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## ARTICLE

### The Constitutionality of Income-Based Fines

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*In America, fines are typically imposed without regard to income. The result is a system that traps low-income offenders in a cycle of debt and jail while letting rich offenders break the law without meaningful financial consequence. One-size-fits-all fines also fail to meet basic goals of the justice system: to treat like offenders alike, punish the deserving, and encourage respect for the law. Elsewhere in the world, however, systems that assess fines based on earnings have been around for nearly one hundred years. The most common model—known as the “day fine”—scales penalties according to a person’s daily income. These models are credited with ensuring proportionality in sentencing, improving the effectiveness of fines as a sanction, and even allowing fines to serve as an alternative to incarceration. They can also lead to startling results, such as a €54,000 speeding ticket assessed to a Finnish businessman. This Article is the first in-depth attempt to examine the constitutionality of a system of income-based fines that would levy significant financial penalties on the wealthy. Ultimately, it concludes that potential constitutional obstacles—arising primarily from the Excessive Fines Clause of the Eighth Amendment—are navigable, especially if a US system caps how high fines can go. As more people awaken to the burden that criminal justice debt imposes on the poor, this Article suggests that now may be an opportunity for a larger reconceptualization of financial sanctions—away from the inflexible fine and toward income proportionality.*

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## INTRODUCTION

When Americans break the law—whether it’s a minor offense like littering or a serious crime like felony assault—they tend to face the same financial penalties, no matter their income. But while a \$250 speeding ticket means little to a millionaire, it’s roughly a week’s pay for someone earning minimum wage.<sup>1</sup> The injustice of levying monetary sanctions without regard to means has nowhere been more on display than in Ferguson, Missouri, where discriminatory enforcement of the municipal code subjected poor and black residents to fines they could not afford and incarceration for nonpayment.<sup>2</sup> A policy that puts low-income offenders in a cycle of debt and jail while letting rich offenders break the law without meaningful financial consequence is one that fails to meet basic goals of the justice system: to treat like offenders alike, punish the deserving, and encourage respect for the law. A system that tailors fines according to income, by contrast,

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<sup>1</sup> See *Minimum Wage* (US Department of Labor), archived at <http://perma.cc/AT9K-GFMM> (stating that the federal minimum wage is \$7.25 per hour effective July 24, 2009).

<sup>2</sup> See *Investigation of the Ferguson Police Department* \*8, 56–58 (US Department of Justice Civil Rights Division, Mar 4, 2015), archived at <http://perma.cc/ZK73-ZXGR>.

would help to ensure that every person experiences a proportional penalty when she runs afoul of the law.

Outside the United States, systems that assess fines based on earnings have been around for nearly one hundred years.<sup>3</sup> The most common model—known as the “day fine”—scales penalties according to a person’s daily income.<sup>4</sup> These systems are credited with ensuring proportionality in sentencing, improving the effectiveness of fines as a sanction, and even allowing fines to serve as an alternative to incarceration.<sup>5</sup> But by their very nature, day-fine systems can lead to startling results, as in 2015, when a €54,000 speeding ticket was assessed to a Finnish businessman caught going sixty-four miles per hour in a fifty zone.<sup>6</sup> While the benefits are clear, would American courts abide a system that could slap Mark Zuckerberg with a million-dollar parking ticket?

Whatever the practical and political impediments to implementing income-based fines in the United States, this Article argues that the federal Constitution is unlikely to get in the way. Potential obstacles—arising primarily from the Excessive Fines Clause—are navigable, especially if a US system caps how high fines can go. Critical to this conclusion is a topic that has received little attention: while courts and commentators have shown increasing interest in whether the Excessive Fines Clause prohibits imposing overly burdensome fines on the poor, there has been no in-depth examination of whether this clause limits imposing weighty fines on the rich.<sup>7</sup> After discussing how fines are assessed in the United States, how income-based fines

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<sup>3</sup> Finland introduced the first day-fine system in 1921. See Hans-Jörg Albrecht, *Post-adjudication Dispositions in Comparative Perspective*, in Michael Tonry and Richard S. Frase, eds, *Sentencing and Sanctions in Western Countries* 293, 306 (Oxford 2001).

<sup>4</sup> See id at 307.

<sup>5</sup> Id at 308. See also Edwin W. Zedlewski, *Alternatives to Custodial Supervision: The Day Fine* \*7 (National Institute of Justice, Apr 2010), archived at <http://perma.cc/LA8Z-YFAG>.

<sup>6</sup> See *Finland: Speeding Millionaire Gets 54,000-Euro Fine* (BBC, Mar 3, 2015), archived at <http://perma.cc/Q92H-KWFS>.

<sup>7</sup> There has been superb work on whether the Excessive Fines Clause prohibits the imposition of burdensome fines on the poor. See, for example, Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal L Rev 277, 345–47 (2014). See also generally Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const L Q 833 (2013). On the other hand, legal scholarship about whether US jurisdictions could implement a day-fine system has so far avoided examining the Excessive Fines Clause. See, for example, Gary M. Friedman, Comment, *The West German Day-Fine System: A Possibility for the United States?*, 50 U Chi L Rev 281, 297–303 (1983).

work abroad, and the policy implications of such a system, this Article discusses why the Excessive Fines Clause and other constitutional doctrines could shape, but ultimately should allow, implementation of income-based fines in the United States.

Part I briefly reviews how fines are assessed in the United States and how income-based fines work abroad. Part II discusses some of the policy implications of scaling fines to income. Part III considers various constitutional impediments to implementing income-based fines in the United States. Part III.A deals with equal protection, due process, the right against self-incrimination, the line between civil and criminal adjudication, and the right to a jury trial. Part III.B—the bulk of this Article—grapples with the Excessive Fines Clause as well as a related subject: grossly excessive punitive damages awards.

### I. THE TARIFF FINE AND THE DAY FINE

Fines, which have always been a feature of the American justice system, became by the late nineteenth century the predominant punishment for petty offenses and economic crimes.<sup>8</sup> Today, fines are often the sole or primary form of punishment for low-level offenses like jaywalking—especially those considered civil rather than criminal.<sup>9</sup> For graver criminal offenses, when incarceration is on the table, fines are typically imposed in conjunction with other sanctions.<sup>10</sup> Although it could once be said that fines for serious crimes were unusual in the United States, the imposition of fines in such cases, levied on top of incarceration, is on the upswing: in 1991, only a tenth of felons

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<sup>8</sup> Lawrence M. Friedman, *A History of American Law* 61 (Simon & Schuster 2d ed 1985) (describing a fine of one thousand pounds of tobacco in a 1660 Maryland proceeding); id at 185 n 24 (discussing an early nineteenth-century New York law that punished the unlicensed practice of medicine by “a sum not exceeding twenty-five dollars”); id at 595 (detailing the common use of fines in late nineteenth-century America). See also *Southern Union Co v United States*, 567 US 343, 349 (2012) (“Fines were by far the most common form of noncapital punishment in colonial America.”).

<sup>9</sup> See, for example, Hawaii’s jaywalking statute, Hawaii Rev Stat § 291C-73(e) (specifying that “[e]very person who violates this section shall be fined \$100”). See also *Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor* \*3 (Council of Economic Advisers, Dec 2015), archived at <http://perma.cc/6JRG-4VZG>.

<sup>10</sup> Susan Turner and Joan Petersilia, *Day Fines in Four U.S. Jurisdictions* \*1 (RAND, Mar 1996), archived at <http://perma.cc/43FK-G8KQ>.

sentenced to prison were fined; by 2004, it was a third.<sup>11</sup> Those convicted of serious crimes but not sentenced to prison are even more likely to face fines.<sup>12</sup>

Income typically plays little, if any, role in determining the size of a fine.<sup>13</sup> Tariff schemes, which set fixed penalties for specific offenses, are common.<sup>14</sup> In Florida, for example, every littering infraction triggers the same \$100 fine.<sup>15</sup> Where courts have leeway in setting fines, mandatory minimum and maximum penalties circumscribe that discretion. Pennsylvania, for instance, punishes a repeat offense of driving under the influence with a fine of “not less than \$300 nor more than \$2,500.”<sup>16</sup> Some laws expressly prohibit consideration of a person’s financial means in assessing the size of financial sanctions<sup>17</sup> or presume

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<sup>11</sup> Alexes Harris, Heather Evans, and Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 *Am J Sociology* 1753, 1769–70 (2010).

<sup>12</sup> *Id.* at 1770.

<sup>13</sup> A note about terminology and the scope of this Article. Although a dizzying number of financial consequences can flow from encounters with the court system—from fines to fees, surcharges, interest and penalties, restitution, and forfeiture—this Article is concerned primarily with the traditional fine, that is, a “financial obligation[ ] imposed as a penalty after a criminal conviction or admission of guilt to a civil infraction.” *Confronting Criminal Justice Debt: A Guide for Policy Reform* \*6 (Criminal Justice Policy Program at Harvard Law School, Sept 2016), archived at <http://perma.cc/N7QU-JRGH>. This focus is no commentary on the relative importance of fines compared to other forms of criminal justice debt, such as “fees” imposed on offenders without regard to ability to pay, which can lead to a punishing cycle of debt and re-incarceration. See, for example, Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry* \*13–20 (Brennan Center for Justice, Oct 4, 2010), archived at <http://perma.cc/YU6H-75DM>. That said, the concept that economic sanctions should be proportioned to financial means is applicable to many forms of criminal justice debt, and some US jurisdictions that have experimented with day fines have accounted for “non-fine” economic sanctions by considering all such costs as “the fine” for the purpose of determining an appropriate sanction. See Barry Mahoney, et al, *How to Use Structured Fines (Day Fines) as an Intermediate Sanction* \*12 (Bureau of Justice Assistance, Nov 1996), archived at <http://perma.cc/RJ37-ZU3W>. Restitution is, perhaps, another matter because it “is imposed only in cases in which specific and direct crime victims have incurred financial losses” and “restitution payments are allocated to these particular people.” Katherine Beckett and Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 *Crimin & Pub Pol* 509, 510 (2011).

<sup>14</sup> Sally T. Hillsman and Judith A. Greene, *Tailoring Criminal Fines to the Financial Means of the Offender*, 72 *Judicature* 38, 39 (1988).

<sup>15</sup> See Fla Stat § 403.413(6)(a). See also Kala Kachmar, *Municipal Courts Slam the Poor Hardest* (Asbury Park Press, Dec 9, 2016), archived at <http://perma.cc/F3ZB-LCNX> (describing how New Jersey’s “regressive municipal court fine system ‘clobbers’ the poor because the penalties are the same across the board—whether you’re a millionaire or living below the federal poverty line”).

<sup>16</sup> 75 Pa Cons Stat Ann § 3804(a)(2)(ii).

<sup>17</sup> See, for example, Cal Penal Code § 1202.4(c) (specifying that “[a] defendant’s inability to pay shall not be considered a compelling and extraordinary reason not to

that all defendants will be able to pay a fine.<sup>18</sup> When income does factor in, it is to *lower or eliminate* a fine because a person lacks financial means rather than increase a fine in proportion to her income.<sup>19</sup> Even when courts have the authority to waive or modify financial penalties for the poor—often *after* sentencing rather than when the fine is imposed—reports suggest they do so far too rarely.<sup>20</sup> And despite Supreme Court decisions holding that incarceration for failure to pay criminal justice debt is appropriate only if a person has the ability to pay but refuses to do so,<sup>21</sup> in practice courts commonly ignore or skirt the requirement to examine a person’s means prior to incarcerating her for outstanding debt.<sup>22</sup>

In day-fine systems, by contrast, offender income plays a central role. First implemented in Finland in 1921, day fines are used across Europe and Latin America, including in Argentina, Austria, Colombia, Finland, France, Germany, and Sweden.<sup>23</sup> Although the specifics of each system differ—such as in how extensively they use day fines, how they calculate income and

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impose a restitution fine” and that “[i]nability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine”). See also Colgan, 102 Cal L Rev at 289 (cited in note 7).

<sup>18</sup> See, for example, Iowa Code § 909.7 (“A defendant is presumed to be able to pay a fine. However, if the defendant proves to the satisfaction of the court that the defendant cannot pay the fine, the defendant shall not be sentenced to confinement for the failure to pay the fine.”).

<sup>19</sup> The United States Sentencing Guidelines, for instance, state that “[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.” USSG § 5E1.2(a).

<sup>20</sup> See Bannon, Nagrecha, and Diller, *Criminal Justice Debt* at \*13–14 (cited in note 13); *Confronting Criminal Justice Debt* at \*27–29 (cited in note 13). On the other hand, there is evidence that when judges *do* take income into account, they do so informally, and sometimes they impose alternative sanctions like incarceration or community service on those perceived as unable to pay a fine. See Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 Iowa L Rev 53, 100 (2017).

<sup>21</sup> See Part III.A.1; *Bearden v Georgia*, 461 US 660, 672 (1983).

<sup>22</sup> See Bannon, Nagrecha, and Diller, *Criminal Justice Debt* at \*19–20 (cited in note 13). See also, for example, *Investigation of Ferguson* at \*52 (cited in note 2) (describing the failure of courts in Ferguson to meaningfully take into account offender income when determining fines and consequences for nonpayment); *In for a Penny: The Rise of America’s New Debtors’ Prisons* \*6 (ACLU, Oct 2010), archived at <http://perma.cc/WN8J-RPSH> (recounting, among other stories, the experience of an unemployed single mother of two who was ordered to pay \$300 or spend three days in jail because the court refused to entertain an alternative payment schedule); *Louisiana v Hotard*, 17 S3d 64, 69 (La App 2009) (vacating a one-year jail sentence imposed on an indigent defendant for failure to pay a \$5,000 fine and ordering the trial court to consider the defendant’s financial status on remand).

<sup>23</sup> See Albrecht, *Post-adjudication Dispositions* at 306–07 (cited in note 3); Zedlewski, *Alternatives to Custodial Supervision* at \*3–5 (cited in note 5).

penalties, and whether caps limit how high a fine can go—the basic structure is the same: fines vary according to a person’s financial means.<sup>24</sup> Take the German system: An offense is first assigned a number of “fine unit[s]” based on its seriousness, from 5 units, for the least serious, to 360.<sup>25</sup> Next, courts determine a person’s daily income by, for instance, consulting public records and interviewing the offender.<sup>26</sup> The amount of a fine is then calculated by multiplying those numbers together. So for an offense carrying a punishment of ten units, a person with a daily income of €100 would pay a €1,000 fine, while a person with a daily income of €50 would pay €500.

Day fines are not entirely foreign to US shores. In the late 1980s and early 1990s, a handful of US jurisdictions—the first in Staten Island, New York—performed limited experiments with day fines and saw encouraging results despite significant statutory and administrative constraints.<sup>27</sup> Overall, these experiences suggest that day-fine systems have the potential to increase fine collection rates and reduce the attendant costs of nonpayment—such as warrants, arrests, and court appearances to collect debt.<sup>28</sup> Revenue could also rise if statutorily imposed maximum fines are relaxed or lifted.<sup>29</sup> Impressively, courts by and large proved able to ascertain offenders’ financial means and calculate the appropriate sanction, notwithstanding legal limits on access to information and resource constraints flowing

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<sup>24</sup> See Albrecht, *Post-adjudication Dispositions* at 308–14 (cited in note 3). The general approach is to consider realized income alone, and not other assets, even though a more inclusive measure of financial circumstances would better serve the goal of proportional punishment. Some systems, however, provide for taking capital assets other than income into account. *Id.* at 312.

<sup>25</sup> Hans-Jörg Albrecht, *Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing*, 76 *L & Contemp Probs* 211, 215 (2013).

<sup>26</sup> In Germany, courts do not have direct access to individual tax data. Mahoney, et al, *How to Use Structured Fines* at \*23 (cited in note 13). In Scandinavian systems, they do. Albrecht, *Post-adjudication Dispositions* at 313–14 (cited in note 3).

<sup>27</sup> The Staten Island experiment began in 1988, followed by tests in Milwaukee, Wisconsin; Maricopa County, Arizona; Des Moines, Iowa; Bridgeport, Connecticut; and four counties in Oregon. See generally Douglas C. McDonald, Judith Greene, and Charles Worzella, *Day Fines in American Courts: The Staten Island and Milwaukee Experiments* (National Institute of Justice, Apr 1992), archived at <http://perma.cc/7297-X8KW>; Turner and Petersilia, *Day Fines in Four U.S. Jurisdictions* (cited in note 10).

<sup>28</sup> See McDonald, Greene, and Worzella, *Day Fines in American Courts* at \*77 (cited in note 27).

