The Role of the Excessive Fines Clause in Ending the Criminalization of Homelessness

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Over the last decade, the United States has seen a dramatic increase in both homelessness and the laws that criminalize it. This Note contends that the Eighth Amendment's Excessive Fines Clause is a powerful but underutilized tool available to end the criminalization of homelessness.

Part I reviews the history of civil and criminal punishment of homelessness in the United States and of the Excessive Fines Clause. Part II explores the weaknesses of other Eighth Amendment doctrines in their application to people experiencing homelessness. Part III explores the Excessive Fines Clause as a constitutional protection against civil punishment for people experiencing homelessness. This Part also evaluates what constitutes "excessive" and "fine" within the meaning of the Clause, and how proportionality between perpetrator, action, and the amount of a fine factors into the "excessiveness" analysis. Finally, Part IV discusses the benefits and drawbacks of applying the Excessive Fines Clause in conjunction with other Eighth Amendment doctrines as a constitutional framework for people experiencing homelessness. The Note concludes by arguing that the Excessive Fines Clause should be used as a tool to stop the criminalization of homelessness.

INTRODUCTION

On September 11, 2019, Debra Blake was criminally charged and fined for resting in a sleeping bag in a Grants Pass, Oregon public park.[1] Ms. Blake, who had been without housing for ten

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1. Blake v. City of Grants Pass, 2020 WL 4209227, at *4 (D. Or. July 22, 2020).

years, needed a place to sleep, eat, and seek shelter from the elements.[2] Nonetheless, citing crimes of illegal camping, "prohibited conduct,"[3] and criminal trespass on city property, the city fined her $885 and banned her from all Grants Pass parks for two weeks.[4] As of July 2020, Ms. Blake owed over $5,000 in unpaid fines.[5]

Theoretically, criminalizing Ms. Blake's homelessness should be unconstitutional. In 1962, the Supreme Court held in *Robinson v. California* that criminalizing a person's status—such as their status as a person addicted to narcotics—violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[6] This so-called *Robinson* doctrine should protect unhoused persons[7] from laws that criminalize them solely for experiencing homelessness.[8] But stories like Debra Blake's persist, and the *Robinson* doctrine has failed to shield unhoused individuals from arrests, fines, and fees imposed solely due to their unhoused status.[9]

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2. *Id.*

3. Ms. Blake's prohibited conduct was lying in a sleeping bag. *Id.*

4. *Id.*

5. *Id.*

6. Robinson v. California, 370 U.S. 660, 667 (1962). In *Robinson*, Lawrence Robinson was convicted under a California law which made it a crime for a person to be "addicted to the use of narcotics." *Id.* at 660.

7. In this Note, I will be using the terms "people experiencing homelessness" and "unhoused persons" interchangeably.

8. *See, e.g.*, Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the* Robinson *Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293 (1995); Jaime Michael Charles, *"America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 B.U. PUB. INT. L.J. 315 (2009) (arguing that the *Robinson* doctrine should be construed to include prohibiting punishment of acts related to status).

9. *See* Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URBAN AFF. REV. 41, 43 (2017) [hereinafter Robinson, *No Right to Rest*] (describing how "a punitive approach increasingly defines the policing of homelessness in the United States").

While the scope of this Note covers the Excessive Fines Clause and the *Robinson* doctrine, other current cases show that there are other litigation options for unhoused plaintiffs. These cases include *Bloom v. City of San Diego*, where unhoused plaintiffs have filed a lawsuit against the City of San Diego for ticketing unhoused persons who choose to sleep in their vehicles. *See* Complaint, *Bloom v. City of San Diego*, No. 17-CV-2324, 2017 WL 5499393 (S.D. Cal. Nov. 15, 2017). Additionally, in North Carolina, the National Homelessness Law Center brought suit against Greensboro, North Carolina, on behalf of three Greensboro citizens against a city ordinance to restrict panhandling. *See* Complaint, *National Law Center on Homelessness and Poverty v. City of Greensboro*, 18-CV-00686 (M.D.N.C. Aug. 8, 2018). During the course of the *NLCHP v. Greensboro* litigation, the City of Greensboro repealed the ordinance and the case was dismissed. *See Law Center Litigation*, NAT'L HOMELESSNESS LAW CTR., https://homelesslaw.org/court-cases/ [https://perma.cc/2NG7-VH58].

Punishing people for experiencing homelessness has become widespread as legislatures respond to housing crises not with policies aiming to help those without shelter but rather with ordinances that fine, cite, and jail unhoused persons for living on the street.[10] These laws, ordinances, and practices are collectively referred to as the "criminalization of homelessness."[11] Nationwide, for example, an unhoused person is eleven times more likely to be arrested than a housed person.[12] City laws criminalizing bans on camping in public have also increased by sixty-nine percent over the last decade.[13] Since 2016, twenty-two new laws have been passed banning sleeping in public places, a forty-four percent increase from the sixteen such laws passed during the previous decade.[14] Despite these harsh policies, scholars and advocates agree that the criminalization of homelessness is not effective at reducing homelessness.[15] In fact, these policies create a cycle of poverty where homelessness leads to reduced employment opportunities, family dysfunction, and difficulty meeting basic needs.[16] A lack of housing also leads to

10. Robinson, *No Right to Rest*, *supra* note 9, at 64 ("Quality of life ordinances require unsheltered homeless people to refrain from sleeping, sitting, sheltering, or conducting other acts of living on the streets. . . . Far more common than provision of a service after a quality of life policing contact is citation or arrest."); *see also* Kristin Lam, *Cities Are Criminalizing Homelessness by Banning People from Camping in Public. That's the Wrong Approach, Report Says*, USA TODAY (Dec. 10, 2019), https://www.usatoday.com/story/news/nation/2019/12/10/homeless-camping-bans-criminalization-report/4378565002/ [https://perma.cc/R7LE-GSX6] ("If homeless people refuse to move . . . they may face arrest, fines or warrants.").

11. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 9 (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/BRH7-Y9PS].

12. *Id.* at 50.

13. City-wide bans on standing have increased by about 88%, bans on sitting or lying down have increased by 52%, and bans on sleeping in vehicles have increased by 143% since 2006. Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 109–10 (2019).

14. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 12.

15. *See, e.g.*, Jennifer Darrah-Okike, *Why There Are Better Alternatives Than Punitive Policies Targeting Homeless People*, SCHOLARS STRATEGY NETWORK (Apr. 9, 2018), https://scholars.org/brief/why-there-are-better-alternatives-punitive-policies-targeting-homeless-people [https://perma.cc/G4DH-979U]; Andrew Weber, *No Sit/No Lie Citations Handed Out by the Thousands, and Most Go Unpaid*, KUT 90.5 (Oct. 5, 2015), https://www.kut.org/austin/2015-10-05/no-sit-no-lie-citations-handed-out-by-the-thousands-and-most-go-unpaid [https://perma.cc/Y4UH-P2QM]; Raul Aguilar, Comment, *Unconstitutionally Fining: Fining People Experiencing Homelessness in the Era of* Timbs, 53 UIC J. MARSHALL L. REV. 587, 603 (2021) (describing how fining people experiencing homelessness does not work and how most of these fines go unpaid).

16. *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.

mental distress which can then lead to mental illness.[17] Thus, the cycle of poverty continues, and unhoused persons continue to receive criminal and civil punishment because they are experiencing homelessness.

The abundance of laws and ordinances criminalizing homelessness have forced courts to take notice.[18] In 2019, for example, Debra Blake joined a class action challenging the laws under which she had been fined for a decade—and won summary judgment on her claim that the local ordinances violated the Eighth Amendment.[19] Ms. Blake's class defeated Grants Pass' ordinances not only under the *Robinson* doctrine, but also under the newly incorporated Excessive Fines Clause of the Eighth Amendment, which prohibits the imposition of excessive fines.[20] This case is currently on appeal to the Ninth Circuit,[21] but its reasoning highlights the Excessive Fines Clause as a tool for advocates of unhoused persons.

This Note argues that advocates for people unhoused people should look beyond the *Robinson* doctrine to the Excessive Fines Clause to more effectively combat the criminalization of homelessness. Part I of this Note reviews the history of punishment of homelessness, both civil and criminal,[22] in the

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430, 436 (2020); *Criminalization of Poverty as a Driver of Poverty in the United States*, HUM. RTS. WATCH (Oct. 4, 2017), https://www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states# [https://perma.cc/AE9T-EN4L]

17. *See* Yong Liu et al., *Relationships Between Housing and Food Insecurity, Frequent Mental Distress, and Insufficient Sleep Among Adults in 12 U.S. States, 2009*, PREVENTING CHRONIC DISEASE 11 (2014).

18. *See, e.g.*, Garcia v. City of Los Angeles, 2020 WL 2129830, at *5–6 (C.D. Cal. Feb. 15, 2020) (discussing illegal seizure claims, due process claims, and vagueness claims against a city ordinance mandating seizure or destruction of "bulky items"); Mass. Coal. for the Homeless v. City of Fall River, 486 Mass. 437 (2020) (reviewing allegations that anti-panhandling statute violated state and federal free speech rights); City of Seattle v. Long, 13 Wash. App. 2d 709 (2020) (holding that the impoundment of an unhoused man's truck was not excessive punishment under the Eighth Amendment); Vigue v. Shoar, 494 F. Supp. 3d 1204, 1232 (M.D. Fla. 2020) (holding that a state statute requiring a government permit for charitable solicitation on public roadways was facially unconstitutional).

19. Blake v. City of Grants Pass, 2020 WL 4209227, at *10 (D. Or. July 22, 2020) (opinion from a magistrate judge on a motion for summary judgement), *appeal docketed*, No. 20-35881 (9th Cir. Oct. 8, 2020).

20. *Id.*

21. Blake v. City of Grants Pass, 2020 WL 4209227 (D. Or. July 22, 2020), *appeal docketed*, No. 20-35881 (9th Cir. Oct. 8, 2020).

22. Civil law "deals with resolving disputes between one entity and another." Will Erstad, *Civil Law vs. Criminal Law: Breaking Down the Differences*, RASMUSSEN UNIV. (Mar. 21, 2022), https://www.rasmussen.edu/degrees/justice-studies/blog/civil-law-versus-criminal-law/ [https://perma.cc/SXM9-SBCM]. Civil laws include government regulations,

United States and the history of the Excessive Fines Clause. Part II discusses the weaknesses in other Eighth Amendment doctrines—including the *Robinson* doctrine, based in the Cruel and Unusual Punishment Clause—as applied to people experiencing homelessness. Part III explores the possibility of using the Excessive Fines Clause as a constitutional shield against civil punishment for people experiencing homelessness. This includes discussion of the conditions under which a civil punishment is a "fine" within the meaning of the Clause, the definition of "excessive" within the meaning of the clause, and how proportionality between perpetrator of the act, the action, and the amount of a fine factors into the "excessiveness" analysis. Based on this doctrinal foundation, Part IV argues that courts should use the Excessive Fines Clause to stop excessive punishment of unhoused persons. Since the Court held that the Excessive Fines Clause applies to the states only four years ago,[23] courts across the country are applying the Clause for the first time. This Note provides a framework for these courts—and all courts—to apply the Excessive Fines Clause to unhoused persons.

I. THE CRIMINALIZATION OF HOMELESSNESS

Homelessness is both a human rights and public health crisis.[24] On an individual level, it is dehumanizing to a person to have to sleep on the street, be unable to bathe, and even be unable to use the bathroom in private.[25] People experiencing homelessness may be excluded from public transit, other public locations, and employment opportunities based on housing status.[26] Furthermore, being employed does not guarantee that an individual will not experience homelessness.[27] Homeless

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and the cause of action in civil cases can be brought by the government or a private party. *Id.* The punishment for violating a civil law is usually a financial penalty or an order to change behavior. *Id.* In contrast, criminal actions can only be brought by the government, and individuals found guilty in criminal court face incarceration and probation. *Id.*

23. Timbs v. Indiana, 139 S. Ct. 682 (2019) (incorporating the Excessive Fines Clause through the Due Process Clause of the Fourteenth Amendment).

24. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 36.

25. *Id.* at 98–100.

26. *Id.* at 44–46.

27. Bruce D. Meyer et al., *Learning about Homelessness Using Linked Survey and Administrative Data* 9 (Becker Friedman Inst., Working Paper No. 2021-65, 2021) https://bfi.uchicago.edu/wp-content/uploads/2021/06/BFI_WP_2021-65.pdf

encampments can also be extremely dangerous for unhoused persons living in them.[28] Beyond individual suffering, homelessness also exacerbates public health crises[29] (such as COVID-19)[30] and contributes to environmental harm.[31] Widespread homelessness is therefore harmful to both the individuals experiencing homelessness as well as the communities in which they live. This pervasive harm requires federal, state, and local government attention.[32]

Unfortunately, the population of unsheltered persons has risen dramatically in the past five years.[33] Rising rents, stagnant wages, and the decline of federally-subsidized housing have led to massive increases in unsheltered populations in the last five

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[https://perma.cc/BVB4-7XPY] ("A substantial share of people experiencing homelessness are either currently working or were recently employed.").

28. *See* GIBSON DUNN, *MARTIN V. CITY OF BOISE* WILL ENSURE THE SPREAD OF ENCAMPMENTS THAT THREATEN PUBLIC HEALTH AND SAFETY 8 (2019), https://www.gibsondunn.com/wp-content/uploads/2019/08/Martin-v.-Boise-White-Paper.pdf [https://perma.cc/4UMV-9QN9].

29. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 99.

30. Due to the COVID-19 crisis, public health concerns surrounding homelessness are more important than ever. Organizations that provide aid to people experiencing homelessness in California, Georgia, Massachusetts, and Washington D.C. have been attempting to combat COVID-19 through handwashing stations, restructuring shelters, and providing education about the virus' spread. Jaboa Lake, *Lawmakers Must Include Homeless Individuals and Families in Coronavirus Response*, CTR. FOR AM. PROGRESS (Mar. 18, 2020), https://www.americanprogress.org/issues/poverty/news/2020/03/18/481958/lawmakers-must-include-homeless-individuals-families-coronavirus-responses/ [https://perma.cc/4FPJ-S6JR]. However, these organizations "don't have the resources to fully meet current needs and are especially underprepared to service the communities who are living unsheltered, in encampments, and in emergency and short-term group lodging." *Id.*

People experiencing homelessness may be particularly vulnerable to COVID-19, as shelters are often overcrowded and may be experiencing additional shortages in response to COVID-19. *Id.* Additionally, forced encampment closures, or "sweeps" create communication and resource distribution barriers for people experiencing homelessness. *Id.* Sweeps, along with the fact that people experiencing homelessness already have less reliable access to updates about the COVID-19 crisis, prevent unhoused persons from learning critical information about COVID-19. *Id.*

31. *See, e.g.*, GIBSON DUNN, *MARTIN V. CITY OF BOISE* WILL ENSURE THE SPREAD OF ENCAMPMENTS THAT THREATEN PUBLIC HEALTH AND SAFETY 8 (2019), https://www.gibsondunn.com/wp-content/uploads/2019/08/Martin-v.-Boise-White-Paper.pdf [https://perma.cc/4UMV-9QN9] (describing problems of garbage and human waste near homeless encampments).

32. *Solutions*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, https://www.usich.gov/solutions/ [https://perma.cc/L5ZN-ACTZ].

33. NAT'L ALL. TO END HOMELESSNESS, STATE OF HOMELESSNESS: 2021 EDITION (2021), https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/ [https://perma.cc/8TNS-7SRU].

years.[34] Tucson, Arizona, for example, processed an average of 52 evictions per day in 2020 compared to its 2019 average of 10 to 30 evictions per day.[35] In no state can a person working full-time at the federal minimum wage afford a two-bedroom apartment at the average, fair market rate.[36]

As unhoused populations increase, there is enormous pressure on public officials to solve the problem, even if their solutions are unlikely to fix the root causes of homelessness.[37] This pressure can lead state and local governments to turn to an easy, popular, and poor solution: criminalization.

Criminalization of homelessness, however, is both cruel and ineffective. Criminalization often appeals to the public because it can lower visibility of poverty, not because it is effective in reducing homelessness.[38] First, criminalization is not cost-effective for state and local governments. In 2014, for example, Central Florida spent $31,000 per year for law enforcement and medical costs for every chronically unhoused person, while permanent housing and case managers for each person would cost approximately $10,000 per year.[39] Second, criminalizing homeless only exacerbates its root causes, such as mental health problems.[40] These punishments also fail to solve the underlying

34. *Id.* ("Since data on homelessness has been collected, unsheltered homelessness has largely trended downward. By 2015, it had dropped by nearly a third. However, over the last five years, there has been a reversal of that trend. The unsheltered population has surged by 30 percent, almost wiping out nearly a decade of previous gains.").

35. Rejane Frederick and Jaboa Lake, *Kicking Folks Out While They're Down*, CTR. FOR AM. PROGRESS (July 27, 2020), https://www.americanprogress.org/issues/poverty/reports/2020/07/27/488110/kicking-folks-theyre/ [https://perma.cc/ZC6H-WPJV]. Frederick and Lake also show how homeowners and renters of color in particular are struggling to make rent payments, showing how 13% of white households missed or deferred their June 2020 rent payment, compared to 23% of Hispanic or Latino households and 29% of Black households. *Id.*

36. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2021 (2021), https://reports.nlihc.org/oor/about [https://perma.cc/DP89-X22A]. This study also shows that the two-bedroom housing wage of $24.90 is more than what nearly 60% of all wage workers earn. *Id.* An average minimum wage worker would need to work "nearly 97 hours per week to afford a two-bedroom rental home or 79 hours per week to afford a one-bedroom rental home at the average fair market rent." *Id.*

37. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 56.

38. *See Decriminalizing Homelessness*, HUD EXCHANGE, https://www.hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness/ [https://perma.cc/WPG6-RU4A].

39. *Id.* at 26, 72.

40. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15 (stating that the American Medical Association and American Public Health Association have condemned both criminalization of homelessness and sweeps due to stress, loss of sleep, and worsened mental health from these practices).

problems of inadequate housing supply, low wages, and too few federally-subsidized housing options.[41] Then, Part I.A provides a piece of the history behind the criminalization of homelessness by reviewing the foundations of civil punishment, and explaining that civil punishment in the United States has been historically used to criminalize Black people, gay people, and poor people.

A. A BRIEF HISTORY OF CIVIL PUNISHMENT

Economic sanctions are a billion dollar industry in the United States, with a lengthy history that predates the nation's founding.[42] English kings used civil fines to "harass . . . foes" and to detain those who were unable to pay.[43] From the founding of the United States, fines became a feature of vagrancy laws, which criminalized "certain types" of people—namely Black people, gay people, and poor people.[44] After the Civil War in particular, Southern states used unpaid fines to force formerly enslaved persons into indentured servitude.[45] Under these vagrancy laws, the government could arrest[46] or civilly punish people, allowing it to maintain social, cultural, political, racial, sexual, economic, and spatial status quos.[47] These laws affected millions of people and demonstrate how law in the United States can be used to punish certain types of people.[48] Part I.B delves further into the

41. *See* William Yu, UCLA Anderson Forecast, Homelessness in the U.S., California, and Los Angeles, https://www.anderson.ucla.edu/documents/areas/ctr/forecast/reports/uclaforecast_June2018_Yu.pdf [https://perma.cc/45BW-UGE2] (showing that rates of homelessness are linked to housing supply).

42. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 22 (2018); Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

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

44. *See generally* RISA L. GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016) (describing how the Supreme Court came to the conclusion that vagrancy, loitering, and suspicious persons laws were unconstitutional).

45. *Timbs*, 139 S. Ct. at 689.

46. *Id. See also* ACLU, *Ending Modern-Day Debtors' Prisons*, https://www.aclu.org/issues/smart-justice/sentencing-reform/ending-modern-day-debtors-prisons [https://perma.cc/HDM9-YX59]. In the face of "mounting budget deficits" at the state and local level, courts across the country have ordered "the arrest and jailing of people who fall behind on their payments, without affording any hearings to determine an individual's ability to pay or offering alternatives to payment such as community service." *Id.* These modern-day debtors' prisons destabilize the lives of poor people, are "racially-skewed," and ensure that poor people receive longer punishments for committing the same crimes as the rich. *Id.*

47. GOLUBOFF, *supra* note 44, at 3.

48. *Id.* at 3–4.

punishment of certain types of people through an exploration of the state of civil punishment and its relation to the criminalization of homelessness.

B. THE LAW OF CIVIL PUNISHMENT

Criminal punishment often receives more attention than civil punishment in part because it triggers greater constitutional and procedural protections.[49] Indeed, criminal prosecution presents the possibility of imprisonment, which triggers the right to counsel.[50] But the civil versus criminal distinction obscures the potential severity of civil punishment. Civil infractions may lead to incarceration for failure to pay fines.[51] To avoid that result and pay their fines, people may forego basic necessities such as food and medicine.[52] Civil punishment can also lead to suspension of driver's licenses, the inability to find a job, and the potential for higher fines in the future.[53] These civil punishments of poverty can lead to an increase in poverty, which leads to a greater likelihood of homelessness.[54] Poverty, civil punishment, and homelessness all exacerbate one another, so in order to assist people experiencing homelessness, scholars and courts should focus on the effects of civil as well as criminal punishment.

The Supreme Court has held that laws *criminalizing* vagrancy, loitering, and suspicious persons are unconstitutional.[55] But *civil* fines[56] are still frequently imposed

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49. *See* Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 368, 370 (2020).

50. *Id.* at 377.

51. *Id. See also* COAL. ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 33 (2015), http://www.cohsf.org/Punishing.pdf [https://perma.cc/MN34-TG7D] ("In nearly all cases, citations lead to lengthy and costly court procedures. Citations frequently result in the issuance of an arrest warrant that solidifies a homeless person's criminal status, and sometimes lead to time in jail."); NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 51 (noting that "79% of prisoners were denied housing or deemed ineligible for it at some point upon re-entry," and that in Los Angeles, California, "homeless people accounted for 19% of metro arrests").

52. *See* Rankin, *supra* note 49, at 379.

53. *Id.*

54. *Id.*

55. *See* GOLUBOFF, *supra* note 44, at 4.

56. A civil penalty is a "non-criminal remedy for a party's violation of laws or regulations." LEGAL INFO. INST., *Civil Penalties (Civil Fines)* (2020), https://www.law.cornell.edu/wex/civil_penalties_(civil_fines) [https://perma.cc/EXF8-66H6]. Civil penalties usually include civil fines or some other method of financial punishment. *Id.* The Supreme Court devised a test to distinguish between civil and

on people experiencing homelessness and on visibly poor people.[57] Civil fines punish a wide array of behavior, including panhandling, sleeping in parks, sitting on sidewalks, camping outside, sitting or lying in public, begging, and loitering.[58] These civil punishments can trigger criminal consequences—including incarceration—if a person fails to appear in court or pay a fine.[59] Failure-to-appear and failure-to-pay provisions can also result in prohibitions on obtaining a driver's license, suspensions of driver's and occupational licenses, restrictions on public benefits, and future denial of housing.[60] Fees also perpetuate the cycle of poverty by requiring unhoused people to pay fines when they are already unable to pay for necessities, such as food, transportation, and basic hygiene products.[61] Poverty, in turn, increases the likelihood of criminal behavior, which continues the cycle of poverty.[62] Essentially, these fines create a system of poverty that unhoused people cannot escape. This cycle can entrench people for life in a system that effectively criminalizes their existence, further resigning them to a lifetime of poverty and homelessness.[63]

This level of punishment and suffering comes from civil ordinances and regulations, which reformers often overlook.[64] Criminal punishment triggers certain rights, such as the right to

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criminal penalties in *United States v. Ward*, 448 U.S. 242 (1980). This test asks (1) Which penalty is the preference of the legislature, and (2) If the intent is civil penalty, will the statute's purpose negate the intention? 448 U.S. at 248–49. If the preference of the statute is a civil penalty, and the purpose does not negate the intention, a fine is considered a civil penalty. *Id.*

57. *See generally* JUSTIN OLSON AND SCOTT MACDONALD, HUM. RTS. ADVOC. PROJECT, SEATTLE U. SCH. OF L. WASHINGTON'S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (2015) (describing Washington ordinances that criminalize homelessness and poverty, including fines, incarceration, and consequent fines that lead to further punishment).

