PAYING FOR THE PRIVILEGE: PAY-TO-STAY INCARCERATION AFTER THE INCORPORATION OF THE EXCESSIVE FINES CLAUSE

PATRICK MCGLASSON*

Pay-to-Stay incarceration, the practice of making inmates in jail pay for the price of their own imprisonment, is common across the United States. Although a great deal of public policy research has been done on the subject, less attention has been paid to the practice in the nation's courthouses. This may well change as a result of the Supreme Court's 2019 ruling in Timbs v. Indiana that the Eighth Amendment's Excessive Fines Clause is incorporated as against the states. Timbs, which primarily concerned in rem forfeiture, may well mark a turning point for the way fines attendant to imprisonment are dealt with in the American legal system. This Note argues, given the broad-reaching language used in Timbs and previous Court rulings, that states must end or drastically reform their pay-to-stay incarceration schemes to bring them into compliance with both the spirit and letter of current Eighth Amendment jurisprudence.

TABLE OF CONTENTS

* J.D. Candidate, 2021, University of Illinois College of Law; B.A. in History and English, Truman State University. A special thank you to Professor Michael S. Moore for his advice and mentorship in drafting and structuring this Note. Also, I would like to thank my parents for all of the support and encouragement they have given me throughout my life and my time in law school. Finally, I must sincerely thank all of the members of the University of Illinois Law Review for their edits, revisions, and suggestions on the successive versions of the Note. I could not have finished it without out any of you.

I. INTRODUCTION

In April 2015, George Richey was sentenced to serve ninety days in a Missouri county jail after being convicted of violating a protection order, a Class A misdemeanor.[1] Richey was credited with time served and was also required to pay "board bills," for his time in the St. Clair County Jail.[2] These "board bills" are *per diem* fees collected from inmates by local governments for the cost of their imprisonment.[3]

In the state of Missouri, conviction of a Class A misdemeanor carries with it a potential sentence to one year in jail and a fine of up to $2,000.[4] During his time in jail, Richey accrued a $3,150 bill, well over the statutorily allowable fine for his underlying conviction.[5] After he was released, Richey was ordered by the same county court to pay for his stay in prison but he failed to do so and was reincarcerated.[6] Richey was charged an additional $2,275 for this second stay.[7]

1. State v. Richey, 569 S.W.3d 420, 421 (Mo. 2019); Brief for American Civil Liberties Union of Missouri as Amicus Curiae in Support of Appellant, at 14, State v. Richey, 569 S.W.3d 420 (Mo. 2019) (No. SC97604) 2019 WL 277192.

2. *Richey*, 569 S.W.3d at 421.

3. Titus Wu, *In Rural Missouri, Going to Jail Isn't Free. You Pay for It.,* COLUM. MISSOURIAN (Dec. 19, 2018), https://www.columbiamissourian.com/news/state_news/in-rural-missouri-going-to-jail-isn-t-free-you/article_613b219a-f4d7-11e8-bf90-33125904976d.html [https://perma.cc/6BV7-LH2M]. These board bills are also known as "pay-to-stay" fines or fees, the term used in the remainder of this Note. Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CTR. FOR JUSTICE 3 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Charging_Inmates_Mass_Incarceration.pdf [https://perma.cc/Q49H-DED3].

4. *Criminal System*, MO. SENT'G ADVISORY COMM., https://www.courts.mo.gov/hosted/JUDEDintra/MOSAC/Criminal_System.html (last visited Mar. 7, 2021) [https://perma.cc/RRL8-FYVE].

5. *Richey*, 569 S.W.3d at 421.

6. *Id.*

7. *Id.*

After being released Richey paid, $1,600 to the county over two years.[8] In March 2018, he filed suit to have his bill re-taxed.[9] The court denied this motion; Richey appealed that decision.[10]

On March 19, 2019, the Supreme Court of Missouri, sitting en banc, found in favor of Richey and another former inmate.[11] The Court held that prison debts "cannot be taxed as court costs and the failure to pay that debt cannot result in another incarceration."[12] Until the decision in *Richey v. State*, this cycle of imprisonment and fees for imprisonment was common practice in Missouri and remains so in other states.[13]

Incarceration for debt has been outlawed at the federal level since 1833.[14] But, charging inmates for their stay in prison is a common practice in many states and is known as "pay-to-stay."[15] As of 2015, inmates in forty-one states could be charged for the time they spend in incarceration, and in forty-three states, they may be required to pay for a public defender.[16] Further, in some states, if a defendant fails to pay these fines, they may well be sent back to prison for failure to pay the debt.[17]

In recent years there has been a growing call for ending statutory schemes that require former inmates to pay for the pleasure of their own incarceration.[18] At the state level there may be a shift in the jurisprudence surrounding "pay-to-stay" laws, and many have been pushing for such laws to be either repealed or found unconstitutional.[19]

8. *Id.* at 422.

9. *Id.*

10. *Id.*

11. *Id.* at 425–26.

12. *Id.* at 425.

13. *Id.* at 421; Eisen, *supra* note 3, at 4.

14. Eli Haber, *Debtor's Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq [https://perma.cc/E536-W9RV].

15. In this article, Eisen notes, "The Brennan Center analyzed state statutes from all 50 states and found that as of 2015, at least 43 states authorize room and board fees and at least 35 states authorize medical fees to be charged to inmates in either state or county correctional facilities." Eisen, *supra* note 3, at 4.

16. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NAT'L PUB. RADIO (May 19, 2014, 4:02 PM), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/8TEE-Y6D3].