<sup>29</sup> In Staten Island, for example, estimates are that revenue would have risen by nearly 80 percent in the absence of statutory maxima. See *id.* at \*42.

from the temporary nature of the experiments.<sup>30</sup> Nevertheless, “all U.S. courts that started day fine programs eventually terminated their efforts.”<sup>31</sup> As one scholar has explained, America’s day-fine experiments were launched just as the “tough-on-crime furor of the late 1980s and early 1990s” reached its zenith, creating a toxic environment for less punitive criminal justice reforms.<sup>32</sup> Today, while a few US jurisdictions provide for day fines by statute, there is little indication that courts use that authority.<sup>33</sup>

## II. THE CASE FOR INCOME-BASED FINES

### A. The Benefits of Income-Based Fines

A shift to income-based fines could have many benefits. For one, it would ensure that offenders of comparable blameworthiness experience similar punishments.<sup>34</sup> Although

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<sup>30</sup> See *id.* at \*25–26; Turner and Petersilia, *Day Fines in Four U.S. Jurisdictions* at \*76 (cited in note 10).

<sup>31</sup> Zedlewski, *Alternatives to Custodial Supervision* at \*10 (cited in note 5).

<sup>32</sup> Colgan, 103 Iowa L Rev at 59–60 (cited in note 20).

<sup>33</sup> In Alabama, “[d]ay fines or means-based fines” are listed in the statutory “[c]ontinuum of [p]unishments.” Ala Code § 12-25-32(2). Arkansas law directs the state Board of Corrections to establish “community correction programs,” such as “[e]conomic sanctions programs” that include “day fines.” Ark Code Ann § 16-93-1202(2)(B). Minnesota authorizes courts to, in some circumstances, “stay imposition or execution of sentence” and impose a day fine. Minn Stat Ann § 609.135(2)(b). Washington has a statutory definition of day fines, Wash Rev Code § 9.94A.030(14), and, in the context of “drug offender sentencing alternative[s],” a state agency was directed to determine “rules for calculating the value of a day fine,” but that provision was removed in 2005. See 2005 Wash Laws 460 § 1 (repealing Wash Rev Code § 9.94A.660(9)(b)(4)). Likewise, Virginia law directs the state sentencing commission to “[p]repare guidelines . . . for alternative sanctions which may include . . . day fines.” Va Code § 17.1-803(4). Puerto Rico appears to have the most extensive statutory authorization. See 33 Puerto Rico Laws Ann § 4677(e) (allowing for day fines), § 4683 (establishing that a court “shall impose” such a penalty “in day-fine units taking into consideration the greater or lesser degree of the crime” with a minimum punishment of one day and a maximum of ninety days, and prescribing that the “daily quota of the fine . . . shall range from one dollar . . . up to forty-four dollars”), § 4687 (establishing that unpaid day fines may be converted into days of imprisonment). In Oklahoma, courts may impose what a statute calls “day fines”—a fine “calculated as a percentage of net daily wages earned” that may not exceed 50 percent of net wages. 22 Okla Stat Ann § 991a(A)(1)(y). Similarly, Kansas authorizes “day fines” but uses the term to mean that defendants may retire fines and other debts through the “performan[ce] [of] services for a period of days.” Kan Stat Ann § 12-4509(f)(11). Alaska Stat Ann § 12.55.036, which authorized the use of “day fines” for certain misdemeanors, was repealed by 2009 Alaska Sess Laws 33 § 4.

<sup>34</sup> Some theorists call this the “theory of just deserts,” though it is rooted in basic “concepts of fairness—fairness to other offenders (who could justly complain if this defendant received a lighter penalty for the same conduct) and fairness to the defendant



imposing the same fine regardless of income is nominally consistent, true uniformity, the argument goes, requires subjective proportionality: punishments that are equally *felt*.<sup>35</sup> From the perspective of retribution, scaling fines to income would ensure that financial sanctions exact meaningful punishment on wealthy offenders. Such a system should also heighten deterrence for offenders with means, as one-size-fits-all fines likely deter the wealthy less than others.<sup>36</sup> It is perhaps unsurprising, then, that some studies suggest upper-class

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(who could justly complain if he were punished more severely than other equally blame-worthy offenders).” Richard S. Frase, *Punishment Purposes*, 58 *Stan L Rev* 67, 74 (2005). Whether or not the theory of just deserts is the right goal for punishment, our justice system appears tailored, at least in part, to serve this end.

<sup>35</sup> Subjective uniformity, consistency in how a punishment is *experienced*, may be a goal of punishment, in addition to objective or nominal uniformity, for at least two reasons. First, effective deterrence would appear to rely on the subjective evaluation of punishment as much if not more than its nominal severity—an agoraphobic, for instance, will be less deterred by the prospect of home confinement. Second, from the perspective of retribution, sentencing an agoraphobic to home confinement would be insufficiently punitive. The distinction between subjective and objective uniformity is infrequently discussed, perhaps because when other punishments like incarceration are concerned, objective uniformity (every offender gets a year in jail) is considered reasonably likely to achieve subjective uniformity—offenders experience a year in custody in roughly the same way. This isn’t always so: a person with young kids may experience a year behind bars very differently from one without. Still, for all the differences between people, everyone’s day has twenty-four hours. Money is, on the other hand, quite unevenly distributed, meaning that nominally uniform financial punishments are particularly bad at achieving subjective uniformity. Moreover, even if nonpecuniary punishments lead to a comparably wide divergence between objective and subjective uniformity, monetary penalties can be more easily tailored to achieve subjective uniformity than most others by simply adjusting the amount to income. For a more detailed exploration of the subjectivity of punishment, see generally Adam J. Kolber, *The Subjective Experience of Punishment*, 109 *Colum L Rev* 182 (2009).

<sup>36</sup> Although whether a given penalty will in practice deter socially undesirable conduct is a vexing question, and one outside the scope of this Article, “[n]o one doubts that legal sanctions, civil and criminal, can have significant behavioral consequences.” Cass R. Sunstein, David Schkade, and Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 *J Legal Stud* 237, 237 (2000). For the purposes of this Article, I simply assume that the size of a penalty has *some* effect on a person’s decision to violate the law. Much research indicates, however, that people are more responsive to the likelihood of being caught than the size of a penalty. See Frase, 58 *Stan L Rev* at 72 & n 11 (cited in note 34). Some studies suggest that introduction of a fine can, under certain circumstances, *increase* the frequency of rulebreaking. See, for example, Uri Gneezy and Aldo Rustichini, *A Fine Is a Price*, 29 *J Legal Stud* 1, 7 (2000). And there are significant reasons to believe that crime is driven less by the variables of deterrence than by a complex web of socioeconomic and other factors. See generally Alfred Blumstein and Joel Wallman, eds, *The Crime Drop in America* (Cambridge 2d ed 2006).

individuals are more likely to break the law while driving than those from more modest circumstances.<sup>37</sup>

Income-based fines could help reduce the burden of criminal justice debt on the poor. Across the country, courts commonly levy steep fines on those without the means to pay and then respond to nonpayment with arrests, court proceedings, and periods of incarceration.<sup>38</sup> One result is that a single minor violation, like driving with an expired registration, can destabilize the life of someone living on the economic margins.<sup>39</sup> Another is that formerly incarcerated people often face outstanding criminal justice debts far in excess of their annual incomes, complicating any hope of effective reentry.<sup>40</sup> Income-based fines, on the other hand, could help ensure that monetary sanctions do not impose impossible-to-meet financial obligations on the poor.

Income-based fines are also more useful, and therefore more capable of substituting for other forms of punishment, than fixed fines. The core problem is that, when state actors set tariffs, minimums, and maximums, they know that whatever they choose will apply to offenders across the income spectrum. As a consequence, they may be unwilling to set fines high enough to reflect the state's interests—such as deterrence and retribution<sup>41</sup>—out of fear that steep fines will unduly penalize poorer offenders.<sup>42</sup> And because fixed fines undersanction some offenses relative to the state's desire, a resulting lack of confidence in fines as a punitive tool may inhibit their use as a substitute for other forms of punishment, such as incarceration.<sup>43</sup> In Germany, where some four out of five of all criminal sanctions are day fines, courts regularly use fines as a substitute for incarceration, including for relatively serious crimes like assault and fraud.<sup>44</sup> Without proportioning fines to income, however, it is far more difficult to set fine levels high enough to satisfactorily substitute

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<sup>37</sup> See, for example, Paul K. Piff, et al, *Higher Social Class Predicts Increased Unethical Behavior*, 109 Proceedings Natl Acad Sci 4086, 4088 (2012).

<sup>38</sup> See *Confronting Criminal Justice Debt* at \*1–3 (cited in note 13).

<sup>39</sup> See id at \*17.

<sup>40</sup> See Harris, Evans, and Beckett, 115 Am J Sociology at 1776–85 (cited in note 11).

<sup>41</sup> Punishment can serve a variety of goals, some of which are in tension. See Frase, 58 Stan L Rev at 74 (cited in note 34).

<sup>42</sup> One study of the expected penalties for drunk driving, for example, concluded that fines for that offense were on the order of one-fourth of the expected harm. See Donald S. Kenkel, *Do Drunk Drivers Pay Their Way? A Note on Optimal Penalties for Drunk Driving*, 12 J Health Econ 137, 145 (1993).

<sup>43</sup> See Zedlewski, *Alternatives to Custodial Supervision* at \*7 (cited in note 5).

<sup>44</sup> See Albrecht, *Post-adjudication Dispositions* at 310 (cited in note 3).

for custodial sanctions like incarceration, at least when serious punitive consequences are considered appropriate.

Depending on how they are designed, income-based fines hold the promise of increasing government revenue. Some of this increase could come from progressivity at the upper end: in the Staten Island experiment, for example, estimates are that revenue from fines would have increased by nearly 80 percent during the demonstration project had relatively miserly statutory maximums not constrained collection from higher-income offenders.<sup>45</sup> And even without steep progressivity, income-based fines could boost revenue by increasing the rate at which low-income offenders pay their debts—as fine amounts become more manageable, offenders may make greater efforts to complete payment.<sup>46</sup>

### B. Potential Criticism

Against these benefits, income-based fines are vulnerable to a number of objections, from the philosophical to the practical. Some will suggest that income-based fines are redistributionist policy masquerading as criminal justice reform.<sup>47</sup> To be sure, economic fairness is, for many, valuable on its own and reason enough to scale fines to income.<sup>48</sup> But even those unmoved by its egalitarian benefits may nonetheless see in income-based fines a way to make monetary sanctions more effective in meeting the various ends of punishment and more capable of substituting for alternative punishments like incarceration.

Others will argue that a person's culpability is unrelated to her financial means, so scaling punishment according to income inappropriately untethers the severity of punishment from offender deserts.<sup>49</sup> Relatedly, some suggest that allowing income to play so important a role in determining the value of a fine leads to an “overdimensionalization” of the financial circumstances of an offender—that is, too great an emphasis on finances relative to other factors that affect whether a

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<sup>45</sup> McDonald, Greene, and Worzella, *Day Fines in American Courts* at \*39 (cited in note 27).

<sup>46</sup> See Colgan, 103 *Iowa L Rev* at 65–67 (cited in note 20).

<sup>47</sup> See, for example, *id.* at 97–99 (collecting such critiques).

<sup>48</sup> See, for example, Harris, Evans, and Beckett, 115 *Am J Sociology* at 1788–91 (cited in note 11).

<sup>49</sup> See Frase, 58 *Stan L Rev* at 73 (cited in note 34) (explaining the purpose theory, under which “the severity of the[ ] punishment should be no more and no less than [the offender] deserve[s]”).

punishment is proportionate to the offense.<sup>50</sup> I have already mentioned the most significant responses to these concerns: (1) in terms of both retribution and deterrence, it is arguably more important to equalize how severely punishment is *felt* than it is to achieve nominal uniformity,<sup>51</sup> and (2) insofar as the concern is that income-based financial sanctions will not reflect the appropriate level of severity, fixed fines—because they are one-size-fits-all—are themselves deeply imperfect.<sup>52</sup> Moreover, a system of income-based fines need not ignore traditional sentencing factors like the “nature and circumstances of the offense and the history and characteristics of the defendant.”<sup>53</sup> In a day-fine regime, for instance, a court could make an individualized and multifactor determination about the number of “fine units” a given offense warrants, with the income of the offender coming into play only when those fine units are converted into the ultimate fine. In this way, an income-based fine system could leave the ability of courts to make individualized sentencing determinations largely undisturbed.

Another objection is that income-based fines will sometimes overdeter the rich. According to this argument, not all crimes are the kind that we want to eliminate entirely, such as mass murder. Rather, some rulebreaking results in more benefit to society than harm—in law and economics terms, “some criminal acts actually are wealth-maximizing”<sup>54</sup>—and we are happy to tolerate noncompliance with the rule if the rulebreaker is willing to pay the price.<sup>55</sup> Consider commercial delivery vehicles that routinely park illegally and see occasional tickets as the cost of doing business. If illegal parking were a capital offense, commerce might slow and we all might be worse off.<sup>56</sup> From this perspective, fixed fines have a valuable purpose: if set at a level

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<sup>50</sup> See Albrecht, *Post-adjudication Dispositions* at 308 (cited in note 3).

<sup>51</sup> See note 35 and accompanying text.

<sup>52</sup> See notes 41–42 and accompanying text.

<sup>53</sup> 18 USC § 3553(a)(1).

<sup>54</sup> Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum L Rev 1193, 1205 (1985).

<sup>55</sup> See A. Mitchell Polinsky and Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J Econ Lit 45, 48 (2000); Note, *Rule Porousness and the Design of Legal Directives*, 121 Harv L Rev 2134, 2137–40 (2008).

<sup>56</sup> This is not to suggest that illegal parking is always an insignificant problem or that current fines for illegal parking are set to reflect the deleterious impact of that conduct on society. From increased congestion to creating street hazards that make streets more dangerous, the effects of illegal parking may be considerable. The comparison to commercial delivery is drawn from Note, 121 Harv L Rev at 2139 (cited in note 55).

that reflects the costs to society of noncompliance, they will deter only undesirable law breaking while allowing those who will benefit society by breaking the law to do so.<sup>57</sup> Because, however, income-based fines reflect not only the costs of rulebreaking but the finances of the rulebreaker, fines imposed on the wealthy will sometimes exceed those costs and thus deter otherwise desirable behavior—making society, as a whole, worse off.<sup>58</sup> It follows that income-based fines may be less appropriate when society can set tariffs at a socially optimal price.

As with much of the discussion on income-based fines, the salience of this critique turns on questions of system design. For instance, if an income-based scheme places a ceiling on the overall size of monetary penalties, perhaps at a level close to the social cost of a given offense, then there is less danger of deterring socially beneficial rulebreaking. This argument also relies on an unduly rosy view of the fixed fine. For reasons already discussed, it is often difficult to calibrate a fixed fine to reflect harms to society when high fines unduly penalize lower-income offenders. Likewise, fixed fines are often imposed as punishment for crimes that society wants to prohibit full stop—wealth maximizing instances be damned.<sup>59</sup> More fundamentally, economically optimal deterrence is not the only end of punishment: as the Supreme Court has stated in a related context, “Citizens and

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<sup>57</sup> A version of this view is that the state ought to set a fine at a level that forces an actor to pay the external costs that his activity imposes on others such that actors will still break rules if the utility of doing so exceeds the total cost to society. See, for example, Robert Cooter, *Prices and Sanctions*, 84 Colum L Rev 1523, 1528, 1550 (1984). There is, however, no single theory of optimal criminal law enforcement. See generally Nuno Garoupa, *The Theory of Optimal Law Enforcement*, 11 J Econ Surveys 267 (1997).

<sup>58</sup> For the sake of clarity, another example. Assume that the total cost to society of parking at a fire hydrant is \$1,000—taking everything into account, from the chance that a fire will break out; to the damage a fire would do; to the costs of enforcing the fire hydrant law, such as traffic cops and towing. A millionaire running late to a meeting might gladly pay a fixed fine of \$1,000 to park in front of the hydrant—perhaps because she will make far more money at the meeting. Under those circumstances, society as a whole might be much better off with an illegally parked Rolls Royce. Consider, however, if the millionaire faces a day-fine system with no maximum penalty. Because day fines scale ever upward with income, the fine on the millionaire could end up far exceeding that \$1,000 cost to society—so high, potentially, that the millionaire will circle the block.

<sup>59</sup> For simplicity, this discussion has and, unless otherwise stated, will continue to assume that the probability of catching an offender for breaking a rule is constant so that the size of a penalty and the reward for successful commission are the primary drivers of a person’s decision whether or not to break the law. If, however, you relax this assumption, then a state could keep the size of a penalty fixed and yet achieve the same level of deterrence by increasing apprehension rates. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J Polit Econ 169, 180–81 (1968).

legislators may rightly insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct, albeit cost-beneficial morally offensive conduct.”<sup>60</sup> Those crafting income-based fine regimes will ultimately have to balance the various benefits of increasing progressivity against the danger of overdetering the rich.

