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Paying for the Privilege of Punishment: Reinterpreting Excessive Fines Clause Doctrine to Allow State Prisoners to Seek Relief from Pay-to-Stay Fees

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NOTES

PAYING FOR THE PRIVILEGE OF PUNISHMENT: REINTERPRETING EXCESSIVE FINES CLAUSE DOCTRINE TO ALLOW STATE PRISONERS TO SEEK RELIEF FROM PAY-TO-STAY FEES

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INTRODUCTION

Across the country, the criminal justice system is becoming both more private and more expensive. Some prison systems have come to rely on private contractors for electronic monitoring, probation, pretrial services, and incarceration services.[1] At the same time, criminal justice fees are exploding, including fees charged to inmates for their "room and board" while in prison.[2] These fees, sometimes called "pay-to-stay," are imposed at the state and county level, and how they are applied varies widely.[3] Some take into account inmates' ability to pay the fees, or the effect on their families.[4] Some do not.[5] Some only apply to prisoners with paying jobs.[6] Some apply to every prisoner.[7] What they all have in common is this: these fees are imposed on convicted offenders who are statistically likely to be low income, and therefore less likely to be able to pay.[8]

Because of this reality, the effects of pay-to-stay systems can be devastating, even when the crime is comparatively minor and the sentence is relatively short. Take the example of George Richey, a Missouri man who spent three months in jail after a misdemeanor conviction.[9] The county charged him thirty-five dollars per day for his stay in jail, leaving him with a bill of $3150 just for room and board.[10] Richey's only income was a $600-per-month disability payment, and over two years after his release from jail, he still owed the county more than half his bill.[11]

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1. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtor's Prison*, 65 UCLA L. REV. 2, 24-25 (2018); *supra* note 205 and accompanying text.
2. *See infra* notes 23-28 and accompanying text.
3. *See infra* Part I.
4. *See infra* note 57 and accompanying text.
5. *See infra* notes 57-58 and accompanying text.
6. *See infra* note 32 and accompanying text.
7. *See infra* note 32 and accompanying text.
8. *See, e.g.*, *infra* notes 47-50 and accompanying text.
9. *See* Titus Wu, *In Rural Missouri, Going to Jail Isn't Free. You Pay for It*, COLUMBIA MISSOURIAN (Dec. 19, 2018), https://www.columbiamissourian.com/news/state_news/in-rural-missouri-going-to-jail-isnt-free-you-pay-for-it/article_613b219a-f4d7-11e8-bf90-33125904976d.html [https://perma.cc/5K6B-45H6].
10. *Id.*
11. *Id.*

In an absurd twist, because Richey could not pay the room and board fees for his jail sentence, the county put him back in jail for failure to pay and charged him an *additional* $2,275 in daily fees for his new jail time.[12] By the time Richey was released again, his debt was higher than it had been before he began paying it down.[13] He still could not afford to pay it.[14] Describing the difficulty of breaking out of this cycle of criminal justice debt, Richey lamented that "[i]t's like trying to shovel in a blizzard."[15] Finally, the court told him "his bill would only be dismissed if he agreed to serve a second 90-day jail stay."[16] In other words, the only way to escape his pay-to-stay debt was to volunteer to serve double the time for his original crime.[17]

When pay-to-stay fees prove ruinous, as they sometimes can, prisoners like Richey may finally have a practical constitutional remedy. In 2019, the Supreme Court turned its attention to a long-ignored clause of the Constitution, the Excessive Fines Clause, which prohibits the government from imposing excessive fines on its citizens.[18] In *Timbs v. Indiana*, the Court declared this Clause of the Eighth Amendment was a "safeguard [that] ... is 'fundamental to our scheme of ordered liberty'" and that it must apply to the states.[19] This Note argues that in the aftermath of *Timbs*, current Excessive Fines Clause doctrine can be interpreted to grant state and county prisoners increased opportunities to bring challenges to pay-to-stay fees. Bearing in mind the Clause's historical background and purpose, it is consistent with the current doctrine for prisoners to argue that these daily fees constitute fines and that those fines are excessive.[20]

Part I explains pay-to-stay fees at the state and local level throughout the United States, providing a specific example through

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12. *Id.*
13. *Id.*
14. *Id.* ("The last time I didn't pay enough, I tried to explain to the court that I can't afford this with housing costs and everything else ... [b]ut they just keep grilling me for the money. I'm paying it down, but I'm not paying fast enough for the judges.").
15. *Id.*
16. *Id.*
17. *Id.*
18. U.S. CONST. amend. VIII.
19. 139 S. Ct. 682, 686-87 (2019) (quoting McDonald v. Chicago, 561 U.S 742, 767 (2010)).
20. *See infra* Part III.A.2.

"subsistence fee" statutes in Florida. Part II then discusses the history of the Excessive Fines Clause and reviews the Court's jurisprudence, drawing doctrinal lessons from each of the four cases in which the Court has interpreted the Clause. Part III argues that prisoners should be able to seek relief from pay-to-stay fees under the Excessive Fines Clause. Part III.A argues that these fees can constitute fines under the Clause, and that those fines can be excessive, particularly if the Court incorporates an "ability to pay" consideration into the evaluation of excessiveness. This Section argues that this slight modification is consistent with the purpose and history of the Clause, and that moral and procedural process concerns support the change.

Finally, Part III.B argues that a doctrinal limitation on fines—that they must be paid to the government to qualify for Clause protection—should be reinterpreted to allow prisoners to seek relief for payments made to private prison contractors. This can be done by reinterpreting this requirement consistently with the Court's dicta in *Paroline v. United States*, to say that a fine does not need to be paid to the government if the imposition of the fine sufficiently "implicates 'the prosecutorial powers of government.'"[21] Alternatively, the Court could address the increasing privatization of the criminal justice system by adding a new requirement to the doctrine: that qualifying fines must be paid to the government or to an "entity performing an essential government function at the government's behest."[22]

I. PAY-TO-STAY ARRANGEMENTS IN STATE PENAL SYSTEMS

Broadly, "pay-to-stay" refers to the custom of charging prisoners for their time in jail.[23] Under pay-to-stay programs, prisons can

21. 572 U.S. 434, 456 (2014) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989)).

22. As will be discussed further, this requirement is inspired by, but meant to be more liberally construed than, existing state action doctrine. *See infra* Part III.B.2.

23. *See* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, 15 LOY. J. PUB. INT. L. 319, 324-26 (2014) (explaining that "there are three different models of 'pay-to-stay' programs": per-diems, individual item charges, and upgrade fees). "Upgrade fees" refers to programs wherein qualifying inmates may pay extra to upgrade their jail experience. *See, e.g.*, Xuan Thai & Tammy Leitner, *Soft Cell: California Inmates Can Pay for Cushier Accommodations*, NBC

charge daily fees for costs associated with prisoner care; these fees are often characterized as "room and board."[24] Alternatively (or additionally), a pay-to-stay program can take a more á la carte approach, charging for necessities like toilet paper and clothing.[25] These pay-to-stay fees are part of a larger trend in American criminal justice, where revenue-raising fees are imposed on a wide variety of pre- and post-conviction services.[26] With state and local governments charging these fees at many stages during arrest, conviction, and post-release supervision, "an estimated 10 million people ... owe more than $50 billion resulting from their involvement in the criminal justice system."[27]

Pay-to-stay fees are a relatively new phenomenon; "room and board" charges exploded in popularity in the 1980s and steadily gained traction over the next three decades.[28] These fees do not replace traditional fines in criminal actions; rather they are imposed on top of other common criminal consequences like restitution or punitive payments.[29] Though many states authorize some form of pay-to-stay fees in state prisons or county jails (or both), there does not appear to a be a uniform model.[30] Some states authorize only county jails to collect these fees.[31] Other states take payment only from those inmates who are employed or on work release, while

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NEWS (June 18, 2017, 9:43 AM), https://www.nbcnews.com/news/us-news/soft-cell-california-inmates-can-pay-cushier-accommodations-n773916 [https://perma.cc/54DY-NHLW] (describing some California jails as "run[ning] $250 a night [and] offer[ing] such amenities as unlimited access to movies, books and cable TV"). Because prisoners who can afford these fees willingly choose to pay them, this type of pay-to-stay arrangement is outside the scope of this Note.

24. Eisen, *supra* note 23, at 322; *see also* Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 58-59 (2013).

25. Eisen, *supra* note 23, at 321.

26. *Is Charging Inmates to Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy [https://perma.cc/J944-G2LE] ("In the last few decades, fees have proliferated, such as charges for police transport, case filing, felony surcharges, electronic monitoring, drug testing, and sex offender registration.").

27. *Id.*

28. Eisen, *supra* note 23, at 322.

29. Plunkett, *supra* note 24, at 60.

30. *See generally State Analysis, 50 State Criminal Justice Debt Reform Builder*, CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., https://cjdebtreform.org/state-analysis [https://perma.cc/RW84-LF38] (providing a compilation of state statutes related to criminal justice debt).

