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A Proposal to Stop Tinkering with the Machinery of Debt

Brandon Buskey

ABSTRACT. The Supreme Court's decision last term in *Timbs v. Indiana*, which held that the Eighth Amendment's Excessive Fines Clause applies against the states, has renewed interest in whether the Eighth Amendment may curtail the rise of criminal fines and fees that court systems impose primarily to generate revenue. This Essay argues that *Timbs* itself offers little promise in this endeavor, as the Supreme Court has previously held in *Bajakajian v. United States* that a fine is only excessive if it is "grossly disproportionate" to the offense. The Court has since made clear that the test, incorporated from the Eighth Amendment's Cruel and Unusual Punishments Clause, will rarely invalidate a punishment.

The Essay makes a novel proposal to replace the gross-proportionality test with the less deferential proportionality test contained in the Excessive Bail Clause. This test allows only those liberty restrictions that are reasonably necessary to achieve a compelling government interest. Unlike gross disproportionality, the reasonable-necessity test could invalidate the profit motive, which all too often drives financial punishments, as a permissible governmental objective. Where the government could identify a compelling interest, the test would require courts to take into account other, less restrictive punitive options before concluding that a particular financial penalty is necessary.

INTRODUCTION

The use of money as punishment has disfigured our criminal court systems. The rise of financial punishments — an array of fines, fees, surcharges, and other court costs — on people with convictions has been thoroughly documented.[1] The

1. *E.g.*, Kevin R. Reitz, *The Economic Rehabilitation of Offenders: Recommendations of the Model Penal Code (Second)*, 99 MINN. L. REV. 1735, 1736-38 (2015); Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. JUST. 7 (2010), https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [https://perma.cc/YFT6-2PJW]; *Fines, Fees, and Bail*, COUNCIL ECON. ADVISERS 3 (Dec.

debt created by these punishments is devastating, forcing people to forgo necessities for themselves and their families, such as food, utilities, and housing payments.[2] Those who cannot make these sacrifices face jailing in our "modern" system of debtors' prisons.[3]

Like leeches clinging to a drowning victim, court systems impose these fees to ensure their survival. Louisiana reveals this parasitic relationship at its most absurd. The largest funding source for Louisiana's public-defender system is a fee that courts collect from those convicted of crimes.[4] Most of this money comes from traffic tickets.[5] The fee creates an untenable dynamic: public-defender clients know that, unless they are convicted, their lawyers will not be paid.

In 2015, Louisiana's public-defender system experienced a severe budget crisis due to a shortfall in conviction fees.[6] Public defenders responded by placing clients, many of whom were incarcerated, on "waiting lists" for representation.[7] At the ACLU, I led a legal team that sued Louisiana's public-defender system for this denial of counsel. During the investigation, we reviewed reports from local public defenders documenting their efforts to raise funds. What we found was startling. Public defenders in several districts described exhorting sheriffs and district attorneys to prosecute more traffic offenses.[8] Public defenders also lamented the fact that prosecutors were diverting more traffic cases, resulting in

2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [https://perma.cc/R38P-LMBF]; *Profiting from Probation: America's "Offender-Funded" Probation Industry*, HUM. RTS. WATCH 39 (Feb. 2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [https://perma.cc/7ZQF-ADYT].

2. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 8 (2018).

3. *See, e.g.*, Dan King, *The Dickensian Return of Debtors' Prisons*, AM. CONSERVATIVE (July 19, 2018), https://www.theamericanconservative.com/articles/the-dickensian-return-of-debtors-prisons [https://perma.cc/BU5E-BCBA].

4. *2018 Annual Board Report*, LA. PUB. DEFENDER BOARD 1 (Jan. 2019), http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2018%20LPDB%20Annual%20Report%20Website%20Version.pdf [https://perma.cc/5RXG-8MKH].