A related criticism is that income-based fines will underdeter the poor. Assuming that the value of successfully committing a crime—say, stealing a television—is constant, an income-based scheme will likely lower the expected penalty for poor offenders, thereby increasing their incentive to commit certain crimes. In fact, because the size of a penalty is directly tied to income, the poorer someone is, the greater the incentive to commit crime.<sup>61</sup> The easiest way to defuse this problem is to set minimum fines, although any departure from the principle of income proportionality undermines many of the reasons for adopting income-based fines in the first place. Perhaps for this reason, European day-fine systems tend to have minimum per day amounts but set them very low.<sup>62</sup> The argument that income-based fines will fail to deter the poor is something of a twist on an old theory: that it is necessary to punish the poor with custodial sanctions rather than financial penalties because, as former Judge Richard Posner put it, “Imprisonment . . . imposes disutility on people who cannot be made miserable enough by having their liquid wealth, or even their future wealth, confiscated.”<sup>63</sup> Whatever the truth of that claim, our system is already committed to the idea that fines are an appropriate penalty for a great

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<sup>60</sup> *Cooper Industries, Inc v Leatherman Tool Group, Inc*, 532 US 424, 439–40 (2001), quoting Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am U L Rev 1393, 1450 (1993).

<sup>61</sup> Consider, for example, someone who expects to earn \$10,000 from a successful crime. If that person faces a \$20,000 fixed fine if caught and thinks the chance of apprehension is over 50 percent, then there is no incentive to try the crime, as the expected cost (the size of the penalty multiplied by the probability of conviction) exceeds the expected gain of \$10,000. But as the fine decreases, the relative incentive to attempt the crime goes up. An example like this one, and an explanation of the problem of underdeterrence of the poor, appears in Friedman, Comment, 50 U Chi L Rev at 302 (cited in note 7).

<sup>62</sup> See Albrecht, *Post-adjudication Dispositions* at 311–12 (cited in note 3).

<sup>63</sup> Posner, 85 Colum L Rev at 1208 (cited in note 54). See also Polinsky and Shavell, 38 J Econ Lit at 71 (cited in note 55) (positing that imprisonment is used in the case of high harm, low probability of detection crimes because their perpetrators “tend to have very low assets,” and carceral sanctions are therefore “required to maintain a tolerable level of deterrence”).

amount of illegal conduct, and it has long imposed fines on the poor despite that regime's apparent inefficacy.<sup>64</sup>

Another objection is that income-based fines could lead to discriminatory enforcement against the wealthy—such as local police officers targeting drivers in expensive cars for speeding tickets. Without a doubt, hunger for government revenue influences the allocation of law enforcement resources. In places like Ferguson, for example, a desire to fill municipal coffers has driven aggressive and discriminatory enforcement in low-income communities.<sup>65</sup> As a result, it isn't hard to imagine that income-based fines could incentivize reallocation of enforcement resources toward wealthier communities where new, more fruitful revenue opportunities will be available.

Because, however, those with higher incomes also tend to be those with the most political power,<sup>66</sup> it may be significantly more difficult for governments to target wealthy communities for disproportionate enforcement without substantial pushback. It is also possible that an increase in the punitive effect of sanctions on those with the most money and political leverage could spur efforts to lower the punitive bite of sanctions across the board<sup>67</sup>—a conversation that is sorely absent so long as only the poorest (and most politically dispossessed) suffer significant consequences from fines.

Moreover, the practical likelihood that law enforcement will target those with higher incomes should not be overstated. Indeed, most offenses are not as conducive to discriminatory enforcement targeting wealth as motor vehicle offenses. For one, the car provides a highly visible proxy for the income of an offender that is absent in other circumstances. For another, law enforcement has a freer hand in enforcing less serious offenses like speeding, for which an officer's testimony alone is often

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<sup>64</sup> There is even some indication that burdensome criminal justice debt can encourage lawbreaking by motivating people to commit crimes as a way to pay it off. See, for example, Harris, Evans, and Beckett, 115 *Am J Sociology* at 1785 (cited in note 11).

<sup>65</sup> *Investigation of Ferguson* at \*4, 9 (cited in note 2). Of course, as a general matter, government should not allocate its law enforcement resources with revenue in mind. But few would doubt that a hunger for revenue plays a role in such decisions.

<sup>66</sup> See Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *Perspectives on Polit* 564, 566, 573 (2014) (finding support for the theory that those with the greatest economic resources control policymaking).

<sup>67</sup> See *id.* at 570 (noting that “[p]olicy making is not necessarily a zero-sum game” because, “[w]hen one set of actors wins, others may win as well, if their preferences are positively correlated with each other”).

sufficient to secure a conviction and penalties are low enough that most charged with an offense will pay a fine without testing the government's case. For more serious offenses, by contrast, the need for corroborating evidence to prove a case, as well as the likelihood that the accused will contest a charge, make it more difficult for law enforcement to bring cases against wealthy offenders out of a desire for revenue—to say nothing of the fact that the integrity of law enforcement alone should prevent such unscrupulous conduct. Finally, reforms that would decouple local government revenue from local law enforcement—as many have already proposed—could greatly reduce any incentive to target wealthy offenders created by income-based fines.<sup>68</sup>

Aside from these theoretical considerations, there are practical challenges to implementing income-based fines. Obviously, laws will have to change, beginning with those that specify fixed fines and limit fines to a narrow range. Some courts will need new capacity to determine the income of offenders, although many courts already dedicate significant time and money to investigating the personal circumstances of offenders in criminal cases,<sup>69</sup> and it is possible that resources currently dedicated to policing the nonpayment of fines could be reallocated if collection rates increase under the new regime.<sup>70</sup> A fuller discussion of how to design an income-based system is outside the scope of this Article.<sup>71</sup>

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Before turning from the policy implications of income-based fines to the next question—whether the federal Constitution is any barrier to implementation—three observations are worth reemphasizing: First, income-based fines can serve traditional goals of punishment, such as retribution and deterrence. Second, some of the thorniest issues that arise have to do with treatment of those at the very top and bottom of the income distribution. Third, minimum and maximum fines, a feature of most

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<sup>68</sup> See, for example, *Confronting Criminal Justice Debt* at \*11–12 (cited in note 13) (detailing various reforms that might successfully curb revenue-related enforcement dynamics in state criminal justice systems).

<sup>69</sup> In the federal system, for example, probation officers conduct presentence investigations into, among other things, the “defendant’s history and characteristics, including . . . the defendant’s financial condition.” FRCrP 32(d)(2)(A).

<sup>70</sup> See Colgan, 103 Iowa L Rev at 66–67 (cited in note 20).

<sup>71</sup> For a detailed discussion about how to design a system of income-based fines, see *id.* at 73–101.



international day-fine systems, can address many of these same problems, though not without a cost to the ends that income-based fines are meant to achieve.

### III. THE CONSTITUTIONALITY OF INCOME-BASED FINES

Whatever the practical and philosophical impediments to implementing income-based fines in the United States, the federal Constitution is unlikely to get in the way. After explaining why a range of constitutional doctrines—from the Due Process Clause of the Fourteenth Amendment to the Sixth Amendment jury trial right—pose little obstacle to such a system, this Article addresses the Excessive Fines Clause, a more substantial challenge.

#### A. Various Constitutional Objections

Other than the Excessive Fines Clause, there is no obvious constitutional hurdle to implementing income-based fines.

As a preliminary matter, substantive constitutional challenges to punishment—that is, challenges to the method or severity of punishment—run up against a powerful background norm of deference to legislative judgment. As Justice Anthony Kennedy put it:

Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order. . . . The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature.<sup>72</sup>

In addition to the value-laden nature of punishment, Kennedy has emphasized that the Constitution “does not mandate adoption of any one penological theory.”<sup>73</sup> Rather, governments “have accorded different weights at different times to the

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<sup>72</sup> *Harmelin v Michigan*, 501 US 957, 998 (1991) (Kennedy concurring); see also *id.* at 999–1001 (collecting cases). Though Kennedy was discussing the Eighth Amendment rather than the Constitution more broadly, the Court has elsewhere emphasized this deference norm with respect to other constitutional provisions. See, for example, *Argersinger v Hamlin*, 407 US 25, 38 (1972) (discussing the Sixth Amendment).

<sup>73</sup> *Harmelin*, 501 US at 999 (Kennedy concurring).

penological goals of retribution, deterrence, incapacitation, and rehabilitation,”<sup>74</sup> and the Constitution should not hinder the ability of states to tailor sentencing toward those various ends. In light of the primary role that the states play in the enforcement of criminal law, the Court has suggested that principles of federalism also counsel in favor of deference: “[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure.”<sup>75</sup>

Finally, the Court has emphasized that judicial review in this area runs the risk of becoming a subjective line-drawing exercise—few objective factors are available to help decide, for example, whether a thirty-year versus twenty-year sentence runs afoul of the Constitution.<sup>76</sup> This is not to say that the Constitution places no substantive limits on the methods or severity of sanctions<sup>77</sup> but that such challenges face an uphill battle. Nevertheless, there are a number of potential constitutional arguments—both substantive and procedural—to volley at a system of income-based fines. None hold much water.

#### 1. Equal protection.

Take, for example, the Equal Protection Clause, which one might assume could limit the imposition of penalties that discriminate on the basis of income. Because the prevailing view is that socioeconomic status is not a suspect class under that doctrine, however, government action that differentiates among people based on income is generally subject to only rational basis review.<sup>78</sup> Indeed, government policies that differentiate on the basis of income, from progressive taxation to means-testing for public benefits, are a staple of American policy.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* See also *McCleskey v Zant*, 499 US 467, 491 (1991) (“Our federal system recognizes the independent power of a State to articulate societal norms through criminal law.”).

<sup>76</sup> See, for example, *Harmelin*, 501 US at 1000–01 (Kennedy concurring).

<sup>77</sup> See Part III.B.

<sup>78</sup> See, for example, *Harris v McRae*, 448 US 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.”); *San Antonio Independent School District v Rodriguez*, 411 US 1, 29 (1973) (“[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.”). See also Mario L. Barnes and Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 L & Contemp Probs 109, 111–14 (2009).

Moreover, to the extent the Equal Protection Clause has limited punishment along class lines, it has been to *require* courts to take income—specifically, poverty—into account rather than to prohibit attention to income.<sup>79</sup> Especially relevant here, in the criminal context the Supreme Court has ruled that the Fourteenth Amendment prohibits “subject[ing] indigents to incarceration simply because of their inability to pay a fine.”<sup>80</sup> In *Williams v Illinois*,<sup>81</sup> for instance, the Court held that extending a maximum prison term on account of an involuntary nonpayment of a fine or court costs is impermissible discrimination under the Equal Protection Clause.<sup>82</sup> In *Tate v Short*,<sup>83</sup> the Court struck down a statute that limited punishment for a traffic offense to a fine but converted that fine to a prison term for an indigent defendant without the means to pay.<sup>84</sup> And in *Bearden v Georgia*,<sup>85</sup> it held that a court may not revoke a defendant’s probation for failure to pay a fine and make restitution absent evidence that the defendant was somehow responsible for that failure—in other words, that nonpayment was “willful[.]” rather than a consequence of an inability to pay—or that alternative forms of punishment were inadequate to meet the state’s interests in punishment and deterrence.<sup>86</sup> Although these cases limit incarceration for nonpayment of criminal justice debt, the Court has suggested that the larger issue of whether fines ought to be tailored to income is a question for legislators and sentencing courts:

The Court has not held that fines must be structured to reflect each person’s ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant’s ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.<sup>87</sup>

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<sup>79</sup> See, for example, *Rodriguez*, 411 US at 20–21.

<sup>80</sup> *Id.* at 21–22, citing *Williams v Illinois*, 399 US 235 (1970), and *Tate v Short*, 401 US 395 (1971).

<sup>81</sup> 399 US 235 (1970).

<sup>82</sup> See *id.* at 240–41.

<sup>83</sup> 401 US 395 (1971).

<sup>84</sup> See *id.* at 397.

<sup>85</sup> 461 US 660 (1983).

<sup>86</sup> See *id.* at 672–73.

<sup>87</sup> *Rodriguez*, 411 US at 22.

## 2. Due process.

Likewise, the Due Process Clause of the Fourteenth Amendment is little barrier to proportioning financial sanctions to income. In a line of cases potentially relevant to income-based fines, the Court has held that due process places both procedural and substantive limitations on the power of states to impose punitive damages in civil suits, including prohibitions on “grossly excessive” or “arbitrary” damage awards.<sup>88</sup> However, the Court has separately held that, “[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.”<sup>89</sup> As a result, the Eighth Amendment’s express prohibition on excessive fines would seem to foreclose an independent due process challenge to the excessiveness of a fine. In any event, the standard the Court has enunciated for determining whether a punitive damages award is “grossly excessive” under the Due Process Clause substantially overlaps with the standard it has applied under the Excessive Fines Clause.<sup>90</sup> While the Court’s treatment of punitive damages awards under due process doctrine could inform the question whether income-based fines run afoul of the Excessive Fines Clause,<sup>91</sup> the Due Process Clause of the Fourteenth Amendment is unlikely to impose constraints on the magnitude of fines beyond those independently required by the Excessive Fines Clause.

## 3. The right against self-incrimination.

Because a system that scales fines to income needs a way to assess offender income, some have explored whether the Fifth Amendment right against self-incrimination could prevent courts from gaining access to financial information, such as tax records, necessary to determine the appropriate level of an

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<sup>88</sup> See *State Farm Mutual Automobile Insurance Co v Campbell*, 538 US 408, 416 (2003).

<sup>89</sup> *County of Sacramento v Lewis*, 523 US 833, 842 (1998) (citations omitted).

<sup>90</sup> Indeed, the Court has expressly compared this due process standard to the test it applies under the Excessive Fines Clause. See *Cooper Industries, Inc v Leatherman Tool Group, Inc*, 532 US 424, 433–35 (2001), citing *United States v Bajakajian*, 524 US 321 (1998).

<sup>91</sup> See Part III.B.

income-based fine.<sup>92</sup> It shouldn't. Broadly speaking, the Fifth Amendment does not protect against production of preexisting records even if they contain incriminating information.<sup>93</sup> Thus, the Fifth Amendment rights of a taxpayer are ordinarily not violated by the enforcement of a summons directing an accountant or attorney to produce that taxpayer's records.<sup>94</sup> Moreover, American courts routinely gather information about an offender's financial circumstance as part of the sentencing process. In the federal system, for example, probation officers conduct presentence investigations that, among other things, provide courts with information about "the defendant's financial condition" for use in sentencing,<sup>95</sup> and federal law expressly provides for the disclosure of tax return information to courts for use in judicial proceedings.<sup>96</sup>

That said, although offenders will rarely be able to shield financial records and other documents from court scrutiny, they may be able to invoke the right against self-incrimination to refuse to answer questions about their income orally or in writing.<sup>97</sup> Because many day-fine systems have relied primarily on self-reporting to determine income, this restraint is potentially of some concern. In Germany, for example, courts faced with legal limits on access to tax data have administered day fines by relying on voluntary disclosures by defendants and reports by prosecutors detailing an offender's occupation, education, and residence to determine income.<sup>98</sup> As a practical

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<sup>92</sup> See, for example, Friedman, Comment, 50 U Chi L Rev at 299–302 (cited in note 7).

<sup>93</sup> See *United States v Hubbell*, 530 US 27, 35–36 (2000). Sometimes, however, "the act of producing subpoenaed documents . . . might nonetheless have some protected testimonial aspects" that fall within the ambit of Fifth Amendment privilege. *Id.* at 36 n 19, citing *United States v Doe*, 465 US 605, 613 (1984).

<sup>94</sup> See *Fisher v United States*, 425 US 391, 397 (1976).

<sup>95</sup> See FRCrP 32(d)(2)(ii). See also Friedman, Comment, 50 U Chi L Rev at 299–300 (cited in note 7).

<sup>96</sup> See 26 USC § 6103(i)(4) (providing for the "[u]se of certain disclosed returns and return information in judicial or administrative proceedings"); *Criminal Resource Manual* § 509 (US Department of Justice, 1997), archived at <http://perma.cc/QM53-Y4HZ> ("[T]ax material may be provided to the court for its use in sentencing pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure.").

<sup>97</sup> See *Fisher*, 425 US at 409 (explaining that the Fifth Amendment protects against compelled "oral testimony"); *Gilbert v California*, 388 US 263, 266 (1967) (explaining that this right extends to compelled written "communications").

<sup>98</sup> See Albrecht, *Post-adjudication Dispositions* at 313–14 (cited in note 3) (discussing day-fine systems in countries where courts do not have unrestricted access to tax records). German courts are also permitted to estimate a person's economic circumstances in the absence of better information, which both eases the administrative burden and may induce offenders to provide the court with accurate information for fear

matter, the limited American experience with day fines suggests that reliance on self-reporting is similarly workable—with high rates of compliance and accuracy in reporting.<sup>99</sup> Nevertheless, a system that relies primarily on self-reporting would no doubt occasionally face the prospect of an offender refusing to volunteer information on Fifth Amendment grounds—either because providing income information would influence the measure of the offender’s liability (that is, the size of a fine)<sup>100</sup> or because disclosing income could reveal illicit or unreported sources of income and thereby subject an offender to further liability.<sup>101</sup> Because, however, a court faced with such intransigence could seek and obtain financial documents notwithstanding the Fifth Amendment, there would likely be little practical benefit to refusing to cooperate. As a result, there is no reason to believe that the self-incrimination right is any significant barrier to implementing income-based fines.