31. *Id.* (stating that Wyoming has this policy).

others recover fees from inmates regardless of employment status.[32] Though the permutations of these programs are many, the justifications for them tend to be similar. States enact pay-to-stay fees to help defray rapidly rising costs associated with rising prison populations.[33]

Proponents of these programs point to moral and political arguments in favor of this arrangement.[34] First, consider some policy alternatives: to address rising costs associated with growing prison populations, one could either (1) reduce those costs by reducing the prison population, or (2) raise new revenue to cover those costs.[35] Faced with the complexities of comprehensive criminal justice reform in the first case, and the unpopularity of tax increases in the second,[36] it is not hard to see why "policy makers, judges, and sheriffs can often gain the support of constituents by supporting inmate 'pay-to-stay' fees."[37] Rather than campaigning on complicated systemic reforms or trying to sell tax increases to a reluctant constituency, elected officials can propose a simple solution: if you do the crime, *you*, and no one else, must be ready to pay for it.[38]

This logic has some intuitive appeal: if these prisoners were the ones who committed a crime, then why should innocent, law-abiding taxpayers have to pay for it?[39] On closer inspection, the reasoning is not so clear-cut. From a moral standpoint, one may argue that when the citizenry chooses to punish wrongdoing with the extreme

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32. BRENNAN CTR. FOR JUST., *supra* note 26 (comparing, for example, Ohio, which charges based on a general "ability to pay," with Nevada, which allows room and board fees "[o]nly if inmate has job or work release").

33. *See, e.g.*, Alison Bo Andolena, Note, *Can They Lock You Up and Charge You for It? How Pay-to-Stay Corrections Programs May Provide a Financial Solution for New York and New Jersey*, 35 SETON HALL LEGIS. J. 94, 95 (2010).

34. Eisen, *supra* note 23, at 323-24.

35. *See* Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CTR. FOR JUST. 12 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Charging_Inmates_Mass_Incarceration.pdf [https://perma.cc/4Q7J-RS74] (noting that the explosion in prison populations was due to changes in criminal justice policy, and that as "budgets grew tighter ... jurisdictions balked at increases in taxes").

36. *See id.*

37. Eisen, *supra* note 23, at 324.

38. *Id.* at 323 n.27.

39. *See, e.g.*, Michael S. Carona, *Pay-To-Stay Programs in California Jails*, 106 MICH. L. REV. FIRST IMPRESSIONS 1, 3-4 (2007), http://repository.law.umich.edu/mlr_fi/vol106/iss1/30 [https://perma.cc/ZF29-4NMJ] ("I believe, and so do most citizens, that those who commit crimes—not law-abiding taxpayers—should pay for the cost of their own incarceration.").

remedy of removing a fellow citizen from society, the citizenry must bear the necessary costs of that choice.[40] Beyond this moral imperative, there is also a practical reason to view this "simple" solution with some skepticism: these programs do not always deliver the revenue they promise. For example, the American Civil Liberties Union (ACLU) of Ohio investigated pay-to-stay programs in Ohio jails and found that high charges do "not translate into higher collection rates."[41] Furthermore, the ACLU found that when the counties employed collections agencies to recover the debt, those agencies "impose a new cost on jails" without providing *any* increase in the likelihood that the fees will be paid.[42] Ohio is not alone in finding that the revenue benefits of pay-to-stay programs may be overstated.[43]

Still, supporters argue that these fees serve important purposes, even beyond revenue. The fees can play a role in punishment, driving home the lesson that a criminal must be prepared to pay for their crime.[44] Fees may serve a rehabilitative function by teaching inmates lessons in responsibility.[45] One may even hope that the imposition of debt will deter future crime.[46] But while deterrence and rehabilitation are important goals, those hoping to achieve these goals will have to reckon with a simple fact: the majority of

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40. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 892 (2009) (explaining that during incarceration, "the state assumes an ongoing affirmative obligation to meet the basic human needs of the people exiled in this way.... If society prefers, it can choose not to incarcerate. But if it wants the benefits of incarceration, society must bear the burden, even if this choice should oblige the state to provide for the needs of people in prison in ways it routinely fails to do for needy people in the free world.").

41. ACLU OHIO, ADDING IT UP: THE FINANCIAL REALITIES OF OHIO'S PAY-TO-STAY JAIL POLICIES 3 (2013), http://www.acluohio.org/wp-content/uploads/2013/06/AddingItUp2013_06.pdf [https://perma.cc/UFM6-U8QB].

42. *Id.* For example, a jail facility in Fairfield County worked with a collections agency to recoup pay-to-stay fees after release, yet "[o]nly about 15% of pay-to-stay fees charged from 2008-2011 were collected." *Id.* at 4.

43. *Cf.* Eisen, *supra* note 35, at 5 ("Some agencies report actual revenues ... as low as 6 percent of the fees assessed.").

44. Eisen, *supra* note 23, at 323, 323 n.27.

45. *See* Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 420 (3d Cir. 2000); *see also* Eisen, *supra* note 23, at 323.

46. Eisen, *supra* note 23, at 323 n.27.

prisoners have very little income.[47] In a survey of labor outcomes before and after incarceration, the Brookings Institution found that "[t]wo years prior to the year they entered prison, 56 percent of individuals have essentially no annual earnings (less than $500)."[48] Post-incarceration labor statistics are equally grim, with 80 percent of former prisoners earning less than $15,000 in the first year after prison, and 49 percent reporting earning $500 or less.[49] Imposing debt on prisoners with little to no income "chart[s] a path back to prison."[50] Financial insecurity and disruptive collection tactics can cause recidivism;[51] thus, those hoping to deter future crime may find that pay-to-stay fees sometimes have the opposite effect.

It may be helpful to provide a specific example of the types of pay-to-stay arrangements discussed in this Note. Florida state law authorizes pay-to-stay fees in its state correctional system and "local subdivisions."[52] Any pay-to-stay debts incurred under these statutes "may survive against the estate of the prisoner."[53] The statutes direct that the systems may recover "all or a fair portion of their daily subsistence costs;"[54] the law also provides for liquidated damages for "damages and losses for incarceration costs and other correctional costs."[55] These damages amount to fifty dollars per day for the entire length of the imposed sentence (regardless of time served); in the case of a life imprisonment or death sentence, damages are capped at $250,000.[56] Finally, any pay-to-stay fee determination should consider what the prisoner can theoretically afford, and whether the prisoner has any dependents.[57] However,

47. *See* Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, BROOKINGS INST. 8 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_ final.pdf [https://perma.cc/UG7K-7732].

48. *Id.*

49. *Id.* at 7.

50. Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 5 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/73BF-MZPU].

51. *Id.*

52. FLA. STAT. ANN. § 944.485 (West 2019); FLA. STAT. ANN. § 951.033 (West 2019).

53. § 944.485; § 951.033.

54. § 944.485; § 951.033.

55. FLA. STAT. ANN. § 960.293(2) (West 2019).

56. § 960.293(2)(a)-(b).

57. § 944.485; § 951.033.

even when state law directs that an inmate's ability to pay should be taken into account, facilities may employ different methods of doing so, with varying degrees of effectiveness.[58]

In the case of Florida, these fifty-dollars-per-day fees are charged against prisoners at the government's discretion.[59] Consider Jeremy Barrett, a former inmate who sued the Florida Department of Corrections over a violent assault he endured in a Florida prison.[60] In response to Barrett's lawsuit, the Department filed a counter-claim against him for $54,750—a fifty-dollars-per-day charge for each of Barrett's 1,095 days behind bars.[61] Such bills are not limited to lawsuits, however; a judge may still decide to impose charges on nonlitigious prisoners.[62] This is what happened to Dee Taylor, another former inmate on a fixed income, who received a $55,000 bill after his release.[63] In short, while it does not necessarily occur in every case, applications of pay-to-stay fees like Florida's can result in enormous debts that may never be paid back.

II. THE EXCESSIVE FINES CLAUSE: HISTORY AND DOCTRINE

In order to understand how these pay-to-stay fees may interact with the Excessive Fines Clause of the Eighth Amendment, it is important to understand where the Clause came from and how it works. The Eighth Amendment commands that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[64] This language, and the Clause itself, have deep roots in English law. Section A of this Part will discuss the Clause's evolution from English history to American

58. *See, e.g.*, *In Jail & in Debt: Ohio's Pay-to-Stay Fees*, ACLU OHIO 2 (2015), https://www.acluohio.org/wp-content/uploads/2015/11/InJailInDebt.pdf [https://perma.cc/AA9T-W8DM] ("Ohio law states that individuals are not supposed to pay more in jail fees than they are able, yet ... few facilities actively take indigence into consideration.").

59. *Subsistence Fees & Collection in Florida Jails,* FLA. SHERIFF'S ASS'N, https://www.flsheriffs.org/uploads/Subsistence%20Fee%20Final%20PDF.pdf [https://perma.cc/UA5J-QT3A].

60. Tanzina Vega, *Costly Prison Fees Are Putting Inmates Deep in Debt*, CNN BUS.: AM. OPPORTUNITY (Sept. 18, 2015, 2:51 PM), https://money.cnn.com/2015/09/18/news/economy/prison-fees-inmates-debt/index.html [https://perma.cc/BA82-N63W].