5. *Id.*

6. *LPDB 2015 Annual Board Report*, LA. PUB. DEFENDER BOARD 1-4 (Jan. 2016), http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2015%20LPDB%20Annual%20Report.pdf [https://perma.cc/E5SE-M87B].

7. Dylan Walsh, *On the Defensive*, ATLANTIC (June 2, 2016), https://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165 [http://perma.cc/YF8E-U4CH].

8. *E.g.*, Rhonda B. Covington, District Defender for the 20th Judicial District, *20th Judicial District Services Plan for Fiscal Year 2015*, at 7 (2015) (on file with author).

fewer convictions and fees.[9] These diversion programs are themselves enrichment schemes, allowing prosecutors to place a price on someone's liberty by conditioning diversion on the payment of a fee.[10]

Louisiana is not alone. States like Oklahoma have effectively barred tax increases to fund their criminal-enforcement systems, in favor of fines and fees.[11] Nationwide, state agencies, judges, and court personnel advocate aggressively against reducing court fees, explicitly invoking their reliance on these penalties for sustenance.[12]

These officials represent the greatest threat to the growing movement to eradicate abusive court debt. Spurred by revelations such as the City of Ferguson's extortion of fines and fees from low-income Black communities through arrests and jailing, reformers have focused primarily on ending debtors' prisons. Their efforts have succeeded in requiring numerous jurisdictions to perform ability-to-pay determinations before incarcerating people for failing to pay court debts.[13]

This year's Supreme Court decision in *Timbs v. Indiana*[14] reinvigorated the debate over whether the Eighth Amendment offers a meaningful additional check on financial punishments. The Eighth Amendment states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[15] *Timbs* held for the first time that the amendment's Excessive Fines Clause applies to the states. However, enthusiasm for the decision may be misplaced, as *Timbs* has nothing to say about the Eighth Amendment's power to restrict financial penalties, whether in the form of fines, fees, forfeitures, or court costs.

In fact, the Supreme Court may have settled this issue over twenty years ago in *Bajakajian v. United States*, and in a manner that drains *Timbs* of its potential

9. *E.g.*, James M. Miller, District Defender for the 5th Judicial District, *5th Judicial District Services Plan for Fiscal Year 2016*, at 1 (2016) (on file with author); *2018 Annual Board Report*, *supra* note 4, at 1.

10. *See* Jessica Pishko, *How Criminal Justice Reform Became an Enrichment Scheme*, POLITICO (July 14, 2019), https://www.politico.com/magazine/story/2019/07/14/criminal-justice-reform-pretrial-diversion-louisiana-227354 [https://perma.cc/8ELX-W2RL].

11. Myesha Braden et al., *Enforcing Poverty: Oklahoma's Reliance on Fines and Fees Fuels the State's Incarceration Crisis*, LAW. COMMITTEE FOR C.R. UNDER L. 5 (2019), https://indd.adobe.com/view/6a8c0376-dba2-4aa2-b64d-f537c63d65b5 [https://perma.cc/AG6U-VAZN].

12. Theresa Zhen, *(Color)blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 177 (2019).

13. *Id.*

14. 139 S. Ct. 682 (2019).

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

to reform fee practices.[16] Borrowing the standard for whether a prison term violates the Eighth Amendment's protection against "cruel and unusual punishments," the Court held that a fine is excessive if it is "grossly disproportionate" to the offense.[17] However, the Court provided scant guidance on how lower courts should apply this standard. In the sentencing context, the Court has stressed that relief under the "grossly disproportionate" standard will be rare.[18]

Thus, for *Timbs* to have any force, impact litigators must upend *Bajakajian*'s gross-disproportionality standard. While numerous scholars have proposed incorporating ability to pay as a factor in the gross-disproportionality inquiry,[19] few have questioned the standard itself. This question is crucial, as merely considering ability to pay will be of limited import if the ultimate standard for relief remains draconian. Further, because determining ability to pay is often an intrusive process overseen by officials with a vested interest in extracting whatever funds a person can pay, overreliance on this approach risks perpetuating the current system.

