Towing After *Timbs*: Why Vehicle Impoundment Violates the Excessive Fines Clause

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The plain text of the Eighth Amendment prohibits the government from punishing people with excessive fines. But until the Excessive Fines Clause was incorporated in 2019, it did not apply to municipal or state governments. In applying federal doctrine to the local context, many courts have not yet extended this guarantee to an obvious application: expensive traffic and parking tickets compounded by the exorbitant costs associated with towed cars or losing the car altogether at a lien sale. While towing companies are third-party contractors, this Note argues that because police authorize the towing companies to tow private vehicles and fine their owners, these punishments fall within the bounds of the Excessive Fines Clause. Additionally, whether fines related to car towing are excessive may depend on the financial circumstances of the car owner. What may be a manageable unplanned expense for one person is not so for others and can throw families living in poverty into economic insecurity and instability. Given this exposure to instability, fines that are reasonable for one family are not for another. Though there is no explicit Eighth Amendment protection against arbitrary impoundments, there is legal momentum around the idea; a growing number of jurisdictions are finding Excessive Fines violations for vehicle impoundments. This Note presents a comprehensive analysis of the Eighth Amendment Excessive Fines Clause as applied to traffic and parking violations, especially when it results in a car being towed without the consent of the owner.

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INTRODUCTION

On a summer afternoon, writer David Sheff found himself at the San Francisco impound lot after his car was towed within only 15 minutes of an accidental parking violation.[1] There, Sheff met neighbors whose impoundments had devastating consequences: a woman who would lose her job if she did not get her car back in time to go to work but who did not have the nearly $900 it would cost; a father who desperately needed to pick up his children; a small business owner whose business relied on his then-impounded truck and who took out a payday loan with 50% interest to retrieve the truck after losing four days of income from the tow.[2]

Sheff, an author on *TIME* Magazine's 2009 list of Most Influential People, could afford the tow, but many others at the impound lot could not.[3] As he put it, "For me, a towed car was an inconvenience. For them, it was a catastrophe."[4] Quantitative data confirms Sheff's insight. The Federal Reserve's latest report on the economic well-being of U.S. households found that 18% of people did not have savings to cover a $100 unexpected expense, and another 14% could not cover an unexpected expense over $500.[5] In California, the average cost to get a car back after an impoundment is $500.[6] In New York City, retrieving a towed car costs at least $300 before tickets and storage fees, and the police sell the vehicles at auction after just ten days.[7] In Chicago, it costs

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1. David Sheff, *If You Want to See Inequality in the U.S. at Its Worst, Visit an Impound* Lot, TIME (Aug. 26, 2014, 4:33 PM), https://time.com/3182726/if-you-want-to-see-inequality-in-the-u-s-at-its-worst-visit-an-impound-lot/ [https://perma.cc/9DGS-FQ9P].
2. *Id.*
3. *See The 2009 TIME 100*, TIME, https://content.time.com/time/specials/packages/completelist/0,29569,1894410,00.html [https://perma.cc/PCP7-WCJY].
4. Sheff, *supra* note 1.
5. *See* Bd. of Governors of the Fed. Rsrv. Sys., Economic Well-Being of U.S. Households in 2022 2 (May 2023).
6. *See* W. CTR. ON L. & POVERTY, TOWED INTO DEBT: HOW TOWING PRACTICES IN CALIFORNIA PUNISH POOR PEOPLE 7 (Mar. 18, 2019).
7. *See Towed Vehicles*, N.Y. POLICE DEP'T, https://www.nyc.gov/site/nypd/ services/vehicles-property/towed-vehicles.page [https://perma.cc/98MZ-GB2R]. The cost of a boot is $136 and a tow is at least $140, with increasing fees depending on the size of the vehicle. There is an additional $80 execution fee and a dispatch fee that starts at $70, also with size-based increases. The city further charges $20 per night for storage. One of the reasons the city tows vehicles is for having over $350 in unpaid parking tickets, meaning that for these car owners the cost of retrieval will be nearly $800 at a minimum. *See Vehicle Auctions*, NYC DEP'T OF FIN., https://www.nyc.gov/site/finance/vehicles/auctions.page [https://perma.cc/4YBC-C3QB] ("If you don't retrieve your vehicle within 72 hours of the

around $200 to reclaim a car.[8] Comparing these towing fines with the Federal Reserve's economic data leads to an obvious conclusion: drivers across the country cannot afford an unexpected impoundment.

A towed car can lead to harsh consequences for low-income families, who often cannot afford to retrieve their cars. For many, a towed car is not just a towed car; it is the potentially permanent loss of their mode of reliable transportation and the access to employment, education, and medical care that comes with it.[9] And for the rising population who live in their cars, a towed car means the loss of their shelter, possessions, and mobility, and a difficult economic recovery.[10] Given that many poor families are unable to cover the typical cost of a tow, these families are more likely to lose their car in a subsequent lien sale.[11] In Chicago, a report by ProPublica found that even a single unpaid parking ticket can lead to bankruptcy for the city's working poor and that the problem disproportionately affects Black residents.[12]

There are also collateral legal consequences of unpaid tickets. For example, Chicago's anti-scofflaw ordinances—designed to get people with unpaid tickets to pay—can cause those who are unable to pay to become ineligible for jobs working for the city and lose access to many programs designed to alleviate the effects of

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tow, the auction process will begin. The vehicle may be auctioned off as soon as [ten] days after being towed.").

8. *See* Elliot Ramos, *Chicago's Towing Program Is Broken*, WBEZ 91.5 CHI. (Apr. 1, 2019). https://interactive.wbez.org/brokentowing/ [https://perma.cc/267X-4Z88] ("The city sold 24,000 cars for scrap prices [in 2017]. The market value was likely five times higher."). The city's towing subcontractor credits the city for some of the tows, many of which are never reclaimed. The tow company then buys these towed vehicles—many well below the market rate—and sells them for parts or scraps. This means the city can essentially pay for its towing contract using residents' cars. *See id.*

9. *See* W. CTR. ON L. & POVERTY, *supra* note 6, at 4.

10. *See id.* at 19–20; *see also* Madeline Gorman, *Op-Ed: The True Costs of Towing: Unemployment, Racial Inequity, and Homelessness*, ENO CTR. FOR TRANSP. (May 6, 2021), https://enotrans.org/article/op-ed-the-true-costs-of-towing-unemployment-racial-inequity-and-homelessness/ [https://perma.cc/N473-BKCG].

11. *See* W. CTR. ON L. & POVERTY, *supra* note 6; *see also* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 5. In this context, lien sales occur when car owners owe debt to a towing company. The creditor can take possession of the property, the vehicle, and sell it to cover the debt. *See* Lucas Downey, *What Is a Lien Sale, and How Does It Work?*, INVESTOPEDIA (Jan. 18, 2024), https://www.investopedia.com/terms/l/lien-sale.asp [https://perma.cc/L5YY-YWQB].

12. *See* Melissa Sanchez & Sandhya Kambhampati, *Driven into Debt: How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA ILL. (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/ [https://perma.cc/BPZ4-SFMF].

poverty, such as grants for furnace replacements.[13] These disastrous results can be from "relatively minor offenses: outstanding parking tickets, lapsed vehicle registration, and remaining parked in one place for more than 72 hours."[14]

The consequences of a vehicle seizure through forfeiture and impoundment laws extend beyond the financial and into the familial. For example, a parent who loses their job due to a lack of reliable transportation after an impoundment would likely find it impossible to make child support payments; failure to pay child support is a crime that frequently leads to incarceration, and incarceration causes family destabilization.[15] The tow affects not only the owner themself, but also family members that rely on the vehicle for transportation to get to work, school, or doctors' appointments.[16] The tow can affect parents' ability to meet their kids' most basic needs, including even sleep.[17]

These collateral consequences compound in the criminal sphere. Indeed, though private debtors' prisons "have been widely illegal in the United States for more than 150 years," many people are still jailed for court debts, including "even those resulting from traffic . . . violations."[18] A shocking number of so-called "failure to pay" arrests are related to traffic violations.[19] And the fines that many cannot afford are set so high because cities use them as a revenue source.[20] By instituting systems that deduct a certain

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13. *See id.* Anti-scofflaw laws in this context are those designed to get people with unpaid traffic and parking tickets to pay.

14. W. CTR. ON L. & POVERTY, *supra* note 6, at 4.

15. *See* Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J. F. 430, 435–36 (2020).

16. *See* W. CTR. ON L. & POVERTY, *supra* note 6, at 16.

17. One mother, Laqueanda Reneau, had to take public transit everywhere after her car was impounded and ultimately surrendered for tickets she could not afford to pay. Her long commutes from the far south suburbs of Chicago to the northside resulted in her five-year-old son only getting seven hours of sleep a night, fewer than the recommended ten hours for a child of that age. As Reneau said, "he hasn't got his full rest. I realized how much of a chain reaction that is." Sanchez & Kambhampati, *supra* note 12; *see How Much Sleep Your Kids Need: Recommendations by Age*, CLEVELAND CLINIC (Sept. 15, 2022), https://health.clevelandclinic.org/recommended-amount-of-sleep-for-children [https://perma.cc/8GVR-F97P].

18. Johann D. Gaebler et al., *Forgotten But Not Gone: A Multi-state Analysis of Modern-day Debt Imprisonment*, PLOS ONE 1 (Sept. 13, 2023).

19. *See id.* at 12 (37% in Oklahoma; 64% in Texas and Wisconsin, excluding arrests for unidentified reasons).

20. *See* Jessica Dimmock, *How Cities Make Money Fining the Poor*, N.Y. TIMES MAG. (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html [https://perma.cc/U984-PWBA]. In Corinth, Mississippi, for example, "the percentage of

amount of debt for every day spent in jail, local governments coerce money out of the indigent, forcing them to go to every length possible to secure the funds to avoid jail time.[21] Despite being against Supreme Court precedent,[22] local courts across the country—from Mississippi,[23] to New York,[24] Texas,[25] Wisconsin,[26] and Oklahoma[27]—all jail people for failure to pay.

Towing has implications for racial equity as well. Before Chicago implemented impoundment reform in 2020, police could automatically impound vehicles during traffic stops for minor offenses, such as playing loud music or littering.[28] These "quality-of-life" offenses resulting in tows were primarily enforced in Black neighborhoods.[29] In Cook County, Illinois, where Chicago is located, Black residents were found to be "particularly vulnerable" to "hostage-taking" of their licenses, vehicles, or both due to accumulated tickets.[30] As a result, Black residents were also more likely to file for Chapter 13 bankruptcy.[31] The fines and potentially permanent loss of vehicles caused by tickets and impoundments can be devastating for families, especially Black families; they can

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revenue generated by criminal-justice-related debt has grown." *Id.* The city's biggest expense is public safety, "or the very people extracting the fines." *Id.* The city thus enables a costly a system that relies on, rather than serves, its poorest citizens.

21. *See id.* At the time of this article—2019—Corinth deducted $25 from a person's debt for every day spent in jail.

22. *See* William v. Illinois, 399 U.S. 235, 242–43 (1970) (finding that imprisoning only indigent defendants for the same crime because of an inability to pay violated the Fourteenth Amendment); *see also* Tate v. Short, 401 U.S. 395, 397–99 (1971) (same).

23. *See* Dimmock*, supra* note 20.

24. *See* Steven Yoder, *New York State Judges Are Jailing People Who Can't Afford Their Fines*, THE APPEAL (Oct. 28, 2019), https://theappeal.org/new-york-state-judges-are-jailing-people-who-cant-afford-their-fines/ [https://perma.cc/WAF5-HPBA].

25. *See* Gaebler et al., *supra* note 18.

26. *See id.*

27. *See id.*

28. *See* Elliot Ramos, *Chicago City Council Approves Reforms to Vehicle Impoundment Program*, WBEZ CHI. (July 22, 2020), https://www.wbez.org/stories/chicago-city-council-approves-reforms-to-vehicle-impoundment-program/cbd354e9-a037-403c-b547-2bc683d2607a [https://perma.cc/ZDQ9-YYZT].