61. *Id.*

62. *Id.*

63. *Id.* Mr. Taylor "supports himself with Social Security payments" and, at the time of this interview, had not paid his prison bill. *Id.*

64. U.S. CONST. amend. VIII.

constitutional amendment, showing that the Clause has remained remarkably consistent over centuries. Section B will then explore the Supreme Court's interpretation of the Clause. This Section will outline the Excessive Fines Clause doctrine, explaining the modern rules for what constitutes a "fine," and when a fine is "excessive."

A. Historical Background of the Excessive Fines Clause

James Madison proposed the language of the Eighth Amendment to the First Congress in June of 1789, but "[i]f Madison and his colleagues could draw up [a] classic inventory of basic rights [in the Bill of Rights], it was because they were the heirs of the constitutional struggles waged by their English forebears."[65] Madison and his compatriots did not construct the Bill of Rights on barren ground; they built upon foundations laid in England.[66] These foundations begin in the thirteenth century with the Magna Carta.[67]

Drafted in 1215, the Magna Carta stands as the first written instrument in English history to declare that the people held certain rights not even the king could violate.[68] Though the document itself does not contain all—or even most—of those rights enshrined in the modern Bill of Rights,[69] Justice Ruth Bader Ginsburg has observed that "[t]he Excessive Fines Clause traces its venerable lineage back to at least 1215, when [the] Magna Carta guaranteed that '[a] Freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his [livelihood].'"[70] These explicit terms promised that no man would pay a fine disproportionate to his crime; nor would he be deprived of his livelihood by fines.[71]

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65. 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 3 (1971).

66. *Id.*

67. *Id.* at 4 ("To an American interested in the English antecedents of the federal Bill of Rights, the obvious starting point is the Magna Carta itself.").

68. *Id.*; *see also id.* at 7 ("[T]he Charter itself tells us that ... 'here is a law which is above the King and which even he must not break.'").

69. *Id.* at 4.

70. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (quoting § 20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225)). To be "amerced" means to be "punish[ed] by a fine whose amount is fixed by the court." *Amerce*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/amerce [https://perma.cc/RAB4-MEG9].

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

Despite this unequivocal ban on excessive fines, English sovereigns continued to impose them.[72] By the seventeenth century, the reigning Stuart kings had become notorious for "using large fines to raise revenue, harass their political foes, and indefinitely detain those unable to pay."[73] The Stuarts were forced to abdicate and parliamentary leaders drafted a list of grievances in response to the king's lawlessness, including complaints about his use of enormous fines.[74] These grievances became the English Declaration of Rights, which "declared in its tenth article: '[t]hat excessive [b]ail ought not to be required, nor excessive [f]ines imposed; nor cruel and unusual [p]unishments inflicted.'"[75] The Declaration's statutory counterpart, the English Bill of Rights, was enacted in 1689.[76]

In 1769, William Blackstone commented that the excessive fines article of the English Bill of Rights affirmed "the old constitutional law"—the Magna Carta—and reasoned that fines should follow the Magna Carta's dictate to be proportional to the offender, not just the offense.[77] He observed that a fine was excessive based on the offense, the offender's condition, and any other applicable circumstances.[78] The English Bill of Rights then "served as a model for the Virginia Declaration of Rights,"[79] and the Constitution's Excessive Fines Clause itself was copied directly from that Declaration.[80]

During the First Congress, the Excessive Fines Clause was not controversial.[81] Indeed, the majority of the original states, not just

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72. *Id.*

73. *Id.* (citing *The Grand Remonstrance* ¶¶ 17, 34 (1641), *in* THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 1625-1660, 210, 212 (S. Gardiner ed., 3d ed. rev. 1906)).

74. 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, 1001-02, 1008 (2019).

75. *Id.* at 1008 (quoting Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?* 31 HARV. J.L. & PUB. POL'Y 35, 38 (2008)).

76. *Id.* at 1009.

77. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 862 (2013) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *372 (Univ. of Chi. Press ed. 1979)).

78. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *371).

79. Bessler, *supra* note 74, at 997.

80. Eisen, *supra* note 23, at 332.

81. Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989); *see also* David Lieber, *Eighth Amendment—The Excessive Fines Clause*, 84 J. CRIM. L. & CRIMINOLOGY 805, 808 (1994) ("Although the Eighth Amendment provides a substantive check on the

Virginia, already had similar clauses in their governing documents.[82] Because the Clause was uncontroversial, there is little record of discussion or debate on the Clause's meaning.[83] But while there was no universal practice regarding what was an "excessive fine," early American history shows that "fines" were not limited to payments to government.[84] For example, in 1791, a South Carolina law decreed that the punishment for "swindling" would be a "fine;" specifically, a "fine" of twice the amount taken, paid *to the victim*, not the state.[85]

Further, while the record is limited, "some state statutes show an explicit link to the Magna Carta's prohibition against defendant impoverishment.... An inability to pay and the effect on one's family were also [sometimes] treated as mitigating factors at sentencing and upon later petition for relief."[86] Looking past the colonial period, there is evidence this view persisted, if not exclusively; some commentators, lawmakers, and state courts cited Blackstone and the Magna Carta's definitions even after the American Civil War.[87]

The Eighth Amendment does not explicitly include the Magna Carta's admonition to preserve an offender's livelihood.[88] However, neither did the English Bill of Rights upon which it was based, and there is evidence that it was understood to be implicit in the concept

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sovereign power to interfere with individual liberty ... the Excessive Fines Clause prohibition has received very little attention either from the framers of the Constitution or from the Supreme Court." (internal citation omitted)).

82. *Browning-Ferris Indus.*, 492 U.S. at 264 n.5 (citing 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 235, 272, 278, 282, 287, 300, 343, 379 (1971)).

83. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 297 (2014).

84. *Id.* at 302-03 ("The actual practice in the colonies and early American states belies the [Supreme] Court's restriction of fines to sanctions payable to the sovereign.... For some convictions, in fact, statutes contemplated that pecuniary penalties go entirely to parties other than the sovereign.").

85. *Id.* at 305. Colgan provides other similar examples from this period, including a Georgia law that awarded half of a punitive "fine" to the victim of a "biting, gouging, or maiming," and a Delaware statute that fined public guardians for neglect, passing half of that fine on to the minor child injured by such neglect. *Id.* at 306-07. In each case, the fee was called a "fine" in the statute. *Id.* at 305, 306-07 n.156-58. Because the Supreme Court interprets (for Clause purposes) a "fine" as a payment to the government, and this Note argues the scope of a fine should be broader than government-only payments, these examples are very much worth noting. *See* discussion *infra* Parts II.B.1.a and III.B.

86. Colgan, *supra* note 83, at 330-31.

87. McLean, *supra* note 77, at 883-84.

88. *See* U.S. CONST. amend. VIII.

of "excessive."[89] The colonial period also contains anecdotal evidence that excessive fines were understood as proportional to the offender.[90] That interpretation is consistent with the historical pedigree and the ultimate purpose of the Clause—to prevent the sovereign from using massive fines to "raise revenue [or] harass their political foes."[91]

B. Excessive Fines Clause Doctrine Today

United States courts have virtually ignored the Excessive Fines Clause for the majority of the country's history,[92] and the Supreme Court did not interpret the Clause until 1989.[93] Indeed, the body of law surrounding the Excessive Fines Clause is so small that the Clause was not incorporated against the states until 2019, in *Timbs v. Indiana*.[94] There, the Court stated:

> [T]he protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.[95]

But how, precisely, does the Excessive Fines Clause function as a "safeguard"? In attempting to understand the Clause's protections, one must first answer two essential questions about the meaning of the Clause: (1) what is a "fine," and (2) when is a fine "excessive"?

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89. *See* McLean, *supra* note 77 and accompanying text.

90. *See supra* text accompanying notes 80-86.

91. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019); *see also supra* text accompanying note 73.

92. McLean, *supra* note 77, at 833.

93. *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) ("[T]his Court has never considered an application of the Excessive Fines Clause.").

94. *See* 139 S. Ct. at 686-87. Despite its recency, *Timbs* is not included in the following discussion of Clause doctrine; the Court granted certiorari only on the question of whether the Clause applies to the states. *See id.* at 686.

95. *Id.* at 686-87 (alteration in original except first bracket) (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010)).

The Supreme Court has provided limited clarification on both of these vital analytical questions within their holdings in four cases.[96] This Section will explore each of those four cases, explaining the shape of the current doctrine.