To resuscitate the Excessive Fines Clause, this Essay argues for replacing gross disproportionality with the proportionality standard from the Excessive Bail Clause. The excessive-bail test sets out a reasonable-necessity standard, requiring all forms of financial penalties to be reasonably calculated to achieve a compelling penological goal. Adopting the reasonable-necessity standard for fines and fees would open a threshold inquiry into whether the government has a compelling interest in using fines and fees to generate revenue, as opposed to traditional goals like retribution. The standard then would demand interrogation of whether the fees actually serve the government's compelling interests without causing undue harm. This heightened scrutiny would more strictly regulate the financial penalties the government imposes primarily for self-perpetuation.

This Essay proceeds in four Parts. Part I explores *Bajakajian*'s destruction of the Excessive Fines Clause. Part II articulates the need for a more rigorous test for excessiveness that goes beyond incorporating ability to pay. Part III makes the case for rejecting gross disproportionality in favor of excessive-bail proportionality, and outlines how that standard would apply in the fees context. Finally, Part IV argues that there is a persuasive basis for the Supreme Court to abandon gross disproportionality in favor of excessive-bail proportionality.

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16. 524 U.S. 321 (1998).

17. *Id.* at 337.

18. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (summarizing the Court's precedents on this point).

19. *See, e.g.*, Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013).

I. *BAJAKAJIAN* AND THE NULLIFICATION OF THE EXCESSIVE FINES CLAUSE

The Supreme Court's decision in *Bajakajian* effectively ended the judiciary's role in curtailing excessive fines. In *Bajakajian*, the Court addressed whether a criminal forfeiture of $357,144 was grossly disproportionate to the offense of failing to disclose the transport of over $10,000 out of the country.[20] After determining that the Excessive Fines Clause applied to criminal forfeitures, the Court addressed the fact that it had never set out a test for excessiveness.[21]

To that end, the Court observed that the Excessive Fines Clause is based on a principle of proportionality, in that the severity of the fine must be proportional to the gravity of the offense.[22] However, the Court found it lacked adequate historical guidance on the appropriate measure of proportionality.[23] The Court consequently invoked two policy considerations derived from the Eighth Amendment's Cruel and Unusual Punishments Clause: (1) deference to legislative judgments about the severity of punishments; and (2) acknowledgement that judgments about the severity of an offense are "inherently imprecise."[24] These considerations persuaded the Court to reject a strict-proportionality standard in favor of the gross-disproportionality standard under the Cruel and Unusual Punishments Clause.[25] Fines that are grossly disproportionate to the gravity of the offense are thus unconstitutional.[26]

However, the Court said nothing more about *how* courts should conduct the gross-disproportionality inquiry. In a brief analysis, the *Bajakajian* Court held that the forfeiture at issue was grossly disproportionate. The Court painted a sympathetic portrait of the defendant, stressing that he committed only a reporting crime unconnected to any other illegal activities, and that he lied about the amount of money he was carrying because, as a Syrian immigrant, he was distrustful of government.[27] This problematic stereotype aside, Bajakajian, in the Court's view, was not the type of person the reporting law targeted—that is, "a money launderer, a drug trafficker, or a tax evader."[28] The Court next characterized the harm caused by the offense as "minimal," in that it only deprived the

20. *Bajakajian*, 524 U.S. at 324.

21. *Id.* at 334.

22. *Id.*

23. *Id.* at 336.

24. *Id.*

25. *Id.*

26. *Id.* at 336-37.

27. *Id.* at 338.

