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## THE BURDENS OF THE EXCESSIVE FINES CLAUSE

BETH A. COLGAN\*

### ABSTRACT

*A key component is missing from the Eighth Amendment's Excessive Fines Clause doctrine: Who has the burden of proof? This question—which has been essentially ignored by both federal and state courts—is not just a second-order problem. Rather, the assignment of burdens of proof is essential to the Clause's enforcement, making it harder—or easier—for the government to abuse the revenue-generating capacity of economic sanctions in ways that can entrench poverty, particularly in heavily policed communities of color.*

*This Article takes on this question by first sorting through a morass within the U.S. Supreme Court's due process doctrine as it relates to assessing the fundamental fairness of procedural practices, including the assignment of burdens of proof. After offering a framework that reconciles the doctrine, it applies that framework to the excessive fines context by breaking the "burden of proof" into four component parts: (1) the burden to raise the excessive fines claim, (2) the burden of producing evidence relevant to that claim, (3) the burden of persuading the decision maker as to the result, and (4) the standard of proof to be employed in that determination. While the government and private interests at stake remain constant across these various burdens, disentangling them allows a more exacting inquiry. In particular, it allows for an examination of how lawmakers have crafted related processes and structures—such as the refusal*

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*to provide counsel or the vast array of direct and collateral consequences attached to both non-payment and conviction—that make it more likely that abuses of power will occur absent the check on authority that burdens of proof can help provide.*

## TABLE OF CONTENTS

INTRODUCTION . . . . .	410
I. SETTING THE SCOPE OF THE INQUIRY . . . . .	415
A. <i>The Excessiveness Inquiry</i> . . . . .	416
B. <i>Reconciling Mathews and Medina</i> . . . . .	418
II. THE ASSIGNMENT OF BURDENS . . . . .	432
A. <i>Interests at Stake in Assigning Burdens</i> . . . . .	433
1. <i>Governmental Interests</i> . . . . .	433
2. <i>Private Interests</i> . . . . .	443
B. <i>Burden of Raising the Excessive Fines Claim</i> . . . . .	450
1. <i>Contemporary Considerations</i> . . . . .	451
2. <i>Historical Evidence</i> . . . . .	454
3. <i>Assignment</i> . . . . .	459
C. <i>Burden of Production</i> . . . . .	461
1. <i>Contemporary Considerations</i> . . . . .	462
2. <i>Historical Evidence</i> . . . . .	464
3. <i>Assignment</i> . . . . .	467
D. <i>Burden and Standard of Persuasion</i> . . . . .	468
1. <i>Contemporary Considerations</i> . . . . .	469
2. <i>Historical Evidence</i> . . . . .	475
3. <i>Assignment</i> . . . . .	479
a. <i>Burdens of Persuasion</i> . . . . .	479
b. <i>Standards of Persuasion</i> . . . . .	480
i. <i>Financial Effect</i> . . . . .	481
ii. <i>Excessiveness of Fines, Fees &amp; Forfeitures:</i>	
<i>Criminal</i> . . . . .	484
iii. <i>Excessiveness of Fines, Fees &amp; Forfeitures:</i>	
<i>Civil</i> . . . . .	487
iv. <i>Excessiveness of Restitution</i> . . . . .	488
III. ADDRESSING CASES INVOLVING MULTIPLE FORMS OF PUNISHMENT . . . . .	490
CONCLUSION . . . . .	496

## INTRODUCTION

In 2019, the California Supreme Court took a rare step in the development of the Eighth Amendment's Excessive Fines Clause jurisprudence, directing the parties in a pending case to answer a question that is straightforward only on its surface: Who carries the burden of proof in establishing the financial effect of a fine for purposes of the excessiveness inquiry—the person fined or the government?<sup>1</sup> This question is noteworthy not only because it had not been a central issue as a series of related cases wound their way through California's intermediate appellate courts,<sup>2</sup> but also because the assignment of burdens of proof in the excessive fines setting has effectively been taken for granted.<sup>3</sup> In the few cases that reference burdens of proof, the lower courts presume the burden is on the defendant either without meaningful analysis or citation to authority,<sup>4</sup> or by reference to the placement of burdens on the

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1. See *People v. Kopp*, 451 P.3d 776, 776 (Cal. 2019). This case remained pending at the time of publication. The California Supreme Court previously held that financial effect is relevant to the excessiveness inquiry. See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 421 (Cal. 2005). The United States Supreme Court has yet to address that issue. See *infra* notes 31-32 and accompanying text.

2. See, e.g., *People v. Kopp*, 250 Cal. Rptr. 3d 852, 893-94 (Ct. App. 2019) (stating that it is the individual's burden to prove financial effect, without conducting a constitutional inquiry); see also *People v. McMahan*, 4 Cal. Rptr. 2d 708, 713 (Ct. App. 1992) (involving only statutory interpretation).

3. This Article focuses on open questions regarding the assignment of burdens of proof at sentencing; the U.S. Supreme Court has determined that on appeal, the factual findings of the trial court are subject to a clearly erroneous standard and that the ultimate question of excessiveness should be reviewed de novo. *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985); *Ornelas v. United States*, 517 U.S. 690, 697 (1996)).

4. For example, the First Circuit has stated: "It is the defendant's burden to show unconstitutionality." *United States v. Fogg*, 666 F.3d 13, 19 (1st Cir. 2011). To support that contention, the court cited *United States v. Jose*, 499 F.3d 105, 108 (1st Cir. 2007), which in turn cited *United States v. Ortiz-Cintrón*, 461 F.3d 78, 81-82 (1st Cir. 2006) and *United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005), both of which speak only about deference to district court factual findings during de novo review. This mismatch has metastasized across jurisdictions. See, e.g., *United States v. Castello*, 611 F.3d 116, 120 (2d Cir. 2010) (citing *Jose*, 499 F.3d at 108) (supporting the contention that the defendant has a burden to show unconstitutionality of a forfeiture); *United States v. Cheeseman*, 600 F.3d 270, 283 (3d Cir. 2010) (same); *United States v. King*, 231 F. Supp. 3d 872, 907-08 (W.D. Okla. 2017) (citing *Fogg*, 666 F.3d at 18-19) (stating the burden on both financial effect and the ultimate question of excessiveness rests with the defendant). In other cases, there is no attempt to cite to authority.

person challenging a non-financial punishment as cruel and unusual without consideration of any potentially relevant distinctions between the Eighth Amendment's Excessive Fines and Cruel and Unusual Punishments Clauses.<sup>5</sup>

The question the California Supreme Court posed is of no small matter. While the United States Supreme Court has interpreted the Excessive Fines Clause to outlaw economic sanctions when their severity is grossly disproportionate to the seriousness of the offense,<sup>6</sup> it has not addressed who must prove the case and by how much.<sup>7</sup> Yet, the assignment of burdens of proof is not just a second-order problem to the question of the scope of the Clause's protections; rather, that assignment is essential to its enforcement.<sup>8</sup> Burdens of proof may make it harder—or easier—for the government to abuse the revenue-generating capacity of economic sanctions by imposing punishments out of proportion with its legitimate penal aims, including sanctions which may create or entrench poverty for people and their families, particularly in heavily policed communities of color.

To answer this question, this Article begins by offering a framework that reconciles incoherence within the U.S. Supreme Court's due process doctrine, the situs of the Court's jurisprudence on the

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*See, e.g.,* United States v. 829 Calle de Madero, 100 F.3d 734, 738 (10th Cir. 1996) (“The burden of showing excessiveness is on the claimant.”).

5. *See, e.g.,* United States v. Vriner, 921 F.2d 710, 712-13 (7th Cir. 1991) (citing *Solem v. Helm*, 463 U.S. 277, 288 (1983)). Again, this myopic approach has spread from court to court. For example, *United States v. Alexander*, 32 F.3d 1231, 1235 (8th Cir. 1994) relied on *United States v. Bucuvalas*, 970 F.2d 937, 946 (1st Cir. 1992), which in turn relied on *Tart v. Massachusetts*, 949 F.2d 490, 503 n.16 (1st Cir. 1991), which based its conclusion that the defendant carried the burden of proving excessiveness on cruel and unusual punishments cases.

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

7. The extent of the Court's intervention on this point is found in a dissenting opinion in which Justice Kennedy stated without analysis that “[a] defendant must prove a gross disproportion.” *Id.* at 348 (Kennedy, J., dissenting); *see also* United States v. Ahmad, 213 F.3d 805, 816 (4th Cir. 2000) (placing the burden on the person claiming excessiveness and citing to the *Bajakajian* dissent); United States v. DeGregory, 480 F. Supp. 2d 1302, 1304 (S.D. Fla. 2006) (same); *In re Prop. of Flores*, 711 N.W.2d 733 (Iowa Ct. App. 2006) (unpublished table decision) (same).

8. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (distinguishing “judicial determinations of what the Constitution means” from “distinct doctrinal rules that direct how courts—faced, as they inevitably are, with epistemic uncertainty—are to determine whether the constitutional meaning has been complied with”).

assignment of burdens of proof. In *Mathews v. Eldridge*, the Court announced a three-part test for assessing procedural rules in which consideration is given to governmental interests, private interests, and the risk that the rule—in this case, the burden—will exacerbate the likelihood of an erroneous decision.<sup>9</sup> In subsequent years, the Court relied on that test for assessing the fundamental fairness of both criminal and civil procedural rules.<sup>10</sup> But after sixteen years of employing the *Mathews* test, the Court muddied the waters in *Medina v. California*.<sup>11</sup> Acting out of deference to state lawmakers in establishing penal laws, the *Medina* Court stated it was rejecting the application of *Mathews* in the criminal sphere, replacing it with a test that required an examination of whether the assignment of a burden “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>12</sup> But *Medina* and its progeny have left unclear the role history is to play: Is it a gatekeeper or merely probative evidence?

If the current doctrine is interpreted so that the historical record serves as a gatekeeper, lawmakers could entrench their ability to abuse the prosecutorial power and thereby extract revenues through economic sanctions—the exact thing the Clause is designed to prevent. They could do so by placing onerous burdens on a person raising a challenge simply because the available historical record cannot be used to establish a long-standing practice as to the assignment of burdens. The historical record related to the Excessive Fines Clause reveals why that approach is nonsensical. The record exposes a long history of abuse, dating back at least to Magna Carta, whereby governments have repeatedly exploited the prosecutorial power, using economic sanctions to generate revenue as a tax-avoidance mechanism by imposing exorbitant fines on people who were politically vulnerable.<sup>13</sup> Even if procedural rules had been established in those periods, they would be tainted by those abuses, the antithesis of fundamental fairness. The historical record on procedures related to the excessiveness of economic

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9. 424 U.S. 319, 335 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

10. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 77-84 (1984) (criminal procedural rules); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil procedural rules).

11. 505 U.S. 437, 445-46 (1992).

12. *Id.* at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

13. See *infra* notes 67-87 and accompanying text.

sanctions is also limited by a variety of other factors, including a lack of attention to economic sanctions by commentators, changes in litigation methods, and conflicting historical practices.<sup>14</sup>

There is, however, a way to reconcile the doctrine. *Mathews* allows us to focus on modern conceptions of risk: Will the assignment of burdens significantly interfere with an important government function, what risks does a person face if the determination is wrong, and how within the particular inquiry would the burden affect the decision maker's ability to reach a proper conclusion? History can aid in thinking through those questions. The longstanding history of abuse, for example, helps make plain that otherwise well-recognized government interests, such as the interest in imposing punishment for wrongdoing, must be taken with greater caution.<sup>15</sup> But for the record to be used appropriately, we must be honest about its limitations, taking into account those abuses, refusing to fill in the blanks where the record is incomplete, and recognizing and respecting anachronisms. In other words, under this approach history can serve as a partner with, rather than a gatekeeper to, modern understandings of fundamental fairness.

With that framework for assessing fundamental fairness in mind, this Article turns to the assignment of burdens of proof for excessive fines claims. It does so by breaking the "burden of proof" into its component parts: the burden to raise an excessive fines claim, the burden of producing evidence related to the claim, the burden of persuading the decision maker as to the result, and the standard of proof to be employed in making that determination. For all of the burdens, the governmental interests remain the same: the interest in responding to violations of the law; in removing the means of committing crimes and the proceeds generated by them from the hands of those who offend; in restoring victims of crime through financial support; in avoiding unnecessary administrative and economic costs; in ensuring that the operation of legal systems comports with the Constitution; and in protecting its own legitimacy.<sup>16</sup> So, too, the private interests at stake: no matter the burden, people upon whom excessive fines are imposed face the risk of

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14. See *infra* notes 89-103 and accompanying text.

15. See *infra* notes 112-30 and accompanying text.

16. See *infra* Part II.A.1.



financial precarity that prevents them and their families from meeting basic human needs, subjects them to highly punitive and stigmatizing responses to nonpayment and further punishment, and strips their communities of access to the resources that may otherwise allow them better opportunities to thrive and engage in full civic participation.<sup>17</sup>

Disentangling the various aspects of the burdens of proof allows a more exacting focus of the third *Mathews* consideration: the way in which an assignment of each particular burden may exacerbate the risk that an erroneous determination—or even no determination at all—will be reached as to the excessiveness of fines. Attending to the burden of raising an excessive fines claim prompts an inquiry into what structures lawmakers have created that would prevent such claims from being raised, such as a denial of counsel or other system designs that render challenges unlikely.<sup>18</sup> Distinguishing the burden of production allows us to move beyond assumptions about the challenger having access to all information regarding their ability to pay or absorb economic sanctions and to recognize that the government has unique access to information about the vast apparatus it has created—including its collections mechanisms, penalties for nonpayment, and collateral consequences of conviction—that directly relate to the severity of the punishment.<sup>19</sup> Focusing precisely on the burdens and standards of persuasion better attends to the risks created by the inherently imprecise nature of assessing overall excessiveness and financial effect, the racial and cultural biases that may infect those determinations, and the lack of opportunities for reversing the improper imposition of excessive sanctions.<sup>20</sup>

This Article proceeds in three parts. Part I begins by identifying the two places within the excessive fines inquiry for which burdens of proof remain unassigned: the determination of financial effect of the economic sanction for the purpose of establishing punishment severity, and the ultimate determination that sanctions are constitutionally excessive. It then sets out and proposes a way of

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17. See *infra* Part II.A.2.

18. See *infra* Part II.B.

19. See *infra* Part II.C.

20. See *infra* Part II.D.

reconciling the *Mathews-Medina* conundrum that allows history to play a role without unduly predominating the due process inquiry. Part II then applies that framework in the excessive fines context,<sup>21</sup> detailing contemporary concerns and risks while plumbing the historical record for what it has to offer. It concludes each assessment of the four burdens with a proposal for their assignment. The proposed burdens and standards of proof vary depending on how lawmakers have devised related procedures and structures that make abuse more likely and exacerbate the risk of private harm, and by the type of economic sanction at issue. Finally, Part III addresses how courts could make those competing burdens and standards of persuasion between economic sanction types (for example, fines and restitution), or punishment types (economic or carceral) administrable, and perhaps even promote a more thoughtful examination of disproportionality by sentencing judges than currently occurs.

### I. SETTING THE SCOPE OF THE INQUIRY

Before undertaking an assignment of the burdens of proof in the excessive fines setting, it is necessary to address two issues in order to set the scope of the inquiry. First are the Eighth Amendment parameters for assessing excessiveness itself. Section A sets out the mechanism for that assessment—which turns on a finding of gross disproportionality—and in particular what aspects of the test require an assignment of burdens. The second issue is the question of what factors are relevant to that assignment. Section B discusses how the Court has approached this question through the Due Process Clause’s requirement of fundamental fairness, though the messiness of that doctrine leaves open questions about the role of historical practices in making that assessment. A framework for resolving the doctrinal disorder follows.

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21. The Court has treated juveniles as having enhanced rights within the cruel and unusual punishments context. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 74 (2010). This suggests that the Court may take a more protective approach to juveniles in the excessive fines context as well, but that analysis—as well as considerations of fundamental fairness in juvenile court proceedings in which parents or guardians may be held jointly or severally liable for economic sanctions imposed on juveniles adjudicated delinquent—are beyond the scope of this Article. *See, e.g.*, FLA. STAT. § 985.437(2)-(3).

### A. *The Excessiveness Inquiry*

The assignment of burdens is absent from the doctrine as to two issues of contestation within the excessiveness inquiry: the determination of the financial effect of an economic sanction on a person and his or her family, and the ultimate determination of whether the sanctions to be imposed are grossly disproportionate to the underlying offense.

In *United States v. Bajakajian*, the Court adopted the gross disproportionality test for measuring whether economic sanctions are excessive, which requires weighing offense seriousness and punishment severity.<sup>22</sup> On the offense-seriousness side of the scale are crime and culpability facts.<sup>23</sup> The crime facts—facts about the nature of the offense and the person’s culpability for it—must be established at trial beyond a reasonable doubt or via guilty plea in criminal matters,<sup>24</sup> though lawmakers have allowed a reduction in the standard of proof in nominally civil proceedings in which economic sanctions are imposed.<sup>25</sup> Beyond the crime facts, sentencing factors related to culpability, such as a person’s criminal history, may be determined after the guilt phase of criminal trials with the prosecution’s burden set at a preponderance of the evidence.<sup>26</sup>

Offense Seriousness
Crime Facts, Criminal Cases— <i>Prosecution, BRD</i>
Crime Facts, Civil Cases— <i>Prosecution, Less than BRD</i>
Sentencing Factors— <i>Prosecution, Preponderance</i>

Shifting to the punishment-severity side of the scale, we look to the dollar value of the economic sanctions. For fines and fees, the allowable dollar value is set out in statute, either within a range or

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22. 524 U.S. 321, 336-37 (1998).

23. *See, e.g., id.* at 337.

24. *In re Winship*, 397 U.S. 358, 364 (1970); *see also* *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (holding that at sentencing a judge may rely only on facts established by the guilty plea to set the range of sentence available). Lawmakers may choose to reduce or shift the burden for crime facts related to affirmative defenses. *See Patterson v. New York*, 432 U.S. 197 (1977).

25. *See infra* notes 143-46 and accompanying text.

26. *See Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998).

at a specific amount.<sup>27</sup> The dollar value of a restitution award is established at a hearing, with the burden of proving a compensable amount on the prosecution, typically by a preponderance.<sup>28</sup> Forfeitures operate differently. Forfeitures occur when the government seizes cash or property with a suspected link to criminal activity and converts the ownership interests for its own use.<sup>29</sup> Though the government is required to prove the relationship between the cash or property seized and the purported crime,<sup>30</sup> for punishment severity purposes, the dollar value is simply dependent upon the amount of cash or the liquidated value of the property seized.

Punishment severity may also include the financial effect of the sanctions—the ability of a person and his or her family to pay fines, fees, or restitution or to absorb the loss of forfeited cash or property. The Court has not yet resolved whether financial effect is relevant

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27. *See, e.g.*, KAN. STAT. ANN. § 21-6611(a)-(b) (2012). This Article uses the term “fees” to refer to administrative fees—such as court costs, warrant fees, indigent defense fees, and the like. *See, e.g.*, Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 35-36 (2018). For ease of reference, the term is also used here to capture what are commonly referred to as “surcharges” or “assessments,” which are typically a flat amount added to or a percentage of base fine amounts that operate like fines. Surcharges may be placed in general funds or be targeted for particular purposes. *See id.* at 32-33.

28. CONG. RSCH. SERV., RL34138, RESTITUTION IN FEDERAL CRIMINAL CASES 20 (2019); *see also* Hester v. United States, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., dissenting) (explaining that restitution requires finding additional facts not established in the guilt phase). There is an open question as to whether the facts used to establish restitution must be decided by a jury beyond a reasonable doubt because an award of restitution necessarily raises the statutory maximum sentence from zero dollars to the compensation amount. *See id.* (positing that the Court should consider whether restitution falls within the jury trial and standard of proof requirements set out in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). That inquiry, which is based on the Sixth Amendment jury trial right, is outside of the scope of this Article.

29. *See, e.g.*, 18 U.S.C. § 982(a).

30. *See, e.g., id.*; 18 U.S.C. § 1963(a); 21 U.S.C. §§ 853(a), 881(a). The burden of proof required to establish the “nexus” between the cash and property to be forfeited and the alleged criminal activity varies across jurisdictions. *See infra* notes 143-46 and accompanying text. The Court has not been asked to determine the constitutionality of using a standard less than beyond a reasonable doubt to address that question, nor has it opined on whether the question of nexus—which does not fit within offense seriousness or punishment severity used to measure gross disproportionality—is relevant to the excessiveness inquiry. *See* Austin v. United States, 509 U.S. 602, 623, 625-26 (1993) (Scalia, J., concurring) (raising the question of whether the excessiveness of instrumentality forfeitures should be ascertained through an examination of the nexus between the property and offense). At least one lower court has adopted a nexus test and also spoken to the question of burdens, placing the burden on the government to establish nexus so that the property owners would not “be forced to prove a negative.” *In re King Properties*, 635 A.2d 128, 133 (Pa. 1993).

to measuring punishment severity.<sup>31</sup> It has, however, suggested that it leans favorably to its inclusion.<sup>32</sup> Therefore, in the interest of providing an analysis robust enough to capture this potential aspect of the proportionality inquiry, this Article presumes that the Court will determine that financial effect is relevant. But the question remains: Who should hold the various burdens of proof and by what standard should the determination of financial effect be made?

<b>Punishment Severity</b>
Dollar value of fines & fees— <i>Statutory</i>
Dollar value of restitution— <i>Prosecution, Preponderance</i>
Dollar value of forfeitures— <i>Value of Cash or Property</i>
Financial Effect—?

Once the component parts of offense seriousness and punishment severity are established, a court must engage in the excessiveness inquiry by discerning whether the punishment severity outweighs offense seriousness to such an extent that it is rendered grossly disproportionate.<sup>33</sup> As with financial effect, the Court has not yet had the opportunity to ascertain the appropriate assignment of burdens on that question, and so both assignments are currently missing from the doctrine. This Article will next address the question of how to ensure those assignments are in keeping with due process.

### *B. Reconciling Mathews and Medina*

For both the preliminary issue of financial effect and the overall determination of disproportionality, a question remains as to what factors should be considered to ensure that the assignment

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31. *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019) (citing *United States v. Bajakajian*, 524 U.S. 321, 340 n.15 (1998)) (noting the Court had not yet taken a position); *see also* *Colo. Dep't of Lab. & Emp. v. Dami Hosp., L.L.C.*, 442 P.3d 94, 96, 101-02 (Colo. 2019), *cert. denied*, 140 S. Ct. 849 (2020) (holding that financial effect is relevant to excessiveness). At the time of publication, the Court was again considering taking up this question. *See* *Rosales-Gonzales v. United States*, No. 21-5305 (2021).

32. Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After Timbs*, 129 *YALE L.J.F.* 430, 433-37 (2020).

33. *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998).

of burdens comports with fundamental fairness. The Court has typically approached the question of whether such an assignment satisfies due process under the test set forth in *Mathews v. Eldridge*, which balances governmental interests, private interests, and the extent to which the assignment will contribute to or reduce the risk of an erroneous decision.<sup>34</sup> After nearly two decades of relying on the *Mathews* test in both criminal and civil matters, the Court mandated a more restrictive test in the criminal sphere in *Medina v. California*.<sup>35</sup> This distinction is particularly relevant here because lawmakers employ economic sanctions in both criminal and civil settings, and the Court has held that the Excessive Fines Clause's protections extend to both so long as the sanctions are at least partially punitive.<sup>36</sup>

In *Medina*, the Court held that the analytical framework for assessing procedural rules, including the assignment of burdens of proof, must include an examination of historical practice for the purpose of establishing whether a procedure “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” thereby necessitating an inquiry into early English and American practices.<sup>37</sup>

In so holding, the Court acknowledged that it had employed the *Mathews* test in two prior cases involving criminal procedure.<sup>38</sup> In the first, *United States v. Raddatz*, the Court upheld the Federal Magistrates Act, which allowed a magistrate to make findings and recommendations related to a motion to suppress a confession as involuntarily obtained.<sup>39</sup> Mr. Raddatz raised several claims, one of which was a due process challenge to the statute.<sup>40</sup> The *Raddatz*

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34. See, e.g., *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

35. *Medina v. California*, 505 U.S. 437, 443, 445-46 (1992).

36. *Austin v. United States*, 509 U.S. 602, 604, 621-22 (1993) (holding that the Excessive Fines Clause applies to economic sanctions, including civil forfeitures, nominally labeled civil so long as they are at least partially punitive); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993) (using the *Mathews* test to assess the constitutionality of civil forfeiture proceedings).

37. *Medina*, 505 U.S. at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

38. *Id.* at 444-45.

39. 447 U.S. 667, 683-84 (1980).