1. What Is a "Fine"?

In order to determine whether a fee runs afoul of the Excessive Fines Clause, one must first understand what types of fees or forfeitures qualify as "fines" under the Clause. This Section will explain the current understanding of a "fine" by describing the three Supreme Court cases that have thus far attempted to define the term: *Browning-Ferris Industries of Vermont v. Kelco Disposal*,[97] *Austin v. United States*,[98] and *Alexander v. United States*.[99] Through these cases—the first to interpret the Clause—the Court has provided some clarity regarding who may impose (or receive) a "fine," and for what purpose.

a. Browning-Ferris Industries*: "Payment to a Sovereign as Punishment for Some Offense"*

The first Supreme Court decision to interpret the Excessive Fines Clause was *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.* in 1989.[100] In that case, respondents had sued petitioner Browning-Ferris Industries in federal court, alleging antitrust violations and interference with contractual relations under state tort law.[101] A jury found for respondents and awarded $6 million in punitive damages.[102] The petitioner appealed the verdict, and the Supreme Court granted certiorari on the issue of whether the punitive damages were unconstitutionally excessive.[103]

96. Colgan, *supra* note 83, at 281, 281 & n.11 (explaining that current Excessive Fines Clause doctrine comes from "a quartet of Supreme Court cases decided between 1989 and 1998").

97. 492 U.S. 257, 265 (1989).

98. 509 U.S. 602, 610-11 (1993).

99. 509 U.S. 544, 558 (1993).

100. 492 U.S. at 262.

101. *Id.* at 260-62.

102. *Id.* at 262.

103. *Id.*

The Court discussed the Clause's history, noting that the lack of debate at the time of the framing left modern courts with an "absence of direct evidence of Congress' intended meaning."[104] In that absence, the Court instead sought the original meaning of the word "fine"; a fine, the Court observed, was "a payment to a sovereign as punishment for some offense."[105]

The Court also relied on the original purpose of the entire amendment: to limit government power.[106] "Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power."[107] Finally, the Court looked to the historical lineage of the Clause. Because it was based on language that originated in the English Bill of Rights of 1689—language drafted in direct response to government abuses—the Court observed that the history supported a limited, government-only interpretation of the Clause.[108] Ultimately, because of the historical definition of "fine," and the "concerns that animate the Eighth Amendment," the Court held that punitive fines in civil cases between *private parties* were outside the scope of the Clause's protection.[109] They were simply not the type of "fines" the Clause was meant to combat.[110] "[T]he Excessive Fines Clause was intended to limit *only* those fines *directly imposed by, and payable to, the government*."[111]

After *Browning-Ferris Industries*, it was clear that while the Court had not explicitly ruled out "extend[ing] the scope of the Excessive Fines Clause beyond the context where the Framers clearly intended it to apply," the Court's "fine" analysis in Excessive Fines Clause cases would nonetheless be guided by a framework built on the historical purpose of the Clause and a contemporaneous understanding of the language.[112] But beyond the limitation established in *Browning-Ferris Industries*, it remained unclear

104. *Id.* at 264-65.
105. *Id.* at 265.
106. *Id.* at 266.
107. *Id.*
108. *Id.* at 266-67.
109. *Id.* at 266-67, 275.
110. *Id.* at 266-67.
111. *Id.* at 268 (emphasis added).
112. *Id.* at 273-76.

what, precisely, constituted a "fine" within the meaning of the Eighth Amendment.

b. Austin v. United States*;* Alexander v. United States*: Forfeitures and Punitive Versus Remedial Intent*

The Court's next opportunity to clarify "fines" came in 1993 with *Austin v. United States*.[113] In that case, petitioner Austin had received a seven-year prison sentence for cocaine possession.[114] Shortly thereafter, the government filed suit in federal court to compel Austin's forfeiture of both his business (an auto body shop) and his mobile home.[115] Austin argued that the forfeiture would violate the Excessive Fines Clause.[116] Both the District Court and the Eighth Circuit Court of Appeals held that civil in rem forfeitures were not "fines" covered by the Eighth Amendment.[117] Because this holding created a circuit split, the Supreme Court granted certiorari.[118]

The government argued that the Excessive Fines Clause could not apply in civil cases.[119] In response, the Court returned to *Browning-Ferris Industries*' discussion of the Clause's purpose and history.[120] Affirming that "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as

113. 509 U.S. 602, 604 (1993).

114. *Id.*

115. *Id.* at 604-05. Federal prosecutors did so pursuant to 21 U.S.C. § 881, which in relevant part authorizes the government to seek forfeiture of vehicles and real property used to facilitate certain drug offenses. 21 U.S.C. § 881(a)(4), (7) (2012). According to the government, after Austin agreed to sell drugs to a customer at his shop, he retrieved cocaine from his mobile home and returned to the body shop to complete the transaction. *Austin*, 509 U.S. at 605. These actions formed the basis of the government's argument that the mobile home and body shop "facilitated" a drug crime and were thus subject to forfeiture under the statute. *See id.*

116. *Austin*, 509 U.S. at 605.

117. *Id.* at 605-06.

118. *Id.* at 606.

119. *Id.* at 607. The government did allow for one exception to its proposed rule: the Excessive Fines Clause could apply in civil proceedings if "that proceeding is so punitive that it must be considered criminal." *Id.* As the Court rejected the government's position in its entirety, it was unnecessary to consider whether this exception would apply. *Id.*

120. *Id.* at 608.

punishment for some offense,'"[121] the Court held that the relevant question was not whether a fine or forfeiture was imposed in a civil (versus criminal) proceeding.[122] Instead, the crucial question is whether that fine is intended "at least in part as *punishment*."[123] Further, the Court held, even a fine with both remedial and punitive purposes would be sufficient to meet this standard.[124]

Using this standard, the in rem forfeiture of Austin's property constituted a "fine" under the Clause.[125] Furthermore, in *Alexander v. United States*, decided the same day as *Austin*, the Court ruled that an "*in personam* criminal forfeiture ... is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"[126] The Court simply cited to the logic explained in *Austin* to support this conclusion.[127]

Austin and *Alexander* clarified that under the Excessive Fines Clause, a "fine" was indeed "payment to a sovereign as punishment for some offense," and, as such, an intent to punish was a necessary element of such fines in any proceeding.[128] The next Subsection will discuss the rule for determining when such punitive forfeitures or fines are "excessive."

2. When Is a Fine "Excessive"?

Through the preceding cases, it is clear that a fine must be (1) paid to the sovereign, not to a private party; (2) in cash or in kind; (3) intended at least partially as punishment; and (4) imposed in either a criminal or civil proceeding.[129] Once a fine is determined to be a "fine" within the scope of the Excessive Fines Clause, however, an important question remains: when is that fine unconstitutionally excessive?

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121. *Id.* at 609-10 (quoting Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

122. *Id.* at 610.

123. *Id.* at 610-11 (emphasis added).

124. *Id.* at 610.

125. *Id.* at 621-22.

126. 509 U.S. 544, 558 (1993).

127. *Id.* at 558-59 ("Accord *Austin*.").

128. *Austin*, 509 U.S. at 622 (quoting Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)); *Alexander*, 509 U.S. at 558.

129. *See* discussion *supra* Parts II.B.1.a and II.B.1.b.

To date, the Court's only attempt to answer that question came in *United States v. Bajakajian*.[130] In that case, the Court applied the Excessive Fines Clause for the first time.[131] The controversy began when respondent Bajakajian was traveling through the Los Angeles airport with his family.[132] At the airport, United States customs investigators searched the family's luggage, recovering $357,144 in cash from the search.[133] Bajakajian pled guilty to a federal charge of failing to report the currency.[134] In response, the government sought forfeiture of the entire cache—more than thirty-five times the statutory minimum amount.[135]

The Court first determined that the forfeiture was indeed a "fine"[136] and pointed to several factors that had made the designation an easy one.[137] The money forfeiture was "imposed at the culmination of a criminal proceeding ... require[d] conviction of an underlying felony, and [could not] be imposed upon an innocent owner of unreported currency," only on one who had been convicted

130. 524 U.S. 321, 334 (1998) ("Until today ... we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive."), *superseded by statute*, USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). It is important to note that the Excessive Fines Clause test articulated in this case was not superseded. Central to the reasoning in *Bajakajian* was that the Court understood Bajakajian's crime—failure to report that he was carrying over $10,000 in cash—as being relatively harmless. *See id.* at 339. Congress disagreed, and in response to the Court's holding, created a new statutory crime: "bulk cash smuggling." USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (relevant section codified as amended at 31 U.S.C. § 5332 (2012)); *see also* United States v. Jose, 499 F.3d 105, 109-11 (1st Cir. 2007) (explaining how the result in *Bajakajian* influenced § 5332 and observing that the statute "makes clear that Congress has now prohibited what it calls 'bulk cash smuggling,' and that it considers this to be *a very serious offense*" (emphasis added)). Thus, the Court's test stands, but the gravity of Bajakajian's specific offense has changed.

131. *Bajakajian*, 524 U.S. at 327 ("This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause.").

132. *Id.* at 324.

133. *Id.* at 325.

134. *Id. See generally* 31 U.S.C. § 5316 (2012) (codifying the reporting requirement).

135. § 5316 (setting the minimum required amount at $10,000); *Bajakajian*, 524 U.S. at 325.

136. *Bajakajian*, 524 U.S. at 328-34.