58. *See* Chris Herring et al., *Pervasive Penality: How the Criminalization of Poverty Perpetuates Homelessness*, 1 SOC. FORCES 1, 2 (2019).

59. *See* Rankin, *supra* note 13, at 10–11; NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15.

60. *See* Colgan, *supra* note 42, at 7–8; NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15. *See, e.g.*, COAL. ON HOMELESSNESS, *supra* note 51, at 2 (stating that 69% of unhoused survey respondents had been cited for a "quality of life" citation in the last year, that 90% of those respondents were unable to pay the fine for their last citation, and that, in San Francisco, inability to pay a fine results in a $300 civil assessment fee in addition to the base fine, an arrest warrant, and suspension of one's driver's license).

61. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15, 62.

62. *See* Rankin, *supra* note 13, at 11–12.

63. *Id.* at 12.

64. *Id.* at 2.

an attorney, while civil punishment does not carry the same protections despite potentially crushing burdens.[65] This leaves a gap in the law where civil punishment can be constitutional even if it has a devastating effect on unhoused persons, while criminal punishment for the same conduct can be unconstitutional.

II. THE INEFFECTIVENESS OF THE *ROBINSON* DOCTRINE

This Part explores the ineffectiveness of the *Robinson* doctrine in protecting unhoused persons from civil and criminal punishment. Despite its promise to prevent criminalization on the basis of status, the *Robinson* doctrine has proved to be an ineffective solution to the excessive punishment of unhoused persons.[66] The *Robinson* doctrine stems from the Supreme Court's decision in *Robinson v. California*, which prohibited the criminalization of status under the Cruel and Unusual Punishment Clause of the Eighth Amendment, such as the status of being addicted to narcotics.[67] This Part argues that even expansive readings of *Robinson*—such as the Ninth Circuit's decision in *Martin v. City of Boise* disallowing criminalization of homelessness based on the *status* of being unhoused[68]—fail to protect unhoused persons because states and municipalities can continue to criminalize "acts" of homeless or impose civil punishment.

A. THE BACKGROUND OF THE *ROBINSON* DOCTRINE

In 1962, the Supreme Court held in *Robinson v. California* that a California statute making it a criminal offense to be addicted to narcotics constituted cruel and unusual punishment under the Eighth Amendment.[69] Lawrence Robinson had been

65. *Id.*

66. *See generally* Edward J. Walters, Note, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619 (1995) (describing the difference between "acts" and "status" for purposes of the *Robinson* doctrine).

67. Robinson v. California, 370 U.S. 660 (1962). The Supreme Court then narrowed *Robinson* in *Powell v. Texas*, 392 U.S. 514 (1968), where a plurality held that the *Robinson* doctrine did not apply to acts, only status. 392 U.S. at 533–34. This allowed for punishment on the basis of acts that were clearly linked to status, such as a statute in California that allowed punishment on the basis of "camping outside," even if the statute served to punish vagrancy. *See* Walters, *supra* note 66, at 1636 (discussing *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995)).

68. *See infra* Part II.B.

69. *Robinson*, 370 U.S. at 667.

convicted under the charge of being "addicted to the use of narcotics."[70] The Supreme Court reasoned that the so-called crime of being addicted to drugs was analogous to having a common cold; without any "irregular behavior," Robinson could not be punished under the Eighth Amendment.[71] Six years later, the Supreme Court returned to the question of cruel and unusual punishment in *Powell v. Texas*.[72] In *Powell*, Leroy Powell was charged with a violation of a Texas statute prohibiting public drunkenness.[73] This time, the plurality stated that it was Powell's *conduct in public* as a "chronic alcoholic" rather than his status that was being punished.[74] The *Powell* plurality emphasized the difference between "a 'status,' as in *Robinson*, and 'condition'" or conduct, allowing punishment even for "involuntary" conduct related to Powell's alcoholism.[75] While Robinson could not be punished under the "common cold" analogy, Powell's criminal alcoholism caused the Court to use a much harsher analogy: that a prohibition on criminalizing public conduct would prevent a state from convicting a murderer who had a compulsion to kill.[76]

Justice White's concurrence created a slightly different distinction: under the *Robinson* doctrine, status cannot be criminalized, but conduct can be.[77] Justice White stated that in *Powell*, "being drunk in a public place" could be criminalized, whereas in *Robinson* there was no action to criminalize.[78] Justice White's concurrence moved away from the plurality's compulsion argument, and focused on the "status" versus "conduct" distinction.[79] Lower courts have treated Justice White's concurrence as *Powell*'s holding.[80] Under the "status" versus

70. *Id.* at 660–61.
71. *Id.* at 667.
72. Powell v. Texas, 392 U.S. 514 (1968).
73. *Id.* at 517.
74. *Id.* at 531–35.
75. *Id.* at 533–35.
76. Robinson v. California, 370 U.S. 660, 660–61(1962); *Powell*, 392 U.S. at 531–35.
77. *Powell*, 392 U.S. at 548–49 (White, J., concurring).
78. *Id.*
79. *Id.*; *cf.* R. George Wright, *Homelessness, Criminal Responsibility, and the Pathologies of Policy: Triangulating on a Constitutional Right to Housing*, 93 ST. JOHN'S L. REV. 427, 431–32 (2019) (explaining the difference between "status" and "conduct" in *Robinson*).
80. *See* Wright, *supra* note 79, at 431; *see also* Marks v. United States, 430 U.S. 188, 193 (1977) ("[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as

"conduct" distinction, the question becomes whether someone has committed a criminally culpable act—even something as innocuous as appearing in public. Part II.B explores the Ninth Circuit's application of this distinction in *Martin v. City of Boise*, where that court held that laws criminalizing sitting, sleeping, or lying outside on public property unconstitutionally punish people experiencing homelessness for their status rather than their conduct.[81]

B. *MARTIN V. CITY OF BOISE*'S APPLICATION OF THE *ROBINSON* DOCTRINE TO PEOPLE EXPERIENCING HOMELESSNESS

In *Martin v. City of Boise*, the Ninth Circuit applied *Robinson*[82] and held that punishing people experiencing homelessness for sleeping outside violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[83] In *Martin*, eleven unhoused plaintiffs sued the city of Boise, arguing that the enforcement of anti-homelessness ordinances in Boise violated

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that position taken by those Members who concurred in the judgements on the narrowest grounds" (internal quotation marks omitted)). See also Bearden v. Georgia, 416 U.S. 660, 666 (1983) (citing Justice Harlan's concurrence as instructive in its holding).

81. Martin v. City of Boise, 920 F.3d 584, 615–17 (9th Cir. 2019).

82. The *Martin* court's application of the *Robinson* doctrine has proved controversial. *See, e.g.*, West Menefee Bakke, *Against the Status Crimes Doctrine*, 73 SMU L. REV. F. 232, 239 (2020) ("The Ninth Circuit's decision in *Martin* was incorrect. Instead of relegating the status crimes doctrine to the limited context of disease, the Ninth Circuit *expanded* it to cover homelessness." (emphasis added)); Brief for The International Municipal Lawyers Ass'n et al. as Amici Curiae Supporting Petitioners, City of Boise v. Martin, *cert. denied*, 140 S. Ct. 674 (2019) (No. 19-247) (arguing that the Ninth Circuit "improperly expand[ed]" the reach of the Eighth Amendment); John Hirschauer, *Why Didn't the Supreme Court Take This Homelessness Case?*, NAT'L REV. (Jan. 8, 2020), https://www.nationalreview.com/2020/01/why-didnt-the-supreme-court-take-this-homelessness-case/ [on file with the Columbia Journal of Law and Social Problems] (arguing that *Martin* incorrectly combines Justice White's concurrence with the dissenters from *Powell*); Devin R. McDonough, *Constitutional Law: Ninth Circuit Decision Presents Public Health Dilemma with Improper Eighth Amendment Application:* Martin v. City of Boise, 16 J. HEALTH & BIOMEDICAL L. 153, 160 (2020) ("The Ninth Circuit inappropriately concluded that the Eighth Amendment prohibits issuing criminal penalties to those homeless individuals sitting, sleeping, or lying outside on public property when those individuals are incapable of obtaining shelter."). *But see* Joy H. Kim, Note, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of Choice*, 95 N.Y.U. L. REV. 1150, 1181 (2020) ("Just as the *Robinson* Court prohibited criminalizing addiction, courts should not allow cities to criminalize individuals for sleeping outside if existing shelters in that city bar individuals with substance use disorders.").

83. *Martin*, 920 F.3d at 617.

their Eighth Amendment rights.[84] One plaintiff, Janet Bell, received a thirty-day sentence after two citations—one for sitting on a riverbank with a backpack, the other for putting down a bedroll in the woods.[85] Another plaintiff, Martin, was cited for resting near a shelter.[86] Martin was found guilty at trial and ordered to pay $150.[87] There were also insufficient shelter beds for unhoused individuals in Boise.[88] On these facts, the Ninth Circuit found that sleeping outside was a human necessity if there were insufficient shelter beds, and, under these circumstances, criminalizing sleeping outside was unconstitutional under *Robinson v. California*.[89] This decision was a victory for unhoused plaintiffs but came with complications.

Martin does not offer unhoused persons adequate protection from punishment based on homelessness. *Martin* uses *Robinson*'s distinction between status and action and applies it to the criminalization of homelessness.[90] This creates a distinction between "culpable" homelessness, or conduct that can be punished, and "nonculpable" homelessness, which is a status that cannot be punished.[91] The *Martin* court used this distinction for shelter beds, citing "inevitability, unavoidability, and involuntariness" of prohibited conduct when shelter beds were unavailable.[92] The *Martin* court, however, did not look at accessibility of shelter beds as compared to the particular individual, only availability of shelter beds to the unhoused population as a whole.[93] Furthermore, the *Martin* court did not

84. Martin v. City of Boise, 920 F. 3d 584, 615 (9th Cir. 2019); Case Comment, Martin v. City of Boise*: Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public*, 133 HARV. L. REV. 699 (2019).

85. Answer to Plaintiffs' Amended Complaint for Injunctive Relief and Declaratory Relief and Monetary Damages ¶ XI, *Bell*, 834 F. Supp. 2d 1103 (No. 09-CV-540).

86. Martin v. City of Boise, 920 F. 3d 584, 606 (9th Cir. 2019).

87. Amended Complaint for Injunctive Relief and Declaratory Relief and Monetary Damages ¶ XI, *Bell*, 834 F. Supp. 2d 1103 (No. 09-CV-540).

88. Martin v. City of Boise, 920 F. 3d 584, 617 n.8 (9th Cir. 2019).

89. *Id.* at 617.

90. *See* Wright, *supra* note 79, at 437.

