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ARTICLE

MORE THAN LIP SERVICE IS REQUIRED: EXCESSIVE FINES CLAUSE LIMITATIONS UPON FINING THE HOMELESS

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I. INTRODUCTION

The United States Court of Appeals for the Ninth Circuit held in *Jones v. City of Los Angeles*[1] that the Eighth Amendment prohibits punishing homeless persons for "involuntarily sitting, lying, and sleeping" in public.[2] The

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1. Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006), *vacated by* 505 F.3d 1006 (9th Cir. 2007).

2. *Id.* at 1138.

Ninth Circuit vacated *Jones* after the parties settled,[3] but the court later reaffirmed its adherence to the central holding and reasoning of *Jones* in *Martin v. City of Boise*.[4] The court explained in *Martin* that the Cruel and Unusual Punishments Clause operates in three ways: "First, it limits the type of punishment the government may impose; second, it proscribes punishment 'grossly disproportionate' to the severity of the crime; and third, it places substantive limits on what the government may criminalize."[5] The substantive limitation prevents the government from criminalizing a person's state of being.[6] For example, it would be considered cruel and unusual punishment to put a person in prison even one day for having a common cold.[7] The Ninth Circuit therefore concluded the Eighth Amendment's prohibition against cruel and unusual punishment "prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter" because these actions "are universal and unavoidable consequences of being human."[8]

The holdings in both *Martin* and *Jones* were narrow.[9] Each held only that a jurisdiction cannot prosecute a homeless person for involuntarily sitting, lying, or sleeping in public when there is a greater number of homeless persons in that jurisdiction than the number of available shelter beds.[10] "That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."[11] Subsequent cases have therefore refused to extend *Martin* to non-criminal statutes or

3. Jones v. City of Los Angeles, 505 F.3d 1006 (9th Cir. 2007); *see also* Jones v. City of Los Angeles, 555 F.App'x 659, 661 (9th Cir. 2014) (explaining how the court vacated and withdrew its opinion in *Jones* "only after the parties entered a settlement agreement suspending the nighttime enforcement" of the Los Angeles ordinance).

4. Martin v. City of Boise, 920 F.3d 584, 604, 616–17 (9th Cir. 2019), *cert. denied* 140 S. Ct. 674 (2019).

5. *Id.* at 615 (citing Ingraham v. Wright, 430 U.S. 651, 667 (1977)); *Jones*, 444 F.3d at 1128.

6. *See generally* Tim Donaldson, *Criminally Homeless? The Eighth Amendment Prohibition Against Penalizing Status*, 4 CONCORDIA L. REV. 1, 11–12 (2019) (concluding the state cannot criminalize merely existing).

7. Robinson v. California, 370 U.S. 660, 667 (1962); *Martin*, 920 F.3d at 615.

8. *Martin*, 920 F.3d at 616–17 (quoting *Jones*, 444 F.3d at 1136).

9. *Martin*, 920 F.3d at 617; *Jones*, 444 F.3d at 1137.

10. *Martin*, 920 F.3d at 617; *Jones*, 444 F.3d at 1138.

11. *Martin*, 920 F.3d at 617; *see also* McArdle v. City of Ocala, 519 F.Supp.3d 1045, 1051–52 (M.D. Fla. 2021) (echoing the court's conclusion in *Martin*).

situations where there was not a credible risk of criminal prosecution.[12] It remains an open question whether *Martin* applies to purely civil infractions.[13]

Martin and *Jones* were both predicated upon the Cruel and Unusual Punishments Clause of the Eighth Amendment.[14] However this clause is not the only limitation contained therein. The Eighth Amendment of the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[15] In *Timbs v. Indiana*,[16] the Supreme Court held that the Excessive Fines Clause is applicable to the States.[17] Additionally, the Court held that the Excessive Fines Clause applies to civil forfeiture proceedings and indicated the clause may be broader in scope than strictly criminal matters.[18] The *Timbs* Court traced the lineage of the Excessive Fines Clause to a prohibition against unreasonable amercements in Magna Carta, which provided economic sanctions must be proportionate to the wrong committed and people should not have a larger financial penalty imposed upon them than their circumstances can bear.[19]

12. *See* Potter v. City of Lacey, 46 F.4th 787, 802–03 (9th Cir. 2022) (Bennett, J., dissenting from certification of state law question) (finding the city's RV ordinance does not violate the Eighth Amendment because it "applies to RV owners outside the criminal process entirely"); O'Callaghan v. City of Portland, No. 3:21-cv-812, 2021 WL 2292344, at *4 (D. Or. June 4, 2021) (refusing to extend *Martin* due to a lack of credible risk of prosecution for plaintiff); Potter v. City of Lacey, No. 3:20-cv-05925, 2021 WL 915138, at *2 (W.D. Wash. Mar. 10, 2021) (holding parking fines and vehicle impounds do not violate the Eighth Amendment because "the Cruel and Unusual Punishments Clause applies almost exclusively to convicted prisoners"); Yeager v. City of Seattle, No. 2:20-cv-01813, 2020 WL 7398748, at *5 (W.D. Wash. Dec. 17, 2020) (refusing to extend *Martin* to non-criminal statutes). *Contra* Blake v. City of Grants Pass, No. 1:18-cv-01823, 2020 WL 4209227, at *8–10 (D. Or. July 22, 2020) (applying the Eighth Amendment to both civil and criminal punishments). At least one commentator opines that any distinction between criminal and civil punishments is *de minimis* and asserts that *Martin*'s rationale should apply to civil fines. Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367, 386–87 (2021).

13. Johnson v. City of Grants Pass, 50 F.4th 787, 813 (9th Cir. 2022).

14. *See Martin*, 920 F.3d at 615–16 (emphasizing the importance of the Eighth Amendment); *Jones*, 444 F.3d at 1135–36 (exploring the Cruel and Unusual Punishments Clause in depth).

15. U.S. CONST. amend. VIII.

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

17. *Id.* at 686–87.

18. *Id.* at 687–91; *see* United States v. Bajakajian, 524 U.S. 321, 327–28 (1998) (finding a forfeiture constitutes a fine under the Excessive Fines Clause); *see also* Austin v. United States, 509 U.S. 602, 607–10, 618, 621–22 (1993) (holding civil forfeitures constitute punishment under the Eighth Amendment).

19. *Timbs*, 139 S. Ct. at 687–88; *see also* Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 268–71 (1989) (reviewing the history of amercements in England).

This Article addresses how the Excessive Fines Clause applies to civil fines imposed for violation of governmental restrictions against sitting, lying, and sleeping in public. Part II reviews the origins and history of the Excessive Fines Clause. Part III discusses the proportionality principle adopted by the Supreme Court and applied by United States Circuit Court cases to evaluate the reasonableness of fines. Part IV reviews leading cases that have addressed the assessment of fines against homeless persons. Finally, Part V proposes a framework to analyze the Excessive Fines Clause in the context of governmental regulation of homelessness, using events occurring in the City of Walla Walla, Washington, to illustrate the complex issues facing local jurisdictions.

II. ORIGINS OF THE EXCESSIVE FINES CLAUSE

The Excessive Fines Clause is derived from a 1689 act of the British Parliament, which adopted a bill of rights.[20] The act declared, "[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[21] Section 9 of the 1776 Virginia Declaration of Rights adopted an almost identical provision.[22] The United States Supreme Court has acknowledged "[t]he Eighth Amendment was based directly on Art. I, § 9, of the Virginia Declaration of Rights."[23]

The right to be free from excessive fines did not originate in the 1689 bill of rights, which "was only declaratory, throughout, of the old constitutional law of the land."[24] The prohibition against excessive fines comes from

20. *Timbs*, 139 S. Ct. at 688; Gregg v. Georgia, 428 U.S. 153, 169–70 (1976) (plurality opinion); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750 (Boston, Hilliard, Gray, and Company 1833); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 130 (2d ed., Phila., H.C. Carey & I. Lea 1829).

21. Bill of Rights 1689, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 41, 43 (1971); *see generally* An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689, 1 W. & M. Sess. 2, c. 2 (Eng.) (providing an official version of the English Bill of Rights).

22. *Timbs*, 139 S. Ct. at 688. *Compare* Bill of Rights, 1689 (declaring "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"), *with* Virginia Declaration of Rights of 1776, art. I, § 9 (stating "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"), *reprinted in* SCHWARTZ, *supra* note 21, at 43, 235.

23. Solem v. Helm, 463 U.S. 277, 285 n.10 (1983).

24. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 372 (Oxford, Clarendon Press 1769).

common law principles that pre-date Magna Carta.[25] Those principles provided that a subject could be amerced (i.e., assessed a financial penalty) for erecting a building that encroached upon royal land, but that the subject should be amerced "so as not to lose any property necessary to maintain his position."[26] Magna Carta confirmed in 1215 that "[a] freeman shall be amerced for a small offence only according to the degree of the offence; and for a grave offence he shall be amerced according to the gravity of the offence, saving his contenement."[27] Magna Carta therefore formally recognized a *salvo contenemento* principle that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry."[28]

The prohibition against excessive amercements in Magna Carta was inconsistently applied prior to enactment of the 1689 bill of rights. The prohibition was not applied to fines imposed by a court of record[29] because a

25. *See* Willowes' Case (1608), 77 Eng. Rep. 1413, 1415, 13 Co. Rep. 2, 3 ("[I]f an excessive or an unreasonable amerciament be imposed in any court-baron or other Court which is not of record, the party shall have *moderata misericordia*; and the Statute of Magna [Carta] is but an affirmance of the common law in such point."); *see also* BLACKSTONE, *supra* note 24, at 372 (citing *Glanvill*, which is believed to have been written before 1189); THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL xxx-xxxi (G.D.G. Hall ed. & trans., Thomas Nelson and Sons, Ltd. 1965) (1554) [hereinafter GLANVILL].

26. GLANVILL, *supra* note 25, at 114; *see also* Beecher's Case (1608), 77 Eng. Rep. 559, 564, 8 Co. Rep. 58a, 59b ("Amercement is in Latin called *misericordia*; and the cause thereof is, because by the common law (which is a law of mercy) no man ought to be amerced so much as he deserves, but less."). Coke's *Institutes of the Laws of England* remarked that the provision in Magna Carta appears to have been made to affirm the common law stated in GLANVILL. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONTAINING THE EXPOSITION OF MANY ANCIENT, AND OTHER STATUTES 27–28 (London, A. Crooke et. al. 1642) [hereinafter COKE II].

27. Magna Carta § 20 (1215), *reprinted in* SCHWARTZ, *supra* note 21, at 10. Magna Carta was renumbered and codified in 1297, and the prohibition against excessive amercements is found at paragraph fourteen of the codification. Magna Carta 1297, 25 Edw. 1, ¶ 14 (Eng.). A similar provision is found in the First Statute of Westminster: "[N]o City, Borough, nor Town, nor any Man be amerced, without reasonable cause, and according to the quantity of his Trespass; that is to say every Freeman saving his [Freehold,] . . . ." First Statute of Westminster 1275, 3 Edw. 1, ¶ 6 (Eng.).

28. BLACKSTONE, *supra* note 24, at 372.

29. COKE II, *supra* note 26, at 27; *see also* Trial of John Hampden, (1684) (KB), *reprinted in* 9 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, 1054, 1125 (London, T.C. Hansard 1816) (commenting that the amercements clause in Magna Carta "was never meant of fines for great offences"); ANTHONY FITZHERBERT, THE NEW NATURA BREVIUM 172 (Matthew Hale ed., 7th ed. Savoy, E. & R. Nutt & R. Gosling 1730) (stating that a writ of *Moderata Misericordia* could be issued only against an outrageous amercement imposed by a court-baron or other

distinction was made between fines levied by such a court and amercements.[30] In addition, it was believed by the mid-1400s that Magna Carta only required someone to be amerced according to the seriousness of an offense.[31] A manuscript attributed to Lincoln's Inn explained:

> [T]his statute provides that no free man shall be amerced except according to the seriousness of the trespass, *saving his contenement (and a merchant his merchandise)*: but these words are void, because they are inconsistent with the premise of this statute. For this statute provides that a man shall be amerced according to the seriousness of the trespass, and these words that his contenement shall be saved (or his merchandise, if he is a merchant) appear to mean that if someone commits a trespass which exceeds his contenement or his merchandise he shall not be amerced: but that is not so, for if someone commits a trespass he shall be amerced according to the terms of the premises of the statute, not regarding his contenement or his merchandise, or his wainage. Therefore these words *saving his contenement* are void.[32]

Thus, it appears that the amercements clause in Magna Carta was not used to reduce penalties on account of a person's financial condition.[33] Commentary attributed to the Honourable Society of Middle Temple further elaborated:

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court "which is not a Court of Record"); THE ANSWER, AND DECLARATION OF THE JUDGES UNTO THE QUESTIONS TRANSMITTED FROM THE HONOURABLE HOUSE OF COMMONS, UNTO THE LORDS SPIRITUAL AND TEMPORAL IN PARLIAMENT ASSEMBLED; WHERETO THEY DESIRED THEIR LORDSHIPS TO REQUIRE THE SAID JUDGES ANSWERS IN WRITING FORTHWITH (1641) ¶ 18, *reprinted in* 2 JOHN NALSON, AN IMPARTIAL COLLECTION OF THE GREAT AFFAIRS OF STATE, FROM THE BEGINNING OF THE SCOTCH REBELLION IN THE YEAR MDCXXXIX TO THE MURTHER OF KING CHARLES I 574 (London, S. Mearne, et. al. 1682) ("[T]he Statute of *Magna* [*Carta*], in which the words of *Salvo Contenemento* are mentioned, is only to be understood of Amerciaments, and not of Fines . . . .").