137. *Id.* at 328.

of the felony of failure to report.[138] Therefore, there was sufficient punitive intent for a "fine."[139]

The Court then turned to the question of whether the fine was excessive.[140] The Court observed that "[t]he 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."[141] But the judiciary would have limited discretion to determine whether a fine was disproportionate, because "judgments about the appropriate punishment for an offense belong in the first instance to the legislature."[142] Therefore, to preserve that required deference to the legislature, the Court held, "a punitive forfeiture violates the Excessive Fines Clause if it is *grossly* disproportional to the gravity of a defendant's offense."[143] In other words, courts cannot strike down financial penalties imposed by the legislature—even disproportionate ones—unless those penalties are not merely disproportionate, but *exceptionally* so.[144]

The Court did not identify any rigid requirements of the "grossly disproportional" test.[145] Still, in ruling Bajakajian's $357,144 forfeiture unconstitutionally excessive, it identified several factors it considered relevant to his case: Bajakajian was not within "the class of persons for whom the statute was principally designed"; the statutory maximum penalties for the crime of failure to report were minimal (6 months in jail, $5,000 fine); and the harm caused to the

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138. *Id.* The Court has also held that forfeiture statutes that "provide an 'innocent owner' defense ... focus [their] provisions on the culpability of the owner in a way that makes them look more like punishment." Austin v. United States, 509 U.S. 602, 619 (1993).

139. *Bajakajian*, 524 U.S. at 328.

140. *Id.* at 334.

141. *Id.* (emphasis added).

142. *Id.* at 336 (citing Solem v. Helm, 463 U.S. 277, 290 (1983) ("Reviewing courts, of course, should grant *substantial deference* to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." (emphasis added))). This observation seems particularly relevant in light of Congress's post-*Bajakajian* legislation overriding the Court's "gravity of the offense" determination in that case. *See supra* note 130 and accompanying text.

143. *Bajakajian*, 524 U.S. at 334 (emphasis added).

144. *Id.* The "grossly disproportional" test is also the standard in cruel and unusual punishment cases; the Court cites the same need for judicial deference to the legislature when evaluating the nonfinancial punishments implicated in that clause of the Eighth Amendment. *See Solem*, 463 U.S. at 290.

145. *Bajakajian*, 524 U.S. at 337-40.

government was slight.[146] Because the forfeiture was "larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it [bore] no articulable correlation to any injury suffered by the Government," it was unconstitutional.[147]

Looking at these cases together, it is evident that in order to trigger the protection of the Excessive Fines Clause, a fine or forfeiture must be punitive in nature, not the result of a civil action between private parties, and *grossly disproportional* to the offense. In so holding, the Court was guided by the history and purpose of the Clause, which has existed in one form or another since the Magna Carta and endures to limit abuses of the government's "prosecutorial power."[148] Using this framework, the next Part will explore how the Excessive Fines Clause can provide case-by-case remedies to a population in need of relief.

III. APPLICATION OF THE EXCESSIVE FINES CLAUSE TO STATE PAY-TO-STAY PROGRAMS

This Part argues that prisoners should be able to make as-applied challenges to pay-to-stay fees under the Excessive Fines Clause. First, any current judicial understanding of these fines as mere nonpunitive fees should be adjusted, because nonpunitive rationales for the fees do not survive scrutiny if the fees are relatively high. Thus, in certain cases, prisoners can and should argue that the fees are punitive fines. Section A.2 argues that an "ability to pay" prong, sometimes referred to as "deprivation of livelihood," should be included in the test courts use to evaluate whether a fine is "grossly disproportional." This Section argues that such a prong is consistent with the historical purpose of the Clause as well as morally and politically appropriate. Then, Section B addresses the concern that the Clause may not apply to fees imposed or collected by private prison industry contractors, arguing that Supreme Court dicta and the Clause's history support application of the Clause to private contractors. Alternatively, an "essential government function" test

146. *Id.* at 338-39.

147. *Id.* at 339-40.

148. *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989); *supra* Part II.A.

should be incorporated into the Clause's framework with the explicit aim of targeting prison industry privatization.

A. Case-by-Case Grounds for Relief

This Section argues that the current, post-incorporation Excessive Fines Clause doctrine leaves room for state prisoners to challenge pay-to-stay fees on an as-applied basis. Subsection 1 argues that typical justifications for pay-to-stay fees, such as those elaborated in *Tillman v. Lebanon County Correctional Facility*, do not foreclose the necessary showing of partially punitive intent; these fees can indeed be fines. Subsection 2 argues that the "grossly disproportional" test of excessiveness should be understood to include the prisoner's ability to pay, because the Clause's history supports this construction. Finally, it argues that both process problems and practical concerns support this liberal interpretation of the Clause.

1. Remedial Fees Versus Punitive Fines

Recall that in order to fall under the Excessive Fines Clause's protection, a financial penalty must be at least partially punitive.[149] Thus, the first hurdle a former prisoner must overcome is this: they must show the pay-to-stay fees imposed were intended, at least in part, to punish them for their crime. In doing so, a prisoner may face many potential counterarguments from their government opposition: for example, that the charges are mere reimbursement for government costs; that the charges are intended to serve a rehabilitative purpose by teaching responsibility; or that subsistence charges cannot be punishment because, in prison or outside, humans necessarily incur daily costs for food and shelter.[150]

For a demonstration of these arguments in action, look to *Tillman v. Lebanon County Correctional Facility*.[151] In that case, the Third Circuit held that a jail's daily fee of ten dollars did not constitute an

149. *See supra* Part II.B.1.b.

150. *See, e.g.*, Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 420 (3d Cir. 2000).

151. *See id.* at 417-21; *see also* Eisen, *supra* note 23, at 334 (describing *Tillman* as "[t]he seminal case in jail fee jurisprudence").

excessive fine because it was neither excessive nor a fine.[152] Specifically, the fee was not a fine because "the fees are designed to teach financial responsibility. More fundamentally, the fees can hardly be called fines when they merely represent partial reimbursement of the prisoner's daily cost of maintenance, something he or she would be expected to pay on the outside."[153] Twelve years later, in *Carson v. Mulvihill*, the court affirmed this finding, holding that the "financial responsibility" and "daily cost of maintenance" rationales justified these fees generally, and not merely in Tillman's specific case.[154]

These statements were the extent of the court's response to the petitioner's Excessive Fines Clause argument, but upon closer examination, both rationales lack persuasive power. *Tillman* and *Carson* argue that pay-to-stay fees serve the legitimate government interest of "teach[ing] financial responsibility,"[155] but this argument cannot be categorically correct. If "financial responsibility" implies, at minimum, that one will not spend more than one earns, it may be useful to look at earning capacity in the prison facilities that charge these fees. The Prison Policy Initiative (PPI) reported that in 2017 the average minimum daily wage for "non-industry prison jobs" was just eighty-six cents.[156] The average maximum was three dollars and

152. *Tillman*, 221 F.3d at 420-21.

153. *Id.* at 420. The court also observed that the fees did not seem to be punishment because they "[did] not vary with the gravity of the offense." *Id.* Putting aside the fact that the total fees ultimately do vary with the offense (because longer terms of incarceration would result in more money owed), this Note does not address this argument because the *Tillman* court itself backed away from it by stating "[w]e will not speculate on the result we would reach where the offense was significantly less serious, or where the daily fees or total debt were significantly higher." *Id.* at 421.

154. *See* No. 10-1470, 2012 U.S. App. LEXIS 14540, at *20 (3d Cir. July 16, 2012) ("[W]e [have] specifically held that such fees are not punishment, but are rather 'designed to teach financial responsibility.' Furthermore, we explained that '[m]ore fundamentally, the fees can hardly be called fines when they merely represent partial reimbursement of the prisoner's daily cost of maintenance, something he or she would be expected to pay on the outside.'" (third alteration in original) (quoting *Tillman*, 221 F.3d at 420)).

155. *See id.*; *Tillman*, 221 F.3d at 420.

156. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/R9GZ-BZC7].

forty-five cents.[157] Yet pay-to-stay fees across the country are often significantly higher than these wages.[158]

For a more specific hypothetical example, look to Pennsylvania, where Tillman was incarcerated.[159] PPI reports that the highest possible hourly wage in the Pennsylvania state prison system in 2017 was one dollar per hour.[160] According to the Pennsylvania Department of Corrections, the standard prison work week is six hours per day, five days per week.[161] Finally, assume a daily fee in the same amount as Tillman's: ten dollars.[162] During one year of confinement, assuming the maximum possible salary, an inmate in this position would have earned $1560 (*before* any applicable deductions) and yet would have accumulated $3650 in daily fees. This equates to a debt-to-income ratio of 2.3 to 1.[163] How is a prisoner supposed to demonstrate "financial responsibility" when the state has decreed their costs will exceed their income by more than 200 percent? Returning to the Florida example, the ratio is even more stark. Though the state is entitled to recover up to fifty dollars per day in fees (just over $18,000 annually), most prison jobs in the state are unpaid.[164] Though some non-industry jobs are compensated, the maximum pay rate does not exceed fifty dollars per *month*.[165]

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157. *Id.*

158. *See supra* notes 52-63 and accompanying text.

159. *See Tillman*, 221 F.3d at 413.