40. The other claims involved the voluntariness of a confession, statutory interpretation of the Federal Magistrates Act, and a constitutional claim based on Article III. See generally *id.*

Court framed the challenge as falling under the three-part *Mathews* test.<sup>41</sup> It then engaged in a fairly shallow inquiry as to the private interest prong, pointing to several prior cases in which it had held that a person's interests were reduced when the question at stake in a particular criminal proceeding is tangential to the ultimate determination of guilt.<sup>42</sup> In dissent, Justice Marshall chided the majority for failing to fully engage with the significant private interests at stake in ensuring that people were not deprived of liberty on the basis of involuntary confessions.<sup>43</sup> He also took issue with how the majority's opinion fell short with respect to the third *Mathews* factor regarding the risk of error, positing that the risk is heightened when a judge must later rely on a magistrate's written recommendation as to voluntariness rather than personally being able to judge the credibility of witnesses.<sup>44</sup> But, rather than faulting the *Raddatz* majority for insufficiently engaging with the *Mathews* factors, the *Medina* Court described *Raddatz* as having not applied *Mathews* at all, stating that it merely "cited to the *Mathews* balancing test ... but did not explicitly rely upon it in conducting the due process analysis."<sup>45</sup>

In addition to *Raddatz*, to reject the *Mathews* approach to assessing whether criminal procedural rules meet due process, the *Medina* Court also had to contend with its prior reliance on the test in *Ake v. Oklahoma*, in which it held that indigent defendants had a right to appointed psychiatric experts in cases in which insanity is a significant factor.<sup>46</sup> To do so, Justice Kennedy, writing for the *Medina* majority explained: "The holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'"<sup>47</sup> Yet, that language was plucked from the *Ake* opinion just before the *Ake* Court explained that the concept of minimal assistance was

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41. *Id.* at 677-81.

42. *Id.*

43. *Id.* at 699-702 (Marshall, J., dissenting).

44. *Id.*

45. *Medina v. California*, 505 U.S. 437, 444-45 (1992).

46. *See Ake v. Oklahoma*, 470 U.S. 68, 77-85 (1985).

47. *Medina*, 505 U.S. at 444-45 (alteration in original) (quoting *Ake*, 470 U.S. at 76).

intended “merely to begin our inquiry,” and that the question of whether psychiatric experts must be provided had to be assessed under the *Mathews* three-part framework.<sup>48</sup> The *Ake* Court then diligently addressed each component, recognizing that the governmental interests were limited given the minimal administrative cost of supplying psychiatric experts, that the private interest at stake—life or liberty—was “almost uniquely compelling,” and that it was important to have such experts weigh in on the inherently imprecise question of sanity in order to reduce the risk of error.<sup>49</sup> In light of its full reliance on the *Mathews* test, the *Medina* Court’s assessment that it was “not at all clear that *Mathews* was essential” to the *Ake* decision is at best baffling.<sup>50</sup>

The *Medina* majority’s rejection of the *Mathews* approach came under immediate fire. In a concurrence joined by Justice Souter, Justice O’Connor noted that the Court “obviously applied” the *Mathews* test in *Ake* and that the test “remains a useful guide in due process cases.”<sup>51</sup> Likewise, in a dissent joined by Justice Stevens, Justice Blackmun wrote that he was “not sure what the Court mean[t]” when it claimed a lack of reliance on *Mathews* by the *Raddatz* and *Ake* Courts, “because both cases unquestionably set forth the full *Mathews* test and evaluated the interests.”<sup>52</sup>

What is more, the *Medina* opinion leaves the role of the now-mandated historical inquiry unresolved. The majority opinion suggests that history serves as a sort of gatekeeper, by which a modern procedure must be left untouched unless it goes *against* a long-standing historical practice.<sup>53</sup> But in its actual employment of that framework, history did not serve as a gatekeeper as suggested. The legal issue being addressed was whether a California law allocating the burden of persuasion to establish incompetency to stand trial to the defendant by a preponderance of the evidence satisfied

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48. *Ake*, 470 U.S. at 76-77.

49. *Id.* at 78-83.

50. *Medina*, 505 U.S. at 444.

51. *Id.* at 453 (O’Connor, J., concurring).

52. *Id.* at 462 n.2 (Blackmun, J., dissenting).

53. *Id.* at 445-46 (majority opinion) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)) (proposing that a criminal procedural rule “is not subject to proscription under the Due Process Clause unless” it violates historical practice).



due process.<sup>54</sup> The majority began its analysis by examining early English and American history, but—upon finding “no historical basis for concluding that the allocation of the burden of proving incompetence to the defendant violates due process”—rather than ending its inquiry, the majority took up consideration of “whether the rule transgresses any recognized principle of ‘fundamental fairness’ in operation.”<sup>55</sup> In doing so, the majority effectively engaged in a *Mathews*-like balancing test. It distinguished other cases assigning the burden of persuasion to the government on the grounds that in those cases the government was seeking to introduce unconstitutionally obtained evidence, whereas here it had committed no such violation—suggesting comparatively heightened governmental interests in this setting.<sup>56</sup> The majority also determined that the risk of an erroneous competency decision to the individual was low given that trial counsel would be available to protect his or her interests, including by re-raising the competency question if necessary.<sup>57</sup> And it considered the limited risk that a preponderance of evidence standard would result in erroneous determinations of competency given that it would only affect “a narrow class of cases where the evidence is in equipoise; that is, where the evidence that a defendant is competent is just as strong as the evidence that he is incompetent.”<sup>58</sup> As Justice Blackmun noted in dissent, “it is clear that the Court ends up engaging in a balancing inquiry not meaningfully distinguishable from that of the *Mathews v. Eldridge* test it earlier appears to forswear.”<sup>59</sup>

Later opinions have also left open the question of what role history plays in the due process analysis. Less than six months after the Court announced *Medina*, it suggested that historical and contemporary practices were on equal footing.<sup>60</sup> Four years later, a plurality of the Court described historical practice as the “primary

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54. *Id.* at 439.

55. *Id.* at 446-48.

56. *Id.* at 451-52.

57. *Id.* at 450-51.

58. *Id.* at 449.

59. *Id.* at 462 (Blackmun, J., dissenting).

60. See *Parke v. Raley*, 506 U.S. 20, 32 (1992) (citing *Medina*, 505 U.S. at 446-47) (“Respondent cites no historical tradition or contemporary practice indicating that Kentucky’s scheme violates due process.”).

guide in determining whether the principle in question is fundamental.”<sup>61</sup> Unsurprisingly, the Court engaged in no historical inquiry in one case involving procedural rules related to DNA testing requests, which could not possibly have had a historical counterpart.<sup>62</sup> And in the three remaining cases in which the Court purported to apply *Medina*,<sup>63</sup> it described the historical inquiry as merely probative of whether a procedure was fundamentally fair, considering it alongside contemporary practices and concerns.<sup>64</sup> For example, in *Cooper v. Oklahoma*, the Court preserved the *Medina* Court’s determination that the burden of persuasion could be placed on a person claiming incompetency to stand trial but struck down a statute raising that burden to a clear and convincing evidence standard. It did so by looking both to historical evidence and modern conceptions of fairness, taking guidance from a series of cases in which the Court expressly relied on the *Mathews* test to assign burdens of proof.<sup>65</sup>

This morass raises the question of whether the *Mathews* approach to ascertaining fundamental fairness can be reconciled with the *Medina* Court’s interest in using historical evidence, whether that be as a gatekeeper or simply a consideration alongside contemporary indicators of fairness.

As becomes clear by examining the question through the lens of the Excessive Fines Clause, allowing history to serve as a gatekeeper is in conflict with the due process goal of fundamental fairness. The *Medina* approach—in which due process is only

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61. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion).

62. *Dist. Att’y’s Off. for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

63. In its two most recent decisions, the Court declined to take up the extent to which *Mathews* and *Medina* control questions involving criminal procedure. *Nelson v. Colorado*, 137 S. Ct. 1249, 1255, 1256 n.9 (2017) (applying the *Mathews* test to a procedure by which people may seek return of monies collected for economic sanctions imposed to a conviction that has subsequently been reversed or vacated because, without a valid conviction, criminal processes are not implicated); *id.* at 1258 (Alito, J., concurring) (arguing that the *Medina* test should have been used because the economic sanctions at issue were originally imposed in criminal cases); *Kaley v. United States*, 571 U.S. 320, 333-34 (2014) (declining to resolve the question of whether *Mathews* or *Medina* applied to a procedure precluding people from challenging grand jury probable cause determinations at pretrial, post-restraint hearings, reasoning that the claimant would lose even if the *Mathews* test applied).

64. See *Deck v. Missouri*, 544 U.S. 622, 627-29 (2005); *Cooper v. Oklahoma*, 517 U.S. 348, 356-66 (1996); *Herrera v. Collins*, 506 U.S. 390, 407-11 (1993).

65. 517 U.S. at 356-66.

implicated if a modern procedure conflicts with a longstanding historical protection—necessarily requires proof of protective procedural practices within the historical record in order to claim a right to such a protection today.<sup>66</sup> That approach fails to account for the ways in which historical processes might be compromised by the very abuses a clause is designed to protect against.

The story of the Excessive Fines Clause is set against a centuries-long history of lawmakers designing systems that allow the government to extract revenue through the use of disproportionate economic sanctions rather than taxation.<sup>67</sup> The roots of the Clause date back at least to Magna Carta,<sup>68</sup> which responded to such abuses by placing two limitations on the imposition of amercements, which were predecessors to modern fines<sup>69</sup>:

A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner, a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy.<sup>70</sup>

Though Magna Carta was designed to protect against abusive economic punishments, in the centuries that followed, English monarchs repeatedly ignored its guarantees, including most notoriously through the use of the Star Chamber. Among other abuses, its jurists employed extraordinary fines to three ends: to drain power from Parliament by creating a source of revenue that undermined its taxing authority, to personally enrich monarchs and nobles in good standing, and to severely punish those who spoke out against the Church or Crown.<sup>71</sup> Even jurists perceived as less

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66. See *supra* note 37 and accompanying text.

67. See *Timbs v. Indiana*, 139 S. Ct. 682, 694 (2019) (Thomas, J., concurring).

68. As Justice Thomas has noted, the proportionality requirement embodied in the Excessive Fines Clause arguably predates Magna Carta and extends back to the Charter of Liberties of Henry I from the year 1101. See *id.* at 693.

69. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 296-97 (2014).

70. Magna Carta, ch. 20 (1215), in A. E. DICK HOWARD, *MAGNA CARTA: TEXT & COMMENTARY* 42 (rev. ed. 1998).

71. See *Timbs*, 139 S. Ct. at 688; *id.* at 693-95 (Thomas, J., concurring); Brief for Eighth Amendment Scholars as Amici Curiae Supporting Neither Party, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 4522295.

beholden to the monarchy appeared willing to impose heavy fines. Take, for example, Sir Edward Coke, who has been heralded as a “Challenger of Kings,” due to his willingness to push back against the abuses of the Star Chamber while serving as Chief Justice of the Court of Common Pleas and the King’s Bench.<sup>72</sup> Coke also recognized both Magna Carta and the English common law as restricting the imposition of excessive economic sanctions.<sup>73</sup> Yet, existing records also paint Coke as particularly adamant about the imposition of exorbitant fines, even as compared to his fellow jurists.<sup>74</sup> While it does appear that fines assessed during the period in which the Star Chamber operated were occasionally remitted,<sup>75</sup> it is

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72. Charles H. Randall, Jr., *Sir Edward Coke and the Privilege Against Self-Incrimination*, 8 S.C. L. REV. 417, 417-19 (1956) (regarding Coke’s efforts to end the oath *ex officio*, a tool for prosecuting heresy, and against the use of torture).

73. Coke served as a jurist prior to the adoption of the English Bill of Rights in which the prohibition against “excessive fines” was first articulated. *See infra* note 77. Because Magna Carta spoke of amercements, Coke understood its protections to be limited to amercements imposed by juries, but posited that the common law afforded the same protections against fines imposed by judges. THE REPORTS OF SIR EDWARD COKE, KT., VOL. 11, 43-44 (E. & R. Nutt, & R. Gosling 1728) (Richard Godfrey’s Case, Mich. 12 Jac. I.) (explaining that “the Reasonableness of the Fine shall be judged by the Justices; and if it appears to them to be excessive, it is ... prohibited by the Common Law” and citing Magna Carta for the proposition that “[e]xcessive amercement is against the law”); *see also* Sollom Emlyn, *Preface to the Second Edition of the State Trials*, in T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at xxxv (London, T.C. Honsend, Peterborough-Court, Fleet Street 1816) (citing Coke in describing Magna Carta as applying to amercements and the common law as applying to fines).

74. *See* JOHN SOUTHERDEN BURN, THE STAR CHAMBER: NOTICES OF THE COURT AND ITS PROCEEDINGS; WITH A FEW ADDITIONAL NOTES OF THE HIGH COMMISSION 86 (London, J. Russell Smith 1870) (describing a case in which the Earl and Countess of Suffolk and Sir John Bingley were sentenced to fines ranging between £30,000 and £2,000, despite Coke’s vote for fines of £100,000 and £5,000, respectively); *id.* at 87 (describing the case of Sir Henry Yelverton, the attorney general, who was convicted “of passing some clauses in the City Charter, not agreeable to the King’s warrant,” for which he was fined £4,000 despite Coke’s declaration that the fine should have been £6,000). One commentator speaking on abuses by jurists in the era remarked:

Such methods as these should be below men of honour, not to say men of conscience: yet in the perusal of this Work, such persons will too often arise to view; and I could wish for the credit of the Law, that that great Oracle of it, the Lord Chief Justice Coke, had given less reason to be numbered among this sort.

Emlyn, *supra* note 73, at xxiv.

75. *See, e.g.*, BURN, *supra* note 74, at 54 (noting a remission of the fine imposed in the case of a sheriff who refused to execute a heretic because the sheriff had acted on “the advice of divers gentlemen of worship of the county, some being learned men and justices of the Peace, and as he was no favourer of heresies”); *id.* at 84 & n.2 (discussing the pardoning of two young

unsurprising that procedural rules for making a request for remission—which would cut so against the *modus operandi*—are absent from the historical records of the time, including in *The Institutes of the Laws of England*, Coke’s seminal writings on the English common law.<sup>76</sup>

The abuses of the Star Chamber were mirrored in later practices despite additional recognition of constitutional limitations on excessive sanctions. The prohibition against the imposition of excessive fines in the English Bill of Rights arose out of reactions to the Star Chamber,<sup>77</sup> and was in turn adopted verbatim, first in the Virginia Declaration of Rights,<sup>78</sup> and ultimately in the Eighth Amendment.<sup>79</sup> Yet, like Magna Carta in England before it, the Excessive Fines Clause was at times ignored on American soil.<sup>80</sup> Though the use of the penal law—and particularly vagrancy codes—to control Black people pre-date the Civil War,<sup>81</sup> a particularly notorious example of lawmaker behavior in contradiction to the Clause is found in the post-antebellum South through the adoption of the Black Codes, a series of laws applicable explicitly or through practice only to Black people.<sup>82</sup> Following trials that were often at

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men convicted for dueling because King James wished to make a symbolic gesture of mercy on his first appearance at the court); *id.* at 140 (noting that the fines and imprisonment imposed had been pardoned “on account of their poverty”).

76. See generally EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CASES* (London, M. Fleshner 1644).

77. An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown 1689, 1 W. & M. c. 2, § 11; see also Emlyn, *supra* note 73, at xxxv-vi (“It was the non-observance of these Rules, which occasioned the dissolution of the Star Chamber.”); *Powell v. McCormack*, 395 U.S. 486, 502 (1969).

78. VA. CONST. OF 1776, art. I, § 9.

79. U.S. CONST. amend. VIII; see also *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019); *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 267 (1989).

80. See JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* 702 (Julius Goebel Jr., ed. 1944) (explaining that during the colonial period, records of fineable offenses show “signs of indulgence and this, indeed, chiefly in relation to prosecutions by Crown informations which were viewed with a jaundiced eye”).

81. RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 115 (2016).

82. See generally DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008); see also *Timbs*, 139 S. Ct. at 688-89 (discussing the use of the Black Codes); *id.* at 697-98 (Thomas, J., concurring) (same).

best a sham, fines were imposed and the debts sold to private parties who then extracted labor from Black people in practices that mirrored enslavement.<sup>83</sup> Again, it would be surprising if the historical record of a system designed to extract wealth and labor *without* meaningful process were to include procedural rules that would undercut those efforts.

In both the English and early American histories, there are also records of abusive practices related to economic sanctions imposed in capital offenses that would make the existence of protective procedures surprising. In addition to execution, capital crimes were punished with partial or full forfeiture of one's estate, by which the person's property interests were transferred to the government.<sup>84</sup> The record is mixed as to the actual prevalence of these practices; there are some indications that statutes requiring forfeiture of estate went unenforced or if imposed were later reversed.<sup>85</sup> But the record also suggests that these forfeitures were seen as a literal fate worse than death, leading lawmakers to take troubling steps to secure those revenues. For example, in the thirteenth and fourteenth centuries, English criminal trials involved the bringing forward of the accused who was questioned as to how they would plead; a refusal to plead meant being "subjected to the infamous

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83. See *Timbs*, 139 S. Ct. at 688-89.

84. See J.F. ARCHBOLD, A COMPLETE PRACTICAL TREATISE: CRIMINAL PROCEDURE, PLEADING AND EVIDENCE, IN INDICTABLE CASES 633 (New York, Banks & Brothers 8th ed. 1880); JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW, VOL. 1 §§ 622, 628 (Boston, Little, Brown and Co. 1856); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 374-81 (1769); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 487-89 (London, Macmillan & Co. 1883). Punishment may also involve corruption of blood, which precluded heirs to the person convicted from inheriting the person's property. BLACKSTONE, *supra*, at 388-89; STEPHEN, *supra*, at 487-89. These economic sanctions would undoubtedly constitute fines under the Court's interpretation of the Excessive Fines Clause. See *supra* note 36 and accompanying text.

85. See, e.g., GOEBEL & NAUGHTON, *supra* note 80, at 712-13 (explaining that though mandated by the Crown, forfeitures of estate were not enforced in New York "due to a variety of factors, not the least of which was the failure to set up in New York an establishment comparable to the English Exchequer whereby the exaction of forfeitures would be assured" and because the money flowing to the Crown "tended to promote ... indifference"); *id.* at 713 (explaining that there was use of forfeiture of estate following the Leisler Rebellion, but that at least some properties were returned to the defendants' families or never seized, and other properties were ultimately restored after an act of the New York assembly); Colgan, *supra* note 69, at 332-33 (describing the large-scale remission of forfeitures of estate that had been imposed following the Revolutionary War).

*peine forte et dure*, wherein weights were laid upon them until they pleaded or expired; the recalcitrant perished, but, not having been convicted, they avoided forfeiture.”<sup>86</sup> In addition, the lure of forfeiture revenues could also result in increased prosecutions. In colonial New York, for example, officials attempted to use forfeiture of estate for economic gain, instituting “prosecutions in order that the debts of the Province might be satisfied from the forfeitures.”<sup>87</sup> It would be surprising indeed to find that the officials who devised methods of torture to push people toward accepting capital sentences or who drummed up prosecutions to resolve fiscal downturns had also built into these systems burdens of proof or other procedures that would protect people from such wrongs.

In other words, this history of abusive practices by the very government actors that would bear responsibility for creating procedural protections shows the danger in employing the *Medina* Court’s test in which due process could only be implicated if a modern procedure conflicted with a longstanding historical protection.<sup>88</sup> To avoid a test myopic to such abuses, any use of history should account for how a lack of procedural protections may be the result of practices that would be in violation of a given constitutional protection had it been enforced.

Beyond gaps that may exist due to abusive practices, it is critical to understand that the historical record may be incomplete, not because a particular practice did not exist, but because it simply was not recorded. Despite the ubiquitous use of economic sanctions,<sup>89</sup> most surviving historical materials focus elsewhere. Economic sanctions such as fines (directed in some cases to victims as a form of restitution), costs, and limited forfeitures were most commonly employed as punishment for misdemeanor offenses.<sup>90</sup>

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86. THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800* 15 (1985); *see also* J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 580-81 (3d ed. 1990).

87. GOEBEL & NAUGHTON, *supra* note 80, at 714.

88. *See supra* note 37 and accompanying text.

89. GOEBEL & NAUGHTON, *supra* note 80, at 709 (“The fine, as we have indicated, was the sanction par excellence of provincial criminal justice.”); *see also* *S. Union Co. v. United States*, 567 U.S. 343, 349 (2012) (“Fines were by far the most common form of noncapital punishment in colonial America.”).

90. *See* BISHOP, *supra* note 84, § 626; 1 J. CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 810 (London, A.J. Valpy, Tookes Court, Chancery Lane 1816); Emlyn, *supra* note 73, at

They were also available punishments in felony cases—in particular, the partial or full forfeiture of estate discussed above,<sup>91</sup> or as part of lesser punishments for people convicted of a felony for the first time whose executions were excused by benefit of clergy.<sup>92</sup> Yet, treatises and scholarly works regarding practices related to both criminal and evidentiary law in the seventeenth, eighteenth, and nineteenth centuries primarily focus on treason, felony offenses, and the punishments they more often carried, including execution or transportation (a form of banishment).<sup>93</sup> Similarly, many treatises and scholarly interventions regarding historical practices focus heavily on descriptions of the substantive criminal law or on pre-trial and trial (but not sentencing) practices and burdens.<sup>94</sup> Further, not only have many records been lost to time, those that have survived often contain little information about procedure.<sup>95</sup> While these materials provide some insight related to burdens of proof generally, they are not specific to the question at hand.

The record may also be incomplete due to changes in litigation strategy and expectations of the judiciary with respect to addressing

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xxxv; STEPHEN, *supra* note 84, at 490.

91. *See supra* notes 84-87 and accompanying text.

92. Benefit of clergy was a widespread practice, the scope and availability of which varied over time, but which allowed a reduction in punishment for people convicted for the first time thus leaving it to judges to rely on other forms of punishment, including fines, for clergiable offenses. *See* BISHOP, *supra* note 84, §§ 622-23; CHITTY, *supra* note 90, at 711; STEPHEN, *supra* note 84, at 458, 462-66.

93. *See* BISHOP, *supra* note 84, §§ 622, 641; CHITTY, *supra* note 90, at 701-05; LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 265, 275, 561, 576 (4th ed. 2019); STEPHEN, *supra* note 84, at 458, 482; *see also* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 266 (1978) (“Treason was also unique in being subject to express standards of proof, on account of a succession of statutes that mostly required two witnesses.”).

94. *See, e.g.*, BISHOP, *supra* note 84, §§ 212, 318, 355-56; CHITTY, *supra* note 90, at 129, 186, 224. *See generally* 3 BLACKSTONE, *supra* note 84; JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* (Boston, Little, Brown and Co. 1898); FRANCIS WHARTON, *A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* (Philadelphia, Kay & Brother, 7th & rev. ed. 1874); JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (1904); J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 L. & HIST. REV. 221, 248 (1991); Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507 (1975) (arguing that the beyond the reasonable doubt standard is lower than the standard applied prior to 1700); BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991) (focusing on felonies and pre-trial and trial proceedings).

95. GOEBEL & NAUGHTON, *supra* note 80, at 723-24 (discussing how available records were “usually silent” about the procedures used to collect fines).



claims and documenting judicial analyses. For example, many early American excessive fines challenges were raised facially, and so necessarily would not involve the assignment of burdens for assessing excessiveness in an as-applied setting.<sup>96</sup> Further, in many available cases, excessive fines challenges were raised but not addressed,<sup>97</sup> were not reached due to an insufficient record of the evidence upon which the conviction stood,<sup>98</sup> contained no meaningful analysis,<sup>99</sup> or did not state explicitly what burdens of proof were employed.<sup>100</sup>

In addition to accounting for potential distortions and gaps in the record, any reliance on history must be measured realistically, keeping in mind that no single understanding on any particular point may have ever existed. As Bernadette Meyler has written, a proper examination of the historical record will reveal a “disunified field” of evidence—in other words, that common law practices were seldom uniform and shifted over time and so may point in different directions with respect to a given question.<sup>101</sup> That, of course,

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96. See, e.g., *Baldwin v. State*, 75 Ga. 482, 485 (1885); *State v. Cannady*, 78 N.C. 539, 544 (1878); *March v. State*, 35 Tex. 115, 116 (1871); *State v. Davidson*, 44 Mo. App. 513, 519 (1891). As is the case today, facial challenges are a uniquely tough row for defendants to hoe. Compare *United States v. Salerno*, 481 U.S. 739, 745 (1987) (rejecting a facial challenge to the federal Bail Reform Act and noting that “respondents have failed to shoulder their heavy burden”), with, e.g., *In re MacDonald*, 33 P. 18, 21 (Wyo. 1893) (“in order to declare the law unconstitutional,” the court must find “that the punishment provided by the law is so disproportionate to the offense as to shock the moral sense of the people.”). One excessive fines challenge decided at the close of the nineteenth century even stated that defendants must show facial unconstitutionality beyond a reasonable doubt. *State v. Lube*, 45 A. 520, 521 (Me. 1899). In many of these cases, however, the early appellate courts emphasized that even if facially valid, sentencing judges were mandated to ensure that fines fell within constitutional limits as applied. See, e.g., *infra* note 239.