17. *Id.* ("The common thread in these cases, and scores more like them, is the jail time wasn't punishment for the crime, but for the failure to pay the increasing fines and fees associated with the criminal justice system.").

18. *See*, *e.g.*, *id.*; ALA. APPLESEED: CTR. FOR L. & JUST., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE (2018), http://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf (last visited Mar. 7, 2021) [https://perma.cc/33C6-2L2Q]; Carla Crowder & Leah Nelson, *What Last Week's SCOTUS Ruling on Excessive Fines and Fees Could Mean for Alabama*, AL.COM (Feb. 3, 2019), https://www.al.com/opinion/2019/02/what-last-weeks-scotus-ruling-on-excessive-fines-and-fees-could-mean-for-alabama.html; Eisen, *supra* note 3, at 8.

19. *See*, *e.g.*, State v. Richey, 569 S.W.3d 420, 421 (Mo. 2019); Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, *The Hidden Costs of Criminal Justice Debt*, BRENNAN CTR. FOR JUST., 3 (2010), https://www.aclu-wa.org/sites/default/files/media-legacy/attachments/Criminal_Justice_Debt_report_V8.pdf [https://perma.cc/4MER-GYGB]; Crowder & Nelson, *supra* note 18; Eisen, *supra* note 3, at 8; Jean Trounstine, *Fighting the Fees that Force Prisoners to Pay for Their Incarceration*, TRUTHOUT: PRISONS AND POLICING (May

Beyond state level action, in February of 2019, the Supreme Court—for the first time—expressly incorporated the Eighth Amendment's Excessive Fines Clause against the states.[20] Given the move toward limiting the financial liability formerly incarcerated persons are required to bear after being released and the incorporation of the Eighth Amendment's prohibition against excessive fines, this Note argues that states must radically rethink their pay-to-stay structures to bring their law in line with both fundamental public policy and the most current Supreme Court jurisprudence.[21]

This Note will proceed in three parts. Part II looks at the history of fees for incarceration generally, introduces the public policy justifications for such systems, and analyzes the statutory schemes of three states specifically.[22] Part III (1) analyzes the historical foundation of the Eighth Amendment and its piecemeal application to the states by the Supreme Court; (2) briefly analyzes previous lower court rulings on Clause Two of the Eighth Amendment specifically; (3) examines the Supreme Court's recent incorporation of the Excessive Fines Clause in *Timbs v. Indiana*; and (4) applies the Supreme Court's reasoning and case law to the statutory schemes presently in place to rebut the common public policy justifications for such schemes.[23] Part IV recommends that states must reconsider their inmate payment structures for their county incarceration facilities under the Eighth Amendment as incorporated against them by the Supreme Court and in keeping with a growing body of public policy research.[24]

II. BACKGROUND

A. State Statutory Background

There is a fundamental division between the types of charges inmates incur while in prison: those for room and board and those for other costs.[25] Charging inmates simply for staying at a correctional facility, usually a county correctional facility, is the subject of this Note, but the complex scheme of charging inmates for individual services would be fertile ground for a Note of similar kind.[26] The

6, 2018), https://truthout.org/articles/fighting-the-fees-that-force-prisoners-to-pay-for-their-incarceration/ [https://perma.cc/GSJ6-EVCE].

20. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019). For a pre-*Timbs*, state-level analysis of the constitutionality of pay-to-stay incarceration see Katherine G. Porter, Student Article, *A "Debt" to Society?: Reassessing the Constitutionality of Pay-to-Stay Programs in Ohio Jails and Prisons*, 44 OHIO N.U. L. REV. 415, 420 (2018).

21. *Timbs*, 139 S. Ct. at 689; *see* discussion *infra* Section III.D.2.

22. *See* discussion *infra* Part II.

23. *See* discussion *infra* Part III.

24. *See* discussion *infra* Part IV.

25. 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#co_footnote_F3404910944_1 [https://perma.cc/Z5BZ-W76W].

26. For example, inmates in Massachusetts may be charged for everything from haircuts and medical bills to depositing money in their accounts and DNA tests. *Fees Charged to Inmates for Services*, PRISONERS' LEGAL SERVS. MASSACHUSETTS, https://www.plsma.org/prisoner-self-help/pro-se-materials/property-and-fees/fees-

first state to impose charges for room and board was Michigan in 1984.[27] Perhaps not coincidentally, Michigan was also the first state to charge inmates any fees whatsoever, medical costs in this case, which the state began to do by statute in 1846.[28]

Though Michigan was the first state to charge for room and board, by 2015, this number had risen to forty-one states in which inmates could be charged for such debt and forty-four in which parolees could be charged for the cost of their parole and probation.[29] These fines are largely, if not exclusively, charged by county jails, and state maximums for these fines can range from $40 to $80 per day.[30] But, the charges do not stop at room and board; inmates can also be charged by their jailing institutions for a litany of basic necessities and services including "work release, physicals, dental visits, medication, prescriptions, nurse sick calls, and hospital treatments."[31]

Although the lion's share of this Note will be spent arguing pay-to-stay charges, as they currently stand, violate the Excessive Fees Clause of the Eighth Amendment,[32] that is not to say there are no arguments in favor of these charges—though these are largely based on recouping the cost of mass incarceration in the United States, a separate issue which is not the province of this Note.[33] The arguments supporting the assessment of pay-to-stay fees were synthesized by Lauren-Brooke Eisen in her essay *Paying for Your Time: How Charging Inmates Fees Behind Bars may Violate the Excessive Fines Clause*.[34]

In that piece, Eisen notes four general rationales for charging inmates: (1) "the revenue stream helps to offset expensive incarceration budgets," (2) "charging inmates for their stay is grounded in rehabilitation or deterrence," (3) "policy makers, judges, and sheriffs can often gain the support of constituents by supporting" these schemes, and they can reduce (4) "frivolous requests for services by inmate[s]."[35] These justifications have been used by courts, legislators, and jail administrators to justify the practice of charging inmates for their stays in state and county institutions.[36]

Suffice it to say on these points, where they are not elsewhere addressed, by incorporating the Excessive Fines Clause against the states, the Court also imposed the historical and theoretical underpinnings of the Amendment against

charged-to-prisoners/ (last visited Mar. 7, 2021) [https://perma.cc/FJ8B-TU9M]; *see* Porter, *supra* note 20, at 415–16.