29. Gorman, *supra* note 10.

30. Edward R. Morrison & Antoine Uetwiller, *Consumer Bankruptcy Pathologies* 20 173 JITE 174, 194 (2017).

31. *See id.* at 178. Chapter 13 requires the consumer to pay all disposable income to their creditors for three to five years to relieve the remaining debt. *See id.* at 174. This further increases financial fragility, as the consumer is unable to save for necessary expenses. *See id.* at 189. Consumers often choose Chapter 13 because it can help them keep their assets, though this often does not work out in practice. *See id.* at 177, 181.

affect every aspect of their lives, making it impossible to build savings and meet basic needs.[32]

This Note argues that the newly incorporated Excessive Fines Clause[33] provides a much-needed solution to the serious problem of overzealous car towing regimes that lead to bankruptcy and lost jobs and perpetuate a cycle of poverty. The argument proceeds in three Parts. Part I considers the historic and legal background of the Excessive Fines Clause and explains why civil municipal fines have been left out of the doctrine for centuries. Part II applies the Excessive Fines Clause to nonconsensual impoundments. This Part examines three factors that support applying the Excessive Fines Clause to municipal impoundments: (1) the partially punitive standard; (2) the relationship between the car owner, violator, state, and towing company; and (3) the excessiveness standard, including ability-to-pay considerations and gross disproportionality between the wrongdoing and the resulting punishment. Finally, Part III considers legal and legislative solutions, including judicial approaches to the issue and possible legislation. These solutions would curb unnecessary impoundments while conserving municipalities' ability to tow when absolutely necessary.[34]

I. FACTUAL & LEGAL BACKGROUND

A. A MODERN HISTORY OF THE EXCESSIVE FINES CLAUSE

The Eighth Amendment to the U.S. Constitution was adopted in 1791 as part of the Bill of Rights.[35] It states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[36] The Supreme Court did not interpret the middle clause, commonly referred to as the Excessive

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32. *See generally supra* notes 2–17 and accompanying text; *see also* Sanchez & Kambhampati, *supra* note 12. Ticket debt in Chicago, for example, is disproportionately high in poor, mostly Black neighborhoods, and these residents are more "affected by ticket debt because they have less money to pay tickets even before debt mounts." Sanchez & Kambhampati, *supra* note 12.

33. Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019).

34. As detailed *infra*, Part II.A.2, this Note recognizes that towing is, of course, sometimes legitimate, such as when a vehicle is parked so as to dangerously obstruct traffic or a car is parked in a handicapped spot indefinitely.

35. *See Bill of Rights (1791)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/bill-of-rights [https://perma.cc/KHM9-3YU6].

36. U.S. CONST. amend. VIII.

Fines Clause, until 1989 in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*[37] In that case, the Court held that punitive damages—court-ordered monetary awards from one non-governmental litigant to another that go beyond making the injured party "whole"—were not subject to the clause.[38] Opting for a narrow interpretation, the Court "rejected outright the historical interpretations reached by the academic community" and held that excessive fines were limited to "payment to a sovereign as punishment for some offense."[39]

Just a few years later, in *Austin v. United States*, the Court expanded its understanding of the clause and found that it was not limited to the criminal punishment context.[40] *Austin* concerned whether the Excessive Fines Clause applies to civil *in rem*—against a property—actions and forfeitures. The Court reiterated its dictum in *Browning-Ferris* that the Eighth Amendment, including the Excessive Fines Clause, and its predecessor, the English Bill of Rights of 1689, "were intended to prevent *the government* from abusing its power to punish" and were "intended to limit only those fines directly imposed by, and payable to, the government."[41] The Court went on to state that the pertinent question in *Austin* was not whether "forfeiture . . . is civil or criminal, but rather whether it is punishment."[42] The Court took the analysis a step further: even though forfeitures may be both remedial and punitive, the duplicative nature of forfeiture does "not exclude the possibility . . . that it is subject to the limitations of the Excessive Fines Clause."[43]

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37. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 497 U.S. 257, 260 (1989); *see also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 297 (2014) [hereinafter Colgan, *Reviving*].

38. *See Browning-Ferris Indus.*, 497 U.S. at 260; *see also* Colgan, *Reviving*, *supra* note 37.

39. Colgan, *Reviving*, *supra* note 37, at 298. Specifically, academics at the time concluded that punitive damages would have been included in the historical understanding of "fines." *Id.* at 298–99.

40. *See* Austin v. United States, 509 U.S. 602, 608 (1993) ("Some provisions of the Bill of Rights are expressly limited to criminal cases. . . . The text of the Eighth Amendment includes no similar limitation.").

41. *Id.* at 607 (emphasis in original).

42. *Id.* at 610.

43. *Id.* That same term, the Court granted certiorari for another case with an Excessive Fines element in need of interpretation, *Alexander v. United States*, this time concerning whether a criminal *in personam*—against the person—forfeiture is subject to the clause. *See id.* at 558. The Court held that the criminal forfeiture in this case was "clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional

The next in this line of cases is *United States v. Bajakajian*, in which the Court finally wrestled with the meaning of the word "excessive" in the context of the clause.[44] The case considered the failure to report a sum of $357,144 in cash to U.S. Customs and Border Protection at the airport.[45] This violated federal law, which provided that people who transport more than $10,000 must declare those monies at customs.[46] The district court found that the entire amount was subject to forfeiture, given its involvement in the offense, but opted to only order forfeiture of $15,000 out of concern for violating the Eighth Amendment.[47] Still, the government appealed all the way to the Supreme Court, attempting to obtain the entire sum of cash.[48]

The Supreme Court, however, concluded that the forfeiture of any currency was punitive, especially considering that states initiate forfeiture only after the property is implicated in a felony—here, the failure to report.[49] The Court expressly adopted a standard for determining whether a punitive forfeiture violates the Excessive Fines Clause: "if it is grossly disproportional to the gravity of a defendant's offense."[50] The Court briefly mentioned some of the history of excessive fines, including the Magna Carta's requirement that fines—then called amercements—"should be proportioned to the offense and . . . should not deprive a wrongdoer of his livelihood."[51] Finally, the Court went on to prescribe two relevant limiting principles to the excessiveness analysis: (i) deference should be given to the legislature in its determination of appropriate punishments, and (ii) appropriate punishments may not always be perfectly proportionate to the offenses, allowing some wiggle room.[52] For these reasons, the Court adopted the

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fine." *Id.* Given the fact-specific nature of deciding whether the fines at issue were excessive in light of the crimes committed, the Court remanded the case. *See id.* at 559.

44. *See* Colgan, *Reviving*, *supra* note 37, at 298.

45. *See* United States v. Bajakajian, 524 U.S. 321, 324 (1998).

46. *See id.* at 325.

47. *See id.* at 325–26.

48. *See id.* at 326–27.

49. *See id.* at 328. Of note, the government unsuccessfully argued that the forfeiture at issue was corollary to the historic legal fiction of in rem forfeiture, an action taken against 'guilty' property. Courts traditionally did not consider in rem proceedings punitive. The Court, however, held that because the government was also pursuing criminal charges against Bajakajian, it was an in personam forfeiture—against the criminal defendant. *See id.* at 329–32.

50. *Id.* at 334.

51. United States v. Bajakajian, 524 U.S. 321, 334 (1998).

52. *See id.* at 336.

Cruel and Unusual Punishments Clause's gross disproportionality standard rather than use history as a guide for interpretation.[53] Despite these limitations to the Excessive Fines Clause, the Court still declared Bajakajian's punishment to be unconstitutionally excessive, affirming the lower court's ruling ordering the government to return the funds.[54]

In sum, since 1989, the Supreme Court has determined that the Excessive Fines Clause *does not* apply to punitive damages, *does* apply to civil fines so long as the fines are at least in part meant to punish, and is only violated when there is gross disproportionality between the wrongdoing and the subsequent punishment. The following section discusses the incorporation of the clause and the constitutional analysis leading to incorporation.

B. INCORPORATION AND THE DEEPLY ROOTED HISTORY OF THE EXCESSIVE FINES CLAUSE

The dearth of case law on the Excessive Fines Clause may be because it was not incorporated against the states until 2019, in *Timbs v. Indiana*.[55] Tyson Timbs was sentenced in state court to a combination of home detention, probation, mandatory participation in a court-supervised addiction-treatment program, as well as fees and "costs" totaling $1, 203.[56] The state of Indiana brought a separate civil suit for forfeiture of Timbs' car, a Land Rover SUV, that Timbs had purchased for $42,000, alleging that the vehicle was used for criminal activity.[57] The state trial court denied the forfeiture, holding that it would be grossly disproportionate to the maximum $10,000 fine available under the Indiana criminal code and so would be unconstitutional under the Excessive Fines Clause.[58] The state appellate court affirmed, and the Indiana Supreme Court reversed on the grounds that the

53. *See id.*
54. *See id.* at 339–40.
55. *See* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019). Incorporation is a process by which the Supreme Court decides that an aspect of the Bill of Rights applies not only to the federal government, but to the states as well through the Fourteenth Amendment's Due Process Clause. To be incorporated, the clause must be "fundamental to our scheme of ordered liberty" and "deeply rooted in the country's history and tradition." McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).
56. *See Timbs*, 139 S. Ct. at 686.
57. *See id.*
58. *See id.*

Excessive Fines Clause applied only to federal actions.[59] The Supreme Court of the United States then granted certiorari to resolve the question of the Excessive Fines Clause's incorporation to the states.[60] The Court held:

> Like the Eighth Amendment's proscriptions of cruel and unusual punishment and excessive bail, the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority. This safeguard, we hold, is fundamental to our scheme of ordered liberty, with deep roots in our history and tradition. The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.[61]

In supporting this incorporation, Justice Ginsburg traced the Clause's more than 800-year-long history beginning with the Magna Carta, expanding upon its brief mention in *Bajakajian* and its more thorough examination in *Browning-Ferris* as related to punitive damages between private parties.[62] The Magna Carta required that "economic sanctions be proportioned to the wrong and not be so large as to deprive an offender of his livelihood."[63] Ginsburg also referenced Blackstone's 1769 Commentaries on the Laws of England, asserting that "no man shall have a larger

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59. *See id.*
60. *See id.*
61. Timbs v. Indiana, 139 S. Ct. 686, 686–87 (2019) (internal citations omitted).
62. *Id.* at 687–88; *see also* The Magna Carta, § 20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225). The Court then detailed the deeply rooted history of the clause's presence in American colonial law, including in eight states' constitutions in 1787, encompassing 70% of the American population at the time, and in 35 of 37 states in 1868 when the Fourteenth Amendment—through which Bill of Rights is incorporated—was ratified. *See Timbs*, 139 S. Ct. at 688. In the unanimous *Timbs* decision, the Court specified that in deciding to incorporate the Excessive Fines Clause, it was not reviewing whether certain applications of the Clause were fundamental or deeply rooted, but rather if the Clause as a whole was. *See id.* at 682, 690. The Court made a clear distinction in the "deeply rooted" analysis—a right can be deeply rooted and thus incorporated without each possible application having to independently be deeply rooted. *Id.* at 682, 690–91. For an example of a deeply rooted right with a modern application, the Court pointed to *Packingham v. North Carolina*, 582 U.S. 98, 105–08 (2017). *See Timbs*, 139 S. Ct. at 690. In that ruling, the Court held that the First Amendment freedom of speech right applied to a North Carolina statute regulating social media access; the right broadly is fundamental and deeply rooted and thus applied without needing to consider whether the social media specific circumstance was itself fundamental and deeply rooted. *See id.*
63. *Timbs*, 139 S. Ct. at 688 (internal quotations omitted) (citing The Magna Carta, § 20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225)).

amercement imposed upon him, than his circumstances of personal estate will bear. . . ."[64]

Although the Supreme Court did not interpret the Excessive Fines Clause for nearly 200 years after its ratification, its incorporation in 2019 indicated a turning point in the Clause's history. Now that Excessive Fines Clause claims are available as protection against state and local governments, litigants will likely make many more claims under the Clause in the coming years. The following section considers the application of the Excessive Fines Clause and its doctrine to the context of municipal car towing.

II. INTERPRETING THE EXCESSIVE FINES CLAUSE: TICKETS, TOWS, AND LIENS

As explained above, there is little Supreme Court guidance on interpreting the Excessive Fines Clause, and the existing case law is associated only with federal crimes. How this clause applies to state and local fines, including car towing, is thus an open question. But the Second Circuit has held that "the *Timbs* decision affirmatively opens the door for Eighth Amendment challenges to fines imposed by state and local authorities,"[65] and other circuits are likely to follow. As established in the Introduction, nonconsensual car tows can lead to missed work and income and loss of the vehicle itself, which can mean losing shelter and transportation.[66] They have implications for racial justice and family stability. At first glance, these consequences certainly seem like they would rise to the level of an excessive fine for parking violations or unpaid tickets. This section analyzes how the Excessive Fines Clause doctrine applies to impoundments, including developing interpretive disagreements among state, district, and appellate courts. The analysis explores three primary questions: (A) are impoundments partially punitive?; (B) who are the actors involved and what are their relationships to the vehicle

64. *Timbs*, 139 S. Ct. at 688 (citing 4 William Blackstone, Commentaries on the Laws of England *372 (1769)). Amercements were payments made to the "crown" for offenses. While previously distinct from fines, the terms became interchangeable by the 18th century. *See id.* at 688 n.2.