97. See, e.g., *Tilley v. Savannah, Fla. & W. R.R. Co.*, 5 F. 641, 650, 659-60 (C.C.S.D. Ga. 1881); *Prentice v. Weston*, 118 N.E. 720, 721-22 (N.Y. 1888); *Burger v. State*, 26 S.C.L. (1 McMul.) 410, 418 (Ct. App. 1841).

98. See *State v. Sheppard*, 32 S.E. 146, 146-47 (S.C. 1899); *Blydenburgh v. Miles*, 39 Conn. 484, 496 (1872); *Wingfield v. Commonwealth*, 1 Ky. Op. 585, 585-86 (Ct. App. 1867).

99. See, e.g., *In re Stone*, 41 A. 658, 658 (R.I. 1898) (per curiam) (stating only that the fine imposed was “not so clearly excessive” as to be unconstitutional); *Ex parte Keeler*, 23 S.E. 865, 668 (S.C. 1896) (“In our opinion, the fine imposed on the defendant was not excessive.”); *State v. Huff*, 40 N.W. 720, 722 (Iowa 1888) (“It is claimed that the punishment is excessive. We do not so regard it.”); *Bradshaw v. State*, 50 S.W. 359, 360 (Tex. Crim. App. 1899) (“We do not think the verdict of the jury is at all excessive.”).

100. See, e.g., *State v. Price*, 39 N.W. 291, 293 (Iowa 1888).

101. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 556-58, 569 (2006).

undermines the idea that history can provide determinative answers to the type of precise questions often raised in constitutional litigation, including what party carried the burdens of proof in the excessive fines context.

Again, the historical record as it relates to excessive fines claims provides examples of this form of limitation. The record is in discord as to judicial discretion to impose fines, with some records indicating that even if lawmakers were to set a mandatory fine in statute, judges had the authority to remit it if it were constitutionally excessive, whereas other sources suggest that judges had no such discretion, pushing the question of remission to pardons and related processes.<sup>102</sup> As another example, an accounting of practices in colonial New York indicates that judges within the same system took varying approaches to the imposition and collection of fines.<sup>103</sup> These inconsistencies warrant caution when relying upon early procedures to establish fundamental fairness in today's system.

In sum, history may prove useful if it tells us something about governmental or private interests or how the risk that a particular assignment of burdens or other procedural rule would increase the likelihood of an erroneous determination so long as we are honest about its limitations. We can do so by recognizing the ways in which governmental self-interest may distort the record, by acknowledging where the record is incomplete, and by identifying anachronisms. We might think of this approach as a question of weight rather than admissibility. Where the historical record is suspect, silent, or inconsistent, it should be afforded little weight, leaving contemporary considerations of fundamental fairness to take center stage.<sup>104</sup> As the historical evidence becomes more reliable, clearer, and more targeted to the question at hand, it can play a larger role, working in conjunction with modern considerations to ascertain the best path forward.<sup>105</sup>

In other words, the *Mathews-Medina* conundrum can be reconciled by allowing history to serve as a partner, rather than a gatekeeper, to contemporary understandings of fundamental fairness.

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102. See *infra* notes 237-41, 248-53 and accompanying text.

103. GOEBEL & NAUGHTON, *supra* note 80, at 724-25.

104. See, e.g., *infra* Part II.B.

105. See, e.g., *infra* Part II.C-D.

The reconciliation proposed here would use the *Mathews* three-part test as a frame for assessing the fundamental fairness of a criminal procedure: (1) will the assignment of burdens significantly interfere with an important government function, (2) what risks does a person face if the determination is wrong, and (3) how do burdens of proof affect the decision maker's ability to reach a proper conclusion?<sup>106</sup> Within that analysis, history may prove useful, to the extent it provides insight into how those same concerns were ameliorated—or not—through criminal processes used across time.

With that approach in mind, we turn now to the assignment of burdens to the questions of financial effect and disproportionality in the excessive fines realm.

## II. THE ASSIGNMENT OF BURDENS

“Burden of proof”—singular—is a misnomer. What follows identifies and analyzes four separate assignments encompassed within the phrase<sup>107</sup>: the burden to raise the claim; the burden of producing evidence relevant to the claim; the burden of persuasion, which is really the “risk of nonpersuasion” on the issue<sup>108</sup>; and the standard of proof, which serves “to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”<sup>109</sup> Standards of proof include, for example, the beyond a reasonable doubt standard for establishing guilt in a criminal case, and the clear and convincing or preponderance of the evidence standards in many other settings.<sup>110</sup>

As detailed above, the framework for assessing the assignment of burdens employed in this Article is taken from the *Mathews* test, which looks to three indicators of fundamental fairness: the manner

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106. See *supra* note 34 and accompanying text.

107. Other scholars have broken the concept of burden into three parts (the burdens of production and persuasion, and the standard of persuasion). See, e.g., Lawrence B. Solum, *You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 691-92 (1994). As detailed further below, it is necessary to also break out the burden of raising the claim in order to capture the way in which lawmakers can design systems that enhance the possibility of governmental abuse. See *infra* Part II.B.

108. Solum, *supra* note 107, at 691-92.

109. *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

110. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

in which the assignment will affect governmental interests, the private interests at stake, and the risk of an erroneous determination—in this case both the determination of financial effect and the ultimate assessment of disproportionality.<sup>111</sup> Here, the governmental and private interests apply across each of the four burden types, so they are set forth at the start. For the third factor—the risk of an erroneous determination—the four iterations of the burden of proof are considered in turn, examining both contemporary indicators of fundamental fairness and historical evidence, subject to the limitations noted above, and concluding with a proposed assignment for each burden. In doing so, I distinguish between the preliminary question of financial effect and the ultimate question of disproportionality, criminal and civil settings, and differences between economic sanction type, where necessary.

#### *A. Interests at Stake in Assigning Burdens*

The following details the governmental and private interests at stake when assigning burdens in relation to Excessive Fines Clause claims.

##### *1. Governmental Interests*

The Court has recognized that “[t]he State, of course, has a fundamental interest in appropriately punishing persons—rich and poor—who violate its criminal laws.”<sup>112</sup> Because the Excessive Fines Clause applies to both criminal and civil economic sanctions,<sup>113</sup> this analysis necessarily also captures offenses that are generally understood to constitute minimal wrongdoing for which the government has a reduced interest,<sup>114</sup> such as low-level public order

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111. *See supra* Part I.A.

112. *Bearden v. Georgia*, 461 U.S. 660, 669 (1983).

113. *See supra* note 36 and accompanying text.

114. *Cf. Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (declining to apply the exigency exception to the Fourth Amendment’s warrant requirement in a case involving the nighttime entry into a home to arrest a person for intoxicated driving in part because Wisconsin’s lawmakers had “chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture for which no imprisonment is possible”).

violations, minor traffic offenses, and parking violations.<sup>115</sup> In both criminal and civil settings, the State's interest in punishing people for any given behavior is, of course, contestable.<sup>116</sup> But for purposes of this analysis, I assume the government has a legitimate interest in responding to at least some behaviors in both spheres.

This interest in imposing appropriate punishment for wrongdoing, however, must be contextualized within the long history of governmental abuse of its prosecutorial power to generate revenue through economic sanctions as a means of tax-avoidance primarily borne by the politically vulnerable. As detailed above, these abuses have been repeated over centuries,<sup>117</sup> and there is good reason to believe that they continue today. Modern lawmakers have long budgeted in revenues from law enforcement to address budgetary gaps.<sup>118</sup> Further, over the years lawmakers have increased both the severity and types of economic sanctions imposed<sup>119</sup> and in many jurisdictions have pressured law enforcement to engage in policing

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115. See, e.g., *Pimentel v. City of Los Angeles*, 974 F.3d 917, 922-24 (9th Cir. 2020) (holding that the Excessive Fines Clause applies to parking tickets and that, while parking laws are intended to decrease traffic congestion, the violation itself is minor).

116. This contestation occurs on three planes. One focuses on the nature of the response, challenging the idea that the government has a legitimate interest in imposing punishment, as opposed to other mechanisms of accountability. See generally, e.g., DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019) (regarding restorative justice practices). The second focuses on the legitimacy of treating particular behaviors as a form of wrongdoing. See, e.g., Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1480-96 (2020) (regarding various forms of criminalization of poverty). The third questions whether the public safety benefits of enforcement are insufficient to justify the continuation of systems that are inextricably intertwined with racial subordination. See generally Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213 (2021).

117. See *supra* notes 67-87 and accompanying text.

118. See, e.g., Thomas A. Garret & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 72 (2009) (regarding such practices in Houston, Nashville, and Washington, D.C.).

119. See, e.g., Karin D. Martin, *Monetary Myopia: An Examination of Institutional Response to Revenue from Monetary Sanctions for Misdemeanors*, 29 CRIM. JUST. POL'Y REV. 630, 636-41 (2018); CAL. LEGIS. ANALYST'S OFF., *THE 2017-18 BUDGET: GOVERNOR'S CRIMINAL FINE AND FEE PROPOSALS 8-10* (Mar. 3, 2017), <https://lao.ca.gov/reports/2017/3600/Criminal-Fine-Fee-030317.pdf> [<https://perma.cc/BUQ9-TG7G>]; MARCUS NIETO, CAL. RSCH. BUREAU, *WHO PAYS FOR PENALTY PROGRAMS IN CALIFORNIA?* 4-5 (Feb. 2006), [https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1306&context=caldocs\\_agencies](https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1306&context=caldocs_agencies) [<https://perma.cc/5NZB-2HL4>].

that results in the imposition of economic sanctions.<sup>120</sup> Particularly in jurisdictions in which opportunities to tax are restricted<sup>121</sup> or that are experiencing periods of fiscal distress,<sup>122</sup> lawmakers have come to rely on such revenues to fund a wide variety of public projects. Those uses may include the operation of courts, law enforcement, prosecution, indigent defense, probation, and incarceration, as well as any manner of public service unrelated to legal systems.<sup>123</sup> While a lack of transparency and data collection problems make exact figures difficult to ascertain, it is clear that local, state, and federal governments take in billions of dollars annually in revenue from fines, fees, and forfeitures.<sup>124</sup>

Further, as has been the case historically,<sup>125</sup> law enforcement practices that generate revenue—including even low-level traffic<sup>126</sup> and parking offenses<sup>127</sup>—are often targeted at politically vulnerable communities, and particularly heavily policed communities of color. Recent studies have shown that the percentage of municipal budgets derived from fines and fees increases with the percentage of people in the community who are Black and Latinx.<sup>128</sup> Similarly,

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120. See, e.g., Beth A. Colgan, *Revenue, Race, and the Limitations of Traffic Enforcement Reform* (forthcoming); Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1514-15 (2021).

121. See, e.g., Patrick Liu, Ryan Nunn & Jay Shambaugh, *Nine Facts About Monetary Sanctions in the Criminal Justice System*, BROOKINGS INST. 1, 6-9 (Mar. 2019), [https://www.brookings.edu/wp-content/uploads/2019/03/BailFacts\\_20190314.pdf](https://www.brookings.edu/wp-content/uploads/2019/03/BailFacts_20190314.pdf) [<https://perma.cc/W7FR-8KFH>]; U.S. COMM'N ON CIV. RIGHTS, TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 9 (2017), [https://www.usccr.gov/pubs/2017/Statutory\\_Enforcement\\_Report2017.pdf](https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf) [<https://perma.cc/A75L-F4LN>].

122. See, e.g., Akheil Singla, Charlotte Kirschner & Samuel B. Stone, *Race, Representation, and Revenue: Reliance on Fines and Forfeitures in City Governments*, 56 URB. AFFS. REV. 1132, 1133 (2020) (using U.S. Census Bureau Census of Governments data to show an increase in average reliance on economic sanctions for municipal revenues as the housing market began to burst in 2006 and further increases by 2012).

123. See, e.g., Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1539-41 (2020).

124. See *id.*

125. See *supra* notes 71-83 and accompanying text.

126. See, e.g., Colgan, *supra* note 120 (collecting studies regarding racial discrimination in traffic enforcement); Woods, *supra* note 120, at 1475-76.

127. Noli Brazil, *The Unequal Spatial Distribution of City Government Fines: The Case of Parking Tickets in Los Angeles*, 56 URB. AFFS. REV. 823, 824 (2018) (finding that parking ticket rates were higher in Black communities).

128. See, e.g., Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1090-92 (2017) (assessing

reviews of forfeiture practices also show disparate enforcement against Black and Latinx people.<sup>129</sup> And while a sufficiently serious fiscal downturn may moderate racially disproportionate enforcement—a study of traffic ticketing practices in Missouri found that a decrease in governmental revenue resulted in increased citation rates of white motorists<sup>130</sup>—at a minimum these studies raise questions about the validity of any claimed governmental interest in imposing financial punishments.

Setting aside, for the moment, these historical and contemporary practices, when assessing the validity of the government's interests we might look to the Court's approval of either utilitarian or retributive justifications for punishment in the Eighth Amendment context.<sup>131</sup> Full investigation of whether economic sanctions—and particularly those that are imposed in unmanageable amounts—actually satisfy those aims is outside of the scope of this Article, but it is important to note that even without the longstanding risks of abuse noted above, the question is more complicated than it might first appear. With respect to the utilitarian goal of deterrence, an overly protective procedure may result in economic sanctions so low that the deterrent effect, if any, is reduced. There is, however, mixed

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data from nine thousand cities); Singla et al., *supra* note 122, at 1146-47, 1151 (analyzing a stratified random sample of ninety-three California municipalities); Dan Kopf, *The Fining of Black America*, PRICEONOMICS (2016), <https://priceonomics.com/the-fining-of-black-america/> [<https://perma.cc/B48H-4CA8>] (comparing the 50 municipalities with the highest proportion of municipal budgets from economic sanctions against all 4,600 municipalities with populations over 5,000 in the U.S. Census Survey of Local and State Finance and finding that “[b]y far the largest difference between the median city and cities that receive substantial revenues from fines is the size of the African American—and, to a lesser extent, Hispanic—population”) (study tables available at U.S. COMM’N ON CIV. RTS., *supra* note 121, at 20-25).

129. See, e.g., Clifton Adcock, *Most Police Seizures of Cash Come from Blacks, Hispanics*, OKLA. WATCH (Oct. 28, 2019), <https://oklahomawatch.org/2015/10/07/most-police-seizures-of-cash-come-from-blacks-hispanics/> [<https://perma.cc/3WUK-3RAM>] (examining state-level forfeitures in ten Oklahoma counties involving seizures of \$5,000 or more and finding that 75 percent of cases involved forfeitures against people of color, with 38 percent of proceedings initiated against Latinx people and 33 percent against Black people).

130. Allison P. Harris, Elliot Ash & Jeffrey Fagan, *Fiscal Pressures and Discriminatory Policing: Evidence from Traffic Stops in Missouri*, 5 J. RACE, ETHNICITY & POL. 1, 15-22 (2020).

131. See *Harmelin v. Michigan*, 501 U.S. 957, 999, 1003, 1008-09 (1991) (plurality) (opinion of Kennedy, J.).

evidence as to whether economic sanctions actually deter unlawful acts and increasing evidence that unmanageable economic sanctions motivate unlawful behavior,<sup>132</sup> so the government interest in that respect is less than certain. Retributive interests would also be undermined by economic sanctions that do not fully account for the person's culpability for the offense, though imposing sanctions beyond a person's desert would equally offend retributive aims.<sup>133</sup> And because economic sanctions implicate not only the financial condition of the individual upon whom they are imposed, but also innocent family members and loved ones who lose access to monies used to pay down economic sanction debt and to forfeited cash or property, the retributive aim of imposing punishment only on those who deserve it is undermined.<sup>134</sup> But, again, assuming that utilitarian and retributive goals would be properly satisfied in some cases, fundamental fairness would not command an assignment of burdens that would fully prevent the government from meeting those aims.<sup>135</sup>

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132. Compare, e.g., Todd L. Cherry, *Financial Penalties as an Alternative Criminal Sanction: Evidence from Panel Data*, 29 ATL. ECON. J. 450, 451-52, 455 (2001) (finding that fines had a general deterrent effect in four North Carolina counties when applied to seven serious felonies), with Foster Cook, JEFFERSON CNT'Y'S CMTY. CORR. PROGRAM, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 11-12 (2014), <https://finesandfeesjusticecenter.org/articles/the-burden-of-criminal-justice-debt-in-alabama/> [<https://perma.cc/8BRF-PTFR>] (finding that 17 percent of survey respondents had committed offenses such as drug sales, sex work, or property offenses in order to obtain money to pay economic sanctions). See generally BETH A. COLGAN, BROOKINGS INST., ADDRESSING MODERN DEBTOR'S PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY 9-11 (2019) (discussing additional studies related to the deterrent effect of economic sanctions).

133. For a discussion of how excessive economic sanctions offend retributive goals, see Colgan, *supra* note 27, at 47-61 & n.257.

134. See COLGAN, *supra* note 132, at 9 (collecting studies documenting how innocent people pay for economic sanction debt, with that burden falling particularly heavy on Black women); see also Thomas B. Harvey & Janae Staicer, *Policing in St. Louis: "I Feel Like a Runaway Slave Sometimes,"* in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 53 (Tamara Rice Lave & Eric J. Miller eds., 2019) (quoting Samantha Jenkins, who had been incarcerated due to inability to pay traffic tickets until her family managed to make payment: "It put my momma and sister in a bind.").

135. Cf. *Addington v. Texas*, 441 U.S. 418, 429 (1979) (declining to require a beyond a reasonable doubt standard for civil commitment proceedings in part because psychiatric diagnoses are sufficiently uncertain that requiring such a standard would make it impossible for the government to succeed in committing people with serious mental health needs).



In addition to its overall interest in responding to illegal behavior, government officials have also expressed a specific utilitarian interest in pursuing forfeitures.<sup>136</sup> There are two primary justifications for forfeitures. First, property may serve as an “instrumentality” of an offense—essentially a tool used by the person to commit a crime, such as a car driven to the location of a drug buy.<sup>137</sup> Second, cash may be forfeited if it constitutes crime proceeds; so, too, may property purchased in whole or in part with crime proceeds.<sup>138</sup> Proponents of the use of forfeiture posit that seizing property instrumental to committing a crime will deter offenses by making them harder to commit, and that seizing crime proceeds will deter offenses by making them less lucrative.<sup>139</sup> Again, the actual deterrent value of forfeiture practices is questionable overall<sup>140</sup> and made more so by the use of civil forfeiture processes. In all but the small handful of jurisdictions that have disallowed civil forfeiture,<sup>141</sup> these processes allow the government to forfeit cash or property without obtaining a conviction—or even charging the owner—with a criminal offense.<sup>142</sup> And while California and Florida require law enforcement to prove a nexus exists between the seized items and criminal activity beyond a reasonable doubt in at least some circumstances,<sup>143</sup> other states require only clear and convincing evidence,<sup>144</sup> a preponderance of the evidence,<sup>145</sup> or even mere probable cause,<sup>146</sup> before shifting the burden to the property owner to prove their innocence. As a result, there is less certainty in the civil

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136. See David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY, 328, 368-69, 386 n.269 (1988) (discussing the potential deterrent effect of forfeiture).

137. See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019).

138. See, e.g., 18 U.S.C. §§ 982(a), 1963(a); 21 U.S.C. §§ 853(a), 881(a).

139. See *United States v. Bajakajian*, 524 U.S. 321, 351-52 (1998) (Kennedy, J., dissenting).

140. See, e.g., John Burnett, *Sheriff Under Scrutiny Over Drug Money Spending*, NPR (June 18, 2008), <https://www.npr.org/templates/story/story.php?storyId=91638378> [<https://perma.cc/G65Q-2U9Z>] (quoting a drug task force officer who described cash forfeitures as “chump change” for drug cartels).

141. See Nick Sibilla, *Maine Becomes Fourth State to End Civil Forfeiture*, INST. FOR JUST. (July 13, 2021), <https://ij.org/press-release/maine-becomes-fourth-state-to-end-civil-forfeiture/> [<https://perma.cc/7QGY-YPYX>].

142. See, e.g., 18 U.S.C. § 983.

143. CAL. HEALTH & SAFETY CODE §§ 11488.4(h)(2)(i)(1)-(2) (West 2017); FLA. STAT. ANN. § 932.704(8) (2016).

144. See, e.g., ARIZ. REV. STAT. ANN. § 13-4311(M) (2017); *id.* § 4312(H)(5)(a).

145. See, e.g., IND. CODE § 34-24-1-4(a) (2019).

146. See MASS. GEN. LAWS Ch. 94C, § 47(d) (2018).

forfeiture context (as well as other settings in which guilt is determined at less than a beyond a reasonable doubt standard) that deterrable criminal activity has even occurred. Further, because in many jurisdictions forfeiture statutes are written so broadly, the nexus between the cash or property and an alleged offense can be tenuous—for example, the forfeiture of an elderly couple’s home after their adult son allegedly sold twenty dollars worth of marijuana from their front porch.<sup>147</sup> But assuming for these purposes that forfeitures deter unlawful activity in at least some cases, if procedures for ascertaining disproportionality are too strict, those efforts at deterrence will be undermined.

The government’s interest in responding to crime also includes the awarding of restitution to crime victims for the stated purpose of making victims financially whole.<sup>148</sup> Yet, even this interest is more complicated than it first appears. Victims’ need for financial assistance following a crime can be great, particularly in light of the fact that crime victims disproportionately come from low-income communities of color, and so are unlikely to have access to savings or community resources that may aid in their recovery.<sup>149</sup> That need, however, is not fulfilled by the imposition of restitution awards upon a person who has no meaningful ability to pay.<sup>150</sup> Hundreds of billions of dollars in restitution arrears exist nationwide—awards that the government often acknowledges are unlikely ever to be paid.<sup>151</sup> Additionally, many crime victims report that responses that

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147. Pa. Senate Judiciary Committee (Oct. 20, 2015) (testimony of Louis S. Rulli, Practice Professor of Law and Director of Clinical Programs, University of Pennsylvania Law School) at 3.

148. *See* *Bearden v. Georgia*, 461 U.S. 660, 670-71 (1983) (treating restitution as an important interest but rejecting the argument that revocation of probation for nonpayment of restitution satisfies that interest when imposed upon those who have no meaningful ability to pay).

149. *See* ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 4 (2016), <https://allianceforsafetyandjustice.org/crimesurvivorsspeak/> [<https://perma.cc/7GLH-GX9C>]; ERIKA HARRELL, LYNN LANGTON, MARCUS BERZOFSKY, LANCE COUZENS & HOPE SMILEY-MCDONALD, BUREAU OF JUST. STAT., WCJ248384 HOUSEHOLD POVERTY AND NONFATAL VIOLENT VICTIMIZATION 2008-2012 2 (2014), <https://www.bjs.gov/content/pub/pdf/hpnnv0812.pdf> [<https://perma.cc/LVV6-988P>].

150. *Cf. Bearden*, 461 U.S. at 670 (“Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming.”).

151. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE

improve community safety are central to their recovery.<sup>152</sup> The imposition of unmanageable restitution may conflict with that need, as there is increasing evidence to suggest that such awards are criminogenic.<sup>153</sup>

Perhaps surprisingly, restitution is not so divorced from the risk that lawmakers will abuse the government's prosecutorial power to generate revenue as it may seem. To be sure, restitution for non-governmental victims does not increase governmental resources. But given the frequency by which restitution goes unpaid, if lawmakers took making crime victims financially whole more seriously, they would have to find ways to directly fund relief to a wider array of victims, which would almost certainly require increased taxation.<sup>154</sup> That appears unlikely. A recent study of the political economies in play as the federal government took up whether to increase crime victim compensation revealed that lawmakers refused to do so if it would require an increase in government expenditures, only agreeing to support financial relief for victims when the proposal shifted to one in which compensation took on the form of restitution made payable by the person convicted of the offense.<sup>155</sup> Similarly, though lawmakers in all fifty states have adopted systems for providing additional victim compensation, they have both populated those funds with revenues from other types of economic sanctions and narrowly defined eligibility for compensation in large part to ward off a need to supplement the funds with tax revenue.<sup>156</sup>

An additional governmental interest relevant to the assignment of burdens in the excessive fines context is its interest in limiting unnecessary administrative costs related to hearings to determine

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IMPROVED 25-26 (2018), <https://www.gao.gov/assets/690/689830.pdf> [<https://perma.cc/9R66-79QR>].