91. *Id.*

92. *Id.*

93. *Id.* Excessive bail under the Eighth Amendment is also subject to complications surrounding individualized circumstances. *See* CONG. RSCH. SERV., R45533, U.S. CONSTITUTIONAL LIMITS ON STATE MONEY-BAIL PRACTICES FOR CRIMINAL DEFENDANTS 2 (2019) ("Typically, judges do not assess a detainee's individual characteristics beyond the offense charged; instead, judges set a defendant's bail based on the criminal offense with which he is charged"). *But see* Kellen Funk, *The Present Crisis in American Bail*, 128

specify whether its protections extend to civil punishment or exclusively cover criminal punishment,[94] despite that civil fines can cause a wealth of problems for unhoused persons.[95] If people experiencing homelessness do not have civil protections under *Martin*, they can easily end up incarcerated for not paying a civil fine just the same as if they had been arrested and criminally charged.[96]

The weaknesses in *Martin* mirror the weaknesses in the *Robinson* doctrine. States may choose to criminalize urinating, sleeping, and eating in public,[97] and a person experiencing homelessness may have no recourse if courts decide that these necessary-for-life activities are conduct rather than status. This razor-thin distinction between status and conduct allows a state to wait for an unhoused person to do something necessary for their survival and criminalize the act as "conduct" rather than "status."[98] States therefore have two potential paths to continue to criminalize homelessness despite *Robinson*—first, to criminalize an "act," or second, to impose a civil punishment.

YALE L.J. F. 1098 (2019) (stating "that unaffordable bail is permissible only when a court finds that release on any other conditions would not reasonably assure the individual's appearance").

94. *See infra* Part II.C.1.

95. *See* Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1501–04 (2020); Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASS'N (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/ [https://perma.cc/M5Q8-BB4R] ("[T]he court routinely imposed excessive fines and ordered the arrest of low-income residents for failure to appear or to make payments, sometimes despite inadequate notice and also without inquiring into their ability to pay.").

96. In theory, wealth-based barriers to litigation access (especially in criminal cases) violate equal protection. In *Bearden v. Georgia*, the Supreme Court created a four-part test for determining whether a state was violating the rights of indigent offenders. 416 U.S. 660 (1983). The test requires courts to inquire into (1) the nature of the individual interest concerned; (2) the extent to which that interest is impacted by the government policy; (3) whether the nexus between the policy's purpose and means is rational; and (4) whether any alternative means exist to accomplish that purpose. *Id.* at 666. In practice, LFOs (legal financial obligations, such as fines and fees imposed on defendants) are increasingly popular. *See* Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 122 (2020). While scholars have argued that there should be a constitutional guarantee of an "ability to pay" inquiry for fines and fees, LFOs remain in widespread use, partially because they are often related to a government's legitimate interest in funding municipal services. *Id.*

97. *See* Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual "Crimes,"* 96 J. CRIM. L. & CRIMINOLOGY 329, 330 (2005).

98. *Id.* at 346.

C. OTHER COURTS' TREATMENT OF *MARTIN V. CITY OF BOISE*

The Fourth and Eleventh Circuits' treatment of *Martin* highlights the ineffectiveness of the *Robinson* doctrine as a legal remedy for people experiencing homelessness. The Fourth Circuit has cited *Martin*'s extension of the *Robinson* doctrine to unhoused persons favorably in *Manning v. Caldwell for City of Roanoke*.[99] In *Manning*, the statutory scheme at issue "authorize[d] Virginia to obtain, in absentia, a *civil* interdiction order against persons it deem[ed] 'habitual drunkards,'" and then "permit[ed] Virginia to rely on the interdiction order to *criminally prosecute* conduct permitted for all others of legal drinking age."[100] The declaration of status as a "habitual drunkard" was a civil designation that led to criminal punishment for possession or attempted possession of alcohol.[101] The Fourth Circuit construed this as cruel and unusual punishment under the *Robinson* doctrine, and stated that the only other Circuit Court to face this issue had been the Ninth Circuit in *Martin*, which came to the "same conclusion" as the Fourth Circuit.[102] But the Fourth Circuit's reasoning suffers from the same deficiencies as *Martin*, and it struck down Virginia's statutory scheme because that scheme explicitly criminalized status.[103] Even this positive reading of Martin does not provide protection for people experiencing homelessness.[104]

The Eleventh Circuit has also expressly declined to follow *Martin*'s reasoning, citing public health concerns and describing the criminalization of people experiencing homelessness as a prohibition on "conduct" rather than "status."[105] In *Joel v. City of*

99. Manning v. Caldwell for City of Roanoke, 930 F.3d 264, 282 n.17 (4th Cir. 2019).
100. *Id.* at 268 (emphasis added).
101. *Id.* at 268–69.
102. *Id.* at 282 n.17.
103. The statutory scheme in Manning punished those who qualified, in the eyes of the court, as "habitual drunkards." *Id.* at 268.
104. An Ohio district court has also cited favorably to *Martin*. *See* Phillips v. City of Cincinnati, 2019 WL 2289277, at *2 n.6 (S.D. Ohio May 29, 2019). Although the court did not address unhoused plaintiffs Eighth Amendment claims at length in *Phillips v. City of Cincinnati*, the court did say that plaintiffs would be likely to succeed on an Eighth Amendment claim if they could show that there were not available shelter beds, citing to *Martin*, as the Sixth Circuit had not yet addressed this issue. *Id.*
105. Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000). Importantly, in comparison to *Martin*, *Joel* noted that the city of Orlando was able to prove that there was "sufficient space available to homeless residents." See Justin Cook, Comment, *Down and*

Orlando, the Eleventh Circuit placed heavy emphasis on the city's interest in "aesthetics, sanitation, public health and safety."[106] The Eleventh Circuit's ability to categorize the behaviors of people experiencing homelessness as conduct rather than status are demonstrative of the weaknesses in *Martin* and how the decision could be effectively narrowed to not protect unhoused plaintiffs from a wide array of punishment. The Eleventh Circuit's reading of *Martin* illuminates the anti-homelessness policy concerns that have led to its mostly narrow reading in district courts.

1. Martin*'s Narrow Application in District Courts Within the Ninth Circuit*

Under *Martin*, courts have denied Eighth Amendment protections for people experiencing homelessness. In *Le Van Hung v. Schaaf*, the United States District Court for the Northern District of California refused to enjoin the City of Oakland from clearing an encampment of persons experiencing homelessness from a local park.[107] The *Le Van Hung* court focused on two provisions of *Martin*. First, the court noted that, while *Martin* forbids the arrest of people experiencing homelessness for living in public places, Oakland's plan to clear the park encampment did not require the arrest of any people experiencing homelessness. Therefore, the court concluded that there was no Eighth Amendment issue with Oakland's plan to clear the park because it did not criminalize sleeping in the park.[108] The court also reasoned that while *Martin* prohibited the arrest of unhoused individuals because of sleeping outside when there is nowhere else for them to go, it did not give people experiencing homelessness the freedom "to occupy indefinitely any public space of their choosing."[109] Furthermore, the court reasoned that even if there were insufficient shelter beds, there was no criminalization because the ordinances did not require

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Out in San Antonio: The Constitutionality of San Antonio's Anti-Homeless Ordinances, 8 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 221, 234 (2006).

106. *See Joel*, 232 F.3d at 1358.

107. Le Van Hung v. Schaaf, 2019 WL 1779584, at *7–8 (N.D. Cal. Apr. 23, 2019). The court did, however, grant a preliminary injunction requiring the city to follow its own policies when clearing the park. *Id.*

108. *Id.* at *4–5.

109. *Id.* at *4–5.

arrests.[110] Therefore, under the *Le Van Hung* court's reasoning, an ordinance mandating an empty park and authorizing seizures would be constitutional, even if there were not sufficient shelter beds in the city.

Other district courts have also read *Martin* in a way that denies relief for unhoused plaintiffs. In *Carlos-Kahalekomo v. County of Kauai*, the United States District Court for the District of Hawaii noted that *Martin* did not require that a city to provide sufficient shelter for the homeless, nor did it ban ordinances that prevented people experiencing homelessness from sleeping in certain areas of the city.[111] In sum, the court saw ordinances that criminalized camping or erecting "temporary sleeping quarters" on "any County public park" as separate from an ordinance that criminalized the mere act of sleeping outside.[112]

Martin's reasoning and explicit mention of criminal punishment also leaves open the possibility that civil punishment of unhoused individuals for status crimes will still be permitted in the Ninth Circuit. In *Quintero v. City of Santa Cruz*, decided just a week after *Le Van Hung*, the United States District Court for the Northern District of California again refused to enjoin a city from closing an encampment of people experiencing homelessness; with no evidence of criminal prosecution, the plaintiffs had no criminalization from which to obtain relief.[113] The *Quintero* court also denied relief under *Martin* based on the availability of shelter beds in the city.[114] These cases show a trend towards reading *Martin* narrowly based on both the criminal punishment point and the availability of shelter beds point. Read together, these points show that *Martin* rests on narrow reasoning.

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110. *Id.* at *4.

111. Carlos-Kahalekomo v. County of Kauai, 2020 WL 4455101, at *3 (D. Haw. Aug. 3, 2020).

112. *Id.* at *3–5. The court in *Carlos-Kahalekomo* claimed that this ordinance did not violate *Martin* because it prohibited camping, and therefore did not criminalize "the simple act of sleeping outside." *Id.* at *3. Under this logic, it seems that construction of "any temporary sleeping quarters," construed broadly, could be banned across an entire county. *Id.* at *4.

113. Quintero v. City of Santa Cruz, 2019 WL 1924990, at *3 (N.D. Cal. April 30, 2019).

114. *Id.*; *see also* Miralle v. City of Oakland, 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018) (stating that *Martin* did not provide a constitutional right to occupy public property indefinitely).

Other courts, however, have shown that the logic of *Martin* may extend beyond the criminal context. In *Aitken v. Aberdeen*, the United States District Court for the District of Washington stated that "courts have been reluctant to stretch the ruling beyond its context of total homelessness criminalization."[115] But the *Aitken* court acknowledged the possibility that *Martin* could extend to criminal sanctions.[116] The court noted an apparent conflict with *Ingraham v. Wright*, a case in which the Supreme Court denied Cruel and Unusual Punishment Clause relief to children receiving corporal punishment in school because the punishment did not involve violation of a criminal statute, and *Austin v. United States,* an Excessive Fines Clause case, reasoning that the Eighth Amendment "cuts across the division between the civil and the criminal law."[117] The court then stated that it was "unwilling to hold definitely that Martin's rationale cannot extend" to sweeping civil anti-camping ordinances.[118] The court did not mention the Excessive Fines Clause, perhaps due to the fact that *Timbs v. Indiana* had incorporated it only four months earlier.[119] Still, the court found that there was a possibility of irreparable harm and granted a preliminary injunction stopping enforcement of anti-homeless ordinances,[120] showing that courts are potentially open to arguments on civil punishment.[121]

Together, these cases show that *Martin*'s reasoning is easily limited, whether it be through the technical availability of shelter beds, the criminalization of sleeping in certain areas of the city, or by reading *Martin* to apply only to criminal prosecution. The easy narrowing of *Martin* to its facts shows a need for stronger constitutional protections for people experiencing homelessness. To expand protections, courts could choose to read *Martin*

115. Aitken v. Aberdeen, 393 F. Supp. 3d 1075, 1081–82 (W.D. Wash. 2019).
116. *Id.*
117. *Id.* at 1082. Other courts have denied Eighth Amendment relief under *Martin* based on the criminal/civil distinction. *See, e.g.*, Butcher v. City of Marysville, 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019) (rejecting a Cruel and Unusual Punishment claim by people experiencing homelessness because they had not faced criminal punishment); Shipp v. Schaaf, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019) (rejecting *Martin's* applicability based on the lack of criminal sanctions). *Austin* and its relationship to civil punishment is explored more fully in Part III.A.
118. *Aitken*, 393 F. Supp. 3d at 1082.
119. *See* Timbs v. Indiana, 139 S. Ct. 682 (2019).
120. *Aitken*, 393 F. Supp. 3d at 1085–86.
121. *See* Rankin, *supra* note 49, at 383.

expansively or provide another constitutional path forward for unhoused litigants. One district court decided to do both.[122]

2. Blake v. City of Grants Pass *and the Expansion of Protections for People Experiencing Homelessness*

Blake v. City of Grants Pass, a 2019 case from the United States District Court for the District of Oregon, reads *Martin* in a way that provides comprehensive protections for unhoused persons. In *Grants Pass*, the court struck down ordinances that banned "camping" in the city of Grants Pass.[123] The court read *Martin* expansively and expressly included civil punishment within *Martin*'s scope.[124] The court also stated that the "Eighth Amendment prohibits cruel and unusual punishment whether the punishment is designated as civil or criminal."[125] To reach this conclusion, the court relied on Supreme Court precedent stating that *in rem* civil forfeitures constitute fines for the purpose of the Eighth Amendment "when they are at least partially punitive."[126] *Grants Pass* viewed the entire Eighth Amendment as applicable to both civil and criminal punishment, and therefore held that ordinances that civilly punish the status of people experiencing homelessness are unconstitutional.[127] *Grants Pass* is currently on appeal, and if its broad reading of *Martin* is overturned, the *Martin* precedent becomes a less effective path forward for unhoused persons.