160. *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html [https://perma.cc/283A-LD8R]. It is worth noting that this maximum salary was reserved for members of the "Asbestos Abatement Crew." *Id.*

161. DEP'T OF CORRS., COMMONWEALTH OF PA., INMATE COMPENSATION MANUAL § 1(C)(1) (2012), https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/816%20Inmate%20Compensation.pdf [https://perma.cc/FG9W-9CL8].

162. *Tillman*, 221 F.3d at 413.

163. This is a purely hypothetical scenario, given that Tillman himself was held in a county jail and the employment policies cited here are applicable to state, not county, facilities. *Id.* at 413; DEP'T OF CORRS., COMMONWEALTH OF PA., *supra* note 161. However, ten dollars is not an unreasonable amount to cite for such a hypothetical given that these fees can actually be much higher. *See, e.g.*, Katherine G. Porter, Note, *A "Debt" to Society?: Reassessing the Constitutionality of Pay-to-Stay Programs in Ohio Jails and Prisons*, 44 OHIO N.U. L. REV. 415, 418 (2018) (describing an Ohio correctional facility that charges inmates $72.67 per day).

164. PRISON POL'Y INITIATIVE, *supra* note 160; *see supra* notes 52-63 and accompanying text.

165. PRISON POL'Y INITIATIVE, *supra* note 160. This is a debt-to-income ratio of, at best, 30 to 1.

In describing these examples, this Note does not argue pay-to-stay fee policies cannot be constructed to teach financial responsibility. One can imagine a scenario where fees are sufficiently low to be manageable on a prisoner's scant salary, or perhaps where fees are charged in reasonable and accurate proportion to a prisoner's liquid assets at the time of incarceration.[166] But there are no data to support the assertion that pay-to-stay actually does have a salutary effect on financial responsibility.[167] Further, when these systems can result in such dramatic disparities in debt and income, it is illogical to accept a remedial "financial responsibility" rationale at face value. Generally, that rationale "is a mere political tool which exists to mask the punitive nature of pay-to-stay. The practice of fostering inmate accountability via saddling inmates—who already face barriers to reentry into society—with exorbitant debts appears to run directly counter to the goal of holding individuals financially accountable."[168] Thus, when a state argues that these fees are not punitive fines under the Excessive Fines Clause because they serve this remedial educational purpose, courts should not accept the state's assertions without inquiring into the as-applied effect of the program. It is clear, at least in some cases, that pay-to-stay fees are not only incapable of teaching financial responsibility, but they actively undermine that educational goal.[169]

Next, turn to the argument that pay-to-stay fees for "daily cost of maintenance" are *by definition* not fines. This argument is

166. Recall that though some pay-to-stay statutes currently do direct that the prisoner's finances should be taken into account, such statutes typically do not mandate how such determinations should be made and their effectiveness and accuracy can vary widely. *See, e.g.*, Wu, *supra* note 9 ("'Generally what you see in many states is that these indigency determinations are not done quickly or upfront'.... It's only after a warrant is issued for failure to pay after all the debt has accumulated that the court later determines one is indigent. 'It's legally compliant because the courts can say, "Oh, we didn't know they were indigent at the time we charged them"'"); *see also supra* note 58 and accompanying text.

167. Joshua Michtom, Note, *Making Prisoners Pay for Their Stay: How a Popular Correctional Program Violates the Ex Post Facto Clause*, 13 B.U. PUB. INT. L.J. 187, 200 (2004) ("No studies have been conducted to determine whether inmates in pay-to-stay facilities manage their money more responsibly during or after incarceration.... Just as when a parent tells a wayward child, 'I'm going to teach you a lesson!' she intends not to educate but to punish, the 'teaching' explanation for pay-to-stay is, in truth, punitive.").

168. Porter, *supra* note 163, at 428.

169. *See supra* notes 163-65 and accompanying text. Note also that because the Clause requires only *partial* punitive intent, even if financial responsibility is accepted as a rationale, one still may be able to show an additional punitive intent. *See supra* Part II.B.1.b.

potentially fatal to pay-to-stay fee claims under the Excessive Fines Clause. To be considered a "fine" under the Clause, a fee must have at least a partially punitive intent.[170] But the argument that pay-to-stay fees are "by definition" not fines would foreclose a showing of any punitive intent.

What this "by definition" argument ignores, however, is the power of choice. Outside prison walls, one may choose to spend or save as necessary. For example, a person might live with family or be dependent on others for support. According to one study, in the five years prior to entering prison, the majority of men bring in annual earnings below the federal poverty line.[171] One year before prison, 84 percent earned less than $500.[172] Bearing in mind these economic realities, it becomes difficult to argue that, for example, a fifty-dollars-per-day fee is equivalent to what one would have to spend on the outside, when it is clear many of the affected prisoners would not have had the ability to do so.

Moreover, while daily pay-to-stay fees are generally limited to costs of inmate housing and food,[173] these costs can include things such as staff salaries, inmate programs, and management.[174] These additional costs inherent in prison housing make it even more difficult to argue that daily prison fees are equivalent to what one would pay outside. Of course, one may argue that prisoners *deserve* to pay these costs. Perhaps they do—but again, that is a punitive rationale.

Ultimately, it is not enough to say prisoners would have to pay their way on the outside. There must be a point at which daily fees are not insulated from review by the application of the seemingly innocuous label of "room and board"; a point at which fees that far exceed what one could or did pay in the outside world do indeed become punitive fines. By showing that pay-to-stay fees, as applied,

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170. *See supra* Part II.B.1.b.

171. *See* Looney & Turner, *supra* note 47, at 10; *2019 Poverty Guidelines*, U.S. DEP'T HEALTH & HUMAN SERVS., https://aspe.hhs.gov/2019-poverty-guidelines [https://perma.cc/CFL3-C9MZ] (setting the poverty threshold for a single-person home at $12,490/year).

172. Looney & Turner, *supra* note 47, at 10.

173. *See supra* Part I.

174. *See, e.g.*, DEP'T OF JUSTICE, FEDERAL PRISON SYSTEM FY 2019 PERFORMANCE BUDGET 19 (2019), https://www.justice.gov/jmd/page/file/1034421/download [https://perma.cc/7FDM-YN4T] (including food, clothing, staff salaries, and operational costs in the category of "Inmate Care and Programs" costs).

are too high to reasonably serve this "by definition" rationale—or the rehabilitative purpose discussed above—a prisoner should be able to successfully argue that the fees are partially punitive under the Clause.

It is also worth noting that the reasoning in *Bajakajian* supports the idea that pay-to-stay fees can be punitive. In *Bajakajian*, the Court determined that a forfeiture was a fine because it was the result of a criminal proceeding and because conviction of an underlying crime was a requirement.[175] Pay-to-stay fees imposed for post-conviction imprisonment clearly meet this threshold. The government in *Bajakajian* also argued that the forfeiture served a remedial deterrence interest.[176] The Court rejected this argument, observing that deterrence is a traditional "goal of punishment."[177] Thus, to the extent that supporters argue that pay-to-stay fees have a deterrent effect,[178] the Court would find punitive intent.

Because the rehabilitative and "by definition" arguments are unpersuasive in certain cases, because deterrence is a punitive goal, and because one argument for pay-to-stay is that prisoners deserve to pay the fees,[179] prisoners should be able to show that imposed fees have the required partially punitive intent under the Clause.

2. A New Understanding of the "Grossly Disproportional Test"

Having shown that a pay-to-stay fee is a fine, a prisoner would next have to show that the fine is "grossly disproportional to the gravity of [the] offense."[180] There is no specific rule or ratio defining what is "grossly disproportional," and therefore this test is highly fact-bound.[181] This Subsection argues that when performing this fact-bound inquiry, courts should incorporate an "ability to pay" prong into the "grossly disproportional" test.

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175. *See supra* notes 136-39 and accompanying text; *see also* Porter, *supra* note 163, at 431.

176. United States v. Bajakajian, 524 U.S. 321, 329 (1998), *superseded by statute*, USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

177. *Id.*

178. *See* Eisen, *supra* note 23, at 323.

179. *See, e.g.*, Carona, *supra* note 39.

180. *Bajakajian*, 524 U.S. at 334.

181. Porter, *supra* note 163, at 434.

The Court, in establishing the current standard, declared that legislatures should determine appropriate punishment for a crime, not courts.[182] Thus, some courts have judged the excessiveness of a fine with reference to the maximum fine set by the legislature.[183] In *Tillman*, for example, the court concluded that Tillman's fine was not excessive because his $4,000 debt paled in comparison to the $100,000 statutory maximum for his crime.[184] Based on this reasoning, it seems clear that fines exceeding the statutory maximum are open to as-applied challenges.

What about fines that do not exceed that threshold, but nonetheless saddle prisoners with virtually unpayable debt? If "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of *proportionality*"[185]—in other words, if it is constitutionally vital that the financial punishment fit the crime—then it is imperative to consider that the same financial sanction punishes different people differently for *identical crimes*. One's degree of suffering when faced with a fine will, of course, depend entirely on their personal access to wealth.