152. See SERED, *supra* note 116, at 29-30.

153. See *supra* note 132 and accompanying text.

154. See Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 157-62 (2020).

155. See Jeremy R. Levine & Kelly L. Russell, *Crime Pays the Victim: Criminal Fines, the State, and Victim Compensation Law, 1964-1984* 3-4 (unpublished manuscript) (on file with the author).

156. See Sinnar & Colgan, *supra* note 154, at 155-60; Levine & Russell, *supra* note 155, at 3-4.

financial effect and overall excessiveness.<sup>157</sup> It is reasonable to expect that an assignment that protects people from the imposition of economic sanctions will result in an increase in the number of hearings, particularly where the government's use of economic sanctions is aggressive—for example, high-dollar-value fines, the imposition of numerous fees, or the forfeiture of cash or property only tenuously related to an offense.<sup>158</sup> It is also reasonable to expect an uptick in challenges when the government seeks to impose economic sanctions against people with limited capacity to pay them or absorb their loss.<sup>159</sup>

But no matter the administrative costs, the government has no valid interest in the strategic advantage a favorable assignment of burdens would provide if it interferes with the full realization of the Constitution's protections<sup>160</sup> including those afforded to its citizens through the Eighth Amendment.<sup>161</sup> That includes protection against lawmakers succumbing to the temptation to pursue excessive economic sanctions that outpace the government's penal interests in order to line governmental coffers at the expense of the politically

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157. *Cf.* *Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996) (considering “the State’s interest in the efficient operation of its criminal justice system”).

158. *See, e.g., infra* note 216 (regarding high fines related to drug offenses); *Pimentel v. City of Los Angeles*, 974 F.3d 917, 922-25 (9th Cir. 2020) (holding that a sixty-three dollar base fine for a parking violation is not constitutionally excessive but remanding on the question of whether a series of late payment fees are); Transcript of Oral Argument at 43-45, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091) (positing, by counsel for Indiana, that the state could forfeit an automobile for the violation of a minor traffic offense); *supra* note 147 and accompanying text (regarding the limited nexus in certain cases).

159. *See infra* Part II.B.1.

160. *See Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) (“The State’s interest in prevailing at trial ... is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases” and therefore, “a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.”).

161. *Weems v. United States*, 217 U.S. 349, 381 (1910).

vulnerable.<sup>162</sup> The government's interests are satisfied, then, by an assignment of burdens that "exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."<sup>163</sup>

Finally, the government has an interest in operating in a way that protects its legitimacy by instilling confidence in the citizenry that it is acting to secure community safety and well-being. The use of economic sanctions disproportionate to the underlying offense undercuts this interest in a variety of ways. When lawmakers value revenue generation over public safety, law enforcement practices can shift away from the protection of the community. One recent study, for example, has shown that governmental dependence on revenues from economic sanctions pushes law enforcement toward the enforcement of offenses that result in their imposition and away from solving violent and serious property crime.<sup>164</sup> Further, people in heavily policed communities targeted for revenue-focused policing become afraid of police involvement, learning not to call 911 out of fear that they will become the subject of enforcement. For example, when Samantha Jenkins called the police to her home to help her during a domestic violence incident, the officers ran a warrants check on her, found a warrant related to unpaid traffic tickets, and arrested her on the spot.<sup>165</sup> The same department later declined to arrest the perpetrator of a homicide in her neighborhood despite the existence of multiple cooperative witnesses.<sup>166</sup> Isiah Kinloch called police to his apartment after a man broke in and assaulted him.<sup>167</sup>

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162. See *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (plurality) (opinion of Scalia, J.) ("For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history ... [e]ven absent a political motive, fines may be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue.'")).

163. *Weems*, 217 U.S. at 381.

164. Rebecca Goldstein, Michael W. Sances & Hye Young You, *Exploitative Revenues, Law Enforcement, and the Quality of Government Service*, 56 URB. AFFS. REV. 5, 8, 17, 21-22 (2020) (finding that a 1 percent increase in the portion of municipal budgets funded through economic sanctions "is associated with a statistically and substantively significant 6.1 percentage point decrease in the violent crime clearance rate and 8.3 percentage point decrease in the property crime clearance rate").

165. Harvey & Staicer, *supra* note 134, at 44-45.

166. *Id.*

167. Anna Lee, Nathaniel Cary & Mike Ellis, *TAKEN: How Police Departments Make Millions by Seizing Property*, GREENVILLE NEWS (Apr. 22, 2020, 7:34 PM), <https://www.greenvillenews.com/2020/04/22/taken-how-police-departments-make-millions-by-seizing-property/>.

While he was at the hospital being treated for a head wound, the officers searched his apartment, taking \$1,800 in cash he had earned as a tattoo artist, claiming that it must have been crime proceeds.<sup>168</sup> For those of limited means subject to cycles of enforcement, sanctioning, and penalties for nonpayment, detailed next, the message received is that system actors—lawmakers, judges, and law enforcement—prize revenue and social control over public safety and justice.<sup>169</sup> In other words, it is in the government’s interest to get this right. Its legitimacy may be *protected* by an assignment of burdens that makes successful excessive fines challenges more likely.

## 2. *Private Interests*

There are also significant private interests at stake. In any case in which an erroneous imposition of excessive economic sanctions occurs, a person upon whom sanctions are imposed is deprived of money or property without justification. But the risk is particularly fraught for those with limited means to pay excessive fines, fees, and restitution, or to absorb the loss wrought by an excessive forfeiture—which is relevant both to questions of financial effect and disproportionality.<sup>170</sup>

With respect to unmanageable fines, fees, and restitution, the deprivation of cash when payments are made can interfere with the ability of people and their families to meet basic human needs, including access to food, stable housing, childcare, and necessary medical care.<sup>171</sup> This is true even when people manage to pay in full immediately because the money used to pay off economic sanctions is siphoned away from those basic needs.<sup>172</sup> When immediate

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greenvilleonline.com/in-depth/news/taken/2019/01/27/civil-forfeiture-south-carolina-police-property-seizures-taken-exclusive-investigation/2457838002/ [https://perma.cc/4BBS-JHEG].

168. *Id.*

169. *See* Colgan, *supra* note 27, at 58-61.

170. *See supra* notes 31-33 and accompanying text.

171. ALA. APPLESEED CTR. FOR L. & JUST., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA’S RACIAL WEALTH DIVIDE 4 (2018), <https://www.alabamaappleseed.org/underpressure/> [https://perma.cc/KLV8-7HY8] (click “Read the Full Report”).

172. *See, e.g., id.* (finding that 82.9 percent of survey respondents reported having to skip payments on basic necessities or child support in order to pay economic sanctions); Steven

payment in full is impossible, the ongoing debt can result in even greater financial precarity, forcing people to subjugate their basic needs and those of their families throughout the period of debt.<sup>173</sup> The financial consequences are so great that the Federal Reserve is now including the financial impact of economic sanctions in its Survey of Household Economics and Decisionmaking.<sup>174</sup>

The financial precarity caused by debt from unpaid economic sanctions is exacerbated when lawmakers employ highly punitive responses to nonpayment.<sup>175</sup> In some cases, these practices restrict access to employment, education, childcare, medical care, and the like by literally preventing the person from getting there. These practices include driver's license revocations, vehicle impoundment programs, and the use of arrest warrants.<sup>176</sup> For example, a study of driver's license revocation in New Jersey found that 42 percent of those surveyed lost existing employment due to license suspension, nearly half of whom were unable to find new employment; of those

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Mello, *Speed Trap or Poverty Trap? Fines, Fees, and Financial Wellbeing*, FINES & FEES JUST. CTR. 1, 35-36 (Nov. 14, 2018), <https://mello.github.io/files/jmp.pdf> [<https://perma.cc/Q3PL-WXB9>].

173. Colgan, *supra* note 27, at 58-60; Harvey & Stacier, *supra* note 134, at 49 (quoting Meredith Walker) ("When it comes time to pay tickets and court fines, they supersede all other things. Whatever medical bills you have, whatever. If the electric bill is due and that court money is due, you gotta pay the court money and let your lights get cut off because lights being cutoff, you're still at your house. Court not being paid, you have a warrant."); see *infra* notes 176, 178-79 and accompanying text (regarding warrant practices).

174. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020 1, 9-10 (May 2020), <https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf> [<https://perma.cc/6PNS-MYXG>].

175. These consequences of nonpayment are distinct from the array of "collateral consequences" lawmakers have created that are imposed upon conviction of certain offenses. See *infra* notes 272-74 and accompanying text.

176. See, e.g., William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585, 1594-1602 (2020); Roediger, *supra* note 116, at 224 (regarding the persistent use of warrants in Missouri municipal courts even after the Department of Justice investigation into Ferguson's court practices, including at rates that exceed an average of more than one warrant per household); Elliott Ramos, *Chicago Police Impound 250,000 Vehicles Since 2010. Here's Why City Hall's Rethinking That*, WBEZ CHICAGO (July 13, 2020), <https://www.wbez.org/stories/chicago-police-impounded-250000-vehicles-since-2010-heres-why-city-halls-rethinking-that/a085f94b-4a87-437b-837a-d5b4501a9168> [<https://perma.cc/8HCL-4BD3>]. The Idaho Supreme Court has ruled that the use of arrest warrants in response to nonpayment is unconstitutional. *Beck v. Elmore Cnty. Magistrate Ct.*, 489 P.3d 820 (Idaho 2021) (striking down the practice under the Fourth and Fourteenth Amendments).

who did, 88 percent had to take jobs with reduced pay.<sup>177</sup> Vehicle impoundment quite literally results in the deprivation of a means of transportation. And an arrest on a warrant for nonpayment not only raises the immediate risk caused by the incarceration itself—which may include dangerous and unsanitary conditions<sup>178</sup>—but also, by cutting the person off from the outside world, it interrupts one’s ability to meet their own and their families’ basic needs.<sup>179</sup>

In addition to governmental responses to nonpayment that directly restrict the ability to meet basic needs, other practices create further hurdles. For example, employers and landlords increasingly rely on credit reports when considering candidates, and so the destruction of credit that can result from ongoing debt impedes access.<sup>180</sup> Barriers to access are even higher in jurisdictions in which full payment is required in order to seal or expunge arrest and conviction records.<sup>181</sup> And the use of wage garnishment as a collection method adds administrative obligations potential employers may be reluctant to take on.<sup>182</sup>

When people saddled with unmanageable economic sanctions lose access to basic human needs, they do not bear those harms alone; those conditions are shared by their families. Unmanageable economic sanctions may result in family disunification, both upon

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177. ALAN M. VOORHEES TRANSP. CTR. & N.J. MOTOR VEHICLE COMM’N, MOTOR VEHICLES AFFORDABILITY AND FAIRNESS TASK FORCE: FINAL REPORT 38 (2006).

178. *See, e.g.*, Harvey & Stacier, *supra* note 134, at 51-55 (describing conditions in jails in St. Louis County, Missouri, as overcrowded, lacking necessary medical care, exposing people to blood and feces smeared in cells, failing to provide clean and sufficient food and water and basic hygiene items such as toothbrushes and menstrual supplies, and allowing sexual harassment by corrections staff).

179. *See, e.g., id.* at 55 (interviewing Keilee Fant, who law enforcement arrested multiple times on warrants for nonpayment, resulting in the loss of several jobs that may have allowed her to move off of public assistance).

180. *See, e.g.*, KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUST. COMM’N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE 43-44, 48 (Aug. 2008), <https://finesandfeesjusticecenter.org/articles/the-assessment-and-consequences-of-legal-financial-obligations-in-washington-state/> [<https://perma.cc/2F8S-VT57>].

181. *See, e.g.*, MO. REV. STAT. § 610.140.5(3) (precluding eligibility for expungement unless all fines and restitution are paid); *see also* Amy Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY (forthcoming 2022) (on file with author).

182. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 518 (2011).



arrest for nonpayment<sup>183</sup> and when family members are forced to separate in order to find piecemeal housing when rent becomes infeasible.<sup>184</sup> These periods of separation can be deeply traumatic, particularly to children who are unable to understand why it has occurred.<sup>185</sup> Nicole Bolden, who had been arrested for nonpayment of traffic tickets, explained:

When I got arrested, I was away from him for two and a half weeks. He was one. He goes through withdrawals now. He freaks out every time I get ready to leave. He always asks me where I am going, am I coming back, no matter where I go. I could just be going down to the grocery store, “Are you coming back?”<sup>186</sup>

An inability to complete payment may also, in some jurisdictions, result in the extension or substitution of other forms of punishment. That can include interest and collection costs that outpace the original debt, making it difficult and at times impossible for people to reach the principal amount.<sup>187</sup> It can also include prolonged terms of probation and parole due to ongoing debt, keeping people who cannot afford to pay in full under the thumb of the government for longer periods of time than those who can.<sup>188</sup> Some jurisdictions provide people with the option of accepting a jail term as a means

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183. *See, e.g.*, Harvey & Stacier, *supra* note 134, at 46-47; *cf.* Utah v. Strieff, 136 S. Ct. 2056, 2073 (2016) (Kagan, J., dissenting) (regarding the frequency by which arrest warrants are issued in relation to outstanding debt on low-level traffic and ordinance violations); Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (explaining that confinement after arrest “may imperil the suspect’s job, interrupt his source of income, and impair his family relationships”).

184. *See* Colgan, *supra* note 27, at 66-67.

185. Harvey & Stacier, *supra* note 134, at 46-47 (interviewing mothers arrested for non-payment regarding their children’s confusion about their absence and fear that it will reoccur).

186. *Id.* at 47.

187. *See, e.g.*, LAWS.’ COMM. FOR CIV. RTS., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 1, 15-19 (Apr. 13, 2015), <https://lccrsf.org/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf> [<https://perma.cc/5K99-78MA>]; Colgan, *supra* note 69, at 288-89.

188. *See* ALA. APPLESEED CTR. FOR L. & JUST., *supra* note 171, at 4, 20; Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 77-80 (2019); Nathan Wong Link, *Paid Your Debt to Society?: Legal Financial Obligations and Their Effects on Former Prisoners* 144-47 (Aug. 2017) (Ph.D. dissertation, Temple University) (on file with Temple University) [<https://perma.cc/3WXC-XJMB>].

of “working off” the debt; the fact that people take up that offer despite the often dangerous conditions inside American jails shows just how illusory such a choice is and how overwhelming the debt can be.<sup>189</sup> Some jurisdictions will allow a substitution of labor through community service for debt; that work is often outside the scope of labor protections, can create childcare issues, takes up time a person may otherwise use for paid employment, and displaces paid labor in the community.<sup>190</sup> And in many jurisdictions, where people are disenfranchised from the right to vote due to a conviction, the inability to pay economic sanctions can preclude reenfranchisement, denying people the opportunity for full civic participation.<sup>191</sup>

These collections and enforcement practices can exacerbate the degree of stigma associated with an offense, increasing the risk to people who are unable to complete payment.<sup>192</sup> When considering the fairness of an assignment of burdens, the Supreme Court has drawn a distinction between civil processes resulting in a loss of money or property and those that would result in more serious deprivations, such as the termination of parental rights.<sup>193</sup> In doing so, it has placed proceedings that would stigmatize a person or family on the side of the equation demanding more protective standards of proof.<sup>194</sup> While initially low-level violations may carry

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189. NIETO, *supra* note 119, at 2; *see supra* notes 178-79 and accompanying text. Additional research is needed to determine how often people opt-in to a jail term as a means of debt relief because many jurisdictions do not track those figures. In response to one survey conducted by the California Research Bureau, two counties reported that in fiscal year 2004-05, over a thousand people chose jail over debt. NIETO, *supra* note 119, at 26.

190. *See* LUCERO HERRERA, TIA KOONSE, MELANIE SONSTENG-PERSON & NOAH ZATZ, UCLA LAB. CTR., WORK, PAY, OR GO TO JAIL: COURT-ORDERED COMMUNITY SERVICE IN LOS ANGELES 3-4 (Oct. 2019), [https://www.labor.ucla.edu/wp-content/uploads/2019/10/UCLA\\_Community\\_ServiceReport\\_Final\\_1016.pdf](https://www.labor.ucla.edu/wp-content/uploads/2019/10/UCLA_Community_ServiceReport_Final_1016.pdf) [<https://perma.cc/2KT9-FFSW>].

191. *See* Colgan, *supra* note 188, at 58-60. For a survey of state laws on the relationship between unpaid economic sanctions and disenfranchisement as of July 2020, *see generally* MARGARET LOVE & DAVID SCHLUSSEL, WHO MUST PAY TO REGAIN THE VOTE? A 50-STATE SURVEY, COLLATERAL CONSEQUENCES RESOURCE CENTER (July 2020).

192. *See* CALANDRA DAVIS, HOPE POL’Y INST., EXAMINING THE INTERSECTION BETWEEN CRIMINAL JUSTICE AND FINANCIAL SERVICES IN THE DEEP SOUTH 3-5, 9-10 (Jan. 13, 2021), <http://hopepolicy.org/manage/wp-content/uploads/Criminal-Justice-Paper.pdf> [<https://perma.cc/J52T-DHEU>].

193. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

194. *Id.* at 756-59 (noting that proceedings that threaten a “stigma” require greater protection); *Addington v. Texas*, 441 U.S. 418, 424 (1979) (explaining that civil cases involving a loss of money or property do not create a risk “of having his reputation tarnished erroneously”).

little, if any, stigma, a low-level offense may become stigmatizing by a jurisdiction's collections and enforcement practices. For example, the use of arrest warrants can result in public humiliation and the indignity of jail booking procedures,<sup>195</sup> subjecting a person to a greater degree of stigma for even those offenses that are not inherently stigmatizing in and of themselves.<sup>196</sup> Further, regardless of offense level, the stigma associated with an offense may be extended when the inability to pay economic sanctions precludes completion of probation or parole or prevents access to the expungement or sealing of records of arrest and conviction.<sup>197</sup>

The use of forfeitures also carries significant risks for those who are unable to absorb the shock of losing cash or property. Because forfeitures are intended to deprive people of the instrumentalities of an offense and crime proceeds, cash or property becomes eligible for forfeiture due to its relationship to the offense; in most cases, its dollar value is irrelevant to its forfeitability.<sup>198</sup> But that value is highly relevant to those against whom excessive forfeitures would be imposed. For example, the loss of a forfeited automobile may mean that the person or his or her family may no longer have the means to access employment and educational services; to reach grocery stores, childcare, medical treatment, and the like; or to satisfy other legal obligations, including attending probation and parole meetings required as a separate component of punishment.<sup>199</sup> Similarly, the forfeiture of a family's home causes displacement and

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195. *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (explaining that upon arrest, jailers may “swab DNA from the inside of your mouth, and force you to ‘shower with a delousing agent’ while you ‘lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals.’” (alterations in original) (quoting *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1514 (2012))).

196. *See Michigan v. Summers*, 452 U.S. 692, 702 (1981) (noting that arrests carry with them “the indignity associated with a compelled visit to the police station”); *Harvey & Stacier*, *supra* note 134, at 43 (quoting Kristine Hendrix, a woman arrested after she was unable to pay traffic ticket debt) (“There’s a lot of shame that goes into that as a person when you’re being arrested. Being arrested is traumatic, especially when you’re arrested for something that’s just so petty. Failure to pay a ticket, so petty.”).

197. *See supra* notes 181, 188 and accompanying text.

198. *See supra* notes 29-30 and accompanying text. A few jurisdictions have adopted rules that alter or limit the procedures for forfeiture eligibility depending on the dollar value of the forfeiture. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11488.4(i) (applying different standards of proof for proving forfeitability depending on the dollar value of the seized cash or property).

199. *See Colgan & McLean, supra* note 32, at 437-39.

may also result in family disunification.<sup>200</sup> And a forfeiture can also be both humiliating and stigmatizing, as it links the owner to sometimes serious criminal offenses even when no conviction results.<sup>201</sup>

These risks are not borne evenly across society. The difficulties caused by the loss of income, cash, or property resulting from economic sanctions are exacerbated for people of color, people with physical disabilities, people who have mental health issues or chemical dependencies, and those who have been subjected to terms of incarceration in light of preexisting structural barriers to housing, employment, and more.<sup>202</sup> Further, as detailed above, enforcement practices that result in the imposition of economic sanctions are often targeted at heavily policed communities of color.<sup>203</sup> These sanctions strip money from such communities—either directly through money spent to pay fines and fees, or indirectly by the taking of real and personal property that may or may not ever be replaced.<sup>204</sup> Those monies might otherwise have been spent in support of local businesses, thus supporting taxes for services that help communities flourish.<sup>205</sup> Instead, economic sanction revenues are often used to fund the perpetuation of criminal legal systems that both over-police those communities and leave them in peril when law enforcement efforts are focused on revenues rather than public safety.<sup>206</sup> But even when funds are used to support other public services, such as education, inequalities may be exacerbated.<sup>207</sup> By redistributing the revenues generally, without consideration of the community from which they were stripped, fines, fees, and forfeitures serve as hidden regressive taxes other communities do not

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200. Rulli, *supra* note 147, at 3-4.

201. *See, e.g.*, Angela J. Davis, *Race, Cops, & Traffic Stops*, U. MIA. L. REV. 425, 438-40 (1997) (describing the detention of a Black family during a pretextual traffic stop for hours in the early morning hours, while law enforcement forced them to stay out on the road in the rain while a drug dog searched their vehicle); Colgan, *supra* note 120 (regarding the use of pretextual traffic stops as a method of accruing forfeiture revenues).

202. *See* COLGAN, *supra* note 132, at 8-9.

203. *See supra* notes 125-30 and accompanying text.

204. *See, e.g.*, Colgan & McLean, *supra* note 32, at 449.

205. *Cf.* MICHAEL LEACHMAN, MICHAEL MITCHELL, NICHOLAS JOHNSON & ERICA WILLIAMS, *ADVANCING RACIAL EQUITY WITH STATE TAX POLICY* 3 (Nov. 15, 2018) (explaining that removing barriers to success in communities of color benefits the economies of those communities).

206. *See supra* notes 164-69 and accompanying text.

207. *See* Colgan, *supra* note 123, at 1557-58.

bear.<sup>208</sup> For those communities, the ripple effects of excessive economic sanctions include downstream consequences of nonpayment, perhaps most pointedly with respect to ongoing voter disenfranchisement.<sup>209</sup> Studies show that disenfranchisement due to a criminal conviction disproportionately diminishes voting rights in Black communities both directly and by depressing voter participation beyond those formally disenfranchised.<sup>210</sup> As a result, these communities lose out on opportunities for fiscal prosperity and the civic participation that would render them less politically vulnerable.

In sum, people against whom excessive economic sanctions are imposed—particularly those in heavily-policed communities of color—risk increased financial precarity that may interrupt their ability to meet their own and their families' basic needs. They may be subjected to highly punitive responses to nonpayment such as driver's license suspensions, towing, and warrants for nonpayment as well as additional economic sanctions and extensions of other forms of punishment such as probation and parole. They are burdened with the stigma that these practices bring, even when the underlying offense is as minor as a traffic ticket. These sanctions also create risks to these communities by prioritizing the enforcement of minor offenses over public safety, by stripping funds needed to support community resiliency, and by reducing the political power of such communities through voter disenfranchisement. Each of these risks is relevant to the assignment of burdens.

With both governmental and private interests in mind, we turn next to an assessment of how the assignment of each of the four burdens may reduce the risk of an erroneous determination.

### *B. Burden of Raising the Excessive Fines Claim*

There is a common assumption that the party who would benefit from a claim has the burden of raising it.<sup>211</sup> Here the assumption

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208. *See id.*

209. *See supra* note 191 and accompanying text.

210. *See, e.g.,* Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOC. SCI. Q. 722, 738, 740 (2009) (finding that disenfranchisement “policies tend to dampen the probability of voting” in Black communities).

211. *See supra* note 107 and accompanying text.

would be that people against whom economic sanctions are imposed have the burden of raising an excessive fines claim, full stop. But, because in many circumstances the government has created systems that make it unlikely that people will be aware of or have the capability of litigating excessive fines claims, the question is not so straightforward. In addition to those contemporary considerations, this Section provides limited historical evidence regarding this burden before proposing a method of assigning burdens that accounts for the governmental and private interests noted above and the procedural risks that make erroneous determinations likely in many cases.

### 1. Contemporary Considerations

Considerations of fundamental fairness include an examination of whether a burden exacerbates or alleviates the risk that the decisionmaker will reach an erroneous determination.<sup>212</sup> Relevant considerations include whether the person seeking enforcement of a right is afforded counsel,<sup>213</sup> and whether the procedure creates an imbalance of power between the government and the party whose right is in question.<sup>214</sup>

The risk of an erroneous determination of financial effect and overall excessiveness is heightened in cases in which there is a lack of access to counsel to assist in raising an excessive fines challenge, which is common in a significant percentage of cases involving economic sanctions.<sup>215</sup> Economic sanctions are widely used in felony cases<sup>216</sup> where the Sixth Amendment right to counsel is afforded,<sup>217</sup>

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212. See *Addington v. Texas*, 441 U.S. 418, 428 (1979).

213. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 516 (1990) (upholding a parental notification statute placing the burden of proof on minors seeking abortions to prove, by clear and convincing evidence, that the minor is sufficiently mature or that the medical procedure is in the minor's best interest, in part because "the minor is assisted in the courtroom by an attorney as well as a guardian ad litem").

214. See *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (describing parental termination proceedings: "The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."); see also *Akron Ctr.*, 497 U.S. at 504 ("[T]he bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony.").

215. See Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 735-36 (2018).

216. Drug offenses, for example, often carry high fines and fees and are a key target for forfeiture practices. See, e.g., WASH. REV. CODE ANN. § 69.50.401(A)(2) (2019) (setting fines

but the volume of misdemeanor, municipal, traffic, parking, and civil forfeiture cases each year in the United States dwarfs the felony caseload.<sup>218</sup> The Court has limited the Sixth Amendment right to counsel in non-felony cases to those in which a term of incarceration is actually imposed.<sup>219</sup> With few exceptions, lawmakers choose not to provide access to counsel where a constitutional right does not attach.<sup>220</sup> Legal services programs—which have insufficient funding to provide for the extensive needs of low-income clients on other matters—rarely have capacity to take up these “quasi-criminal” cases.<sup>221</sup> Left on their own, it is highly unlikely that people subjected to economic sanctions would be aware of the Clause’s existence, let alone the mechanism for determining proportionality, the types of arguments related to the financial effect of the sanctions on them or their families that may be in play, or how to preserve or undertake an appeal of the excessiveness determination.<sup>222</sup> Without the “guiding hand of counsel,”<sup>223</sup> people are effectively left outside of the Clause’s protective ambit.

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between \$2,000 and \$100,000); *id.* §§ 69.50.430, .438 (adding additional fines between \$1,000 and \$500,000); *id.* § 69.50.505(I)(g) (regarding cash and property forfeitures related to drug crimes).

217. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

218. *See, e.g.*, Stevenson & Mayson, *supra* note 215, at 737 (estimating annual misdemeanor case filings at 13.2 million). Even with access to counsel in felony cases, there is often a lack of attention to economic sanctions, likely due to power imbalances in plea bargaining brought on by the threat of significant periods of incarceration. *See* Beth A. Colgan, *Nor Excessive Fines Imposed*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* 173-74 (Meghan J. Ryan & William Berry III, eds., 2020); *see also infra* notes 335-36 and accompanying text.

219. *See* *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that the Sixth Amendment right to counsel does not apply to non-felony cases unless incarceration is ordered).

220. For example, the federal government provides counsel in civil forfeiture proceedings, but only when the person is already represented by appointed counsel in a related criminal case or if the property subject to forfeiture is the person’s primary residence. 18 U.S.C. § 983(b).

221. Rulli, *supra* note 147, at 2-3, 19. The University of Pennsylvania School of Law’s legal clinic provides representation in civil forfeiture cases, but only has capacity to take on a limited number of cases involving the forfeiture of homes. *Id.*

222. *See* *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (explaining that without counsel, a layperson would be ignorant of the claims available and how to marshal evidence); *cf.* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 337 (2011) (“[I]ndividuals who plead guilty in the fast-paced, high-volume lower criminal courts may not even be aware of the right to appeal, or the need to file a notice of appeal within a short time period after conviction.”).

223. *Powell*, 287 U.S. at 69.

Additionally, the risk of an erroneous decision is heightened in civil proceedings in which lawmakers have reduced the government's burden of proof for establishing wrongdoing. Because excessiveness is measured by gross disproportionality, in which offense seriousness is weighed against punishment severity, a reduction in certainty as to the very existence of the offense or the person's culpability for it necessarily increases the risk that the economic sanctions imposed will be disproportionate.<sup>224</sup> Yet, lawmakers have employed a reduced standard of proof in many low-level traffic and public order cases.<sup>225</sup> Lawmakers have also often set reduced standards of proof for establishing a nexus between forfeited cash or property and alleged criminal activity.<sup>226</sup> The risk of error is particularly great when a lack of access to counsel and a reduced burden for establishing guilt are combined. The lack of counsel at the guilt stage means that the person "may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible."<sup>227</sup> And with a lower standard of proof required, the certainty of whether an offense occurred at all is further undermined. But in any case, given the role that offense seriousness plays in the disproportionality evaluation, the risk of an erroneous determination goes up as the certainty of guilt drops.

Finally, civil forfeiture proceedings are designed in a manner that results in a significant imbalance of power between the government

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224. See *supra* notes 22-33 and accompanying text.

225. See, e.g., ARIZ. R. PROC. CIV. TRAFFIC AND CIV. BOATING VIOLATION 17 (burden on the state by a preponderance in traffic cases); WIS. STAT. § 800.08(3) (2013) ("The standard of proof for conviction of any person charged with violation of any municipal ordinance shall be evidence that is clear, is satisfactory, and convinces the judge to a reasonable certainty."). Some states have retained a beyond a reasonable doubt standard in low-level cases. See, e.g., FLA. STAT. § 318.14(6) (2020) (traffic cases). It is often unclear what standard is used in processes that allow people to challenge parking violations, though the structure of such processes effectively places the burden of proof on the person ticketed. See, e.g., City of Chicago, *Contesting Tickets In-Person (Parking, Red Light and Automated Speed Enforcement)*, [https://www.chicago.gov/city/en/depts/fin/supp\\_info/revenue/challenging\\_tickets/contesting\\_in\\_person.html](https://www.chicago.gov/city/en/depts/fin/supp_info/revenue/challenging_tickets/contesting_in_person.html) [<https://perma.cc/GZR9-8UE5>] (listing affirmative defenses for parking violations). Whether reductions in the burdens of proof on the issue of guilt in these proceedings comports with due process is outside of the scope of this Article but worthy of further examination in its own right.

226. See *supra* notes 143-46 and accompanying text.

227. *Powell*, 287 U.S. at 68-69.



and the person whose cash or property is forfeited and thereby may effectively preclude excessive fines claims.<sup>228</sup> Lawmakers have often designed civil forfeiture proceedings to be so complex that experienced attorneys have difficulty parsing them.<sup>229</sup> Given the complexity of the proceedings, the cost of representation often exceeds the value of the cash or property to be forfeited, which disincentivizes any challenge to the forfeiture, let alone an excessive fines challenge.<sup>230</sup> Adding to the expense, in many jurisdictions lawmakers have mandated that a person seeking to challenge a forfeiture pay bonds that may be in the hundreds or thousands of dollars and therefore initiating proceedings within which an excessive fines challenge might be raised could be cost prohibitive.<sup>231</sup> As Justice Thomas recently explained, the resulting lack of oversight “has led to egregious and well-chronicled abuses,” including that “forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings.”<sup>232</sup>

## 2. Historical Evidence

We turn now to the consideration of the very limited and mixed historical record with respect to the assignment of the burden of raising an excessive fines claim. While records exist that provide more insight as to the other burdens, in this case, it should be afforded little weight in the overall analysis.

A key problem with the historical record on this point relates to possible anachronisms between historical and modern practices. It was widely accepted that at common law, for any misdemeanor offenses codified without setting a specific punishment and for felonies in which the person convicted had been given the benefit of

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228. See Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/E38S-WZQZ>].

229. See *id.*

230. See *id.*; Michael Sallah, Robert O’Harrow Jr., Steven Rich, & Gabe Silverman, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST (Sept. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize> [<https://perma.cc/UV93-K3YZ>].

231. See, e.g., HAW. REV. STAT. § 712A-10(9) (higher of \$2,500 or 10 percent of the property value).

232. *Leonard v. Texas*, 137 S. Ct. 846, 848 (2017) (Thomas, J., statement respecting the denial of certiorari).

clergy, judges (and in some instances, juries)<sup>233</sup> had discretion to impose sanctions constrained by Magna Carta and the Excessive Fines Clause.<sup>234</sup> Less clear are the bounds of and processes for judicial discretion where codified misdemeanors explicitly set out the punishment to be imposed, including the amount of the fine or

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233. The ability of juries to set fines was codified in some early American statutes, subject to the same constitutional restrictions as judges. *See, e.g.*, 1786 VA. ACTS 41-42 (in an act for “moderating ameracements,” requiring fines to be set by a jury limited by the proportionality and financial effect guarantees of Magna Carta); *see also* *Kistler v. State*, 54 Ind. 400, 404 (1876) (describing a statute giving juries the ability to set fines and other punishments, subject to the restrictions of the Eighth Amendment).

234. *See* BISHOP, *supra* note 84, § 940 (“[W]hen a statute forbids or commands an act of a public nature, but is silent as to the punishment, the common law imposes, for disobedience, fine and imprisonment.”); *id.* (noting that Connecticut courts have found that the fine must be limited and that courts may not forfeit (all the defendant’s “property”)); *id.* § 941 (explaining that it was within judicial discretion to consider aggravating or mitigating facts in determining whether to “make the punishment heavier or lighter”); 4 BLACKSTONE, *supra* note 84, at 371-73 (explaining that, consistent with Magna Carta and the English Bill of Rights, judges had no authority to disregard the form of punishment established through statute, but that “pecuniary fines neither can, nor ought to be, ascertained by any invariable law” because “[t]he value of money itself changes from a thousand causes; and, at all events, what is ruin to one man’s fortune, may be matter of indifference to another’s”); CHITTY, *supra* note 90, at 710 (“It may be laid down as a general rule, that all those offences which exist at common law, and have not been regulated by any particular statute, are within the discretion of the court to punish.”); *id.* at 711-17 (explaining that after the ceremonial branding of the person’s hand to mark that the person had used their one opportunity for benefit of clergy, punishments were left “to the wisdom of the court” subject to the restrictions of Magna Carta, the English Bill of Rights, and the principles of proportionality); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 328 (Boston, Little, Brown and Co. 1868) (“Within such bounds as may be prescribed by law, the question of what fine shall be imposed is one addressed to the discretion of the court. But it is a discretion to be judicially exercised, and it would be error in law to inflict a punishment clearly excessive.”); W. EDEN, PRINCIPLES OF PENAL LAW 73 (3d ed. 1744-1776) (“It is the usage of the courts, superinduced on the clause of Magna Charta relative to civil ameracements, never to extend the fine of any criminal so far, as to take from him the implements, and means of his profession, and livelihood; or to deprive his family of their necessary support.”); *see also* *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000) (noting that English trial judges in the late eighteenth century had limited sentencing discretion in felony cases beyond invoking the pardon process, but significantly more discretion in misdemeanor cases in which fines were imposed); *Jones v. United States*, 526 U.S. 227, 244 (1999) (noting the “breadth of judicial discretion over fines and corporal punishment in less important, misdemeanor cases”); *Williams v. New York*, 337 U.S. 241, 246 (1949) (“[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.”).

forfeiture.<sup>235</sup> Some sources suggest that judges were constrained to impose the statutory fine,<sup>236</sup> shifting the procedure for obtaining relief to a pardon, a direction to the prosecutor to enter a *nolle prosequi*,<sup>237</sup> or through administrative procedures overseen by other entities, such as the Secretary of the Treasury.<sup>238</sup> In contrast, other sources suggest that even where a statute set a specific penalty, judges were mandated to avoid imposing that penalty should it be constitutionally excessive in light of the degree of the person's culpability for the offense and financial condition,<sup>239</sup> or even to remit fines once imposed.<sup>240</sup> While the position that judges have authority

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235. For examples of the codification of explicit punishments for misdemeanors, see CHITTY, *supra* note 90, at 706-07.

236. *See id.* at 707-08 (describing a punishment set out in statute and noting that "therefore, the courts will regard themselves as bound to pronounce a judgment, embracing all the punishments which those acts severally inflict"); *id.* at 809-10 ("[W]here a statute specifies the sum to be forfeited, the court have (sic) no power to mitigate it after conviction.").

237. BISHOP, *supra* note 84, § 708 (describing availability of pardon power to remit fines and forfeitures, though noting limitations on the pardoning of costs); CHITTY, *supra* note 90, at 706-07, 763-64 (describing the availability of pardon or *nolle prosequi* at the Crown's direction).

238. CHITTY, *supra* note 90, at 722, 810 (regarding requests for admission to be submitted to the court of Exchequer or the lords of Treasury); *see also infra* notes 277-93 and accompanying text.

239. *See, e.g.,* Louisville, H. & St. L. Ry. Co. v. Commonwealth, 46 S.W. 207, 208 (Ky. 1898) (noting that the jury set the fine within the statutory range and "[h]ence we should not disturb the judgment," but also stating that "cases might arise in which this court would feel bound, under [the state's Excessive Fines Clause], to refuse its sanction to laws which imposed excessive fines"); S. Express Co. v. Commonwealth *ex rel.* Walker, 22 S.E. 809, 811 (Va. 1895) (rejecting the contention that the lack of a maximum fine renders a statute facially excessive because "if a jury were to impose such a fine, it is the province of the court, and would be its duty, to set aside the verdict"); *see also* People v. Haug, 37 N.W. 21, 27-28 (Mich. 1888) (relying on Magna Carta's prohibition on "impair[ing] the capacity of gaining a business livelihood" in partially striking down a statute that, in addition to fines and possible imprisonment, punished pharmacists who failed to keep required records of liquor sales with a prohibition on engaging in the pharmacy business for two years).

240. *See, e.g.,* ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 116 n.222 (1930) ("There are examples, mostly in the seventeenth century, of county courts having remitted fines which they had imposed.").

to determine that an economic sanction set out in statute is constitutionally excessive has won out,<sup>241</sup> these procedural anachronisms provide only a shaky historical foundation for the assignment of burdens.

In addition to those anachronisms, the record is mixed as to procedures involving the question of whether a fine was or was not appropriate. As now, a presumption historically existed that the party requesting the court to act in a particular way would have the obligation of raising the claim.<sup>242</sup> But the idea of a moving party with respect to the propriety of imposing economic sanctions does not fit comfortably with historical sentencing processes, at least in the bulk of cases in which judges had discretion as to the amount of fine to impose.<sup>243</sup> There is some support for placing the obligation on the defendant wishing to reduce a fine: scattered references to those upon whom fines are imposed moving for a reduction,<sup>244</sup> and the ability of judges to impose fines without the defendant being present while requiring defendants to appear in court to present an argument for mitigation.<sup>245</sup> There is also some evidence to support

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241. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (striking down a mandatory forfeiture as excessive); 18 U.S.C. § 982(a)(1) (mandating that when a person is convicted of a reporting offense, the court “shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property”). The Court’s willingness to strike down economic sanctions despite the mandatory nature of the statute at issue may separate the Excessive Fines and Cruel and Unusual Punishments Clauses. Though writing only for a plurality of three, in *Harmelin v. Michigan*, Justice Kennedy opined that individualized sentencing was not mandated outside of the death penalty context, and that “[p]rosecutorial discretion before sentence and executive or legislative clemency afterwards provide means for the State to avert or correct unjust sentences.” 501 U.S. 957, 1007-08 (1991) (plurality) (opinion of Kennedy, J.).

242. WIGMORE, *supra* note 94, at 3526 (“The party having the risk of non-persuasion ... is naturally the one upon whom first falls this duty of going forward with evidence; because, since he wishes to have the jury act for him, and since without any legal evidence at all they could properly take no action, there is no need for the opponent to adduce evidence.”).

243. *See supra* notes 233-41 and accompanying text; *see also* CHITTY, *supra* note 90, at 707-08 (describing misdemeanors with fixed penalties and noting “the more usual course is to proceed at common law, because prosecutions on the statute are attended with more difficulty, and require more formal exactness”); *id.* at 711 (explaining that in addition to common law misdemeanors and those codified without set sentences, the sentencing of clergiable felonies also fell within the realm of judicial discretion).

244. *See, e.g.*, THAYER, *supra* note 94, at 166 (describing a case from 1666 in which jurors had been fined £5 each for returning an improper verdict, an amount reduced to forty shillings “upon the petition of the jurors”).

245. BAKER, *supra* note 86, at 698; *see* CHITTY, *supra* note 90, at 809-10; *see also* *People v. Taylor*, 3 Denio 91, 91 n.a (N.Y. 1846) (citing Chitty for the proposition that the court could

placing the obligation on the prosecutor; in particular, there are references to placing the obligation to address a fine's propriety on the prosecutor who initiated the sentencing proceeding.<sup>246</sup> Most likely the truth is somewhere in the middle. It appears that the standard procedure at sentencing was to allow the defendant to address the court in mitigation and the prosecution in aggravation,<sup>247</sup> with neither operating in the modern sense of a moving party.

There is also competing evidence regarding the obligation to raise a claim in cases in which judges were understood to have limited discretion given statutory mandates, which pushed the question of a sanction's propriety to pardons or similar processes. On the one hand, pleading requirements that required pardon requests to specifically set out the grounds for relief indicate that the person requesting the pardon had an obligation to raise arguments related to excessiveness,<sup>248</sup> and other references in the historical record suggest that the person or his or her family were typically obligated to seek relief.<sup>249</sup> Further, at least during the reign of Henry VII, it appears that the Crown regularly took bribes from people seeking pardons, a troubling but useful indication that it was the person seeking relief who initiated the process.<sup>250</sup> On the other hand,

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impose a sentence on a defendant who was not present in court if the sentence involved only a fine).

246. CHITTY, *supra* note 90, at 181 (describing the prosecution as moving for aggravation). It appears that in cases involving convictions of parishes for failing to keep highways in working order, a different process was employed. It began with "the prosecutor, calling on the defendants to show cause why a specific fine should not be imposed on them," upon which the defendants could "enlarge the rule, calling upon the trustees of the roads to show cause why it should not be apportioned between themselves and the parishioners." *Id.* at 690-91.

247. *See* State v. Reeder, 60 S.E. 434, 435 (S.C. 1908) ("The American cases lay down the principle that, where it devolves upon the court to determine the punishment either upon the finding or upon the plea of guilty, it is the correct practice for it to hear evidence in aggravation or mitigation, as the case may be, where there is any discretion as to the punishment."); Kistler v. State, 54 Ind. 400, 408 (1876) (explaining that at common law, practices allowed judges to consider aggravating and mitigating information in determining sentence "when brought to its attention by the evidence"); ARCHBOLD, *supra* note 84, at 180-1 & n.4 ("[T]he defendant may address the court in mitigation of punishment, as well as in arrest of judgment."); BISHOP, *supra* note 84, § 633 ("When, therefore, the court is to pronounce its sentence, if the law leaves to it a discretion, it will look at any evidence produced that should properly influence a judicious magistrate to make the punishment heavier or lighter.").

248. *See* 4 BLACKSTONE, *supra* note 84, at 390-95 (describing pardon processes).

249. *See, e.g.,* CHITTY, *supra* note 90, at 722 (noting that the defendant "may obtain a remedy by petition to the lords commissioners of the Treasury.").

250. *See* BURN, *supra* note 74, at 32-33.

judges—rather than the person who would be benefited by the pardon—were allowed, and perhaps mandated, to begin the pardon process in at least some cases,<sup>251</sup> and in some periods this appears to have been the primary method.<sup>252</sup> Yet other records suggest that other officials, such as local councils, could seek pardon on behalf of a person within their community.<sup>253</sup>

In short, given both the anachronisms and the mixed record, the assignment of burdens should be grounded on contemporary indicators of fundamental fairness rather than considerations of historical practice.

### 3. *Assignment*

In undertaking an assignment of the burden of raising an excessive fines claim, consideration must be given to the governmental interests at stake, the corresponding private interests, and the risk that the assignment will result in an erroneous imposition of excessive fines.<sup>254</sup> The government has an interest in responding to illegal behavior, removing from circulation the instrumentalities and proceeds of crimes, providing financial support for crime victims, and avoiding unnecessary administrative costs.<sup>255</sup> But it also has an interest in the enforcement of the Excessive Fines Clause and in preserving its own legitimacy through fair and just proceedings.<sup>256</sup> By establishing procedures that increase the risk that a person will be unaware of and incapable of raising excessive fines challenges, the government both undermines its own interests and creates significant risk that erroneous determinations of financial effect and excessiveness will lead to the interruption of basic needs, punishments for nonpayment, stigmatization, loss of civic

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251. See 4 BLACKSTONE, *supra* note 84, at 394 (explaining that for parliamentary pardons “a man is not bound to plead it, but the court must *ex officio* take notice of it”); *Apprendi v. New Jersey*, 530 U.S. 466, 480 (2000) (noting that judges could begin the pardon process in cases where the mandated sentence was inappropriate).

252. See BAKER, *supra* note 86, at 590 (noting that judicial initiation of pardons was routine by 1700); J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND: 1600-1800* 431-32 (1986) (describing the procedure by which courts initiated pardon proceedings).

253. See SCOTT, *supra* note 240, at 202.

254. See *supra* notes 34, 106 and accompanying text.

255. See *supra* Part II.A.1.

256. See *supra* notes 160-69 and accompanying text.

participation, and the undermining of community well-being that has plagued many of those subjected to economic sanctions.<sup>257</sup>

The following proposed assignments recognize gradations in risk in various types of proceedings. In cases in which a right to counsel attaches and in which lawmakers have refrained from imposing other procedural barriers to raising a claim, the obligation to raise a claim could be assigned to the party against whom economic sanctions would otherwise be imposed. In contrast, at least in cases involving fines, fees, restitution, or criminal forfeitures for which lawmakers have declined to provide counsel, that assignment would only be appropriate if the government provides meaningful notice of the availability of, and issues important to, excessive fines claims.<sup>258</sup> Though the risk of governmental abuse is reduced in cases in which restitution is paid to non-governmental victims, this notice requirement should apply in the restitution context as well. The government has an interest in the imposition of restitution awards, but excessive restitution awards are more likely to be unmanageable and remain unpaid and may even undermine the desire many victims have to live in safe and stable communities.<sup>259</sup> Unmanageable restitution also can result in long-term financial instability for those upon whom restitution is imposed and their families.<sup>260</sup> Providing notice of potential claims while requiring people seeking the protection of the Clause to ultimately raise those claims strikes a proper balance. Regardless of the type of economic sanction at

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

258. For notice to be meaningful, it must be designed to account for the pressures inherent to being called into court and lack of familiarity with legal systems and terminology so that the legal issues at hand are accessible. See generally D. James Greiner, Dalié Jiménez & Lois R. Lupica, *Self-Help Reimagined*, 92 IND. L.J. 1119, 1123-24 (2017). Self-help tools related to ascertaining the financial effect of economic sanctions are becoming more common. See, e.g., Superior Court of California, County of San Francisco, *Can't Afford to Pay*, <https://www.sfsuperiorcourt.org/divisions/traffic/cant-afford-pay> [<https://perma.cc/2GKZ-X97D>]. For a discussion on the administrative and economic efficiencies that may be created by gathering information related to financial effect, see Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 69 (2017). For a discussion of the potential negative consequences of ability-to-pay determinations that are too invasive and do not attend to structural bias, see Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 209 (2019).

259. See *supra* notes 148-56 and accompanying text.

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

issue, to be meaningful, notice must include not only the existence of the claim, but also the nature of the gross disproportionality test and importance of financial effect to it, how to provide relevant evidence, and how to appeal if the initial claim is unsuccessful.<sup>261</sup>

In addition to the requirement to provide meaningful notice in situations in which lawmakers fail to afford counsel, in civil settings in which lawmakers have chosen to reduce the government's burden of proving wrongdoing below a beyond a reasonable doubt standard the nature of the notice should be extended. For notice to be meaningful, it would be necessary to ensure that the explanation of the gross disproportionality tests include the importance of noting the uncertainty on the offense-seriousness side of the scale, the relevance of which is discussed below.<sup>262</sup>

Finally, in circumstances in which lawmakers have developed systems that make it highly unlikely that an excessive fines challenge would be made—such as civil forfeiture proceedings in many jurisdictions—the government should carry the burden of initiating the excessiveness inquiry. That assignment attends to the combination of a lack of counsel, reduced standards of proof, fiscal barriers that make retention of counsel unlikely, and other procedures that raise the risk of governmental abuse,<sup>263</sup> as well as the risk of financial precarity caused by the loss of forfeited cash and property.

### *C. Burden of Production*

When attending to the production of relevant evidence, the Supreme Court has looked to both who has “superior access” to the evidence and how burdens may be used to incentivize the parties to provide such evidence.<sup>264</sup> As detailed below, these considerations,

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261. *Cf.* *North v. Russell*, 427 U.S. 328, 335 (1976) (upholding the use of lay judges in courts handling low-level offenses on the assumption that courts provide notice of the unconditional right to a trial de novo—essentially a form of appeal—and the time by which such an appeal must be filed).