28. *Id.*

Government of knowledge that Bajakajian was transporting a large sum of money out of the country.[29]

At first glance, the Court's analysis appears favorable to those contesting harsh fines. The Court essentially concluded that Bajakajian was a good person who paid too steep a price for a crime that was not so bad. Also encouragingly, the Court relied heavily on its decision in *Solem v. Helm*, where, in a similar spirit, it held that a sentence of life imprisonment without the possibility of parole was grossly disproportionate to the crime of writing a $100 bad check for a defendant who had previously been convicted of several minor offenses.[30]

However, the Court's subsequent decisions have vitiated the gross-disproportionality test's ability to provide a meaningful check on fines. For example, in the 2003 decision *Ewing v. California*, a splintered majority concluded that a sentence of twenty-five years to life under California's "three strikes" law was not cruel and unusual for a person who stole three golf clubs valued at "nearly $1,200."[31] Ironically, Justice Thomas—who authored the *Bajakajian* majority opinion—concurred on the ground that the Cruel and Unusual Punishments Clause does not contain a proportionality guarantee.[32] He added, "[t]he proportionality test announced in *Solem v. Helm*"—and followed in *Bajakajian*—"is incapable of judicial application."[33] Yet even the dissenters, who asserted that judges could objectively administer the gross-proportionality test, acknowledged that sentences would "fail[] the test only in *rare* instances."[34]

That the Cruel and Unusual Punishments Clause will rarely allow courts to disturb sentences is the one unifying principle in the Court's otherwise disjointed jurisprudence. One commenter has argued persuasively that "[t]he Constitution itself promises that the government will not inflict cruel and unusual punishments on individuals, but the Court has essentially decided that no non-capital sentence will ever be deemed unconstitutional."[35]

The lower federal courts have transferred this reticence to the excessive-fines cases, and like the Supreme Court, they have failed to agree on a single test.[36]

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29. *Id.* at 339.

30. 463 U.S. 277, 296-300 (1983).

31. 538 U.S. 11, 28 (2003).

32. *Id.* at 32 (Thomas, J., concurring).

33. *Id.*

34. *Id.* at 36 (Breyer, J., dissenting).

35. Bidish J. Sarma & Sophie Cull, *The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Nonviolent Offenses*, 66 CASE W. RES. L. REV. 525, 554 (2015).

36. David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 543-44 (2017) (discussing appeals courts' various excessive fines tests).

One recent survey found that only four courts of appeals have overturned fines since *Bajakajian*, with two of those cases involving facts functionally indistinguishable from *Bajakajian*.[37] This record indicates that *Bajakajian* is a meager tool for reforming financial punishments.

II. THE NEED TO MOVE BEYOND ABILITY-TO-PAY DETERMINATIONS

Post-*Timbs*, the question becomes whether advocates can infuse the Excessive Fines Clause with more authority than *Bajakajian* provides to invalidate financial penalties that jurisdictions impose for revenue. The most popular argument is that the history of the Excessive Fines Clause requires courts to consider an individual's ability to pay when setting the amount of a fee.[38] Scholars favoring this approach note that, even when courts do not jail people for failing to pay their fees, unaffordable court debt can still amount to indefinite punishment.[39] They additionally invoke the Excessive Fines Clause's roots in the English legal principle known as *salvo contenemento suo*, meaning, roughly, "saving his livelihood."[40] This principle prevented courts from levying unaffordable fines.[41]

Requiring courts to consider one's ability to pay under the Excessive Fines Clause is a worthwhile goal. Unfortunately, this argument has been unsuccessful to date. Except for the First and Second Circuits, the courts of appeals have rejected ability to pay under *Bajakajian*'s gross-disproportionality test.[42]

Even if courts were to consider ability to pay, this factor might not achieve meaningful change. Indeed, ability-to-pay determinations may perpetuate the existing extortive system.[43] Several shortcomings combine to make such determinations potentially problematic. The first is that the Supreme Court has not provided a precise definition of the term, leaving lower courts to examine "the entire background of the defendant, including his employment history and financial resources."[44]

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37. *Id.* at 544.

38. *See generally* Colgan, *supra* note 2 (arguing that the Excessive Fines Clause requires an ability-to-pay determination at sentencing).

39. *Id.* at 8.