65. Pimentel v. Los Angeles, 974 F.3d 917, 922 (2d Cir. 2020).

66. *See supra* Introduction.

and the state?; and (C) can impoundments be considered excessive fines?

A. IMPOUNDMENTS ARE PARTIALLY PUNITIVE

Regardless of whether a fine is excessive, it must be punitive to trigger the Excessive Fines Clause analysis.[67] Under the *Austin* standard, a fine need only be partially punitive to trigger the Excessive Fines Clause and need not be a criminal penalty.[68] The first step in analyzing whether the Excessive Fines Clause specifically applies to civil impoundments and their resulting fines and consequences is to determine whether they are partially punitive.

1. *Legislative Insights*

One important consideration in the punitiveness analysis is how the legislature describes impoundment.[69] Looking to state statutes and municipal codes provides insight into the legislature's intent, implicitly via context, i.e. the structure of the statutory text, or explicitly via direct statement or legislative history.[70] Characterizing a fine as punitive in a municipal code is a simple way to establish punitive intent. But saying a fine is not intended to punish does not necessarily mean that it is not punitive.[71] A

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67. *See* U.S. v. Viloski, 814 F.3d 104, 109 (2016). In the developing case law on the municipal towing issue, the defending parties have sometimes conceded this first step of the Excessive Fines Clause analysis without arguing that the tow is not partially punitive. *See, e.g.*, Tsinberg v. City of New York, 2021 WL 1146942, at *8 (S.D.N.Y. Mar. 5, 2021) ("Here, the parties and the Report focus only on the second question, assuming that the Excessive Fines Clause applies in the first instance."); *see also* Blickenstaff v. City of Hayward, 2023 WL 187100, at *7 (N.D. Cal. Jan. 13, 2023) ("Notably, neither side points me to any case law addressing . . . whether the impoundment of a vehicle constitutes a punishment falling within the Excessive Fines Clause. . . .").

68. *See* Austin v. United States, 509 U.S. 602, 618 (1993).

69. *See, e.g.*, *id.* at 619. The Court here looked to federal legislation describing forfeiture: "We find nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment." Courts must analyze the text and legislative history to verify the punitive intent of the statute under which the municipality conducted the forfeiture in question.

70. *See id.*

71. *Cf.* United States v. Halper, 490 U.S. 435, 446–48 (1989). The *Halper* Court considered whether fines were criminal or civil for the purposes of double jeopardy safeguards. The government argued that "whether proceedings are civil or criminal is a matter of statutory construction." *Id.* at 447. Yet the Court held that it was not appropriate to merely defer to the statute in the context of the "'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Id.* So, when there are

statutory description of a fine as punishment is thus sufficient to meet the partially punitive standard, but it is not necessary.

While the structure of various municipal codes will vary from city to city, looking at several cities' codes may reveal patterns of punitive intent or a lack thereof. A legislature can determine that a fine is punitive by explicitly characterizing it as such or by creating a "link to prohibited conduct or treatment of economic sanctions like other recognized forms of punishment."[72]

In *City of Seattle v. Long*, for example, the plaintiff challenged the city's tow of his truck—which he lived in at the time—pursuant to a municipal code prohibiting parking in the same place for more than 72 hours.[73] The relevant municipal code states: "Vehicles in violation of this section are subject to impound as provided for in Chapter 11.30 SMC, in addition to any other penalty provided for by law."[74] The code's characterization of the impoundment as being "in addition to any *other* penalty" signals that the legislature also intended the tow as a penalty.[75] The inclusion of the word "other" applies the characterization of penalty to the tow itself rather than just to associated tickets or different penalties. In Tampa, Florida, impoundments are also statutorily categorized as punitive. Section 15-125 of its Code of Ordinances is titled "Additional penalties and enforcement include immobilization, impoundment, and use of a collection agency."[76] In Seattle and Tampa, the city codes do the work of defining impoundments as punitive, through structure or explicit statement.

Not every municipal code so clearly defines towing for parking violations as a penalty, however. For example, while Chicago's

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important constitutional liberties at stake, the courts may look beyond the statute to determine the nature of a fine.

72. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 13 (2018).

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

74. SEATTLE, WASH., MUN. CODE § 11.72.440 (2006), https://library.municode.com/wa/seattle/codes/municipal_code [https://perma.cc/SB6S-H4PR].

75. *Long*, 493 P.3d at 99 ("the plain language shows that one purpose of the ordinance is to penalize violators") (emphasis in original); *see also* ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012) (discussing the interpretive canon of *noscitur a sociis*—it is known by its associates—which requires that when any words in a statutory text are "associated in a context suggesting that they have something in common, they should be assigned a permissible meaning that makes them similar").

76. TAMPA, FLA., CODE OF ORDINANCES § 15-125, https://library.municode.com/fl/tampa/codes/code_of_ordinances?nodeId=COOR_CH15PA_ARTIIREPEPE_DIV4PEEN_S15-126IMIMVE [https://perma.cc/4EXA-6QL4].

municipal code indicates that it may impound vehicle for traffic code "violations," it does not associate those tows with punitive intent; the relevant section of the code never uses the word "penalty."[77] When a city's code explicitly categorizes impoundments as punitive, as Tampa's does, it meets the partially punitive requirement of the Excessive Fines Clause without the need for further inquiry.[78] City codes like Chicago's, without explicit linkage between punitive intent and the purpose of impoundment, may make proving partial punitiveness for Excessive Fines purposes more difficult. As detailed in the next section, however, establishing that the fine goes further than would be needed for purely remedial purposes can overcome a lack of clear punitive intent in the municipal code.[79]

2. *The Remedial/Punitive Sliding Scale*

As described by the Indiana Supreme Court on remand in *Timbs II*, the more remedial a fine, the less punitive, and vice versa.[80] A fine is remedial if it pays for the cost of some service or directly resolves some harm done.[81] Determining if a fine is remedial is, thus, a two-step process. In step one, the court must determine the harm caused by the prohibited activity.[82] In other

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77. *See generally* CHI., ILL., MUN. CODE § 9-92, https://codelibrary.amlegal.com/codes/chicago/latest/overview [https://perma.cc/6F8T-F4EN].

78. *See supra* Part II.A.

79. *See, e.g.*, Beatty v. Gilman, F. Supp. 3d __ (D. Conn. 2024) (analyzing non-statutory factors in meeting the partially punitive standard).

80. *See* State v. Timbs (*Timbs II*), 134 N.E.3d 12, 36 (Ind. 2019). Despite courts framing punitiveness and remediability as a sliding scale, where something could be, say, 40% remedial and 60% punitive, there is evidence that courts in the founding era would not have delineated punitive fines from remedial fines. Rather, a fine was a fine was a fine. *See* Colgan, *Reviving*, *supra* note 37, at 311. So, while for the purpose of winning an Excessive Fines Clause claim, it is necessary to argue that a fine is partially punitive under current doctrine, this doctrine itself may deserve pushback.

81. *See, e.g.*, Austin v. United States, 509 U.S. 602, 621 (1993) (finding that while "forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society," forfeiture of a legally owned vehicle used to convey contraband could not be considered remedial); U.S. v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) (holding that removing guns from circulation was remedial as it kept "potentially dangerous weapons out of the hands of unlicensed dealers"); Helvering v. Mitchell, 303 U.S. 391, 401 (1938) (finding that "sanctions imposing additions to a tax" have a "remedial character" because "they reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud").

82. While courts have not broken down the analysis as such, it follows that in order to determine if something remedies a harm done, it is first necessary to identify the harm. In the examples listed *supra* note 81, the harms would be transporting contraband, the

words, *why* was the activity prohibited in the first place? Then, in step two, the court must determine if the fine corrects the harm.[83] If the fine completely remedies the harm, the fine is purely remedial.[84] If the fine partially remedies the harm but goes further than needed, it is likely partially punitive and partially remedial.[85] If the fine is unrelated to the harm, the fine is not remedial and is purely punitive.[86] This sliding scale is crucial because a fine need only be *partially* punitive to trigger the Excessive Fines Clause, so even the slightest punitive intent will suffice.[87]

Bajakajian—the unreported currency at customs case—is one useful data point in which the Supreme Court found a fine to be partially punitive rather than purely remedial, as the federal government argued.[88] The harm the government alleged was "a loss of information regarding the amount of currency leaving the country."[89] Forfeiture of the cash in question would have compensated the government for monetary loss,[90] but the government faced a loss of information, not money. Awarding the government the cash would not have remedied the loss of information.[91] The fine in *Bajakajian* was thus found to meet the partially punitive standard.[92]

This framework can also apply to a more relatable example: a parking ticket for overstaying a parking meter. The ticket would be purely remedial if the fine were equal to the cost of remaining parked at the meter. If, however, the fine were larger than needed to recover the lost revenue for the purpose of deterring people from overstaying their meters, the fine would be partially punitive. As

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potential circulation of dangerous weapons, tax fraud, and the administrative expense to identify the fraud, respectively.

83. Following the examples set out *supra* note 81, the remedies would be forfeiting the contraband, forfeiting the weapons from the unlicensed dealers, and charging the fraudulent taxpayer for both the unpaid taxes and the cost of investigation.

84. For examples of purely remedial fines and forfeitures, see *supra* note 81.

85. *See, e.g.*, *Austin*, 509 U.S. at 610–11 (1993) (concluding that the forfeiture in question served "in part to punish").

86. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 332 (1998) (holding that the currency forfeiture served "no remedial purpose.").

87. *See Austin*, 509 U.S. at 610–11.

88. *See* 524 U.S. 321, 329 (1998).

89. *Id.*

90. *See id.*

91. *See id.*

92. *See id.*

the Supreme Court explained in *Bajakajian*, "[d]eterrence . . . has traditionally been viewed as a goal of punishment."[93]

How does this paradigm apply to a vehicle tow? There are circumstances where municipalities impound improperly parked cars for legitimate safety reasons, such as impeding traffic or blocking a fire lane.[94] In these cases, the initial tows are not punitive, as they resolve the underlying harm. To remain purely remedial in these circumstances, the associated costs for the car owner cannot be greater than is necessary for the city to recoup the cost of moving the car. If the fines were out of proportion with the costs associated with towing and storage, they could be partially punitive rather than purely remedial. If a court detects any level of punitiveness, the Excessive Fines Clause analysis is likely to apply.

Fitzpatrick v. City of Los Angeles presents a useful example of the paradigm applied to municipal towing.[95] Los Angeles maintains an "Unpaid Parking Tickets Vehicle Seizure Policy," or VSP, through which the city seizes vehicles via boot or tow without warrant until the tickets are paid, pressuring the owner into paying.[96] Pursuant to this policy, the city towed plaintiff Breonnah Fitzpatrick's car following several unpaid parking tickets.[97] Fitzpatrick repeatedly explained to the city that she had not paid the tickets because she was in the hospital and was unable to work due to COVID-19 and her medical condition.[98] Regardless, the city refused to grant her relief or release her car from the impound lot until she paid the tickets and the towing and storage charges she had accrued.[99]

The city argued that the towing and storage charges were not fines under the Excessive Fines Clause because they were remedial "administrative charges."[100] At the time of the impoundment, however, the vehicle was safely parked and was not impeding traffic; therefore, the car was not towed to remedy an

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93. *Id.*
94. *See* Ramos, *supra* note 8 ("So-called hazard tows, for example, involve cars that block alleys and fire hydrants.").
95. *See* 2023 WL 3318748 (C.D. Cal. Jan. 31, 2023).
96. *See id.* at *3.
97. *See id.* at *4.
98. *See id.* at *4.
99. *See id.*
100. *See id.* at *32.

underlying public safety concern.[101] Rather, under the VSP, the city towed the car to pressure the owner to pay the unpaid parking tickets.[102] The four original tickets that accumulated during Fitzpatrick's hospital stay totaled $764 for expired meters and violating a "no park" order for street cleaning.[103]

Applying the parking analysis above, these initial fines are likely punitive, contrary to the government's argument.[104] The later tow did not remedy the wrongdoing—unpaid parking tickets—as it did not compensate the city for the tickets. The tow itself was thus not remedial, but punitive. Despite the city's argument, the documents it submitted to the court "repeatedly refer[red] to a 'penalty'" in discussing methods used to enforce payment on overdue fines.[105] At its core, the impoundment was punishment for a punishment; it did not remedy the unpaid tickets, nor did it remedy the underlying parking violations that resulted in the tickets. Therefore, the impoundment—itself an attempt to enforce other punitive fines—was at least partially punitive, if not entirely so.[106] In short, tows to enforce or collect other punitive fines are themselves within the realm of punishment.

