, but some still levy fees for defendants who are acquitted or whose charges were dropped.²²⁸ For instance, the Supreme Court suggested in *United States v. Bajakajian* that a forfeiture, which might otherwise be a civil assessment, was punitive when assessed in conjunction with a criminal conviction.²²⁹

Imposition on criminal defendants distinguishes criminal fees from other forms of financial transactions with government

222. *Id.*

223. *See supra* Part I.

224. *See* Menendez et al., *supra* note 133, at 40 (listing universal fees in Florida).

225. *Id.* at 34.

226. *Id.*

227. O’Hear, *supra* note 19, at 1204 (comparing *Austin* with *Bajakajian*).

228. *See, e.g.,* Hale, *supra* note 20 (explaining that pretrial detention fees are often waived or refunded, if the defendant’s charge is dismissed or if he or she is acquitted); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052–54 (2006) (surveying state statutes that require a defendant to pay for the cost of his or her public defender).

229. 524 U.S. 321, 332 (1998).

entities.²³⁰ From driver's license fees to road tolls, these costs are accepted as a cost of living in society and benefiting from government programs.²³¹ In fact, the provision of these programs—roads, public utilities, clean water, and more—depends on the public's willingness to fund them through user fees and regulatory fees.²³²

However, unlike criminal fees, other government-imposed fees are voluntary and are subject to the variations of the free market.²³³ To be sure, all government-imposed fees carry some kind of compliance cost, which disproportionately hurts low-income payors.²³⁴ But criminal defendants do not choose to be ensnared in the financial web of the criminal legal system.²³⁵ It may be true that the choice to commit an illegal act is always voluntary.²³⁶ Certainly, the body of criminal law presupposes voluntary acts.²³⁷ But whether an individual consents to be punished is an entirely different question. Even within a social contract, individuals do not consent to state violence.²³⁸ Legally,

230. See Kleiman, *supra* note 19, at 520.

231. This argument is more tenuous in the context of criminal fees, which can rack up for minor offenses, like traffic code violations, for which practically everyone with a driver's license is guilty. See Colgan, *Revenue, Race, and Unintended Consequences*, *supra* note 15, at 902 (stating that because the traffic code is so comprehensive, most drivers violate it constantly, so "[s]atisfying . . . evidentiary standards for a traffic stop through officer observation is remarkably easy").

232. See Kleiman, *supra* note 19, at 520.

233. *Id.*

234. See Pamela Herd et al., *Introduction: Administrative Burden as a Mechanism of Inequality in Policy Implementation*, RUSSELL SAGE FOUND. J. SOC. SCI., Sept. 2023, at 1, 5–6 (defining compliance costs and explaining their impact on individuals seeking government programs and services).

235. See Martin et al., *supra* note 33, at 475 (illustrating the many downstream effects of unpaid criminal fees, including the loss of basic services like drivers' licenses, employment, childcare, and voting rights).

236. *But cf.* Kleiman, *supra* note 19, at 543 (explaining that in the mid-1990s, many state courts began to hold that voluntariness was no longer a required element of valid user fees).

237. See generally Christopher P. Taggart, *Retributivism, Agency, and the Voluntary Act Requirement*, 36 PACE L. REV. 645 (2016) (arguing that in order to ascribe to a retributivist perspective on punishment, one must accept that criminal defendants themselves cause their free, morally responsible actions).

238. See Alice Ristroph, Essay, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 613 (2009) (drawing on Thomas Hobbes' discussion of punishment in his influential seventeenth century work, *Leviathan*, to argue that the state's right to punish is not grounded in the subjects' concessions). *But*

criminal defendants always have a right to resist their punishment,²³⁹ to plead not guilty,²⁴⁰ to seek a trial by jury,²⁴¹ to present their own evidence,²⁴² to seek the advice of an attorney,²⁴³ to appeal a conviction or sentence,²⁴⁴ to challenge the terms of their punishment,²⁴⁵ and so on. And practically, defendants do choose to exercise those rights, some to a greater extent than others.²⁴⁶ In addition, regardless of how a defendant becomes involved in the system—that is, the type of offense with which they

see Claire Finkelstein, *Punishment as Contract*, 8 OHIO ST. J. CRIM. L. 319 *passim* (2011) (arguing that every member of society is part of a contractual agreement to be governed by laws of punishment in the event that they commit a crime).

239. See Alice Ristroph, *Regulation or Resistance: A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1582–83 (2015) (arguing that a “defendant’s act of resistance is itself constitutionally sanctioned”).

240. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that because a guilty plea waives the defendant’s right to trial before a judge or jury, it must be done voluntarily, knowingly, and intelligently).

241. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”); *S. Union Co. v. United States*, 567 U.S. 343, 352 (2012) (holding that the determination of any fact that increases a defendant’s maximum potential sentence is subject to the right to trial by jury).

242. See *Holmes v. South Carolina*, 547 U.S. 319, 319 (2006) (holding that a defendant could not be barred from introducing evidence that implicated another person in the commission of the crime with which he was charged). Note, however, that this right is subject to the Rules of Evidence. See *United States v. Scheffer*, 523 U.S. 303, 308 (1998).

243. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (holding that the Sixth Amendment guarantees a right to an attorney for any person accused of a crime).

244. Unlike the aforementioned rights in this list, the right to appeal a criminal conviction is not guaranteed by the U.S. Constitution. See *McKane v. Durston*, 153 U.S. 684, 687 (1894) (denying that the Due Process Clause of the Fifth and Fourteenth Amendments required states to provide a right of appeal in criminal cases). However, in the twentieth century, the right to appeal a conviction was codified in federal law and in the criminal code of every state. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMPAR. & INT’L L. 1, 32–33 (2011). That right is then subject to the constitutional guarantees of due process and equal protection. *Id.* at 33. In sum, because every jurisdiction provides a right to appeal and that right has substantive requirements, every criminal conviction entails a right to appeal.

245. See generally *Cooper v. Pate*, 378 U.S. 546 (1964) (establishing that prisoners have constitutional rights that can support a lawsuit against prison administrators).

246. See Marshall, *supra* note 244, at 1 n.3 (“The criminal process has been characterized as a struggle, with most people charged with crimes doing everything in their power to avoid punishment.”).

are charged—they have no control over the amount of fees they will ultimately accrue.²⁴⁷ Fee levels are ultimately determined *ex post*, so a defendant cannot make an informed decision before committing an offense.²⁴⁸

Criminal fees, then, are substantially different from other user fees because of the mandatory nature of fee-funded criminal justice services.²⁴⁹ These fees only apply to individuals who have been charged with a crime.²⁵⁰ A fee applied to all defendants, even those who were acquitted or whose cases were dismissed, may be a pure revenue-generation method;²⁵¹ even then, however, the fee only attaches because of a suspicion of a defendant's participation in a crime.²⁵² Admittedly, under this analysis, it is hard to imagine an exaction in the criminal context which is not a fine.²⁵³ But, as discussed earlier in this Part, the Supreme Court's jurisprudence has little patience for government attempts to seize personal finances in the name of recovery.²⁵⁴

247. See Kleiman, *supra* note 19, at 530 (distinguishing criminal fees from other user fees).

248. See *id.* at 540 (explaining that the ultimate fee burden depends on many different factors, including the charge, the defendant's race and gender, and the political pressures on the prosecutor and court).

249. See *id.* at 538 (noting that monopolistic criminal justice agencies, unlike other agencies, target a politically powerless group—criminal defendants—for fees).

250. See Adamson, *supra* note 27, at 306, 308 (“Like a term of imprisonment, LFO payment obligations are a condition of sentence. . . . LFO obligations remain a mandatory condition of probation, parole, or other correctional supervision.”).

251. Beeman et al., *supra* note 33, at 11 (“Federal law permits fees to be assessed . . . regardless of conviction status.”).

252. A criminal fee that applies regardless of conviction may imply excessiveness, as individuals adjudicated not guilty are subject to the costs of going through proceedings. See *infra* Part II.B.2.

253. See O'Hear, *supra* note 19, at 1180. The exception, perhaps, is restitution, which repays the victim rather than the government, even though the prosecutor asserts and provides evidentiary support for a restitution claim and restitution obligations are enforceable just like other criminal financial obligations. *Id.* at 1190; *cf.* *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (holding that punitive damages awarded in civil litigation between private parties, albeit technically a state-imposed cost, are not subject to the Excessive Fines Clause).

254. See *supra* notes 198–200 and accompanying text; see also O'Hear, *supra* note 19, at 1205 (citing *Paroline v. United States*, 572 U.S. 434, 456 (2014)).