#### 4. The civil-criminal line.

The difference between civil and criminal adjudication is, as Chief Justice William Rehnquist put it mildly, “of some constitutional import,”<sup>102</sup> and classification of an offense as one or the other leads to consequences ranging from the applicable burden of proof—reasonable doubt in the criminal context and preponderance of the evidence in the typical civil case<sup>103</sup>—to the

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of an overestimate. See *id.* at 314. See also Friedman, Comment, 50 U Chi L Rev at 289–90 (cited in note 7).

<sup>99</sup> See Colgan, 103 Iowa L Rev at 63–64 (cited in note 20) (noting that the Staten Island, Milwaukee, and Oregon day-fine projects “included verification results, and each showed a substantial degree of accuracy”). That said, a system with ready access to offender financial information will obviously avoid the administrative burdens involved in trying to determine an offender’s income by other means.

<sup>100</sup> This is so even if offender income comes into play only at the sentencing phase. See *Mitchell v United States*, 526 US 314, 321 (1999) (explaining that the right against self-incrimination applies at sentencing).

<sup>101</sup> For discussion about how and whether calculation of offender income should include illicit or unreported income, see Colgan, 103 Iowa L Rev at 93–96. If it were frequently the case that offenders refused to disclose income out of fear that disclosure would reveal illicit or unreported sources of income, one possible work-around would be for courts and prosecutors to offer “use and derivative use” immunity in connection with the volunteered financial information—that is, an agreement that prevents the government from using the volunteered information against the witness in a criminal prosecution. See *Kastigar v United States*, 406 US 441, 453 (1972).

<sup>102</sup> *United States v Ward*, 448 US 242, 248 (1980).

<sup>103</sup> See *Securities and Exchange Commission v C.M. Joiner Leasing Corp.*, 320 US 344, 355 (1943).

availability of procedural protections that exist only in the criminal realm.<sup>104</sup> Because fines are so frequently imposed as punishment for civil offenses, a move to income proportionality that spurred a shift from civil to criminal adjudication could prove enormously disruptive.

The Supreme Court has, however, largely deferred to legislative determinations about whether penalties are civil or criminal, and the test it employs to second-guess legislative judgment suggests that a significant increase in civil penalties imposed on the rich is unlikely to force reclassification. As it has explained, “[T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction” focused on legislative intent.<sup>105</sup> If the statute indicates, either “expressly or impliedly,” an intent to establish a civil penalty, then the Court asks whether the scheme is “so punitive either in purpose or effect as to negate that intention,” and “only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.”<sup>106</sup> In determining the punitive purpose or effect of a sanction, the Court has considered a number of factors.<sup>107</sup> Importantly, it has expressly rejected overemphasis on the degree to which a penalty is “grossly disproportionate to the harm caused”<sup>108</sup> and suggested that such claims are more appropriately addressed by the Excessive Fines Clause.<sup>109</sup> In contrast to other, nonfinancial penalties, which may be inappropriate in the civil setting, it has observed that “the payment of fixed or variable sums of money [is a] sanction which ha[s] been

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<sup>104</sup> See *Ward*, 448 US at 248.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 248–49, quoting *Flemming v Nestor*, 363 US 603, 617–21 (1960).

<sup>107</sup> See *Hudson v United States*, 522 US 93, 99–100 (1997), quoting *Kennedy v Mendoza-Martinez*, 372 US 144, 168–69 (1963):

[U]seful guideposts [ ] includ[e]: (1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether it comes into play only on a finding of *scienter*”; (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”; (5) “whether the behavior to which it applies is already a crime”; (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and (7) “whether it appears excessive in relation to the alternative purpose assigned.”

<sup>108</sup> *Hudson*, 522 US at 101 (overruling *United States v Halper*, 490 US 435 (1989), because it “elevated . . . whether the sanction appeared excessive in relation to its non-punitive purposes [ ] to dispositive status”).

<sup>109</sup> *Id.* at 102–03 (“[S]ome of the ills at which *Halper* was directed are addressed by other constitutional provisions. . . . The Eighth Amendment protects against excessive civil fines.”).

recognized as enforceable by civil proceedings since the original revenue law of 1789.”<sup>110</sup> Another factor, whether a “sanction comes into play ‘only’ on a finding of scienter,”<sup>111</sup> also counsels in favor of the continued classification of many low-level offenses as civil no matter the penalty, as civil offenses like littering and parking violations are typically strict-liability offenses. And the Court has noted that the use of financial sanctions to promote deterrence “is insufficient to render a sanction criminal” even though deterrence is a traditional goal of punishment, “as deterrence ‘may serve civil as well as criminal goals.’”<sup>112</sup> For these reasons, a shift to income-based fines is unlikely to turn offenses currently classified as civil into criminal ones.

##### 5. The Sixth Amendment right to a jury trial.

The Sixth Amendment right to a jury trial<sup>113</sup> poses a more noteworthy challenge, but only for regimes that levy hefty financial sanctions on those at the very top of the income scale. The issue is this: fines are often imposed for criminal offenses considered “petty” as opposed to “serious.” A significant increase in the fines that high-income offenders face could potentially turn some petty crimes into serious ones. And because the Supreme Court has held that the Sixth Amendment jury trial right applies only to serious criminal prosecutions,<sup>114</sup> a reclassification from petty to serious could trigger that right where it currently doesn’t apply, leading to various complexities in both system design and administration.

In determining whether a particular crime is petty or serious, courts look chiefly to the “severity of the maximum authorized penalty.”<sup>115</sup> In this analysis, “[p]rimary emphasis” is “placed on the maximum authorized period of incarceration”—while “[p]enalties such as probation or a fine may engender ‘a significant infringement of personal freedom,’ . . . they cannot approximate in severity the loss of liberty that a prison term entails.”<sup>116</sup> Indeed, the Supreme Court has established a

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<sup>110</sup> Id at 104, quoting *Helvering v Mitchell*, 303 US 391, 400 (1938).

<sup>111</sup> *Hudson*, 522 US at 104.

<sup>112</sup> Id at 105, quoting *United States v Ursery*, 518 US 267, 292 (1996).

<sup>113</sup> The Sixth Amendment reads, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury.” US Const Amend VI.

<sup>114</sup> *Blanton v City of North Las Vegas*, 489 US 538, 541–42 (1989).

<sup>115</sup> Id at 541, quoting *Baldwin v New York*, 399 US 66, 68 (1970).

<sup>116</sup> *Blanton*, 489 US at 542, quoting *Frank v United States*, 395 US 147, 151 (1969).



rebuttable presumption that offenses punishable by six months' imprisonment or less are petty,<sup>117</sup> which a defendant may overcome "only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."<sup>118</sup> And it has remarked more than once that it will be a "rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line."<sup>119</sup>

In *Southern Union Co v United States*,<sup>120</sup> however, the Court made clear that fines can rise high enough to trigger the jury trial right even when incarceration isn't on the table.<sup>121</sup> Explaining that "not all fines are insubstantial, and not all offenses punishable by fines are petty," the Court suggested that the defendant was "properly accorded a jury trial" under the Sixth Amendment given that the charges at issue carried a maximum fine of \$50,000 for *each day* of a violation, culminating in a maximum potential fine of \$38.1 million.<sup>122</sup> To make its point, the Court cited an illustrative sample of "substantial" fines: a criminal contempt fine of \$52 million, a \$400 million fine for a violation of the Sherman Antitrust Act, a fine of \$448.5 million for two violations of the Foreign Corrupt Practices Act, and a fine of \$1.195 billion for violations of food and drug laws.<sup>123</sup> If these eye-popping totals are any guide, then an eight-figure fine is likely high enough to trigger the Sixth Amendment right. At the other end of the equation, the Court has sanctioned petty crimes with maximum authorized fines of \$10,000 in 1975<sup>124</sup> (roughly

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<sup>117</sup> See *Blanton*, 489 US at 543.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 543 (quotation marks omitted). See also *United States v Nachtigal*, 507 US 1, 5 (1993) (finding that a maximum fine of \$5,000 did not render a DUI offense "serious").

<sup>120</sup> 567 US 343 (2012).

<sup>121</sup> *Id.* at 351.

<sup>122</sup> *Id.* at 347, 351–52.

<sup>123</sup> See *id.* at 351.

<sup>124</sup> See *Muniz v Hoffman*, 422 US 454, 477 (1975). This and the following inflation adjustments were calculated using the Bureau of Labor Statistics' Consumer Price Index Inflation Calculator and are accurate as of February 2018. *CPI Inflation Calculator* (Bureau of Labor Statistics, Apr 2018), online at <http://data.bls.gov/cgi-bin/cpicalc.pl> (visited May 8, 2018) (Perma archive unavailable). The fact that the *Muniz* Court allowed a petty offense to carry a fine close to \$50,000 in today's dollars could suggest that the *Southern Union* Court viewed the aggregate \$38.1 million dollar fine, rather than the \$50,000 per day penalty, as the reason why that financial sanction was too high to escape the Sixth Amendment jury trial right.

\$47,000 adjusted for inflation), \$1,000 in 1989<sup>125</sup> (roughly \$2,000 today), and \$4,000 in 1993<sup>126</sup> (roughly \$7,000 today).

The Court is unlikely to adopt a strict numerical rule governing when a fine makes a crime serious for Sixth Amendment purposes, but even a conservative reading of these cases suggests that an income-based fine regime could punish offenses with fines well into the tens-of-thousands of dollars range without triggering the jury trial right. In other words, only a Finland-like system with no ceiling on the overall size of fines would risk transforming petty crimes into serious ones.<sup>127</sup> Moreover, this discussion has so far assumed that the *absolute* size of the fine is the appropriate measure, but the Court has on occasion suggested that it is the *relative* burden that a fine would impose that matters for Sixth Amendment purposes.<sup>128</sup>

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<sup>125</sup> See *Blanton*, 489 US at 544–45.

<sup>126</sup> See *Nachtigal*, 507 US at 5.

<sup>127</sup> An additional wrinkle: courts look to the “maximum authorized penalty” when deciding whether an offense is petty or serious. *Blanton*, 489 US at 541. How would that general rule apply when an income-based fine regime authorized stiff maximum penalties for petty offenses but specified that such fines would apply only to wealthy offenders? In other words, if an income-based fine specifies a maximum authorized sanction of \$1 million but also that such a fine applies only if an offender is a billionaire, does that make an offense that would otherwise be petty for low-income offenders become a serious one for all offenders, including poor offenders who face no real threat of that maximum penalty being imposed? If so, then implementing a system of income-based fines that included high penalties on the wealthy for otherwise petty offense would more extensively disrupt the current practice of petty offense adjudication. One way to defuse this potential problem is to have factfinding or stipulations about an offender’s income level at the initial stages of a criminal prosecution so that a court can determine whether an offender will, if convicted, face a penalty high enough to be “serious”; in practice, only wealthy offenders will. Another solution is to remove the maximum authorized penalty altogether, as in a Finland-style day-fine regime. This is because, when a statute fails to specify a maximum penalty, courts look to the penalty actually imposed to determine whether the jury right should have attached. See *Frank*, 395 US at 149. The practical result would be that otherwise petty offenses would become serious only for high-income offenders, as these are the only offenders who will have constitutionally serious fines imposed at sentencing. Put together, a “low max” system (with penalties in the tens of thousands) and a “no max” system (of Finland-style day fines) might both be easier to implement than a “high max” system (one that authorized penalties in the tens of millions), at least when the trial right and petty offenses are concerned.

<sup>128</sup> See *Muniz*, 422 US at 477:

It is not difficult to grasp the proposition that six months in jail is a serious matter for any individual, but it is not tenable to argue that the possibility of a \$501 fine would be considered a serious risk to a large corporation or labor union. . . . [W]e cannot say that the fine of \$10,000 imposed on Local 70 in this case was a deprivation of such magnitude that a jury should have been interposed to guard against bias or mistake. *This union . . . collects dues from some 13,000 persons.*

Even if steep fines could trigger the jury trial right, the results would hardly counsel against scaling fines to income. First, as this Section discusses, fines are frequently imposed as punishment for crimes deemed serious because they carry long periods of incarceration, meaning that for these offenses the jury trial right has already attached. As for crimes that would become serious under an income-based fine regime, expansion of the jury right would lead to some increase in the number of jury trials, along with their associated costs and burdens, but that effect would likely be small:<sup>129</sup> after all, even if the jury trial is *available*, “the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>130</sup> Finally, under *Apprendi v New Jersey*,<sup>131</sup> when the Sixth Amendment jury right attaches, the accused possesses an attendant right to have every fact “[o]ther than the fact of a prior conviction . . . that increases the penalty for a crime beyond the prescribed statutory maximum . . . submitted to a jury, and proved beyond a reasonable doubt.”<sup>132</sup> Accordingly, under an income-based fine scheme in which the maximum penalty varied according to income, an offender’s income could become a jury question.<sup>133</sup> By contrast, without any maximum penalty, a judge could determine an offender’s income along with the amount of a financial sanction at sentencing.<sup>134</sup> While the design of an income-based fine regime will have to take these considerations into account, they are hardly insurmountable.

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(emphasis added). See also *Southern Union*, 567 US at 351 (distinguishing between fines imposed on “organizational defendants” and those imposed on “an individual” and citing 18 USC § 3572(a)(2), which requires a court to consider “the burden that the fine will impose upon the defendant” in determining whether to impose a fine and in what amount).

<sup>129</sup> Moreover, only high-income offenders would likely receive jury trial rights where they currently have none. See note 127.

<sup>130</sup> *Lafler v Cooper*, 566 US 156, 170 (2012) (noting that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas”).

<sup>131</sup> 530 US 466 (2000).

<sup>132</sup> *Southern Union*, 567 US at 348, quoting *Apprendi*, 530 US at 490.

<sup>133</sup> This is not without its perils: as the Court has recognized, “presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses,” *State Farm*, 538 US at 417 (2003), and presumably the same danger exists for wealthy individuals.

<sup>134</sup> See *Southern Union*, 567 US at 353 (“Nor . . . could there be an *Apprendi* violation where no maximum is prescribed.”).

## B. The Excessive Fines Clause

According to *United States v. Bajakajian*<sup>135</sup>—the only decision in which the Supreme Court has struck down a fine as excessive—a fine violates the Excessive Fines Clause if it is “grossly disproportional to the gravity of a defendant’s offense.”<sup>136</sup> Whether this clause limits the ability of governments to impose weighty fines on the rich primarily turns on the meaning of disproportionality: A fine must be proportional, but proportional in what sense?<sup>137</sup>

On the one hand, income-based fines are by definition proportional: as the size of a monetary penalty rises or falls in proportion to a person’s income, offenders experience similar retributive consequences and deterrent effects. And insofar as a proportional punishment is one tailored to serve the ends of punishment as opposed to one that is unnecessary or gratuitous when measured against its purposes, income-based fines are proportional insofar as they improve the ability of financial sanctions to meet important goals of punishment, such as retribution and deterrence. On the other hand, the Excessive Fines Clause could constrain income-based fines if it requires an income-blind assessment of proportionality or if proportionality is understood as a strict relationship between the gravity of the offense and the absolute—as opposed to relative—severity of a punishment. To explore which view of proportionality might prevail and other implications of this doctrine for income-based fines, what follows is a review of the Supreme Court’s Excessive Fines Clause jurisprudence, a survey of cases in state and lower federal courts, and a discussion of the Court’s larger “gross disproportionality” and due process case law.<sup>138</sup>

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<sup>135</sup> 524 US 321 (1998).

<sup>136</sup> *Id.* at 334.

<sup>137</sup> The framing of this question, and the following discussion about various strains of proportionality, is deeply informed by the work of Professor Richard Frase. See, for example, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 Minn L Rev 571, 588–97 (2005).

<sup>138</sup> For the purposes of this Article, I do not dwell on the question of whether the doctrine surrounding the Excessive Bail Clause can offer any insight on the constitutionality of income-based fines. The Court’s Excessive Fines Clause cases have largely ignored the Excessive Bail Clause, in part because, unlike the other two provisions of the Eighth Amendment, the Bail Clause is not concerned with punishment. See *Austin v. United States*, 509 US 602, 609 (1993). The Excessive Bail Clause requires an individualized bail determination, with bail set no higher “than an amount reasonably calculated” to assure the presence of the accused, taking into account, among other factors, the financial circumstances of the defendant. *Stack v. Boyle*, 342 US 1, 5 (1951). On this

Ultimately, the Excessive Fines Clause should not prevent government efforts to scale financial sanctions to income. As with the constitutional objections already discussed, this clause is not an obstacle to a scheme that would reduce the burden of financial sanctions on those without means—if anything, it may prohibit the imposition of overly burdensome fines on the poor. At the other end of the income spectrum, the Excessive Fines Clause could place an upper limit on financial sanctions levied on the rich, especially for low-level offenses. But that result is uncertain and, if international examples are any guide, unlikely to dramatically affect the design of a US system, as most day-fine regimes include caps on the size of fines for reasons wholly apart from any constitutional constraints.