30. Griesley's Case (1588), 77 Eng. Rep. 530, 532–33, 8 Co. Rep. 38a, 38a–39b; *see also* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND OR COMMENTARY UPON LITTLETON 126b (London, A. Crooke et. al. 1628) (clarifying that "a fine differeth from an amerciament") [hereinafter COKE I].

31. *See* SELECTED READINGS AND COMMENTARIES OF MAGNA CARTA 1440–1604, *reprinted in* 132 SELDEN SOCIETY 159, 160–61, 165–66, 170 (John Baker ed., 2015) [hereinafter SELECTED READINGS] (emphasizing the concept that amercements must be proportional to the offense committed).

32. *Id.* at 160–61.

33. *See id.* at 159 ("*A free man shall not be amerced . . . [saving his contenement].* As to the words in the statute *saving his contenement*, this provision is void (as I believe), for a man shall be amerced according to the seriousness of the trespass even if he cannot bear it.").

> This statute provides that no free man shall be amerced for a small trespass in the same way as for a great trespass, or according to his riches, but solely according to the seriousness of the trespass, and so that he may save his contenement, and also a merchant in the same manner [saving his merchandise]. But as to these words of the statute which say saving his contenement and wainage, they are of no effect (riens a purpose), for the effect of the statute is according to the seriousness of the offence, be it more or less, without regard to merchandise or riches; for a poor man may cause as much damage to someone as the most respectable man, and if he is not amerced because he has nothing then he will go on causing damage to everyone, which would be a mischief. Therefore these words are void.[34]

Magna Carta therefore memorialized the principle that financial penalties cannot be excessive, but the ancient prohibition against unreasonable amercements did not, in practice, limit fines by someone's ability to pay.[35]

However, the idea did permeate English common law.[36] In 1608, *Willowes Case* held that excessive fines were not allowed, because "the common law forbids any excessive distress."[37] That case further explained:

> [T]he common law doth forbid intolerable and excessive oppressing and ransoming of villains, whereby of rich they become poor: and yet it may be said, that a man may do with his villain what he pleaseth, or with his tenant at will; but the law limits the same in a reasonable and convenient manner: for it appeareth, that such intolerable oppression of the poor tenants is to the disinherison of him in the reversion.[38]

By the 1600s, the common law therefore disallowed financially crushing fines even if that was not how the amercements clause in Magna Carta was

34. *Id.* at 165–66.

35. *See* JOHN SELDEN, TABLE-TALK BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 20 (London, E. Smith 1689) ("The old Law was. That when a Man was Fin'd, he was to be Fin'd *Salvo Contenemento*, so as his Countenance might be safe, . . . but now they Fine men ten times more than they are worth.").

36. *See* COKE I, *supra* note 30, at 60a (explaining fines imposed by a the lord of a manor against long established tenants, known as copiholders, must be reasonable because "all [excessiveness] is abhorred in Law"); *see also* 2 HENRI DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 329–30 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (1569) ("It is clear that a knight and a free man shall only be amerced according to the gravity of the offence, according as it is great or small, and excepting his contenement; a merchant excepting his merchandise; a villein excepting his wainage.").

37. Willowes' Case (1608), 77 Eng. Rep. 1413, 1415.

38. *Id.*

technically applied.[39] Shortly before the reign of James II, Chief Justice North of the Court of Common Pleas commented in *Lord Townsend v. Hughes*[40] that "[i]n cases of *fines* for criminal matters, a man is to be fined by Magna [Carta] with a *salvo contenemento suo*; and no fine is to be imposed greater than he is able to pay."[41] The Court of King's Bench contemporaneously acknowledged in another case that it should mitigate fines imposed by lower tribunals when excessively imposed.[42]

The 1689 bill of rights was enacted in response to various abuses committed during the reign of James II, which included the imposition of excessive fines.[43] The Act came on the heels of the case brought against John Hampden in 1684 for his complicity in a plot to assassinate the King. Hampden was convicted and his counsel argued that his financial condition should be considered in assessing any fine in accordance with Magna Carta's dictate that a freeman should be saved his contenement when penalized.[44] The judges discussed the issue and the Chief Justice remarked that the amercements clause in Magna Carta did not apply.[45] The judges thereafter further conferred and imposed a fine of forty thousand pounds and ordered that Hampden be imprisoned until he could pay.[46] Noted legal historian Sir James Fitzjames Stephen later wrote that fine imposed against Hampden would have been one of the fines to which Parliament referred when enacting the prohibition against excessive fines in the 1689 bill of rights.[47]

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39. *See* Godfrey's Case (1614), 77 Eng. Rep. 1199, 1201–03.

40. Lord Townsend v. Hughes (1677–78), 86 Eng. Rep. 994.

41. *Id.* at 994.

42. Anonymous (1679), 86 Eng. Rep. 217.

43. *See* An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689, 1 W. & M. Sess. 2, ch. 2 (Eng.) (listing abuses committed during the reign of James II as the reasons for its enactment); *see also* 5 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND FROM THE NORMAN CONQUEST, IN 1066, TO THE YEAR 1803 109 (London, T.C. Hansard 1809) ("[E]xcessive Bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the Liberty of the Subjects: and excessive Fines have been imposed; and illegal and cruel Punishments inflicted . . . .").

44. Trial of John Hampden, (1684) (KB), *reprinted in* HOWELL, *supra* note 29 at 1054, 1124.

45. *Id.* at 1054, 1125.

46. *Id.* at 1054, 1125–26.

47. 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 490 (London, MacMillan & Co. 1883). Another notorious example of sentencing abuse was the flogging ordered against Titus Oates for perjury. Second Trial of Titus Oates, (1685) (KB), *reprinted in* HOWELL, *supra* note 29, at 1316.

Shortly after enactment of the 1689 bill of rights, the House of Lords heard a writ of error brought by Samuel Barnardiston.[48] Barnardiston had been fined ten thousand pounds by the Court of King's Bench for sending letters that criticized the government.[49] The House of Lords considered the conviction and fine, and the judgment was reversed.[50] With respect to the fine, the Lords ordered: "That this Fine of Ten Thousand Pounds is exorbitant and excessive, and not warranted by legal Precedent in former Ages; for all Fines ought to be with a *Salvo Contenemento*, and not to the Parties Ruin."[51]

In a concurrent case, the House of Lords reviewed proceedings against the Earl of Devonshire, which occurred during the reign of James II.[52] Devonshire was charged with assault in the King's Bench and fined thirty-thousand pounds.[53] Argument was made that the tribunal could not "impose a greater fine than what the party may be capable of paying immediately into court."[54] It was urged that unaffordable fines cause public harm by making those who are oppressively penalized a burden on society, "especially if he be a man of no great estate, for the excessive charge that attends a confinement will quickly consume all that he has, and then he and his family must live upon charity."[55] It was accordingly maintained that fines levied in prior similar cases should be used as a guide, "and so proportionably to add or abate, as the manner and circumstance of the case do require."[56]

The Lords called those involved in the proceedings against the Earl of Devonshire to explain themselves and were dissatisfied with the explanations given.[57] Sir Robert Wright acknowledged to the Lords that fines were "usually set according to the quality and estate of the person fined[,]" but

48. 14 JOURNALS OF THE HOUSE OF LORDS 210 (London, Her Majesties Stationery Office 1691).

49. Trial of Sir Samuel Barnardiston, (1684) (KB), *reprinted in* HOWELL, *supra* note 29, at 1334–36, 1351–58, 1371.

50. JOURNALS OF THE HOUSE OF LORDS, *supra* note 48, at 210.

51. *Id.*

52. Case of the Earl of Devonshire, (1689) (HL), *reprinted in* 11 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1354, 1367 (London, T.C. Hansard 1811).

53. *Id.* at 1357, 1367.

54. *Id.* at 1363.

55. *Id.* at 1364.

56. *Id.* at 1362.

57. *See id.* at 1369–70 (outlining the conversations between the lords and the individuals involved in the proceedings).

additional discussion on that point did not occur because the judge who imposed the fine simply admitted it was excessive.[58] The Lords ultimately ruled "that the fine of 30,000[imposed by the court in King's bench upon the earl of Devon was excessive and exorbitant, against Magna [Carta], the common right of the subject, and the law of the land."[59]

Clearly, the prohibition against excessive fines required the amount of a financial penalty to be measured against the gravity of an offense and the culpability of an offender. William Hawkins summarized the rules developed in England regarding the imposition of fines in his treatise *Pleas of the Crown* as follows:

> [I]t seems to be in great Measure left to the Prudence of the Court to inflict . . . such Fine . . . as shall seem most proper and adequate to the Offence, from the Consideration of the Baseness, Enormity, and dangerous Tendency of it, the Malice, Deliberation and Wilfulness, or Inconsideration, Suddenness and Surprize with which it was committed, the Age, Quality and Degree of the Offender, and all other Circumstances which may any way aggravate or extenuate the Guilt.[60]

From the limited reported case law available, this appears to be the rule adopted in the United States. In an early case, the Virginia Supreme Court of Appeals invalidated a fine levied against a faultless sheriff and his deputy for failing to return an execution to a judgment creditor in disputed circumstances, writing:

> The latitude in the sum of the fine, left to the discretion of the Court, is meant to meet the degrees of offence in the officer, and of injury to the creditor. That discretion is not to be exercised arbitrarily, but justly; so as to impose a fine commensurate to the offence and injury; and it was to check these discretionary powers, that our Bill of Rights has declared, that "excessive fines shall not be imposed."[61]

In addition, a *salvo contenemento* principle was adopted for the American colonies even before enactment of the 1689 Bill of Rights. The 1682 laws

58. *Id.* at 1369.

59. *Id.* at 1372.

60. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS, ch. 48, § 14, at 445 (Savoy, Eliz. Nutt & R. Gosling eds., 1721).

61. Bullock v. Goodall, 7 Va. (3 Call) 44, 49 (1801).

agreed upon in England for Pennsylvania provided "[t]hat all fines shall be moderate, and saving men's contenements, merchandize, or wainage."[62] The 1683 charter of liberties and privileges for New York similarly states "[t]hat A ffreeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold, And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize."[63] Both adopted constitutional protections against unreasonable fines after becoming states.[64] Almost all of the original States also adopted prohibitions against excessive fines.[65] There are few legal authorities from the Founding Era that directly address whether the constitutional provisions adopted by the various States limited fines on the basis of an offender's ability to pay, but historical

62. LAWS AGREED UPON IN ENGLAND, &C. § XVIII in PENNSYLVANIA FRAME OF GOVERNMENT, 1682, *reprinted in* SCHWARTZ, *supra* note 21, at 141 ¶ XVIII.

63. New York Charter of Libertyes and Priviledges of 1683, *reprinted in* SCHWARTZ, *supra* note 21, at 165.

64. *See* An Act Concerning the Rights of the Citizens of this State, 1787 N.Y. Laws ch. 1, § 7–8, *reprinted in* 2 LAWS OF THE STATE OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE HELD IN THE YEARS 1785, 1786, 1787, AND 1788 INCLUSIVE 345 (Albany, Weed, Parsons, & Co., 1886) ("[N]o citizens of this State shall be fined or amerced without reasonable cause and such fine or amerciament shall always be according to the quantity of his or her trespass or offence and saving to him or her, his or her contenement; That is to say every freeholder saving his freehold, a merchant saving his merchandize and a mechanick saving the implements of his trade. . . . [E]xcessive bail ought not to be required, nor exces[s]ive fines imposed, nor cruel and unusual punishments inflicted."); Plan or Frame of Government for the Commonwealth or State of Pennsylvania § 29 in Pennsylvania Declaration of Rights of 1776, *reprinted in* SCHWARTZ, *supra* note 21, at 272 ("[A]ll fines shall be moderate.").