40. Pimentel, *supra* note 36, at 562.

41. *Id.*

42. *See* United States v. Viloski, 814 F.3d 104, 110 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1223 (2017); McLean, *supra* note 19, at 834-35, 835 n.7 (citing United States v. Levesque, 546 F.3d 78, 83-85 (1st Cir. 2008); United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007)).

43. *See* Zhen, *supra* note 12, at 193-201.

44. Bearden v. Georgia, 461 U.S. 660, 670 (1983).

This lack of standards leads to a second shortcoming: ability-to-pay determinations grant decision-makers, many of whom profit from these hearings, relatively unfettered discretion. Louisiana again illustrates how judges can abuse this discretion. Individuals who owed fines and fees to the Orleans Parish, Louisiana criminal court filed a federal civil-rights action in 2017, asserting in part that the court's judges had an inherent conflict of interest in assessing ability to pay because proceeds from fines and fees accounted for one quarter of the Judicial Expense Fund — the court's administrative budget.[45] The judges used money from the Fund to pay court personnel salaries and court expenses.[46] The Fifth Circuit agreed that the arrangement created an untenable "temptation" for judges to abuse ability-to-pay assessments, a ruling that endangers judicial funds across the state.[47] Worse still, officials like these may harbor implicit (or explicit) biases that make them more likely to jail low-income individuals or those from racial and ethnic minorities by concluding that they are able to pay, but are willfully choosing not to.[48]

The third shortcoming is that jurisdictions place onerous burdens of proof on individuals who assert that they cannot afford court fees. Courts often force these people to disclose numerous categories of income, such as public-assistance income, liquid assets, owned property, or, as in Alabama, whether they "own anything of value" including TVs, stereos, or jewelry.[49] The inquiries also cover a person's expenses, like "rent, utilities . . . , food, clothing, health care/medical, insurance, car payments or transportation expenses . . . child support payments and alimony."[50] Theresa Zhen notes that, while some jurisdictions allow individuals to detail their finances under oath, others require people to produce verifying documentation, a major barrier for those with irregular or informal work histories.[51]

Having scoured an individual's financial past for any indication of ability to pay, and motivated by self-interest or implicit bias to find that a person can pay *something*, officials are likely to impose the same perpetual payment obligations that many hope to end under the Excessive Fines Clause.[52] These shortcomings

45. Cain v. City of New Orleans, 281 F. Supp. 3d 624, 657 (E.D. La. 2017), *aff'd sub nom.* Cain v. White, 937 F.3d 446 (5th Cir. 2019).

46. *Id.* at 654.

47. Cain v. White, 937 F.3d 446, 454 (5th Cir. 2019).

48. *See* Zhen, *supra* note 12, at 207.

49. *Id.* at 202-03.

50. *Id.* at 202.

51. *Id.* at 203.

52. *See id.* at 198-99.

suggest that advocates should explore other means to reanimate the Excessive Fines Clause. That exploration should begin with *Bajakajian*.

III. THE CASE AGAINST GROSS PROPORTIONALITY AND FOR EXCESSIVE-BAIL PROPORTIONALITY

The *Bajakajian* Court overlooked two critical considerations that, taken together, show the Court should have looked to the Excessive Bail Clause for the proper proportionality test. The first omission concerns the Court's selection of guiding policy concerns. To review, the Court identified the need for deference to the legislature and the difficulty inherent in evaluating subjective decisions about the proper amount of a fine. However, the Court neglected to mention another policy concern: that officials are far likelier to abuse fines when their budgets depend on them. As Justice Scalia explained in *Harmelin*:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.[53]

The metastasis of financial punishments also stems from the fact that it is easier for states to derive revenue from court debt than to raise taxes.[54] The reality that court systems unjustly enrich themselves at the expense of the individuals they prosecute weighs heavily against an excessive-fines standard as permissive as gross disproportionality.