A circuit split has developed with respect to this issue. While most circuits to consider the question have held that "grossly disproportional" depends on the characteristics of the crime, not the criminal, the First and Second Circuits have included "whether the forfeiture would deprive the defendant of his livelihood" in their proportionality tests.[186] In doing so, these courts relied on the history of the Clause and concluded that this "livelihood" requirement was "deeply rooted" in the Eighth Amendment.[187] The goal of the Clause and its antecedents was not just to avoid enormous fines; instead, the laws upon which the Clause is based specifically targeted fines that were "ruinous."[188] It is clear the Magna Carta prioritized the balance between punishment and livelihood,[189] and

182. *See supra* note 142 and accompanying text.

183. *See, e.g.*, Tillman v. Lebanon Cnty. Corr. Facility, 221 F.3d 410, 420-21 (3d Cir. 2000).

184. *Id.*

185. *Bajakajian*, 524 U.S. at 334 (emphasis added).

186. *See* United States v. Viloski, 814 F.3d 104, 111 (2d Cir. 2016); United States v. Levesque, 546 F.3d 78, 83-85 (1st Cir. 2008); *see also* McLean, *supra* note 77, at 846.

187. *Levesque*, 546 F.3d at 83-84.

188. *Id.* at 84 (citing Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 290 (1989) (O'Connor, J., concurring in part and dissenting in part)).

189. *See supra* notes 70-71 and accompanying text.

these rulings correctly conclude that the subsequent history supports prioritizing this balance today.[190]

A "deprivation of livelihood" or "ability to pay" prong would necessarily result in the potential for more claims under the Clause; this, of course, is the point. This tweak to the doctrine, however, may trigger concerns about judicial efficiency. With pay-to-stay programs in state and local jails across the country,[191] more claimants may flood the courts. "But the Constitution recognizes higher values than speed and efficiency,"[192] and in any case, to the extent that successful claims may reduce recidivism[193] and deter states from setting high fees, the increase in volume may be temporary.

Furthermore, this doctrinal tweak is not inconsistent with *Bajakajian* because the Court in that case did not rule out a "livelihood" analysis.[194] It simply did not reach the question.[195] Bajakajian argued that the forfeiture was excessive by *any* metric and the Court agreed.[196] Therefore, the opinion did not address the livelihood component, leaving open the possibility that it may be analytically relevant in future cases.[197]

It is true, however, that the Court's opinion did discuss the importance of giving significant deference to the legislature in the determination of appropriate punishments, including fines and forfeitures.[198] This strongly stated concern—fundamentally, preservation of the separation of powers between courts and the legislature—would seem to suggest that courts should not take on a larger

190. *See* Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J.F. 430, 433-37 (2020) (describing the Court's heavy reliance on the Clause's history and that this history supports the "constitutional relevance of financial hardship").

191. *See supra* Part I.

192. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

193. *See, e.g.*, Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 72-73 (2017) ("[U]nmanageable economic sanctions ... drain defendants' [sic] and their families of necessary resources, thus creating or exacerbating financial instability. Such instability has also been linked to increases in recidivism and participation in crime.").

194. McLean, *supra* note 77, at 847.

195. *Id.*

196. *See id.*

197. *Id.* at 847-48.

198. *See supra* note 142 and accompanying text.

role in evaluating the legislature's imposition of pay-to-stay fees. But such deference to the legislature does not seem entirely appropriate in the face of the political process concerns that pay-to-stay fees present. Consider the argument that the Excessive Fines Clause should be liberally construed because of the "potential governmental abuses that predictably could flow from institutional incentives to impose excessive monetary punishment."[199] Unlike detention, or other punishments such as revocation of privileges, the legislature has incentives to institute financial penalties when those penalties result in money for government.[200]

This seems particularly true when those financial consequences are borne by a politically unpopular group, such as prisoners.[201] Because of this unpopularity, there are political incentives in addition to financial ones: by shifting the burden of incarceration cost from voting constituents (who presumably are pleased, for example, not to see their taxes raised) to prisoners, legislators can score political points.[202] With both financial and political incentives weighing on the side of potential legislative abuse, it makes sense that the judiciary should take on a more active checking function regarding these pay-to-stay fines; thus, legislative deference in the face of utter inability to pay is inappropriate. In sum, because the history of the Clause supports it, because it is not inconsistent with the Court's current doctrine, and because process concerns require it, courts should consider the "deprivation of livelihood" or "ability to pay" when evaluating pay-to-stay fees under the Excessive Fines Clause.

B. The Private Prison Puzzle

Fees in private prisons will pose one further problem under the Excessive Fines Clause. Even assuming that prisoners are able to broaden their ability to seek relief from pay-to-stay fees under the Eighth Amendment by arguing that (1) the fees are at least

199. Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 514.

200. *Cf. id.* at 513-14 (discussing process issues in the context of civil asset forfeiture).

201. *See* Colgan, *supra* note 1, at 22-23.

202. *See supra* note 23 and accompanying text.

partially punitive and (2) that courts should adopt "ability to pay" as a factor in the grossly disproportional test,[203] another piece of the Excessive Fines Clause doctrine will work against occupants of privately run state prisons. Recall that the Court has defined a fine as "payment *to a sovereign* as punishment for some offense."[204]

This "to a sovereign" requirement places a meaningful obstacle between some prisoners and relief from excessive fines. Because the requirement seems to suggest that only payments directly to the government are qualifying fines under the Eighth Amendment, one may assume that fees paid to private prison-industry contractors are outside the Clause's protective shield.[205]

Were this the case, consider the scale of the affected population. Private prison use has skyrocketed over the past few decades, with the ACLU noting that "the number of prisoners in private prisons increased by approximately 1600% between 1990 and 2009."[206] According to the U.S. Department of Justice (DOJ), in 2017, five states held 20 percent or more of their state prison populations in privately run facilities.[207] In total, the DOJ estimated that 93,851 state prisoners were serving their time in private facilities.[208] Returning to an example cited in Part I, the state of Florida held an estimated 11,676 prisoners (or 12 percent of the total state prison population) in private facilities.[209] This is a sizeable population that, under the current understanding of the Excessive Fines Clause,

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203. *See* discussion *supra* Parts III.A.1-2.

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

205. *See, e.g.*, Colgan, *supra* note 1, at 24-25 (noting that the use of private companies in the prison industry "can result in the imposition of fees payable to private entities for pre- and post-trial incarceration, probation and collections, electronic monitoring, [and] mandated chemical dependency.... If the Court retains the restriction that fines must be paid to a sovereign government, *none of these fees would constitute fines*" (emphasis added) (footnote omitted)).

206. ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 5 (2011), https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf [https://perma.cc/5LU9-CAJL].

207. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, PRISONERS IN 2017 16 (2019), https://www.bjs.gov/content/pub/pdf/p17.pdf [https://perma.cc/2YHV-VPRH] (stating the five states were "Montana (38%), Hawaii (28%), Tennessee (26%), Oklahoma (26%), and Arizona (20%)").

208. *Id.* at 25. This number is equal to 7.2 percent of the total state prison population. *See id.*

209. *Id.*

would face an insurmountable obstacle to constitutional relief. This Section argues that the government's "prosecutorial power" is sufficiently implicated in the case of prisoners held in private prisons. Therefore, the purposes of the Clause and the Court's own statements support granting this subset of the population meaningful Eighth Amendment rights.

1. Browning-Ferris Industries*,* Paroline*, and the "To A Sovereign" Requirement*

The Court has declared that an excessive fine must be "to a sovereign."[210] But in *Paroline v. United States*, the Court signaled a willingness to stretch this definition beyond its governmental understanding.[211] *Paroline* was not an Excessive Fines Clause case; the Court granted certiorari to address a causation requirement for restitution related to child pornography.[212] But in evaluating the proposed causation requirement, which would have resulted in each possessor of the pornographic material being held individually liable for all damages caused by all possessors, the Court observed:

> That approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment. To be sure, this Court has said that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." But while restitution under [the statute] is paid to a victim, it is imposed by the Government "at the culmination of a criminal proceeding and requires conviction of an underlying" crime. Thus, despite the differences between restitution and a traditional fine, *restitution still implicates the "prosecutorial powers of government*."[213]

This dicta points to the Court's willingness to consider a fine within the Clause when the fine "results from the government's

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

211. 572 U.S. 434, 455-56 (2014).

212. *Id.* at 443.