Grants Pass provided another avenue, however, to protect people experiencing homelessness against civil punishment—the Excessive Fines Clause. The court held that the ordinances at issue were a violation of the Cruel and Unusual Punishment Clause *and* the Excessive Fines Clause of the Eighth Amendment.[128] The Excessive Fines Clause could allow a

122. *See* Blake v. City of Grants Pass, 2020 WL 4209227, at *5, *10, *11 (D. Or. July 22, 2020).

123. *Id.* at *1, *2. The ordinances at issue included Grants Pass Municipal Codes ("GPMC") 5.61.020 (the "anti-sleeping ordinance"); GPMC 5.61.030 and GPMC 6.46.090 (the "anti-camping ordinances"), GPMC 6.46.350 (the "park exclusion ordinance"), which prohibited, in relevant part, bedding and sleeping bags "maintained for the purpose of maintaining a temporary place to live." Grants Pass Municipal Code 5.61.020.

124. *See* Rankin, *supra* note 13, at 16.

125. *Blake*, 2020 WL 4209227, at *8.

126. *Id.* at *9 (describing the Supreme Court's conclusions in *Austin v. Texas*, 509 U.S. 602 (1993)).

127. *Id.*

128. *Id.* at *10.

constitutional claim for unhoused plaintiffs that would evade the problems posed by the *Robinson* doctrine, such as a narrow interpretation of "status" crimes versus "activity" crimes. This analysis could also evade the pitfall of applying the Cruel and Unusual Punishment Clause exclusively to criminal sanctions. Considering the recent incorporation of the Excessive Fines Clause, people experiencing homelessness may be able to win relief for civil punishment of life-sustaining behavior. Part III of this Note explores the kind of relief that unhoused litigants may be able to receive and discusses the potential pitfalls in the application of the Excessive Fines Clause to people experiencing homelessness.

III. THE EXCESSIVE FINES CLAUSE AS A PATH FORWARD FOR PEOPLE EXPERIENCING HOMELESSNESS

This Part explores the framework of the Excessive Fines Clause and its potential application to unhoused litigants. Part III.A begins by examining how the history of the Excessive Fines Clause may provide context for its application. Part III.B then analyzes the two requirements for the Clause to apply—that the policy (1) impose a fine that is punitive and (2) that it be "excessive"—and explores how the Clause applies to homelessness. Part III.C concludes that the punishment unhoused litigants on the basis of their housing status face falls within the bounds of the Excessive Fines Clause, and that courts should use an individualized inquiry when determining whether or not a fine on an unhoused person is excessive.

A. THE HISTORY OF THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE AS A PROTECTION AGAINST CIVIL FINES

Although there is limited Supreme Court jurisprudence on the Excessive Fines Clause,[129] the Clause has a lengthy history that should inform how courts and advocates have employed it. The Clause is short, stating only a prohibition against "excessive fines imposed."[130] The Court did not invoke the Clause until 1989 in *Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal,*

129. *See* Colgan, *supra* note 42, at 10.
130. U.S. Const. amend. VIII.

Inc., holding that punitive damages did not violate the Excessive Fines Clause,[131] and has only addressed the question of excessiveness once, in *United States v. Bajakajian*.[132] Furthermore, the Court only incorporated the Excessive Fines Clause against the states in 2019,[133] meaning that, for much of American history, state courts could contribute little to the Clause's meaning. As a result, the Clause's exact requirements and limitations remain largely undefined.

Notwithstanding scant jurisprudence, the Excessive Fines Clause has a strong foundation in American civil rights and civil liberties.[134] Its origins trace back to the Magna Carta,[135] which required that economic punishment be proportionate to the wrong it sought to punish and not deprive people of their livelihoods.[136] The English Bill of Rights also contained a provision that excessive fines should not be imposed.[137] Early American settlers brought this provision to the colonies, and was written into the Virginia Declaration of Rights.[138] By 1787, eight state constitutions had similar provisions.[139] By 1868, thirty-five of thirty-seven states had provisions prohibiting excessive fines.[140] Currently, all fifty states either prohibit excessive fines or require proportionality for fines in their constitutions.[141]

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131. Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal, Inc, 492 U.S. 257, 259–60 (1989); *see also* Deborah F. Buckman, *When Does Forfeiture of Motor Vehicle Pursuant to Federal Statute Violate Excessive Fines Clause of Eighth Amendment*, 169 A.L.R. Fed. 615, § 2[a] (2001).

132. *See* Buckman, *supra* note 131, at § 2[a]; United States v. Bajakajian, 524 U.S. 321 (1998). *See infra* Part III.A.

133. *See* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019).

134. *Id.* at 687–90 (describing the history of the Excessive Fines Clause).

135. The Magna Carta was a charter of liberties to which the English King John gave his assent in June 1215. *Magna Carta*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/Magna%20Carta [https://perma.cc/NT2C-QYB6].

136. *Timbs*, 139 S. Ct. at 687; *English Translation of Magna Carta*, BRITISH LIB. (Jul. 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/2PST-JMLM].

137. *Timbs*, 139 S. Ct. at 688; *English Bill of Rights 1689*, AVALON PROJECT (2008), https://avalon.law.yale.edu/17th_century/england.asp [https://perma.cc/3DZV-HLKA] ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

138. *Timbs*, 139 S. Ct. at 688; *The Virginia Declaration of Rights*, NAT'L ARCHIVES (Sep. 29, 2016), https://www.archives.gov/founding-docs/virginia-declaration-of-rights [https://perma.cc/26PU-HEC9] ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

139. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

140. *Id.*

141. *Id.* at 689.

Given the Clause's strong foundation, the Supreme Court has been willing to view what constitutes a fine broadly. In *Austin v. United States*, the Supreme Court held that *in rem* civil forfeitures[142] fell within the scope of the Excessive Fines Clause.[143] In *Austin*, Richard Austin was arrested and indicted for possessing cocaine with intent to distribute.[144] After his arrest, the United States filed an *in rem* action seeking forfeiture of Austin's home and business.[145] Austin argued that this was a violation of the Eighth Amendment's Excessive Fines Clause, and the Supreme Court agreed that a civil *in rem* proceeding could be a violation of the Excessive Fines Clause.[146] The Court focused its analysis on whether "the forfeiture was monetary punishment," rather than whether the proceeding was civil or criminal.[147] Instead of focusing on the nature of the punishment, the Court turned its attention to the history of the Eighth Amendment, noting that the Excessive Fines Clause limits the government's ability to "extract payments" whether civil or criminal.[148] In the case of *in rem* civil forfeitures, the United States has a long tradition of requiring property forfeiture for the violation of criminal and civil statutes, and the forfeiture of property involved in both was considered punitive.[149] While civil forfeitures were traditionally based on the legal fiction that the property was the guilty party, the Court noted that the intent of the forfeiture was to punish the owner for their culpability or complicity in the criminal or civil violation.[150] In sum, the Court determined that civil forfeitures, a type of civil sanction, could be

142. An *in rem* civil forfeiture describes an action brought in court against property. *See Types of Federal Forfeiture*, U.S. DEP'T OF JUST. (Feb. 17, 2022), https://www.justice.gov/afms/types-federal-forfeiture [https://perma.cc/8WCC-VXHU].

143. Austin v. United States, 509 U.S. 602, 602 (1993). The Court has, however, also held that civil forfeitures do not constitute punishment *for the purposes of the Double Jeopardy Clause*. United States v. Ursery, 518 U.S. 267, 285–86 (1996). The Court distinguished the Double Jeopardy Clause from the Excessive Fines Clause, acknowledging that the "categorical approach under the Excessive Fines Clause [is] wholly distinct" from civil forfeitures in other constitutional contexts. *Id.*

144. *See* Austin v. United States, 509 U.S. 602, 604 (1993); Robin M. Sackett, *The Impact of* Austin v. United States*: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings*, 24 GOLDEN GATE U. L. REV. 495, 505 (1994).

145. *Id.*

146. *Id.* at 506.

147. *Austin*, 509 U.S. at 610.

148. *Id.*

149. *Id.* at 613–616.

150. *See* Colgan, *supra* note 42, at 19.

considered fines and placed them under the purview of the Excessive Fines Clause.[151]

While *Austin* mostly limited its discussion to civil *in rem* forfeitures, the Court cited other forms of civil punishment twice, suggesting that they could also fall within the scope of the Excessive Fines Clause.[152] First, the Court noted that forfeitures were listed alongside other provisions for punishment, and the word "forfeiture" was a substitution for fine, providing evidence of punitive intent.[153] Second, the Court noted that forfeiture provisions bolstered statutory fines provisions and imprisonment, showing further evidence of punitive intent.[154]

The Court's analysis has since been complicated by Justice Thomas' majority opinion in *United States v. Bajakajian*, which reaffirmed *Austin*'s holding while simultaneously asserting that traditional *in rem* forfeitures were "not considered punishment against the individual for an offense."[155] However, Justice Thomas' statement is not historically accurate, as court and statutory records in the United States from 1773 and onwards described sanctions as penal in nature, or expressly used them to punish malicious conduct.[156] Additionally, Justice Thomas, concurring in a recent denial of a writ of certiorari, wrote that "[m]odern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes."[157] Based on Justice Thomas' more recent statement, the Court's stance appears to be consistent with its prior precedent—civil forfeiture statutes may be, at least in part, punitive.

The Supreme Court most recently invoked the Excessive Fines Clause in 2019 in *Timbs v. Indiana*, which incorporated the

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151. *Id.*

152. *Id.* at 19–20. The Court noted the relationship between economic sanctions and other forms of punishment, as well as "Congress's recognition that forfeiture would supplement statutory fines and imprisonment." *Id.* (citing Austin v. United States, 509 U.S. 602, 614–20 (1993)).

153. *Id.*; Austin v. United States, 509 U.S. 602, 614 (1993).

154. *See* Colgan, *supra* note 42, at 19.

155. United States v. Bajakajian, 524 U.S. 321, 331 (1998).

156. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 313–315 (2014) ("[B]eyond nomenclature, statutory language often reflected an understanding that sanctions that served remedial purposes were, in fact, punishment[.]").

157. Leonard v. Texas, 137 S. Ct. 847, 847 (2017) (statement of Thomas, J., respecting the denial of certiorari); Colgan, *supra* note 42, at 17 n.87.