27. Joshua Michtom, *Making Prisoners Pay for Their Stay: How a Popular Correctional Program Violates the Ex Post Facto Clause*, 13 B.U. PUB. INT. L.J. 187, 188 (2004).

28. Eisen, *supra* note 3, at 3.

29. Haber, *supra* note 14.

30. ME. REV. STAT. ANN. tit. 17-A, § 1751 (West 2019); KY. REV. STAT. ANN. § 534.045 (West 2019).

31. Eisen, *supra* note 25.

32. U.S. CONST. amend. VIII, § 2.

33. Eisen, *supra* note 25.

34. *Id.*

35. *Id.*

36. *See id.,* at nn.27–29; Tillman v. Leb. Cnty. Corr. Facility, 221 F.3d 410, 419 (3d Cir. 2000) (arguing such fees should be allowed where they "teach fiscal responsibility to inmates . . . . ," and ready inmates for leaving their time in incarceration when they will be "expected by society to pay [their] own room and board.").

the states as well as its own case law which may make justifying such schemes—as they presently stand—more difficult if not impossible for state officials.[37] This Note directly addresses these policy arguments in Section III.D after the first three sections of Part III have addressed the Supreme Court and lower courts' case law on the subject.[38]

B. State Statutory Schemes Providing for Pay-to-Stay Incarceration

Across the United States, maximum pay-to-stay fines are often so high they are unconscionable.[39] Though many states have statutes providing for onerous fees to be assessed against inmates for their incarceration, this Section will look at only three.[40] Methodologically, these states were chosen chiefly for their geographic diversity and the spread over their statutorily allowable fines along the price range for such fines across the United States.[41]

The statutes of these states will be briefly analyzed, providing a foundation for the remainder of the Note. The analysis of these statutory schemes will occur in four steps: a brief look into the background of and discussion surrounding these statutes in the state; an analysis of how much an inmate may be charged for incarceration *per diem* under state statute; an assessment of what kinds of convictions could result in incarceration in these institutions and how long a person convicted of that crime could be imprisoned; and a comparison of how much an inmate could be charged for a maximum sentence in one of these institutions with the maximum fine for a conviction of the particular crime. This analysis will show that, at least in the states examined here, there is a massive gulf between the amount a person convicted of a given offense can be ordered to pay under state law as a fine for their crime of conviction and the amount the same defendant could rack up in board bills while serving a term of imprisonment for that same conviction.

1. Maine

Maine's system of incarceration, like many states, is and has been plagued by budgetary deficits.[42] In 2019, the Maine state legislature attempted to address the issue, but six bills proposed "to increase state funding for Maine's county

37. *See* Timbs v. Indiana, 139 S. Ct. 682, 687–89 (2019).

38. *See infra* Sections III.A–D.

39. *See infra* Sections II.A–B.

40. KY. REV. STAT. ANN. § 534.030 (West 2020); ME. REV. STAT. ANN. tit. 17-A, § 1751 (West 2019); MICH. COMP. LAWS ANN. § 801.83 (West 2019).

41. *See infra* notes 42–77.

42. Alex Acquisto, *Lawmakers Delay Quest for Solution to Maine's Long-Term Jail Funding Problem*, BANGOR DAILY NEWS (Apr. 12, 2019), https://bangordailynews.com/2019/04/12/politics/lawmakers-delay-quest-for-solution-to-maines-long-term-jail-funding-problem/ [https://perma.cc/E8D5-ZLPS].

jails," failed to pass out of committee in the spring, though there was hope the legislature would address the issue in a coming session.[43]

At the beginning of the legislative year in 2020, state lawmakers again put corrections costs on their agenda, focusing on "[a] broad range of criminal justice and correctional issues . . . [as the] top focus of the Legislature."[44] Whether such reform will occur remains to be seen, but it appears unlikely; as the co-chair of the Criminal Justice Committee Charlotte Warren noted in 2019: "[E]very year we deal with this issue of trying to figure a way to stabilize county jail funding . . . Every year all our sheriffs across the state spend their entire spring . . . at the Legislature . . . [hoping to] get the money to fund their jails."[45]

No matter how these issues play out though, no amount of legislative gridlock could justify the system of pay-to-stay fees that is currently in place in the Pine Tree State. Under that statutory scheme an inmate in a county jail may be charged $80 per day for being housed in a cell.[46] Such stays may be given to a convict where they have been found guilty of a Class D or Class E misdemeanor.[47] Beyond this, if a prisoner or ex-inmate is unable to pay such a fine, the burden rests on them to prove they cannot afford repayment of the debt in a civil court by a preponderance of the evidence.[48]

A person convicted of a Class D misdemeanor in Maine[49] is liable to 364 days in such a jail and no more than a $2,000 fine.[50] But, if they were charged the statutory maximum for their room and board, they would be indebted to the county for $29,120—well over twelve times the amount they may be required by way of fine under state statute.[51]

43. *Id.* ("The reason why the Criminal Justice and Public Safety Committee unanimously voted 'ought not to pass' on six bills, said House Committee Chair Charlotte Warren, D-Hallowell, was so committee members can convene a work group and fashion a bill together after the first legislative session adjourns.").