The *Bajakajian* Court's second omission is more baffling. The Court incorporated the definition of "excessive" from the Cruel and Unusual Punishments Clause, despite the fact that it had already defined "excessive" with respect to the Excessive Bail Clause. In the 1951 decision *Stack v. Boyle*, the Court held that the purpose of requiring bail was to ensure an individual's presence at trial, and "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive.'"[55]

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53. Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., announcing judgment).

54. *See* Colgan, *supra* note 2, at 22.

55. 342 U.S. 1, 5 (1951).

Stack raises an issue of constitutional construction. The Eighth Amendment prohibits excessive bail, excessive fees, and cruel and unusual punishments. Neither the courts nor scholars have explained why the Eighth Amendment would use the same term ("excessive") with two different definitions, or why it would have two different terms ("excessive" and "cruel and unusual") with the same definition.

The Justices engaged in a related and instructive debate over whether the Cruel and Usual Punishments Clause contains a proportionality guarantee. In *Harmelin*, Justice White argued in dissent that the Eighth Amendment contained a general-proportionality guarantee for punishments because the Framers equated excessive fines with disproportionate fines.[56] Justice Scalia retorted:

> The logic of the matter is quite the opposite. If "cruel and unusual punishments" included disproportionate punishments, the separate prohibition of disproportionate fines (which are certainly punishments) would have been entirely superfluous. When two parts of a provision (the Eighth Amendment) use different language to address the same or similar subject matter, a difference in meaning is assumed.[57]

Accepting this logic, the most plausible reading of the Eighth Amendment is that the Framers intended for the two clauses that use the term "excessive" to share the same meaning, and for the clause that uses the term "cruel and unusual" to mean something else.[58]

Harmonizing the Excessive Fines Clause with the Excessive Bail Clause offers a more rigorous standard for limiting financial punishments. The Excessive Bail Clause requires the government to articulate a compelling purpose before imposing bail.[59] The Supreme Court has only recognized compelling interests in ensuring that people accused of offenses attend their trials and in protecting public safety.[60] Bail is more likely excessive when courts impose it for purposes beyond these traditional goals.[61]

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56. *Harmelin*, 501 U.S. at 1009 (White, J., dissenting).

57. *Id.* at 978 n.9 (Scalia, J., announcing judgment).

58. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (arguing that constitutional meaning can be derived from "read[ing] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase").

59. *See* United States v. Salerno, 481 U.S. 739, 753-55 (1987) (finding that federal government had compelling interest in protecting public safety prior to trial).

60. *Id.*

61. Cohen v. United States, 82 S. Ct. 526, 528 (1962).

Within this framework, the Supreme Court and lower federal courts have expressed skepticism about whether the collection of revenue is a compelling goal. In *Cohen v. United States*, the Court disapproved the practice of setting bail on the condition that the amount would satisfy any fines imposed upon a later conviction.[62] The Eleventh Circuit has questioned whether a jurisdiction's "pecuniary interests" are sufficiently compelling,[63] while the Fifth Circuit has found that collecting administrative fees is not compelling.[64] These courts agree that, although the Eighth Amendment does not forbid pursuing fiscal benefit, restrictions advancing this goal must only effect "a minor and largely theoretical restriction on a person's liberty interest."[65] When the fees impede a person from posting bail and being released, they are excessive.[66]

Applied to financial penalties, this precedent would require jurisdictions to identify a compelling interest in setting fines and fees. The traditional ends of punishment—retribution, deterrence, incapacitation, and rehabilitation—would surely qualify. However, the analysis would require jurisdictions to identify alternative compelling interests for additional costs like Louisiana's recoupment fees discussed above. Though the Excessive Fines Clause governs partially punitive fines that advance nonpunitive interests,[67] the Supreme Court has not considered which of these nonpunitive interests are compelling. However, extrapolating from the bail cases discussed in the previous paragraph, sheer revenue generation would likely be inadequate.