2. Criminal Fees' Inherent Excessiveness

If fees are fines under the Eighth Amendment, then they cannot be excessive.²⁵⁵ Excessiveness, in turn, depends on whether the fee is proportionate to the offense to which it attaches.²⁵⁶ Proportionality is the hallmark of the Eighth Amendment and of the Excessive Fines Clause.²⁵⁷ In its discussions of the Excessive Fines Clause, the Supreme Court has relied heavily on Magna Carta, which required that economic sanctions “be proportioned to the wrong” and “not be so large as to deprive [an offender] of his livelihood.”²⁵⁸ Given that the Excessive Fines Clause only applies when retribution is at issue, it makes sense

255. U.S. CONST. amend. VIII.

256. Even though the Supreme Court mandates a proportionality inquiry to measure excessiveness, it has not yet articulated a proportionality test. Lower courts and scholars have taken it upon themselves to craft that inquiry, resulting in a “patchwork” of tests. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL’Y REV. 541, 543–44 (2017). For instance, Professor Daniel Harawa proposes a four-part test: “(1) whether the defendant is able to pay the fine; (2) whether fines are a significant revenue source in the sentencing jurisdiction; (3) whether other jurisdictions impose similar fines for similar crimes; and (4) whether the sentencing jurisdiction disproportionately imposes fines against minority defendants.” Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 69 (2020). The Tenth Circuit, by contrast, applies a nine-factor test. *See United States v. Wagoner Cnty. Real Est.*, 278 F.3d 1091, 1101 (10th Cir. 2002). *See generally Excessive*, BLACK’S LAW DICTIONARY (1st ed. 1891) (defining excessiveness in the context of punishment or bail as “unreasonably great and clearly disproportionate to the offense involved”).

257. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (“The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”); *see also Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (“[T]he punishment must not be grossly out of proportion to the severity of the crime.” (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958))); *id.* at 155 (approving of a state statute that only permitted death sentences after the state supreme court reviewed for proportionality); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (finding that death is a disproportionate punishment for a rape conviction); *Kennedy v. Louisiana*, 554 U.S. 407, 407 (2008) (holding that the death penalty is disproportionate for a child rape offense); *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (“[P]unishment for crime should be graduated and proportioned’ to both the offender and the offense.” (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005))).

258. *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (quoting *Browning-Ferris Indus.*, 492 U.S. at 271).

to focus on proportionality.²⁵⁹ Retribution hinges on proportionality—the classic “eye for an eye,” for example, or the idea that punishment should be the just response to an offense.²⁶⁰ Without proportionality to either the offense or the work expended by the government, criminal fees are inherently excessive.

This Subsection first looks to the principle of comparative proportionality to consider whether criminal fees fit the offenses for which they are levied. Then, it considers, on the other side, the nature of the government injury being redressed. Third, it weighs the individual defendant’s financial circumstances. Finally, it looks to the social consensus surrounding criminal fees. All these factors weigh in favor of criminal fees being inherently excessive.

a. Relationship to Offense

Eighth Amendment doctrine includes the principle of comparative proportionality. That is, a more serious crime should be punished with a more serious sentence.²⁶¹ Criminal fees, however, are usually assessed regardless of the severity of the crime. In most jurisdictions, criminal fees are not differentiated by case type.²⁶² A general public defender fee, for instance, may apply to all criminal defendants in a jurisdiction, regardless of whether they were convicted of driving under the influence or double homicide.²⁶³ In fact, fees for minor offenses often exceed those for more serious offenses.²⁶⁴

In addition, fees often outstrip the fines on top of which they are imposed.²⁶⁵ If a fine is imposed by statute ostensibly to punish and deter undesirable conduct,²⁶⁶ adding criminal fees that

259. See *supra* Part II.B.1 for a discussion of retribution and the Excessive Fines Clause.

260. Pattillo & Kirk, *supra* note 16, at 52–53.

261. Colgan & Galbraith, *supra* note 29, at 1052 (first citing *Kennedy*, 554 U.S. at 442; and then citing *Solem v. Helm*, 463 U.S. 277, 303 (1983)); Kleiman, *supra* note 19, at 525.

262. See, e.g., Beeman et al., *supra* note 33, at 11 (explaining this phenomenon with respect to public defender fees).

263. *Id.*

264. See Kleiman, *supra* note 19, at 525 n.48; DiTommaso, *supra* note 29, at 35 (discussing a study that found individuals charged with misdemeanors, which are generally “less serious offenses, were more likely to have fees ordered than felony offenders, who are generally charged with more serious offenses”).

265. See Kleiman, *supra* note 19, at 528.

266. See O’Hear, *supra* note 19, at 1185.

exceed the amount of the fine implies that the government's burden in punishing the crime is worth more than the punishment and deterrence itself.

Even in a single state, there may be excessive variation in the cost assessed in the same proceedings.²⁶⁷ Some local governments charge their own criminal fees in addition to state criminal fees, essentially double charging the defendant for the same administrative costs.²⁶⁸

As fees accumulate,²⁶⁹ their relationship to the original offense becomes even more attenuated.²⁷⁰ In many jurisdictions, an individual can be assessed a fee—or have their drivers' license suspended, or be jailed, or have their probation revoked—for nonpayment.²⁷¹ But those punishments respond to the failure to pay, not to the original offense.

267. See DiTommaso, *supra* note 29, at 33 (attributing this variation to the “[l]ack of standardized or nationally mandated fine, fee, or restitution schedules”); see also *Overview of State Criminal Fines and Fees and Probation Fees*, CAL. LEGIS. ANALYST’S OFF. 7 (2019), <https://lao.ca.gov/handouts/crimjust/2019/State-Fines-and-fees-Overview-020519.pdf> [<https://perma.cc/Z6Y7-6NAH>] (showing that the number, type, and level of probation fees varied significantly between three California counties, in part because counties have discretion to adjust fees based on the probationer’s ability to pay); Kahryn Riley, *Is It Constitutional to Require Criminal Defendants to Fund Their Own Prosecution?*, MACKINAC CTR. (Apr. 4, 2018), <https://www.mackinac.org/is-it-constitutional-to-require-criminal-defendants-to-fund-their-own-prosecution/> [<https://perma.cc/6JBD-624N>] (explaining that court costs vary by jurisdiction within Michigan because of the differing expenses of running each court). But see *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (plurality opinion) (“[T]he Eighth Amendment contains no proportionality guarantee.”).

268. See Bannon et al., *supra* note 123, at 1.

269. See Kleiman, *supra* note 19, at 527 (“The total fee burden for an individual will rise over time as she inhabits a system over which she has little control.”).

270. Cf. Colgan & Galbraith, *supra* note 29, at 1039 (“The question then [becomes], what alternative responses to nonpayment of economic sanctions [are] sufficiently equal to the imposition of the economic sanctions in the first instance.”).

271. *Id.* at 1047–48; see Jones, *supra* note 64, at 1601 (“[S]ome surveys show that as many as one in two people with outstanding fines and fees debts have gone to jail because they could not afford to pay.”).

b. Relationship to Government Injury

Excessive Fines Clause jurisprudence prohibits a fine that is grossly disproportionate to the injury suffered by the government.²⁷² State and local governments justify criminal fees by arguing that they merely recoup the government's expenses throughout a criminal proceeding, but fees are completely unrelated to those expenses.²⁷³

Compared to the fines imposed for serious offenses, or of the forfeitures demanded by the U.S. government in *Austin v. United States*, *United States v. Bajakajian*, and *Timbs*, criminal fees may seem comparatively low.²⁷⁴ But the monetary amount is not the sole indicator of disproportionality. While there is no clear definition, *Bajakajian* provides a list of factors contributing to the disproportionality of forfeiture, including that it had no articulable correlation to any injury suffered by the government.²⁷⁵ Similarly, criminal fees assessed regardless of the crime committed can have no correlation to the government's alleged injury.²⁷⁶ Fee amounts are generally specified as fixed amounts or ranges, disconnected from any identifiable case-processing costs.²⁷⁷

The government cannot claim, as Oklahoma's statutes would, that a \$40 public defender fee accurately represents the work done by a public defender in both a misdemeanor and a felony.²⁷⁸ Nor can it claim, as Florida's statutes seemingly do, that all criminal offenses are subject to *both* a \$50 misdemeanor

272. *United States v. Bajakajian*, 524 U.S. 321, 339–40 (1998).

273. *See supra* Part II.B.1.a.

274. *But see* MehChu, *supra* note 16, at 1507 (arguing that even small criminal costs have devastating consequences for defendants and their families).

275. *Bajakajian*, 524 U.S. at 338–39 (also citing that *Bajakajian*'s crime was just a reporting offense; his money was the proceeds of legal activity and was to be used to repay a lawful debt; he did not fit into the class of persons for whom the statute was principally designed; and the harm he caused was minimal).

276. *See* ANNE TEIGEN, ASSESSING FINES AND FEES IN THE CRIMINAL JUSTICE SYSTEM 1 (Nat'l Conf. of State Legislatures, 2020) (discussing the broad range of crimes for which criminal fees may be assessed, ranging from traffic tickets to criminal convictions).

277. Martin et al., *supra* note 33, at 473 (explaining that there are no clear federal guidelines for setting fee amounts and that state guidelines only provide loose parameters).