44. Scott Thistle, *Health Care, Corrections, Broadband at Top of State Legislative Agenda*, PRESS HERALD (Jan. 5, 2020), https://www.pressherald.com/2020/01/05/health-care-corrections-broadband-at-top-of-state-legislative-agenda/ [https://perma.cc/T9NB-AW62].

45. Don Carrigan, *Sheriffs and Lawmakers Look for a Way to End Jail Funding Battles*, NBC NEWS CTR. ME. (Oct. 23, 2019, 11:55 AM), https://www.newscentermaine.com/article/news/crime/sheriffs-and-lawmakers-look-for-a-way-to-end-jail-funding-battles/97-f9653e4e-57bc-4826-a918-4a3d1a6da103 [https://perma.cc/BC2E-RRG6].

46. ME. REV. STAT. ANN. tit. 17-A, § 1751 (West 2019).

47. ME. REV. STAT. ANN. tit. 17-A, § 1610(1) (West 2019).

48. ME. REV. STAT. ANN. tit. 17-A, § 1751(6)(A) (West 2019) ("Unless the individual shows by a preponderance of the evidence that the default was not attributable to an intentional or knowing refusal to obey the court's order or to a failure on the individual's part to make a good faith effort to obtain the funds required to make payment, the court shall find that the default was unexcused and may commit the individual to the custody of the sheriff until all or a specified part of the reimbursement fee is paid.").

49. A Class D misdemeanor could occur as a result of being convicted of a number of charges including: Possession of a Schedule W drug (such as cocaine), Driving Under the Influence, or Domestic Violence. *See* ME. REV. STAT. ANN. tit. 17-A, § 1107-A(1)(C) (West 2019); ME. REV. STAT. ANN. tit. 29-A, § 2411(5) (West 2019); ME. REV. STAT. ANN. tit. 17-A, § 207-A(1) (West 2019).

50. Off. of the Maine Att'y Gen., *Criminal Justice System: Frequently Asked Questions*, MAINE.GOV, https://www.maine.gov/ag/crime/criminal_justice_system.shtml (last visited Mar. 7, 2021) [https://perma.cc/6M74-3HQW].

51. *See id.*; ME. REV. STAT. ANN. tit. 17-A, § 1751 (West 2019).

2. Michigan

As noted above, Michigan was the first state both to institute charges for prisoners of any kind and specifically for room and board.[52] But, in recent years, these practices have fostered a growing debate in the state pitting county officials against advocacy organizations seeking to put an end to the practice.[53] One such advocacy organization, the ACLU, "published a report called 'In For A Penny,' in 2010 after a yearlong investigation . . . [criticizing] the practice of incarcerating those who can't pay the fees called 'legal financial obligations,' or LFOs."[54]

On the other side, however, county officials like Oakland Sheriff Michael Bouchard argue "[t]he conduct that brought them to be in the facility was their own choice . . . Why should taxpayers pay? The way to avoid the bill in jail is don't break the law."[55] But John Cooper of the Citizens Alliance for Prison also noted that inmates who incur such debts in county jails face an "additional barrier to success after incarceration," and "[t]he people impacted by these fees are disproportionately poor to begin with, and the fees from even a short jail stay—on top of other collateral consequences—can become a long-term barrier to success in the community."[56]

Additionally, in response to an inquiry by the Mackinac Center for Public Policy, many prison officials said they were often unable to collect these fees.[57] Kahryn Riley, in an article detailing the responses to that inquiry, noted, "Jail administrators responded to our question about what portion of inmates pay their bill with answers like 'unknown, but low,' 'very low,' and 'very, very low – maybe 2 in 450 [inmates pay],'" one of the respondents called the practice "'like getting blood from a turnip.'"[58] Because of this, Riley argued, pay-to-stay is both a "bad business practice," and "counterproductive," in that it "pose[s] an insurmountable barrier to successful reintegration in the community, especially because it's visible in background checks conducted by prospective employers and universities."[59]

52. *See* discussion *supra* Section II.A.

53. *See, e.g.*, Tom Gantert, *Michigan Jails' 'Pay-to-stay' Jail Fees Stir Controversy*, MICH. CAPITOL CONFIDENTIAL (Jan. 8, 2018), https://www.michigancapitolconfidential.com/michigan-jails-pay-to-stay-jail-fees-stir-controversy [https://perma.cc/D4F2-WG3K]; Kahryn Riley, *Neither Inmates Nor Counties Get Out of Jail Free*, MACKINAC CTR. FOR PUB. POL'Y (June 15, 2018), https://www.mackinac.org/neither-inmates-nor-counties-get-out-of-jail-free [https://perma.cc/MN7X-J5EQ]; Charles Crumm, *Pay to Stay: Inmates Billed for Time in County Jail*, ROYAL OAK TRIB. (Mar. 31, 2017), https://www.dailytribune.com/news/pay-to-stay-inmates-billed-for-time-in-county-jail/article_99532de7-91f0-5669-aecc-86472d3e8aef.html [https://perma.cc/X2PD-NK5E].