Excessive Fines Clause through the Fourteenth Amendment.[158] In *Timbs*, Tyson Timbs pled guilty to a drug offense in Indiana.[159] As a result, he was sentenced to home detention followed by probation.[160] In addition to his detention, the state authorized the forfeiture of Timbs' car, a vehicle worth four times more than the maximum fine he could have received for the crime.[161] The determination of whether or not Timbs had been excessively fined centered on the forfeiture of his car, and the Court expressly incorporated the Eighth Amendment to include civil *in rem* forfeitures as fines.[162] On remand, the Indiana Supreme Court repeatedly noted that Timbs used his car to meet basic needs, including food, shelter, and medical care.[163] This shows that lower courts are willing to consider the importance of an item to the defendant in civil forfeiture actions, which could be the start of a shift towards considering the plaintiff's life situation to determine whether a civil forfeiture violates the Excessive Fines Clause.[164]

The Indiana court's analysis also highlights the reasons that the Court felt it was necessary to incorporate the Clause. Justice Ginsburg wrote that the "historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is . . . overwhelming."[165] The Clause's background in English law, colonial era provisions, and state constitutions showed that the protections guaranteed by the Clause were fundamental.[166] Furthermore, Justice Ginsburg stated that civil *in rem* forfeitures fell within the scope of the Clause when they are at least partially punitive.[167] With the recent incorporation of the Excessive Fines Clause and the analysis in *Timbs*, advocates have a new tool to challenge

158. Timbs v. Indiana, 139 S. Ct. 682, 684 (2019) (incorporating the Eighth Amendment's Excessive Fines Clause to the States through the Fourteenth Amendment).
159. *Id.* at 686.
160. *Id.*
161. *Id.*
162. *Id.* at 690.
163. *See* Colgan & McLean, *supra* note 16, at 432 (describing how on remand, the Indiana Supreme Court considered the magnitude of the punishment on the individual to determine excessiveness).
164. *Id.*
165. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).
166. *Id.* at 688.
167. *Id.* at 690.

excessive civil in rem forfeitures related to the criminalization of homelessness.

B. THE PUNITIVE REQUIREMENT

Part III.B focuses on the punitive requirement under the Excessive Fines Clause. Punitive fines trigger the Excessive Fines Clause, whereas non-punitive economic sanctions do not.[168] A punitive economic sanction need be only "partially punitive" to be considered constitutionally punitive, and therefore a "fine," under the Clause.[169] Whether or not a sanction is "partially punitive" can be determined either through a showing that the sanction is linked to the prohibited conduct or through a showing that the sanction is treated like other forms of punishment.[170] If a sanction meets either of these standards, it is partially punitive, and therefore a "fine" that can be analyzed under the Excessive Fines Clause.[171]

The Supreme Court created the partially punitive requirement in *Austin v. United States*, which established that civil in rem forfeitures could be considered under the Excessive Fines Clause.[172] In *Austin*, the Court concluded that a forfeiture of Austin's mobile home and auto body shop was punitive based on the historical link between civil forfeitures and wrongful conduct.[173] The Court noted that forfeitures of property were historically intended to ascribe the offender's wrongdoing to the property itself, thus making the property an instrumentality in the offense and its forfeiture appropriate punishment.[174] The Court also examined the history of civil forfeitures, and noted that they were traditionally listed alongside other forms of punishment.[175] Because the Excessive Fines Clause only applies to fines intended by legislatures to punish wrongdoing, the fine's

168. *See* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 163 (1995).

169. *See* Colgan, *supra* note 42, at 18 (describing the requirement for partially punitive under *Austin*).

170. *Id.* at 19.

171. *Id.*

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

173. *Id.* at 604. The Court held only that forfeiture of property *could* be excessive under the Excessive Fines Clause, and remanded on the issue of whether or not the forfeiture was actually punitive. *Id.*

174. *Id.* at 612, 615.

175. *See* Colgan, *supra* note 42, at 19.

amount—such as a hefty tax intended to incentivize rather than punish—would not constitute a fine but a smaller fee aimed at punishing would.[176]

Laws that criminalize homelessness, including quality of life laws such as the one at issue in *Grants Pass*, are at least partially punitive. Legislatures use these statutes and ordinances to regulate behavior that cannot otherwise "be classified as serious crime,"[177] aiming to protect public order and to allow society to ban conduct which it finds offensive[178] such as begging, sleeping outdoors, and public camping.[179] These bans are, however, also often deliberately designed to forcibly remove—indeed, punish—people experiencing homelessness from public spaces.[180]

Beyond immediate removal, quality of life laws also have the ripple effect of increasing financial insecurity, limiting access to jobs, and stigmatizing unhoused persons.[181] These laws also lead to ticketing and arrests of people experiencing homelessness,[182] including Debra Blake in *Grants Pass*.[183] These ordinances are, at their core, designed as punitive "sticks" to decrease homelessness.[184] Critics may argue that these fines are not punitive, and are rather intended as incentives to protect public safety. But this is not the inquiry under the Clause. The appropriate inquiry under the Clause is whether the fine is at least *partially* punitive, not whether the fine serves no remedial

176. *See id.* at 20 n.106; R. A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007) (describing wrongdoing leading to criminal responsibility).

177. Mary I. Coombs, *The Constricted Meaning of "Community" in Community Policing*, 72 ST. JOHN'S L. REV. 1367, 1367 (1998).

178. *See generally* Christine L. Bella & David L. Lopez, Note, *Quality of Life—At What Price? Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT. 89 (1994) (discussing the impact of quality of life laws on people experiencing homelessness).

179. *See, e.g.*, *id.* at 92; Blake v. City of Grants Pass, 2020 WL 4209227, at *17 (D. Or. July 22, 2020) (describing the fines at issue).

180. *See* Christine L. Bella & David L. Lopez, Note, *Quality of Life—At What Price? Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT. 89, 91 (1994) ("These efforts have ranged from the enforcement of noncontroversial ordinances regulating such conduct as littering and excessive noisemaking, to regulations that essentially 'criminalize' the often involuntary state of homelessness.").

181. *See generally* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11 (describing the impact of homelessness nationwide).

182. *See* Robinson, *No Right to Rest*, *supra* note 9, at 42–43.

183. *Blake*, 2020 WL 4209227, at *11.

184. *See* Robinson, *No Right to Rest*, *supra* note 9, at 66.

purpose.[185] Because of the innately punitive nature of laws criminalizing homelessness, the "partially punitive" test for the Eighth Amendment's Excessive Fines Clause would likely be easily met, and these laws' concomitant financial penalties would likely be considered "fines" under the meaning of the Clause.

C. THE EXCESSIVENESS STANDARD

The following Part explains the requirement that a fine be "excessive" in order for it to be unconstitutional under the Excessive Fines Clause. In *United States v. Bajakajian*, the Supreme Court applied a "gross disproportionality" standard, first developed in *Solem v. Helm*, to determine the excessiveness of a fine.[186] Courts have interpreted the gross disproportionality standard to weigh the fine's appropriateness in light of "the nature of [the] offense, the nature of [the] sentence, and the sentence [the offender] could have received in other States for the same offense."[187] This allows defendants to show gross disproportionality through jurisdictional comparison or by through a comparison of the punishment and the offense. At the time of *Bajakajian*, the Court did not address the issue of the financial burden on the defendant.[188] Part III.C.1 further explains the gross disproportionality standard.

1. *The Gross Disproportionality Standard*

Fines criminalizing homelessness should be considered grossly disproportional to the offense. The gross disproportionality standard weighs the seriousness of an offense against the seriousness of the punishment.[189] The proportionality analysis in the Excessive Fines Clause derives from the Cruel and Unusual

185. Austin v. United States, 509 U.S. 602, 610 (1993) ("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.").

186. United States v. Bajakajian, 524 U.S. 321, 322 (1998).

187. Solem v. Helm, 463 U.S. 277, 284 (1983); *see generally* Nancy Keir, *Solem v. Helm: Extending Judicial Review Under the Cruel and Unusual Punishments Clause to Require "Proportionality" of Prison Sentences*, 33 CATH. U. L. REV. 479 (1984) (describing proportionality in light of *Solem v. Helm*).

188. *Bajakajian*, 524 U.S. at 340 n.15.

189. *See* Colgan, *supra* note 42, at 11.

Punishment Clause of the Eighth Amendment[190] in which the Supreme Court compares the punishment actually imposed to the punishment that *could* have been imposed in other jurisdictions for the same crime.[191] As applied to unhoused litigants, the proportionality analysis likely presents and obstacle for unhoused litigants because as approximately 72 percent of cities have laws prohibiting camping in public, and there has been an approximately 70 percent increase in anti-camping laws since 2006.[192]

Fortunately, litigants can also establish gross disproportionality by comparing the punishment to the offense. In the context of homelessness, therefore, litigants can establish that the fines are grossly disproportionate to their minor offenses, as was the case in *Bajakajian*. The Supreme Court has given more weight to the proportionality between the offense and the punishment in the context of fines and forfeitures than it has in the imprisonment context.[193] Unfortunately, lower courts have not been consistent in applying proportionality between the offense and the punishment. For example, the Fourth Circuit focuses its analysis on whether property was an instrumentality in the offense, whereas the Eighth Circuit uses a proportionality test.[194] Accordingly, advocates should urge courts to follow faithfully the Supreme Court's analysis in *Bajakajian*, considering the proportionality between the offense and the fine.

In the Excessive Fines Clause's proportionality analysis, the seriousness of the offense is key.[195] The fine itself often reflects

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190. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 688 (2005).

191. *See* Charles Doyle, CONG. RSCH. SERV., LSB10196, ARE EXCESSIVE FINES FUNDAMENTALLY UNFAIR? 2 (2019). While further expansion on the Cruel and Unusual Punishment Clause is beyond the scope of this Note, it is by no means a settled area of the law. *See, e.g.*, Alex Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1917 (2018) (describing Supreme Court jurisprudence on Eighth Amendment proportionality doctrine).

192. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 12.

193. *See* Melissa A. Rolland, Case Comment, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause, and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371, 1383 (1999) ("[T]he Court noted that two separate analyses are required in criminal forfeiture cases, because the Cruel and Unusual Punishments Clause does not require any proportionality review of a sentence less than life imprisonment without the possibility of parole, but the Excessive Fines Clause requires a proportionality review in every case to determine if a fine is excessive" (citation omitted)).

194. *Id.* at 1386–87; United States v. Chandler, 36 F.3d 358 (4th Cir. 1994); United States v. 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994).

195. *See* Colgan, *supra* note 42, at 48.

the seriousness of the offense. The fine for the first violation of a municipal ordinance, for example, might be $100, whereas a fourth violation might be $400.[196] Fines may also have statutory maximums or minimums that reflect a defendant's ability to pay or are enhanced based on a previous criminal record.[197] Consideration of previous records merits special attention in the context of unhoused litigants, as the criminalization of homelessness entails fines and fees for small offenses, such as sleeping outside.[198] For repeat offenders, when the fine is deeply disproportionate to the offense, it should be a violation of the Excessive Fines Clause. Part III.C.2 discusses another consideration under the Clause, individual characteristics of the offender and the offender's ability to pay.

2. *Individual Characteristics & Ability to Pay*

Courts should consider an individual's characteristics—namely, ability to pay—when considering the excessiveness of a fine. Whether excessiveness turns on the fine's collateral consequences or an individual's ability to pay remains unsettled:[199] the Supreme Court has yet to address the question, leading to obscurity in the law.[200]

Circuits are split on whether or not they consider ability to pay in their excessive fines analysis. The Eleventh Circuit, for

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196. *See, e.g.*, SEDRO-WOOLLEY, WA., MUN. CODE § 18.30.060.C (2022) (directing city directors to consider "repeat violations" when deciding to issue a notice of violation in lieu of a notice of infraction); TWP. OF HAMILTON, N.J., GEN. LEGIS. § 224-5 D (2016) (stating that a repeat offender "shall be sentenced by the court to an additional fine as a repeat offender").