### 1. Excessive fines in the Supreme Court.

The Eighth Amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>139</sup> While the Supreme Court had long grappled with the meaning of “cruel and unusual punishment”<sup>140</sup> and the prohibition on “excessive bail,”<sup>141</sup> it took until 1989 for it to consider an application of the Excessive Fines Clause.<sup>142</sup> A series of four cases followed, culminating in *Bajakajian*.

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ground, one might argue by analogy that interpreting the Excessive Fines Clause to require an income-blind assessment of excessiveness would be inappropriate. But as the following Sections discuss, there are firmer doctrinal bases for that conclusion.

<sup>139</sup> US Const Amend VIII.

<sup>140</sup> See, for example, *Wilkinson v Utah*, 99 US 130, 134–35 (1878) (upholding a sentence of death by firing squad).

<sup>141</sup> See, for example, *Stack*, 342 US at 5–6 (holding excessive bail that was set higher than an amount reasonably calculated to assure that the accused will stand trial and submit to sentence if found guilty).

<sup>142</sup> See *Browning-Ferris Industries of Vermont, Inc v Kelco Disposal, Inc*, 492 US 257, 262 (1989) (“[T]his Court has never considered an application of the Excessive Fines Clause.”). Otherwise, there is “[e]ssentially no Supreme Court Excessive Fines Clause case law . . . prior to the modern era.” McLean, 40 Hastings Const L Q at 870 (cited in note 7). In *Ex parte Watkins*, 32 US 568 (1833), the Court declined to hear an excessive fines challenge on jurisdictional grounds but went on, in dicta, to remark that “there is nothing on the record in this case, which establishes that at the time of passing judgment the present fines were in fact, or were shown to the circuit court to be excessive.” *Id* at 574. Similarly, in 1846, a litigant before the Court apparently argued that a criminal fine was “an excessive fine, and a consequent cruel and unusual punishment,” as “[t]he law never imposes a fine, where it presumes the party can have nothing to pay”; but the Court denied this and other claims without comment. *Spalding v New York*, 45 US 21, 30, 36 (1846). Perhaps the fullest discussion prior to the modern era occurred in *Pervear v Massachusetts*, 72 US 475 (1866), in which the Court considered whether a fine of “fifty dollars” and a sentence of “imprisonment at hard labor . . . for three months” imposed as

First, in *Browning-Ferris Industries of Vermont, Inc v Kelco Disposal, Inc*,<sup>143</sup> the Court held that the Excessive Fines Clause constrains only fines “directly imposed by, and payable to, the government.”<sup>144</sup> As it explained, “At the time of the drafting and ratification of the Amendment, the word ‘fine’ was understood to mean a payment *to a sovereign* as punishment for some offense.”<sup>145</sup> And although there is little direct evidence of the Founders’ intent in crafting the clause, its language draws near-verbatim from a provision of the English Bill of Rights of 1689<sup>146</sup> that was itself targeted at curbing government excess—in particular, a practice in which the king’s judges would impose heavy fines on political opponents and allow those who could not pay to languish in jail.<sup>147</sup> In keeping with that history, the Court rejected any notion that the clause constrains the size of punitive damages awards in civil cases between private parties.<sup>148</sup>

Next, in *Austin v United States*,<sup>149</sup> the Court determined that the clause “limits the government’s power to extract payments . . . as *punishment*” whether or not a proceeding is considered civil or criminal.<sup>150</sup> “The notion of punishment,” it explained, “cuts across the division between the civil and the criminal law.”<sup>151</sup> As such, “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent

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punishment for unlicensed liquor sales was “excessive, cruel, and unusual” but rejected the challenge on the ground that—as was the case prior to ratification of the Fourteenth Amendment—the Eighth Amendment did not apply to the states. *Id.* at 480. In dicta, however, the Court stated that it perceived “nothing excessive, or cruel, or unusual” in the punishment, as “[t]he object of the law was to protect the community against the manifold evils of intemperance,” and prohibiting unlicensed liquor sales “under penalties” was “the usual mode adopted in many, perhaps, all of the States” and “wholly within the discretion of State legislatures.” *Id.*

<sup>143</sup> 492 US 257 (1989).

<sup>144</sup> *Id.* at 268.

<sup>145</sup> *Id.* at 265 (emphasis added). On this point and others, Professor Beth A. Colgan has been sharply critical of the Court’s historical analysis. See, for example, Colgan, 102 Cal L Rev at 300 (cited in note 7).

<sup>146</sup> *Browning-Ferris*, 492 US at 266–67. The English Bill of Rights of 1689 read, in relevant part: “[E]xcessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.” English Bill of Rights, 1 Wm & Mary, sess 2, ch 2 (1689), in 6 Statutes of the Realm 142, 143.

<sup>147</sup> *Browning-Ferris*, 492 US at 267.

<sup>148</sup> *Id.* at 275–76.

<sup>149</sup> 509 US 602 (1993).

<sup>150</sup> *Id.* at 609–10.

<sup>151</sup> *Id.* at 610, quoting *Halper*, 490 US at 447–48.

purposes, is punishment” within the clause’s purview.<sup>152</sup> Applying these principles, the Court determined that a civil action in which the government sought forfeiture of property connected to drug trafficking was subject to the clause’s limitations given that the purpose of such a forfeiture was, at least in part, punitive.<sup>153</sup> In *Alexander v United States*,<sup>154</sup> a companion case issued the same day, the Court held that a *criminal* forfeiture, levied atop a six-year prison term and \$100,000 fine, was similarly challengeable—“no different, for Eighth Amendment purposes, from a traditional ‘fine.’”<sup>155</sup>

While those cases concerned what constitutes a fine, *Bajakajian* marks the first time the Court has spelled out the standard for determining whether a fine is excessive. In it, a man attempted to board a plane leaving the United States without reporting, as required by federal law, that he was transporting more than \$10,000 in cash.<sup>156</sup> Pursuant to another law that made “any property . . . involved in such offense”<sup>157</sup> subject to forfeiture, the Government sought all \$357,144 that the man failed to declare.<sup>158</sup> Following the trio of cases just discussed, the Court had “little trouble concluding” that the forfeiture was “punishment,” and thus a “fine” within the meaning of the clause, given that it was imposed following a criminal conviction and, as the Government argued, served the state’s interest in deterring the illicit movement of cash—deterrence being a “traditional[ ] . . . goal of punishment.”<sup>159</sup>

Turning to whether the fine was constitutionally “excessive,” the Court noted that the “touchstone” of that inquiry “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.”<sup>160</sup> Yet as Justice Clarence Thomas remarked in his opinion for the majority, “The text and history of the Excessive Fines Clause . . . provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an

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<sup>152</sup> *Austin*, 509 US at 610, quoting *Halper*, 490 US at 448.

<sup>153</sup> See *Austin*, 509 US at 621–22.

<sup>154</sup> 509 US 544 (1993).

<sup>155</sup> *Id.* at 558.

<sup>156</sup> *Bajakajian*, 524 US at 324.

<sup>157</sup> *Id.*, quoting 18 USC § 982(a)(1).

<sup>158</sup> *Bajakajian*, 524 US at 324.

<sup>159</sup> *Id.* at 328–29.

<sup>160</sup> *Id.* at 334.

offense in order to be ‘excessive.’”<sup>161</sup> Contemporary dictionaries defined “excessive” as “surpassing the usual, the proper, or a normal measure of proportion”<sup>162</sup>—little help on the specifics. As to history, the Court recounted the legacy of the English Bill of Rights of 1689, as well as Magna Carta’s limits on “amerce-ments (the medieval predecessors of fines),” which required that such penalties “be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood,”<sup>163</sup> but the Court found scarcely anything to suggest “how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive.”<sup>164</sup>

Left wanting by text and history, the Court adopted a century-old standard<sup>165</sup> from its Cruel and Unusual Punishments Clause jurisprudence: gross disproportionality. This clause, the Court has explained, though by its terms addressing “cruel and unusual punishments,” “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”<sup>166</sup> Because, however, “judgments about the appropriate punishment for an offense belong in the first instance to the legislature” and “judicial determination regarding the gravity of a particular criminal offense [is] inherently imprecise,” the Court has largely deferred to legislative judgment in this area, policing only punishments that are *grossly* disproportionate.<sup>167</sup>

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<sup>161</sup> *Id.* at 335.

<sup>162</sup> *Bajakajian*, 524 US at 335, citing Noah Webster, 1 *An American Dictionary of the English Language*, excessive (Converse 1828) (defining excessive as “beyond the common measure or proportion”), and Samuel Johnson, 1 *A Dictionary of the English Language*, excessive (Strahan 4th ed 1773) (defining excessive as “[b]eyond the common proportion”).

<sup>163</sup> *Bajakajian*, 524 US at 335–36, citing Magna Carta Art 14:

A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentment; [ ] and a Merchant likewise, saving to him his merchandise; [ ] and any other’s villain than ours shall be likewise amerced, saving his wainage.

<sup>164</sup> *Bajakajian*, 524 US at 336.

<sup>165</sup> Thomas, writing for the *Bajakajian* majority, relied on *Solem v Helm*, 463 US 277 (1983), and *Rummel v Estelle*, 445 US 263 (1980), both of which drew on the proportionality analysis of *Weems v United States*, 217 US 349, 368 (1910).

<sup>166</sup> *Solem*, 463 US at 284.

<sup>167</sup> *Bajakajian*, 524 US at 336. Some commentators have criticized the Court for importing the proportionality limitations of the Cruel and Unusual Punishments Clause into the Excessive Fines Clause. See, for example, 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, 506 (arguing that the Excessive Fines Clause contains a more robust proportionality requirement than the Cruel and Unusual Punishments Clause).



Thus, under *Bajakajian*, a fine “violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”<sup>168</sup> Although the Court did not spell it out in precisely these terms, this inquiry can be divided into three parts: (1) the gravity of an offense, (2) the magnitude of a fine, and (3) proportionality.

The Court discussed gravity in terms of culpability and harm. As to culpability, the Court first observed that the “essence” of the defendant’s crime was a “willful failure to report the removal of currency from the United States”—a relatively unserious “reporting offense.”<sup>169</sup> Then the Court took an individualized look at the defendant’s conduct, noting that his “violation was unrelated to any other illegal activities” given that “[t]he money was the proceeds of legal activity and was to be used to repay a lawful debt.”<sup>170</sup> As a consequence, *Bajakajian* himself did “not fit into the class of persons for whom the statute was principally designed: He [was] not a money launderer, a drug trafficker, or a tax evader.”<sup>171</sup> Particular emphasis was placed on the “other penalties that the Legislature ha[d] authorized” for the crime, which the Court took as “relevant evidence” of the “offense’s gravity.”<sup>172</sup> Specifically, the Court took the fact that, “under the Sentencing Guidelines, . . . the maximum sentence that could have been imposed on [*Bajakajian*] was six months, while the maximum fine was \$5,000” as confirmation of the defendant’s “minimal level of culpability.”<sup>173</sup>

As to harm, the Court adopted a similarly narrow view, defining it in terms of the consequences of the defendant’s individual conduct, injury to the government as opposed to the public, and injury caused by the failure to report irrespective of the amount unreported. As it explained,

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<sup>168</sup> *Bajakajian*, 524 US at 334.

<sup>169</sup> *Id.* at 337.

<sup>170</sup> *Id.* at 338.

<sup>171</sup> *Id.*

<sup>172</sup> *Bajakajian*, 524 US at 339 n 14.

<sup>173</sup> *Id.* at 338–39. The Court’s reliance on the Sentencing Guidelines was somewhat curious. As the dissent stressed, Congress authorized a maximum fine of \$250,000 plus five years’ imprisonment for the statutory violation, and the Guidelines separately permitted a “forfeiture if mandated by statute.” *Id.* at 339 n 14. In the majority’s view, that the Guideline sentence was “but a fraction of the penalties authorized . . . show[ed] that [defendant’s] culpability relative to other potential violators of the reporting provision . . . [was] small indeed.” *Id.*

[The] [f]ailure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and . . . no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived *only of the information* that \$357,144 had left the country.<sup>174</sup>

Rejecting the Government's argument that the harm it suffers increases along with the amount of money leaving the country unreported, the Court again made reference to the defendant's own conduct: "It is impossible to conclude . . . that the harm [defendant] caused" by moving \$357,144 "is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking \$12,000 out of the country in order to purchase drugs."<sup>175</sup>

Moving from the gravity of the offense to the magnitude of the fine, the Court concluded only that "full forfeiture of [the defendant's] \$357,144" violated the Excessive Fines Clause, declining to speculate as to how high the forfeiture could have gone without running afoul of the Constitution.<sup>176</sup>

As to the meaning of proportionality, the Court gave even fewer clues. The majority seemed concerned with what *degree* of disproportionality the Constitution should tolerate,<sup>177</sup> but the more basic question of what proportionality *is* went, at least on the surface, unexamined. The forfeiture, the Court noted, was "larger than the \$5,000 fine" authorized by the Guidelines—indeed, it was some sixty-five times greater.<sup>178</sup> This focus could suggest that the Court thought of proportionality as a mathematical ratio: a fine may be only so many multiples of the gravity of an offense. The Court also remarked that full forfeiture was excessive because it bore "no articulable correlation to any injury suffered by the Government,"<sup>179</sup> perhaps suggesting that if the government had explained why the forfeiture served

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<sup>174</sup> Id at 339 (emphasis added).

<sup>175</sup> Id. The majority's answer here is something of a non sequitur: whether the government's interest in preventing unreported movement of money increases along with the amount is a separate question from whether the movement of licit money causes less harm than the movement of illicit money.

<sup>176</sup> *Bajakajian*, 524 US at 337 n 11.

<sup>177</sup> See id at 335 ("[T]he Clause's text and history provide little guidance as to *how disproportional* a punitive forfeiture must be to gravity of an offense in order to be 'excessive.'") (emphasis added).

<sup>178</sup> Id at 340.

<sup>179</sup> Id.

important state interests—in other words, that there was a correlation between the sanction imposed and the gravity of the offense—the result might have been different. This points toward a view of proportionality as requiring that sanctions further the ends of punishment as opposed to being unnecessary or gratuitous when measured against the purposes of punishment.

More telling, perhaps, than what the Court said is what it left unaddressed. Specifically, it failed to engage with an argument raised by the government and the dissent: that forfeiture of the full amount served the state's interest in deterrence.<sup>180</sup> As Kennedy argued in the dissent, Congress authorized full forfeiture of all undeclared cash in order “to deter lucrative money laundering”—without full forfeiture, the consequence of moving undeclared cash becomes a “modest cost of doing business in the world of drugs and crime.”<sup>181</sup> Because the majority instead fixed on the individual blameworthiness of the defendant and the harm resulting from his actions, without reference to the government's interest in setting a financial sanction necessary to deter such conduct, many commentators have suggested that *Bajakajian* adopts a view of “retributive proportionality” grounded in the “traditional elements of blameworthiness”: harm and culpability.<sup>182</sup> Under this view, “[I]t is wrong to punish an individual to a greater degree than offense seriousness would dictate, even if such disproportionate punishment generates significant social gain.”<sup>183</sup> By contrast, under a nonretributive or utilitarian model of proportionality, in which interests such as deterrence are recognized as legitimate bases for punishment, a fine high enough to “deter future violations, rather than simply to compensate the government for the injury caused by the

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<sup>180</sup> The majority directly discusses the state's interest in deterrence only in the context of concluding that the forfeiture was a “fine” for the purposes of the Excessive Fines Clause. As it noted, the fact that the forfeiture could serve the interest of deterrence does not mean that the forfeiture did not constitute “punishment” because “deterrence . . . has traditionally been viewed as a goal of punishment.” *Bajakajian*, 524 US at 329.

<sup>181</sup> *Id.* at 350, 354 (Kennedy dissenting). The dissent also took a more categorical—that is, less individualized—view of the offense in question, focusing not on the defendant's relative blamelessness but on the role that reporting violations writ large play in the world of international criminal enterprise. See *id.* at 351.

<sup>182</sup> Frase, 89 Minn L Rev at 602, 623 n 236 (cited in note 137). See also, for example, Johnson, 2000 U Ill L Rev at 493–95 (cited in note 167).

<sup>183</sup> Johnson, 2000 U Ill L Rev at 494 (cited in note 167).

defendant” would be appropriate despite being “*some* multiplier of the actual harm caused.”<sup>184</sup>

As I allude to above, because culpability and harm will rarely vary with income,<sup>185</sup> the constitutionality of income-based fines under the standard announced in *Bajakajian* largely turns on the definition of proportionality. Under nonretributive proportionality, weighty income-based fines imposed on the rich could be justified as improving the ability of financial sanctions to deter wealthy offenders. From the perspective of retributive proportionality, income-based fines could still be justified on a theory of *subjective* retribution: increased fines on the rich are necessary to ensure that fines have an adequate retributive “bite”—in other words, that wealthy offenders *experience* financial sanctions as sufficiently punitive. But if proportionality is understood as mandating a strict relationship between the gravity of the offense and the absolute, as opposed to relative, severity of a punishment, or if the Excessive Fines Clause requires an income-blind assessment of proportionality, then income-based fines will be significantly constrained.