If the government can identify compelling interests in setting fees, the proportionality inquiry under the Excessive Bail Clause would next examine the degree to which the fees advance the government's goals. The Supreme Court has explained in the bail context that "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more."[68] For the government's nonpunitive interests in revenue generation, it could not impose costs greater than reasonably necessary to cover actual expenses.[69]

The government's punitive interests in retribution and deterrence would be subject to a similar standard. Beyond fines and forfeitures, it would be difficult

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62. *Id.*

63. Campbell v. Johnson, 586 F.3d 835, 843-44 (11th Cir. 2009) (per curiam).

64. Broussard v. Parish of Orleans, 318 F.3d 644, 648-49, 651 (5th Cir. 2003).

65. *Campbell*, 586 F.3d at 843 (discussing *Broussard* and Payton v. County of Carroll, 473 F.3d 845, 846-50 (7th Cir. 2007)).

66. *Id.*

67. Austin v. United States, 509 U.S. 602, 610-11 (1993).

68. United States v. Salerno, 481 U.S. 739, 754 (1987).

69. *Campbell*, 586 F.3d at 843-44.

to classify most fees as retributive, as they are typically not calibrated based on the severity of the charge.[70] Rather, these fees are better suited for deterrence. Colgan explains, "it is the creation of a 'pinch on the purse' that deters bad acts, and the degree to which the pinch is felt necessarily depends on the amount of coin in a given defendant's purse."[71] A person's financial circumstances thus would be relevant to determining the fee's deterrent effect.

However, even if a court set affordable bail, the reasonable-necessity test would require the fee to satisfy both means and ends proportionality. A punishment violates means proportionality if it is unnecessarily costly compared to other alternatives.[72] Means proportionality derives from Jeremy Bentham's utilitarian proposition that "punishment itself is an evil and should be used as sparingly as possible"; thus, the state cannot justify a harsh punishment if "the same end may be obtained by means more mild."[73] The excessive-bail jurisprudence embodies this principle by invalidating bail determinations if a less restrictive alternative would be equally effective.[74]

A punishment violates ends proportionality if its burdens greatly outweigh its benefits. Again from Bentham, "the evil of the punishment [should not exceed] the evil of the offence."[75] This analysis requires the government to show that the punishment does what is intended—for instance, deterring future wrongdoing—and that these salutary benefits outweigh the harms inflicted on the person being punished. The relevant harms to the individual include collateral consequences such as the impact of sanctions on the person's livelihood.[76]

Satisfying both means and ends proportionality for recuperative financial penalties would be difficult for the government. On means proportionality, the government would first have to show that the other penalties imposed (incarceration, statutory fines, restitution, etc.) did not subsume the marginal effects of additional fees and court costs. If not, the government must still demonstrate that other less restrictive alternatives, such as diversion or treatment programs, are not equally effective in curbing future deviance.

Ends proportionality presents a more formidable hurdle. The Supreme Court has already recognized that severe debt has "the perverse effect of inducing

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70. Zhen, *supra* note 12, at 184 & n.45.

71. Colgan, *supra* note 2, at 67.

72. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 592-93 (2005).

73. *Id.* at 595.

74. *Id.* at 603.

75. *Id.* at 593.

76. *Id.* at 595.

the [debtor] to use illegal means to acquire funds."[77] Recent sociological research corroborates the Court's contention.[78] Research has also revealed the pernicious collateral consequences of debt, such as destabilizing or separating families through the loss of housing or the depletion of finances needed to provide necessities like food or medicine.[79] Jurisdictions would have to mount significant evidence that court costs provide other penological benefits that counterbalance these harms.

Forcing the government to prove that harmful financial penalties are necessary and effective would likely invalidate far more schemes than the gross-proportionality test, even with an ability-to-pay component. In addition, hearings conducted under this standard could provide an optimal forum for litigators and advocates to expose the extractive practices of our court systems.