197. *See generally* Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017) (describing considerations for a system of gradation for civil fines and its implementation).

198. *See generally* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11 (showing statistics for the criminalization of homelessness, including laws regulating begging, sleeping, and camping outside).

199. *See* Colgan & McLean, *supra* note 16 (advocating for an ability to pay based framework for the Excessive Fines Clause). *Bearden v. Georgia*, 416 U.S. 660 (1983), is "the modern touchstone for evaluating claims that wealth-based barriers to litigation access . . . violate the principle of equal justice." Fisher, *supra* note 96, at 113. *Bearden* should be applicable to the consequences of failing to pay fines and fees, but currently the doctrine "authorizes criminal justice user fees, as long as certain procedures are in place to protect indigent defendants." *Id.* at 119. While the *Bearden* line of cases is beyond the scope of this Note, its shortcomings allow for the wealth-based civil punishments that this Note seeks to eradicate.

200. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834 (2013).

example, expressly declines to consider the "characteristics of the offender" when determining whether or not a fine is excessive.[201] Instead, the Eleventh Circuit focuses its attention on the relationship of the fine to the character of the offense itself.[202] The First Circuit, in contrast, expressly considers a defendant's financial characteristics.[203] Other circuits are mixed in what factors they consider, and the extent to which they will consider a defendant's ability to pay.[204]

Although the Supreme Court did not discuss specifically whether an individual's ability to pay is relevant for the Excessive Fines Clause,[205] the reasoning incorporating the Eighth Amendment to the states suggests that "ability to pay" is relevant to excessiveness determinations.[206] The Court referenced history dating back to the Magna Carta, and observed that economic sanctions at the time had to be proportionate to the wrong and "not be so large as to deprive [an offender] of his livelihood."[207] In the majority opinion, Justice Ginsburg continued by describing the protection against excessive fines as "a constant shield throughout Anglo-American history" and "fundamental."[208] By tying in the original proportionality requirement for an excessive fine and making the clause's history and foundations key for its incorporation, the Supreme Court could be showing an inclination

201. Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 87 (2020) (quoting United States v. 817 Ne. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999)). *See also* Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000) (quoting Joyce v. City and County of San Francisco (N.D. Cal. 1994)) (finding that homelessness is "not a status," and that punishment of camping permissibly targets conduct). The *Joel* decision is troubling, as the Supreme Court held in *Bearden* that judges must "conduct a meaningful inquir[y] into the reasons for failure to pay before jailing a person for nonpayment" (internal quotation marks omitted). *ACLU Statement for the U.S. Commission on Civil Rights Hearing on "Municipal Policing and Courts: A Search for Justice or a Quest for Revenue,"* ACLU (Mar. 18, 2016), https://www.aclu.org/hearing-statement/aclu-statement-us-commission-civil-rights-hearing-municipal-policing-and-courts [https://perma.cc/AK9M-7E9B].

202. *See* McLean, supra note 200, at 846.

203. *See* Harawa, *supra* note 201, at 87; United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007).

204. *See* Harawa, *supra* note 201, at 87; United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) (considering other penalties authorized by the legislature); United States v. Sperrazza, 804 F.3d 1113, 1127 (11th Cir. 2015) (considering, in part, penalties authorized by the legislature and the harm caused by the defendant).

205. *See* Harawa, *supra* note 201, at 93. The Court in *Timbs* did not discuss ability to pay even though the issue had been submitted before them. *Id.*

206. *Id.* at 94.

207. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) (quoting Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)).

208. *Id.* at 689 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

towards an ability-to-pay inquiry as a component of the Excessive Fines Clause.[209]

As a policy matter, an ability-to-pay analysis is advantageous to unhoused litigants invoking the Excessive Fines Clause. People experiencing homelessness often lack the ability and resources to meet even their most basic needs, such as rest and shelter.[210] In addition, civil fines on unhoused persons further exacerbate the cycle of poverty.[211] If courts require an individualized inquiry into the socioeconomic status of the offender, an unhoused person's socioeconomic status would help remove them from risk of fines that may not be large in monetary value, but that they are unable to pay. In *Timbs*, the Supreme Court did not go beyond incorporating the Excessive Fines Clause to the states through the Fourteenth Amendment and remanding Timbs' case to the Indiana Supreme Court.[212] On remand, the Indiana Supreme Court stated that it was critical to consider a punishment's magnitude on an individual for the purposes of the clause, giving further weight to the idea that an individual's circumstances are important for determining the excessiveness (or lack thereof) of a fine.[213]

IV. THE EXCESSIVE FINES CLAUSE'S APPLICATION TO CIVIL PUNISHMENT OF UNHOUSED PERSONS

This Part demonstrates that the Excessive Fines Clause covers civil forfeiture and monetary fines. Part IV.A discusses civil forfeitures, while Part IV.B discusses monetary fines. Part IV.C concludes that *Austin* and *Timbs* show that the Excessive Fines Clause provides protections against excessive, partially punitive civil punishment.[214]

209. *See* Harawa, *supra* note 201, at 90.
210. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 11.
211. *Id.* at 15.
212. *See* Harawa, *supra* note 201, at 90.
213. *See* Colgan & McLean, *supra* note 16, at 432.
214. *See* Colgan, *supra* note 42, at 18.

A. CIVIL FORFEITURES FOR PEOPLE EXPERIENCING HOMELESSNESS

Civil fines for people experiencing homelessness often come in the form of civil forfeitures, and courts should consider those forfeitures as fines when deciding cases under the Excessive Fines Clause. The Supreme Court has indicated that civil forfeitures fall within the Clause.[215] Civil forfeitures include forfeiting nearly any kind of property for its alleged involvement in a crime.[216] In the case of *Timbs v. Indiana*, for example, the state seized Timbs' car, alleging that he had used his car to transport heroin.[217]

When the state seizes an unhoused person's property, the value of the property itself may not be high,[218] such as the seizure of tents, blankets, bedding, and other personal property.[219] Because courts have already placed a special emphasis on items such as homes and cars because they are necessary for a person to live, they could extend this logic to other life-saving items that people may need to survive outside.[220] Because courts have previously considered the intangible, subjective value of a property,[221] they could extend this logic to aid people experiencing homelessness. Through this extension, courts could block law enforcement officials from discarding blankets and personal property[222] on the theory that the subjective value of that property is too high compared to the "crime" of sleeping outside.

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215. *Id.* at 10.
216. *Types of Federal Forfeiture*, *supra* note 142.
217. Timbs v. Indiana, 139 S. Ct. 682, 684 (2019).
218. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 58 (describing the city of Sacramento's practice of seizing unhoused people's "personal property"); Jenna Chandler, CURBED, *Homeless Advocates Challenge Constitutionality of Sweeps, Seizures* (Jul. 19, 2019), https://la.curbed.com/2019/7/18/20699345/homeless-camps-seizures-lawsuit-constitutional [https://perma.cc/L33G-PF3R] (describing seizure of bike repair tools, a vacuum, cleaning supplies, and a tent).
219. Laura Smith, *Denver Isn't the Only City Seizing Homeless People's Gear*, MOTHER JONES (Dec. 16, 2016), https://www.motherjones.com/politics/2016/12/denver-homeless-survival-gear-seizures/ [on file with Columbia Journal of Law and Social Problems].
220. *See, e.g.*, Von Hofe v. United States, 492 F.3d 175, 188 (2d Cir. 2007).
221. State v. 633 East 640 North, 994 P.2d 1254, 1260 (Utah 2000).
222. Smith, *supra* note 219.

B. MONETARY FINES FOR PEOPLE EXPERIENCING HOMELESSNESS

The Excessive Fines Clause also covers small monetary fines placed upon people experiencing homelessness for activities such as sleeping outside, using a tent, or begging. First, civil fines can lead to criminal punishment, and as such should be subject to close judicial scrutiny.[223] Civil fines can collaterally lead to imprisonment through punishments for failure to pay,[224] but are not afforded the same resources or protections as criminal punishment.[225]

Even when fines do not lead to imprisonment, consequences can be dire. It is estimated that tens of millions of poor people are in debt.[226] Differently situated people experience the same punishments differently.[227] A small fine may seem insignificant to many, but could be insurmountable for an unhoused person.[228] For an unhoused person, fines can make it difficult if not impossible to find employment, transportation, or be eligible for housing in the future.[229]

These fines can lead to imprisonment.[230] Even though the Court has ostensibly held debtors' prisons as unconstitutional,[231]

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223. *See* Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1500 (2020) (Recent research has catalogued the numerous recurring procedural failures that have contributed to the continued prevalence of "modern-day debtors' prisons" despite the protections laid out in *Bearden*."). Although this Note does not cover the scope of criminal punishment, criminal punishment does lead to heightened constitutional protections, but only once judicial proceedings have been initiated, and not for all criminal proceedings. *See generally Right to Counsel*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/right_to_counsel [https://perma.cc/JVD4-H8MR].

224. *See, e.g.*, 18 U.S.C. § 3614 (allowing for imprisonment if a defendant "willfully refused" to pay a fine or "failed to make sufficient bona fide efforts" to pay a fine).

225. *See* Rankin, *supra* note 49, at 381 ("But to the extent . . . constitutional protections apply to criminalization, they mostly apply to criminal charges, hardly to civil enforcement, and not at all to invisible persecution.").

226. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1786 (2010) ("Because monetary sanctions are increasingly employed, and because the number of people convicted of criminal offenses in the United States has reached a record high, we can infer that the number of people who possess legal debt is significant and rapidly increasing.").

227. *See* Rankin, *supra* note 49, at 397.

228. *See generally* Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020) (discussing "poverty criminalization" and its impact on poor communities).

229. *See* Colgan, *supra* note 42, at 64–65.

230. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1761 (2010)

if a person is unable to pay their fine or fee, they may be reincarcerated for their failure to pay and then charged by the jail for the cost of their incarceration.[232] Debt can also be used to increase criminal sentences.[233] Ironically, legal debt can force people to turn to illegal means to avoid more debt and higher sentences in the future.[234]

The average fine for a person experiencing homelessness is $150.[235] Approximately 10 percent of unhoused people actually pay these fines.[236] A smaller percentage will attempt to complete community service in order to pay fines, but approximately 60 percent of unhoused people do nothing about their legal debt.[237] So, not only do these fines increase recidivism,[238] worsen future opportunities for people experiencing homelessness,[239] and severely damage the mental health of unhoused people,[240] but they may fail to even raise revenues for municipalities.[241]

C. A POTENTIAL FRAMEWORK FOR THE USE OF THE EXCESSIVE FINES CLAUSE TO UNHOUSED PERSONS

This Part offers a proposed framework to apply the Excessive Fines Clause to people experiencing homelessness. Courts should emphasize proportionality and ability to pay and concludes that the Excessive Fines Clause is a viable path forward for unhoused persons.

("Although some researchers claim, perhaps rightly, that it is unconstitutional to imprison offenders for nonpayment of debt . . . ., this does not mean that it does not occur, as the U.S. Supreme Court has ruled that debtors may be incarcerated for "willful" nonpayment of legal debt" (internal quotations omitted)).

231. *See* Bearden v. Georgia, 461 U.S. 660, 664 (1983) ("A sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was somehow responsible for the failure.").

232. *See* Harris et al., *supra* note 226, at 1783–84.

233. *Id.* at 1784.

234. *Id.* at 1785.

235. Herring, *supra* note 58, at 12.

236. *Id.*

237. *Id.*

238. *See* Harris et al., *supra* note 226, at 1785.