278. *See, e.g.,* Beeman et al., *supra* note 33, at 10 (explaining Oklahoma's \$40 nonrefundable application fee for defendants seeking a public defender).

prosecution fee and a \$100 felony prosecution fee, for a total of \$150, regardless of the nature of the offense.²⁷⁹

As discussed in relation to whether fees are fines, comparative proportionality is a key tenet of criminal punishment.²⁸⁰ A more serious crime should beget a more serious punishment.²⁸¹ Assigning criminal fees across the board without regard to actual charges, let alone the actual facts of the offense, indicates excessiveness.

c. Relationship to Individual Defendant

A person's financial condition may be relevant to assessing the severity of their pecuniary punishment.²⁸² To be sure, discrimination against an individual based on their wealth in other contexts is constitutionally permissible,²⁸³ but criminal courts cannot punish a person for their poverty.²⁸⁴ In *Timbs*, the Supreme Court noted that both Magna Carta and Blackstone, sources from which the United States derives the concept of disproportionate punishment, referenced the effects of monetary sanctions on a defendant in determining proportionality.²⁸⁵ Lower courts since *Timbs* have split on whether to incorporate the financial effect of an economic sanction into the excessiveness inquiry.²⁸⁶

279. *Id.* at 86 (listing Florida's universal fees).

280. *See supra* Part II.B.1.a.

281. *See* *Solem v. Helm*, 463 U.S. 277, 303 (1983) (holding that that disproportionate sentences for less serious crimes might violate the Eighth Amendment).

282. *See* *Colgan & Galbraith*, *supra* note 29, at 1049 (drawing a comparison with Fourteenth Amendment claims, which prevent wealth-based discrimination that renders a system fundamentally unfair).

283. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973); *Colgan & Galbraith*, *supra* note 29, at 1037–38 (proposing that the Court declined to afford protections for wealth-based discrimination in order to foreclose the idea that the government had an obligation to eliminate wealth-based disparities).

284. *Bearden v. Georgia*, 461 U.S. 660, 671 (1983) (drawing this conclusion under the Due Process and Equal Protection Clauses). “Some lower courts have interpreted *Bearden* narrowly, while others have interpreted it more broadly.” *Jones*, *supra* note 64, at 1605.

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

286. *Colgan & Galbraith*, *supra* note 29, at 1049 n. 304.

Individuals who are unable to immediately pay their criminal fees are subject to additional fees and further punishment.²⁸⁷ Payment plans, a common solution for low-income defendants,²⁸⁸ draw out the length of time during which an individual is under threat of punishment for non-payment.²⁸⁹

Installment fines and fees, also called graduated sanctions, were once celebrated as a reprieve for low-income defendants who could not pay their criminal costs upfront.²⁹⁰ Since then, however, installment fines have been bureaucratized, privatized, and weaponized—and, of course, increased.²⁹¹ Some jurisdictions even charge an additional fee every time a payment is made.²⁹² While well-intentioned, installment fines are now just another tool of the carceral state. Even the Supreme Court at the onset of the installment-fines era offered another solution: Reduce the fine.²⁹³

In addition, installment fines compromise the concept of comparative proportionality, a core element of the excessiveness inquiry.²⁹⁴ If a poorer defendant convicted of manslaughter can pay less money (either in total or per installment) than a wealthier defendant convicted of DUI, then the more severe punishment is not imposed for the more severe offense.²⁹⁵ The fee is excessive with respect to the poorer defendant.

287. *Id.* at 1050 (“[P]eople unable to pay immediately are subjected to added economic sanctions, further punishments, and a wider net of state involvement in one’s private life.”).

288. *See, e.g.,* Chapoco, *supra* note 106 (telling the story of an Alabama woman who was charged \$162 in criminal fees on top of her \$40 speeding ticket, forcing her to set up a payment plan to pay off her debt in installments).

289. *See* Colgan & Galbraith, *supra* note 29, at 1051–52 (referring to installment fines as having an “ongoing nature of punishment” and being “an extended form of punishment”).

290. *See id.* at 1000 (explaining the historical background of installment fines).

291. *See id.* at 1042 (describing the changes in installment fines since the early 1980s).

292. *Id.* at 1047 (citing a statute in Florida and unwritten practice in Louisiana as examples).

293. *Id.* at 1039.

294. For a discussion of the importance of comparative proportionality in criminal punishment, see *supra* Part II.B.2.a.

295. Colgan & Galbraith, *supra* note 29 at 1052–53 (criticizing the use of a payment plan divorced from a mechanism for graduating economic sanctions according to ability to pay).

3. History and Purpose of the Excessive Fines Clause: Safeguarding Constitutional Protections

In the development of the Excessive Fines doctrine lies a clear historical mandate against abuses of state power, particularly when employed against marginalized citizens.²⁹⁶ From Magna Carta to the Stuart Kings and the English Bill of Rights, the prohibition against excessive fines rests on a history of opposition to government actors' use of fines as both a cudgel against political enemies and a machine of state enrichment.²⁹⁷ In the United States, the Reconstruction Era framers of the Fourteenth Amendment sought incorporation of the Excessive Fines Clause against the states in order to "protect against the widespread [physical and financial] abuse of formerly enslaved Black people."²⁹⁸ Throughout Anglo-American history, the protection against excessive fines serves as an acknowledgement that "exorbitant tolls undermine other constitutional liberties."²⁹⁹ The modern-day imposition of criminal fees belies this protective purpose.

a. Criminal Punishment to Raise Revenue

Many jurisdictions impose and enforce criminal costs, to the detriment of the people who must pay and with very little economic or public safety benefits for the community at large.³⁰⁰ In some communities, local law enforcement agencies are responsible for the collection of criminal costs;³⁰¹ in others, that task is delegated to private debt collection agencies.³⁰² Unlike con-

296. See *id.* at 1053 (explaining that Magna Carta and the English Bill of Rights were responses to the abuses of English monarchs who used fines as weapons against political enemies).

297. *Id.* (first citing *Timbs v. Indiana*, 139 S. Ct. 682, 693–95 (Thomas, J., concurring); then citing *United States v. Bajakajian*, 524 U.S. 321, 335–36 (1998); and then citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266–68 (1989)).

298. Harawa, *supra* note 256, at 103 (reviewing the history of the Fourteenth Amendment's ratification).

299. *Timbs*, 139 S. Ct. at 689.

300. See Menendez et al., *supra* note 133, at 5 (finding that criminal debt fails to prevent recidivism, improve public safety, or generate revenue).

301. See, e.g., Ferguson Report, *supra* note 39, at 2 (explaining the use of policing to extract criminal debt in Ferguson, Missouri).

302. See Highsmith, *supra* note 132, at 39 (explaining how private companies extract wealth from communities at each step of our punishment continuum).

sumer debt collection agencies, criminal debt collectors are entirely unregulated.³⁰³ When costs are then distributed to courts and law enforcement, there is a perverse incentive for the government to charge and convict people of crimes as a method of generating revenue.³⁰⁴

Excessive fees today are a method for states, counties, and cities to raise money at the expense of individuals saddled with mounting debt and the collateral consequences thereof.³⁰⁵

b. Undermining Criminal Constitutional Rights

Assessing fees at every juncture of a criminal proceeding prevents low-income defendants from exercising all their constitutionally guaranteed procedural rights.³⁰⁶ States and cities apply fees for court-appointed lawyers, the prosecution's use of a drug analysis, and impaneling a jury—implicating the Sixth Amendment's right to counsel, confrontation of witnesses, and trial by jury, respectively.³⁰⁷ Criminal fees thus turn those fundamental rights into commodities only available to those who can pay.³⁰⁸ And if fundamental rights of criminal procedure are conditioned on payment, poor people will be disproportionately incentivized to waive those rights.³⁰⁹

303. For a discussion of the analogies between criminal debt and consumer protection, see Sobol, *supra* note 141, at 895.

304. See Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837, 1841 (2015) (arguing that current budget-cutting trends in criminal justice incentivize too-high economic sanctions).

305. See *supra* Part I.C (describing the economic and social consequences of criminal fees).

306. See King, *supra* note 88, at 562 (characterizing this shift as “a privatization of criminal procedure” that has the potential to fundamentally change how we think about constitutional rights).

307. See *id.* at 562 (describing each of these as “a surcharge for those defendants who elect to exercise a constitutional right”); see also U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

308. See King, *supra* note 88, at 587 (warning that this “risks creating a secondary class of criminal justice for poor people”).

309. See Fisher, *supra* note 113, at 129 (making a distributive inequality objection to user fees).

First, the Sixth Amendment guarantees that a criminal defendant is entitled to the assistance of counsel,³¹⁰ which the Supreme Court held in *Gideon v. Wainwright* requires states to provide attorneys for defendants who could not afford representation.³¹¹ Nevertheless, in more than forty states, indigent defendants can be assessed fees for invoking their right to counsel.³¹² Public defense fees interfere with attorneys' ability to build trust with their clients.³¹³ They also dissuade defendants from obtaining legal representation, with devastating legal aftermath: the collateral consequences of a criminal conviction; the possibility of deportation for noncitizen defendants; and the abusive tactics of private debt collectors and police.³¹⁴

For those who do exercise their right to counsel, the debt—even for individuals who are acquitted or have their charges dropped—can be staggering. In Iowa, which has some of the nation's highest attorney's fees, defendants say that “the aftermath of exercising their right to counsel was so bad they wished they had refused the services of a lawyer altogether.”³¹⁵

Second, the Sixth Amendment grants a criminal defendant the right to a jury trial.³¹⁶ In 2000, Justice Antonin Scalia wrote that the jury guarantee had “always been free.”³¹⁷ Unfortunately, his optimism may have been short-lived. At least fourteen states now either explicitly add a fee for defendants who elect for a jury trial or charge a convicted defendant more for the

310. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

311. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

312. See Beeman et al., *supra* note 33, at 3.

313. See Devon Porter, *Paying for Justice: The Human Cost of Public Defender Fees*, AM. C.L. UNION OF S. CAL. 3 (2017), <https://law.yale.edu/sites/default/files/area/center/liman/document/pdf/fees-report.pdf> [https://perma.cc/7C2X-BBGW].