Determining where towing fees fall on the remedial-to-punitive spectrum is not always so straightforward. In *Long*, Seattle argued that Long's accrued fines and fees were not punitive, but remedial, because they were meant to recoup the city's towing and storage expenses.[107] The Supreme Court of Washington asserted that the "fees were imposed only as a result of the impoundment, . . . [which was] characterize[d] as a penalty. While the costs may

101. *See* Fitzpatrick v. City of Los Angeles, 2023 WL 3318748, at *4 (C.D. Cal. Jan. 31, 2023).

102. *See id.* at **3–4. While there have been no factual findings in this case as this decision was ruling on a motion to dismiss, the VSP-related facts are presumed to be true for the purposes of the legal analysis.

103. Def.'s Req. for Judicial Notice in Supp. Mot. Dismiss Pl.'s Fourth Am. Compl. Pursuant to Fed. R. Civ. P 12(B)(6).

104. *See supra* note 94 and accompanying text.

105. Fitzpatrick v. City of Los Angeles, 2023 WL 3318748, at *32 (C.D. Cal. Jan. 31, 2023) ("the City's own documents, of which the Court took judicial notice at Defendants' request, repeatedly refer to a 'penalty' related to the underlying parking citations, late fees, other 'increased penalties' from various agencies, 'legal action to satisfy the outstanding fin(es)' that could include 'seizing property' and 'garnishment of wages,' and so forth.").

106. *See id.* ("The Court rejects Defendants' characterization of the VSP. It is, at least in part, punitive and thus cognizable under the Eighth Amendment.").

107. *See* City of Seattle's Opening Brief at 12, City of Seattle v. Long, 493 P.3d 94, 109 (Wash. 2021).

be remedial, they are also punitive."[108] Under the *Long* court's framing, impoundments that have an associated penalty, such as a ticket, comprise one part of a greater punitive measure.[109]

One could argue that a punitive tow is separate from the remedial fees imposed to recoup the cost of towing and storage, and that therefore they should be considered separately for Excessive Fines purposes. Indeed, courts may still adopt a less holistic view than the *Long* court and analyze the impoundment and subsequent fines separately.[110] But courts should resist the temptation to differentiate the tow itself from the associated costs because the associated costs would not exist without the initial impoundment.[111] In other words, there is but-for causation between the punitive impoundment and the associated costs: but for the city punitively impounding the resident's car, there would be no towing or storage fees. The fines result from a punitive action, and the city knows that the car owner will have to pay the fines when it orders a tow; thus, the fines themselves should be seen as punitive and inseparable from the initial impoundment.[112]

If courts were to view the tow and its associated costs as part of a whole rather than as isolated consequences of the initial wrongdoing, then municipal towing would be considered punitive most of the time. This is especially true when considering that it is a common practice to give a punitive ticket at the same time as ordering a tow.[113] These measures likewise can be a package deal, as declining to do so may create a workaround for cities. Considering the tow and the ticket separately allows cities to split what could be considered a partially punitive, and sometimes partially remedial, enforcement action into a punitive ticket and a

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108. *Long*, 493 P.3d at 109.

109. *See id.* ("The fees were imposed only as a result of the impoundment, which SMC 11.72.440(E) characterizes as a 'penalty.' While the costs may be remedial, they are also punitive.").

110. *See, e.g.*, Barber v. Alabama, 2021 WL 37634, at *7 (N.D. Ala. Jan. 5, 2021). In this case, the court distinguished between the impoundment ordered by the police and the fines called for by the tow company as separate measures.

111. *See Long*, 493 P.3d at 109.

112. *Cf. id.* (impliedly applying but-for causation to show how "remedial" fines are ultimately punitive).

113. *See, e.g.*, *Common Towing Questions*, CHICAGO.GOV, https://www.chicago.gov/city/en/depts/streets/supp_info/common_towing_questions.html [https://perma.cc/Y2C4-ZF72] (providing information on the ticket associated with the tow); *How To Get Your Towed Car Back*, CITY OF BOSTON, https://www.boston.gov/departments/transportation/how-get-your-towed-car-back [https://perma.cc/LX67-V6WC] (reminding residents to also pay the parking ticket associated with their tow).

remedial tow. While it is true that there is sometimes a need for a truly remedial impoundment, such as for a car parked in a fire lane, simultaneous ticketing implicates punitive intent. When a car towed to remedy a safety issue is also ticketed by the police ordering the impoundment, the tow and the ticket should be considered as two parts of one whole, rather than as separate measures. Considering tickets, tows, and their associated costs as parts of a punitive whole originating from a single police interaction eases the already low burden of establishing that impoundments are often at least partially punitive.

Impoundments are thus at least partially punitive when they do not correct a safety hazard that needs remediation, especially when their purpose is to coerce payment for another wrongdoing, as in *Fitzpatrick*. The associated costs of impoundments cannot be viewed in isolation; if the initial wrongdoing resulting in impoundment did not require an impoundment as a remedy, the impoundment *and* the associated costs can be seen as two subparts of one overarching punitive measure.

3. *Permanence Is Not a Requirement of the Excessive Fines Clause*

Some have argued that impoundment is not a fine because it is only a temporary, rather than permanent, deprivation of one's property.[114] Although permanence is not an explicit requirement of the Excessive Fines Clause,[115] courts should address its role in Excessive Fines analysis. Cities that argue that property loss must be permanent to be unconstitutional point to *Coleman v. Watt*, where the Eighth Circuit concluded that a fine must be intended to be permanent for the Excessive Fines Clause to apply.[116] As the *Long* court pointed out, however, the *Coleman* court mistakenly focused only on the subject—permanent property loss—of the Supreme Court cases *Austin* and *Alexander v. United*

114. *See, e.g.*, City of Seattle v. Long, 493 P.3d 94, 109 (Wash. 2021); Culley v. Marshall, 2022 WL 2663643, at *3 (11th Cir. 2022); *accord* Coleman v. Watt, 40 F.3d 255, 263 (8th Cir. 1994).

115. Neither the text of the Eighth Amendment nor Supreme Court doctrine requires permanence.

116. *See* Coleman v. Watt, 40 F.3d 255, 263 (8th Cir. 1994); *Long*, 493 P.3d at 110 (Wash. 2021) ("Seattle does not meaningfully dispute the remedial versus punitive nature of the impoundment. Instead, the city argues that a fine must be a permanent loss as required by *Coleman*.").

States rather than looking to their reasoning.[117] *Austin* established the partially punitive standard, which requires an analysis of the "function of a specific sanction, not its form or duration,"[118] while *Alexander* held that forfeitures can be considered punitive for Eighth Amendment purposes.[119] As the *Long* court wrote, "While it is true that *Austin* and *Alexander* concerned the permanent loss of property via forfeiture, neither requires it."[120] The *Coleman* court likely erred by interpreting the subject of the Supreme Court cases—permanent property loss—as a threshold requirement, even though the Court never addressed the question of permanence.

Even assuming that the Clause requires permanent loss, establishing permanence can be simple when a temporary impoundment has permanent consequences.[121] These consequences can include loss of employment, bankruptcy, and family destabilization.[122] Additionally, vehicle owners must pay significant expenses to repossess their vehicles, and the money paid for repossession is lost permanently. Finally, impoundment often leads to permanent property loss if the property owner is unable to pay the associated fines on time.[123] Because permanence is not an established factor, but could be proven regardless, permanence or the lack thereof will likely not be the determinative

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117. *See Long*, 493 P.3d at 110 ("While *Austin* and *Alexander* concerned the permanent loss of property via forfeiture, neither requires it.").

118. Austin v. United States, 509 U.S. 602, 618 (1993) ("[S]anctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish.").

119. *See* Alexander v. U.S., 509 U.S. 544, 558–59 (1993).

120. *Long*, 493 P.3d at 110.

121. Other constitutional interpretations support the idea that deprivation of property need not be permanent to have constitutional significance. In analyzing whether post-seizure hearings for towed vehicles satisfied due process requirements, the Ninth Circuit wrote that the "interest in the uninterrupted use of an automobile is substantial. A person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed." Stypmann v. City of San Francisco, 557 F.2d 1338, 1342–44 (9th Cir. 1977). Thus, the impoundment in question was a "temporary but substantial deprivation." *Id.* The Supreme Court has also found that "'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 318 (1987).

122. *See supra* Introduction.

123. In 2017, Chicago sold an average of 66 impounded cars a day, around 24,000 vehicles in total. *See* Ramos, *supra* note 8. That same year San Francisco sold 6, 100 impounded vehicles, around 17 cars a day. *See* W. CTR. ON L. & POVERTY, *supra* note 6.

factor in establishing whether a government action is punitive for the purposes of the Excessive Fines Clause.

In sum, it is easy to establish that an impoundment is partially punitive, so long as the tow is not fully remedial in nature and is intended in part to punish. Courts may consider the wording of the municipal code and permanence elements as additional factors in the partially punitive analysis, but these factors are not dispositive. Even if these factors weigh against a finding of punitiveness, it is a very low bar to meet.

B. RELATIONSHIPS BETWEEN THE ACTORS INVOLVED

Before turning to the primary question—whether a fine is excessive—the Excessive Fines Clause analysis must consider the actors involved.[124] Specifically, it asks: what is the relationship between the vehicle owner and the punitive action?[125] If the vehicle owner is not the actor being punished, the Excessive Fines Clause may not apply. And does it matter if the fines are not being paid directly to the local government but rather to a third-party towing company?[126] The State Action Doctrine, which allows those acting "under color of state law" to be held responsible for constitutional violations, would suggest it does not.[127]

1. *The Car Owner/Wrongdoer Relationship: An Unfortunate Loophole*

When a city tows a vehicle for punitive reasons, and someone other than the person for whom the punishment is meant owns the vehicle, an Excessive Fines Clause claim may not be available. For example, consider a driver who is ticketed for playing loud music while borrowing their friend's car and never pays. If that car were later towed for failure to pay the ticket, the tow would end up punishing the owner rather than the driver towards whom the punishment is targeted. Still, the owner may not be able to bring an Excessive Fines Clause claim because some jurisdictions

124. *See, e.g.*, Fitzpatrick v. City of Los Angeles, 2023 WL 3318748, at *33 (C.D. Cal. Jan. 31, 2023).

125. *See, e.g.*, Austin v. United States, 509 U.S. 602, 615–16 (1993); Krueger v. City of Eastpointe, 413 F. Supp. 3d 679, 694 (E.D. Mich. 2020).

126. *See, e.g.*, *Fitzpatrick*, 2023 WL 3318748, at *33.

127. *See* Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 563 (2008). For more on the State Action Doctrine, see also *infra* note 147.

require that the Clause only apply to the person the municipality seeks to punish, creating a counterintuitive gap in the Excessive Fines Clause analysis.[128] Punitive intent towards one person does not extend to another, even if the punitive action has a substantial effect on the other person.

Take, for instance, a set of cases from the Eastern District of Michigan concerning an impoundment that occurred after a drunk driving incident.[129] The driver was not the owner of the vehicle; it belonged to his grandfather, who did not learn until a few days after the arrest and seizure that the car had been impounded.[130] By the time the case was heard, the grandfather, the owner of the car, faced over $6, 000 in fines.[131] He eventually filed a lawsuit making, *inter alia*, an Excessive Fines Clause claim against the city for not releasing his car.[132] The district court ruled that because the owner was not "a 'defendant' . . . being punished for an 'offense,'" the Excessive Fines Clause did not apply to him.[133] Although the government was acting punitively, it only meant to punish the driver of the vehicle, not the owner of the property implicated in the punishment.