213. *Id.* at 455-56 (emphasis added) (citations omitted) (first quoting Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989); then quoting United States v. Bajakajian, 524 U.S. 321, 328 (1998); and then quoting Browning-Ferris Indus., 492 U.S. at 275).

power to criminally prosecute."[214] When the government prosecutes a defendant, it brings the full weight of the government's prosecutorial power to bear on that defendant—the exact power the Clause was meant to limit.[215] The *Paroline* dicta suggests that prosecutorial action is enough on its own; any punitive fines resulting therefrom, and predicated on conviction, would be subject to the Clause.[216]

Though *Paroline* discussed restitution specifically,[217] this same logic would apply to sufficiently high daily fees for the cost of incarceration in private prison. These fees are the result of prosecution, conviction, and sentencing by the government, and fees charged for incarceration require the conviction of an underlying crime.[218] This result is consistent with the Clause's history and purpose for the same reasons discussed in Part III.A above,[219] because the Clause would still prevent ruinous fees charged as a result of the government's prosecution.[220]

Moreover, process concerns support the application of the Clause to daily fees in private prisons as well. The powerful financial incentives inherent in financial punishment[221] are also present in privatization arrangements because these arrangements allow the government to avoid spending excessive tax revenue on the now-privatized facilities and services.[222] Indeed, this monetary benefit could result in political benefits as well as financial. In short, any interpretation of the Clause that excludes these arrangements serves the government's own financial interests while "mak[ing] an end run around the Excessive Fines Clause, leaving those subjected

214. Kevin Bennardo, *Restitution and the Excessive Fines Clause*, 77 LA. L. REV. 21, 36 (2016) (discussing the application of the Clause to restitution payments).

215. *See Browning-Ferris Indus.*, 492 U.S. at 266.

216. *See supra* note 213 and accompanying text; *see also supra* notes 136-39 and accompanying text.

217. *Paroline*, 572 U.S. at 443.

218. *See supra* Part I. This obviously does not hold true for any daily fees charged during pretrial detention, which are outside the scope of this Note.

219. *See supra* Part III.A.

220. *See supra* notes 70-71, 136-39, 187-88 and accompanying text.

221. *See supra* notes 199-201 and accompanying text.

222. Colgan, *supra* note 1, at 28.

to economic sanctions without an avenue for redress that would be available but for the privatization."[223]

Of course, the Court has interpreted the history of the Clause to require some limitations on its scope, and in *Browning-Ferris Industries*, it chose not to apply the Clause to suits between private parties.[224] Therefore, the Court may continue to decline to eliminate the "to a sovereign" restriction entirely.[225] However, by tweaking the restriction in the way *Paroline* suggests (to those payments implicating "prosecutorial power"),[226] the Court could remain true to those limiting principles while still preventing the government from exploiting a technicality to render the Clause obsolete through privatization.

2. Proposing an Alternative Doctrinal Requirement: An "Essential Government Function" Test

Given the Court's concern in *Browning-Ferris Industries* about limiting the scope of the Clause,[227] it is possible the Court will decline to find that *Paroline's* "prosecutorial powers" dicta alone can carry the weight of a constitutional remedy for the thousands of citizens controlled by private prison-industry contractors. "Prosecutorial powers," after all, could be construed broadly—to encompass restitution, for instance, or actions where the government is merely a party.

Therefore, to address any concerns that the "prosecutorial powers" test may broaden the scope of the Clause too far, this Note proposes an alternative doctrinal requirement: a fine under the Clause must be paid to a sovereign, or to an "entity performing an essential government function at the government's behest." This modification, modeled off of existing state action doctrine,[228] would

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223. *Id.* at 29 (footnote omitted).

224. *See* discussion *supra* Part II.B.1.a.

225. *See, e.g.*, Colgan, *supra* note 1, at 29 (supporting the elimination of the to-a-sovereign restriction).

226. Paroline v. United States, 572 U.S. 434, 456 (2014).

227. Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989).

228. *See, e.g.*, Robert S. Gilmour & Laura S. Jensen, *Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of "State Action,"* 58 PUB. ADMIN. REV. 247, 250 (1998).

expand the reach of the Clause's protection beyond pure government actors to include those the government empowers to perform the core government function of law enforcement. This test, made an explicit part of Clause doctrine, should be liberally construed because of the "need for exacting judicial review of ... monetary penalties" due to the particular incentives for abuse.[229]

This modification may seem dramatic; it is technically ahistorical. But this caveat in the doctrine serves the spirit of the Clause: protecting vulnerable citizens from ruinous fines resulting from adversarial proceedings against the government. Further, it would do so while acknowledging the changing landscape of the American justice system: increasingly, jurisdictions are using private contractors for fee-based pre- and post-conviction criminal justice services.[230] The intent of this "essential government function" test is to sweep up private entities who have contracted with the government to perform a necessary law enforcement function, while at the same time avoiding the temptation to extend the Clause's protection to every action that comes into a courtroom.

This new prong in the doctrine is vulnerable to the same kinds of criticisms as existing state action doctrine. It leaves tremendous room for judicial discretion, the lines defining a "function" can be fuzzy, and the test is difficult to consistently employ.[231] All this is true. Yet, there is something fundamentally unsettling about the idea that these criticisms are sufficient reason to reject such a reform. In an era of increasing privatization, should the courts withdraw a constitutional protection from the people because the alternative to that withdrawal is a new test that might be difficult to apply?

The Court's willingness to apply difficult tests to protect other constitutional rights suggests that this objection should carry little weight. The Court is "often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines";[232] this problem is not unique to the state

229. Johnson, *supra* note 199, at 513-14.

230. Colgan, *supra* note 1, at 24.

231. *See, e.g.*, Gilmour & Jensen, *supra* note 228, at 248-51 (describing the "judicial confusion" surrounding state action doctrine and its "idiosyncratic" application).

232. United States v. Lopez, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring).

action doctrine or the Excessive Fines Clause.[233] If a test is fuzzy, yet it helps enforce the fundamental demands of a constitutional clause, then courts should apply the test in spite of its flaws.[234] The alternative—undermining the right—is unacceptable. As the Court itself has acknowledged, it "'cannot avoid the obligation to draw lines, often close and difficult lines' in adjudicating constitutional rights."[235]

The need for judicial management of these "close and difficult lines" is especially acute for prisoners. Private prison contractors have a high level of authority over prisoners; they control when prisoners sleep, what they eat, and where they can spend their waking hours.[236] Such is the nature of prison—but with that level of control must come accountability. Otherwise, if private entities like these contractors do not have to follow constitutional rules, "delegating authority to private parties may allow the government to do through them what it cannot do itself."[237]

What the government cannot do itself is clear: it must not impose excessive fines.[238] This is the command of eight centuries of legal touchstones and a virtually undebated amendment to the United States Constitution.[239] The government should not get around this edict now by hiring someone else to impose those fines in its stead. In view of the modern phenomenon of pay-to-stay fees,[240] the ever-growing private prison system,[241] and the consequences of criminal justice debt,[242] Excessive Fines Clause doctrine can and should be

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233. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 49 (1972) (Powell, J., concurring) (observing that questions of "[d]ue process ... embod[y] *principles of fairness rather than immutable* [rules] as to every aspect of a criminal trial" (emphasis added)).

234. *Cf.* County of Allegheny v. ACLU, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring in part and concurring in judgment) ("Although the endorsement test requires careful and often difficult line-drawing and is highly context specific, no alternative test has been suggested that captures the essential mandate of the Establishment Clause as well as the endorsement test does, and it warrants continued application and refinement.").

235. *Lopez*, 514 U.S. at 579 (Kennedy, J., concurring) (quoting *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring in part and concurring in judgment)).

236. *See* Carona, *supra* note 39, at 1-2.

237. Gilmour & Jensen, *supra* note 228, at 248.

238. U.S. CONST. amend. VIII.

239. *See supra* Part II.A.

240. *See supra* Part I.

241. *See* ACLU, *supra* note 206.

242. Bannon et al., *supra* note 50, at 5.

adjusted to protect the politically vulnerable among us who have been ruined by fines, regardless of who oversees their government-imposed punishment.

CONCLUSION

Since *Timbs v. Indiana* in 2019, it is beyond dispute that the Excessive Fines Clause applies to the states.[243] This Note proposes to build on this knowledge by finding room in the ambiguities of the existing Excessive Fines Clause doctrine to provide prisoners, in both government-run and private facilities, with more opportunity to challenge state and county pay-to-stay fees in court.

Using the current understanding of the doctrine, prisoners can present reasonable arguments that pay-to-stay fees constitute fines in certain situations, and with an "ability to pay/deprivation of livelihood" prong added to the "grossly disproportional" test, poor and indigent prisoners will have a better chance to obtain constitutional relief. This is desirable for both moral and policy reasons. Poorer defendants should not be punished more than other defendants for similar crimes, and insurmountable debt is a pathway to recidivism.[244] Finally, the doctrine should be liberally construed to account for state and county prisoners in privately operated facilities, who must not be left out in the constitutional cold because of the facility in which they were placed.

It is true that some interpretations and doctrinal shifts proposed in this Note are not necessarily within the current understanding of the Clause. But "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."[245] The Court in *Browning-Ferris Industries* acknowledged this principle to be true but held it had no bearing upon fines that were not "strictly modern creation[s]" and had a "solid grounding in pre-Revolutionary

243. *See* 139 S. Ct. 682, 686-87 (2019).
244. *See supra* Part III.A.2.
245. Weems v. United States, 217 U.S. 349, 373 (1910).

days."[246] Pay-to-stay fees are indeed a modern mischief.[247] They require a modern Constitution to meet them.

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246. Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 273-74 (1989).

247. *See* Eisen, *supra* note 23, at 322.

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