54. Crumm, s*upra* note 53.

55. *Id.*

56. Gantert, s*upra* note 53.

57. Riley, *supra* note 53 ("One thing that all counties seem to have in common is difficulty collecting housing fees. Although we were not able to secure precise figures on how much jails are able to recoup, it appears that almost none of them collect even half of what they charge.").

58. *Id.*

59. *Id.*

Taking all of this into account, Michigan's statutory schemes provide that inmates may be charged up to $60 per day to stay in a county's penal institutions.[60] A defendant might be required to do so after being convicted of a misdemeanor of a higher or lower class.[61]

Being convicted of a crime in the higher class of misdemeanor would mean up to a year in the county jail and would carry with it a potential fine of $1,000.[62] But, if that same inmate was charged the statutorily allowable amount for that stay, they would incur a debt of $21,900; twenty times the allowable maximum fine.[63] The former inmate could then be made to pay this fine as part of her probation.[64]

3. Kentucky

Kentucky did not adopt a pay-to-stay statute until 2000 when the General Assembly passed Senate Bill 332 allowing prison administrators to charge inmates for staying in their facilities.[65] When the bill passed, jailers and other county officials "lauded" the plan that had the potential to allow them to bring in as much as one million dollars annually, but one jailer cautioned, "while the numbers sound good . . . collecting the money would probably be next to impossible in most cases," because "'most of our inmates are indigent or close to indigent . . . All we'd really be doing is adding to the amount of money they already owe and can't pay.'"[66]

Kentucky, unlike Maine and Michigan, has not seen a significant movement toward ending these fees in recent years; indeed, earlier this year, the Kentucky Court of Appeals was faced with an issue that may seem even more morally objectionable than billing convicted inmates for the cost of their incarceration: billing innocent inmates for the cost of their incarceration.[67] In the Commonwealth, since the inception of the statute, "Kentucky jailers have taken money for booking fees and up to $50 in daily charges from inmates who must pay to stay behind bars," and these fees are often kept "even if someone is found not guilty or the charges are dropped."[68]

60. MICH. COMP. LAWS ANN. § 801.83(1)(a) (West 2019).

61. *See* Lauren Baldwin, *Michigan Misdemeanor Crimes by Class and Sentences*, CRIM. DEF. LAW., https://www.criminaldefenselawyer.com/resources/michigan-misdemeanor-crimes-class-and-sentences.htm (last visited Mar. 7, 2021) [https://perma.cc/FC67-WK6C].

62. *Id.*

63. *See* MICH. COMP. LAWS ANN. § 801.83 (West 2019).

64. MICH. COMP. LAWS ANN. § 801.83(2) (West 2019) ("Reimbursement under this act may be ordered as a probation condition entered pursuant to section 3 of chapter XI of the code of criminal procedure.").

65. Kelley Lynn, *Inmates Paying for Stay in Jail May Have Little Impact Locally*, KY. NEW ERA (Jun. 19, 2000), https://www.kentuckynewera.com/article_d0fb31f3-7701-55ee-baed-1bc2700089fc.html [https://perma.cc/4YWL-6YCD] ("[Jailer Livy] Leavell said . . . . 'You can charge $100 per day, but if you're only collecting $5 then you're not accomplishing much.'").

66. *Id.*

67. Jason Riley, *Kentucky Court to Decide if Jails Can Force Inmates to Pay Before Conviction*, WDRB (Jan. 27, 2020), https://www.wdrb.com/in-depth/sunday-edition-kentucky-court-to-decide-if-jails-can-force/article_83ed9aae-3ed9-11ea-ac75-ef17215be46b.html [https://perma.cc/38G7-RSUK].

68. *Id.*

On February 14, 2020, the Court of Appeals of Kentucky held in *Jones v. Clark County*, an unpublished opinion, that a former inmate could be made to pay for their stay in a county penal institution while awaiting a trial.[69] In that case, David Jones had been held in the Clark County Detention Center for fourteen months and charged, among other things, $10 per day for his stay.[70] All tolled, Jones racked up a fee of $4,008.85.[71] In its decision, the court reasoned that, even though the Kentucky statute providing for the assessment of *per diem* fees was to be assessed on the order of the "sentencing court," such an order was not required under statute "when the inmate has the funds to pay the required fees available—such an order is only necessary when the prisoner still owes fees at the time of his sentencing."[72]

Turning to the system of pay-to-stay incarceration that led to this result, in the Commonwealth of Kentucky, a person convicted of a Class D felony may be sentenced to serve her time in a county jail for up to five years.[73] The statute provides the attendant fine "shall . . . not [be] less than one thousand dollars ($1,000) and not greater than ten thousand dollars ($10,000) or double [her] gain from commission of the offense, whichever is the greater."[74]

If that same inmate, however, was charged the maximum allowable amount per day of $50 or "the actual per diem cost, whichever is less, for the entire period of time the prisoner is confined to the jail,"[75] that inmate could rack up a board bill of $91,250 for 1,825 days (or five years) in the facility. This means they could leave the jail owing ninety times as much as the minimum allowable fine.[76] Even after leaving confinement, a person could then be made to pay for the cost of staying in jail which was "required by the sentencing court," at the time of her conviction.[77]

III. ANALYSIS

Given the statutory schemes outlined above, this Note moves to a discussion of the historical, constitutional, legal, and policy justifications for ending or

69. Jones v. Clark Cnty., No. 2018-CA-001710-MR, 2020 WL 757095, at *1 (Ky. Ct. App. Feb. 14, 2020). This case came after Jones had failed to obtain relief in the federal court system where he alleged violations of his Fourth and Fourteenth Amendment rights to property and due process. *See* Jones v. Clark Cnty., 666 Fed. App'x 483, 483 (6th Cir. 2016).