Distinguishing between the person whom the city intends to punish and the person who suffers the consequences creates an unfortunate legal loophole to the Excessive Fines Clause. For example, consider a fine that is clearly excessive, such as the currency forfeiture in *Bajakajian*. Bajakajian was taking the unreported $357,144 out of the country to pay off a legally accrued debt.[134] Supreme Court precedent dictates that forfeiting such a large amount of money for failing to report the currency at customs

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128. *See* Krueger v. City of Eastpointe, 413 F. Supp. 3d 679, 694 (E.D. Mich. 2020).

129. In the original case, *Krueger v. City of Eastpointe*, police stopped Douglas Slayton for driving erratically, found him to have a high blood alcohol level, and arrested him for "operating a vehicle while intoxicated (OWI)." *Id.* at 684. Police also found drugs in the car and discovered that Slayton had a suspended license. *See id.* During the traffic stop, the vehicle Slayton was driving was impounded and towed, and Slayton signed a Notice of Seizure and Intent to Forfeit under Michigan state law. *See id.*

130. *See id.* at 685. The grandfather attempted to have the car released from the impound lot, but did not file his motions for return of the vehicle in the correct court. *See id.*

131. *See id.* at 694.

132. *See id.*

133. *Id.* Of note, the court also asserted that "even if the government were to have initiated a forfeiture proceeding against Slayton—the person to who the government was directing its effort to penalize for the commission of a serious offense—the forfeiture proceedings would almost certainly be proportional to his crimes and thus not be in violation of the Eighth Amendment." *Id.*

134. *See* United States v. Bajakajian, 524 U.S. 321, 337–38 (1998).

is excessive under the Excessive Fines Clause.[135] But what if the money Bajakajian was taking out of the country had been entrusted to him by a friend for the same purpose of paying off a debt abroad? Under the Eastern District of Michigan's framework, the Excessive Fines analysis would not apply, as the friend would not be "a 'defendant' . . . 'being punished for an 'offense.'"[136] Rather, like the grandfather in *Krueger*, the friend whose money was forfeited would suffer an unfortunate externality of punishment intended for someone else and would be left without access to a remedy under the Excessive Fines Clause.

While it does seem unfair that someone who did no wrong should suffer the consequences of another's wrongdoing, it is worth examining whether it is really possible to have a completely innocent car owner in this circumstance. Consider again the hypothetical car owner whose car has been towed following a friend's negligence to pay a "quality-of-life" ticket incurred while borrowing the car. A city may argue that the owner who let a friend borrow their car, as described above, is contributorily negligent by letting an irresponsible friend borrow the car and thus is to some extent also liable for the wrongdoing.[137] While a court could rule in the city's favor on the matter of contributory negligence, the car owner would still be less liable than the actual wrongdoer, and thus the fine is more likely to be excessive in comparison to the owner's more limited negligence. Additionally, there could be circumstances in which the car owner is truly innocent (such as a parent whose teenager borrows their car without permission, resulting in a tow).

It is difficult to imagine that this outcome was the intention the Framers had in mind when ratifying the Eighth Amendment.[138] To avoid this absurd result, there are other ways to frame cases where the person being de facto punished is not the person for whom the punishment is intended. For example, rather than use the relationship between the property and its owner as a

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135. *See id.* at 324.

136. Krueger v. City of Eastpointe, 413 F. Supp. 3d 679, 695 (E.D. Mich. 2020). Of course, there would be nothing to bar a suit between the two friends for recovery of the lost funds.

137. *See, e.g.*, Austin v. United States, 509 U.S. 602, 615–16 (discussing the Court's previous rejections of the innocent-owner defense, as "the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence").

138. Consider the popularity of the Blackstone ratio—the idea that it is better to let ten guilty men go free than let one innocent suffer—during the founding fathers' time. *See generally* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. (1997).

dispositive factor barring Excessive Fines claims, courts can use it as just one analytical factor. A fine may not be excessive in proportion to some wrongdoing but be disproportionate when the property owner has done nothing wrong. This framework would not mean that offenses committed while using borrowed property must go unpunished, but it would mean that punishment must be designed to avoid externalities affecting innocent individuals, even if their property is implicated in the misdeed. In other words, the Excessive Fines Clause can be interpreted broadly to include fines that unavoidably affect people towards whom the punitive fine was not directed.

2. *The State/Tow Company Relationship and the State Action Doctrine*

Some case law suggests the Supreme Court might have intended to adopt a strict "to the sovereign" requirement that would require the government to both impose and collect fines to trigger the Excessive Fines Clause. Even if that were so, a tow conducted by a private company should be considered state action subject to the Excessive Fines Clause when it is ordered by the government.

a. *The "To a Sovereign" Requirement*

In several cases, judges have ruled that impoundment fees are not subject to the Excessive Fines Clause because they are paid to a third-party contractor and not to "a sovereign."[139] That is to say, when the government contracts with private companies to carry out police-directed impoundments, the government denies responsibility for the fees paid to these private companies. This raises two questions: is there actually a "to a sovereign" requirement in Excessive Fines Clause doctrine? And, if there is, what does and does not qualify as a sovereign under this requirement?

For the first inquiry, the *Browning-Ferris* ruling cited as establishing the "to a sovereign requirement" is critical. As discussed above, *Browning-Ferris* established that the Excessive Fines Clause does not apply to punitive damages for civil actions

139. Andreaccio v. Weaver, 2023 WL 3724714, at *6 (D. Nev. May 9, 2023); Barber v. Alabama, 2021 WL 37634, at *7 (N.D. Ala. Jan. 5, 2021).

between private parties.[140] In other words, if the fine arises from actions between non-government actors, the party facing the fine cannot make an Excessive Fines Clause claim. The Supreme Court was unequivocal in its analysis: "[T]he history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[141] Several district courts have taken this reasoning literally in applying it to impoundments despite the context being very different from that of the punitive damages at issue in *Browning-Ferris*.[142]

In at least one instance, a court has found that the "to a sovereign" requirement is non-binding dicta because the holding of *Browning-Ferris*—that the Excessive Fines Clause does not apply to disputes between private parties—is irrelevant in cases where "governmental entities authorize and direct unconstitutional conduct."[143] Vehicle owners facing an involuntary tow may pay towing and storage fees to the impoundment company that the city contracted or to the city directly.[144] The fines at issue are thus usually only in part paid directly to the government in the form of the accompanying traffic citation. The fines for towing and storage, however, are not paid directly to the government but instead to its third-party contractor. Additionally, the state may still implicate itself in the events that occur after the initial call to impound a vehicle when its policy is to only call pre-approved towing companies and mandate that they charge the car owners only what is reasonable and customary for the services.[145]

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140. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 497 U.S. 257, 259 (1989); *supra* notes 37–39 and accompanying text.

141. 497 U.S. at 268.

142. For example, *Barber v. Alabama* concerns a vehicle impounded for driving without a license plate. 2021 WL 37634, at *2. The court cited *Browning-Ferris* and Alabama state law, which allows an "approved towing service" that has impounded a vehicle at police direction to charge owners "reasonable and customary towing and storage fees." *Id.* at *7; *see also Andreaccio*, 2023 WL 3724714, at *6.

143. Fitzpatrick v. City of Los Angeles, 2023 WL 3318748, at *33 (C.D. Cal. Jan. 31, 2023).

144. *See, e.g.*, *Max Towing Fees: Police Authorized Impounds*, SEATTLE.GOV, https://www.seattle.gov/your-rights-as-a-customer/find-a-towed-car/max-towing-fees-police-authorized-impounds [https://perma.cc/54EY-7SS8] ("To retrieve your car, towing and storage fees must be paid to the towing company at the time of vehicle retrieval."); CITY OF BOSTON, *supra* note 113 (detailing circumstances where owners pay the city directly and others when they pay a private towing company instead).

145. *See Barber*, 2021 WL 37634, at *7.

By making requirements of these third-party towing companies, the state indicates that it knows the costs leading from its action can be burdensome and that it is interested in how the companies it contracts with treat its residents. When police direct impoundments for some sort of legal wrongdoing, leading to civil or criminal penalties, there is a nexus to governmental action; the dispute is not just between two private actors as in *Browning-Ferris*. Thus, the "to a sovereign" requirement may well be dicta; the case only considers private disputes between parties, and a broad "to a sovereign" requirement would go well beyond the scope of *Browning-Ferris* and ignore instances where the government contracts with private parties who then collect fines.

b. The State Action Doctrine

Next, it is necessary to examine whether the state action doctrine applies.[146] The purpose of the analysis is not to find a private cause of action for plaintiffs to sue private towing companies. Instead, the state action doctrine assesses whether local governments can shirk responsibility for charges resulting from tows they ordered because part of the fines are paid to the towing company and not "to the sovereign." If courts properly apply the state action doctrine, they may find that Eighth Amendment claims can include applications where fines are paid to private companies when the government initiated the actions leading to the fines.[147] In the case of nonconsensual towing, this means that fines stemming from police action could be considered an extension of that action and thus subject to the Eighth Amendment. This is because the towing company is acting "at the behest of" the state in carrying out its interest in enforcing traffic laws; in other words, there is joint participation between the state

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146. The state action doctrine arises from Title 42 U.S.C. § 1983 and imposes private liability for defendants acting under the "'color of state law" that results in depriving someone of a constitutional right. *See* Brown, *supra* note 127 at 563–64. Courts have articulated different tests to determine whether an action falls under the doctrine, partially because it is a highly fact-sensitive inquiry. *See id.* at 564–55. The tests most relevant to this Note are the State Compulsion Test, which asks whether the private entity had choice in its action; the Nexus Test, which asks whether there is a close nexus between the state's actions and the challenged action so as to consider the private action state action; and the Joint Participation Test, which asks whether the private actor is so encouraged by the state in its activity that it can be considered state activity. *See id.* at 565–67.

147. *See Fitzpatrick*, 2023 WL 3318748, at *33.

and the towing company.[148] At least one district court has found that, in the towing context, towers acting on police instructions are acting under color of state law for the purposes of the state action doctrine.[149]

The fine for the vehicle owner includes more than just the towing and storage charges. It comprises the "initial impound, the ongoing deprivation while the vehicle is stored, and the potentially permanent loss of a vehicle at a lien sale."[150] It is logical to consider the tow and its subsequent fines as two parts of one state-initiated punitive action. Considering them separately for the purposes of Excessive Fines analysis would endorse a legal fiction. It does not "matter to a constitutional inquiry whether a municipality's contract with a private towing company calls for direct or indirect payments to the private entity."[151] The city directly contracts with the private companies, and the companies act at the direction of the city.[152] The Ninth Circuit has twice held that a towing company acting at the direction of a police officer was acting under color of state law.[153]

Thus, even if the "to a sovereign" language from *Browning-Ferris* were a holding rather than dicta, the state action doctrine allows fines paid to a government's third-party contractor to face scrutiny under the Excessive Fines Clause.

148. *Id.* at 33–34.

149. *See* Fitzpatrick v. City of Los Angeles, 2023 WL 3318748, at *33 (C.D. Cal. Jan. 31, 2023).

150. *Id.*

151. *Id.*

152. *See id.*

153. *See id.*; Goichman v. Rheuban Motors, Inc., 682 F.2d 1320, 1322 (1982); Stypmann v. City of San Francisco, 557 F.2d 1338 (1977). Other jurisdictions have also held the same. *See* Transurban v. D'Arco, 92 Va. Cir. 285, 4 (Cir. Ct. Va, Fairfax Cnty. 2016) (describing the argument that the private company contracted to enforce unpaid tolls was acting in its private capacity as "totally without merit"). This case is notable because it is one of the few examples where the person making the Excessive Fines claim is the defendant. *See also* State v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000) (discussing restitution payments to victims under the Excessive Fines Clause; "We do not believe the State can make an end run around the Excessive Fines Clause by simply making a punishment payable to a victim."). *But see* Barber v. Alabama, 2021 WL 37634, at *7 (N.D. Ala. Jan. 5, 2021) (holding that the towing fees were not subject to the Eighth Amendment because they were paid to a private towing company); Andreaccio v. Weaver, 674 F. Supp. 3d 1011, 1023 (D. Nev. 2023) (same).