314. *Id.* at 3; see Colgan, *Paying for Gideon*, *supra* note 21, at 1933–35 (arguing that the *Gideon* court did not envision the vast net of collateral consequences of criminal debt).

315. Gill & Li, *supra* note 1. One Iowa legislator said that the purpose of public defense fees was to prevent defendants from seeing their legal representation “as a kind of gift.” *Id.*

316. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .”).

317. *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (also describing the jury-guarantee as “one of the least controversial provisions of the Bill of Rights,” even though it was “never . . . efficient”).

cost of their prosecution if they are tried by a jury.³¹⁸ In addition, other states with a two-tiered criminal adjudication system, in which a defendant can get a *de novo* appeal in a higher court with a jury, assess an additional charge for a defendant who exercises that right to trial by jury.³¹⁹ These financial pressures coerce defendants into accepting plea offers.³²⁰ Courts essentially convict defendants who are “too poor to assert their constitutional right to go to trial.”³²¹

Third, the Sixth Amendment also guarantees a defendant the right to be confronted with the witnesses against them, meaning that they are entitled to see the testimony of the state’s witnesses and to cross-examine them.³²² Nevertheless, some states impose a fee on defendants who exercise that right by calling a state’s expert witness—like a drug analyst who provides a certificate affirming the composition of a drug sample—to appear in court.³²³ In some states, a defendant who ultimately does not conduct a cross-examination is charged an additional fee.³²⁴ While supporting crime labs is a legitimate government objective, doing so by levying a fee on defendants unnecessarily penalizes them for exercising their constitutional confrontation right.³²⁵

318. See King, *supra* note 88, at 579 (listing Colorado, Delaware, Illinois, Mississippi, Missouri, Montana, Nevada, Ohio, Oklahoma, Texas, Virginia, Washington, West Virginia, and Wisconsin as states with jury trial fees).

319. See *id.* at 580 (citing, as an example, Arkansas, in which the appealing defendant who wants a jury trial must pay \$150, “which is nonrefundable regardless of whether the charge results in conviction, acquittal, or dismissal”).

320. Paula Hannaford-Agor et al., *Preserving the Future of Juries & Jury Trials*, NAT’L CTR. FOR ST. CTS.: CTR. FOR JURY STUD. 30 (2024), <https://www.ncsc.org/sites/default/files/media/document/Future-of-Juries-and-Jury-Trials.pdf> [<https://perma.cc/4X8K-ZBTC>].

321. Emily J. Stauffer, *Plea Bargains: Justice for the Wealthy and Fear for the Innocent*, 35 BYU PRELAW REV. 167, 170 (2021). Arguably, deterring exercise of the Sixth Amendment right to demand a jury trial also discourages assertion of the Fifth Amendment right to not plead guilty. See *United States v. Jackson*, 390 U.S. 570, 581 (1968).

322. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

323. See King, *supra* note 88, at 578 n.117 (citing state laws in Alabama, Colorado, Louisiana, North Carolina, South Dakota, and Virginia as examples).

324. See *id.* at 577 n.112 (citing a state law in Alabama as an example).

325. See Jessica Smith, *Imposing Fees for Forensic Expert Testimony—Is It Constitutional?*, N.C. CRIM. L. BLOG (Sept. 18, 2013), <https://nccriminallaw.sog.unc.edu/imposing-fees-for-forensic-expert-testimony-is-it-constitutional> [<https://perma.cc/53AB-82GH>] (considering North Carolina’s statute charging defendants for the cost of examining the prosecution’s forensic experts).

Criminal fees today have unnecessarily and “needlessly chill[ed] the exercise of basic constitutional rights.”³²⁶ As criminal procedure has increasingly privatized, user fees for Sixth Amendment rights have become more popular among state legislatures.³²⁷ These conflicts will continue to prevent defendants from exercising their constitutional liberties.³²⁸ If the Excessive Fines Clause is to have teeth, courts and legislatures must “serv[e] as a blockade” against government greed.³²⁹ Otherwise, as before 2019, the Clause will continue to languish in the dusty basement of the Bill of Rights.

III. PRACTICAL SOLUTIONS & IMPLEMENTATION

Eliminating criminal fees, omnipresent in modern criminal punishment and ingrained in local budgets, is a daunting task.³³⁰ But it is not impossible. Some cities, counties, and states have begun to reform their criminal fee statutes, recognizing that fees do more harm than good.³³¹

This Part identifies solutions, both potential and existing, to remedy the abuses of criminal fees. Section A outlines the practical concerns in eliminating criminal fees and suggests that reforms should start with fees that undermine defendants’ exercise of their constitutional rights. Section B addresses the potential for judicial action but recognizes that courts usually defer to legislative bodies on questions of criminal punishment. Section C describes feasible legislative action and calls for legislatures to eliminate criminal fees and seek alternative budgeting practices. Finally, Section D demonstrates why categorical eliminations of criminal fees is preferable to merely expanding judicial discretion.

The greatest concern for either judicial or legislative action may be the potential loss of revenue associated with criminal fees. That concern may be overblown. While a vast majority of

326. *United States v. Jackson*, 390 U.S. 570, 582 (1968).

327. *See Fisher*, *supra* note 113, at 122–23 (explaining the history behind user fees for confronting witnesses and jury trials).

328. *See Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

329. *Colgan & Galbraith*, *supra* note 29, at 1056 (calling for Excessive Fines Clause challenges to “tak[e] a cautious and critical eye to the ways in which installment fines may hide unconstitutionally excessive practices”).

330. *See supra* Part I (chronicling the breadth of criminal fees).

331. *See infra* Part III.C (describing legislative actions and their motivations).

jurisdictions charge criminal fees to recoup the costs of appointing a lawyer, bringing in a jury, holding a defendant in pre-trial detention, and so on, much of that money is never actually paid to the jurisdiction.³³² In fact, redirecting the attention of law enforcement and courts from minor, money-generating offenses to more serious crimes can improve public safety, which in turn improves local economies.³³³ Besides, as this Part illustrates, various courts and legislative bodies have been able to eliminate criminal fees without sacrificing the services they provide to their constituents.³³⁴

A. PRACTICAL CONSIDERATIONS: PRIORITIZING FEES THAT UNDERMINE CONSTITUTIONAL RIGHTS

Parts II.B.1 and II.B.2 of this Note demonstrate why *all* criminal fees are constitutionally excessive and should be eliminated. But that is a bold, idealistic proposal,³³⁵ and reform driven by idealism is more likely to have “limited and short-term successes.”³³⁶ Consequently, this Part will call for advocates, judges, and lawmakers to prioritize the elimination of criminal fees that infringe on the constitutional rights of criminal defendants, as identified in Part II.B.3.a: the right to an attorney; the right to a jury trial; and the right to confront witnesses.³³⁷ Innocent people should not have to pay to prove that they are innocent; guilty people should not have to pay the state to prove that they are guilty.

332. See Menendez et al., *supra* note 133 (finding that billions of dollars in court debt are not repaid).

333. See Colgan, *Revenue, Race, and Unintended Consequences*, *supra* note 15, at 933 (“A growing body of research suggests that in many departments, revenues may push law enforcement away from investigation of violent and property offenses and toward traffic enforcement and drug interdiction [which generate fines, fees, and forfeitures].”).

334. See *infra* Part III.C (discussing budgetary concerns and the fiscal impacts of recent reforms).

335. See Jones, *supra* note 64, at 1606 (acknowledging that criminal fee abolition is a remote possibility in many jurisdictions).

336. See Malcolm M. Feeley, Keynote Address, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 694 (2018) (drawing this conclusion from the history of bail reform).

337. See *supra* Part II.B.3.a (explaining how charging defendants fees for exercising their Sixth Amendment rights contradicts the purpose of the Excessive Fines Clause).

Still, eliminating just some types of fees—for instance, fees imposed on top of traffic tickets—may not be a superior alternative. As long as government actors, particularly law enforcement officers, have an incentive to extract fees for some offenses, their efforts to prosecute those offenses will continue. For instance, reforming traffic policing in an effort to reduce police shootings could actually expose marginalized communities to violence by law enforcement in other areas instead.³³⁸ In many jurisdictions, lawmakers view traffic ticket revenue as an important source of funding, even including it in projected budgets.³³⁹ Eliminating criminal fees for traffic tickets is unlikely to eliminate that budget item but rather to shift it to another category of offense, like public order offenses or municipal code violations, which would be duly prosecuted.³⁴⁰ With an all-encompassing criminal code, the options are limitless.³⁴¹ Therefore, advocates and lawmakers should be cautious in calling for piecemeal reform and anticipate where budgetary pressures will be reallocated.