70. *Jones*, 2020 WL 757095, at *1.

71. *Id.*

72. *Id.* at *4 (quoting Cole v. Warren County, 495 S.W.3d 712 (Ky. App. 2015)). This decision came over the stringent objections of Judge Combs who wrote: "[a] sentencing court alone is vested with jurisdiction to order payment for lodging in the county jail, and no such order was ever entered. . . in this case. Instead, the county, though [sic] its jailer . . . assumed the right, *sua sponte*, to become in effect a collection agency . . . ." *Id.* at *7 (Combs, J., dissenting).

73. *See* KY. REV. STAT. ANN. § 532.100 (West 2020).

74. KY. REV. STAT. ANN. § 534.030(1) (West 2020).

75. KY. REV. STAT. ANN. § 441.265(2)(a)(2) (West 2020).

76. *See* KY. REV. STAT. ANN. § 441.265(2)(a)(2) (West 2020); *see also* KY. REV. STAT. ANN. § 534.045 (West 2020).

77. KY. REV. STAT. ANN. § 441.265(1) (West 2020).

substantially reducing pay-to-stay fines across the United States. First, it will examine the historical underpinnings of the Eighth Amendment in order to position the reader in the landscape of constitutional history and rights tradition.[78] Next, it will dive into the case law of the Supreme Court and lower courts surrounding the Excessive Fines Clause, however sparse that may be, to provide a practical framework for how the argument in the remainder of the Note will proceed.[79] Finally, it will conclude by rebutting the public policy arguments used by proponents of such statutory schemes with recent research and studies done by prison rights advocacy organizations in several states.[80]

A. Historical and Constitutional Context of the Eighth Amendment

At sixteen words, the Eighth Amendment is the shortest amendment to the Constitution.[81] In its entirety, the Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[82] Though the language of the Eighth Amendment itself is brief, its roots stretch back over 800 years to the Magna Carta.[83] Chapter twenty of that document reads, in part, "[F]or a trivial offence, a free man shall be fined only in proportion to the degree of his offense, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood."[84] Though the sentiment of the Eighth Amendment can be traced back to 1215, its exact language comes from the English Bill of Rights, a document drafted at the end of the Glorious Revolution of the 17th Century.[85]

The English Bill of Rights, itself the product of a peaceful revolution in the governance of Great Britain,[86] declared: "[E]xcessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."[87] The keen reader might well note that the language of the Constitution's Eighth Amendment is almost identical to that in the English Bill of Rights; this

78. *See* discussion *infra* Sections III.A–C.

79. *See* discussion *infra* Section III.D.

80. *See* discussion *infra* Section III.D.2.

81. *What Is the Shortest Amendment in the Bill of Rights?*, STUDY.COM, https://study.com/academy/answer/what-is-the-shortest-amendment-in-the-bill-of-rights.html (last visited Mar. 7, 2021) [https://perma.cc/AZC8-SPU6]; *see* U.S. CONST. amend. I–XXVI; Eugene Volokh, *What Is the Shortest Amendment in the U.S. Constitution?*, VOLOKH CONSPIRACY (Nov. 22, 2008, 9:04 AM), http://volokh.com/2008/11/22/what-is-the-shortest-amendment-in-the-u-s-constitution/ [https://perma.cc/Z8KP-P66K].

82. U.S. CONST. amend. VIII.

83. John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 1041 (2019).

84. *English Translation of Magna Carta*, BRIT. LIBR. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/2CNN-DWWP].

85. Bessler, *supra* note 83, at 996; Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2131–32 (2016) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

86. House of Commons Information Office, The Glorious Revolution, FACTSHEET G4 GEN. SERIES (August 2010), https://www.parliament.uk/documents/commons-information-office/g04.pdf [https://perma.cc/8WHQ-EA5B].

87. Bill of Rights, 1688, 1 W. & M. c. 2, https://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction [https://perma.cc/J95M-RTG3]; Bessler, *supra* note 83, at 1008.

is no accident—across time the language of such amendments has seen almost no change.[88]

In many ways, not germane to the subject of this Note, the Glorious Revolution was first and foremost the result of religious tensions, however, it was also in no small part, "about checking royal power and restoring the rights and civil liberties of English and Scottish subjects."[89] Among these liberties was the right to be free from the imposition of fines in excess of what justice required, which the Parliament felt had been violated during the reign of King James II & VII by the monarch himself, his counselors, and the functionaries of his government.[90]

The Enlightenment notion that government ought to be constrained in the sentences at its disposal to punish those convicted of crimes travelled across the Atlantic with the settlers in the newly formed colonies and the principle can be seen in their constitutions.[91] In writing the constitutions and statutes of the newly formed colonies, the drafters of those documents sought to "prohibit[] . . . excessive bail, excessive fines, and cruel and unusual punishments," as well as limit the imposition of "the death penalty and corporal punishments."[92] Indeed, the Virginia Declaration of Rights written in 1776, the Constitution of Massachusetts drafted in 1780, and the Constitution of Maryland drafted in 1776 all included some version of the language that would later be codified as the Eighth Amendment.[93]

Beyond this, James Madison advocated for the inclusion of such a right in the body of the Constitution.[94] Writing in opposition to ratification, Brutus argued the Constitution should not be adopted because it did not include, among other things, a prohibition against excessive bail, fines, and cruel and unusual punishment because such guarantees were "as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, [and] inflicting punishments . . . ."[95] Though language assuring these and other rights were not added to the body of the Constitution as adopted, when Congress drafted a Bill of Rights for the nation it turned to the Virginia Declaration of Rights as written by George Mason, which itself had been modeled off of—and largely cribbed from—the English Bill of Rights.[96]

88. As an example, the most recent state to enter the Union, Hawaii, has a constitutional provision which reads in part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." HAW. CONST. art. 1, § 12.