C. EXCESSIVENESS CONSIDERATIONS

The next step in the analysis is to determine if the fine is excessive under the Excessive Fines Clause. There are two primary considerations in the excessiveness analysis: ability to pay[154] and proportionality between the fine and the underlying wrongdoing.[155]

1. *Ability To Pay*

In its historical analysis of the Excessive Fines Clause, the Supreme Court has repeatedly cited the Magna Carta's requirement that "amercements"—the historical term for fines—not be so great as to "deprive a wrongdoer of his livelihood."[156] Furthermore, in the recent unanimous *Timbs* decision, the Court cited Blackstone's Commentaries' statement that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear."[157] Though the inclusion of this historical ability-to-pay consideration is part of the Supreme Court's "deeply rooted" analysis and is not binding, its repeated inclusion and the recent expansion of this idea in the decision's commentary indicates the Court's interest in expanding this doctrine. While the Supreme Court has not yet explicitly analyzed or ruled upon indigency exceptions,[158] adopting ability to pay as a factor in the excessiveness analysis is gaining legal

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154. For the purposes of this Note, ability to pay, means testing, and indigency exceptions or considerations all refer to the same idea: examining a fined person's ability, or means, to pay.

155. *See, e.g.*, Pimentel v. City of Los Angeles, 974 F.3d 917, 924 (9th Cir. 2020) (affirming the lower court's ruling regarding the proportionality between the underlying offense and ticket in question without ruling on means testing); United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998) (discussing the possibility of a means-testing consideration); *id.* at 337–44 (discussing the proportionality between the wrongdoing and the fine at length).

156. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 497 U.S. 257, 271 (1989); *Bajakajian*, 524 U.S. at 336; Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

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

158. The Supreme Court declined to comment on the ability-to-pay factor in *Bajakajian*, as the respondent did not argue that issue. *Bajakajian*, 524 U.S. at 340 n.15; *see also* Colgan & McLean, *supra* note 15, at 433.

traction. Washington,[159] Colorado,[160] Indiana,[161] and the Second Circuit[162] have all recently adopted means testing as part of their gross disproportionality frameworks.

As framed by scholars Beth Colgan and Nicholas McLean, the Court's adoption of the Eighth Amendment's Cruel and Unusual Punishments Clause's gross disproportionality test supports the inclusion of financial hardship as a consideration in an Excessive Fines analysis.[163] In its gross disproportionality framework, the Court considers equality in sentencing.[164] Translating this to Excessive Fines, equality in fines—charging the same fine for the same wrongdoing—should be considered. There are two ways to view this Eighth Amendment equality framework: formal or substantive. Under the formal view, equality means fining people the same amount for the same wrongdoing.[165] Under the substantive view, equality considers whether the *effects* of the fine are equal.[166]

Though the Supreme Court has not yet officially addressed the question, both formal and substantive equality considerations weigh in favor of considering ability to pay in the gross

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159. *See* City of Seattle v. Long, 493 P.3d 94, 114 (Wash. 2021) ("We conclude . . . that courts considering whether a fine is constitutionally excessive should also consider a person's ability to pay.").

160. *See* Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 103 (Colo. 2019). Shortly after *Timbs*, the Colorado Supreme Court also adopted an ability-to-pay consideration into its excessiveness analysis and ordered the lower court to include it as part of its Eighth Amendment "gross disproportionality" test on remand. *See also* Hernandez v. City of Kent, 497 P.3d 871, 878–79 (Wash. App. 2021). This case concerned the civil forfeiture of a car used during a drug sale for which Hernandez was arrested. *Id.* at 873. Given Hernandez's indigency, the appellate court wrote that it "seems illogical that the Constitution would allow the State to deprive him of his only asset, a $3, 000 vehicle." *Id.* at 879. This case is notable because the vehicle owner was considerably more culpable than many facing a lien sale after a tow they were unable to afford. Hernandez pleaded guilty to one count of possession of methamphetamine with intent to distribute, resulting in a two-year federal prison sentence. *See id.* at 873. The court still declined to deprive Hernandez of his one asset as it would be a disproportionate sentence when considering the size of his estate. *See id.* at 879.

161. State v. Timbs, 134 N.E.3d 12, 37 (Ind. 2019). In deciding *Timbs* on remand, the Supreme Court of Indiana wrote, "the forfeiture's effect on the owner is an appropriate consideration in determining the harshness of the forfeiture's punishment." *Id.*

162. U.S. v. Viloski, 814 F.3d 104, 115 (2d Cir. 2016) ("Courts should not consider a defendant's personal circumstances—such as age, health, or present financial condition—when making a proportionality determination, except insofar as they are relevant to determining whether a forfeiture would deprive a defendant of his livelihood.").

163. *See* Colgan & McLean, *supra* note 15, at 433.

164. *See id.* at 435.

165. *See id.*

166. *See id.* at 435–36.

disproportionality analysis. Formal equality, paying the same amount for the same wrongdoing, is not present when the initial inability to pay leads to the recipient of the fine paying more over time. This snowball effect could occur through losing the vehicle, accumulating overnight storage fees, or taking out high-interest loans to retrieve the vehicle.

Prior to *Timbs*, the First and Eighth Circuits held that courts should not consider ability to pay because an indigent defendant may later come into money.[167] This reasoning may make sense when considering monetary penalties for wrongdoing: if someone comes into money later, then they presumably will be able to pay at that time. That is, of course, assuming the fines do not accumulate interest or lead to other consequences, including unemployment, poor credit scores, or worsened health problems due to being unable to attend medical appointments without a vehicle.[168] Given that many Excessive Fines cases concern non-monetary asset forfeiture, the appellate courts' holdings are especially counterintuitive.[169] When an indigent person faces the loss of their car, and with it reliable transportation to and from work or their only shelter, the chances that they will "come into" money later diminishes.

Additionally, ignoring indigency considerations does not make sense in the impoundment context because it fails to consider the rapid accumulation of fines. If a vehicle owner is unable to pay to get their car out of an impound lot, fines typically accumulate for each night the car spends in the lot until the police eventually sell

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167. *See* U.S. v. Levesque, 546 F.3d 78, 85 (1st Cir. 2008) (noting that the "defendant's inability to satisfy a forfeiture at the time of conviction . . . is not sufficient to render a forfeiture unconstitutional"); U.S. v. Smith, 656 F.3d 821, 828 (8th Cir. 2011) ("Even if it appears at the time of sentencing that Smith cannot satisfy the forfeiture in the future, there is always a possibility that he might legitimately come into money.").

168. *See* W. CTR. ON L. & POVERTY, *supra* note 6, at 6. Mary Lovelace's credit score dropped after the city filed a lien against her impounded car and sold it at auction. As an interior designer, she was unable to gain new employment without a car. She eventually had to declare bankruptcy. Miguel, an elderly man using a walker, was unable to get to medical appointments or find permanent housing after his car was towed from the county hospital's parking lot.

169. Consider that two out of four Supreme Court cases on the Excessive Fines Clause concern vehicle forfeiture. *See* Timbs v. Indiana, 139 S. Ct. 682, 686 (2019) (concerning forfeiture of a Land Rover SUV); Austin v. United States, 509 U.S. 602, 602 (1993) (mobile home and auto body shop); Alexander v. U.S., 509 U.S. 544, 558–59 (1993) (adult media); United States v. Bajakajian, 524 U.S. 321, 336 (1998) (cash).

it at lien.[170] This means that people who cannot pay immediately will pay more over the long term because of their indigency. Consider the person journalist David Sheff met at the tow lot who needed his truck for his personal business and took out a payday loan to retrieve it.[171] Not only did he lose income for several days because he could not afford the tow, but he took out a loan with a 50% interest rate to get his car back.[172]

Using the remote possibility of future income to avoid considering indigency is thus illogical when the owner cannot easily pay the fee later. The loss of access to a car makes indigency more likely in the future,[173] and indigency increases the chances that the owner will lose the car permanently or pay more to retrieve it.[174] The logic is akin to taking away someone's life vest because a speed boat might come to rescue them; without the life vest, they will never make it to the speed boat.

As for substantive equality—the effect the fine has on the payer—the Court has indicated that it may be willing to consider a defendant's ability to pay, repeatedly citing the Magna Carta's consideration of what the "estate can bear."[175] The Second Circuit has put forward a framework for incorporating the ability-to-pay or livelihood analysis.[176] The court contended that "[w]hether a forfeiture would destroy a defendant's livelihood is a component of the proportionality analysis, not a separate inquiry."[177] Means testing is one factor among several, is not dispositive, and is not

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170. *See* W. CTR. ON L. & POVERTY, *supra* note 6, at 6 (discussing the high cost of an unexpected tow, including daily storage fees); GRACE BROMBACH, GETTING OFF THE HOOK OF A PREDATORY TOW, U.S. PIRG EDUCATION FUND 9 (May 2021).

171. *See* Sheff, *supra* note 1.

172. *See id.*

173. *See* W. CTR. ON L. & POVERTY, *supra* note 6, at 16 ("Beyond the direct financial impacts of towing and lien sales, the loss of a vehicle can have far-reaching economic consequences for low wage workers and their ability to earn a living."). Studies repeatedly show that having a car is a major indicator in ability to find and keep a job, as well as for earning potential. *See id.* at 16–17.

174. *See id.* at 7, 9 ("[L]ow-income vehicle owners suffer devastating consequences when their cars are towed and impounded. . . . [A] single impound may put their car out of reach for good: they will not be able to pay to retrieve their car from the tow lot, and the car will be sold.") ("[E]very day that the car remains impounded, storage fees accrue. Many people have reported that they have begged, borrowed, and sold belongings to raise money to pay tow-related fees, only to take the cash to the tow yard and find their efforts futile, because the tow bill has gone up.").

175. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 497 U.S. 257, 271 (1989); United States v. Bajakajian, 524 U.S. 321, 336 (1998); Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

176. *See* U.S. v. Viloski, 814 F.3d 104, 111–12 (2016).

177. *Id.*

always a necessary consideration.[178] As put by the Indiana Supreme Court in the remanded *Timbs* case, it is necessary to consider indigency in the proportionality analysis, as "[t]o hold the opposite would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally."[179]

In a contrasting interpretation of the *Bajakajian* opinion, the Eleventh Circuit has held that the effect on the defendant should not be considered in forfeiture proceedings because the Court did not take ability to pay into account.[180] While the *Bajakajian* Court focused on two "particularly relevant" considerations in developing an excessiveness standard, it did not foreclose the possibility of means testing as an additional consideration.[181] Indeed, the *Bajakajian* court did make note of ability to pay as a historic consideration, but simply did not rely on it.[182] The Court was able to resolve the case on a simple disproportionality basis and did not need to add elements to its analysis.[183] As put by the Second Circuit, "In light of this strong constitutional pedigree, it seems unlikely that the *Bajakajian* Court meant to preclude courts from considering whether a forfeiture would deprive an offender of his livelihood."[184]

Although circuit courts disagree on the ability-to-pay consideration, it seems logical to at least leave the option open for someone facing a potentially excessive fine. This is especially true if, as is often the case with car towing, it leads to paying more, deprives someone of their entire estate, or impacts the claimant's ability to make money, further affecting their ability to pay.

2. *Proportionality*

Whether the wrongdoing and the fine are proportional is the next step of the Excessive Fines Analysis.[185] The proportionality analysis requires courts to balance the severity of the offense with

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178. *See id.* at 112. The Supreme Court found that a fine was excessive without considering ability to pay in this circumstance. *See id.*

179. State v. Timbs, 134 N.E.3d 12, 36 (Ind. 2019).

180. *See* U.S. v. 817 N.E. 29th Drive, Wilton Manors, Fla., 175 F.3d 1304, 1311 (11th Cir. 1999).

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

182. *See id.* at 340 n.15.

183. *See id.* at 335–36; *see also supra* notes 49–54 and accompanying text.

184. U.S. v. Viloski, 814 F.3d 104, 111 (2d Cir. 2016).

185. *See id.*

the severity of the fine to determine whether the fine is grossly disproportionate.[186] Parking tickets—punitive fines often given in conjunction with or leading up to a tow—are unlikely to meet the gross disproportionality standard as long as the fines are within the scope of local statute.[187] However, once the fine for the same underlying offense rises to the point of impoundment and potential sale of what may be someone's only asset, it is likely to be grossly disproportionate.