65. *See* Delaware Declaration of Rights of 1776 § 16, *reprinted in* SCHWARTZ, *supra* note 21, at 278 ("[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishements inflicted."); GA. CONST. of 1777 art. LIX, *reprinted in* SCHWARTZ, *supra* note 21, at 300 ("Excessive fines shall not be levied, nor excessive bail demanded."); Maryland Declaration of Rights of 1776 § XXII, *reprinted in* SCHWARTZ, *supra* note 21, at 282 ("[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted; by the courts of law."); Massachusetts Declaration of Rights of 1780, pt. 1, § XXVI, *reprinted in* SCHWARTZ, *supra* note 21, at 343 ("No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."); New Hampshire Bill of Rights of 1783, § XXXIII, *reprinted in* SCHWARTZ, *supra* note 21, at 379 ("No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."); North Carolina Declaration of Rights of 1776, § X, *reprinted in* SCHWARTZ, *supra* note 21, at 287 ("[E]xcessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."); Virginia Declaration of Rights of 1776, art. I, § 9, *reprinted in* SCHWARTZ, *supra* note 21, at 235 ("[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *cf.* South Carolina Constitution of 1778, § XL, *reprinted in* SCHWARTZ, *supra* note 21, at 335 ("That the penal laws, as heretofore used, shall be reformed, and punishments made in some cases less sanguinary, and in general more proportionate to the crime.").

sources indicate recognition of a *salvo contenemento* principle.[66] Influential constitutional commentator Thomas Cooley later wrote in the mid-1800s that "[a] fine should have some reference to the party's ability to pay it."[67]

In another early case, the Virginia Supreme Court of Appeals reversed a joint fine assessed against several defendants on the basis that an offender should not be punished for the fault of another.[68] Judge Roane commented that a controlling statute requiring fines to be assessed "according to the degree of the fault and the estate of the offender" was founded upon the spirit of the constitutional prohibition against excessive fines, and he opined that it would therefore be unreasonable to hold an offender jointly liable for the portion of a penalty attributable to another.[69] Judge Pendleton disagreed, writing that co-defendants could be jointly assessed a fine as long as they might be severed if they differed "in the degree of offence or ability to pay."[70] Judge Carrington more thoroughly explained why he thought it would be manifestly unfair to assess a joint fine when those responsible for paying it might have entirely different financial circumstances:

> Where several persons are concerned in a trespass, the probability is, that some one of them is either from wealth, situation or talents, a man of more influence than the rest; and therefore that he does, by these adventitious circumstances, prevail upon the others to unite with him in it. Now in such a case as that, would it not be the highest injustice to oblige one of the others of less capacity, poorer circumstances and therefore liable to all the influence of his companion, to undergo as severe punishment as him who was more guilty? [A]nd perhaps in event a greater? It strikes me that nothing could be

66. Nicholas M. McClean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L. Q. 833, 865–72 (2013). The Continental Congress included a provision in the ordinance adopted for the Northwest Territories that "all fines shall be moderate." Northwest Ordinance of 1787, art. 2, *reprinted in* SCHWARTZ, *supra* note 21, at 400. An argument may be made that the ordinance and the Constitution complement each other. Early commentator, St. George Tucker, opined that the articles in the ordinance "were to be considered as articles of compact between the original states" and territories, and "valid against the United States under the [C]onstitution." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 279–80 (Philadelphia, William Young Birch & Abraham Stall eds., 1803).

67. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 328 (2d ed. Boston, Little, Brown, & Co. 1871).

68. Jones v. Commonwealth, 5 Va. (1 Call) 555, 556–60 (1799).

69. *Id.* at 557 (Roane, J.).

70. *Id.* at 560 (Pendleton, J.).

> more unreasonable; and therefore I shall be very lo[a]th to yield my assent to such a position.[71]

All three judges expressed agreement with the principle that a fine should be assessed in consideration of the degree of an offense and an offender's ability to pay.[72]

III. CONSTRUCTION OF THE EXCESSIVE FINES CLAUSE

There are no early U.S. Supreme Court cases that discuss the meaning of the Excessive Fines Clause.[73] The Court commented in *Austin v. United States*[74] that it had only once previously considered the clause in *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal Inc.*[75] In addition, the Supreme Court acknowledged in *Browning-Ferris Indus.* that:

> The Eighth Amendment received little debate in the First Congress, . . . and the Excessive Fines Clause received even less attention. This is not surprising; at least eight of the original States which ratified the Constitution had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions, so the matter was not a likely source of controversy or extensive discussion.[76]

Despite the absence of early authorities directly addressing the Excessive Fines Clause, the Supreme Court generally embraced a proportionality principle in *Weems v. United States*.[77] A convicted criminal defendant argued in *Weems* that the length of his sentence inflicted cruel and unusual punishment.[78] The Court acknowledged that the prohibition against cruel and unusual punishments was originally directed against torture and other barbaric

71. *Id.* at 558–59 (Carrington, J.).

72. *Id.* at 556–57, 558–59, 560.

73. McClean, *supra* note 66, at 870.

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

75. *Id.* at 606; Browning-Ferris Indus. of Vt. v. Kelco Disposal, 492 U.S. 257 (1989).

76. *Browning-Ferris Indus.*, 492 U.S. at 264 (citation omitted); *see also* Weems v. United States, 217 U.S. 349, 368–69 (1910) (discussing the lack of debate on the Eighth Amendment in the First Congress).

77. *See Weems*, 217 U.S. at 380–81 (outlining various punishments for different crimes); *see also* O'Neil v. Vermont, 144 U.S. 323, 337–41 (Field, J., dissenting), 370–71 (Harlan, J., dissenting) (1891) (opining that the prohibition against cruel and unusual punishments should apply to sentences that are greatly disproportionate to an offense by excessive length or severity).

78. *See Weems*, 217 U.S. at 352–54, 362–63 (claiming a prison sentence of fifteen years for the crime of "falsification of a public and official document" is a cruel and unusual punishment).

methods of punishment, but it explained that the prohibition must be given wider application to remain vital.[79] It therefore held that the prohibition against cruel and unusual punishments also applies to the severity or length of a criminal sentence, and the Court struck a punishment that was disproportionate when compared to penalties for similar crimes.[80] *Weems* did not invoke the Excessive Fines Clause, but the Court did note its historical application.[81]

In *Browning-Ferris Indus.*, the Supreme Court held that the Excessive Fines Clause limits only fines directly imposed by the government, and the clause does not limit the award of punitive damages in a civil proceeding between private parties.[82] However, it clarified in *Austin* that the clause is not confined to criminal proceedings.[83] The Court wrote that the purpose of the Eighth Amendment is to "limit the government's power to punish."[84] It therefore "cuts across the division between the civil and the criminal law."[85] The Court explained that the Eighth Amendment limits the government's power to punish by extracting payments, whether criminally or civilly.[86] The question to be answered in applying the Excessive Fines Clause is whether a governmentally imposed financial sanction is considered "punishment."[87]

In *Austin*, the Court employed a two-step approach when interpreting the Excessive Fines Clause: (1) Is a governmentally imposed economic sanction punitive? (2) If so, is the sanction excessive?[88] A remedial sanction is subject to the Eighth Amendment if it serves any retributive or deterrent purpose.[89] An economic sanction escapes scrutiny under the Excessive Fines Clause only if its purpose is solely remedial.[90]

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79. *Id.* at 368–73.

80. *Id.* at 380–81.

81. *Id.* at 375–76.

82. Browning-Ferris Indus. of Vt. v. Kelco Disposal, 492 U.S. 257, 263–64 (1989).

83. Austin v. United States, 509 U.S. 602, 608–09 (1993).

84. *Id.* at 609.

85. *Id.* at 610 (quoting United States v. Halper, 490 U.S. 435, 447–48 (1989)).

86. *Id.* at 609–10.

87. *Id.*; *see also* Alexander v. United States, 509 U.S. 544, 558–59 (1993) (holding that a forfeiture is no different than a traditional fine for Eighth Amendment purposes because it is clearly a form of punishment).

88. Wright v. Riveland, 219 F.3d 905, 915 (9th Cir. 2000); *see also* United States v. Viloski, 814 F.3d 104, 109–10 (2d Cir. 2016) (describing the two-step process); *Austin*, 509 U.S. at 609–11, 619–23 (analyzing the first question and deferring an answer to the second question).

89. *Austin*, 509 U.S. at 610–11.

90. *Id.* at 610–11, 621–22; *see also* Paroline v. United States, 572 U.S. 434, 455–56 (2014) (holding restitution constitutes a fine even if its primary goal is remedial or compensatory because it also serves

The Supreme Court declined in *Austin* to establish a test for determining whether a fine is excessive,[91] but it later provided a framework in *United States v. Bajakajian*.[92] The Court wrote in *Bajakajian* that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[93] The text and history of the Excessive Fines Clause provided little guidance, and the Court therefore relied upon two considerations emphasized in cases involving the Cruel and Unusual Punishments Clause: (1) deference should be afforded to legislators about the appropriate punishment for an offense, and (2) judicial determinations about the gravity of a particular offense are inherently imprecise.[94] The Court reasoned that those principles counseled against requiring strict proportionality, and it therefore adopted the gross proportionality standard articulated in its Cruel and Unusual Punishments Clause precedents.[95] In determining the gravity of an offense under the gross proportionality standard, the *Bajakajian* Court reviewed the nature of the offense, the offender's level of culpability, and the amount of harm caused by the offender.[96] It held: "If the amount of [a fine] is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."[97]

Bajakajian involved the excessiveness of a forfeiture rather than a traditional fine.[98] Bajakajian pleaded guilty for failing to report $357,144 that he was carrying while traveling abroad.[99] He was sentenced to three years of probation and a fine of $5,000.[100] The district court initially concluded after a bench trial that the entire $357,144 was subject to forfeiture since it was involved in the offense.[101] The question in *Bajakajian* was whether the

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a punitive purpose); United States v. Bajakajian, 524 U.S. 321, 329 n.4 (1998) (stating forfeiture falls within the purview of the Excessive Fines Clause if it is punitive in part).

91. *Austin*, 509 U.S. at 622–23.
92. *See Bajakajian*, 524 U.S. at 334–37 (relying upon conclusions reached in *Austin*).
93. *Id.* at 334.
94. *Id.* at 336.
95. *Id.*
96. *Id.* at 337–40.
97. *Id.* at 337.
98. *Id.* at 324–26.
99. *Id.* at 324–25.
100. *Id.* at 326.
101. *Id.* at 325–26.

$357,144 forfeiture violated the Excessive Fines Clause, rather than whether the $5,000 fine was excessive.[102]

The *Bajakajian* Court explained that "[e]xcessive means surpassing the usual, the proper, or a normal measure of proportion."[103] It emphasized legislative primacy regarding determinations about the appropriate punishments for offenses.[104] Therefore, the Court resorted to statutory guidelines to help measure excessiveness.[105] It reviewed the *mens rea* required for a violation of the statute creating the offense for which Bajakajian was convicted.[106] It looked at whether Bajakajian was the type of offender against whom the statute was principally designed to protect.[107] The Court considered the maximum sentence and fine that could have been imposed under sentencing guidelines.[108] Based on these markers and Bajakajian's lack of involvement in other illegal activities, the Court deduced that Bajakajian had only a minimal level of culpability.[109] After considering the minor amount of actual harm caused by Bajakajian's reporting violation, the Court concluded the forfeiture of $357,144 was grossly disproportionate to the gravity of the offense, remarking that the amount bore no articulable correlation to any injury suffered by the government and that it exceeded Bajakajian's $5,000 fine by many orders of magnitude.[110] However, the Court took no position on whether an offender's ability to pay should be considered when determining excessiveness.[111]

Circuit Courts disagree whether to consider an offender's ability to pay,[112] but they have adopted similar tests to determine excessiveness in relation to

102. *Id.* at 324.

103. *Id.* at 335.

104. *Id.* at 336.

105. *See id.* at 338 (comparing the maximum fine for a reporting offense of $5,000 to the $357,144 the district court had ordered respondent to forfeit).

106. *Id.* at 337–38.

107. *Id.* at 338.

108. *Id.* at 338–39.

109. *Id.* at 339.

110. *Id.* at 339–40.

111. *See id.* at 340 n.15 ("Respondent does not argue that his wealth or income are relevant to the proportionality determination . . . and the District Court made no factual findings in this respect.").

112. *Compare* United States v. Levesque, 546 F.3d 78, 84–85 (1st Cir. 2008) (finding deprivation of livelihood is a factor), *with* United States v. 817 N.E. 29th Drive, Wilton Manors, Fla., 175 F.3d 1304, 1311 (11th Cir. 1999) (indicating ability to pay is not a factor).

the gravity of an offense.[113] Most have adopted tests in circumstances like *Bajakajian* where the amount of a forfeiture rather than a traditional fine was at issue.[114] Many afford a presumption of constitutionality to forfeitures that are less than the maximum legislatively authorized fine.[115] The First and Eleventh Circuits have described the principal *Bajakajian* factors as follows:

> (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant.[116]

The Second Circuit Court of Appeals has framed the issue using a slightly different four-part test that reviews:

> (1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct.[117]

A nearly identical four-part test has been utilized by the Third, Fifth, Seventh, and D.C. Circuits.[118] The Fourth Circuit has varied order and wording, but it has also distilled the standard into four factors:

> (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between

113. *Compare* United States v. Browne, 505 F.3d 1229, 1281 (11th Cir. 2007) (adopting the gross disproportionality test), *with* United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) (applying the same three-factor test as in *Browne*).

114. *See* Pimentel v. City of Los Angeles, 974 F.3d 917, 921–22 (9th Cir. 2020) (citing multiple cases where forfeiture was an issue).

115. *See, e.g.*, *817 N.E. 29th Drive*, 175 F.3d at 1309 (presuming a forfeiture well within the maximum fine for the offense is constitutional).

116. *Browne*, 505 F.3d at 1281; *Heldeman*, 402 F.3d at 223; *see also* United States v. Chaplin's, Inc., 646 F.3d 846, 851–55 (11th Cir. 2011) (discussing and applying the *Browne* factors).

117. United States v. Viloski, 814 F.3d 104, 110 (2d Cir. 2016) (quoting United States v. George, 779 F.3d 113, 122 (2d Cir. 2015)).

118. United States v. Suarez, 966 F.3d 376, 385–88 (5th Cir. 2020); Collins v. SEC, 736 F.3d 521, 526–27 (D.C. Cir. 2013); United States v. Malewicka, 664 F.3d 1099, 1104 (7th Cir. 2011); United States v. Cheeseman, 600 F.3d 270, 283–84 (3d Cir. 2010).