262. *See infra* notes 300-08 and accompanying text.

263. *See supra* notes 228-32 and accompanying text.

264. *Medina v. California*, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring) (“In determining whether the placement of the burden of proof is fundamentally unfair, relevant considerations include: whether the government has superior access to evidence; [and] whether the defendant is capable of aiding in the garnering and evaluation of evidence on the matter to be proved.”); *see also* *Cooper v. Oklahoma*, 517 U.S. 348, 355 & n.6 (1996) (striking



along with helpful information in the historical record, support an imposition of burdens of production designed to meet those aims.

### 1. *Contemporary Considerations*

Given that a key consideration within the excessiveness inquiry is the financial effect of economic sanctions on the person upon whom they are imposed, it would appear that the defendant would have the greatest access to relevant information, including evidence about their finances, dependents, and other debts.<sup>265</sup> If that were the extent of information relevant to financial effect, it may make sense to place the burden of production on this issue entirely on the defendant.

But in reality, the government has superior access to much of the information necessary to make such a determination. For example, for people who are also sentenced to a term of incarceration, the government has access to data regarding the likelihood of obtaining employment within the jail or prison and what the limited wages for that employment would be.<sup>266</sup> The government also has access to its formulas for deducting economic sanctions arrears from such wages and from any monies sent to the incarcerated debtor by family and friends that would otherwise be available for the purchase of hygiene items, food, educational services, and the like.<sup>267</sup> It is also

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down the use of a clear and convincing evidence standard in proceedings to determine competency to stand trial and noting that burdens may be used to incentivize a party to “cooperate with the information-gathering process necessary to a reliable competency determination”) (citing *Medina*, 505 U.S. at 455 (O’Connor, J., concurring)); *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (regarding parental rights termination hearings in which the state “enjoys full access to all public records concerning the family,” and that the relevant witnesses would be state child protective service employees); *Speiser v. Randall*, 357 U.S. 513, 523-24 (1958) (explaining that considerations of fairness include which party has “opportunities for knowledge” regarding the issue at hand) (quoting *Morrison v. California*, 291 U.S. 82, 88-89 (1934)); *Com. Molasses Corp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104, 111 (1941) (“Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee’s liability, the law lays on him the duty to come forward with the information available to him.”).

265. *Cf. Stack v. Boyle*, 342 U.S. 1, 3 (1951) (noting “petitioners submitted statements as to their financial resources, family relationships, health, prior criminal records, and other information” in requesting a reduction of bail).

266. *See, e.g., CAL. CODE REGS.*, tit. 15, § 3040(j) (2021).

267. Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638, 642 (2015).

the government that contracts with phone providers, often at exorbitant rates, and sets policies related to expenses for other services, such as medical co-pays—and so it holds relevant information about the fiscal burdens of incarceration.<sup>268</sup> Similarly, if a person is to be sentenced to a period of probation and parole, government actors often have authority to impose or waive supervision fees, or other expenses including those for drug testing or mandatory treatment services, making evidence regarding the likely scope of those fees uniquely within the government’s control.<sup>269</sup> And in any case, because the government controls the collection of economic sanctions, it is the government that has access to whether or not it will impose collection costs, partial payment fees, and interest on unpaid debt,<sup>270</sup> as well as whether it will engage in tax-intercepts, wage garnishment, or other collection methods.<sup>271</sup>

The government also has a unique ability to understand and provide evidence related to the vast web of collateral consequences of conviction it has devised that may impede a person’s ability to pay debt from economic sanctions. Distinct from the downstream consequences of nonpayment described above, such as driver’s license suspensions and vehicle impoundment,<sup>272</sup> lawmakers have also formulated collateral consequences unrelated to payment and

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268. *Id.* at 643.

269. *See, e.g.*, Minn. Dep’t. of Corr., *Supervision Fees—Field Services* 201.013(D) (Dec. 20, 2016) (“The commissioner of corrections may waive payment of the fee if the commissioner determines that the offender does not have the ability to pay the fee, the prospects for payment are poor, or there are extenuating circumstances justifying waiver of the fee.”).

270. *See supra* note 187 and accompanying text. There are strong arguments that these various types of fees are themselves “fines” within the scope of the Clause’s protections. Colgan, *supra* note 120, at 36; Colgan, *supra* note 27, at 316-17. *See generally* Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), <https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate> [<https://perma.cc/Z6X7-SNC3>]; *City of Seattle v. Long*, 493 P.3d 94, 109-10 (Aug. 12, 2021) (holding that towing and impound fees constitute fines).

271. *See, e.g.*, COLO. OFF. OF THE STATE AUDITOR, VICTIM’S RESTITUTION: THE JUDICIAL BRANCH & DEPARTMENT OF CORRECTIONS PERFORMANCE AUDIT 8-9, 23-25 (2014), <https://leg.colorado.gov/sites/default/files/documents/audits/2197p-victimsrestitutionapril2014.pdf> [<https://perma.cc/C42U-E37G>]; *supra* note 182 and accompanying text.

272. *See supra* notes 175-77 and accompanying text. Again, these practices may themselves constitute fines for purposes of the Clause. *Long*, 493 P.3d at 109 (holding that vehicle impoundment is a fine).

which are imposed upon conviction.<sup>273</sup> These consequences are so many and so diverse that even an incomplete inventory includes nearly 45,000 such consequences nationwide, including, for example, restrictions on occupational licensing and access to public benefits that provide for basic human needs such as housing or food assistance.<sup>274</sup> All of these practices—over which the government has superior access—may have implications for the person’s ability to pay economic sanctions and absorb the loss of forfeited cash or property.

## 2. *Historical Evidence*

As with the burden to raise the claim, historical evidence related to the burden of production is also limited, though it provides greater insight that should be accorded some weight in the overall analysis. As detailed further below, the record supports the conclusion that the assignment of the burden of production should account for which party has unique access to relevant evidence.

The record shows that historically, both parties were afforded opportunities to provide evidence in support of their positions on the appropriateness of economic sanctions.<sup>275</sup> If the prosecution wished to convince the judge as to the proportionality of a higher sentence or the defendant wished to provide evidence lessening his or her culpability or establishing a meager financial condition, the parties were required to supply affidavits or other evidence to those ends.<sup>276</sup>

But there are also sources that indicate that the government had an obligation to produce evidence that would tend to show an economic sanction’s disproportionality. Records of forfeiture remissions from the early Treasury Department is one such source, and Kevin Arlyck’s exploration of such remissions undertaken between 1789

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273. See *National Inventory of Collateral Consequences of Conviction*, NAT’L REENTRY RES. CTR., <https://niccc.nationalreentryresourcecenter.org/> [<https://perma.cc/T93A-QKYH>].

274. *Id.*

275. See *State v. Smith*, 2 S.C.L. (2 Bay) 62, 62-63 (S.C. Ct. App. 1796).

276. See *supra* notes 242-47 and accompanying text; see also *Smith*, 2 S.C.L. (2 Bay) at 62-63 (requiring evidence of extenuating circumstances to be submitted by affidavit to the court for consideration after conviction and before sentencing); CHITTY, *supra* note 90, at 691-93 (describing the exchange of affidavits by the defense and prosecution prior to the sentencing hearing).

and 1806 proves particularly useful.<sup>277</sup> In 1789, Congress passed a series of customs laws establishing duties to be paid as well as a broad array of reporting and processing requirements to be undertaken by people bringing ships into U.S. ports.<sup>278</sup> Not only did these statutes criminalize a wide range of behaviors, they also imposed strict liability for violations, rendering even inadvertent or mistaken acts subject to punishment.<sup>279</sup> The penalties for such violations included the imposition of heavy fines as well as the forfeiture of a ship's contents, or even the vessels themselves.<sup>280</sup> And, like modern fines and forfeitures, these practices served to generate revenue for the U.S. fisc, and also further incentivized customs investigations by allowing customs officers and informants to retain a portion of the forfeiture proceeds.<sup>281</sup>

These early customs practices soon became the subject of concern and reform. By January 1790, Treasury Secretary Alexander Hamilton reported to Congress that he had observed situations “in which considerable forfeitures have been incurred, manifestly through inadvertence and want of information.”<sup>282</sup> Because the breadth of the laws and the lack of a mens rea requirement gave the government the ability to routinely impose fines and forfeitures from which to generate revenue, Secretary Hamilton believed that possibly unjust forfeitures could not “fail to attend the recent promulgation of laws of such a nature.”<sup>283</sup> He urged Congress to create a system to provide relief so that “heavy and ruinous forfeitures” could be unwound.<sup>284</sup> Later that year, Congress obliged, passing the 1790 Remission Act, which allowed property owners to petition the Secretary of the Treasury for a return of all or a part of the forfeited items.<sup>285</sup> The Act required petitioners to “truly and particularly set[] forth the circumstances of his case.”<sup>286</sup> After

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277. Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1452 (2019).

278. *Id.* at 1466-68.

279. *Id.* at 1468.

280. *Id.*

281. *Id.* at 1468-69.

282. Alexander Hamilton, *Report on the Petition of Christopher Saddler*, in 6 THE PAPERS OF ALEXANDER HAMILTON 191-92 (Harold C. Syrett ed., 1962).

283. *Id.*

284. *Id.*

285. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23 (repealed 1797).

286. *Id.*

hearing from the U.S. Attorney and any other person claiming a portion of the fine or forfeiture, the judge provided a statement of facts to the Secretary of the Treasury, who then had the discretion to remit the punishments in whole or in part if he determined that the penalty was “incurred without wilful negligence or any intention of fraud.”<sup>287</sup>

To be sure, the historical record does not evince a direct tie between the Remission Act and the Excessive Fines Clause, but as Professor Arlyck recounts, there is reason to believe that Secretary Hamilton and his contemporaries may have seen the two as related.<sup>288</sup> In 1792, in arguing against the idea that fines and forfeitures imposed for violation of a separate federal law were “unusual or excessive,” Secretary Hamilton pointed to the fact that they could only be imposed for willful and fraudulent breaches.<sup>289</sup> That stood in contrast to the offenses for which relief from forfeiture was granted in the Remission Act cases, suggesting his attentiveness to the idea of proportionality between offense seriousness and punishment severity.<sup>290</sup> Though Professor Arlyck acknowledges this provides a “slender reed,” Secretary Hamilton’s use of language reflecting the Eighth Amendment’s prohibitions, along with the familiarity amongst Americans writ large of the inherent nature of the right against excessive fines,<sup>291</sup> suggests at a minimum that these procedures were understood to be guided by the principles long-before secured by Magna Carta.

The 1790 Remission Act significantly cabined the government’s customs practices in a way directly relevant to the assignment of the burden of production. Although the burden of requesting remission was on the claimant who would present evidence to the trial court, which the court would then summarize in a statement of facts for Treasury’s review, Professor Arlyck’s study reveals that the

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287. *Id.*

288. *See* Arlyck, *supra* note 277, at 1512-13; *see also* Colgan, *supra* note 69, at 323-24 (noting a need for caution when interpreting historical records that show a remission of economic sanctions without an explicit connection to a constitutional source).

289. Arlyck, *supra* note 277, at 1512-13.

290. *Id.* at 1512-14 (describing debates related to the “Whiskey Tax” imposed for violations of the Spirits Act).

291. *See* *Timbs v. Indiana*, 139 S. Ct. 682, 692-93 (2019) (Thomas, J., concurring in the judgment); Arlyck, *supra* note 277, at 1513.

Secretaries often sought out additional evidence from the customs officers who made the seizure.<sup>292</sup> As Secretary Hamilton put it to one customs collector, he was “unwilling ... to precipitate a forfeiture as long as there is a *chance* of new light to evince innocence.”<sup>293</sup> This suggests that while the initial burdens of raising the claim and producing evidence rested with the property owner, government officials felt an obligation not only to produce any relevant information in their control, but also to help claimants make the strongest case possible in favor of remission.

In addition to these remission practices, historical treatises also exhibit attention to access to relevant evidence. Early treatises note that in the guilt phase of the trial, in circumstances in which the party with the ultimate burden of persuasion would have to prove a negative to succeed—for example, that a person is not insane to ward off an insanity defense—a general principle arose that the burden of persuasion on that point of fact should shift to the party with “peculiar knowledge” on the question.<sup>294</sup> Though the discussion of the peculiar knowledge principle in the historical record relates to determinations of guilt rather than sentencing and speaks in terms of burdens of persuasion, this supports the modern Court’s use of the burden of production to promote the delivery of relevant evidence by the party with superior access.<sup>295</sup>

### 3. *Assignment*

Both contemporary considerations of fairness and evidence of historical practice show that, for the assignment of the burden of production, the primary concern is access to relevant evidence that can be used to bolster the governmental goals of appropriately and constitutionally responding to illegal behavior, that protect against excessive sanctions that can undermine the fiscal health of the people upon whom they are imposed, their families, and their communities, and that help reduce the risk of an erroneous determination. The importance of access is relevant across both the

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292. Arlyck, *supra* note 277, at 1490-91.

293. *Id.* at 1491.

294. See THAYER, *supra* note 94, at 359; WIGMORE, *supra* note 94, at 3524-25, § 2486.

295. See *supra* Part II.B.1.

criminal and civil arenas, and so variation based on gradations of procedural risk is unnecessary. Instead, no matter the forum, if one party has peculiar knowledge of or superior access to evidence, the burden of production should be placed accordingly.

As detailed above, in the excessive fines context, some of the relevant information regarding financial effect and overall disproportionality will be peculiarly within the possession of the person claiming an economic sanction is excessive, whereas the government will have superior access to other relevant information.<sup>296</sup> Therefore, both parties should have the burden of production for information to which they have peculiar knowledge and access.

In addition to considerations of access, burdens may also properly be assigned in a manner that promotes parties to comply with their production obligations.<sup>297</sup> To promote production on both sides, once the person challenging the sanctions provides a colorable claim that their imposition will undermine the ability to meet basic human needs or would interrupt activities that support that end, if the government fails to provide evidence necessary to understand the downstream consequences of ongoing debt and of conviction for the offense, the standard of persuasion or related procedural rules—discussed further in the next Section—should shift to become more protective. The opportunity to be afforded more protective treatment may incentivize the defense to produce mitigating evidence, and the opportunity to avoid that heightened protection should incentivize the government to produce evidence uniquely within its control.

#### *D. Burden and Standard of Persuasion*

The burden of persuasion—whether it be as to financial effect or disproportionality—is an assignment of risk to a party, whereas the standard of persuasion establishes the degree by which the party with that burden must persuade the finder of fact.<sup>298</sup> While separate

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296. *Cf. Medina v. California*, 505 U.S. 437, 456 (1992) (explaining that the government has no “responsibility to gather evidence of a defendant’s competence” given that the relevant evidence is within the control of the accused); *Patterson v. New York*, 432 U.S. 197, 209 (1977) (“To recognize at all a mitigating circumstance does not require the State to prove its non-existence in each case in which the fact is put in issue.”).

297. *See Medina*, 505 U.S. at 455.

298. *See, e.g., THAYER, supra* note 94, at 356; *Solum, supra* note 107, at 691-92.

concepts, there is an overlap in both contemporary considerations and historical evidence regarding the risk of an erroneous determination, and so this Section addresses them together. Joined with the governmental and private interests, these considerations support the conclusion that the burden of persuasion should reside with the government in all cases as to the financial effect of the sanction and in all cases other than restitution for the determination of overall excessiveness. These combined considerations also support variance in the standards of persuasion according to the criminal or civil nature of the proceeding and between economic sanctions whose revenues accrue directly to the government and restitution paid to non-governmental victims.

### *1. Contemporary Considerations*

When assessing the constitutionality of the assignment of burdens and standards of persuasion the Supreme Court has looked to three key considerations that are particularly relevant here: the imprecision of the question to be determined, the risk that racial or cultural bias will influence the decision, and the dearth of opportunities to seek the correction of an erroneous determination.

First, when assigning standards of proof, the Court has recognized that the imprecision or fallibility of the evidence related to an inquiry supports the imposition of a protective standard.<sup>299</sup> By its very design, the ultimate question of disproportionality is inexact. Recall that the disproportionality analysis weighs offense seriousness against punishment severity.<sup>300</sup> With respect to offense seriousness, as the Court has explained, “any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.”<sup>301</sup> The imprecision in determining offense seriousness is particularly strong in the civil context given the reduction in the standard of proof for showing that the offense itself occurred.<sup>302</sup> To date, the Court has only applied the disproportionality analysis

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299. *See* *Addington v. Texas*, 441 U.S. 418, 429 (1979) (requiring that the prosecution show a need for civil commitment by clear and convincing evidence in part due to the “lack of certainty and the fallibility” of the evidence).

300. *See supra* note 22 and accompanying text.

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

302. *See supra* notes 143-46 and accompanying text.



in criminal cases,<sup>303</sup> in which the government is held to the burden of proving guilt beyond a reasonable doubt.<sup>304</sup> That highest burden is employed in criminal cases to “safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property.”<sup>305</sup> Without it, criminal punishments—including economic sanctions—cannot be imposed.<sup>306</sup> The lower standard of proof in civil settings effectively “dilute[s] ... the moral force” of the law, undermining the idea that “every individual going about his ordinary affairs [can] have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.”<sup>307</sup> By choosing to lower the standard of proof as to wrongdoing, not only do lawmakers create a greater risk of an erroneous determination of guilt, they also increase the risk of an erroneous assessment of proportionality by making it more likely that a person’s guilt will be overstated and thus that they will be excessively punished.<sup>308</sup>

Similar to the question of offense seriousness, a determination of financial effect for the purpose of assessing punishment severity is necessarily imprecise and made more so by related governmental policies. While it may be more readily quantifiable than, for example, a person’s competency,<sup>309</sup> any deprivation that would result in ongoing debt or loss of property that a person has little means to replace requires a forward-looking calculation into an uncertain future,<sup>310</sup> made even more uncertain by the byzantine array of

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303. See, e.g., *Bajakajian*, 524 U.S. at 324; *Harmelin v. Michigan*, 501 U.S. 957, 997-98 (1991) (plurality) (opinion of Kennedy, J.).

304. *In re Winship*, 397 U.S. 358, 358 (1970).

305. *Brinegar v. United States*, 338 U.S. 160, 174 (1949).

306. See *Nelson v. Colorado*, 137 S. Ct. 1249, 1251 (2017) (requiring the return of monies paid to satisfy economic sanctions after a successful appeal because “once those convictions were erased, the presumption of innocence was restored”); *McMillan v. Pennsylvania*, 477 U.S. 79, 92 n.8 (1986) (explaining that criminal penalties may only be imposed “[o]nce the reasonable-doubt standard has been applied to obtain a valid conviction”).

307. *In re Winship*, 397 U.S. at 364.

308. See *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (requiring defendant to prove competency to stand trial by only a preponderance of the evidence rather than clear and convincing evidence because the latter standard would create too great a risk that too many people would be unable to prove incompetency).

309. See *id.*

310. For a discussion of how time limitations imposed on ongoing payments based upon offense seriousness promote the principles undergirding the Excessive Fines Clause, see Colgan, *supra* note 27, at 55-57.

downstream penalties lawmakers have crafted when people prove unable to pay<sup>311</sup> and the collateral consequences of conviction.<sup>312</sup> Though the requirement that the government provide information in its control regarding the likely application of those penalties and consequences would help reduce the imprecision of the determination,<sup>313</sup> because debts for even minor offenses can go on for years, the question of financial effect is necessarily speculative.<sup>314</sup> And in any case, judges may quite reasonably fail to anticipate economic crises, such as that created by the COVID-19 pandemic, which has been particularly calamitous for people of color and those who work in low-wage, service sector employment,<sup>315</sup> many of whom are also subjected to disproportionate enforcement of pandemic-related violations.<sup>316</sup> When economic calamities come to be, those with the most financial instability are the first to suffer losses and the last to recover.<sup>317</sup> What once may have been a manageable debt may—due to personal, or in this case global, catastrophe—suddenly be out of reach.

The imprecision inherent to the excessiveness inquiry can—yet again—be further exacerbated by lawmaker decisions related to system design. Along with the civil forfeiture processes described above,<sup>318</sup> another example of these design decisions can be found in municipal courts. The most infamous municipal court is surely that of Ferguson, Missouri, which municipal officials designed and operated as a modern-day debtor's prison that stripped revenue for municipal use from its Black residents.<sup>319</sup> But Ferguson is far from

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311. See *supra* notes 175-91 and accompanying text.

312. See *supra* notes 272-74 and accompanying text.

313. See *supra* Part II.C.3.

314. See, e.g., Harvey & Staicer, *supra* note 134, at 50 (regarding a case in which it took seven years to complete payment of debt related to traffic tickets).

315. See, e.g., Brea L. Perry, Brian Aronson & Bernice A. Pescosolido, *Pandemic Precarity: COVID-19 Is Exposing and Exacerbating Inequalities in the American Heartland*, 118 PROCS. NAT'L ACAD. SCIS. 1, 1 (2021).

316. See Timothy Colman, Pascal Emmer, Andrea Ritchie & Tiffany Wang, *The Data Is In. People of Color Are Punished More Harshly for Covid Violations in the US*, GUARDIAN (Jan. 6, 2021, 6:17 AM), <https://www.theguardian.com/commentisfree/2021/jan/06/covid-violations-people-of-color-punished-more-harshly> [<https://perma.cc/7QGM-UEJJ>].

317. See *id.*

318. See *supra* notes 228-32 and accompanying text.

319. See *generally Investigation of the Ferguson Police Department*, U.S. DEP'T OF JUST. CIV. RTS. DIV. (Mar. 4, 2015), <https://www.justice.gov/sites/default/files/opa/press-releases/attach>

alone. As Alexandra Natapoff and Justin Weinstein-Tull have recently documented,<sup>320</sup> in many jurisdictions these courts—which handle local ordinance violations, traffic citations, and in some cases misdemeanor offenses—operate in what some have called “constitution-free zones.”<sup>321</sup> In many jurisdictions the judges in such proceedings are not required to be lawyers or to have even basic knowledge of the law.<sup>322</sup> A survey of 1250 municipal courts in New York found that nearly 75 percent of judges were not lawyers, “and many—truck drivers, sewer workers or laborers—[had] scant grasp of the most basic legal principles. Some never got through high school, and at least one went no further than grade school.”<sup>323</sup> But even with law-trained judges, municipal courts are often subject to limited oversight from state court systems<sup>324</sup> and may experience pressure to raise revenues to support court funding or other local projects.<sup>325</sup> Under such circumstances, there is a significant risk of erroneous determinations of ability to pay and excessiveness that can be tempered, at least somewhat, by placement of the burden and standard of persuasion on the government at a high level.

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ments/2015/03/04/ferguson\_police\_department\_report.pdf [https://perma.cc/9SNN-V85C].

320. See generally Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031 (2020).

321. Weinstein-Tull, *supra* note 320, at 1046.

322. Natapoff, *supra* note 320, at 1000-03; Weinstein-Tull, *supra* note 320, at 1053-55.

323. William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), <https://www.nytimes.com/2006/09/25/nyregion/25courts.html> [https://perma.cc/HM9B-LXWX]; Weinstein-Tull, *supra* note 320, at 1054-55; see also Julia C. Lamber & Mary Lee Luskin, *City and Town Courts: Mapping Their Dimensions*, 67 IND. L.J. 59, 67 (1991) (analyzing Indiana city and town courts and finding that only 42 percent of judges were lawyers). The Supreme Court has approved the use of lay judges in courts handling low-level matters such as traffic violations on the understanding that those cases did not involve “complex litigation.” *North v. Russell*, 427 U.S. 328, 334 (1976). For the reasons discussed herein, an excessive fines claim is certainly more complex than determining whether or not someone ran a red light. The Court also required that appeals as of right to a higher court be provided in such cases, along with meaningful notice of how to undertake such an appeal. *Id.* at 335. Further research is needed to understand the extent to which municipal courts using lay judges adhere to those requirements. *Cf.* Natapoff, *supra* note 320, at 1003-05 (noting that several states have limited appeals in ways inconsistent with *Russell*, including Delaware in which appeals may not be taken for fines less than \$100).

324. See Weinstein-Tull, *supra* note 320, at 1064-76.

325. See, e.g., U.S. DEPT OF JUSTICE CIV. RTS. DIV., *supra* note 319, at 14 (linking pressure from Ferguson’s Finance Director and the municipal judge’s adoption of numerous fees and surcharges, which the Finance Director praised in a report to the City Council as having helped “significantly increas[e] court collections over the years”).