In considering proportionality, many jurisdictions rely on four factors the Court first articulated in *Bajakajian*.[188] The Second Circuit summarized them as follows:

> (1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fit[s] 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.[189]

Despite this straightforward test, there are still few examples of what qualifies as grossly disproportionate in the context of civil fines and penalties, especially as related to parking violations. The Ninth Circuit has held that a $63 fine was not grossly disproportional to overstaying a parking space.[190] Relying on this Ninth Circuit precedent, the Central District of California found in *Fitzpatrick* that the underlying parking offenses were minor.[191] The court went on to hold, however, that the "potentially *thousands* of dollars in fees that individuals must pay in order to

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186. *See Bajakajian*, 524 U.S. at 336.

187. *See, e.g.*, Torres v. City of New York, 590 F. Supp. 3d 610, 628 (S.D.N.Y. 2022) ("Plaintiffs violated New York City's parking laws and were given tickets within what the law permitted. Although Plaintiffs' culpability is low because the underlying parking violation is minor, a $95 and $115 fine are not grossly disproportional to an illegal parking violation." (internal quotations omitted)); Pimentel v. City of Los Angeles, 974 F.3d 917, 925 (9th Cir. 2020) ("[W]e hold that the City's initial parking fine of $63 is not grossly disproportional to the underlying offense of overstaying the time at a parking space.").

188. U.S. v. Bajakajian, 524 U.S. 321, 336–40 (1998).

189. US v. Castello, 611 F.3d 116, 120 (2d Cir. 2010).

190. *See* Pimentel, 974 F.3d 917, 924–25 (2020) (declining to affirmatively incorporate a means-testing analysis, i.e. ability to pay, as part of its Eighth Amendment inquiry).

191. *See* Fitzpatrick v. City of Los Angeles, 2023 WL 3318748, at *34 (C.D. Cal. Jan. 31, 2023). The court found that the plaintiff's culpability was low, there was no suggestion that the plaintiff's offense was related to other illegal activities, there were less harmful means for the city to achieve its deterrence and revenue goals, and the harm caused by the underlying offense was minimal, as it caused no serious safety concerns. *See id.*

avoid even *greater* punishment, the loss of their vehicles," was grossly disproportional to the same underlying offense.[192] Comparing the essence of the crime, a relatively harmless parking violation, to the maximum punishment, the eventual loss of the vehicle, the court found that the gross disproportionality standard was met.[193]

In addition to comparing the harm of the offense to the severity of the punishment, courts can look to existing case law to guide their analysis by comparing cases with similar fines but dissimilar wrongdoing or vice versa. This approach encourages uniformity and helps avoid absurd results.[194] For example, in the many cases concerning drug-related felonies resulting in civil forfeitures of vehicles, courts have found the forfeiture grossly disproportionate to the wrongdoing.[195] Given the lower statutory culpability of a parking violation in relation to a felony, a parking violation leading to a tow and lien sale would almost certainly also be grossly disproportionate.[196] A similar analysis would apply to lien sales resulting from tows meant to punish unpaid parking tickets.

While it is easy to reach the conclusion that lien sales resulting from tows are disproportionate to the initial wrongdoing, it is less obvious whether impoundments that do not result in lien sales meet the gross disproportionality standard. Imagine a car owner challenged an impoundment and its accompanying fees for a car that remained in the same spot for more than 72 hours without moving on a residential street with plenty of spaces, in violation of

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192. *Id.*

193. *See id.*

194. For example, this would help avoid considering the same fine non-excessive for parking during street cleaning, but excessive for an infraction with much higher safety risk, such as a DUI.

195. *See e.g.*, *State v. Timbs* (*Timbs III*), 169 N.E.3d 361, 377 (Ind. 2021) (concerning dealing in a controlled substance and the subsequent vehicle forfeiture); Hernandez v. City of Kent, 497 P.3d 871, 873, 878–79 (vehicle forfeiture for methamphetamine distribution); One (1) Charter Arms, Bulldog 44 Special, Serial No. 794774 v. State *ex rel.* Moore, 721 So. 2d 620, 621 (Miss. 1998) (forfeiture of a Corvette for cocaine possession); State v. Brophy, 889 S.E.2d 337, 339–40 (Ga. Ct. App. 2023) (vehicle forfeiture for methamphetamine possession).

196. Consider, for example, that Tyson Timbs plead guilty to a state Class B felony dealing in a controlled substance and was sentenced to six years in prison. *Timbs II*, 134 N.E.3d 12, 21 (Ind. 2019). Still, the forfeiture was ultimately found to be an excessive fine. *Timbs III*, 169 N.E.3d at 377. Now compare this with Steven Long parking in the same spot for over 72 hours, resulting in a mere traffic infraction. *See* City of Seattle v. Long, 198 Wash. 2d 136, 143 (Wash. 2021); SEATTLE, WA. MUN. CODE, § 11.31.121 (2023). Despite vastly different levels of culpability, both faced the same de facto punishment: loss of their vehicle.

parking restrictions.[197] Applying the *Bajakajian* factors shows this fine would be grossly disproportionate. The wrongdoing would not have any obvious connections to other unlawful civil or criminal activities and could be the result of a vacation or illness. The vehicle owner would fall into the class of persons the fine was intended for. The maximum allowable fine, a lien sale, would be more drastic than just the tow. However, the nature of the harm done would be extremely minor; it would merely deprive others of the parking spot. Weighing these factors, it would be reasonable for a court to find that the very minor harm is grossly disproportionate to the fine which deprives someone of their property and costs the owner hundreds of dollars in fines.[198] Thus, even without considering ability to pay and substantive equality, courts may find the threshold for finding an Excessive Fines violation has been met when a car is impounded for a minor parking violation.

Having established (i) that impoundments can be partially punitive, (ii) that the excessive fines clause is not strictly limited by the actors involved, and (iii) that impoundments for minor traffic violations can meet the gross excessiveness standard, this Note now turns to judicial and legislative solutions to the problem of punitive car towing regimes.

III. JUDICIAL AND LEGISLATIVE SOLUTIONS

As the jurisprudence of Excessive Fines doctrine develops in civil suits, courts must carefully consider the legal and policy implications of their decisions and legislatures must clearly define the goals and methods of civil consequences for prohibited activities. This Part first details the legal standards by which courts should interpret the Excessive Fines Clause to maximize fairness and minimize harm to those with few economic resources. It then goes on to discuss potential legislative solutions to the issue.

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197. A car owner would bring such a suit under Section 1983, as a claim against a local government alleging violations of constitutional rights. *See What are the elements of a section 1983 claim?*, THOMSON REUTERS (June 13, 2022), https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/ [https://perma.cc/2TA9-7L48].

198. *See supra* Introduction.

A. RECOMMENDED JUDICIAL APPROACH

In analyzing the Excessive Fines Clause as applied to civil impoundments, courts should adopt the following analytical framework, based on reasoning laid out in current case law, most notably *Long*, and the Supreme Court's historical interpretation of the clause. The direction that this area of law goes as it develops will have serious implications for people in dire financial and life-threatening circumstances; it is therefore critical that courts carefully apply the legal standards set forth below.

1. *Interpreting the Partially Punitive Standard*

In determining whether fines are partially punitive, courts should adopt the following framework. First, in determining whether a particular fine is partially punitive, courts should analyze local statutes. If the fine is directly associated with a word indicating an intent to deter or punish, the fine is partially punitive.[199] Courts can additionally use legislative history and analysis of the statute's structure to glean intent to punish.[200] Second, when additional fines exist that may be remedial in nature but would not be incurred without an initial punitive action, these additional fines should be viewed in conjunction with the initial punitive action.[201] That is, courts should view fines holistically: the pertinent inquiry should not be an exacting charge-by-charge analysis, but a look at whether the charges in question have any relationship to a punitive context. Third, courts should analyze how remedial the fine is.[202] When, for example, a city tows a car for causing a true safety issue, the tow and subsequent fines—assuming they are only as much as is needed for recouping the costs of the tow and storage—would be fully remedial and thus would not trigger the Excessive Fines Clause. To be fully remedial, the purpose of the fines can only be to remedy the harm, not to punish the person who caused the harm. Finally, while permanent deprivation of property, i.e., a lien sale due to an impoundment

199. *See* City of Seattle v. Long, 493 P.3d 94, 109 (2021) ("The fees were imposed only as a result of the impoundment, which SMC 11.72.440(E) characterizes as a 'penalty.'").

200. *See generally* William N. Eskridge Jr., *Legislative History Values*, 66 Chi.-Kent L. Rev. 365 (1990) (discussing the benefits of using legislative intention as an interpretive canon, and the values that this implicates).

201. *See Long*, 493 P.3d at 109.

202. *See* United States v. Bajakajian, 524 U.S. 321, 329, 333 (1998).

someone is unable to afford, may be evidence of harsher punishment, a lack of permanence does not create a per se assumption of a total lack of punitive intent.

Under this framework, local governments would be able to continue to tow when absolutely necessary but would be much less likely to do so for punitive reasons, such as to coerce payment for unpaid tickets.[203] Parking violations that do not give rise to public safety hazards, such as parking in a permitted area without clearly displaying a permit or overstaying a meter, would also be considered punitive under this framework.[204] In contrast, tows needed for genuine safety reasons, such as for a car blocking a fire lane or creating an imminent traffic hazard, would not be considered punitive, as a tow would remedy the safety hazard in these instances. In maintaining a high threshold for necessity and a low threshold for punitiveness, courts can better honor the promise of the Excessive Fines Clause.

2. *Interpreting Relationship Between the Actors Involved*

Next, in considering the relationship between the actors involved, courts should take an approach that avoids absolving the government of its responsibility for property deprivation.

When the person involved in the wrongdoing for which the state confiscates the property is different from the property owner, as in *Krueger*,[205] whether it is appropriate to deprive the owner of their property deserves extra attention. When the state needs the property, for example, as part of a criminal investigation for evidence, it makes sense for the state to retain the vehicle for purposes of the investigation.[206] If the vehicle is being held as punishment against the wrongdoer, however, it does not make

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203. *See* Fitzpatrick v. City of Los Angeles, 2023 WL 3318748 (C.D. Cal. Jan. 31, 2023); *supra* notes 95–106 and accompanying text.

204. *See supra* Part II.A.2.

205. *See supra* Part II.B.1; Krueger v. City of Eastpointe, 413 F. Supp. 3d 679, 684 (E.D. Mich. 2020).

206. *See, e.g.*, Lupro v. State, 603 P.2d 468, 476 (Alaska 1979). In this case, Lupro, the vehicle owner, was convicted of negligent homicide following a hit and run. *See id.* at 471. The court held that the police properly retained the vehicle so as to prevent Lupro from destroying evidence, and they also properly seized the vehicle in the first place as it was found abandoned after being intentionally pushed over the side of an embankment. *See id.* In contrast, a vehicle seized without probable cause cannot be held *ad infinitum* by police. *See, e.g.*, *In re* 13811 Highway 99, Lynnwood, Washington, 194 Wash. App. 365, 378 P.3d 568, 576–77 (2016). Generally, vehicle seizures for the purpose of criminal investigations are subject to the Fourth Amendment, which is beyond the scope of this Note.

sense to retain the vehicle, as the person whom the state is actually punishing (the owner) is not the one the state intends to punish (the wrongdoer). To frame this within the Excessive Fines Clause analysis, some jurisdictions have determined that impoundment and lien sales are excessive punishments for actions *with* culpability, like overstaying a parking spot.[207] If the owner has *no* culpability, the disproportionality between wrongdoing and punishment is even greater. Still, if the owner is not the target of the punishment, it is possible that courts would find that the Eighth Amendment does not apply at all, as the Eastern District of Michigan has held.[208] Regardless, it is both unfair and nonsensical to hold property that belongs to someone who has done no wrong without a very compelling reason.

When the relationship being analyzed is the one between the party being paid—often the third-party contractor—and the state, courts can use a simple test. If the state directed the tow, the Excessive Fines Clause should apply regardless of whom the payment is directed towards. The state should not escape constitutional liability simply because it contracts with third parties.

3. *Interpreting Proportionality*

Finally, in examining the extent to which the fine is proportional to the severity of the activity being punished, courts should take ability to pay and indigency into account. When the owner is unable to pay to retrieve their car, courts should weigh the much harsher punishment of losing a car at lien sale in relation to the sum of the owner's estate. If the owner is unable to pay to retrieve their car, resulting in a lien sale, they are unlikely to have other assets, and courts should also consider the indirect consequences. Will a lien sale result in their loss of shelter? Will it make it harder for them to get or keep a job, furthering their indigency? Will it have implications for their family, making them unable to attend child visitations, pick up their siblings from school, or take their parents to medical appointments? When these factors come into play, it is much easier to see how a simple car tow for something as minor as illegally parking can result in gross disproportionality between punishment and wrongdoing.