> the crime charged and other crimes; and (4) the harm caused by the charged crime.[119]

The Ninth Circuit does not rely upon a rigid test, but it has looked to the following four criteria: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused."[120]

The Sixth Circuit listed the factors as: "the nature of the offense, the connection to other illegal activities, the source and likely use of the funds, whether [the] conduct fit into the class the statute was designed to cover[], and the potential fine under the advisory guideline range."[121] The Eighth Circuit has also considered multiple unenumerated factors but found that the following considerations provide a framework, which will vary from case-to-case:

> the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited. . . .
>
> . . . .
>
> "Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant's motive and culpability and, of course, the extent that the defendant's interest and the enterprise itself are tainted by criminal conduct."[122]

The Tenth Circuit has used factors taken directly from *Bajakajian* supplemented with other considerations:

> One of the most important was Congress's judgment about the appropriate punishment for the owner's offense. Maximum statutory fines provide guidance on the legislative view of the seriousness of the offense. . . .
>
> . . . .
>
> Additional factors for consideration of the gravity of the offense include the extent of the criminal activity, related illegal activities, and the harm caused to other parties.

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119. United States v. Blackman, 746 F.3d 137, 144 (4th Cir. 2014) (quoting United States v. Jalaram, 599 F.3d 347, 355–56 (4th Cir. 2010)).

120. United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1122 (9th Cir. 2004).

121. United States v. Ely, 468 F.3d 399, 403 (6th Cir. 2006). The Sixth Circuit has also utilized the Fourth Circuit's test. United States v. Bates, 784 Fed. App'x 312, 34041 (6th Cir. 2019).

122. United States v. Bieri, 68 F.3d 232, 236 (8th Cir. 1995) (quoting United States v. Alexander, 32 F.3d 1231, 1236–37 (8th Cir. 1994)).

> . . . .
> [I]n addition to the *Bajakajian* factors, we suggested other considerations: the general use of the forfeited property, any previously imposed federal sanctions, the benefit to the claimant, the value of seized contraband, and the property's connection with the offense.[123]

Different terminology is used by the various tests but all consider the nature of an offense, the conduct and culpability of an offender, and the amount of harm caused by an offense. Other miscellaneous factors, such as measuring the amount of a financial sanction against the maximum legislatively authorized penalty, seem geared more towards forfeitures than traditional fines to ensure that a minor offense in the eyes of a legislature is not converted into a major punishment by an added forfeiture of money or property.

The opinion by Judge Tjoflat in *Yates v. Pinellas Hematology & Oncology, P.A.*[124] thoughtfully distinguishes between forfeitures and traditional civil fines.[125] Forfeitures are naturally limited to the value of the property forfeited whereas fines are not.[126] The amount of a forfeiture may also be rationally compared against a legislatively authorized fine applicable to an offense to assess its gravity, whereas comparing a civil fine for one offense to the penalties that may be imposed for other offenses "is like comparing apples to oranges."[127] Judge Tjoflat also explained that the presumption of constitutionality given to forfeitures that are less than the maximum criminal fine for an offense really does not address proportionality in the context of a civil fine where there is no criminal fine to guide the analysis.[128] He therefore concluded that a different approach should be used to evaluate the excessiveness of civil fines rather than the one used in forfeiture cases.[129]

The Ninth Circuit used its *Bajakajian* criteria to evaluate municipal parking fines in *Pimentel v. City of Los Angeles*[130] and found parts of the test ill-

123. United States v. Wagoner Cnty. Real Est., 278 F.3d 1091, 1100–01 (10th Cir. 2002) (citations omitted).

124. Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, (11th Cir. 2021).

125. *See id.* at 1326–30 (Tjoflat, J., concurring in part and dissenting in part) (explaining the distinctions between forfeitures and civil fines).

126. *Id.* at 1328–29.

127. *Id.* at 1328–29.

128. *Id.* at 1329–30.

129. *Id.* at 1330.

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

suited to the task.[131] The court wrote that a review of the relationship between an offense and other criminal activities is not as helpful in the context of civil fines as it is when considering whether criminal penalties are excessive.[132] The court similarly concluded that any analysis of the excessiveness of a civil fine is not advanced by comparing it to alternative penalties that might be imposed.[133] The Ninth Circuit therefore focused upon the nature and extent of the offense and the harm caused by a violation.[134]

The Seventh Circuit applied *Bajakajian* in the context of a traditional fine in *Towers v. City of Chicago*.[135] A Chicago ordinance was challenged in *Towers* that imposed a $500 administrative fine against owners of vehicles in which drugs or unregistered firearms were found.[136] The court measured the gravity of the offense by its nature, the harm it caused, and the offender's level of culpability.[137] The court then compared the amount of the fine against this overall gravity of the offense.[138] It acknowledged that $500 is not a trifling sum, but the court yielded to the City's goal of deterring vehicle owners from blindly lending their vehicles and then disclaiming responsibility for the vehicle's use.[139] The Seventh Circuit ultimately concluded that the amount of the fine "is large enough to function as a deterrent, but it is not so large as to be grossly out of proportion to the activity that the City is seeking to deter."[140]

The Ninth Circuit found the reasoning of *Towers* persuasive in *Pimentel*.[141] It wrote that courts typically look at an offender's culpability to assess the nature and extent of an offense.[142] The *Pimentel* court adopted a sliding scale to evaluate the gravity of an offense:

> [I]f culpability is high or behavior reckless, the nature and extent of the underlying violation is more significant. Conversely, if culpability is low, the nature and extent of the violation is minimal. It is critical, though, that the

131. *Id.* at 923.
132. *Id.*
133. *Id.*
134. *Id.* at 922–24.
135. Towers v. City of Chicago, 173 F.3d 619, 625–26 (7th Cir. 1999).
136. *Id.* at 621.
137. *Id.* at 625.
138. *Id.* at 625–26.
139. *Id.* at 626.
140. *Id.*
141. Pimentel v. City of Los Angeles, 974 F.3d 917, 923 (9th Cir. 2020).
142. *Id.* at 922.

> court review the specific actions of the violator rather than by taking an abstract view of the violation.[143]

The court recognized that even "benign actions may still result in some non-minimal degree of culpability."[144] Relying on *Towers*, the *Pimentel* court held that a violator may still be culpable even if an underlying offense is minor.[145]

The Ninth Circuit acknowledged in *Pimentel* that the simplest way to assess an offense's harm is by reviewing the monetary costs that result from a violation.[146] This also appears to be done on a sliding scale by which a violation that causes greater monetary harm is considered more significant than one where no actual loss is suffered.[147] However, the *Pimentel* court cautioned that harms are not limited to monetary losses.[148] It wrote, "Courts may also consider how the violation erodes the government's purposes for proscribing the conduct."[149] It noted that some types of harm are not readily quantifiable.[150] In the case of parking fines at issue in *Pimentel*, the court recognized that overtime parking increases congestion and impedes traffic flow, and it held that considerable deference must be given to legislative authorities in determining the types and limits of punishments.[151]

Federal Circuit Courts have split upon whether the proportionality analysis under the Excessive Fines Clause includes an offender's ability to pay.[152] In *United States v. 817 N.E. 29th Drive, Wilton Manors, Fla.*[153] the Eleventh Circuit Court of Appeals acknowledged that an offender's financial condition is a legitimate and important part of a determination regarding the

143. *Id.* at 923.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*; *see also* Korangy v. FDA, 498 F.3d 272, 277–78 (4th Cir 2007) (upholding substantial fines and recognizing that the use of non-certified mammography equipment is a serious offense because it can deprive patients of early breast cancer detection).

150. *Pimentel*, 974 F.3d at 924.

151. *Id.*; *see also* Balice v. U.S. Dep't of Agric., 203 F.3d 684, 698–99 (9th Cir. 2000) (deferring to regulatory purposes when holding that a USDA fine was not grossly disproportionate to an offense).

152. *Compare* United States v. Levesque, 546 F.3d 78, 83–85 (1st Cir. 2008) (holding proportionality analysis must include consideration of whether a fine would effectively deprive a defendant of his or her livelihood), *with* United States v. 817 N.E. 29th Drive, Wilton Manors, Fla., 175 F.3d 1304, 1311 (11th Cir. 1999) (comparing the amount of a fine proportionally against the gravity of an offense and not the amount of an offender's assets).

153. United States v. 817 N.E. 29th Drive, Wilton Manors, Fla., 175 F.3d 1304 (11th Cir. 1999).

appropriateness of fine for non-constitutional reasons,[154] but it understood *Bajakajian* to mean Eighth Amendment "excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender."[155] The Ninth Circuit observed in *United States v. Dubose*[156] that Supreme Court authority does not require inquiry into an offender's ability to pay when considering whether bail is excessive under the Eighth Amendment; therefore concluding the same should uniformly apply to fines.[157] In *United States v. Levesque*,[158] although the First Circuit acknowledged *Bajakajian* did not explicitly consider ability to pay, it found that the Supreme Court's reliance on the historical underpinnings of the Excessive Fines Clause indicates its recognition of a *salvo contenemento* principle similar to one that motivated adoption of the 1689 English bill of rights, upon which the Eighth Amendment is based.[159] The Eighth Circuit adopted a hybrid position in *United States v. Lippert*,[160] holding an offender's ability to pay is not a factor when considering whether a forfeiture is excessive, but it is a factor when considering the excessiveness of a fine.[161]

The Eighth Circuit gave a reasoned explanation in *United States v. Hines*[162] why an offender's ability to pay is not particularly relevant when considering excessiveness in forfeiture situations but an important consideration when evaluating whether a traditional fine is excessive: "Proportionality is likely to be the most important issue in a forfeiture case, since the claimant-defendant is able to pay by forfeiting the disputed asset. In imposing a fine, on the other hand, ability to pay becomes a critical factor."[163] *Pimentel v. City*

154. *Id.* at 1311 n.12.

155. *Id.* at 1311; *see also* United States v. Suarez, 966 F.3d 376, 388 (5th Cir. 2020) (appearing to endorse the Eleventh Circuit's holding in *817 N.E. 29th Drive*). *But see* Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1320–23 (11th Cir. 2021) (Newsom, J., concurring) (questioning the holding in *817 N.E. 29th Drive*).

156. United States v. Dubose, 146 F.3d 1141 (9th Cir. 1998).

157. *Id.* at 1146. *But see* United States v. Real Property Located at 2445 via Dona Christa, Valencia, Cal., 138 F.3d 403, 409 (9th Cir. 2008) (indicating proportionality analysis should consider hardship to an offender including the effect of a forfeiture on an offender's financial condition).

158. United States v. Levesque, 546 F.3d 78 (1st Cir. 2008).

159. *Id.* at 83–85; *see also* United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007) (recognizing a deprivation of livelihood principle). The Second Circuit took a similar approach in United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016).

160. United States v. Lippert, 148 F.3d 974 (8th Cir. 1998).

161. *Id.* at 978. *But see* United States v. Smith, 656 F.3d 821, 828 (8th Cir. 2011) (holding inability to pay was irrelevant when assessing the alleged excessiveness of a fine-like money judgment imposed when forfeitable assets could not be found).

162. United States v. Hines, 88 F.3d 661 (8th Cir. 1996).

163. *Id.* at 664.

of Los Angeles[164] lends support to the Eighth Circuit's position. The Ninth Circuit recognized in *Pimentel* that some of the *Bajakajian* factors are not helpful when assessing whether a traditional fine is excessive.[165] The question in forfeiture cases centers largely upon whether it is fair to take assets away from an offender in addition to imposition of a traditional fine.[166] It therefore makes sense to compare the amount of a forfeiture against the maximum allowable fine when considering the gravity of an offense.[167] In contrast, comparison of a traditional fine against the maximum allowable fine says little about whether the legislatively authorized limit is excessive itself, and consideration of other factors such as ability to pay seems more probative.[168]

Recent cases trend towards considering the financial circumstances of an offender.[169] The members of a three judge panel on the Eleventh Circuit agreed in *Yates v. Pinellas Hematology & Oncology, P.A.* that an offender's ability to pay should be considered when determining whether a fine is excessive.[170] Circuit Judge Newsom commented that the Excessive Fines Clause is not self-explanatory, and the text of the clause leaves open the question of what a fine is compared against to determine if it is excessive.[171] He opined that it is therefore necessary to review the lineage of the clause and the guaranties secured by the 1689 English bill of rights and Magna Carta.[172] "Among those guarantees was a prohibition on economic sanctions that would deprive an offender of his livelihood."[173] Judge Newsom ascertained from his review of the historical background that a "deprivation-of-livelihood

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

165. *See id.* at 923 (9th Cir. 2020) (discussing the limitations of the *Bajakajian* factors).

166. *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998) ("The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.").

167. *Id.* at 338–39.

168. *See* Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1328–30 (11th Cir. 2021) (Tjoflat, J., concurring in part and dissenting in part) (noting the limitations of a comparative analysis).

169. *See id.* at 1318–23 (Newsom, J., concurring) (calling for some proportionality between the fine imposed and what the offender can afford); Colorado Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101–02 (Colo. 2019) (emphasizing the potential to bankrupt individuals as a consideration in determining whether a fine is excessive); City of Seattle v. Long, 493 P.3d 94, 112–13 (Wash. 2021) (holding consideration of an individual's ability to pay is constitutionally required).

170. *Yates*, 21 F.4th at 1318–23 (Newsom, J., concurring); *id.* at 1333–34 (Tjoflat, J., concurring in part and dissenting in part).

171. *Id.* at 1321.

172. *Id.* at 1321–22.