B. JUDICIAL ACTION

The idea that courts should take a drastic step to remedy the explosion of criminal fees may seem improbable. Punishment is usually the domain of state legislatures, not of the judiciary.³⁴² Indeed, even in the context of monetary sanctions, courts defer to legislative judgments in upholding state exactions against Excessive Fines Clause challenges.³⁴³ However, some state courts have taken action to prevent the imposition of excessive criminal fees under an Excessive Fines Clause analysis.³⁴⁴

338. See Colgan, *Revenue, Race, and Unintended Consequences*, *supra* note 15, at 897.

339. *Id.* at 925–26.

340. *Id.* at 942, 946–47.

341. *Id.* at 946–47 (“Given the breadth of the substantive criminal law, there are numerous avenues for law enforcement to use nontraffic offenses to fill governmental coffers.”).

342. See Anthony J. Franze, *Clinging to Federalism: How Reluctance to Amend State Law-Based Punitive Damages Procedures Impedes Due Process*, 2 CHARLESTON L. REV. 297, 302 (2008) (denouncing courts’ deference to state legislatures in evaluating the excessiveness of punitive damages).

343. See O’Hear, *supra* note 19, at 1207 n.178 (citing multiple examples of courts deferring to legislative judgment).

344. This Note does not call for the U.S. Supreme Court to strike down criminal fees, for two reasons. First, that is decidedly impractical. See, e.g., *Toth v. United States*, 143 S. Ct. 552, 552 (2023) (denying certiorari to a plaintiff who

Two state supreme court cases decided in the aftermath of *Timbs v. Indiana* are instructive in this area. *Seattle v. Long* in Washington and *State v. Gibbons* in Montana both applied their respective State Excessive Fines Clauses, alongside the Federal Excessive Fines Clause, to strike down a fee or fine. However, the courts in both cases decided that an ability-to-pay determination would be sufficient to overcome an Excessive Fines issue. As Part III.B.3 explains, *Long* and *Gibbons* show why state legislatures, not courts, are the strongest avenue for criminal fee reform.

1. *Seattle v. Long* (Wash. 2021)

In 2016, Steven Long, a tradesman in Seattle, was living in his truck when it broke down in a city-owned parking lot.³⁴⁵ Because Long could not have his truck moved from the lot, the city impounded it.³⁴⁶ While his \$44 ticket was waived because he was unable to pay, Long was charged \$547.12 in impoundment fees and \$10 in administrative fees and was put on a payment plan of \$50 per month.³⁴⁷ He appealed the charges under a variety of claims, including violations of the State and Federal Excessive Fines Clauses.³⁴⁸

The Washington Supreme Court first found that the impoundment fee was a fine governed by the Excessive Fines

argued that the Internal Revenue Service's civil penalties violated the Excessive Fines Clause). Second, American criminal law is highly fragmented, and each state has their own criminal procedure and funding. See Feeley, *supra* note 336, at 705. State courts and state legislatures, therefore, are best equipped to evaluate their own criminal fee statutes, understand how they fit within the statutory scheme of criminal law, and make decisions about how to replace them with alternative sources of funding.

345. City of Seattle v. Long, 493 P.3d 94, 99 (Wash. 2021).

346. *Id.*

347. *Id.* Long requested a hearing to contest the infraction, at which he explained that he lived in his truck and kept his work tools in it. *Id.* The magistrate judge was somewhat sympathetic, waiving the \$44 ticket and reducing the impoundment fee from \$946.61 to \$547.12. *Id.* Long said that he "felt 'forced' to agree or risk losing his truck at a public auction." *Id.*

348. *Id.* at 107. Washington's constitution states, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted," differing only from the Federal Eighth Amendment in that it prohibits punishments that are merely cruel and not unusual. WASH. CONST. art. I, § 14. The Washington Supreme Court views the parallel provisions as "coextensive for the purpose of excessive fines." *Long*, 493 P.3d at 107.

Clause.³⁴⁹ While it was intended “to recoup the towing and storage fees that the city paid on Long’s behalf,” it was only imposed as a result of the impoundment, which was itself a “penalty” under Seattle law for illegal parking.³⁵⁰

Then, the Washington Supreme Court held that the fee, as applied to Long, violated the Excessive Fines Clause. The court applied a five-part test that considers “the nature and extent of the crime,” “whether the violation was related to other illegal activities,” “the other penalties that may be imposed for the violation,” “the extent of the harm caused,” and “a person’s ability to pay the fine.”³⁵¹ Weighing Long’s precarious financial status, including the possibility of additional late charges and collection efforts if he fell behind on payments, against the State’s harm in paying the costs of towing and impoundment, the court held that the fees “deprived Long of his means of living” and were, therefore, excessive in his case.³⁵²

However, the court cautioned readers that its decision did not suggest that Seattle could never impose costs associated with towing.³⁵³ But reimbursement alone was an insufficient rationale for charging a fee.³⁵⁴ The court instead offered an impoundment hearing in municipal court as a means of determining the owner’s ability to pay.³⁵⁵ It is difficult to understand why the court would believe this to be a viable alternative, since Long *did* have an impoundment hearing, *did* state his inability to pay, and *did* have the fee reduced—but still was not able to pay the reduced amount. As explained in Subsection 3.a, ability-to-pay hearings have proven to be an insufficient remedial measure.

2. *State v. Gibbons* (Mont. 2024)

In 2021, Robert Murray Gibbons was found guilty of his fifth DUI, which landed him with a \$5,000 mandatory minimum fine under Montana law.³⁵⁶ He challenged the sentencing statute as

349. *Id.* at 109.

350. *Id.*

351. *Id.* at 114 (quoting *State v. Grocery Mfrs. Ass’n*, 461 P.3d 334, 353 (Wash. 2020)).

352. *Id.* at 115.

353. *Id.*

354. *Id.* at 114.

355. *Id.* at 115.

356. *State v. Gibbons*, 2024 MT 63, ¶ 1, 416 Mont. 1, 545 P.3d 686.

facially unconstitutional.³⁵⁷ The Montana Supreme Court agreed, holding that a mandatory minimum fine prevented the trial court from “considering in every case constitutionally and statutorily required factors embodied in the prohibition against excessive fines and fees of the United States Constitution [and] the Montana Constitution.”³⁵⁸ The court stressed the importance of judicial discretion to impose lower fines, as mandatory minimum fines produce punishment that is “disproportionate and unjust.”³⁵⁹

Notably, and unlike the Washington Supreme Court in *Long*, the Montana Supreme Court considered disproportionality in the aggregate, not just as applied to Gibbons. Mandatory minimum fines “disproportionately impact minority communities and people of color,” “impoverished defendants,” “families of poor defendants,” and “women in an offender’s family,” the court acknowledged.³⁶⁰

Ultimately, as in *Long*, the Montana Supreme Court’s offered solution was to require judges to investigate a defendant’s ability to pay before imposing a fine.³⁶¹ While the U.S. Supreme Court has held that an individual cannot be punished for non-payment without an ability-to-pay hearing,³⁶² considering a defendant’s ability to pay cannot absolve a fee of its inherent excessiveness.³⁶³ Much like the Washington Supreme Court’s decision in *Long*, *Gibbons* ultimately fails to right the wrong against low-income defendants.

3. Inadequacy of Judicial Action

Long and *Gibbons*, both decided after *Timbs*, illustrate courts’ continued reluctance to rely on the Excessive Fines

357. *Id.*

358. *Id.* ¶ 2. The Montana Constitution uses the same wording as the Eighth Amendment of the U.S. Constitution: “Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted.” MONT. CONST. art. II, § 22.

359. *Gibbons*, 2024 MT 63, ¶¶ 52–54.

360. *Id.* ¶¶ 54–55.

361. *Id.* ¶ 56.

362. *See* *Bearden v. Georgia*, 461 U.S. 660, 674 (1983).

363. *See infra* Part III.C.2.

Clause to curb criminal fees and fines.³⁶⁴ Courts are obligated to grant “substantial deference” to legislatures’ broad authority to determine the types and limits of punishments for crimes, so a facial challenge to a criminal fee statute on grounds that it is inherently excessive is likely to be unsuccessful.³⁶⁵

a. Failures of Ability-to-Pay Determinations

Some courts, like the Montana Supreme Court in *Gibbons*, remain amenable to challenges against fines and fees that ignore a defendant’s ability to pay. Yet, that claim has been available since 1983, when the U.S. Supreme Court held in *Bearden v. Georgia* that courts cannot imprison a defendant for failure to pay court debt unless that person “willfully” chose not to.³⁶⁶ Relying on the Court’s guidance in *Bearden* and subsequent cases, some states have sought to implement compliant procedures for their courts.³⁶⁷ For instance, Oklahoma House Bill 2259, passed in 2023, creates presumptions that certain individuals will be unable to pay and requires the court to adjust their financial obligations.³⁶⁸ West Virginia Senate Bill 191, also passed in 2023, establishes that an individual cannot be denied a deferred adjudication just because they could not pay fines and fees.³⁶⁹ Still, most criminal fee laws developed in the forty years since *Bearden* do not grant judges any discretion to lower fees.³⁷⁰ And even when judges do have that discretion, there is no guarantee

364. See, e.g., *State v. Griepsma*, 525 P.3d 623 (Wash. Ct. App. 2023) (rejecting an excessive fines challenge to an automatic \$500 victim penalty assessment); *State v. Tatum*, 514 P.3d 763 (Wash. Ct. App. 2022) (rejecting an excessive fines challenge to the imposition of \$2,600 in combined fines and fees); *People v. Accredited Sur. & Cas. Co.*, 279 Cal. Rptr. 3d 799 (Cal. Ct. App. 2021) (rejecting a facial challenge to the constitutionality of a statutory scheme governing the forfeiture of bail). But see *Dean v. State*, 736 S.E.2d 40 (W. Va. 2012) (finding that a seizure of a defendant’s home was disproportionate to the offense of selling \$600 in drugs).