On that last point, *Bajakajian* expressly reserved the question whether “wealth or income are relevant to the proportionality determination” or whether the fact that a fine will “deprive [an offender] of his livelihood” is relevant to the constitutional analysis.<sup>186</sup> But that is not the only statement on the matter from the Supreme Court. Rather, writing for herself and Justice John Paul Stevens in *Browning-Ferris*, Justice Sandra Day O’Connor concluded that the Excessive Fines Clause does not bar a state from taking the wealth of an offender into account when setting a punishment:

Using economic analysis, some of the *amici* in support of [the defendant] argue that the wealth of a defendant should not, as a constitutional matter, be taken into account in setting the amount of an award of punitive damages. It seems to me that this argument fails because the Excessive Fines Clause is only a substantive ceiling on the *amount* of a monetary sanction,<sup>187</sup> and not an economic primer on what

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<sup>184</sup> Pamela S. Karlan, “Pricking the Lines”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 Minn L Rev 880, 902 (2004).

<sup>185</sup> See text accompanying notes 50–53.

<sup>186</sup> *Bajakajian*, 524 US at 340 n 15.

<sup>187</sup> How to reconcile O’Connor’s statement that the Excessive Fines Clause is a “substantive ceiling on the *amount* of a monetary sanction” given that the rest of this passage

factors best further the goals of punishment and deterrence. Just as the Fourteenth Amendment does not enact Herbert Spencer's Social Statics, . . . the Eighth Amendment does not incorporate the views of the Law and Economics School. The "Constitution does not require the States to subscribe to any particular economic theory." . . . Moreover, as a historical matter, the argument is weak indeed. First, Magna Carta only required that an amercement be proportionate and not destroy a person's livelihood. Second, Blackstone remarked that the "*quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's."<sup>188</sup>

Especially notable for our purposes, O'Connor endorsed the view that a state could *increase* the nominal size of a penalty in response to a defendant's wealth rather than addressing whether the Excessive Fines Clause requires the reduction of penalties on the poor.<sup>189</sup> Her position rested on two pillars: first, that "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," especially when a challenge to that legislative judgment would require imposing a single penological—or economic—theory on the state;<sup>190</sup> and second, the historical foundations of the Excessive Fines Clause—the proportionality and deprivation of livelihood principles in Magna Carta, both of which were acknowledged by

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suggests that a fine may be proportioned to income? Perhaps she was endorsing the view that, while a state may take income into account, it may only go so far in doing so. See text accompanying notes 255–56.

<sup>188</sup> *Browning-Ferris*, 492 US at 300 (O'Connor concurring in part and dissenting in part) (citations omitted). The majority in *Browning-Ferris* concluded that the Excessive Fines Clause does not apply to punitive damages awards in cases between private parties, but O'Connor disagreed, which is why she proceeded to sketch out the appropriate standard for determining whether that award was excessive within the meaning of the Eighth Amendment. Interestingly, even one of the amici to which O'Connor referred conceded in its brief that "[i]f an individual is held liable for his or her own wrongful conduct, there is a basis for taking the individual's wealth into account in setting a punitive damages award" but argued that taking into account the wealth of a *corporation* was another matter. Brief for Navistar International Transportation Corp as Amicus Curiae Supporting Petitioners, *Browning-Ferris Industries of Vermont, Inc v Kelco Disposal, Inc*, No 88-556, \*7, 14–15 (US filed Jan 19, 1989).

<sup>189</sup> *Browning-Ferris*, 492 US at 300–01.

<sup>190</sup> *Helm*, 463 US at 290.

the Court in *Bajakajian*,<sup>191</sup> as well as Blackstone's recognition of the subjectivity of financial sanctions.<sup>192</sup> Although she did not speak for the Court, O'Connor's statement in *Browning-Ferris* is perhaps the firmest doctrinal foothold for a party arguing in favor of the constitutionality of weighty income-based fines. That said, her view that a state *may* take income into account is far from a requirement that it do so, nor is it irreconcilable, strictly speaking, with the Constitution setting some retributive upper limit restricting how high a state may set a sanction in relation to the gravity of an offense.

Having exhausted the Supreme Court's own Excessive Fines Clause jurisprudence,<sup>193</sup> I now turn to how other courts have interpreted that provision in the wake of *Bajakajian*.

## 2. Excessive fines in lower courts.

To say that the lower courts are confused about how to apply *Bajakajian* is an understatement. As one scholar has remarked, "[T]he doctrine has created a quagmire."<sup>194</sup> The DC Circuit has, characteristically, put it more mildly: *Bajakajian*'s gross disproportionality analysis "hardly establish[es] a discrete

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<sup>191</sup> See *Bajakajian*, 524 US at 335–36.

<sup>192</sup> A fuller version of the Blackstone commentary contains both a recognition of the inherent relativity of financial sanctions and an evocative example of how fixed fines can inadequately deter the wealthy:

The *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference, to another's. Thus the law of the twelve tables at Rome fined every person, that struck another, five and twenty *denarii*: this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomever he pleased, and then tender them the legal forfeiture.

William Blackstone, 4 *Commentaries on the Laws of England* 371–72 (Clarendon 1769).

<sup>193</sup> The Supreme Court has mentioned the Excessive Fines Clause in cases since *Bajakajian* but mostly in passing. Its most lengthy discussion of the subject since *Bajakajian* occurred in *Paroline v United States*, 134 S Ct 1710 (2014), in which the Court considered the scope of restitution available to victims of child pornography. *Id.* at 1716. There, the Court concluded that a defendant in such a case should be made liable only for the consequences and gravity of his own conduct, not the conduct of others. See *id.* at 1725–26. In so holding, the Court remarked that to do otherwise, making "a single possessor" of a victim's images "liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate" under the Excessive Fines Clause. *Id.* at 1726.

<sup>194</sup> Colgan, 102 Cal L Rev at 295 n 92 (cited in note 7) (detailing disagreement in the lower courts both as to "what a fine is and the question of what renders a fine excessive").

analytic process.”<sup>195</sup> For our purposes, two observations bear mentioning. First, seizing on *Bajakajian*’s emphasis on the magnitude of authorized penalties, lower courts have found that nearly any fine within the range prescribed by a legislature is constitutional. The upshot is that a government’s decision to authorize income-based fines will, in and of itself, erect a significant barrier to challenge under the Excessive Fines Clause. Second, courts are divided as to whether, and how, the finances of a defendant should factor into the constitutional analysis.<sup>196</sup>

In concluding that the defendant showed a “minimal level of culpability,” the *Bajakajian* Court discussed an array of factors: that the crime of conviction was “solely a reporting offense”; that the defendant’s conduct was “unrelated to any other illegal activities”; that the defendant was not within “the class of persons for whom the statute was principally designed”; and that, under the Sentencing Guidelines, the forfeiture at issue far exceeded the maximum authorized fine.<sup>197</sup> Lower courts, however, have largely made this last consideration—whether a challenged fine is within the range authorized by statute or guidelines—the locus of the constitutional inquiry. As one court observed after surveying the landscape of post-*Bajakajian* challenges, “[I]t is doubtful that a penalty that is . . . less than the total maximum penalty authorized by law could ever be grossly disproportional

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<sup>195</sup> *Collins v Securities and Exchange Commission*, 736 F3d 521, 527 (DC Cir 2013).

<sup>196</sup> Courts are also divided as to whether the Excessive Fines Clause applies to the states at all, and at the time of publication, the Supreme Court has granted cert in *Indiana v Timbs*, 84 NE3d 1179 (Ind 2017), to consider precisely that question. *Timbs v Indiana*, 138 S Ct 2650 (2018). If it doesn’t apply to the states, the clause will obviously be no impediment to state efforts to implement income-based fines. Compare *Timbs*, 84 NE3d at 1182 (holding that the clause is not incorporated); *Montana v Forfeiture of 2003 Chevrolet*, 202 P3d 782, 783 (Mont 2009) (same); *Reyes v North Texas Tollway Authority*, 830 F Supp 2d 194, 207 (ND Tex 2011) (same), with *Pennsylvania v 1997 Chevrolet*, 160 A3d 153, 162 n 7 (Pa 2017) (noting that the clause is incorporated); *Watson v Johnson Mobile Homes*, 284 F3d 568, 572 (5th Cir 2002) (same). See also *Wright v Riveland*, 219 F3d 905, 915–19 (9th Cir 2000) (applying the Excessive Fines Clause to state action sub silentio); *Towers v City of Chicago*, 173 F3d 619, 623–24 (7th Cir 1999) (same). The Supreme Court has up to this point sent—in dicta—conflicting signals. Compare, for example, *McDonald v City of Chicago*, 561 US 742, 765 n 13 (2010) (“We never have decided whether the Third Amendment or the Eighth Amendment’s prohibition of excessive fines applies to the States through the Due Process Clause.”), with *Cooper Industries*, 532 US at 433–34 (“[T]he Due Process Clause of the Fourteenth Amendment . . . makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States.”).

<sup>197</sup> *Bajakajian*, 524 US at 337–39.

to the offense's gravity."<sup>198</sup> Indeed, the dominant position appears to be that if a fine falls "within the range of fines prescribed by Congress, a *strong presumption* arises that the [fine] is constitutional,"<sup>199</sup> and some courts have said that "careful[ ] consider[ation]" of the *Bajakajian* factors is necessary only if the fine at issue "exceeds the statutory and Guideline maximum fines."<sup>200</sup> Even when it is framed as a presumption, many courts have treated the fact that a fine falls within the authorized range as determinative.<sup>201</sup>

The logic behind this emphasis is plain: it stresses deference to legislative determinations about what punishment is appropriate, and by "[t]ranslating the gravity of a crime into monetary terms,"<sup>202</sup> it reduces *Bajakajian's* multifactor test—which runs the risk of subjective application—into a matter of elementary school arithmetic. Of course, taken to an extreme, it threatens to make a mockery of the Excessive Fines Clause because fines, no matter how steep, will pass muster so long as they are authorized. As the *Bajakajian* Court itself cautioned, legislative authorization "cannot override the constitutional requirement of

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<sup>198</sup> *Pacific Ranger, LLC v Pritzker*, 211 F Supp 3d 196, 226 (DDC 2016). See also *Pharaon v Board of Governors of the Federal Reserve System*, 135 F3d 148, 157 (DC Cir 1998) (rejecting an Excessive Fines Clause argument because "the penalty is proportional to [the] violation and well below the statutory maximum"); *United States v Mackby*, 221 F Supp 2d 1106, 1110 (ND Cal 2002) (observing that "federal courts have consistently found that civil penalty awards in which the amount of the award is less than the statutory maximum do not run afoul of the Excessive Fines Clause" and collecting cases).

<sup>199</sup> *United States v 817 NE 29th Drive*, 175 F3d 1304, 1309 (11th Cir 1999) (emphasis added). See also *United States v Varrone*, 554 F3d 327, 331–32 (2d Cir 2009) (collecting cases); *United States v Heldeman*, 402 F3d 220, 223 & n 1 (1st Cir 2005) (noting that "[s]ome circuits have treated a forfeiture of less than the statutory or guideline maximum as strongly suggesting or conclusive of compliance with the Eighth Amendment" and collecting cases); *817 NE 29th Drive*, 175 F3d at 1309–10 n 9 (observing that the converse is not true—"the fact that a forfeiture within the congressionally mandated range of fines is presumptively constitutional does not mean that a forfeiture outside of that range is presumptively unconstitutional").

<sup>200</sup> *Varrone*, 554 F3d at 332.

<sup>201</sup> See, for example, *United States v Bernitt*, 392 F3d 873, 880–81 (7th Cir 2004):

Bernitt's penalty of \$115,500 is significantly lower than the total penalty that the district court could have imposed. Given the potential punishment the district court could have imposed on Bernitt, the government's seizure of Bernitt's property valued at \$115,500 is not grossly disproportionate to the gravity of the harm the jury found Bernitt caused.

See also *817 NE 29th Drive*, 175 F3d at 1310–11 ("[T]he sentencing guidelines and the statute agree that a fine of up to \$1,000,000 would be proportional to [defendant's] crimes; consequently, the forfeiture of a \$70,000 property based on those crimes does not violate the Eighth Amendment.").

<sup>202</sup> *817 NE 29th Drive*, 175 F3d at 1309.



proportionality review.”<sup>203</sup> Whatever its merits, the implication of this approach for income-based fines is clear: so long as it is authorized by a statute, even a system that imposed heavy fines on the wealthy would be relatively secure against constitutional challenge.

Not all of the developments in the lower courts since *Bajakajian* augur in favor of the constitutionality of income-based fines. Indeed, courts are divided as to whether, and how, the financial circumstances of a defendant should factor into the constitutional analysis, with many concluding that courts should ignore, or sharply cabin, consideration of an offender’s means. As mentioned above,<sup>204</sup> *Bajakajian* expressly reserved the question whether the Excessive Fines Clause, which has roots in Magna Carta’s requirement that “amercements . . . be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood,”<sup>205</sup> requires or constrains consideration of an offender’s financial circumstances.<sup>206</sup> Since that decision, some courts, including the Eleventh Circuit, have held that they should “not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment.”<sup>207</sup> Curiously, the Eleventh Circuit suggested that this result flowed from *Bajakajian* itself.<sup>208</sup> The First and Second Circuits, by contrast, while agreeing that “a defendant’s inability to satisfy a forfeiture at the time of conviction, in and of itself, is not at all sufficient to render a forfeiture unconstitutional” have concluded, following Magna Carta, that a fine that “effectively would deprive the defendant of his or

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<sup>203</sup> *Bajakajian*, 524 US at 339 n 14.

<sup>204</sup> See text accompanying note 186.

<sup>205</sup> *Id* at 335. See note 164 and accompanying text.

<sup>206</sup> See *Bajakajian*, 524 US at 340 n 15.

<sup>207</sup> *United States v Dicter*, 198 F3d 1284, 1292 n 11 (11th Cir 1999). See also, for example, *United States v Smith*, 656 F3d 821, 828 (8th Cir 2011) (rejecting a claim that a money judgment is an excessive fine on the grounds of indigence); *United States v Dubose*, 146 F3d 1141, 1146 (9th Cir 1998) (“[A]n Eighth Amendment gross disproportionality analysis does not require an inquiry into the hardship the sanction may work on the offender.”); *Duckworth v United States*, 705 F Supp 2d 30, 48 (DDC 2010) (“[A]bility to pay is not a component of the Eighth Amendment proportionality analysis.”).

<sup>208</sup> See *817 NE 29th Drive*, 175 F3d at 1311. An intermediate appellate court in Oregon, by contrast, cited *Bajakajian* for exactly the opposite proposition: “Whether an otherwise proportional fine is excessive can depend on, for example, the financial resources available to a defendant, the other financial obligations of the defendant, and the effect of the fine on the defendant’s ability to be self-sufficient.” *Oregon v Goodenow*, 282 P3d 8, 17 (Or App 2012), citing *Bajakajian*, 524 US at 335–36.

her livelihood” would violate the Constitution.<sup>209</sup> In other words, those courts that have considered the financial circumstances of offenders have distinguished whether a fine would “destroy a defendant’s *future* livelihood” (which is grounds for finding a fine unconstitutionally excessive) from consideration of “a defendant’s *present* personal circumstances, including age, health, and financial situation” (which is not).<sup>210</sup>

Because whether the clause limits overly burdensome fines on the poor is a topic well covered by other scholarship, this Article is concerned with that question only to the extent it bears on the imposition of heavy fines on the rich.<sup>211</sup> And on their face, statements such as the Eleventh Circuit’s suggest that income-based fines could face significant obstacles under the Excessive Fines Clause. After all, if a court must ignore an offender’s financial circumstances in determining whether a fine is grossly disproportional, then a \$100,000 parking ticket assessed to a billionaire would receive the same scrutiny as a \$100,000 ticket assessed to someone living in poverty. The consequence, if the Excessive Fines Clause has any teeth, would be invalidation of both.

Read in context, however, there is little reason to believe these broad prohibitions on the consideration of income will stand in the way of income-based fines. For one, the courts to have confronted the question of financial circumstances have done so by way of asking if the Excessive Fines Clause requires courts to invalidate state-chosen sanctions as imposing unconstitutionally burdensome fines on the poor.<sup>212</sup> In that setting, the

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<sup>209</sup> *United States v Levesque*, 546 F3d 78, 84–85 (1st Cir 2008). See also *United States v Fogg*, 666 F3d 13, 19 (1st Cir 2011); *United States v Viloski*, 814 F3d 104, 111–12 (2d Cir 2016). The First and Second Circuits disagree about how exactly this inquiry should be conducted. See *Viloski*, 814 F3d at 111–12 & n 12 (noting that, while in the Second Circuit, “[w]hether a forfeiture would destroy a defendant’s livelihood is a *component of the proportionality analysis, not a separate inquiry*,” the First Circuit “require[es] a separate inquiry as to whether a forfeiture would deprive a defendant of his livelihood”) (emphasis added), citing *Levesque*, 546 F3d at 85. See also *Pennsylvania v 1997 Chevrolet*, 160 A3d 153, 189 (Pa 2017).