Second, in addition to considering the imprecision of the inquiry, the Court has recognized the need for at least a clear and convincing standard when the assessment at hand is “vulnerable to judgments based on cultural or class bias,” which it has explained can be expected in circumstances where the people subject to the possible deprivation are “poor, uneducated, or members of minority groups.”<sup>326</sup> As detailed above, law enforcement efforts at generating revenue through economic sanctions have long been focused on heavily policed—and particularly Black and Latinx—communities.<sup>327</sup> Not only does that heighten the risk to people in those communities when economic sanctions are imposed, it also heightens the risk that the determination of financial effect, and therefore of overall excessiveness, will be faulty. Sentencing judges may, for example, insufficiently account for structural issues of race and class that restrict access to employment, childcare, health care, and other basic needs.<sup>328</sup>

And finally, the risk of error is exacerbated by the fact that there is a scarcity of opportunities to seek correction of an erroneous determination. The Court has taken this concern particularly seriously in cases in which the assignment of burdens involves a decision that is irreversible: a determination as to insanity prior to execution,<sup>329</sup> a decision to remove life support,<sup>330</sup> or the termination of parental rights.<sup>331</sup> But most recently, the same concern arose in *Nelson v. Colorado*, in which the Court struck down a procedure that both actually (in the case of misdemeanors) and effectively (by assigning the burden of proof in felony cases to the individual beyond a reasonable doubt) prevented a return of money paid to satisfy economic sanctions imposed on the basis of convictions later overturned.<sup>332</sup>

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326. *Santosky v. Kramer*, 455 U.S. 745, 762-64 (1982) (requiring at least a clear and convincing evidence standard be employed in hearings to terminate parental rights).

327. *See supra* notes 80-83, 125-30 and accompanying text.

328. *See Zhen, supra* note 258, at 201.

329. *See Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986).

330. *Cruzan v. Director*, 497 U.S. 261, 283 (1990).

331. *Santosky*, 455 U.S. at 759.

332. 137 S. Ct. 1249, 1260 (2017) (Alito, J., concurring) (“These stringent requirements all but guarantee that most defendants whose convictions are reversed have no realistic opportunity to prove they are deserving of refunds.”).

Opportunities to obtain relief on the issue of financial effect, as well as the ultimate question of excessiveness are effectively unavailable in many cases. The possibility of being sentenced to terms of incarceration places tremendous pressure on people to plead guilty to offenses carrying lower terms or no period of incarceration but that still involve, in many cases, significant economic sanctions.<sup>333</sup> Once taken, the plea often carries with it a waiver of the ability to appeal excessive fines claims.<sup>334</sup> In addition, because lawmakers have chosen not to provide counsel in many misdemeanor and low-level cases, people are left to manage excessive fines claims on their own.<sup>335</sup> As noted above, that is unlikely given that laypeople may not be aware of the existence of the Excessive Fines Clause, let alone how to argue and properly preserve an excessive fines claim.<sup>336</sup> While the notice requirement proposed above with respect to the burden of raising the claim helps temper this concern,<sup>337</sup> even in misdemeanor cases, in which access to counsel is afforded in at least some circumstances, appeals on any issue—let alone excessive fines challenges—are rare. In a recent study, Professors Nancy King and Michael Heise determined that, accounting for all issues, appellate courts review only eight out of ten thousand misdemeanor cases.<sup>338</sup> Appeals are made even more complicated in jurisdictions in which the lower courts that often impose economic sanctions are not required to create transcripts upon which an appeal may be based.<sup>339</sup> Further, along with the

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333. See, e.g., Christopher W. Maidona, *Ordering Criminal Restitution: An Exercise in Overstepping Statutory Authority*, 120 W. VA. L. REV. 253, 272 (2017); Alexes Harris, Beth Huebner, Karin Martin, Mary Pattillo, Becky Pettit, Sarah Shannon, Bryan Sykes & Chris Uggan, *United States Systems of Justice, Poverty and the Consequences of Non-Payment of Monetary Sactions: Interviews from California, Georgia, Illinois, Minnesota, Missouri, Texas, New York, and Washington*, ARNOLD FOUND. 39 (2017), <https://perma.cc/AVN9-3MTB> (stating that several respondents reported “that during their sentencing, they had been focused on so many other things, such as the length of time they were going to be incarcerated, that they didn’t fully comprehend the burden of the fines and fees being imposed until after they were released and had to start making payments”).

334. See Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 875-79 (2010).

335. See *supra* notes 218-21 and accompanying text.

336. See *supra* notes 222-23 and accompanying text.

337. See *supra* Part II.B.3.

338. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1941 (2019).

339. Natapoff, *supra* note 320, at 980, 1003-04; Weinstein-Tull, *supra* note 320, at 1072-73.

general limitations on error correction, in some forfeiture cases, property may be sold off while an appeal is pending,<sup>340</sup> and people convicted of criminal offenses are precluded from requesting that the U.S. Attorney's office employ its statutory authority to mitigate forfeitures.<sup>341</sup>

Beyond the limitations on relief via appeal, pardons may in theory provide an avenue for error correction, but that may also be hampered by state policy. In some states, people are precluded from seeking pardons until economic sanctions are paid in full.<sup>342</sup> And, though technically available in other states, pardons are employed only rarely in modern times in any case.<sup>343</sup> Further, while public pressure has led some jurisdictions to offer one-time amnesty relief for long-overdue debt,<sup>344</sup> this ad hoc approach does not constitute the kind of sustained and meaningful opportunity for relief that might warrant a less-protective assignment of the burden and standard of persuasion.<sup>345</sup>

## 2. Historical Evidence

As in the context of burdens of production, the historical evidence relevant to the burdens and standards of persuasion to be assigned in relation to excessive fines claims is useful for analyzing the fundamental fairness of these assignments. In particular, and despite the longstanding pattern of abuse dating back to Magna Carta, the historical record does show that protecting the guarantees of proportionality and attention to one's ability to meet basic needs

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340. See 18 U.S.C. § 1963(f); 21 U.S.C. § 853(h).

341. See 18 U.S.C. § 1963(i)(2).

342. See, e.g., IDAHO ADMIN. CODE r. 50.01.01.550.02(b)(v) (2021).

343. See Rachel E. Barkow & Mark Osler, *Reconstructing Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 6 (2015).

344. See, e.g., Nushrat Rahman, *Detroit Court's Amnesty Program Ends Next Week: What You Should Know*, DETROIT FREE PRESS (July 3, 2020, 4:49 PM), <https://www.freep.com/story/news/local/michigan/detroit/2020/07/02/detroit-36th-district-courts-amnesty-program/3284371001/> [<https://perma.cc/D9FV-9BXQ>] (regarding a short-term program that allowed waivers for fees but not fines related to traffic tickets).

345. See *Addington v. Texas*, 441 U.S. 418, 428-29, 433 (1979) (mandating that the standard for civil commitment be clear and convincing evidence, reasoning in part that it need not be as high as a beyond a reasonable doubt standard because the person would be subject to ongoing treatment and thus have repeated opportunities to seek release from an erroneous commitment).

was understood to be important, as is evident in caselaw,<sup>346</sup> statutes,<sup>347</sup> and treatises<sup>348</sup> from the seventeenth century forward.

What is noteworthy in the historical record is evidence indicating that, when taken seriously rather than ignored for fiscal and political gain, remission of fines and forfeitures was common, suggesting that the burden of persuasion was either on the claimant but at a low standard or instead rested with the government to justify that the punishment was not excessive. This is not to say that all attempts at seeking relief were successful; in the few as-applied challenges in the early American appellate record, there were both wins and losses.<sup>349</sup> But other records suggest that at the trial stage

346. See, e.g., *State v. Manuel*, 20 N.C. 114, 128 (1838) (“Whether a fine be reasonable or excessive ought to depend on the nature of the offense and the ability of the offender.”); *Commonwealth v. Morrison*, 9 Ky. 75, 99 (Ct. App. 1819) (reasoning that a fine “should bear a just proportion to the offense committed” as well as to “the situation, circumstances and character of the offender”); *Jones v. Commonwealth*, 5 Va. 555, 556-57 (1799) (explaining that fines must “be imposed *secundum quantitatem delicti salvo contenemento*” and, referring to the Excessive Fines Clause, that “the fine or amercement ought to be according to the degree of the fault and the estate of the defendant”); *The Case of William Earl of Devonshire*, 11 How. St. Tr. 1353, 1370 (H.L. 1689) (striking down a £30,000 fine as “excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land”); see also *State v. Reid*, 11 S.E. 315, 316 (N.C. 1890) (“It is hardly possible, by any fixed or arbitrary rule, to apportion, with exact precision, punishments to offenders; for there are almost as many shades of guilt, and of aggravation or mitigation to be considered in passing sentence, as there are offenses committed.”); *Burgh v. State ex rel. McCormick*, 9 N.E. 75, 55 (Ind. 1886) (noting that a court that uses discretion to impose severe fines in situations where there is a “grave wrong” would be justified); *State v. Miller*, 94 N.C. 904, 907 (1886) (“[I]t may not be so enormous and disproportionate to the crime proved by the evidence, indicating a disposition to oppress, rather than subserve the common good.”); *Blydenburgh v. Miles*, 39 Conn. 484, 497 (1872) (noting that an individual challenge to the excessiveness of the fine “must depend materially upon the circumstances and the nature of the act for which it is imposed”); *Bullock v. Goodall*, 7 Va. 44, 48 (1801) (noting that the prohibition on excessive fines be “commensurate to the offence and injury”).

347. See, e.g., 1787 N.Y. LAWS 344-45 (requiring that any “fine or amercement shall always be according to the quantity of his or her trespass or offence and saving to him or her, his or her contenement”); 1786 VA. ACTS 41-42 (“[T]he amercement which ought to be according to degree of the fault, and saving to the offender his contenement.”).

348. See, e.g., 4 BLACKSTONE, *supra* note 84, at 371 (describing proportionality as requiring consideration of “the aggravations ... of the offence,” and “the quality and condition of the parties”); CHITTY, *supra* note 90, at 711 (explaining that judicial discretion is constrained by Magna Carta); STEPHEN, *supra* note 84, at 490 (“The statutory rules as to the amount of the fines ... are vague to the last degree. I know, indeed, of two [constraints] only. The first is the provision of Magna Carta .... The second is the provision of the Bill of Rights.”).

349. Compare *Bullock*, 7 Va. at 49-50 (“No man can doubt, but that a fine of 264£ 8s. 9d. imposed on an officer who has committed no fault, for the benefit of a creditor who has sustained no injury, is superlatively excessive, unconstitutional, oppressive, and against

and in other processes of remission, reductions in fines were relatively routine in at least some courts. For example, a tract contrasting the seventeenth century judicial practices of Archbishop of Canterbury John Whitgift to other judges sitting in the Star Chamber reported that he “did constantly in this Court maintain the liberty of the *Free Charter* that none ought to be fined but *salvo contenimento*. He seldom gave any sentence but therein did mitigate in something the acrimony of those that spake before him.”<sup>350</sup>

Historical records related to pardon and similar procedures also indicate that remission of economic sanctions was common. In the mid- to late eighteenth century, the Rhode Island General Assembly regularly granted petitions for relief, including on claims that economic sanctions would leave a person or his or her family destitute.<sup>351</sup> Likewise, Professor Arlyck’s study of the 1790 Remission Act proceedings provides an additional example of the common practice of reducing economic sanctions that may otherwise be constitutionally excessive. As described above, after forfeiture, property owners could seek relief through the Secretary of the Treasury, who would often gather additional evidence regarding the circumstances of the forfeiture.<sup>352</sup> With evidence from both the property owner and government collected, the Secretary would then consider whether to grant relief.<sup>353</sup> While the burden of proving that the violation was unintentional was on the claimant, any plausible indication that the offense was unwillful or due to ignorance of the law was sufficient to require remission in whole or in part, even in cases with limited or questionable evidentiary support.<sup>354</sup> As a result, the Secretaries granted 91 percent of all remission petitions, nearly three-quarters

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conscience.”), with *Ex parte Keeler*, 23 S.E. 865, 868 (S.C. 1896) (holding that a fine imposed for a dispensary act violation was not excessive).

350. BURN, *supra* note 74, at 4, 10; see also 4 BLACKSTONE, *supra* note 84, at 19 (“[J]udges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy.”); Alfred N. May, *An Index of Thirteenth-Century Peasant Impoverishment? Manor Court Fines*, 26 ECON. HIS. REV. 389, 395-99 (1973) (analyzing court roles dating from 1208 to 1321 and positing, based in part on references to poverty in the records and the existence of an economic crisis, that declining fine rates in the period may be explained by consistent attention to individual financial condition in setting fines).

351. Colgan, *supra* note 69, at 331.

352. See *supra* notes 277-93 and accompanying text.

353. See *supra* notes 286-87 and accompanying text.

354. See Arlyck, *supra* note 277, at 1488-91.



of which were granted in full, with the remaining grants significantly reducing the penalty.<sup>355</sup>

In addition to the frequency of remission, another historical practice—jury nullification—provides some insight regarding burdens and standards of persuasion. Jury nullification occurred when jurors refused to convict or convicted only for a lesser offense despite evidence of guilt beyond a reasonable doubt because they understood that the punishment that would follow would be disproportionate to the offense.<sup>356</sup> As the Supreme Court has explained: “This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as ‘pious perjury’ on the jurors’ part.”<sup>357</sup> In some cases, jurors were motivated by a desire to avoid the imposition of forfeiture of estate, and so would convict only on lesser offenses that did not carry the penalty,<sup>358</sup> or by declining to find the existence of property that could be subject to forfeiture.<sup>359</sup> To be sure, available records do not explicitly tie this form of jury nullification to the Excessive Fines Clause. But because jurors were reacting in whole or in part to the severity of the punishment that would be imposed upon conviction and its disproportionality to the alleged offense, this practice effectively placed the burden of proving proportionality on the prosecution beyond a reasonable doubt.

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355. *Id.* at 1488.

356. For example, in 1815 a South Carolina court remarked:

However absurd it may appear, that a jury who are sworn to determine a case according to the evidence, should be authorized to find goods stolen of less value than twelve pence, when all the witnesses swear they are of much greater value, it is what Judge Blackstone calls a pious perjury, which they have been indulged in, until it has become the law of the land. The principle has been too long established, to be now called in question, and therefore, a new trial must be refused.

JOSEPH BREVARD, REPORTS OF JUDICIAL DECISIONS IN THE STATE OF SOUTH CAROLINA 515 (1840) (reprinting *State v. John Bennett*); *see also* 4 BLACKSTONE, *supra* note 84, at 18 (“[J]uries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence.”); *Bushell’s Case*, 124 Eng. Rep. 1006, 1017 (C.P. 1670) (holding that jurors could not be fined for jury nullification absent a demonstration that the result was actually improper).

357. *Apprendi v. New Jersey*, 530 U.S. 466, 479 n.5 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 245 (1999)).

358. *See* 4 BLACKSTONE, *supra* note 84, at 380; GOEBEL & NAUGHTON, *supra* note 80, at 712.

359. *See* GOEBEL & NAUGHTON, *supra* note 80, at 715-16.

### 3. *Assignment*

The following first addresses the assignments of the burdens and then the standards of persuasion for various economic sanctions.

#### *a. Burdens of Persuasion*

When the contemporary considerations and historical practices regarding governmental interests, private interests, and risks of erroneous determinations are combined, they support an assignment of the burden of persuasion to the government for two questions: (1) financial effect regardless of economic sanction type; and (2) the ultimate question of disproportionality with respect to fines, fees, and forfeitures.

While the government has an interest in enforcing the law, depriving people of the actual instrumentalities and proceeds of crimes, and avoiding unnecessary administrative and economic costs, those interests are set against the backdrop of a problematic history. For centuries the allure of using the government's prosecutorial power as a tax avoidance mechanism, implemented primarily against those with limited political power, has proven too great to go without a meaningful check.<sup>360</sup> And the government has no interest in the imposition of disproportionate economic sanctions that undermine constitutional enforcement and raise questions about its legitimacy.<sup>361</sup>

Further, the imposition of excessive fines can create significant financial and social precarity for the person against whom they are imposed and their families, with ripple effects felt by entire communities and particularly communities of color.<sup>362</sup> Those risks are present even with respect to restitution paid to non-governmental victims, where the risk of governmental abuse is reduced. That reduced risk is accounted for in assigning the burden of persuasion for overall excessiveness of restitution to the defendant, addressed next, and in assigning the standard of persuasion on that

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360. See *supra* notes 67-87, 117-30 and accompanying text.

361. See *supra* notes 160-69 and accompanying text.

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

question.<sup>363</sup> The imposition of the obligation to pay \$1,000 has the same effect on a person's financial condition—including the punitive and stigmatizing responses to nonpayment devised by the government—no matter the recipient.

Add to this the imprecision inherent in determining disproportionality and financial effect, the risk of bias infecting such determinations, and the lack of opportunities to reverse a wrongful imposition.<sup>364</sup> Collectively, these considerations suggest that to meet the requirement of fundamental fairness, the burden of persuasion must be assigned to the government with regard to the financial effect of any form of economic sanction, and with regard to proving the proportionality of fines, fees, and forfeitures.

Unlike other economic sanctions, however, the assignment of burdens and standards with respect to the disproportionality of a restitution award to a non-governmental victim does not stand in the shadow of such a significant risk of government abuse. It is true that restitution is an imperfect system and that unmanageable restitution can exacerbate financial precarity—which is considered again below with respect to the standard of proof that should apply.<sup>365</sup> But it is also true that before restitution must be imposed, the government carries the obligation to prove by at least a preponderance of the evidence that there are compensable losses for which the defendant is culpable, which provides at least a limited degree of protection as to the offense seriousness side of the proportionality inquiry.<sup>366</sup> Therefore, it is in keeping with contemporary considerations of fairness and history to place the burden of establishing the excessiveness of a restitution award on the person against whom it is imposed.

#### *b. Standards of Persuasion*

With the burdens of persuasion assigned, the question becomes what standard of proof should apply. Three traditional standards, from most protective to least, are beyond a reasonable doubt, clear

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363. See *infra* Part II.D.3.b.iv.

364. See *supra* Part II.D.1.

365. See *infra* Part II.D.3.b.iv.

366. See *supra* note 28 and accompanying text.

and convincing evidence, and the preponderance of the evidence.<sup>367</sup> Generally, the Court has required the prosecution to prove sentencing factors, such as prior criminal history, by a preponderance of the evidence, but has reserved the question of whether the burden should be heightened for facts that may significantly increase sentence severity.<sup>368</sup>

*i. Financial Effect*

No matter the setting, when determining financial effect, a clear and convincing evidence standard is warranted.<sup>369</sup> There are, of course, important distinctions between criminal and civil settings. Those distinctions, however, are not implicated with respect to ascertaining the financial effect of the punishment. For example, while it is true that in a criminal matter in which the sentence includes both fines and a period of incarceration, the fact of the incarceration—which, among other things, cuts the person off from outside employment, substituting in the mere possibility of earning below-market wages if fortunate enough to obtain a position within

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367. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

368. *See Almendarez-Torres v. United States*, 523 U.S. 224, 247-48 (1998) (requiring that prosecutors prove a person's prior criminal history by a preponderance of the evidence, but noting "we express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of the sentence"); *United States v. Watts*, 519 U.S. 148, 156 & n.2, 157 (1997) (per curiam) (noting a "divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence").

369. Under this set of proposed assignments, more stringent procedural protections would be necessary if (1) the person upon whom the sanction would be imposed raises a colorable claim that the proposed sanctions would preclude that person or his or her family from meeting basic needs or would interrupt activities that support that end and (2) the government in turn fails to produce evidence uniquely in its control regarding the downstream implications of systems it has created that may interfere with payment. *See supra* notes 298-99 and accompanying text. One possibility is to preclude the imposition of economic sanctions until the government provides relevant information in its control. An alternative would be to raise the standard of proof to beyond a reasonable doubt. It should be noted that the imposition of a rebuttable presumption would be insufficient in this context because it merely serves to shift the burden of persuasion, which would already be placed on the government under the proposed assignment. *See Solum, supra* note 107, at 700-02 (explaining that imposition of presumption—a corollary to burdens of persuasion—can be justified where it creates incentives to reduce future uncertainty and deter bad acts, using as an example the presumption that spoliated documents contained evidence unfavorable to the party who destroyed them).

the jail or prison<sup>370</sup>—will have implications for the person's fiscal condition that would not exist in the civil setting in which sentences of incarceration are not allowed. But available income is part of the consideration of financial effect regardless of whether a person is subjected to incarceration or not, and whether the government chooses to subject a person to criminal or civil proceedings.

The assignment of a clear and convincing evidence standard for ascertaining financial effect is justified on two grounds. First is the imprecise nature and effective finality of the inquiry. In the context of fines and fees that will result in ongoing debt, the question is inherently forward looking, and so a court is unable to account for unforeseen personal or societal fiscal calamities.<sup>371</sup> And in any case, there is a substantial risk that the court will fail to account for racial or class bias in reaching the determination, a particularly important risk in light of the disproportionate enforcement of behaviors that often results in the imposition of fines, fees, and forfeitures.<sup>372</sup> The dearth of opportunities for post-imposition relief via appeal, pardon, or other processes essentially locks in the error.<sup>373</sup> Taken together, those uncertainties and conclusiveness not only raise the risk that excessive economic sanctions will be imposed on people unable to absorb them, but also increases the risk to the government with respect to its interests in upholding the Constitution and ensuring that its legitimacy is not undermined by economic sanctions that line its coffers while impoverishing its citizenry.

Beyond the risk created by the uncertainty of the inquiry, the clear and convincing evidence standard is justified because of the way in which lawmakers' decisions to adopt highly punitive penalties for non-payment and collateral consequences of conviction heighten the risk to people, their families, and their communities.<sup>374</sup> To be sure, the Court has previously mandated a clear and convincing standard in cases where the question at hand involves

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370. See *State and Federal Prison Wage Policies and Sourcing Information*, PRISON POLICY INITIATIVE, [https://www.prisonpolicy.org/reports/wage\\_policies.html](https://www.prisonpolicy.org/reports/wage_policies.html) [<https://perma.cc/BJ57-JLRX>].

371. See *supra* notes 313-17 and accompanying text.

372. See *supra* notes 125-30, 326-28 and accompanying text.

373. See *supra* notes 329-41 and accompanying text.

374. See *supra* notes 175-91, 272-74 and accompanying text.

significant deprivations, such as denaturalization,<sup>375</sup> termination of parental rights,<sup>376</sup> and the loss of liberty due to civil commitment,<sup>377</sup> in part because those deprivations were more significant than a “mere loss of money” or property.<sup>378</sup> As detailed above, however, the consequences of imposing economic sanctions can result in the loss of citizenship rights such as voting,<sup>379</sup> financial precarity that places family unity at risk,<sup>380</sup> and deprivations of liberty through the use of arrest warrants.<sup>381</sup>

It should be noted, however, that this assignment of a clear and convincing standard need not be set in stone. Lawmakers could take steps to limit the amount of economic sanctions imposed by abolishing the fees that they have tacked on over time to generate more and more revenue, and by eliminating or significantly reducing the addition of interest and collections costs so people can reach the principal debt.<sup>382</sup> Lawmakers could also significantly reduce the downstream penalties associated with unpaid economic sanctions—for example, by doing away with driver’s license suspensions, vehicle impoundment programs, arrest warrants, and similar consequences for those unable to pay; eliminating or strictly limiting collateral consequences of conviction that restrict access to employment and public benefits; and disentangling ongoing debt resulting from economic sanctions from other forms of punishment, such as the length of probation and parole terms and voter disenfranchisement.<sup>383</sup> Lawmakers could also reduce the risk of an erroneous

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375. *Schneiderman v. United States*, 320 U.S. 118, 122-23 (1943).

376. *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

377. *Addington v. Texas*, 441 U.S. 418, 433 (1979).

378. *Id.* at 424; *Santosky*, 455 U.S. at 758-59; *Schneiderman*, 320 U.S. at 122.

379. *See supra* notes 191, 209-10 and accompanying text.

380. *See supra* notes 183-86, 199-200 and accompanying text.

381. *See supra* notes 176, 178-79 and accompanying text.

382. *See supra* note 187 and accompanying text.