89. Bessler, *supra* note 83, at 1007.

90. *Id.*

91. *See id.* at 1046–48.

92. *Id.* at 1048.

93. MASS. CONST. of 1780 art. XXVI (specifying "[n]o magistrate or court of law shall demand excessive . . . ."); MD. CONST. of 1776, art. XXII; VA. CONST. of 1776, § 8.

94. Bessler, *supra* note 83, at 1048.

95. *Id.* at 1049; BRUTUS, BRUTUS NO. 2 (1787), *reprinted in* 1 THE COMPLETE ANTI-FEDERALIST doc. 26 (Herbert Storing ed., 1981), http://press-pubs.uchicago.edu/founders/documents/v1ch14s26.html [https://perma.cc/B3ES-ZBC6].

96. *See* Bessler, *supra* note 83, at 997.

B. Application of Eighth Amendment Clauses in Supreme Court Cases

After the Bill of Rights was ratified in 1791,[97] the Eighth Amendment went largely unadjudicated until the Supreme Court's decision in *Wilkerson v. Utah* in 1878.[98] In that decision, the Court held death by firing squad did not qualify as cruel and unusual punishment "within the meaning of the eighth amendment," but that punishments such as being "embowelled alive, beheaded, and quartered," would.[99]

The next major case in this jurisprudential hinterland did not come until the Court's 1993 decision in *Austin v. United States*.[100] There, the United States sought *in rem* forfeiture of the "mobile home and auto body shop" of Richard Austin who had been convicted in South Dakota state court of possession with intent to distribute cocaine.[101] The forfeiture was granted by the district court and the Eighth Circuit "reluctantly agreed with the government," upholding the decision of the district court.[102]

The Eighth Circuit also noted that it felt "the Government was 'exacting too high a penalty in relation to the offense committed,'" but that it "felt constrained from holding the forfeiture unconstitutional" by the Supreme Court's precedence.[103] The Court iterated that the relevant question to the Excessive Fines inquiry was not whether the forfeiture was "civil or criminal, but rather whether it was punishment."[104] The Supreme Court proceeded to hold that the primary question at issue was whether the fine served "in part to punish," and further explained "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[105] The Court in *Austin* did not decide whether the forfeiture in that case violated the Excessive Fines Clause, but rather remanded "for further proceedings."[106]

1. Background of Bajakajian v. United States

Although the Court did not determine the constitutionality of the forfeiture in *Austin*,[107] it was only five years later, in 1998, that the Supreme Court found

97. *Id.* at 998.

98. Wilkerson v. State of Utah, 99 U.S. 130, 134–35 (1878).

99. *Id.* at 135.

100. Austin v. United States, 509 U.S. 602 (1993). Although the Court did make a ruling on the Eighth Amendment in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, this decision was concerned not with government action, but with a civil award of punitive damages. 492 U.S. 257, 259 (1989).

101. *Austin*, 509 U.S. at 604–05.

102. *Id.* at 605–06 (quoting United States v. One Parcel of Prop., 964 F.2d 814, 817 (1992)) (internal quotations omitted).

103. *Id.* at 606 (quoting *One Parcel of Prop.*, 964 F.2d at 818.) (internal citation omitted).

104. *Id.* at 610.

105. *Id.* (internal quotation omitted).

106. *Id.* at 622–23 ("Prudence dictates that we allow the lower courts to consider that question in the first instance.").

107. *Id.* at 622.

that a *fine* did violate the Eighth Amendment's prohibition on excessive fines in *United States v. Bajakajian*.[108] In that case, Justice Thomas noted, "[t[his Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause."[109]

In *Bajakajian*, the Court held that the government's seizure of $357,144 of the defendant's cash-money was an excessive fine where the crime of conviction was "transporting more than $10,000 in currency" out of the country without reporting it to officials.[110] In order to reach this decision though, the Court first had to jump through a series of analytical hoops before reaching the question of whether the fine violated the Eighth Amendment, which this Note, in time, will have to navigate as well.[111]

First, the Court noted that when the Constitution was drafted the term "'fine' was understood to mean a payment to a sovereign as punishment for some offense."[112] Next, the Court recognized that the forfeiture which Bajakajian was forced to make for his failure to report the currency he attempted to carry out of the country was in fact a "fine" under this definition.[113] Here, the Court reasoned the forfeiture was "imposed at the culmination of a criminal proceeding and require[d] a conviction of an underlying felony," and therefore the forfeiture "constitute[d] punishment."[114]

In so reasoning, the Court rejected the government's contention that the forfeiture should not be considered a fine in that it was for remedial and deterrent purposes.[115] The Court explained, "[d]eterrence . . . has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for loss."[116] The Court additionally rejected the government's contention that the forfeiture was allowable as it "[fell] within a class of historic forfeitures of property tainted by crime," because the underlying "theory behind such forfeitures was the fiction that the action was directed against 'guilty property,' rather than against the offender himself."[117]

Finally, the Court noted that the forfeiture Bajakajian was forced to make did not "bear any of the hallmarks of traditional civil *in rem* forfeiture," but rather, fell within the tradition of "in personam, criminal forfeitures."[118] Because

108. United States v. Bajakajian, 524 U.S. 321, 337 (1998).

109. *Id.* at 327.