173. *Id.* at 1321.

component of the excessiveness inquiry endured across the centuries."[174] He therefore concluded:

> There's good reason to think, then, that when the founding generation ratified a prohibition against "excessive fines," the phrase carried with it an understanding that a fine's excessiveness (or lack thereof) depended on *both* the relationship between the fine and the offense *and* that between the fine and the offender.[175]

Many state appellate courts have reached similar conclusions that ability to pay should be a factor when analyzing excessiveness.[176]

Courts that consider deprivation of livelihood as a factor when evaluating excessiveness disagree whether an offender's financial circumstances should be considered a component of proportionality review or an overriding separate factor.[177] The First Circuit relied upon its historical understanding of the Excessive Fines Clause in *Levesque* and concluded that deprivation of livelihood should be treated as a separate factor.[178] It noted that amercements were originally set by a court at common law and later reduced by an offender's assembled peers in accordance with the offender's ability to pay.[179] The First Circuit therefore reasoned that an analogous two-step

174. *Id.* at 1322.

175. *Id.* at 1323. Judge Tjoflat agreed in *Yates* that proportionality should include consideration of an offender's ability to pay, and he dissented primarily because he did not think the *Bajakajian* factors should be used as the starting point when analyzing the excessiveness of a civil fine. *Id.* at 1326–30, 1333–34 (Tjoflat, J., concurring in part and dissenting in part).

176. State v. Wise, 795 P.2d 217, 219 (Ariz. Ct. App. 1990); Lockyer v. R.J. Reynolds Tobacco Co., 124 P.3d 408, 421 (Cal. 2005); People v. Cowan, 260 Cal.Rptr.3d 505, 520–21 (Cal. Ct. App. 2020), *rev. granted* 466 P.3d 843 (Cal. 2020); City and Cnty. of San Francisco v. Sainez, 92 Cal.Rptr.2d 418, 432 (Cal. Ct. App. 2000); Colorado Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101–02 (Colo. 2019); People v. Pourat, 100 P.3d 503, 507 (Colo. Ct. App. 2004); People v. Malone, 923 P.2d 163, 165–66 (Colo. Ct. App. 1995); Nez Perce Cnty. Prosecuting Att'y v. Reese, 136 P.3d 364, 371 (Idaho Ct. App. 2006); Cnty. of Nassau v. Canavan, 802 N.E.2d 616, 622 (N.Y. 2003); State v. Goodenow, 282 P.3d 8, 17 (Or. Ct. App. 2012); Commonwealth v. 1997 Chevrolet & Contents Seized from Young, 160 A.3d 153, 188–89 (Pa. 2017); City of Seattle v. Long, 493 P.3d 94, 112–13 (Wash. 2021). *Contra* Wheatt v. State, 410 So.2d 479, 481 (Ala. Crim. App. 1982); State v. Ybarra, No. 34275, 2008 WL 9469545, at *2 (Idaho Ct. App. Sept. 22, 2008).

177. *Compare* United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016) (indicating deprivation of livelihood is one of several factors), *with* United States v. Levesque, 546 F.3d 78, 84–85 (1st Cir. 2008) (applying deprivation of livelihood as a separate factor).

178. *Levesque*, 546 F.3d at 83–85; *accord* Jacobo Hernandez v. City of Kent, 497 P.3d 871, 878–79 (Wash. Ct. App. 2021).

179. *Levesque*, 546 F.3d at 84.

process should be used when evaluating the excessiveness of a fine.[180] The Second Circuit arrived at an opposite result in *United States v. Viloski*.[181] It relied upon the reasoning of the Supreme Court in *Bajakajian* that excessiveness "involves *solely* a proportionality determination."[182] Since the constitutional question revolves around gross disproportionality, the Second Circuit reasoned that "a forfeiture that deprives a defendant of his livelihood might nonetheless be constitutional, depending on his culpability or other circumstances."[183] It therefore held that consideration of whether a fine would destroy an offender's livelihood "is a component of the proportionality analysis, not a separate inquiry."[184] The Second Circuit also held that this factor need not be considered in all cases.[185]

Both the Second Circuit in *Viloski* and the First Circuit in *Levesque* found the emphasis given by *Bajakajian* to the deeply rooted history of the Excessive Fines Clause indicates that excessiveness considerations include whether a fine would deprive an offender of his or her livelihood.[186] Neither held however that excessiveness should be measured against an offender's ability to pay at time of conviction.[187] The Second Circuit explained, "[w]hile hostility to livelihood-destroying fines is deeply rooted in our constitutional tradition, consideration of personal circumstances is not."[188] It therefore held "that courts may not consider as a discrete factor a defendant's personal circumstances, such as age, health, or present financial condition, when considering whether a criminal forfeiture would violate the Excessive Fines Clause."[189] The First Circuit similarly wrote that a fine cannot

180. *Id.* at 85.

181. *Viloski*, 814 F.3d at 112 n.12.

182. *Id.* at 111 (quoting United States v. Bajakajian, 524 U.S. 321, 333–34 (1998)).

183. *Id.* at 112.

184. *Id.* at 111; *see also* State v. Wise, 795 P.2d 217, 219 (Ariz. Ct. App. 1990) (holding an offender's ability to pay is not dispositive in an excessiveness analysis).

185. *Viloski*, 814 F.3d at 112.

186. *Id.* at 111; United States v. Levesque, 546 F.3d 78, 83–85 (1st Cir. 2008).

187. *See Viloski*, 814 F.3d at 112 ("[A]sking whether a forfeiture would destroy a defendant's *future* livelihood is different from considering as a discrete factor a defendant's *present* personal circumstances, including age, health, and financial situation."); *Levesque*, 546 F.3d at 85 ("[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, nor is it even the correct inquiry.").

188. *Viloski*, 814 F.3d at 112.

189. *Id.*; *see also* United States v. Chin, 965 F.3d 41, 58 (1st Cir. 2020) (quoting *Levesque*, 546 F.3d at 84–85) ("[N]et worth, familial obligations, and inability to earn a professional-level salary simply are not sufficient to ground a determination that the full forfeiture order sought by the government would constitute the type of 'ruinous monetary punishment' that might conceivably be 'so onerous as to

be "so onerous as to deprive a defendant of his or her future ability to earn a living, thus implicating the historical concerns underlying the Excessive Fines Clause."[190] The personal circumstances of an offender at the time a fine is imposed may be indirectly relevant to a proportionality determination but only insofar as they bear upon an offender's ability to make a living.[191]

It seems likely that the Supreme Court will ultimately include deprivation of livelihood as a factor when considering the excessiveness of a fine.[192] The Court reemphasized the historical foundations of the Excessive Fines Clause in *Timbs v. Indiana*, including the common law prohibition against financially crushing amercements that dates back to at least Magna Carta.[193] It is less clear whether the Supreme Court will limit consideration to impacts upon an offender's livelihood or will more generally review other financial circumstances of an offender. The Court in *Timbs* recognized that "Magna Carta required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'"[194] However, *Timbs* also quoted *Blackstone's Commentaries* for the proposition that no one could have a larger amercement imposed than an offender's "circumstances or personal estate will bear."[195] It is also uncertain whether the Supreme Court will consider ability to pay as an overriding factor in evaluating the excessiveness of a fine. *Timbs* noted that *Bajakajian* took no position on "whether a person's income and wealth are *relevant* considerations," but it did not discuss the weight that might be given to such considerations.[196] Lastly, *Timbs* was a forfeiture case like *Bajakajian*, and it is therefore unclear whether the Court will use the same factors when evaluating the excessiveness of traditional fines as opposed to forfeitures.[197]

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deprive a defendant of his or her future ability to earn a living' and thus violate the Eighth Amendment's Excessive Fine Clause.").

190. *Levesque*, 546 F.3d at 85.

191. *Viloski*, 814 F.3d at 113.

192. *See* Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1320–21 (11th Cir. 2021) (Newsom, J., concurring) (acknowledging in light of *Timbs* that the Eleventh Circuit may have misread *Bajakajian* in *817 N.E. 29th Drive* by excluding consideration of an offender's ability to pay when analyzing excessiveness).

193. Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019).

194. *Id.* at 688 (quoting Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)).

195. *Id.* (quoting BLACKSTONE, *supra* note 24, at 372).

196. *Id.* (emphasis added).

197. *Id.* at 686, 689–91. Justice Scalia noted in his concurrence in *Austin* that the excessiveness analysis for forfeitures "must be different from that applicable to monetary fines." Austin v. United States, 509 U.S. 602, 627 (1993) (Scalia, J., concurring).

IV. LONG AND BLAKE/JOHNSON

The City of Seattle had a truck towed for violation of parking time-limit restrictions in *City of Seattle v. Long*.[198] The fine for violation of the parking infraction was waived by a local magistrate, but the owner who lived in the truck was ordered to pay reduced impound and administrative fees totaling $557.12 on a $50.00 per month payment plan.[199] The Washington Supreme Court held that the impound charges constituted punishment for purposes of the Excessive Fines Clause—despite Seattle's claim that the charges only reimbursed the city for the towing and storage costs.[200] The court acknowledged that cost recovery may be remedial, but it noted that the costs had been characterized as a penalty by the city code, and it concluded that the impoundment and associated costs were at least partially punitive and therefore fell within the Excessive Fines Clause.[201]

Having concluded that the impound charges constituted a fine, the Washington Supreme Court relied upon the four *Bajakajian* factors used by the Ninth Circuit to evaluate excessiveness plus an additional factor.[202] The court reviewed the history of the Excessive Fines Clause and concluded that the common law protection of livelihood is incorporated into constitutional proportionality restrictions.[203] It found that the homeless crisis demonstrates the need to consider an offender's ability to pay as a factor when determining whether fines arising from living condition offenses are excessive.[204] With respect to the vehicle impoundment fees at issue in *Long*, the court noted that nearly 12,000 people were homeless in the county in which Seattle is situated, and over 2,000 of those people lived in their vehicles.[205] The Washington Supreme Court concluded:

> The excessive fines clause descended from English law that sought to protect individuals from fines that would deprive them of their ability to live. This

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

199. *Id.*

200. *Id.* at 109.

201. *Id.*

202. *Id.* at 111, 114.

203. *Id.* at 111–13.

204. *See id.* at 113 (addressing the circumstances that led to an increase in the Seattle homeless population).

205. *Id.*

> concern is directly related to an offender's circumstances—in this case, homelessness and the circumstances forcing individuals into it.[206]

In applying the Ninth Circuit's *Bajakajian* factors, the court in *Long* recognized that a city has an interest in keeping its streets clear but concluded that overtime parking is a relatively minor offense.[207] It further found that the offense was not related to any other criminal activity.[208] The court noted that the only penalty for the offense was a $44 fine plus impound charges.[209] It also felt that the harm caused by the offense was minimal because the impounded vehicle was not parked in a high demand area, residential neighborhood, or in a manner that obstructed other roadway uses.[210] Balanced against the truck owner's financial circumstances, the Washington Supreme Court determined that the fine was clearly excessive.[211]

The *Long* decision emphasized personal financial circumstances.[212] The court focused upon the importance of the impounded truck to its owner's living situation:

> Long was attempting to move himself out of homelessness by saving for an apartment. During that time, Long's truck held his clothes, food, bedding, and various work tools essential to his job as a general tradesman. After the truck was towed, Long slept outside before seeking shelter from the cold weather, and he contracted influenza. These facts indicate Long could not afford to pay the $547.12 assessment. From October 13 until November 3, Long did not have his truck and could not access his tools, thus he could not find skilled labor jobs. During that period, he was homeless and sick, likely making very little money. The impoundment severely compromised Long's ability to work—in other words, his livelihood.[213]

The court rejected Seattle's argument that the payment plan eliminated any excessiveness concerns by comparing the truck owner's meager $700 monthly earnings against the minimum $2,270 needed each month to survive in Seattle, noting that "[i]t is difficult to conceive how Long would be

206. *Id.*
207. *Id.* at 114.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 114–15.
212. *See id.* (considering Long's financial circumstances important to its decision).
213. *Id.*

able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life."[214]

Long provides helpful guidance regarding consideration of an offender's financial circumstances when determining whether a fine is excessive.[215] It reviews the history and reasons for the Excessive Fines Clause,[216] modern application of the clause,[217] and, most importantly, the real-world impact that governmentally imposed financial obligations have on homeless persons and their efforts to escape homelessness.[218]

However, *Long* does not provide a workable framework for assessing the excessiveness of traditional fines. Its analysis is directed towards the excessiveness of impound charges rather than an ordinary fine.[219] The traditional fine was waived in *Long* and its excessiveness was not at issue.[220] The waived fine was also used as a benchmark to show the insignificance of the offense that led to the impound and the excessiveness of the impound charges.[221] *Long* is therefore more closely analogous to situations encountered in forfeiture cases, where the excessiveness of an extra penalty is considered in relation to the regular fine applicable to an offense, than it is to a situation where the excessiveness of traditional fine is itself at issue.[222]

The excessiveness of traditional fines was addressed in a case involving the City of Grants Pass, Oregon.[223] Grants Pass adopted ordinances that banned camping and similar activities.[224] Camping was prohibited on sidewalks, in parks, under bridges, and at most other public locations.[225] The

214. *Id.* at 115.

215. *See id.* at 111–15 (providing the history of the Excessive Fines Clause and discussing its relevance to offenders' financial circumstances in a proportionality determination).

216. *Id.* at 111–12.

217. *Id.* at 112–13.

218. *Id.* at 113–15.

219. *See id.* at 114–15 (underlining Long's hardships exacerbated by the city's vehicle impound fees).

220. *Id.* at 99.

221. *Id.* at 114.