365. See *Solem v. Helm*, 463 U.S. 277, 290 (1983).

366. *Bearden*, 461 U.S. at 672. For a discussion of the development of the Court’s jurisprudence related to criminal financial penalties, see *supra* note 154.

367. See, e.g., *Jones*, *supra* note 64, at 1610–27 (explaining ways to ensure that judges will make fair and accurate ability-to-pay determinations).

368. H.B. 2259, 2023 Leg., Reg. Sess. (Okla. 2023).

369. S.B. 191, 2023 Leg., Reg. Sess. (W. Va. 2023).

370. See O’Hear, *supra* note 19, at 1184 (“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.”).

that a defendant—like Steven Long—will be able to pay the lessened fee.³⁷¹

Policies that require courts to consider a defendant's ability to pay also require courts to do extensive fact-finding. Government lawyers appearing before the U.S. Supreme Court in the 1970s and 1980s argued that it was too difficult to validate claims of exigency.³⁷² Today, as criminal courts face extensive backlogs, there is little incentive for judges to consider every facet of an individual's financial situation: income; family status; disabilities; and more.³⁷³ Fee waivers already exist in other areas of criminal law, but there are wide disparities among judges in granting those waivers, which could indicate that procedures are not standardized, and, thus, claims of financial hardship are more difficult for judges to adjudicate.³⁷⁴ Likewise, defendants seeking to reduce their criminal financial obligations bear the burden of proof to show that they qualify for such relief.³⁷⁵ This burden is the same as the burden of proof in obtaining a fee waiver.³⁷⁶ As in other areas of the criminal legal system, as well as in the civil system, it can be difficult for an applicant to demonstrate their need.³⁷⁷ The elimination of criminal fees, by contrast, would reduce burdens on courts and defendants alike.

371. *City of Seattle v. Long*, 493 P.3d 94, 99 (Wash. 2021) (explaining that the magistrate judge had lowered Long's impoundment fees by several hundred dollars, but he was still unable to pay).

372. *See* Colgan & Galbraith, *supra* note 29, at 1054; *see also* Rutledge v. Turner, 495 P.2d 119, 124 (Okla. Crim. App. 1972) (stating that installment payments would "burden the already overtaxed trial courts"); *Hood v. Smedley*, 498 P.2d 120, 123 (Alaska 1972) (describing installment payments as an "administrative burden" for courts).

373. *Cf.* Amy Corral et al., *Growing Backlog of Court Cases Delays Justice for Crime Victims and the Accused*, CBS NEWS (Dec. 20, 2022), <https://www.cbsnews.com/news/growing-backlog-of-court-cases-delays-justice-for-crime-victims-and-the-accused> [<https://perma.cc/3WEH-U9A5>] (explaining how the nationwide court backlog, exacerbated by the Covid-19 pandemic, also threatens to deny defendants' constitutional right to a speedy trial).

374. *See* Susie Allen, *Why We Know So Little About Disparities Within the Federal Court System—and How That's Finally Changing*, KELLOGGINSIGHT (July 10, 2020), <https://insight.kellogg.northwestern.edu/article/public-court-records-federal-judges-timing-efficiency-fairness> [<https://perma.cc/ETL2-CVH2>].

375. *See* Colgan, *Burdens*, *supra* note 19, at 410.

376. *See id.* at 463.

377. *See id.* at 410 (discussing how courts have placed the burden of proof in challenging criminal fees on defendants with little analysis or reference to any authority).

b. Overlooking Fees' Impact on Defendants' Constitutional Rights

Courts do not always recognize that criminal fees undermine other constitutional protections. As discussed previously in this Note, many states charge defendants for the exercise of their criminal rights, including the rights to counsel, trial by jury, and confronting witnesses.³⁷⁸ For instance, in *State v. Doe*, the Iowa Supreme Court rejected an equal protection challenge to a state law preventing expungement for individuals who hadn't repaid fees for their court-appointed lawyers.³⁷⁹ The legitimate state purpose, the court reasoned, was just to encourage payment of court debt.³⁸⁰ Doe, whose charges were actually dismissed, was punished for exercising her Sixth Amendment right to counsel, but the Iowa Supreme Court saw no reason why this should supersede the State's interest in recouping costs.³⁸¹

On the other hand, some state courts recognized in the mid-twentieth century that charging defendants for exercising their right to a jury trial is unconstitutional,³⁸² but, beginning in the 1980s, the practice raged across the country regardless. Today's courts often merely look to whether a fee bears a "superficial relationship to the criminal justice system broadly."³⁸³ As one commentator wrote, "the constitutionality of recoupment statutes seems to depend upon a widespread ignorance of their existence."³⁸⁴

378. See *supra* Part II.B.3.a.

379. See *State v. Doe*, 927 N.W.2d 656, 656 (Iowa 2019). *Doe* was decided before *Timbs*, so it relies on the Equal Protection Clauses of the U.S. Constitution and the Iowa Constitution, rather than the Excessive Fines Clause.

380. *Id.* at 665.

381. *Id.* at 659 (explaining that Doe's court-appointed attorney withdrew after Doe and the State reached an agreement to drop charges, but the district court still assessed Doe \$718 in attorney's fees despite knowing that her only source of income was \$250 per month in food assistance).

382. See *King*, *supra* note 88, at 586.

383. See *Kleiman*, *supra* note 19, at 542. Courts are not applying a different version of the U.S. Supreme Court's test for excessive fines, discussed *supra* Part II.B, but rather ignoring that standard altogether and making general pronouncements about challenges to specific fines.

384. *King*, *supra* note 88, at 591.

c. Ongoing Irrelevance of State Excessive Fines Clauses

All fifty state constitutions have their own prohibitions on excessive fines.³⁸⁵ It is possible that state courts, like the Washington Supreme Court in *Long*, would rely on those state constitutional provisions to end abusive criminal fees.³⁸⁶ But in the centuries since the adoption of state excessive fines clauses, state courts have rarely invalidated criminal penalties on those grounds.³⁸⁷ By contrast, state courts have been willing to expand other criminal procedure rights, like protection from searches and seizures, beyond what the federal constitution guarantees.³⁸⁸

Timbs is unlikely to affect state courts' interpretations of their own constitutions.³⁸⁹ After all, *Timbs* did not alter the Excessive Fines Clause analysis but merely extend it to state penalties.³⁹⁰ Many state courts already relied on the Supreme Court caselaw that undergirds *Timbs* to understand their own excessive fines provisions.³⁹¹

Consequently, anti-fee advocates cannot rely on the courts to curb criminal fees, even those that infringe on the fundamental constitutional rights of criminal defendants. Instead, we must turn to the bodies with the sole authority to answer "diffi-

385. Lisa Soronen, *Why Timbs v. Indiana Won't Have Much Impact*, NAT'L LEAGUE OF CITIES (Apr. 12, 2019), <https://www.nlc.org/article/2019/04/12/why-timbs-v-indiana-wont-have-much-impact> [<https://perma.cc/H8GH-2LBZ>]; see *supra* notes 170–71 and accompanying text (explaining the history of excessive fines prohibitions in colonial and state constitutions).

386. See *supra* Part III.B.1 (discussing the *Long* decision).

387. Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 64 (2008).

388. See *id.* at 66.

389. See Jamie Markham, *Timbs v. Indiana: Excessive Fines Clause Applies to the States*, N.C. CRIM. L. BLOG (Feb. 21, 2019), <https://nccriminallaw.sog.unc.edu/timbs-v-indiana-excessive-fines-clause-applies-to-the-states> [<https://perma.cc/YZ9P-CYVP>] (noting that *Timbs* may not be helpful considering all fifty states already limited excessive fines in their own constitutions prior to the decision).

390. See *supra* Part II.A.2 (describing *Timbs*' adherence to existing federal standards).

391. See, e.g., *State v. Sanford Video & News, Inc.*, 553 S.E.2d 217, 219 (N.C. Ct. App. 2001) ("As the wording of the [excessive fines] clause under our North Carolina Constitution is identical to that of the United States Constitution, our analysis is the same under both provisions.").

cult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order”³⁹²: state legislatures.

C. LEGISLATIVE ACTION³⁹³

In *Bearden*, the U.S. Supreme Court offered an alternative solution for jurisdictions struggling with nonpayment of criminal debt: “[R]educe the fine.”³⁹⁴ Even as elected officials espouse a “tough-on-crime” mentality,³⁹⁵ recent polling shows that voters still support criminal justice reform.³⁹⁶ State legislators have consequently begun to take up the mantle of eliminating criminal fees.