IV. THE FEASIBILITY OF REPLACING *BAJAKAJIAN*

Replacing the gross disproportionality test under the Excessive Fines Clause with the Excessive Bail Clause's proportionality standard would better confront our parasitic system of criminal legal debt. Nevertheless, gross disproportionality is the law of the land. Adopting a new standard therefore requires overturning or limiting *Bajakajian*. But there are reasons for hope.

First, overturning *Bajakajian* may be viable despite the stare decisis doctrine. Although stare decisis promotes the predictable development of legal principles, the Court has recognized that it is a prudential policy rather than an "inexorable command."[80] The doctrine holds less sway in constitutional decisions, due to the near-impossibility of correcting judicial error through legislation.[81] And it holds no sway where the relevant decision is "unworkable" or "badly reasoned."[82]

These considerations urge abandoning *Bajakajian*'s constitutional holding. As discussed, gross disproportionality stands on unstable historical and doctrinal foundations. The Court has admitted that "the precise contours of [the gross-disproportionality test] are unclear,"[83] and *Bajakajian*'s author has disclaimed the test as incoherent.[84] Further, *Bajakajian* is the Court's only decision

77. Colgan, *supra* note 2, at 63-64.

78. *Id.*

79. *Id.* at 66-67.

80. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

81. *Id.*

82. *Id.*

83. Lockyer v. Andrade, 538 U.S. 63, 73 (2003).

84. Ewing v. California, 538 U.S. 11, 32 (2003) (Thomas, J., concurring).

interpreting proportionality under the Excessive Fines Clause, and it has caused tremendous discord among the lower federal courts.[85]

Short of abandoning the decision, *Bajakajian* could be limited to forfeitures. As the dissent notes, the tradition of barring excessive fines was intended in part to prevent sovereigns from using unaffordable debt to jail their enemies.[86] Forfeitures, however, do not necessarily raise this concern. While they may be ruinous, they do not impose a new financial obligation that the government may enforce prospectively by incarceration — seizure of the property in question necessarily satisfies the individual's financial obligation.[87] Further, the *Bajakajian* Court signaled that it was deciding only the question of "whether a punitive *forfeiture* is constitutionally excessive,"[88] and did not address whether the gross-disproportionality standard applies to other forms of financial punishment. These aspects of the decision create an opening for a more rigorous standard of excessiveness — and one anchored to the Excessive Bail Clause — in nonforfeiture cases where the defendant cannot immediately satisfy the fine and stands at risk of prolonged economic punishment, backed by the threat of incarceration.

CONCLUSION

Timbs did not ring the death knell for extortive fines and fees.[89] But it should catalyze debate about how the Eighth Amendment's Excessive Fines Clause can meaningfully support the movement to end these practices. Doing away with *Bajakajian*'s misguided gross-disproportionality test in favor of the proportionality standard under the Excessive Bail Clause is a promising option. Along with requiring courts to account for a person's ability to pay a fine, the reasonable-necessity test would impose a heavier burden on the government to prove that the fine serves a compelling interest, and that it does so better than less oppressive alternatives. A state like Louisiana would surely struggle under this standard to justify its wide array of recuperative fees, such as those that pit public defenders' fiscal needs directly against their clients' rights to a zealous defense. This heightened scrutiny thus could undermine the profit schemes that have warped our criminal-justice systems.

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85. Pimentel, *supra* note 36, at 543-44 (describing various and inconsistent tests circuits apply under *Bajakajian*).

86. United States v. Bajakajian, 524 U.S. 321, 354-55 (1998) (Kennedy, J., dissenting).

87. *Id.* at 355.

88. *Id.* at 334 (majority opinion) (emphasis added).

89. Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeiture's Coffin*, AM. C.L. UNION (Mar. 15, 2019, 4:45 PM), https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/supreme-court-didnt-put-nail-civil-asset [https://perma.cc/7PAB-JKC3].

Deputy Director for Smart Justice Litigation, American Civil Liberties Union. *I would like to thank Jordan González, my* Forum *Editor at the* Yale Law Journal*, for his enthusiasm, diligence, and insight in shaping this Essay.*