222. *Compare id.* (analyzing the excessiveness of impound charges), *with* United States v. $100,348.00 in U.S. Currency, 354 F.3d 1110, 1121–24 (9th Cir. 2004) (analyzing the excessiveness of a forfeiture), *and* Pimentel v. City of Los Angeles, 974 F.3d 917, 923 (9th Cir. 2020) (recognizing the difficulties encountered when applying the test used in forfeiture cases to evaluate the excessiveness of a traditional fine).

223. Blake v. City of Grants Pass, No. 1:18-cv-01823, 2020 WL 4209227, at *5, *10–11 (D. Or. July 22, 2020), *aff'd sub. nom. on other grounds by* Johnson v. City of Grants Pass, 50 F.4th 787 (9th Cir. 2022).

224. *Blake*, 2020 WL 4209227, at *2, *4–5.

225. *Id.* at *4–5.

city also outlawed sleeping on sidewalks, streets, and alleys or in the entrances to properties that abut public rights-of-way.[226] Violation of camping restrictions carried a mandatory $295 fine, and the fine for illegal sleeping was $75.[227] Collection fees were added if the fines were not timely paid.[228] In addition, those who repeatedly violated park regulations could be excluded from all city parks for a period of thirty days.[229] Hundreds of citations were issued for violation of the ordinances.[230] Grants Pass was thereafter sued on multiple grounds.[231]

With respect to claims asserted under the Excessive Fines Clause, the Oregon District Court held that the civil fines imposed by the Grants Pass ordinances were punitive.[232] The court wrote that it does not matter whether the fines are characterized as criminal or civil penalties.[233] The question is whether a fine "at least partially serves the traditional functions of retribution and deterrence."[234] The court noted that the Supreme Court has recognized "that all civil penalties have some deterrent effect."[235] It therefore concluded that the civil fines for violating the ordinances would be considered punitive under *Bajakajian*, and the only remaining issue was whether they were excessive.[236]

The district court recognized in *Blake v. City of Grants Pass*[237] that the proportionality standard for evaluating excessiveness consists of a non-exclusive list of several factors regarding the gravity of an offense.[238] However, it did not review each of the *Bajakajian* factors usually relied upon by other courts.[239] The court wrote that "[h]ere, the decisive consideration is that [homeless persons] are being punished for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay

226. *Id.* at *4.
227. *Id.* at *5.
228. *Id.*
229. *Id.*
230. *Id.*
231. *See id.* at *5–15 (addressing cruel and unusual punishment, excessive fines, procedural due process, equal protection, and substantive due process claims).
232. *Id.* at *11.
233. *Id.* at *10.
234. *Id.*
235. *Id.* (citing United States v. Hudson, 522 U.S. 93, 102 (1997)).
236. *Id.*
237. *Id.* at *11.
238. *Id.*
239. *See id.* (acknowledging the court did not apply the *Bajakajian* factors, as most courts do).

warm and dry."[240] It found that homeless persons could not afford to pay the fines and inevitable collection fees, making it even harder for them to find housing.[241] The court therefore concluded that the fines imposed by Grants Pass for illegal camping were grossly disproportionate to the gravity of the offense and held that "[a]ny fine is excessive if it is imposed on the basis of status and not conduct."[242]

The Ninth Circuit Court of Appeals affirmed *Blake* but found it unnecessary to address whether the Grants Pass ordinances violated the Excessive Fines Clause.[243] The court in *Johnson v. City of Grants Pass*[244] held that the city's civil citation system was intertwined with a criminal enforcement mechanism, which thereby triggered both the Cruel and Unusual Punishment Clause and a *Martin* analysis.[245] It rejected the city's argument that the Grants Pass ordinances imposed only civil fines rather than criminal punishment because citations under the ordinances matured into potential criminal liability after repeated infractions.[246] In summary, a person who twice violated the ordinances could be issued a park exclusion order, which, in turn, could be enforced by criminal trespass charges.[247] The court noted that "[i]mposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances' Eighth Amendment infirmity."[248] It further explained that "*Martin* applies to civil citations where, as here, the civil and criminal punishments are closely intertwined."[249]

Johnson held that the Grants Pass camping restrictions violated the Cruel and Unusual Punishments Clause under *Martin* because they effectively left homeless people with nowhere to sleep safely from the elements and subjected violators to an eventual risk of criminal prosecution.[250] The court narrowed but upheld an injunction recognizing the right of homeless persons to protection against the elements and, thus concluded that no one

240. *Id.*
241. *Id.*
242. *Id.*
243. Johnson v. City of Grants Pass, 50 F.4th 787, 798, 813 (9th Cir. 2022).
244. Johnson v. City of Grants Pass, 50 F.4th 787 (9th Cir. 2022).
245. *Id.* at 806–08, 813.
246. *Id.* at 807–08.
247. *Id.* at 807.
248. *Id.* at 808.
249. *Id.* at 813.
250. *See id.* at 808 ("The anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid.").

could be fined for protected activity.[251] It therefore concluded that "there is no need for us to address whether hypothetical fines would be excessive."[252] Consequently, *Johnson* "does not address a regime of purely civil infractions, nor does it prohibit [a] City from attempting other solutions to the homelessness issue."[253]

V. PROPOSED STANDARD

The factors reviewed to evaluate excessiveness of a forfeiture in *Bajakajian* are not particularly helpful when considering the excessiveness of a traditional fine.[254] This in large part is because *Bajakajian* considered whether a forfeiture was excessive and used the traditional fine as a benchmark to assess the gravity of the offense that triggered the forfeiture.[255] The same type of comparison cannot be made when evaluating whether a traditional fine is excessive itself.[256] As Judge Tjoflat recognized in *Yates*, "*Bajakajian* was tailored to the context of forfeiture."[257]

However, the Supreme Court did indicate where to look for guidance. *Bajakajian* gave two principal reasons for the constitutional excessiveness standard that it adopted: (1) "judgments about the appropriate punishment for an offense belong in the first instance to the legislature"; and (2) "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise."[258] For those reasons the Court adopted a "standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents."[259]

Solem v. Helm[260] summarized the criteria adopted by Cruel and Unusual Punishments Clause precedents as follows:

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251. *Id.* 812–13.

252. *Id.* at 813.

253. *Id.*

254. *See* Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1326–30 (11th Cir. 2021) (Tjoflat, J., concurring in part and dissenting in part) (demonstrating the limits of the *Bajakajian*'s applicability in certain cases); *see also* Pimentel v. City of Los Angeles, 974 F.3d 917, 923 (9th Cir. 2020) (finding the second and third *Bajakajian* factors unhelpful when analyzing whether a traditional fine was excessive).

255. *See* United States v. Bajakajian, 524 U.S. 321, 337–40 (1998) (listing the predominant factors in determining the excessiveness of a forfeiture).

256. *Yates*, 21 F.4th at 1328–29 (Tjoflat, J., concurring in part and dissenting in part).

257. *Id.* at 1328.

258. *Bajakajian*, 524 U.S. at 336.

259. *Id.*

260. Solem v. Helm, 463 U.S. 277 (1983).

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[261]

Solem explained that the first criterion considers the seriousness of an offense by evaluating its nature, comparing it against other offenses, and examining the circumstances of a violation to determine its gravity.[262] The second criterion compares the penalty for an offense to the penalties imposed for other offenses in the same jurisdiction.[263] "If more serious [offenses] are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."[264] The third criterion compares the penalty imposed by a jurisdiction to the penalties imposed by other jurisdictions for the same offense.[265] The "list is by no means exhaustive," but it provides a starting point.[266] In addition, *Solem* noted that "no one factor will be dispositive in a given case."[267]

Application of the *Solem* criteria was refined by Justice Kennedy's concurring opinion in *Harmelin v. Michigan*.[268] This concurrence is recognized as the controlling view.[269] Justice Kennedy wrote that "the Eighth Amendment does not mandate adoption of any one penological theory."[270] It is the province of legislatures rather than courts to make determinations about penalties for offenses because determinations about the nature and purposes of punishment "implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order."[271] Courts therefore give substantial deference to

261. *Id.* at 292.

262. *Id.* at 290–91.

263. *Id.* at 291.

264. *Id.*

265. *Id.* at 291–92.

266. *Id.* at 294. *But see* Harmelin v. Michigan, 501 U.S. 957, 985–90 (1991) (arguing the *Solem* criteria are unworkable).

267. *Solem*, 463 U.S. at 291 n.17.

268. *Harmelin*, 501 U.S. at 998–1001 (Kennedy, J., concurring).

269. Graham v. Florida, 560 U.S. 48, 60 (2010); *see also* Ewing v. California, 538 U.S. 11, 23–24 (2003) (plurality opinion) (confirming Justice Kennedy's concurrence in *Harmelin* guided the Court's analysis).

270. *Harmelin*, 501 U.S. at 999.

271. *Id.* at 998; *see also* Rummel v. Estelle, 445 U.S. 263, 283–84 (1980) (describing how nationwide sentencing trends find their source in legislatures rather than courts).

legislative determinations regarding the types and limits of punishment for offenses.[272] There is room for a wide range of legislative determinations because local conditions may differ and uniformity is not constitutionally required.[273] Based on those considerations and an admonition that courts should use objective factors to the maximum possible extent when reviewing proportionality, the *Harmelin* concurrence concluded that the second and third criteria from *Solem*, which compare a penalty for an offense to other penalties, only apply "in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[274]

Solem and *Harmelin* were further clarified by *Graham v. Florida*.[275] *Graham* distinguished the circumstances where proportionality analysis applies from those involving categorical rules.[276] Categorical rules prohibit a particular punishment based on the nature of an offense or the characteristics of an offender.[277] For example, capital punishment is impermissible for non-homicide crimes, and its use is prohibited against persons under eighteen years of age.[278] A different approach is taken for adoption of categorical rules than regular proportionality review.[279] *Graham* explains:

> In the cases adopting categorical rules the Court has taken the following approach. The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.[280]

Harmonizing these Cruel and Unusual Punishments precedents with *Bajakajian*, a gross disproportionality analysis should not be used to

272. *Harmelin*, 501 U.S. at 999.
273. *Id.* at 999–1000.
274. *Id.* at 1005.
275. Graham v. Florida, 560 U.S. 48, 59–62 (2010).
276. *Id.* at 60–61.
277. *Id.*
278. *Id.*
279. *Id.* at 61.
280. *Id.* (citations omitted) (first quoting Roper v. Simmons, 543 U.S. 551, 563 (2005); and then quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).

categorically disallow fines based on the nature of an offense or the characteristics of an offender.[281] Therefore, a fine should not be automatically considered excessive for violation of a governmental restriction against sitting, lying, or sleeping in public.[282] It should also not be automatically impermissible to fine a homeless person under the Excessive Fines Clause. There may be circumstances when the nature of an offense or the characteristics of the offender categorically prohibits imposition of a fine—but here, the test is whether (1) there are objective indicia of a national consensus against imposition of a fine in those circumstances, and (2) imposition of a fine would violate the Constitution based on the "Eighth Amendment's text, history, meaning, and purpose."[283] Courts should use this higher bar when establishing categorical rules in light of the emphasis given in *Bajakajian* to legislative primacy in determining the types and limits of punishments for offenses and the admonition made in *Ingraham v. Wright*[284] that the Eighth Amendment should only be used sparingly as a substantive limit on legislative authority to define offenses.[285]

For purposes of proportionality analysis, the seriousness of an offense should be determined by evaluating its nature, comparing it against other types of offenses, and examining the circumstances of a violation.[286] The starting point should be legislative purpose.[287] A relatively minor offense is not necessarily immune from imposition of a fine that deters a real and legitimate public concern.[288] However, a sliding scale should be used, and the

281. *Graham*, 560 U.S. at 60–62 (arguing the categorical approach should apply only in certain situations).

282. *Contra* Blake v. City of Grants Pass, No. 1:18-cv-01823, 2020 WL 4209227, at *11 (D. Or. July 22, 2020).

283. *Graham*, 560 U.S. at 61 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421, (2008)).

284. Ingraham v. Wright, 430 U.S. 651 (1977).

285. *See* United States v. Bajakajian, 524 U.S. 321, 336 (1998) ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature."); *Ingraham*, 430 U.S. at 667 ("[The Eighth Amendment] imposes substantive limits on what can be made criminal and punished as such. We have recognized [this] last limitation as one to be applied sparingly.") (citation omitted); *see also* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define [an offense], and ordain its punishment.").

286. Solem v. Helm, 463 U.S. 277, 290–91 (1983).

287. *See, e.g.*, *Bajakajian*, 524 U.S. at 336 (recommending deference to legislative purpose).

288. Pimentel v. City of Los Angeles, 974 F.3d 917, 923–24 (9th Cir. 2020); Towers v. City of Chicago, 173 F.3d 619, 625–26 (7th Cir. 1999); *see also* Potter v. City of Lacey, No. 3:20-CV-05925, 2021 WL 915138, at *1 (W.D. Wash. Mar. 10, 2021) (applying *Pimentel* to analyze and uphold a fine for overtime parking by a recreational vehicle used as a domicile).

gravity of an offense is directly proportional to the offender's culpability.[289] If culpability is low, the legitimacy of the public interest behind a restriction must be more apparent.[290] Consideration should also be given to the harm caused by the offense.[291] The harm does not necessarily have to be monetary or readily quantifiable.[292] As with evaluating seriousness, an inquiry into harm involves reviewing why the legislature prohibited the conduct.[293] This should also be done on a sliding scale—a violation that causes greater harm is considered more significant.[294]

If a threshold comparison of a fine and the gravity of an offense infers a gross disproportionality, the fine might be compared against (1) fines imposed for other offenses in the same jurisdiction and (2) fines imposed for commission of the same offense in other jurisdictions.[295] However, deference should be given to a legislative authority and the local interests it seeks to advance in a particular situation.[296] What is appropriate for one jurisdiction may not be good for another, and it is constitutionally permissible for various jurisdictions to address problems using different approaches.[297] "[E]ven assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions . . . ."[298] Intrajurisdictional and interjurisdictional comparisons should only be used to validate an initial determination of excessiveness and should not be

289. *Pimentel*, 974 F.3d at 923.