207. *See* City of Seattle v. Long, 493 P.3d 94, 114 (2021).
208. *See Krueger*, 413 F. Supp. 3d at 694–96 (E.D. Mich. 2020).

B. LEGISLATIVE ACTION

Considering that courts defer to legislatures in deciding appropriate punishments, local legislatures can obviate the need for this analysis altogether by addressing certain gaps in local ordinances. The suggested reforms fall into two broad categories: ex ante reforms consider changes to what cars cities tow in the first place, and ex post reforms consider changes to payment systems after a car has already been towed.

1. *Ex Ante Reforms*

a. Limit Purely Punitive Towing

As a starting point, local legislatures could put an end to punitive towing practices and implement policies of only towing when the tow is at least partially remedial, including correcting immediate public safety concerns, removing junk cars, and freeing up crucial parking spots, especially for handicapped spaces. This would put an end to the most predatory towing practices, like Los Angeles' Vehicle Seizure Policy, which tows cars for nonpayment of parking tickets.[209] While this seems like a drastic restriction on police power, it is not without precedent; during the COVID-19 pandemic, San Francisco paused poverty tows, i.e., those which disproportionately impact low-income and unhoused people for five-plus unpaid tickets, expired registrations, and staying in the same spot for 72 hours.[210] In 2022, Los Angeles temporarily paused impoundments for unpaid tickets as well.[211] While these policies may seem to give implicit permission for drivers to park in one spot indefinitely, as an advocate for Coalition for the Homeless put it: "towing does not enforce paying debt . . . If a person has no

209. *See* Fitzpatrick v. City of Los Angeles, 2023 WL 3318748 (C.D. Cal. Jan. 31, 2023); *supra* notes 95–106 and accompanying text.
210. *See* Carly Graf, *SFMTA to Resume 'Poverty Tows' Amid Calls to Make Temporary Ban Permanent,* S.F. EXAM'R (May 4, 2021), https://www.sfexaminer.com/archives/sfmta-to-resume-poverty-tows-amid-calls-to-make-temporary-ban-permanent/article_fd66d49b-bbd1-5282-b5f9-c6b81bfbb632.html [https://perma.cc/9LCF-9XRK].
211. *See* Rachel Uranga, *L.A. Temporarily Halts Impounding of Vehicles With [Five] Or More Unpaid Tickets*, L.A. TIMES (Feb. 8, 2022), https://www.yahoo.com/news/l-temporarily-halts-impounding-vehicles-011438840.html [https://perma.cc/LSY2-GCDC]. Interestingly, this was a response to a case heavily relied on in this Note, Fitzpatrick v. City of Los Angeles, 2023 WL 3318748 (C.D. Cal. Jan. 31, 2023).

money, they have no money."[212] Further, there are other much less drastic ways to get someone to move: issuing tickets before resorting to towing or contacting the vehicle owner via a courtesy phone call or letter asking them to move their vehicle. As punitive towing, especially for unpaid tickets, does not solve the underlying problem and only further impoverishes the car owner, these reforms are logical ways to prevent further harm on affected communities. Additionally, limiting purely punitive towing would decrease the likelihood of a court later finding a policy to be unconstitutionally excessive under the Eighth Amendment, and so would also benefit the city by protecting it from constitutional liability.

b. Consider the Remedial/Punitive Sliding Scale in Making Towing Decisions

As for tows that are partially remedial, police should consider the urgency of moving the car or freeing up the parking spot. For example, towing a car left in a handicapped spot at a hospital is more urgent than towing a car left in a residential street with ample parking and few cars. Thus, courts would put towing a car in the former scenario closer to the remedial side of the sliding scale as it would be less excessive compared to the harm done, and therefore, it could be reasonably towed at the police's discretion. Conversely, towing a car in the latter scenario is much more likely to be unnecessary and so would be closer to the punitive side of the sliding scale. Police should then use their discretion to *not* tow. Of course, these are more obvious examples. Where things get more muddy in the middle of the scale—as in a car blocking street cleaning operations—cars are better left alone so as to not incidentally infringe on someone's constitutional rights to be free from excessive fines.

c. End Punitive Booting Practices

Under the proposed framework, municipalities should cease booting cars except to prevent a reckless driver from accessing the vehicle.[213] When a car is booted for unpaid tickets, it would be

212. *See* Graf, *supra* note 210 (quoting Flow Kelly from Coalition for the Homeless).
213. *See, e.g.*, Rachel Lippmann, *Caught Driving Recklessly in St. Louis? An Alderwoman Wants to Boot Your Car*, ST. LOUIS NPR (Feb. 28, 2024), https://www.stlpr.org/

purely punitive, just like impoundments for the same reason. Unlike towing for parking violations, however, it is never possible for a parking-violation boot to be also partially remedial. Booting for a parking violation not only does not remedy the situation, but actually exacerbates it. Immobilizing the car makes it more difficult for the vehicle owner to remedy the violation. If the owner cannot pay the removal fee immediately, they will not be able to move the car and correct the parking violation. Thus, in most circumstances, booting is likely purely punitive, and thus is less likely to stand up to constitutional scrutiny.

2. *Ex Post Reforms*

a. A Moderate Proposal: Capping Costs, Payment Plans, and Eliminating Liens

At a minimum, a system where the cost of towing and storage was capped at a reasonable price[214] and the owner could retrieve the car without a large upfront payment would help owners get their cars back faster and would lower the overall expense of the tow.[215] Payment plans would additionally help make tows more manageable.[216] They would allow owners to retrieve their car immediately upon signing up for the payment plan without having to go to drastic measures to scrounge up enough money to pay the entire fee in one go. This system has the potential to vastly reduce lien sales, as car owners would better be able to retrieve their vehicles before the city sells them at police auction. In circumstances where no one ever retrieves a vehicle towed for a

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government-politics-issues/2024-02-28/caught-driving-recklessly-in-st-louis-an-alderwoman-wants-to-boot-your-car [https://perma.cc/JPW3-UJ8B]. Laws like these would be primarily remedial, as they are intended to keep unsafe drivers off the road without ticketing or otherwise punishing the driver.

214. For example, in 2020, Chicago capped costs at $1, 000. *See City Council Approves Overhaul of Chicago Vehicle Impound Program, Caps Fines and Storage Fees*, ABC7 CHI. (July 23, 2020), https://abc7chicago.com/chicago-impound-lot-car-towed-city-council/6330163/ [https://perma.cc/WG3M-P3GB].

215. *See, e.g.*, Melissa Sanchez et al., *Chicago Alderman Proposes Reining in Ticket Penalties That Drove Thousands of Black Motorists into Debt*, PROPUBLICA (Oct. 31, 2018), https://www.propublica.org/article/chicago-tickets-penalties-alderman-gilbert-villegas-proposals [https://perma.cc/4KGT-KQQY]. The towing reform Chicago ultimately passed did not go as far as the proposed bill. *See* C.J. Ciaramella, *Chicago City Council Votes to Partially Reform Its Notoriously Harsh Vehicle Impound Program*, REASON (Jul. 23, 2020). https://reason.com/2020/07/23/chicago-city-council-votes-to-partially-reform-its-notoriously-harsh-vehicle-impound-program/ [https://perma.cc/Y93N-AX8D].

216. *See, e.g.*, Sanchez et al., *supra* note 215.

legitimate safety reason, the city could donate the car to local nonprofits who can redirect it to people in need.[217] Without lien sales, cities no longer would be incentivized to impound vehicles. While this could cut into a city's revenue, cities should find other streams of revenue that are not especially predatory to low-income residents. This system could also reduce the negative effects a tow has on individuals and families that rely on their vehicles to keep afloat or for shelter by reducing the possibility of spiraling debt.[218]

b. A More Progressive Proposal: Graduated Fines

Capping fines does, however, mean that those who can easily afford fines may have little incentive to avoid racking up fines in the first place. This begets two potential solutions, both which require "graduated fines" of one form or another.[219] Using these methods to graduate the fines would create a more substantively equal system,[220] whereas a simple cap would create more formally equal one.[221]

The first allows those who cannot afford the fines, even as capped, to apply for reduced fines or exemptions.[222] Under this system, indigent owners could apply to reduce or eliminate their towing and storage fees.[223] Indeed, some U.S. cities already use this method to achieve fine graduation of some level. For example, Long Beach, California, allows homeless residents to apply for a one-time waiver for towing fees and citations.[224] And San Francisco has reduced fees for first-time tows and indigent owners

217. *See, e.g.*, *id.*
218. *See* COMMUNITY ORGANIZING AND FAMILY ISSUES, STOPPING THE DEBT SPIRAL 9 (2018), https://cofionline.org/wp-content/uploads/2022/11/COFI-STOP-Report.pdf [https://perma.cc/6FJ9-J8V7].
219. Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1544–45 (2020).
220. *See supra* notes 163–166 and accompanying text; Colgan & McLean, *supra* note 15, at 435–36.
221. *See* Colgan & McLean, *supra* note 15, at 435–36.
222. *Cf. First Steps Toward More Equitable Fines and Fees Practices*, FINES & FEES JUST. CTR. 3–4, https://finesandfeesjusticecenter.org/content/uploads/2020/11/FFJC_Policy_Guidance_Ability_to_ Pay_Payment_Plan_Community_Service_Final_2.pdf [https://perma.cc/X8RK-72QE].
223. *See id.*
224. *See Homelessness Waiver: One-time Towing and Parking Citation Waiver for Homelessness Policy*, LONG BEACH FIN. MGMT, https://www.longbeach.gov/finance/services-and-permits/towing-and-lien-sales/homelessness-waiver/ [https://perma.cc/L53M-3X2S].

and waives fees for people experiencing homelessness.[225] In the context of criminal court fines, several states have recently adopted similar means-testing provisions.[226]

Under this legislative solution, indigent car owners could fill out a simple form requesting the waiver or reduction, and the city would be required to decide in a reasonable amount of time. If the owner is approved for an indigency exception or reduction, the city will be required to release the vehicle from the impound lot. Additionally, if combined with a payment plan system as described above, the owner will be able to retrieve their car under a payment plan before applying for the exception.

The second solution is to base the fines off the fined person's income in the first instance.[227] For example, "day fines" multiply a standardized "penalty unit" by the offender's income.[228] All offenders thus pay the same percentage of their income for the same offense. While such a system is more substantively equal than the waiver system, it does create more administrative hurdles, costs, and could implicate privacy concerns, as it would require that the police ask for car owners' personal financial information before fining them.

Regardless of the method, limiting the fines owners must pay after their car is towed would help keep fines in compliance with the Excessive Fines Clause, preventing gross disproportionality. Further, such limits would disincentivize the state from ordering unnecessary tows as if a litigant challenges a tow, there would be a chance that the state, rather than the owner, will end up bearing the costs.

CONCLUSION

Tows can have real and lasting impacts on people's lives. As the Excessive Fines Clause case law in this area develops after

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225. *See Waivers for people experiencing homelessness or low-income and reduction for first time tow*, SFMTA, https://www.sfmta.com/getting-around/drive-park/towed-vehicles/reduced-fees-first-time-tow-and-low-income-individuals [https://perma.cc/2EM4-CP8E].

226. *See 2023 State Legislative Round-Up: Fines and Fees Reform Across the Country*, FINES & FEES JUST. CTR. (Jan. 29, 2024), https://finesandfeesjusticecenter.org/2024/01/29/2023-state-legislative-round-up-fines-and-fees-reform-across-the-country/ [https://perma.cc/A2JT-PLLR] (summarizing ability-to-pay bills enacted in 2023). Kansas considered, but did not pass, a bill requiring ability-to-pay considerations and payment plans for traffic-related cases. S.B. 192, 2023–2024 Sen., Reg. Sess. (Kan. 2023).

227. *See* Colgan, *supra* note 219, at 1544–45.

228. *Id.*

Timbs, courts should consider the wide-reaching implications of impoundments, as well as a person's ability to pay, as part of their proportionality analysis. Legislatures should likewise act to prevent the harm to individuals excessive towing causes by strengthening protections against state seizure of vehicles for minor infractions. Limiting overzealous city towing regimes has the potential to alleviate one vicious cycle of poverty in which so many are trapped. These early years of the Excessive Fines doctrine's application to municipal fines are a crucial opportunity to develop strong protections for individuals against unconstitutional impoundments and lien sales.