383. *See supra* notes 175-79, 187-90, 272-74 and accompanying text; *see also* Colgan, *supra* note 188, at 77-80. Lawmakers could also eliminate penal disenfranchisement entirely, as the District of Columbia did in 2020, joining Maine and Vermont as jurisdictions in which a conviction does not restrict the franchise. Fenit Nirappil, *D.C. on the Brink of Allowing Inmates to Vote from Prison*, WASH. POST (July 8, 2020, 3:20 PM), [https://www.washingtonpost.com/local/dc-politics/dc-prison-voting/2020/07/08/2683bd1e-c11d-11ea-b4f6-cb39cd8940fb\\_story.html](https://www.washingtonpost.com/local/dc-politics/dc-prison-voting/2020/07/08/2683bd1e-c11d-11ea-b4f6-cb39cd8940fb_story.html) [<https://perma.cc/7HCL-HM54>].

imposition of excessive economic sanctions by creating meaningful ongoing opportunities for pre- and post-imposition remission.<sup>384</sup>

*ii. Excessiveness of Fines, Fees & Forfeitures: Criminal*

Turning now to the question of overall excessiveness, we begin with the imposition of fines, fees, and forfeitures in criminal settings in which people are afforded full procedural protections including proof of guilt beyond a reasonable doubt and access to counsel.<sup>385</sup> As with the question of financial effect, a balancing of the governmental interests and private interests at stake along with the risks of an erroneous determination support the assignment of a clear and convincing evidence standard.<sup>386</sup>

The governmental interest in avoiding an overly protective assignment of burdens is highest in this setting. Ensuring that guilt is established beyond a reasonable doubt shores up the offense seriousness side of the proportionality analysis and supports governmental claims that its interests in responding to violations of the law and depriving people of the instrumentalities and proceeds of crimes are more firmly established.<sup>387</sup> That, and the fact that people subjected to economic sanctions have counsel to argue on their behalf at each stage of the proceedings, also increases the governmental interest in ensuring that the Excessive Fines Clause will be enforced.<sup>388</sup>

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384. See *supra* notes 334-45 and accompanying text.

385. There are many reasons to question the benefit of the procedural protections afforded in criminal proceedings. See, e.g., Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1783-90 (2016) (regarding chronic underfunding of indigent defense services); Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855 (2019) (regarding the implications of collateral consequences for plea bargaining). The point made here is that in terms of governmental interests, private interests, and risks of erroneous decision-making, the procedural protections afforded in criminal settings are comparatively less problematic than in civil processes.

386. As with the assignment of a clear and convincing standard on the question of financial effect, if the government failed to meet its discovery obligations it would trigger enhanced procedural protections including either a prohibition on imposing economic sanctions until the government produces relevant information or an increase in the burden to a beyond a reasonable doubt standard. See *supra* note 369.

387. See *supra* notes 112-47, 299-308 and accompanying text.

388. See *supra* notes 215-23, 227 and accompanying text. Criminal cases in which counsel is effectively denied would fall under the assignment of standards in the civil setting addressed in the next subpart.

Though the governmental interests related to responding to offending behavior are heightened in the criminal arena, its interests in administrative efficiency and legitimacy present a more complicated picture. It might be assumed that a clear and convincing standard could overly incentivize the raising of excessive fines challenges, tying up the courts' dockets.<sup>389</sup> But an uptick in hearings may be most likely in jurisdictions where governmental legitimacy is at greatest risk, for example, where lawmakers have established very high-dollar fine amounts, imposed fee after fee in a bid at tax-avoidance, or drawn forfeiture laws so loosely that the loss of cash or property is possible even when the offense is minor or the connection to any offense is tenuous at best.<sup>390</sup> Challenges would also likely increase in cases in which the risk that economic sanctions will create or exacerbate poverty is aggravated by punitive responses to nonpayment—among the very cases that undermine governmental legitimacy by leading people to question whether the government prizes revenues over justice.<sup>391</sup> Further, such an uptick may not even increase system costs given that the resulting imposition of fewer unmanageable economic sanctions could lessen the reliance on the administrative apparatus created to collect and enforce those debts that go unpaid.<sup>392</sup>

As to the possibility of private harms, the risks of an erroneous determination of excessiveness are reduced in the criminal sphere due to the enhanced procedural protections afforded in criminal settings, as well as the assignment of a heightened standard of proof for determining financial effect proposed above.<sup>393</sup> Because guilt is established beyond a reasonable doubt, the certainty of whether an offense occurred is greater, contributing to the ability to properly assess overall proportionality.<sup>394</sup> On the other side of the proportionality equation is punishment severity, assessed in part through the

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389. *Cf. Pimentel v. City of Los Angeles*, 974 F.3d 917, 928 & n.8 (9th Cir. 2020) (Bennett, J., concurring in judgment) (expressing concern that individual excessiveness determinations on parking tickets would tie up the courts).

390. *See supra* notes 118-23, 136-47 and accompanying text.

391. *See supra* notes 175-86 and accompanying text; Colgan, *supra* note 27, at 58-61.

392. *See, e.g., Colgan, supra* note 258, at 69-73.

393. *See supra* Part II.D.3.b.i.

394. *See supra* notes 224-27 and accompanying text.



determination of financial effect.<sup>395</sup> The assignment of the burden of proving financial effect to a clear and convincing standard will aid in reducing the risks caused by the inherently imprecise nature of that determination.

The question then becomes whether, in this more protective criminal setting, it would be sufficient to use the preponderance of the evidence standard—within which the parties “share the risk of error in roughly equal fashion”<sup>396</sup>—in light of the Court’s admonition that “[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.”<sup>397</sup>

Whether adjudicated criminally or not, the potential private harms outweigh the at times contradictory governmental interests in play, supporting application of a heightened standard. The imposition of constitutionally excessive economic sanctions not only makes it more likely people will be unable to meet their own and their families’ basic needs, it also triggers the punitive and stigmatizing array of penalties for non-payment and increases in punishment lawmakers have designed. Those systems keep people, their families, and their communities under the government’s thumb not due to their culpability for the underlying offense, but because they are unable to pay or absorb the loss. Given the severity of these punishments, the harm caused to innocent family and community members, and the way in which these results undermine the governmental interests in constitutional enforcement and legitimacy, the possible injury is significantly greater than any likely governmental harm. A clear and convincing evidence standard is warranted.

As with the assignment of the clear and convincing evidence standard with respect to financial effect, the government itself holds the keys to a less onerous standard for proving overall excessiveness. In addition to the reforms noted above, such as the elimination of fees and punitive downstream responses to nonpayment, lawmakers could, for example, more strictly limit what constitutes a significant nexus for purposes of criminal forfeiture so that it is less

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395. See *supra* notes 31-32 and accompanying text.

396. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

397. *Id.* at 427.

likely that a family's home, automobile, or other essential property will be lost due to a tangential relationship to a crime.<sup>398</sup>

*iii. Excessiveness of Fines, Fees & Forfeitures: Civil*

For the purpose of assuring fundamental fairness in assigning burdens, the civil setting is distinct from the criminal in two critical ways—both of which support the use of a beyond a reasonable doubt standard for assessing overall excessiveness.<sup>399</sup>

First, the risk of an erroneous decision is increased where lawmakers have denied access to counsel who might present countervailing evidence and have eschewed the beyond a reasonable doubt standard for ascertaining whether an offense even occurred.<sup>400</sup> This is crucial to the proportionality inquiry, which depends on the existence of an offense against which the proportionality of the punishment can be measured.<sup>401</sup> In other words, without those safeguards, the protections against the wrongful imposition of *any* punishment is reduced, making the risk of excessive punishment greater.

Second, by choosing to create systems by which the government can more effortlessly extract money and property from people, lawmakers have made it easier to abuse the government's penal power as a means of tax-avoidance, with such abuses disproportionately borne by politically vulnerable Black and Latinx communities. They have done so not only by denying access to counsel and reducing burdens of proof, but also in some cases by allowing guilt and punishment to be imposed by lay judges without legal training or by seeking forfeitures through complicated procedures without ever even charging a person with a crime.<sup>402</sup> Not only do these and other procedural barriers undermine the government's interest in being

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398. *See supra* note 147 and accompanying text.

399. Unlike with the standard for financial effect and fines, fees, and forfeitures in the criminal sphere, *see supra* note 369, it is more difficult to increase the beyond a reasonable doubt standard here should the government fail to meet its discovery obligations. One possibility is to increase the standard to one of absolute certainty. The alternative of prohibiting imposition of economic sanctions absent production of relevant information also remains available.

400. *See supra* notes 215-23, 301-08 and accompanying text.

401. *See supra* notes 22-26 and accompanying text.

402. *See supra* notes 141-47, 228-32, 318-25 and accompanying text.

perceived as legitimate, these choices strike at the very heart of what the Excessive Fines Clause is designed to protect against.<sup>403</sup> In light of the fact that the risk of harm to people against whom economic sanctions are imposed remains just as great as in the criminal setting, requiring the government to prove proportionality beyond a reasonable doubt is consistent with fundamental fairness. That standard can serve an important symbolic function to the community at large: that the government shall not be allowed to engage in “policing for profit,”<sup>404</sup> or to maintain “modern-day debtors’ prison[s].”<sup>405</sup>

As in the criminal context, it is within lawmakers’ power to avoid the imposition of a beyond a reasonable doubt standard by choosing to turn away from systems that make it so easy to abuse governmental power. This includes the reforms noted above, as well as additional reforms targeted at ensuring meaningful consideration of excessive fines claims through the provision of counsel, and through the reduction or elimination of fees to contest a forfeiture along with other procedural hurdles.<sup>406</sup> And, of course, the government may also avoid this higher standard by holding itself to the burden of proving guilt beyond a reasonable doubt.

#### *iv. Excessiveness of Restitution*

Restitution paid to non-governmental victims is on a different footing. The proposed assignment above would place the burden of proof on the person against whom restitution is imposed to prove the disproportionality of the restitution award in recognition of the reduced risk of abuse in play when the penalty imposed accrues to someone other than the government.<sup>407</sup> There are reasons, however, to impose only a preponderance of evidence standard on this

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403. See *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

404. See, e.g., LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* (3d ed. 2020).

405. Kate Gibson, *Poor Defendants Say They Face Modern-Day Debtors’ Prison*, CBS NEWS (Aug. 23, 2016, 5:15 AM), <https://www.cbsnews.com/news/poor-defendants-say-they-face-modern-day-debtors-prison/> [<https://perma.cc/9VEW-CD7H>].

406. See *supra* notes 215-32 and accompanying text.

407. See *supra* Part II.D.3.a.

question.<sup>408</sup> First, while the government has an interest in making victims whole through restitution, the imposition of unmanageable restitution does not make it forthcoming and may even undermine victims' needs by making the communities they live in less safe.<sup>409</sup> Further, by maintaining a focus on restitution assessed against people convicted of crimes, lawmakers avoid the responsibility of creating systems that better address victim needs.<sup>410</sup> Second, restitution carries with it the same very serious consequences for the person against whom it is imposed and their innocent family members and communities.<sup>411</sup> Taken together, these considerations support the conclusion that the standard of proof should be that of a preponderance.<sup>412</sup> But like the other assignments, reforms that lessen the risk of harm against those upon whom restitution is imposed—the elimination of punitive penalties for nonpayment, imposition of additional punishments, and application of collateral consequences upon conviction, for instance—could support the assignment of a clear and convincing standard down the road.

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At first glance, this combination of burdens on various issues may raise questions of administrability, which—as noted above—is a consideration relevant to establishing burdens of proof.<sup>413</sup> But each component is determined separately; the financial effect of the forfeiture of an automobile, for example, would be ascertained independently from the overall examination of disproportionality, which takes into account financial effect in conjunction with crime facts, sentencing factors, and the dollar value of the total package of economic sanctions.<sup>414</sup> Courts are already adept at this kind of

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408. Again, should the government fail to meet its discovery obligations, it would be appropriate to either prohibit the imposition of restitution until those obligations are met or to reduce this standard further, for example to a probable cause standard. *See supra* note 369.

409. *See supra* notes 148-53 and accompanying text.

410. *See* Colgan, *supra* note 123, at 1558-65, 1579-80.

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

412. *Cf.* *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986) (assigning the burden of proof to the prosecution but only by a preponderance, satisfying the need for deterrence without overcorrecting in a way that would deprive juries of seeing probative evidence).

413. *See supra* note 157 and accompanying text.

414. *See* Colgan & McLean, *supra* note 32, at 443-49.

mixing of burdens, as is done when the prosecution seeks to supplement evidence proven beyond a reasonable doubt at trial or through a guilty plea with facts, such as prior criminal history, which are proven under a preponderance of the evidence standard.<sup>415</sup> There are more complex questions related to administrability when a sentencing court imposes both fines, fees, or criminal forfeitures *and* restitution, or other punishments with differing burdens and standards of proof, which are addressed below.

### III. ADDRESSING CASES INVOLVING MULTIPLE FORMS OF PUNISHMENT

This Article has proposed a varying assignment of burdens and standards of persuasion depending on the nature of the economic sanction—differentiating between fines, fees, and forfeitures on the one hand, and restitution on the other—as well as whether the sanctions are imposed in criminal or civil proceedings. This raises the question of whether it is feasible to employ those different burdens in a single case in which multiple punishments are imposed. This issue does not implicate the determination of financial effect, which must be decided prior to conducting the excessiveness inquiry because it helps establish the severity of the punishment.<sup>416</sup> The issue also will not arise in cases involving minor offenses for which the only available punishments are fines and fees, such as parking or low-level traffic or ordinance violations.<sup>417</sup> But it would apply in cases, for example, in which fines and fees are imposed in addition to restitution, or in cases where economic sanctions are imposed in addition to punishments challengeable under the Eighth Amendment’s Cruel and Unusual Punishments Clause, such as execution, incarceration, or probation.<sup>418</sup>

Consider the following hypothetical: a statute sets the punishment for a misdemeanor graffitiing of private property as restitution and up to a \$1,000 fine. The two forms of economic sanction are inherently linked in the disproportionality analysis by the fact that

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415. See *supra* notes 24-26 and accompanying text.

416. See *supra* notes 31-33 and accompanying text.

417. See *Pimentel v. City of Los Angeles*, 974 F.3d 917, 920 (9th Cir. 2020).

418. See *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019).

there is only one underlying offense against which their collective punitive severity must be measured:

Offense Seriousness	Punishment Severity
Crime Facts re: Graffitiing of Property [Sentencing Factors, if any]	Dollar Value of Restitution + Fine Financial Effect of Restitution + Fine

If the dollar value and financial effect of the restitution were weighed against the offense’s seriousness separately from the dollar value and financial effect of the fine, the government would improperly have two bites at the apple. It would allow the imposition of restitution *and* a fine that may not be separately disproportionate to the graffitiing, but collectively disproportionate. Therefore, as the dollar value of either the restitution, the fine, or both increases, the more disproportionate the punishment becomes to the act of graffitiing.<sup>419</sup>

That said, beginning the proportionality inquiry with a focus on restitution can make the distinctions in burdens and standards of persuasion in this scenario administrable. Assuming the Court adopts the burdens and standards posited above, the defendant would have the burden of proving the disproportionality of the restitution by a preponderance of the evidence, and the government would hold the burden of proving the proportionality of the fine by clear and convincing evidence.<sup>420</sup> The sentencing judge can manage this distinction by beginning with the analysis of restitution; if the defendant meets the burden of showing that the proposed compensable amount is disproportionate to the offense, requiring the imposition of a lower restitution award, then the government will necessarily fail to show by any standard that an additional fine is allowable.<sup>421</sup> If, in contrast, a court determines that the compensable

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419. See *State v. Timbs*, 169 N.E.3d 361, 372-74 (Ind. 2021) (explaining that the assessment of punishment severity included the challenge forfeiture of a vehicle and “other sanctions imposed on Timbs” including “six years of restricted liberty as well as \$1,200 in fees and costs”).

420. See *supra* Part II.D.3.a.ii, iv.

421. See *United States v. Bajakajian*, 542 U.S. 321, 336-40 (1998); see also *id.* at 349 (Kennedy, J., dissenting) (“The majority affirms the reduced \$15,000 forfeiture on *de novo* review ... which it can do only if a forfeiture of even \$15,001 would have suffered from a gross

amount is not grossly disproportionate to the offense, then the defendant has not met his or her burden and the full restitution award could issue.<sup>422</sup> The question then becomes whether the government can meet its burden of showing that the addition of a fine on top of the restitution amount remains proportionate to the offense.<sup>423</sup> This ordering of the assessment has the benefit of prizing restitution over the types of revenue-generating sanctions that raise the risk of abuse the Clause is particularly intended to protect against.<sup>424</sup>

We can also test the effects of combining competing burdens between the Excessive Fines and Cruel and Unusual Punishments Clauses by using a different hypothetical: a statute setting out the punishments available for possession of a small quantity of narcotics, for which the maximum term of incarceration is one year and the maximum fine is \$10,000.

To undertake this analysis we must begin with a few assumptions. The first assumption is that the Court has adopted the assignment of burdens and standards of persuasion posited herein—for this hypothetical, the assumption is that the prosecution must establish the proportionality of the fine by clear and convincing evidence.<sup>425</sup> The analysis that follows also assumes that the Court would require the defendant to prove gross disproportionality for cruel and unusual punishments purposes by a preponderance of the evidence. The Court has clearly placed the burden of persuasion on the defendant, but to date has only described that burden in sentencing cases as “heavy.”<sup>426</sup> It has, however, used that same term to describe the preponderance standard in other settings,<sup>427</sup> and adopted a preponderance standard in cruel and unusual punishments cases challenging conditions of confinement.<sup>428</sup> This should not be taken to suggest that this low standard puts a showing of gross disproportionality well within the challenger’s grasp.<sup>429</sup>

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disproportion.”).

422. *See id.* at 336-40 (majority opinion).

423. *See Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020).

424. *See id.*

425. *See supra* Part II.D.3.a.ii.

426. *See Gregg v. Georgia*, 428 U.S. 153, 175 (1976).

427. *See Colorado v. Connelly*, 479 U.S. 157, 185 (1986) (Brennan, J., dissenting).

428. *See Crawford-El v. Britton*, 523 U.S. 574, 594-95 (1998).

429. *See Harmelin v. Michigan*, 501 U.S. 957, 1003-04 (1991) (plurality) (opinion of Kennedy, J.).

Rather, because the Court has shown such significant deference to lawmakers' authority in establishing nonfinancial punishments, the burden can only be met if the defendant proves that it is more likely than not that no rational basis for the punishment—whether retributive or utilitarian—could exist.<sup>430</sup>

Similar to the hypothesized imposition of restitution and a fine, these punishments are linked in the disproportionality analysis by the fact that there is only one underlying offense—possession of narcotics:

Offense Seriousness	Punishment Severity
Crime Facts re: Possession of Narcotics [Sentencing Factors, if any]	Dollar Value of Fine Financial Effect of Fine Term of Incarceration

Therefore, any approach to the application of these divergent burdens and standards of persuasion must ensure that the collective punishment—both economic and carceral—is not grossly disproportionate to the seriousness of the offense.<sup>431</sup>

That the economic and carceral punishments are collectively imposed against a single offense does not mean that their constitutionality necessarily lives or dies with each other. Undergirding these competing burdens is the extreme deference the Court has afforded lawmakers in the cruel and unusual punishments context and the suspicion with which it has approached lawmakers in the excessive fines context.<sup>432</sup> Throughout the cruel and unusual punishments doctrine, the Court has based its interpretations of

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430. *See id.*

431. *See supra* note 419 and accompanying text; *Weems v. United States*, 217 U.S. 349, 366 (1910) (considering all aspects of the punishment of cadena temporal, including imprisonment for at least twelve years, during which time the person was to be chained at the ankle and wrist and subjected to “hard and painful labor,” the stripping of parental and marital rights, and lifetime surveillance and restrictions, including the inability to vote); *cf. Blanton v. City of North Las Vegas*, 489 U.S. 538, 543-45 (1989) (considering a period of incarceration and other statutory penalties such as fines in assessing whether available punishments are sufficiently serious to justify a right to a jury trial).

432. *Compare Harmelin*, 501 U.S. at 1003-04 (plurality) (opinion of Kennedy, J.) (deferring to the state legislature because it “could with reason conclude” that petitioner’s crime warranted the sentence imposed), *with Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (describing how lawmakers could abuse their ability to impose fines).



the Clause's scope on considerable deference to lawmakers' ability to devise appropriate punishments for people found to have committed crimes.<sup>433</sup> As Justice Kennedy explained in the *Harmelin v. Michigan* plurality, such decisions "implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order."<sup>434</sup> And while in adopting a gross, rather than strict, disproportionality test the *Bajakajian* majority showed deference to lawmakers,<sup>435</sup> throughout its excessive fines jurisprudence, the Court has repeatedly called into question whether lawmakers will set financial punishments in accord with penal principles or will rather act to secure tax-avoidance.<sup>436</sup> In other words, a court may hold that imposing incarceration is constitutional while also finding that the use of a fine violates the core principles of the Excessive Fines Clause.<sup>437</sup> Further, unlike in the cruel and unusual punishments setting, the inclusion of the subjective consideration of financial effect in assessing the severity of a fine gives a person challenging its constitutionality more secure footing to argue that the fine, as applied in a particular case, is constitutionally excessive.<sup>438</sup>

Given the distinctions between the degree of deference, or lack thereof, incumbent to the two clauses, and the structural distinction of bringing the subjectivity of financial effect into the excessiveness inquiry, it is appropriate for a court to begin by assessing the constitutionality of the two forms of punishment separately under their respective clauses. This does not, however, lend itself to the same

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433. *Harmelin*, 501 U.S. at 998 (plurality) (opinion of Kennedy, J.).

434. *Id.*

435. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) ("[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature.").

436. *See, e.g., Timbs*, 139 S. Ct. at 689.

437. *See Harmelin*, 501 U.S. at 978 n.9 (plurality) (opinion of Scalia, J.). This distinction between affording great deference in the cruel and unusual punishments context and suspicion in the excessive fines context is possible in part because the Court has to date treated lawmakers' decision-making about what constitutes a crime and whether execution, incarceration, or community supervision are appropriate in a vacuum, rather than recognizing that the very same lawmakers might be motivated to create or retain substantive criminal violations in part for their revenue-generating capacity. Whether grappling with the reality that lawmakers may have multiple interests opens the door for reexamination of the Court's rational basis approach to the Cruel and Unusual Punishments Clause, however, is outside of the scope of this Article.

438. *See Colgan & McLean, supra* note 32, at 443-49.

type of preference ordering suggested above for the restitution-fine combination. In that situation, while it may be constitutionally excessive in some instances, restitution clearly runs a smaller risk of offending the Clause's core aims than fines, fees, and forfeitures, and so prizing it in the disproportionality analysis makes sense.<sup>439</sup> That is not, however, the case in the fines-incarceration context where the Court's central understanding of the two clauses stand in contradiction.<sup>440</sup> It is also not as simple as prizing financial punishments over the more severe punishment of incarceration. While the Court has generally understood there to be a hierarchy of punishment severity, with fines ranking less severe than at least incarceration,<sup>441</sup> and while certainly a lengthy term of incarceration is a more severe punishment than a small fine, it is not so clear that economic sanctions are *always* less severe than other forms of punishment.<sup>442</sup> This is borne out, for example, by people who opt for jail terms to "work off" economic sanctions in order to avoid the ongoing financial precarity such debt creates.<sup>443</sup>

Once separately assessed, however, it would be critical to engage in an additional consideration: whether collectively the punishments that survive the first stage of review are so severe that they outweigh the underlying offense. If the answer is no, a court could constitutionally impose both forms of punishment.<sup>444</sup> If the answer is yes, a court would be required to adjust, reducing the economic sanctions, the term of incarceration, or both.<sup>445</sup>

A potential benefit of assigning disparate burdens and standards of persuasion between economic sanctions and other forms of punishment is that it requires courts to actually consider the nature of the punishment and its multiple forms in a way that may not occur if the sanctions were lumped together at the outset. More than just sand in the gears, the approach ensures that the economic sanctions imposed—which may otherwise be seen as mere add-ons

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439. See *Timbs*, 139 S. Ct. at 689.

440. Compare *Harmelin*, 501 U.S. at 998 (plurality) (opinion of Kennedy, J.), with *Timbs*, 139 S. Ct. at 689.

441. See, e.g., *Solem v. Helm*, 463 U.S. 277, 294 & n.18 (1983).

442. See Colgan & McLean, *supra* note 32, at 443-49.

443. See *supra* note 189 and accompanying text.

444. See *Solem*, 463 U.S. at 290.

445. See *id.*

to a period of incarceration or other punishment—do not get lost in the shuffle, but instead are understood as what they are: significant aspects of punishment, with real perils to both citizen and state, subject to the Clause’s protections.

#### CONCLUSION

Burdens of proof matter. They do more than tell the parties what their obligations are and the decision maker how to decide—though of course burdens serve those important purposes as well. Assigning burdens provides us an opportunity to consider the incredible, and even devastating, consequences economic sanctions pose in conjunction with the ways in which lawmakers have designed broad and overlapping processes and structures of punishment. In doing so, we are able to ensure that the burdens work to cabin governmental overreach, thus reflecting societal values.<sup>446</sup> Once assigned, at sentencing, articulating the various burdens of proof creates moments for reflection on the severity of economic sanctions in and of their own right, and in conjunction with other forms of punishment.

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446. See *In re Winship*, 397 U.S. 358, 364 (1970) (holding that a beyond a reasonable doubt standard is required for the guilt phase of juvenile trials because it is “critical that the moral force of the criminal law not be diluted”); see also *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 283 (1990) (“But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as ‘a societal judgment about how the risk of error should be distributed between the litigants.’” (quoting *Santosky v. Kramer*, 455 U.S. 745, 755 (1982))).