290. *Cf.* Discount Inn, Inc. v. City of Chicago, 803 F.3d 317, 320–21 (7th Cir. 2015) (concluding if the social purpose is slight, "the maximum fine, although not large as fines go, may be excessive" (citing Towers v. City of Chicago, 173 F.3d 619, 624–26 (7th Cir. 1999))).

291. *Bajakajian*, 524 U.S. at 339.

292. *See Pimentel*, 974 F.3d at 923–24 (determining harm based on non-monetary considerations).

293. *Id.* at 924.

294. *See id.* (holding forfeiture must "bear some relationship to the gravity of the offense" (quoting *Bajakajian*, 524 U.S. at 334)).

295. *See* Harmelin v. Michigan 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (concluding grossly excessive punishments may give rise to "inrajurisdictional and interjurisdictional analyses"); Solem v. Helm, 463 U.S. 277, 291–92 (1983) ("[C]ourts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.").

296. *Harmelin*, 501 U.S. at 998–99 (Kennedy, J., concurring) (citing *Solem*, 463 U.S. at 290); *Pimentel*, 974 F.3d at 924; *see also* RAWLE, *supra* note 20, at 131 ("The judicial authority would not undertake to pronounce a law void, because the fine it imposed appeared to them excessive . . . .").

297. *Harmelin*, 501 U.S. at 999–1000 (Kennedy, J., concurring); *see also* John M. Harlan, *The Bill of Rights and the Constitution*, 50 A.B.A. J. 918, 920 (1964) ("[F]ederalism not only tolerates, but encourages, differences between federal and state protection of individual rights, so long as the differing policies alike are founded in reason and do not run afoul of dictates of fundamental fairness.").

298. *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring).

performed in cases where an inference of gross disproportionality does not arise.[299]

A city must keep its streets and sidewalks open for public passage and may consider that primary purpose when accommodating other uses.[300] The same principle applies to other types of public property shared by various users, and a city "has [the] power to preserve the property under its control for the use to which it is lawfully dedicated."[301] Public areas have many occupants, and a city consequently has legitimate safety and sanitary concerns about their use.[302] "Very unsanitary conditions can develop quickly, as a result of insects, excrement[,] and the presence of items that are not systematically cleaned."[303] Therefore, one should not assume that every restriction against sitting, lying, or sleeping in public is trivial.

For example, the number of chronically homeless persons doubled in the vicinity of Walla Walla, Washington, between 2011 and 2016.[304] The city experienced numerous problems with the establishment of campsites.[305] Some were erected in unsafe areas or interfered with other uses.[306] Garbage and other debris were left that had to be cleaned by the city or property owners.[307] Dangerous materials such as syringes and weapons were left at campsites.[308] Businesses entries were blocked.[309] Some campers committed thefts and engaged in threatening behavior that endangered others.[310] Garbage receptacles near campsites were rummaged through and left in disarray.[311] Some campers tampered with electrical and other public facilities.[312] Human waste was left near campsites, which endangered public health.[313]

299. *Id.* at 1005.

300. *E.g.*, Cox v. Louisiana, 379 U.S. 536, 554–55 (1965) (restricting travel on the streets to ensure public safety supersedes the people's ability to exercise a civil right).

301. Adderley v. Florida, 385 U.S. 39, 47 (1966).

302. *E.g.*, Acosta v. City of Salinas, No. 15-cv-05415, 2016 WL 1446781, at *9 (N.D. Cal. Apr. 13, 2016) (outlining the city's interest in preventing health hazards and blockage of thoroughfares).

303. Love v. City of Chicago, No. 96-C-0396, 1996 WL 627614, at *3 (N.D. Ill. Oct. 25, 1996).

304. Walla Walla, Wash., Ordinance 2018-28 § 3(a) (Aug. 22, 2018).

305. Walla Walla, Wash., Ordinance 2017-04 § 1 (Feb. 22, 2017).

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

In response, the Walla Walla City Council appointed a committee to investigate and recommend how to address local homelessness.[314]

Walla Walla tried to address the human waste problem by authorizing the placement of porta-potties in late 2015.[315] However, this change led to homeless persons congregating near the porta-potties and occupying a city parking lot in the summer of 2016.[316] The parking lot campsite was especially unsafe and many makeshift weapons were found when it was ultimately abated in early August.[317] Thereafter, on August 15, the city designated an area where people could temporarily camp in a city park.[318] Problems almost immediately arose, and both campers and social workers who assisted at the camping area complained about an unsafe and disruptive living environment.[319] The city responded by establishing conditions for entering and remaining on city property and rules for removing disruptive and unmanageable persons.[320] Problems nonetheless persisted.[321]

On November 7, 2016, the committee appointed by the city reported its recommendations, which included the adoption of an anti-camping ordinance and prohibitions against sleeping and loitering in public.[322] Walla Walla adopted an ordinance on February 17, 2017, that prohibited camping except in areas designated by the city.[323] However, the city rejected an ordinance that generally prohibited sitting or lying on downtown city sidewalks.[324] Walla Walla thereafter designated a new managed camping area,[325] and it hired social workers and security personnel to provide services and supervision.[326]

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314. Walla Walla City Council, Work Session Minutes 3–4 (June 27, 2016).

315. Walla Walla City Council, Regular Meeting Minutes 4–5 (Dec. 16, 2015).

316. *See* Walla Walla, Wash., Ordinance 2017-04 (Feb. 22, 2017) (Declaration of Brent Baldwin ¶ 5.2 (Feb. 15, 2017)) (issuing abatement orders to homeless persons sleeping in a local parking lot).

317. *Id.*

318. Walla Walla, Wash., Ordinance 2017-13, at 2–4 (Apr. 26, 2017).

319. Walla Walla City Council, Regular Meeting Minutes 1–2 (Sept. 28, 2016).

320. *See generally* Walla Walla, Wash., Ordinance 2016-31 (Sept. 28, 2016) (establishing conduct regulations and allowing the exclusion of violators from city property).

321. Walla Walla City Council, Regular Meeting Minutes 1–2 (Oct. 12, 2016).

322. Walla Walla City Council Work Session Minutes 2–3 (Nov. 7, 2016).

323. Walla Walla, Wash., Ordinance 2017-04 (Feb. 22, 2017). The city subsequently amended its anti-camping ordinance to expressly address and prohibit camping in unsafe areas such as roads, street medians, and traffic islands. Walla Walla, Wash., Ordinance 2019-05 (March 13, 2019).

324. *See* Walla Walla City Council, Regular Meeting Minutes 5–6 (Feb. 22, 2017) (discussing "the need to preserve protections for the [F]irst [A]mendment activities," the council rejected the proposed ordinance).

325. Walla Walla, Wash., Administrative Policy 2017-04 (May 17, 2017).

326. Walla Walla, Wash., Resolution 2017-59 (July 12, 2017).

The managed camping area opened on May 17, 2017, and unfortunately, Walla Walla began experiencing problems in its vicinity.[327] Users of the camping area left "[j]unk, litter, debris, animal waste, and human waste . . . in the area surrounding the designated camping area."[328] Unauthorized camp sites were established nearby.[329] Fights broke out among individuals who congregated around the camping area.[330] Fires were started and public sidewalks were blocked.[331] "Visibly intoxicated and impaired persons . . . created disturbances" and some individuals who congregated around the camping area were observed publicly urinating.[332] In summary, internal management and security largely addressed the problems inside the camping area, but the neighborhood suffered negative impacts.[333] Consequently, Walla Walla adopted prohibitions against sitting or lying down in the area surrounding the managed camping area.[334] The prohibitions substantially diminished the neighborhood problems, which indicated that the changes worked. Therefore, when the designated campsite was moved in 2019, the city also applied these prohibitions to the new site.[335]

Camping, sitting, and lying down might seem like minor offenses to an outside observer unfamiliar with local circumstances in Walla Walla. However, each activity was restricted because of real problems. The city adopted camping prohibitions to address the significant public health and safety concerns it experienced.[336] The prohibitions were not intended to oppress the homeless or drive them from the city; some restrictions were adopted for the express purpose of keeping campers safe.[337] The same rationale applies to the city's prohibitions against sitting or lying down in public. Walla Walla initially rejected an ordinance banning individuals from sitting or lying down on downtown sidewalks.[338] However, it later adopted targeted restrictions against sitting or lying down near a designated camping area.[339] The harm

327. Walla Walla, Wash., Ordinance 2018-36 § 1–2 (Sept. 26, 2018).
328. *Id.* § 2.
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* § 5.
335. Walla Walla, Wash., Ordinance 2019-04 §§ 3–4, 7 (Mar. 13, 2019).
336. Walla Walla, Wash., Ordinance 2017-04 § 1 (Feb. 22, 2017).
337. Walla Walla, Wash., Ordinance 2019-05 §§ 3–4 (March 13, 2019).
338. Walla Walla City Council Regular Meeting Minutes 5–6 (Feb. 22, 2017).
339. Walla Walla, Wash., Ordinance 2018-36 §§ 2, 5 (Sept. 26, 2018). Restrictions that apply to particular places or at certain times are not the same as those that apply twenty-four hours a day, seven

caused by each activity might seem small in abstract, but the real impacts were significant. Depending on location and circumstances, these offenses could be insignificant, but they are substantial in the City of Walla Walla.

An offender's ability to pay should be considered in addition to the gravity of an offense when determining whether a fine is excessive.[340] The principle dates back to at least the issuance of Magna Carta.[341] However, this principle was not consistently applied historically.[342] Technicalities provided loopholes.[343] Inequities led to abuses during the reigns of Charles II and James II in England.[344] Parliament prohibited excessive fines in response to those abuses.[345] It restored the common law practice of considering a person's financial circumstances when determining the reasonableness of a fine.[346] These historical foundations "strongly suggest that considering ability to pay is constitutionally required."[347] In addition, the Supreme Court relied heavily on the origins of the Excessive Fines Clause in *Bajakajian* when recognizing that its text and history "demonstrate the centrality of

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days a week, and city-wide. *See* Johnson v. City of Grants Pass, 50 F.4th 787, 812 n.33 (9th Cir. 2022) (recognizing "several district courts have held that the government may evict or punish sleeping in public in some locations, provided there are other lawful places within the jurisdiction for involuntarily homeless individuals to sleep"); Martin v. City of Boise, 920 F.3d 584, 603–04, 617 n.8 (9th Cir. 2019) (acknowledging that "an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible" (citing Jones v. City of Los Angeles, 444 F.3d 1118, 1123 (9th Cir. 2006))); Sausalito/Marin Cnty. Chapter of Cal. Homeless Union v. City of Sausalito, No. 21-CV-01143, 2021 WL 5889370, at *2 (N.D. Cal. Dec. 13, 2021) (explaining that "*Martin* prohibits a ban on all camping, not the proper designation of permissible areas").

340. Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1323 (11th Cir. 2021) (Newsom, J., concurring); City of Seattle v. Long, 493 P.3d 94, 111–14 (Wash. 2021); *see also* United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016) (considering deprivation of livelihood to be a factor).

341. Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019); United States v. Bajakajian, 524 U.S. 321, 335–36 (1998); Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 287–89 (1989) (O'Connor, J., concurring in part and dissenting in part).

342. *See* SELECTED READINGS, *supra* note 31, at 160–61, 165–66, 170 (issuing amercements "according to the seriousness of the offense").

343. *See* Trial of John Hampden, (1684) (KB), *reprinted in* HOWELL, *supra* note 29, at 1054, 1125 (stating the amercements clause in Magna Carta did not apply to great offenses against the crown); COKE II, *supra* note 26, at 27 (stating the amercements clause did not apply to fines imposed by a court of justice).

344. *Browning-Ferris Indus.*, 492 U.S. at 290–91 (O'Connor, J., concurring in part and dissenting in part).

345. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689, 1 W. & M. Sess. 2, c. 2 (Eng.).

346. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES, at *372–73.

347. City of Seattle v. Long, 493 P.3d 94, 112 (Wash. 2021).

proportionality to the excessiveness inquiry."[348] The Colorado Supreme Court explained in *Colorado Dep't of Lab. & Emp. v. Dami Hosp., LLC*[349] that the concept of proportionality itself dictates consideration of an offender's ability to pay:

> A fine that would bankrupt a person or put a company out of business would be a substantially more onerous fine than one that did not. For some types of criminal or regulatory infractions, a penalty that would have that kind of grave consequence might be warranted, whereas for others the severity of that outcome may be out of proportion to the gravity of the offense for which the fine is imposed.[350]

The Washington Supreme Court attributes the homeless crisis to many factors: "volatile housing markets, uncertain social safety nets, colonialism, slavery, and discriminative housing practices—all exacerbated by the global COVID-19 pandemic."[351] The City of Walla Walla found a much more direct local cause: economic hardship.[352] Around the same time that local homelessness was doubling, 31.4% of renters in Walla Walla were severely burdened by housing costs exceeding 50% of their gross income.[353] Nearly half of all households in the city were economically distressed.[354] The lack of affordable housing and rising home prices expanded the gap, which resulted in many households living in higher-cost housing than they could afford.[355] Housing affordability is not the only cause of homelessness, but it is a significant contributor locally in Walla Walla. Failure to at least consider the economic circumstances of an offender when evaluating the excessiveness of a fine would reduce proportionality analysis to an academic exercise detached from reality. In addition to their ability to pay, a homeless person's economic circumstances relate to their culpability; the background conditions that led to their homelessness; its associated problems, attempted

348. United States v. Bajakajian, 524 U.S. 321, 335 (1998).

349. Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94 (Colo. 2019).