Even though eliminating fees might reduce state revenue, the fiscal impacts are lessened by the fact that fees and fines are a particularly inefficient source of government revenue.³⁹⁷ Since 2017, the revenue generated from fines and fees has remained stagnant, while state and local budgets grew, drawing from other revenue sources.³⁹⁸ In 2022, fines and fees compromised just 0.3% of state and local revenue, the lowest share since at least 2005.³⁹⁹ States rely very little on criminal fees and get most

392. *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991).

393. Each year, the Fines and Fees Justice Center publishes a state legislative round-up, summarizing state-level reforms and regressive actions. *See, e.g., 2024 Legislative Roundup: Fines and Fees Reform Around the Country*, FINES & FEES JUST. CTR. (Feb. 3, 2025), <https://finesandfeesjusticecenter.org/2025/02/03/2024-legislative-roundup-fines-and-fees-reform-around-the-country> [<https://perma.cc/2KBJ-QY35>].

394. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

395. *See, e.g., Caitlyn Frolo, Trump Rallies Support for ‘Tough on Crime’ Agenda at DOJ Visit*, ABC 33/40 NEWS (Mar. 14, 2025), <https://abc3340.com/news/nation-world/trump-looks-to-rally-support-for-law-and-order-at-doj-visit-pam-bondi-fbi-change-crime-politics-jack-smith-classified-documents-january-6> [<https://perma.cc/M54C-VZS6>] (explaining current U.S. President Donald Trump’s vision for criminal justice during his second term).

396. *See New Polling Shows Criminal Justice Reform Is a Winning Issue for 2024 Election*, FWD (Oct. 9, 2024), <https://www.fwd.us/wp-content/uploads/2024/10/New-Polling-Shows-Criminal-Justice-Reform-is-a-Winning-Issue-for-2024-Election-1.pdf> [<https://perma.cc/ZW45-4J99>] (finding that 81% of likely voters support criminal justice reform, including 76% of Republicans, 82% of Independents, and 85% of Democrats).

397. *See supra* notes 132–36 and accompanying text.

398. Aravind Boddupalli, *Five Facts About Fines and Fees Revenues*, TAX POL’Y CTR. (Dec. 5, 2024), <https://taxpolicycenter.org/taxvox/five-facts-about-fines-and-fees-revenues> [<https://perma.cc/5PED-D53K>].

399. *Id.*

of their funding from taxes and licenses, which could make state-level fee reforms more palatable.⁴⁰⁰ At the local level, smaller cities are more reliant on criminal costs to raise revenue; large cities, like New York and Chicago, still only draw less than 3% of revenue from fees.⁴⁰¹

This Section offers avenues for state legislative action in eliminating criminal fees. Subsection 1 identifies reforms for the most pressing criminal fees: those that dissuade defendants from exercising their Sixth Amendment rights. Subsection 2 then considers recent bills that have reformed other types of criminal fees.

1. Protecting Constitutional Rights

This Note previously explained how criminal fees undermine other constitutional protections held by criminal defendants. Namely, fees on defendants for exercising their Sixth Amendment rights to counsel, to a jury trial, and to confront the state's witnesses fly in the face of the Eighth Amendment's protective purpose.⁴⁰² Consequently, Part III.A urges criminal fee reform to begin with the elimination of these unconstitutional fees. This Section surveys state laws both implementing and eliminating public defense, jury trial, and witness confrontation fees and identifies encouraging trends.

a. Eliminating Public Defense Fees

Very little reform of public defender fees occurred between 2000 and 2020.⁴⁰³ Since then, several states have eliminated public defense fees, even against concerns about funding. These successful reforms show promise for the movement against criminal fees (and for state budgets).

California Assembly Bill 1869, passed in 2020, eliminated twenty-three types of criminal fees, including public defense fees.⁴⁰⁴ The state instead allocated \$65 million per year over five

400. *Id.*

401. *Id.*

402. *See supra* Part II.B.3.a. (discussing why some criminal fees undermine the Sixth Amendment).

403. Beeman et al., *supra* note 33, at 18 (“[L]ittle progress has been made in eliminating public defense system fees in the past 20 years.”).

404. A.B. 1869, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (“It is the intent of the Legislature to eliminate the range of administrative fees that agencies and

years to backfill revenues lost by the fees.⁴⁰⁵ By contrast, the bill would discharge an estimated \$16 billion statewide in criminal debt.⁴⁰⁶

Delaware House Bill 244, passed in 2022, eliminated public defense fees, along with repealing almost all fines and fees for minors in criminal cases, prohibiting courts from charging extra for late payments or installment plans, eliminating probation fees, and establishing new reporting requirements.⁴⁰⁷ The state estimated an annual revenue loss of \$320,000, as a result of eliminating the “Public Defender Fee.”⁴⁰⁸ However, since that fee was previously directed to Delaware’s general fund, not the state’s public defender services, it should not significantly impact the delivery of public defense services for Delaware defendants.⁴⁰⁹

New Jersey Senate Bill 3771, passed in 2023, eliminated fees, liens, and warrants issued for public defender services.⁴¹⁰ Even though the Bill was projected to result in an approximate revenue loss of \$4 million in the first year,⁴¹¹ the state legislature merely allocated that amount to the 2024 budget to pay for indigent defense.⁴¹² Advocates applauded the bill as a “neces-

courts are authorized to impose to fund elements of the criminal legal system”); see *Ending Unjust and Ineffective Criminal Fees in California*, U.C. BERKELEY POL’Y ADVOC. CLINIC (Dec. 2024), <https://www.law.berkeley.edu/experiential/clinics/policy-advocacy-clinic/adult-fees/ending-criminal-adult-fees-in-california> [https://perma.cc/X78C-QJBV].

405. A.B. 1869.

406. *Governor Signs Historic Bill Repealing Unjust Criminal Fees in California Providing Much Needed Relief to Californians*, DEBT FREE JUST. CAL. (2020), <https://www.law.berkeley.edu/wp-content/uploads/2020/09/California-Governor-Signs-Historic-Bill-Abolishing-Unjust-Criminal-Fees-9-21-20-.pdf> [https://perma.cc/VJ2S-M9BH].

407. H.B. 244, 151st Gen. Assemb., Reg. Sess. (Del. 2022).

408. H. 151-2451510051, Reg. Sess., at 2 (Del. 2022).

409. See Paul Kiefer, *Legislature Passes First Leg of Constitutional Amendment to Allow Broader Detention Without Bail*, DEL. PUB. MEDIA (July 1, 2022), <https://www.delawarepublic.org/politics-government/2022-07-01/legislature-passes-first-leg-of-constitutional-amendment-to-allow-broader-detention-without-bail> [https://perma.cc/SX8J-JQVP].

410. S. 3771, 220th Leg., Reg. Sess., (N.J. 2023).

411. S. 220-3771FE, Reg. Sess., at 1 (N.J. 2023).

412. *Governor Murphy Signs Bill Eliminating Public Defender Service Fees*, ST. OF N.J.: GOVERNOR PHIL MURPHY (June 30, 2023), <https://www.nj.gov/governor/news/news/562023/20230630g.shtml> [https://perma.cc/V5UE-B5KG].

sary step to eliminating a two-tiered justice system” and an effort to “reduce racial and wealth disparities” in the state.⁴¹³ As the policy director of the ACLU of New Jersey said, “The right to counsel is meaningless if it depends on the size of one’s wallet.”⁴¹⁴

Indiana House Bill 1493, also passed in 2023, eliminated public defender fees in juvenile court.⁴¹⁵ The state estimated that it would result in an estimated revenue loss of \$30,000 to \$56,000 annually.⁴¹⁶ While the state did not expressly allocate funds to mitigate the loss, local news sources reported that the costs would likely be absorbed by county public defender funds.⁴¹⁷

The eradication of public defense fees is not just commendable, but feasible.⁴¹⁸ Aside from the aforementioned bills, six other states—Hawaii, Mississippi, Nebraska, New York, Pennsylvania, and Rhode Island—never enacted a statewide public defense fee but were still able to fund the provision of court-appointed counsel.⁴¹⁹ More states should follow these examples and eliminate barriers to defendants’ exercise of their Sixth Amendment right to counsel.

b. Eliminating Jury Trial Fees & Witness Confrontation Fees

While the elimination of public defense fees has shown considerable progress, the same cannot be said for fees imposed on defendants who exercise their Sixth Amendment rights to trial

413. *Id.*

414. *Id.*

415. H.B. 1493, 123rd Gen. Assemb., 1st Reg. Sess. (Ind. 2023). The bill also reallocated the burden of proof to courts to show that families can pay other costs, including being placed in residential treatment or detained in a Department of Corrections facility. *Id.*

416. H. 123-LS7015, 1st Reg. Sess., at 1–2 (Ind. 2023).

417. See Katrina Pross, *Being in Juvenile Court Can Cost Thousands. A New Indiana Law Will Change That*, WFYI (May 24, 2023), <https://www.wfyi.org/news/articles/being-in-juvenile-court-can-cost-thousands-a-new-indiana-law-will-change-that> [<https://perma.cc/Z7NR-LT35>].