239. *See* Colgan, *supra* note 42, at 65.

240. *See* Herring, *supra* note 58, at 10.

241. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 44 ("An analysis of thousands of vehicle tows and lien sales in multiple California cities suggests that this practice costs more than cities recoup in tickets or revenue flowing from sales of impounded vehicles.").

When applying the Excessive Fines Clause to unhoused persons, courts should focus on proportionality. With the incorporation of the Excessive Fines Clause, many courts will be deciding for the first time what fines and fees fall under the Clause and whether or not they are "excessive."[242] Professor Beth Colgan, one of the country's leading experts on economic sanctions as punishment and the Excessive Fines Clause,[243] advocates for a multifactored approach when addressing financial hardship for proportionality under this clause.[244] Under her approach, courts would look to employment and educational access, meeting basic human needs, family and social stability, and satisfying legal obligations.[245] For people experiencing homelessness, the inquiry under this framework would be relatively simple and effective—as discussed in Part II *supra*, these fines are unimaginably disruptive for people experiencing homelessness, and unhoused persons are more often than not unable to pay them.[246]

The issues people experiencing homelessness face with fines calls into question whether any fine for life-sustaining activities is constitutional. The wealth of the offender is the key factor for the deterrent effect of a fine, not the amount of the fine.[247] Even when using the Excessive Fines Clause, a small, "constitutional" fine can still be life-altering for people experiencing homelessness. If courts hold large fines to be constitutional, despite their potential for massive individualized harm, the Excessive Fines Clause risks losing its original meaning and its protections.[248] Because the Excessive Fines Clause is meant to protect individuals, courts should not presume that fines are constitutional if they are within legislative guidelines, as they

242. *See generally* Harawa, *supra* note 201, at 87 (creating a roadmap for courts to apply the Excessive Fines Clause).

243. *Beth A. Colgan*, UCLA LAW, https://law.ucla.edu/faculty/faculty-profiles/beth-a-colgan [perma.cc/B9S2-QK5S].

244. Colgan & McLean, *supra* note 16.

245. *Id.*

246. *See supra* Part IV.B.

247. *See* John Bronsteen et al., *Retribution and the Experience of Punishment*, 98 CAL. L. REV. 1463, 1465–75 (2010). In this article, the authors argue that smaller or larger fines do not substantially impact the negative experience of punishment—instead, the wealth of the offender in relation to the fine determines the impact of the punishment. *Id.* The authors conclude that this fact should lead retributivist scholars to reexamine proportionality between crime and punishment. *Id.*

248. *See* Colgan & McLean, *supra* note 16.

have done in the past.[249] Courts should instead consider whether *any* fine criminalizing homelessness through criminalizing activities such as sleeping, lying down, or begging is "excessive," and should use individualized determinations when deciding the excessiveness of a fine.

The Excessive Fines Clause is meant to be a "constant shield" against "exorbitant tolls."[250] To be an effective shield, courts must take individualized circumstances into account.[251] While individualized determinations may pose a resource challenge for courts, they are necessary to ensure the effectiveness of the Clause. Holistic frameworks, such as the one laid out by Professor Colgan, can provide a way for courts to efficiently assess individualized circumstances. In the case of unhoused persons, individualized determinations should be more straightforward—the criminalized conduct is often minor, including activities such as sleeping, and the individual's ability to pay is low.[252] Individualized determinations for fines criminalizing homelessness may even show that these fines are always constitutionally excessive.[253]

The question of whether any fine criminalizing homelessness is constitutionally valid shows a need for courts and legislatures to explore other solutions for homelessness. Homelessness is a public health crisis,[254] and there are many reasons not to want people living on the street.[255] But criminalization through quality of life ordinances and laws does not work for combating

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249. *See, e.g.*, United States v. Seher, 562 F.3d 1344, 1371 (11th Cir. 2009) (assuming the constitutionality of a fine as long as it is within legislative guidelines).

250. Colgan & McLean, *supra* note 16, at 433.

251. McLean, *supra* note 200, at 901 ("[P]rotection of a minimum core level of economic viability for persons against whom penalties are assessed, determined with some reference to the individual's personal economic circumstances . . . were unquestionably recognized as fundamental rights at common law."). The application of an individualized Excessive Fines inquiry is beyond the scope of this Note.

252. *See supra* Part III.C.

253. It follows that if the offender's ability to pay and the offense are both relevant in determining a fine's excessiveness, fines that criminalize the conduct of poor people living outside may always be excessive. *Id.*

254. *See* GIBSON DUNN, *supra* note 31, at 7.

255. *See Litigation Update:* City of Boise v. Martin, FEDERALIST SOC'Y, https://fedsoc.org/events/litigation-update-city-of-boise-v-martin [https://perma.cc/Y6S4-FUZ4] (describing how people experiencing homelessness in homeless encampments are exposed to "crime, disease, intimidation, all sorts of other problems" when living on the street).

homelessness.[256] As Magistrate Judge Clarke explained in *Blake v. City of Grants Pass*,

> Quality of life laws erode the little trust that remains between homeless individuals and law enforcement officials. This erosion of trust . . . increases the risk of confrontations between law enforcement and homeless individuals, . . . [and] makes it less likely that homeless individuals will cooperate with law enforcement. Moreover, quality of life laws, even civil citations, contribute to a cycle of incarceration and recidivism. Indeed, civil citations requiring appearance in court can lead to warrants for failure to appear . . . [and] unpaid civil citations can impact a person's credit history and be a direct bar to housing access in competitive rental markets . . . . In this way, civil penalties can prevent homeless people from accessing the very housing that they need to move from outdoor public spaces to indoor private ones.[257]

Prohibiting the imposition of civil fines on people experiencing homelessness is unlikely to worsen rates of homelessness, because these fines cause and exacerbate homelessness.[258] These fines also cause recidivism[259] and mental health problems for people experiencing homelessness.[260] By declaring that Constitution will not support fines that serve to criminalize homelessness, courts can push legislatures to think of empathetic solutions rather than "solutions" that amount to little more than a band-aid on a systemic problem.[261]

The Excessive Fines Clause can provide an Eighth Amendment tool that helps protect against civil punishment and factors in the proportionality of a punishment to the offense and the offender. This framework can work in conjunction with other constitutional protections that go beyond the scope of this note,

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256. *See supra* Part III.C.

257. Blake v. City of Grants Pass, 2020 WL 4209227, at *17 (D. Or. July 22, 2020) (footnotes omitted).

258. *Cf.* Herring, *supra* note 58, at 12 (describing increased violence due to enforcement of anti-homeless laws).

259. *See* Harris et al., *supra* note 226, at 1783–84.

260. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15.

261. *See Blake*, 2020 WL 4209227, at *17; *see generally* Herring, *supra* note 58 (describing how the criminalization of homelessness perpetuates homelessness in the United States).

such as using the First Amendment to protect against the criminalization of begging and the Fourth Amendment to protect against unconstitutional seizures.[262]

While the Excessive Fines Clause is a promising path forward for unhoused litigants, success is far from guaranteed. For example, in civil forfeiture cases, owners of property are not appointed a lawyer, and it would often be economically unfeasible for these property owners to afford representation.[263] This means that the Clause's protections may be a "back-end solution" that only provides protection if people experiencing homelessness fight back in court.[264] But, while a back-end solution is not a permanent solution towards ending the criminalization of homelessness, it could be effective as another tool to chip away at laws criminalizing homelessness.

Chipping away at laws criminalizing homelessness could be effective, as this sort of gradual approach has worked before. Lawyers and advocates spent twenty years chipping away at the vagrancy law regime in the United States from the 1950s through the 1970s.[265] Before the 1960s, people arrested for vagrancy laws had little to no chance at getting a lawyer and little to no chance at success in the courts.[266] But once lawyers started taking on these cases, the resulting litigation thrust vagrancy laws and the problems with them into the public sphere.[267] Once vagrancy laws were publicly attacked, advocates had more success in striking them down, culminating in *Papachristou v. City of Jacksonville*, which struck down ordinances criminalizing loitering and vagrancy.[268]

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262. *See generally* Rankin, *supra* note 13 (discussing Fourth Amendment protections against seizures of tents and blankets); NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 81 (describing how the First Amendment right to expressive conduct may be used to protect people experiencing homelessness); *see also* Paul Ades, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989) (discussing prohibitions against sleeping outside as unconstitutional under the Due Process Clause of the Fourteenth Amendment).

263. *See* Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeiture's Coffin*, ACLU BLOG (Mar. 15, 2019), https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-didnt-put-nail-civil-asset-forfeitures [https://perma.cc/47BH-J9RH].

264. *Id.*

265. *See generally* GOLUBOFF, *supra* note 44 (describing how vagrancy laws were deemed unconstitutional through repeated litigation across various frameworks).

266. *Id.* at 5.

267. *Id.* at 6.

268. *Id.*; Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972).

The same approach could work for laws criminalizing homelessness.[269] By incorporating the Excessive Fines Clause as a tool for unhoused litigants, people experiencing homelessness could escape the pitfalls of the *Robinson* doctrine and find relief against monetary fines and civil forfeiture. This approach would allow courts to assist in ending criminalization of homelessness without calling on them to run municipal governments. Even if the Excessive Fines Clause argument is not always successful in courts, elevating the constitutional arguments could push criminalization of homelessness into the public conversation and motivate legislatures to come up with creative solutions for solving homelessness—ones that do not focus on crude additions to the criminal code.[270]

CONCLUSION

The end goal of advocacy for people experiencing homelessness should not be the right to live on the street.[271] Instead, advocacy for people experiencing homelessness should focus on building a future where people are guaranteed access to housing and basic needs.[272] By moving the Eighth Amendment focus for people experiencing homelessness away from the *Robinson* doctrine and towards the Excessive Fines Clause, this Note contends that advocates for unhoused persons should focus on decriminalizing

269. The Excessive Fines Clause would be a tool for unhoused litigants. For examples of other legal victories for unhoused persons, see, e.g., *Coalition for the Homeless Legal Victories*, COAL. FOR THE HOMELESS, https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/other-coalition-for-the-homeless-legal-victories/ [https://perma.cc/3UE4-MT2C] (describing how the Coalition for the Homeless has used litigation to protect the rights of people experiencing homelessness throughout the last three decades). Their work has involved class action lawsuits demanding medically appropriate housing for unhoused persons in New York City who are seropositive for HIV, ensuring that people with disabilities are able to meaningfully access Department of Homeless Services (DHS) shelters, and successfully seeking education and job training for unhoused people under the age of 21. *Id.*

270. *Martin* itself led to a $1,335,000 settlement, and the city of Boise has committed to spend at least one-third of the settlement on rehabilitating people experiencing homelessness and creating additional overnight shelter space. *Settlement Reached in Groundbreaking* Martin v. City of Boise *Case*, CITY OF BOISE (Feb. 8, 2021), https://www.cityofboise.org/news/mayor/2021/february/settlement-reached-in-groundbreaking-martin-v-boise-case/ [https://perma.cc/A4QR-333X]; *see also* Blake v. City of Grants Pass, 2020 WL 4209227, at *17 (D. Or. July 22, 2020) (proposing that the legislature come up with creative solutions for solving homelessness in Grants Pass).

271. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 10.

272. *Id.*

behavior beyond status crimes and a person's right to live on the street.

With its 2019 incorporation, state courts may be applying the Eighth Amendment's Excessive Fines Clause for the first time. When applying the Clause to unhoused persons, courts should consider the proportionality between the offense and the offender, the individual's ability to pay, and should consider property seizures as fines. By doing this thorough analysis, courts can faithfully apply the original meaning of the Clause—as a protection against disproportionate punishment. The Eighth Amendment's Excessive Fines Clause presents a promising strategy moving forward for advocates for people experiencing homelessness.