350. *Id.* at 102.

351. *Long*, 493 P.3d at 113.

352. *See* Walla Walla, Wash., Ordinance 2021-23 (Aug. 11, 2021) (Walla Walla Regional Housing Action Plan 9–12) (introducing a housing plan to address the region's economic hardships).

353. *Id.* at 10–11.

354. *Id.* at 11–12.

355. *Id.* at 14–15.

solutions, and their attendant challenges; and ultimately the adoption of restrictions against sitting, lying, and sleeping in public.[356]

However, an offender's ability to pay should not be treated as an overriding factor.[357] The Supreme Court held in *Solem* that a single factor should not determine the outcome of proportionality analysis in a given case.[358] The Eighth Amendment does not dictate a particular penological theory.[359] It provides flexibility to give "different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."[360] The United States District Court for the Northern District of Texas recognized in *Johnson v. City of Dallas*[361] that the Eighth Amendment should not be used to create an entire class of people who are immune by homelessness from complying with laws generally applicable to all.[362] There may be circumstances where the deterrent goals of a fine deserve greater weight than an offender's financial situation.[363] "If the Eighth Amendment permits the Government to end some offenders' lives, it surely permits the Government to destroy other offenders' livelihoods."[364]

Walla Walla did not adopt its targeted restrictions against sitting and lying in public solely to address neighborhood impacts attributed to its designated

356. *Cf. Long*, 493 P.3d at 114–15 (describing how Long's circumstances prevented him from being able to pay the fine).

357. United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016). *Contra* United States v. Levesque, 546 F.3d 78, 84–85 (1st Cir. 2008) (explaining the inability to pay should be a separate consideration under the Excessive Fines Clause from the test for gross disproportionality); United States v. King, 231 F.Supp.3d 872, 902–04 (W.D. Okla. 2017) (following the standard applied in *Levesque*); Jacobo Hernandez v. City of Kent, 497 P.3d 871, 878–79 (Wash. Ct. App. 2021) (holding a defendant's financial circumstances may outweigh all other considerations when determining whether a fine is excessive).

358. Solem v. Helm, 463 U.S. 277, 290–91 n.17 (1983).

359. Harmelin v. Michigan 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

360. *Id.*

361. Johnson v. City of Dallas, 860 F.Supp. 344 (N.D. Texas 1994), *rev'd in part, vacated in part by* Johnson v. City of Dallas, 61 F.3d 442 (5th Cir. 1995).

362. *Johnson*, 860 F.Supp. at 349–50. The Supreme Court indicated in *Williams v. Illinois* that it might be inverse discrimination under the Equal Protection Clause to allow an indigent person to escape punishment based upon inability to pay when other offenders are punished for the same conduct. Williams v. Illinois, 399 U.S. 235, 244 (1970); *cf.* Bearden v. Georgia, 461 U.S. 660, 669 (1983) ("The State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws. A defendant's poverty in no way immunizes him from punishment.").

363. *See* Colo. Dep't of Lab & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 103 (Colo. 2019) ("We thus cannot allow the size of aggregated per diem fines in this case to distort our Eighth Amendment jurisprudence more generally.").

364. United States v. Viloski, 814 F.3d 104, 112 n.13 (2d Cir. 2016) (citation omitted).

camping area.[365] One of the reasons for establishment of a managed camping area was to "provide a safe place to sleep at night."[366] In practice, people who were expelled from the camping area for substance abuse problems and other reasons would simply relocate directly outside the camping area and disrupt its operations.[367] In one case, individuals who camped outside the designated area became a conduit for entry of alcohol and other banned substances inside the designated camping area.[368] The occupancy of the right-of-way adjacent to the designated camping area became a problem for its safe and proper management.[369] Walla Walla's restrictions against sitting and lying in public were adopted in part to address those problems.[370] The offenders against whom the restrictions were primarily directed (1) had already been expelled from the designated camping area for causing problems, and (2) were completely undeterred by their expulsion.[371] These are circumstances where the deterrent goals of a fine arguably deserve greater weight than the offender's ability to pay because non-monetary remedies have already proven ineffective to curb problem behavior.

The following framework is therefore proposed to analyze traditional civil fines for excessiveness:

> A. Categorical rules prohibiting fines either on the basis of the nature of an offense or the characteristics of an offender should be adopted only if the national consensus standard enunciated in Graham v. Florida is met.[372]
>
> B. Excessiveness in individual cases should be evaluated by considering:
>
> 1. The gravity of an offense, as determined by:
>
> a. The seriousness of an offense using a sliding scale where the magnitude of an offense is greater when culpability is high and less when culpability is low;[373] and

365. Walla Walla, Wash., Ordinance 2018-36 § 2 (Sept. 26, 2018).

366. *Id.* (Hindman Aff. ¶ 1.3).

367. *Id.* ¶ 1.4–1.6.

368. *Id.* ¶ 1.5.

369. *Id.* ¶ 1.6.

370. *Id.* § 2(F).

371. *See id.* ¶ 1.4–1.5 ("In short, the 'outsiders' as we have started referring to them, are a significant problem.").

372. Graham v. Florida, 560 U.S. 48, 61–62 (2010).

373. Pimentel v. City of Los Angeles, 974 F.3d 917, 923 (9th Cir. 2020).

b. The harm caused by a violation using a sliding scale where a violation that causes greater harm is considered more significant.[374]

The gravity review should give substantial deference to legislative determinations.[375] In the rare case where the threshold comparison of a fine against the gravity of an offense leads to an inference of gross disproportionality, comparison may be made to:

c. Fines imposed against other offenders in the same jurisdiction; and
d. Fines imposed for commission of the same offense in other jurisdictions.[376]

2. An offender's financial circumstances. However:[377]

a. An offender's ability to pay should not be considered a superseding factor over the gravity of an offense.[378]

3. The excessiveness considerations listed in the framework are not exhaustive and other objective factors may be considered.[379]

C. A fine should be considered excessive only if it is grossly disproportional to the gravity of an offense when considered together with an offender's ability to pay and other objective factors.[380]

374. *Id.* at 923–24.

375. United States v. Bajakajian, 524 U.S. 321, 336 (1998); Harmelin v. Michigan 501 U.S. 957, 998–99 (1991) (Kennedy, J., concurring).

376. *Harmelin*, 501 U.S. 957, 1005 (1991); *see also* Solem v. Helm, 463 U.S. 277, 291–92 (1983) (recommending a comparative analysis of sentences).

377. Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1323 (11th Cir. 2021) (Newsom, J., concurring); City of Seattle v. Long, 493 P.3d 94, 111–13 (Wash. 2021).

378. United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016); *cf. Solem*, 463 U.S. at 291 n.17 (recommending no one factor to be determinative). *Contra* United States v. Levesque, 546 F.3d 78, 84–85 (1st Cir. 2008) (holding that deprivation of livelihood may be an overriding factor).

379. *See Solem*, 463 U.S. at 290, 292, 294 (explaining the Eighth Amendment requires sentences based on objective factors). Judge Tjoflat suggests using the factors codified in 18 U.S.C. § 3553(a) and 18 U.S.C. § 3572. *Yates*, 21 F.4th at 1334–36 (Tjoflat, J., concurring in part and dissenting in part).

380. *See Bajakajian*, 524 U.S. 336–37 (adopting a gross disproportionality standard); *Solem*, 463 U.S. at 290, 292 (determining a proportionality analysis based on objective criteria).

VI. CONCLUSION

The touchstone of the Excessive Fines Clause is proportionality.[381] A fine is constitutionally excessive if it is grossly disproportional to the gravity of an offense.[382] This principle applies to both criminal and civil fines because the Eighth Amendment generally limits the government's power to punish by extracting payments.[383] Financial sanctions are limited by the Excessive Fines Clause if they are meant to punish even in part.[384]

Many jurisdictions have addressed the homeless crisis by adopting restrictions against sitting, lying, and sleeping in public that rely upon civil fines for enforcement.[385] Not much guidance exists regarding the standard that should be used to evaluate excessiveness claims. The Supreme Court paid little attention to the clause until late in the twentieth century.[386] It held in *United States v. Bajakajian* that a civil forfeiture was excessive after comparing the gravity of the offense against the amount forfeited by an offender, but it announced only generalized excessiveness considerations.[387] Many Circuit Courts of Appeal have adopted criteria in similar contexts based upon the factors considered in *Bajakajian*.[388] They have only limited utility however when evaluating the excessiveness of a traditional fine.[389]

When determining if a traditional fine is excessive, circuit courts of appeal have focused on (1) the nature and extent of an offense, and (2) the harm caused by a violation.[390] They are split upon whether an offender's ability to pay should be considered.[391] However, the Supreme Court discussed the

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

382. *Id.* at 337.

383. Austin v. United States, 509 U.S. 602, 609–10 (1993).

384. *Bajakajian*, 524 U.S. at 329 n.4; *Austin*, 509 U.S. at 610–11, 621–22.

385. Blake v. City of Grants Pass, No. 1:18-CV-01823, 2020 WL 4209227, at *2, *4–5 (D. Or. July 22, 2020) , *aff'd in part, vacated in part, remanded sub nom.* Johnson v. City of Grants Pass, 50 F.4th 787 (9th Cir. 2022).

386. *See Austin*, 509 U.S. at 606 (admitting the Court had considered the Excessive Fines Clause only once prior to the case at bar).

387. *See Bajakajian*, 524 U.S. at 336–40 (considering minimal culpability and minimal harm as factors in the Court's analysis).

388. Pimentel v. City of Los Angeles, 974 F.3d 917, 921–22 (9th Cir. 2020).

389. *See* Yates v. Pinellas Hematology & Oncology, P.A., 21 F.4th 1288, 1326–30 (11th Cir. 2021) (Tjoflat, J., concurring in part and dissenting in part) (refusing to apply *Bajakajian* to civil fines).

390. *See Pimentel*, 974 F.3d at 922–24 (applying only two of the four *Bajakajian* factors); Towers v. City of Chicago, 173 F.3d 619, 624–26 (7th Cir. 1999) (looking at the gravity of the offense and the harm caused by the conduct).

391. *See, e.g.*, United States v. Levesque, 546 F.3d 78, 83–85 (1st Cir. 2008) (considering deprivation of livelihood in the court's excessiveness analysis). *But see* United States v. 817 N.E. 29th Drive,

origins of the Excessive Fines Clause in *Timbs v. Indiana* and recognized a common law prohibition against financially crushing amercements that dates back to Magna Carta.[392] Recent decisions by lower courts have relied upon those foundations and held that an offender's financial circumstance is relevant in an excessiveness determination.[393]

Traditional fines should be reviewed for excessiveness by considering the gravity of an offense and an offender's ability to pay.[394] The gravity of an offense should be determined by evaluating the seriousness of an offense and the harm caused by a violation using a sliding scale where gravity increases when offender culpability is higher and harm is more significant.[395] However, a fine may still be appropriate even when an underlying offense is seemingly minor.[396] Substantial deference should be given to legislative determinations regarding the gravity of an offense.[397] An offender's financial circumstances should be considered together with the gravity of an offense, but an offender's ability to pay should not be an overriding factor.[398] Other objective factors may also be considered.[399] A fine should be considered constitutionally excessive only when it is grossly disproportional to the gravity of an offense when considered together with an offender's ability to pay and other objective factors.[400]

The reality is that imposition of any fine against a homeless offender will likely worsen that person's living situation.[401] There may be circumstances where the gravity of an offense nonetheless warrants a heavy fine.[402] However, ability to pay should be considered when determining excessiveness if

Wilton Manors, Fla., 175 F.3d 1304, 1311 (11th Cir. 1999) (declining to apply defendant's financial status as a factor in determining excessiveness).

392. Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019).

393. *Yates*, 21 F.4th 1288, 1318–21 (11th Cir. 2021) (Newsom, J., concurring); Colorado Colo. Dep't of Lab & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101–02 (Colo. 2019); City of Seattle v. Long, 493 P.3d 94, 111–13 (Wash. 2021).

394. *Yates*, 21 F.4th at 1320–23.

395. Pimentel v. City of Los Angeles, 974 F.3d 917, 923–24 (9th Cir. 2020).

396. *Id.*

397. United States v. Bajakajian, 524 U.S. 321, 336 (1998).

398. United States v. Viloski, 814 F.3d 104, 111–12 (2d Cir. 2016).

399. Solem v. Helm, 463 U.S. 277, 290, 292, 294 (1983).

400. *Cf. Bajakajian*, 524 U.S. at 336–37 (adopting a gross disproportionality standard).

401. *See* City of Seattle v. Long, 493 P.3d 94, 114–15 (Wash. 2021) ("It is difficult to conceive how Long would be able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life.").

402. Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 102 (Colo. 2019).

more than mere "lip service" is to be paid to the Excessive Fines Clause and its history.[403]

403. *Long*, 493 P.3 at 114.