<sup>210</sup> *Viloski*, 814 F3d at 112.

<sup>211</sup> See note 7 and accompanying text. Importantly, even those scholars who have argued that the Excessive Fines Clause contains a “livelihood-protection” principle that would prevent the imposition of overly burdensome fines have acknowledged the difference between that rule and one that would more broadly require a direct relationship between fines and offender means. See McLean, 40 *Hastings Const L Q* at 890 n 211 (cited in note 7).

<sup>212</sup> Academic study of the Excessive Fines Clause has similarly focused on the question of burdensome fines on the poor. See note 7.

powerful deference accorded to state penological judgment militates against preventing the state from imposing its preferred penalty. When, instead, the question is whether the Excessive Fines Clause prohibits a state from taking income into account, that same deference weighs in favor of income-based fines. Because deference is the animating rationale behind many of the decisions rejecting consideration of income,<sup>213</sup> one would assume that principle will apply neutrally and not as a one-way ratchet against the poor.

For another, at least some of the courts to suggest that the financial circumstances of an offender have no constitutional relevance have signaled that this rule is related, in part, to factors special to *criminal forfeiture* as opposed to other types of fines.<sup>214</sup> For example, the Second Circuit has explained that criminal forfeiture is designed to take from an offender the proceeds of crime as well as property used in connection with crime, both of which are unrelated to an offender's financial circumstances.<sup>215</sup> As a result, "forfeitures should be 'concerned not with how much an individual has but with how much he received in connection with the commission of the crime.'"<sup>216</sup> When determining the severity of other penalties, by contrast, a more individualized inquiry, taking into account the nature and

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<sup>213</sup> At least those decisions that provide *any* rationale for their holdings. See, for example, *Viloski*, 814 F3d at 112 (explaining that the need to defer to Congress compels the conclusion that "courts may not consider as a discrete factor a defendant's personal circumstances, such as . . . present financial condition"). But see *Duckworth*, 705 F Supp 2d at 48 (concluding without analysis that "ability to pay is not a component of the Eighth Amendment proportionality analysis").

<sup>214</sup> Indeed, because the value of property sought under forfeiture so often dwarfs the size of traditional fines, a significant portion of Excessive Fines Clause cases concern forfeiture.

<sup>215</sup> See, for example, *Viloski*, 814 F3d at 110–13; *Securities and Exchange Commission v Contorinis*, 743 F3d 296, 310 (2d Cir 2014) (noting that "forfeiture is 'designed primarily to confiscate property used in violation of the law, and to require *disgorgement* of the fruits of illegal conduct'"), quoting *Ursery*, 518 US at 284. See also 21 USC § 853(a)(1)–(2) (providing that an individual convicted of certain offenses "shall forfeit to the United States . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation" as well as "property used, or intended to be used, in any matter or part, to commit, or to facilitate the commission of" crime).

<sup>216</sup> *Viloski*, 814 F3d at 113, quoting *United States v Awad*, 598 F3d 76, 78 (2d Cir 2010). Relatedly, some courts have suggested that a criminal forfeiture cannot be "grossly disproportional" if the "proceeds from [ ] criminal activity [ ] are well in excess of the amount of forfeiture." See also *United States v All Assets Held at Bank Julius*, 229 F Supp 3d 62, 71 (DDC 2017).

circumstances of the offender, is appropriate.<sup>217</sup> By this logic, the Excessive Fines Clause may more readily permit consideration of an offender's means when financial sanctions other than forfeiture are at play.<sup>218</sup>

### 3. Gross disproportionality under the Cruel and Unusual Punishments Clause.

Because *Bajakajian* “adopt[ed] the standard of gross disproportionality articulated in [the Court’s] Cruel and Unusual Punishments Clause precedents,”<sup>219</sup> the next step is to plumb those cases for clues. Even the Court itself, however, has commented on the doctrine’s inscrutability: “Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality.”<sup>220</sup> The strand of that doctrine most applicable to income-based fines, concerning challenges to the length of imprisonment, is particularly fractured, with no single rationale uniting a majority of the Court.<sup>221</sup> Still, these cases reveal a number of factors likely to play into the question of income-based fines—particularly whether, and under what circumstances, such a system will need caps to guard against weighty fines on the rich.

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<sup>217</sup> *Viloski*, 814 F3d at 111 n 11.

<sup>218</sup> See *Goodenow*, 282 P3d at 19:

As a general matter, separating a criminal defendant from the direct proceeds of her crimes is an appropriate—not an excessive—punishment. It serves legitimate retributive and deterrent purposes, and it takes from the defendant only that which she should not have received in the first place. As a punishment, its severity is minimal; it has no effect on the defendant’s legitimate financial position. It simply returns the defendant to the position that she would have been in had she not committed her crimes.

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To illustrate: a judgment that requires a defendant to pay a fine, under circumstances in which the fine must be paid from *legally obtained funds*, is entirely different from a court order that a defendant forfeit *illegally obtained funds*. The fine has a negative effect on the defendant’s legitimate financial position; the forfeiture does not.

How to square this distinction with *Bajakajian* itself, which if anything rejected the notion that there is something special about forfeiture as opposed to other financial sanctions for purposes of the Excessive Fines Clause, is another matter. See *Bajakajian*, 524 US at 333–34.

<sup>219</sup> *Bajakajian*, 524 US at 336.

<sup>220</sup> *Lockyer v Andrade*, 538 US 63, 72 (2003) (collecting cases).

<sup>221</sup> *Id.*, quoting *Helm*, 463 US at 1001 (Kennedy concurring) (“[W]e lack clear objective standards to distinguish between sentences for different terms of years.”).

The Court's Cruel and Unusual Clause disproportionality cases fall into two categories.<sup>222</sup> In the first, the Court has announced categorical restrictions on the death penalty, such as prohibitions on capital punishment for crimes other than homicide.<sup>223</sup> In the second, the Court has entertained "challenges to the length of term-of-years sentences given all the circumstances in a particular case."<sup>224</sup> And though they have a common source, the Court has by and large been careful to keep these two lines of cases separate, each with its own distinct test.<sup>225</sup> In *Bajakajian*, the Court adopted the standard articulated in the term-of-years cases.<sup>226</sup> Under that inquiry, a court "begin[s] by comparing the gravity of the offense and the severity of the sentence."<sup>227</sup> Unlike in *Bajakajian*, however, this question is a "threshold comparison," which, if it "leads to an inference of gross disproportionality," triggers a "comparative analysis" of "the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions."<sup>228</sup> Only "[i]f this

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<sup>222</sup> See *Graham v Florida*, 560 US 48, 59 (2010).

<sup>223</sup> See *id.* at 60–61. See also *Kennedy v Louisiana*, 554 US 407, 413 (2008) (holding that the Eighth Amendment prohibits the imposition of the death penalty for the crime of raping a child).

<sup>224</sup> See *Graham*, 560 US at 59. There is likely a third category concerning the punishment of children. See *Miller v Alabama*, 567 US 460, 481–82 (2012). There are also cases that do not fall neatly into this schematic, such as *Robinson v California*, 370 US 660 (1962), in which the Court invalidated a ninety-day sentence for the crime of drug addiction. *Id.* at 667. But whether that case was an application of the Eighth Amendment's proportionality principle is contested. See *Harmelin*, 501 US at 993 n 14 (Scalia opinion).

<sup>225</sup> When it comes to disproportionality review, "death is different." *Harmelin*, 501 US at 994 (Scalia opinion). See also *id.* at 1000 (Kennedy concurring) ("[B]ecause the penalty of death differs from all other forms of criminal punishment, the objective line between capital punishment and imprisonment for a term of years finds frequent mention in our Eighth Amendment jurisprudence.") (quotation marks and citations omitted); *Graham*, 560 US at 60–61 (describing the different tests that the Court has applied in the death and term-of-years contexts).

<sup>226</sup> *Bajakajian*, 524 US at 336, citing *Helm*, 463 US at 288, and *Rummel*, 445 US at 271.

<sup>227</sup> *Graham*, 560 US at 60.

<sup>228</sup> *Id.* The *Bajakajian* Court did engage in a form of comparative analysis when it compared the defendant's Guideline sentence to the Guideline sentences of other offenders. But while the *Bajakajian* Court compared the sentence imposed only to others available under the same scheme, the comparative analysis in the Court's gross disproportionality cases have taken a broader view, analyzing punishments across statutes and across jurisdictions. See *Ewing v California*, 538 US 11, 43–45 (2003) (Breyer dissenting); *Helm*, 463 US at 288–89. If few jurisdictions pursued income-based fines, a cross-jurisdictional comparative analysis would obviously cast more suspicion on such schemes than an intrajurisdictional comparison.

comparative analysis validates an initial judgment that the sentence is grossly disproportionate” is the sentence struck down.<sup>229</sup>

If there is one thing to take away from the Court’s length-of-incarceration cases, it is—again—the powerful deference afforded to legislative judgments. Only once has the Court struck down a term of years as grossly disproportional: in *Solem v Helm*,<sup>230</sup> when it invalidated a sentence of life without parole for the crime of passing a worthless check, the defendant’s seventh nonviolent felony.<sup>231</sup> In contrast, it has rejected a challenge to a sentence of twenty-five years to life for the theft of three golf clubs under California’s three-strikes law;<sup>232</sup> upheld a sentence of life without parole for possessing a large quantity of cocaine;<sup>233</sup> sustained a sentence of life with the possibility of parole for the crime of obtaining money by false pretenses, the defendant’s third nonviolent felony;<sup>234</sup> and countenanced a sentence of forty years for possession of marijuana with the intent to distribute and distribution of marijuana.<sup>235</sup> The factors that explain this deference are by now familiar: “[T]he primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system,” and the difficulty of developing “objective standards to distinguish between sentences for different terms of years.”<sup>236</sup>

Unlike *Bajakajian* itself, which was largely silent as to the meaning of proportionality and, if anything, suggested a purely retributive view, these gross disproportionality cases have mostly embraced a nonretributive one. Under this standard, a state is free to designate the purposes of punishment, but proportionality requires that there be a meaningful relationship between those goals and the punishment imposed, as opposed to a sanction that is unnecessary or gratuitous when measured against its purposes. As O’Connor put it in *Ewing v California*,<sup>237</sup> “It is enough that the State . . . has a reasonable basis for believing that dramatically enhanced sentences . . . ‘advance[] the goals of [its] criminal justice system in any

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<sup>229</sup> *Graham*, 560 US at 60 (quotation marks and citations omitted).

<sup>230</sup> 463 US 277 (1983).

<sup>231</sup> *Id.* at 303.

<sup>232</sup> *Ewing*, 538 US at 30–31 (O’Connor) (plurality).

<sup>233</sup> *Harmelin*, 501 US at 961, 996.

<sup>234</sup> *Rummel*, 445 US at 265–66.

<sup>235</sup> *Hutto v Davis*, 454 US 370, 371–72 (1982).

<sup>236</sup> *Harmelin*, 501 US at 1001 (Kennedy concurring).

<sup>237</sup> 538 US 11 (2003).

substantial way.”<sup>238</sup> Under the retributive model, by contrast, it is wrong to punish an individual to a greater degree than offense seriousness would dictate, no matter whether it would serve societal interests like deterrence and incapacitation.<sup>239</sup> Once one accepts the principle that the Constitution does not mandate any one penological theory, the reason for the dominance of the nonretributive model is clear: the alternative constitutionalizes one purpose of punishment over the others by invalidating state action that serves those other ends. That the state will be able to justify income-based fines in part on their increased deterrence benefits could bode well for their constitutionality.

But while the Court has repeatedly emphasized the role that interests like deterrence and incapacitation may play in justifying harsh sanctions, there is disagreement—among cases and among members of the Court—about how strictly to scrutinize the nexus between those interests and a state’s chosen sanction. The Court’s decision in *Ewing* is illustrative. For the plurality, O’Connor wrote that California’s three-strikes law was designed to combat recidivism by increasing the deterrence and incapacitation of repeat offenders.<sup>240</sup> These justifications, she stressed, were “no pretext”—“[r]ecidivism is a serious public safety concern,” with some “67 percent of former inmates released from state prisons [ ] charged with at least one ‘serious’ new crime within three years of their release.”<sup>241</sup> And she observed statistics suggesting that recidivism had markedly declined among the target population in the wake of the new law.<sup>242</sup> In dissent, Justice Stephen Breyer more closely examined the state’s policy. Rather than consider the state’s interest in deterrence writ large, he asked whether the lengthy sentence furthered the state’s interest in deterring the *crime of conviction*: shoplifting.<sup>243</sup> On this point, he noted the absence of any

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<sup>238</sup> Id at 28 (O’Connor) (plurality). In *Ewing*, both the plurality by O’Connor and the dissent by Justice Stephen Breyer adopted this view, meaning that seven of the nine justices at that time accepted some version of the nonretributive framework. See id at 28–30 (O’Connor) (plurality); id at 51 (Breyer dissenting) (asking whether the punishment “would further a significant criminal justice objective”).

<sup>239</sup> See *Rummel*, 445 US at 288 (Powell dissenting) (“The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.”).

<sup>240</sup> See *Ewing*, 538 US at 25 (O’Connor) (plurality).

<sup>241</sup> Id at 26.

<sup>242</sup> See id at 27.

<sup>243</sup> See id at 40–41 (Breyer dissenting).

“evidence presented here that the law enforcement community believes lengthy prison terms necessary adequately to deter shoplifting” and observed that other methods of detecting (and thus deterring) shoplifting were available.<sup>244</sup>

Under the more permissive strand of nonretributive proportionality, the deterrence logic behind income-based fines could alone be enough to pass constitutional muster: fines need to scale with income to deter wealthy offenders. Under the stricter version, the constitutionality of heavy income-based fines on the wealthy could vary from offense to offense, with heavy income-based fines able to survive only for those offenses for which there is reason to believe that a harsher sanction is necessary. Under either view, wealthy offenders will argue against exorbitant income-based fines on the ground that a lower financial sanction would have had an adequate deterrent effect, an objection that will perhaps be more plausible for those offenses for which the expected value of commission is ascertainable and unrelated to income.<sup>245</sup> Importantly, the Supreme Court has recognized the legitimacy of deterrence—and not merely the law and economics varietal.<sup>246</sup> As a result, the deterrence value of income-based fines ought to be measured not in terms of optimal social value but in terms of whether the severity of the sanction meaningfully decreases the likelihood that a rule will be broken.

Relatedly, when asking whether a given financial sanction is gratuitous in relation to its ends, a court might take into account not only whether a lower fine would suffice but also the state’s choice to impose a financial penalty as opposed to other, more severe forms of punishment like incarceration. When compared to prison, even a hefty income-based fine could look proportional. Of course, it is much more difficult to compare severity across modes of punishment than within one.

Although nonretributive proportionality is the consensus view, Justice Antonin Scalia suggested that “[p]roportionality—

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<sup>244</sup> *Ewing*, 538 US at 40 (Breyer dissenting).

<sup>245</sup> This is because, in purely rational terms, if the expected value of the commission of an offense (pricing in the likelihood of detection) is constant at \$1,000, then any penalty above that amount is adequate to deter, meaning that a penalty far above that amount is gratuitous. If, however, the value of the commission of an offense varies with income—for instance, if the price an individual is willing to pay in order to speed increases along with their wealth—then the state can more easily argue that fines must scale with income in order to deter.

<sup>246</sup> See, for example, *Cooper Industries*, 532 US at 439–40; *BMW of North America, Inc v Gore*, 517 US 559, 592–93 (1996) (Breyer concurring).



the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution.”<sup>247</sup> For him, “it becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given significant weight.”<sup>248</sup> This is so, he said, because once the size of the penalty is tailored to deter, rather than merely to fit the gravity of an offense, the size of the penalty can become wildly unhinged from the seriousness of an offense:

[S]ince deterrent effect depends not only upon the amount of the penalty but upon its certainty, crimes that are less grave but significantly more difficult to detect may warrant substantially higher penalties. Grave crimes of the sort that will not be deterred by penalty may warrant substantially lower penalties, as may grave crimes of the sort that are normally committed once in a lifetime by otherwise law-abiding citizens who will not profit from rehabilitation.<sup>249</sup>

Undoubtedly, once a fine is tailored to serve multiple ends, it will no longer correspond to any one of them. Yet it is by no means clear that proportionality becomes any less intelligible—if that means judicially administrable—if deterrence, rather than retribution alone, is a factor. The question whether a given sanction will deter conduct is *more* susceptible to “objective” review, through evidence and empirical measurement, than the question of how *grave* a given crime is.<sup>250</sup> But insofar as Scalia was accusing the Court of misdescribing the nature of its proportionality inquiry, he was on the money. As he said, what the Court has “read[ ] into the Eighth Amendment is not the [ ] proposition that all punishment should be reasonably proportionate to the gravity of the offense, but rather the [ ] proposition that all punishment should reasonably pursue the multiple purposes of the criminal law.”<sup>251</sup> That summarizes well the non-retributive view.<sup>252</sup>

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<sup>247</sup> *Ewing*, 538 US at 31 (Scalia concurring).