418. See generally *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002) (noting that state legislative action to lessen criminal punishment is significant because states are typically more likely to enact harsher punishments).

419. See Beeman et al., *supra* note 33, at 15 (categorizing all fifty states and D.C. as requiring either an upfront fee, a cost of counsel fee, both, or neither). However, Mississippi lawyers say a cost of counsel fee is routinely imposed anyway. *Id.* at 5.

by jury or to confront witnesses. Instead, states have added jury fees and expert witness fees to defendants' bills.

Today, at least fourteen states charge additional fees on defendants who elect for a jury trial, and others operate a two-tiered adjudication system in which a defendant can pay extra to have their *de novo* appeal heard by a jury.⁴²⁰ Still, at least nine states have rejected—either in the legislature or in the courts—fees for jury trials.⁴²¹ As with public defense fees, the fact that courts in those nine states can cover the costs of a jury trial (including paying jurors for their time) signals that other states can do the same, especially given the relatively low number of defendants who exercise their right to a jury trial.⁴²²

Similarly, a number of states charge a fee on a defendant who wants a state's expert to appear in court as a live witness.⁴²³ There is no national consensus about which party should bear the costs of producing the state's witnesses—even though it is the state that has chosen to use the witness's information as evidence—or whether assessing defendants an extra fee for exercising their right to confront adverse witnesses is constitutional.⁴²⁴

Even though the trend has turned towards, rather than away from, fees that punish defendants for exercising their right to trial by jury and their right to confront the witnesses against them, neither has become the norm in a majority of states. Many states do not seek to infringe on defendants' constitutional rights solely to fund their own prosecutorial costs. For the states that have regressed in these areas, there is a viable opportunity to restore defendants' rights.

420. See King, *supra* note 88, at 579–80 (listing Colorado, Delaware, Illinois, Mississippi, Missouri, Montana, Nevada, Ohio, Oklahoma, Texas, Virginia, Washington, West Virginia, and Wisconsin as states with jury trial fees).

421. See *id.* at 581 (listing Alaska, Connecticut, Idaho, Kansas, Michigan, New Hampshire, North Dakota, Ohio, and South Carolina as states that have rejected jury trial fees).

422. See Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 26, 29, 37 n.48 (2017) (stating that in 2016, only 2.1% of federal criminal cases went to trial).

423. See King, *supra* note 88, at 578 n.117 (citing state laws in Alabama, Colorado, Louisiana, North Carolina, South Dakota, and Virginia as examples).

424. See *id.* at 578 (reflecting on the U.S. Supreme Court's twenty-first century Confrontation Clause jurisprudence).

2. Other Criminal Fee Reforms

While this Note calls first for eliminating criminal fees that undermine criminal defendants' constitutional rights, states have shown significant progress in recent years in eliminating other criminal fees or limiting their consequences.

Juvenile fee reform remains popular. As mentioned in Part III.C.1.a, Indiana House Bill 1493, passed in 2023, requires a court to prove that a juvenile defendant's family can pay costs (including for placement in a residential treatment facility or detention in a state correctional facility) before imposing those costs, thereby shifting the ability-to-pay determination to the court.⁴²⁵ Texas Senate Bill 1612, also passed in 2023, repealed all remaining fees assessed against juvenile defendants.⁴²⁶ Washington Senate Bill 5974, passed in 2024, began the process of waiving the \$43 million owed in juvenile fines and fees across the state.⁴²⁷

States continue to eliminate fees that accumulate after a conviction. Maryland House Bill 531, passed in 2024, eliminated parole supervision fees and prohibited the Division of Parole and Probation from charging supervisees for drug or alcohol testing.⁴²⁸ New Mexico House Bill 139, passed in 2023, eliminated all post-adjudication fees.⁴²⁹ Nevada Senate Bill 416, also passed in 2023, ended numerous fees charged to incarcerated individuals, including commissary markups, room and board fees, and medical co-pays.⁴³⁰ And Tennessee Senate Bill 13, passed in 2023, gives a formerly incarcerated individual a six-month post-release period in which they are not obligated to pay any criminal debt, allowing them to find their footing first.⁴³¹

Even in states that still permit many criminal fees, there have been efforts to reduce their collateral consequences. Ohio

425. H.B. 1493, 123rd Gen. Assemb., 1st Reg. Sess. (Ind. 2023).

426. S.B. 1612, 88th Leg., Reg. Sess. (Tex. 2023).

427. S.B. 5974, 68th Leg., Reg. Sess. (Wash. 2024); *see Removing Fines Gives Juvenile Defenders Another Chance*, BURKE BROWN ATT'YS, PLLC, <https://burkebrown.com/removing-fines-gives-juvenile-offenders-another-chance> [<https://perma.cc/5J6A-MZVQ>] ("SB 5974 wiped out \$43 million across 143,000 cases for outstanding juvenile court fines and fees.").

428. H.B. 531, 2024 Leg., Reg. Sess. (Md. 2024).

429. H.B. 139, 56th Leg., 1st Reg. Sess. (N.M. 2023).

430. S.B. 416, 82nd Leg., Reg. Sess. (Nev. 2023).

431. S.B. 13, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

House Bill 29, passed in 2024, eliminated driver's license suspensions for failure to pay fines and fees.⁴³² New Mexico Senate Bill 47⁴³³ and Vermont House Bill 53,⁴³⁴ both passed in 2023, also ended license suspension for unpaid fines and fees. Alabama Senate Bill 154, also passed in 2023, did not fully eliminate driver's license suspensions but instead allows a defendant to simply appear in court as an alternative.⁴³⁵

Admittedly, many of these reforms are too recent for their full fiscal impacts to be clear. But since states rely so little on criminal fees to begin with,⁴³⁶ legislatures have the flexibility to re-examine financial penalties that are socially detrimental⁴³⁷ and economically inefficient.⁴³⁸

In sum, the movement towards eliminating criminal fees is promising.⁴³⁹ Eliminating a particular criminal fee in its entirety would eliminate judges' need to conduct ability-to-pay hearings and defendants' need to prove their poverty.⁴⁴⁰ Avoiding unnecessary court appearances is beneficial for both parties: Judges can devote time to more pressing cases, and defendants need not miss work or assemble tax statements.⁴⁴¹ As judicial discretion is limited in remedying abuses of state power—like excessive fees and abusive revenue-raising police practices—in individual cases, legislatures would be best suited to redressing these harms on a wider scale.⁴⁴² The most direct approach to

432. H.B. 29, 135th Gen. Assemb., Reg. Sess. (Ohio 2024).

433. S.B. 47, 56th Leg., 1st Reg. Sess. (N.M. 2023).

434. H.B. 53, 2023 Gen. Assemb., Reg. Sess. (Vt. 2023).

435. S.B. 154, 2023 Leg., Reg. Sess. (Ala. 2023).

436. See *supra* notes 132–36, 387–91 and accompanying text.

437. See *supra* notes 109–17 and accompanying text (describing the devastating impacts of criminal debt on low-income people and people of color).

438. See *supra* notes 118–22, 132–35 and accompanying text (explaining how criminal fees are inefficient individually, as debtors struggle to obtain employment or build credit, and, more broadly, as states pay too much to attempt to collect unpaid fees).

439. But cf. *2024 Legislative Roundup*, *supra* note 393 (noting some “regressive” bills and legislation, along with the many positive reform efforts).

440. See, e.g., Brittany Friedman et al., *What Is Wrong with Monetary Sanctions? Directions for Policy, Practice, and Research*, 8 RUSSELL SAGE FOUND. J. SOC. SCI. 221, 225 (explaining how defendants must prove their financial status to courts).

441. See Kleiman, *supra* note 19, at 557–58 (describing ability-to-pay inquiries as “inconsistently applied, and difficult to administer”).

442. See James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 674 (1976) (“While courts have no choice but to take

eliminating the harms of excessive fines is to abolish them altogether.⁴⁴³

CONCLUSION

Fees are pernicious in modern criminal punishment.⁴⁴⁴ Ostensibly intended to recoup the costs spent by the government in prosecuting a criminal defendant, they bear no relationship to either the offense or the government's expenditures.⁴⁴⁵ This Note proposes that criminal fees violate the Excessive Fines Clause and are ripe for reform. Fees are imposed as punishment for a crime and are inherently disproportionate to the crime, the harm caused, and the impact on the defendant.⁴⁴⁶ As such, legislation abolishing criminal fees will allow us to return to the original promise of the Excessive Fines Clause: to guard against abusive government greed.⁴⁴⁷

For Lori Mathes in Iowa, Rick Dempsey in Indiana, and the ten million other Americans with criminal debt, fee reform cannot come quickly enough.⁴⁴⁸ With public opinion on their side, state legislatures should begin revising criminal fee statutes, beginning with those that contravene defendants' constitutional protections.⁴⁴⁹

action when presented with clear violations, there are serious limitations in seeking to remedy officials' abuse of power on a case-by-case basis.").

443. See Jones, *supra* note 64, at 1606 (acknowledging that this goal is "far-off" in many jurisdictions).

444. See *supra* Part I.

445. See *supra* Part II.B.

446. See *supra* Part II.B.2.

447. See *supra* Part II.B.3.

448. See *supra* Introduction.

449. See *supra* Part III.B.