<sup>248</sup> *Harmelin*, 501 US at 989 (Scalia opinion).

<sup>249</sup> *Id.*

<sup>250</sup> As Scalia observed, it is enormously difficult to identify “objective” indicia of the gravity of an offense. See *id.* at 987–88.

<sup>251</sup> *Ewing*, 538 US at 32 (Scalia concurring).

<sup>252</sup> Scalia contended that proportionality is inherently a retributive concept in service of his larger argument that the Cruel and Unusual Punishments Clause does not contain a gross disproportionality principle but rather prohibits only modes of punishment that are “cruel and unusual.” *Harmelin*, 501 US at 976 (Scalia opinion). Whatever the merits of that view, it is clear that the Excessive Fines Clause does contain a

The Court's Cruel and Unusual Clause cases elsewhere hint at the presence and continued viability of the retributive view, not so much as a substitute for the nonretributive model but as an overlapping constraint. As Justice Lewis Powell put it in his *Rummel v Estelle*<sup>253</sup> dissent: "The [gross disproportionality] inquiry focuses on whether a person deserves such punishment, *not simply* on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice."<sup>254</sup> In other words, states may take into account ends other than retribution, but there is a retributive upper limit on the severity of sanctions.<sup>255</sup> The Court's capital punishment line of cases has at times expressly suggested that nonretributive and retributive versions of disproportionality can simultaneously circumscribe punishment: "[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; *or* (2) is grossly out of proportion to the severity of the crime."<sup>256</sup>

Supposing there is some retributive upper limit in the Excessive Fines Clause, the result is hardly fatal for income-based fines. As already discussed, income-based fines could serve purely retributive ends according to a theory of subjective retribution. Powell's discussion in *Rummel* suggests that the rationale behind the retributive upper limit is a fear that the nonretributive view is inadequate because it allows barbaric sentences in the name of interests like deterrence and incapacitation. But from the perspective of subjective retribution, a heavy fine imposed on a wealthy person is no more barbarous than a similarly proportioned fine on a person without means. Rather, a fine might be gratuitous given the

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proportionality principle; it bans *excessive* fines, and it polices only one mode of punishment: the financial sanction. As a result, it's hardly clear that this line of criticism can be intelligibly transposed into the realm of excessive fines.

<sup>253</sup> 445 US 263 (1980).

<sup>254</sup> *Rummel*, 445 US at 288 (Powell dissenting) (emphasis added).

<sup>255</sup> Frase calls this concept "limiting retributivism." Frase, 89 Minn L Rev at 591–93 (cited in note 137). It "allows all traditional punishment purposes to play a role but places retributive outer limits both on who may be punished (only those who are blameworthy), and how hard they may be punished (within a range of penalties which would be widely viewed as neither unfairly severe or unduly lenient)." *Id.* at 591.

<sup>256</sup> *Coker v Georgia*, 433 US 584, 592 (1977) (White) (plurality) (emphasis added).

percentage of a person's income it entails—a total financial wipeout is different than a fine that represents 1 percent of income—but not based on its absolute magnitude. For this reason, it's by no means obvious that the logic behind a retributive upper limit applies when income-based fines—rather than prison or the thumbscrew—are on the table.

Perhaps counterintuitively, it may be easier to defend income-based fines in terms of subjective retribution than on the basis of deterrence. Wealthy offenders will attack the deterrence rationale by arguing that a lower financial sanction would have sufficed to dissuade their conduct, and one can imagine evidence, empirical and otherwise, to support such an argument. A similar challenge to a fine as overly retributive, given the relative subjectivity of that judgment and the resultant paucity of available evidence to support it, could be more likely to come across as an attempt to have a court substitute its own assessment of the gravity of an offense for that of the legislature.<sup>257</sup> Likewise, if subjective retribution is recognized as a legitimate goal, a \$100,000 fine imposed on a millionaire and a \$100 fine on someone earning \$10,000 a year will rise and fall together, giving courts little room to police burdensome fines on the wealthy without disrupting a system of financial sanctions they have long abided.

If, nonetheless, a retributive upper limit operates as a relationship between the absolute value of a fine and the gravity of the offense, a Finland-style system without a ceiling on the size of income-based fines is out of the question. That said, governments could still proportion fines to income so long as they cap maximum fines at levels related to offense seriousness; and given the deference generally afforded states in setting punishment, these caps could likely be quite high. Indeed, when fines are imposed for serious offenses like felonies—in addition to, or in lieu of incarceration—the Excessive Fines Clause would seem to pose little obstacle to income-based fines with hefty

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<sup>257</sup> In the context of due process limits on the award of punitive damages, Breyer has made a similar observation:

Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of [the defendant's wealth] to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives).

*BMW*, 517 US at 591 (Breyer concurring).

maximums. After all, if a sentence of twenty-five years to life is not grossly disproportional to the gravity of shoplifting three golf clubs, one would presume that a financial sanction, even one in the hundreds of thousands or millions of dollars, could likewise pass muster. It would be odd indeed if the Court were to more aggressively constrain financial sanctions—which “cannot approximate in severity the loss of liberty that a prison term entails”<sup>258</sup>—than incarceration, at least so long as the Excessive Fines Clause is thought to embody the same standard of gross disproportionality as the Cruel and Unusual Clause.<sup>259</sup>

As for the punishment of less serious offenses—from misdemeanor crimes to parking violations<sup>260</sup>—lower caps will be necessary, but here too legislatures have room to scale fines to income. The one-size-fits-all nature of tariff fines means that, under the status quo, monetary penalties may frequently under-sanction relative to desire, even in purely retributive terms. Thus, even for low-level offenses, governments could set maximum fines high enough to fully reflect society’s desire to sanction, with penalties scaling down from there as offender income declines.

#### 4. Due process and grossly excessive punitive damages awards.

Finally, because the Court has held that due process places substantive limitations on “grossly excessive” punitive damage awards in civil suits<sup>261</sup> using a test that is closely related to the Eighth Amendment’s standard of gross disproportionality,<sup>262</sup> it is worth briefly investigating how that line of cases could inform the constitutionality of income-based fines.<sup>263</sup>

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<sup>258</sup> *Blanton*, 489 US at 542.

<sup>259</sup> Of course, some argue that the Excessive Fines Clause does embody a stricter standard. See, for example, Johnson, 2000 U Ill L Rev at 506 (cited in note 167).

<sup>260</sup> Powell’s dissent in *Rummel* uses “overtime parking” to illustrate the kind of low-gravity offense that could not, consistent with the standard of gross disproportionality, be punished with lifetime imprisonment. See *Rummel*, 445 US at 288 (Powell dissenting). Since then, the Court has continued to use overtime parking as an archetypal example of a low-level offense. See, for example, *Ewing*, 538 US at 35 (Stevens dissenting); *Harmelin*, 501 US at 963–64 (Scalia opinion), 1009 (Kennedy concurring).

<sup>261</sup> See *State Farm*, 538 US at 416.

<sup>262</sup> See *Cooper Industries*, 532 US at 434–35 (comparing the due process test with gross disproportionality under the Cruel and Unusual Punishments and Excessive Fines Clauses).

<sup>263</sup> For reasons I discuss in Part III.A.2, that doctrine is unlikely to, of its own force, impose limits on the excessiveness of fines beyond those derived from the Excessive

First, while the Court's punitive damages cases also veer between the retributive and nonretributive models of proportionality,<sup>264</sup> the Court has expressly discussed the role that wealth can play in determining the size of punitive awards. To resummarize O'Connor's view of offender wealth and punitive damages: because the Constitution does not mandate any one penological or economic theory and because there is clear historical precedent for taking financial circumstances into account when setting fines, the state is entitled to do so.<sup>265</sup> But in the same passage, O'Connor suggested nonetheless that there is "a substantive ceiling on the *amount* of a monetary sanction,"<sup>266</sup> which may indicate that in her view there is yet some retributive upper limit, whether it be relative or absolute.

Breyer's concurrence in *BMW of North America, Inc v Gore*<sup>267</sup> confronted the same subject.<sup>268</sup> That case concerned a jury award of \$4 million in punitive damages against a car seller who failed to tell a buyer that his car had been repainted prior to sale—an omission that meant the car was worth \$4,000 less than expected.<sup>269</sup> On appeal, the Alabama Supreme Court reduced the award to \$2 million in punitive damages—the amount

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Fines Clause. Moreover, many of the concerns that animate due process limits on punitive damages awards simply don't apply to statutorily authorized fines. As the Court has explained, limits on the extent to which punitive damages can exceed actual damages are rooted in concerns about arbitrariness—caused by juries given wide discretion to choose the amount of punitive damages—and in the need to provide fair notice to defendants about the severity of the penalties to which they may be subjected. See *State Farm*, 538 US at 416–18. See also *Exxon Shipping Co v Baker*, 554 US 471, 499 (2008) ("The real problem, it seems, is the stark unpredictability of punitive awards."). But neither of these concerns is present when a statutory scheme expressly authorizes income-based fines.

<sup>264</sup> Compare *BMW*, 517 US at 575 ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."); id at 580 ("Because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, we are persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a \$2 million exemplary damages award."), with id at 568 ("Only when an award can fairly be categorized as 'grossly excessive' in relation to [the State's legitimate interests in punishment and deterrence] does it enter a zone of arbitrariness that violates" due process); id at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

<sup>265</sup> See *Browning-Ferris*, 492 US at 300 (O'Connor concurring in part and dissenting in part).

<sup>266</sup> Id.

<sup>267</sup> 517 US 559 (1996).

<sup>268</sup> Id at 592–93 (Breyer concurring).

<sup>269</sup> Id at 563–65.

it deemed constitutionally reasonable.<sup>270</sup> Agreeing with the Court that the punitive damages award violated due process, Breyer stressed that the test applied by the Alabama Supreme Court to rein in the jury's verdict was incapable of "significant[ly] constrain[ing]" jury awards or "protect[ing] against arbitrary results."<sup>271</sup> Notable for our purposes, he observed that the Alabama test expressly considered the "financial position" of the defendant but that this factor was hardly any constraint on the jury's verdict:

Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of [the financial position of the defendant] to the State's interest[s]. . . . This factor, however, is not necessarily intended to act as a significant *constraint* on punitive awards. Rather, it provides an open-ended basis for inflating awards when the defendant is wealthy. . . . That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct.<sup>272</sup>

On its own, this passage could suggest that Breyer sees the need for some retributive upper limit—grounded in the reprehensibility of a defendant's conduct—to constrain punitive awards driven by the wealth of a defendant. Later, however, Breyer frames his conclusion in nonretributive terms—that is, as a failure by the Alabama Supreme Court to provide *any* economic rationale connecting the size of the award to the state's interests, nor any other community understanding, historical practice, or legislative standard to explain the award as something other than unfettered discretion.<sup>273</sup> A system of income-based fines, grounded in a theory of effective deterrence and subjective retribution, and proportioning punishment according to a set formula, would presumably escape the same verdict. As the

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<sup>270</sup> *Id.* at 567.

<sup>271</sup> *BMW*, 517 US at 588 (Breyer concurring).

<sup>272</sup> *Id.* at 591 (Breyer concurring) (citations omitted).

<sup>273</sup> See *id.* at 593 (Breyer concurring) ("The record before us, however, contains nothing suggesting that the Alabama Supreme Court, when determining the allowable award, applied *any* 'economic' theory that might explain the \$2 million recovery."), citing *Browning-Ferris*, 492 US at 300 (O'Connor concurring in part and dissenting in part) (noting that the Constitution "does not incorporate the views of the Law and Economics School," nor does it "require the States to subscribe to any particular economic theory").

Court has elsewhere observed, variation in punitive damages awards “might be acceptable or even desirable if they result from judges’ and juries’ refining their judgments to reach a generally accepted optimal level of penalty and deterrence . . . while producing fairly consistent results in cases with similar facts.”<sup>274</sup>

Finally, in *State Farm Mutual Automobile Insurance Co v Campbell*,<sup>275</sup> the Court invalidated an award of \$145 million in punitive damages that the Utah Supreme Court rationalized, in part, by reference to the defendant corporation’s substantial assets.<sup>276</sup> In finding that award far in excess of constitutional limits, the Court observed that the defendant’s wealth was one of many factors considered by the Utah Supreme Court that “had little to do with the actual harm sustained by the [plaintiffs].”<sup>277</sup> And citing Breyer’s concurrence in *BMW*, the Court declared—with frustratingly little explanation—that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”<sup>278</sup> Perhaps the most natural reading of that statement reflects a retributive view: that wealth cannot drive too great a departure from deserts. But it is also susceptible to a nonretributive one: that a state taking wealth into account must explain how doing so meaningfully furthers its interests—in other words, that wealth is not a trump card that renders a damages award, otherwise unhinged from the state’s legitimate interests, per se constitutional.

Next, because the Court has imposed a rough mathematical constraint on the magnitude of punitive damages in civil cases, it is tempting to ask whether a similar rule could be transposed into the context of excessive fines. Though “reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award” the Court has said that, “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>279</sup> Punitive damages within the single-digit range, by contrast, “are more likely to comport with due process, while still achieving the

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<sup>274</sup> *Exxon*, 554 US at 500.

<sup>275</sup> 538 US 408 (2003).

<sup>276</sup> See *id.* at 427.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* *State Farm* appears to wrench Breyer’s rumination on offender wealth from its context: as I explain above, the thrust of that comment was that offender wealth is not an effective *restraint* on punitive damages awards.

<sup>279</sup> *State Farm*, 538 US at 424–25.

State's goals of deterrence and retribution," than higher-ratio awards.<sup>280</sup> Thus, it has for example struck down punitive damages awards that were 145 times<sup>281</sup> and 500 times<sup>282</sup> the compensatory amount.

Translating this rule into the excessive fines context would do little to help guide courts in applying the gross disproportionality standard, at least when the offense itself does not express harm as a monetary value. Consideration of the "ratio" of punitive damages to harm rests on "a piece of information that [most] criminal cases" and most civil offenses lack: "[A]n indication of the gravity of the offense that uses the very currency in which punishment is to be meted out."<sup>283</sup> To be sure, some civil and criminal offenses offer an indication, albeit incomplete, of monetary loss: in New York, for example, grand larceny in the fourth degree is the theft of property worth more than \$1,000.<sup>284</sup> But in the typical case, such as distribution of narcotics or a speeding ticket, the harm caused by an offense is never defined in monetary terms. If the Court were nonetheless inclined to find some objective, mathematical rule of thumb to rein in the role that income may play in setting fines, there are options available. For instance, it could fix a ratio between the absolute value of the lowest and highest authorized fines, meaning that a statute with a minimum fine of \$10 could not, on the basis of income, set a maximum higher than \$100, or ten times greater. But given the Court's general reluctance to adopt bright-line rules in its gross disproportionality jurisprudence—especially in the criminal context—development along these lines is unlikely.

#### CONCLUSION

Fines are a dominant feature of American life, as certain as death and taxes. In every facet and context, they play some role in regulating behavior and expressing society's moral reprobation. Perhaps because of that ubiquity, the way we impose fines is taken for granted, as if it were a law of nature that fines exact the same price from every offender, no matter her income. But as this Article has suggested, there is an alternative to the status quo, and it aligns at least as well with our intuitions about

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<sup>280</sup> *Id.* at 425.

<sup>281</sup> See *id.*

<sup>282</sup> See *BMW*, 517 US at 582.

<sup>283</sup> Karlan, 88 Minn L Rev at 907 (cited in note 184).

<sup>284</sup> NY Penal Law § 155.30(1).



justice and the purposes of punishment. As more people awaken to the burden that criminal justice debt imposes on the poor, there may be an opportunity for a larger reconceptualization of financial sanctions. At a minimum, the tariff fine is an aspect of our justice system ripe for experimentation.

As for whether the federal Constitution is any barrier to income-based fines, some doctrinal questions are unsettled, but enough is clear that governments should not hesitate to pursue reform out of fear that those efforts will founder in court. Changes that reduce the burden that tariff fines place on the poor, the most urgent policy task, face no obstacle. A system that imposed hefty financial sanctions on those at the very top of the income scale could face complications, but the resulting problems are manageable and can largely be avoided with caps on the size of fines. Whether or not the million-dollar parking ticket is desirable or constitutionally permissible, introducing some measure of progressivity into financial sanctions is an idea whose time has come.