110. *Id.* at 324, 337.

111. *Id.* at 327–34; *see* discussion *infra* Section III.D.

112. *Bajakajian*, 524 U.S. at 327 (quoting Browning–Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 265 (1989)).

113. *Id.* at 328.

114. *Id.*

115. *Id.* at 329.

116. *Id.*

117. *Id.* at 329–30 (quoting Various Items of Pers. Prop. v. United States, 282 U.S. 577, 581 (1931)).

118. *Id.* at 331–32. ("Such forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law. Although *in personam* criminal forfeitures were well established in England at the time of the founding, they were rejected altogether in the laws of this country until very recently.") (internal citations omitted).

of this, the Court reasoned: "[T]he forfeiture . . . constitutes punishment and is thus a 'fine' within the meaning of the Excessive Fines Clause;" only then did the Court reach the question of whether the fine violated the Eighth Amendment.[119]

2. Application of the Excessive Fines Clause in Bajakajian

Once the Court reached the question, it held "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[120] Here, the Court hit a stumbling block: How excessive must a fine be before it exceeds the allowed amount under the Eighth Amendment?[121] After searching, however briefly, through the history of the amendment itself and discussing the need for legislative difference and a flexible rule,[122] the Court finally held lower courts must "compare the amount of the forfeiture to the gravity of the defendant's offense," and held if the forfeiture "is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."[123]

Applying this standard to the matter before it, the Court first noted the only crime engaged in by Bajakajian was a failure to report the money and that this crime caused minimal harm "affect[ing] only one party, the Government."[124] Thus, the Court concluded the penalty Bajakajian suffered "[was] grossly disproportional to the gravity his of the offense."[125] As noted above, this was the first time the Court applied the Excessive Fines Clause to determine if a fine was unconstitutional. Perhaps in accordance with this, the Court's incorporation of all three Eighth Amendment clauses against the states has occurred only over the last sixty years.[126] The first clause to be incorporated was the ban on cruel and unusual punishment in 1962, the second clause incorporated was the prohibition on excessive bail in 1971, and the last, the Excessive Fines Clause was not incorporated until 2019.[127]

Additionally, it should be marked that the Court in *Bajakajian* was addressing the Excessive Fines Clause as regarding a criminal forfeiture and not a fine imposed for staying in a penal institution.[128] The Court has made few decisions on whether such a fine violates the Excessive Fines Clause as against the federal

119. *Id.* at 334.
120. *Id.*
121. *Id.*
122. *Id.* at 334–36.
123. *Id.* at 336–37.
124. *Id*. at 337–38. (The Court noted: "[T]he essence of respondent's crime is a willful failure to report the removal of currency from the United States. Furthermore, as the District Court found, respondent's violation was unrelated to any other illegal activities.").
125. *Id.* at 339–40.
126. *See* Timbs v. Indiana, 139 S. Ct. 682, 686 (2019); Bessler, *supra* note 83, at 991–93.
127. Bessler, *supra* note 83, at 991–93.
128. *Bajakajian*, 524 U.S. at 331–32.

government;[129] however, it would be reasonable to theorize this is largely because these fines are generally, if not exclusively, charged by county jails to county inmates and thus the issue, as a Constitutional matter, has not reached the high court because the Excessive Fines Clause did not apply against the state governments.[130]

The next major ruling on the Excessive Fines Clause from the Supreme Court after its ruling in *Bajakajian* did not come until 2019, when the Court incorporated the clause against the states in *Timbs v. Indiana*.[131] That ruling is the province of Section III.C.2 of this Note and is discussed further there.[132] As such, this Note next turns to its final foundation: lower court case law concerning fines for imprisonment.

C. Application of the Excessive Fines Clause

*1. Pre-*Timbs *Lower Court Ruling:* Tillman v. Lebanon County Correctional Facility

Before the Court's decision in *Timbs*, the lower courts were largely left to their own devices in deciding cases where the Excessive Fines Clause of the Eighth Amendment were implicated.[133] The most prominent of these cases, *Tillman v. Lebanon County Correctional Facility*, was decided by the Third Circuit.[134]

In that decision, the Third Circuit held that such fees were allowed in so far as their primary purpose was "to teach fiscal responsibility to inmates," and prepare those who were incarcerated for their reentry into the world beyond jail where they would be "expected by society to pay [their] own room and board."[135] As this case is, or perhaps was, the "seminal case in jail fee jurisprudence," it will form the foundation of this Note's comparison between how courts formerly dealt with this issue without guidance from the Supreme Court and how this might now change how state courts apply the Eighth Amendment which is already occurring.[136]

129. Eisen, *supra* note 25.

130. One of the few cases where a federal court did reach this issue, *Tillman v. Lebanon County Correctional Facility*, is discussed in the Analysis section of this Note. *See* Tillman v. Leb. Cnty. Corr. Facility, 221 F.3d 410, 413, 419 (3d Cir. 2000); *see also infra* Section III.C.

131. This ruling was made in direct response to the Supreme Court of Indiana's contention that the Eighth Amendment's Excessive Fines Clause did not apply as against the states. *Timbs*, 139 S. Ct. at 686. This argument was soundly rejected by the Court. *Id.* at 690.

132. *See* discussion *infra* Section III.C.2.

133. *See* Eisen, *supra* note 3, at 6; Michtom, *supra* note 27, at 190; Porter, *supra* note 20, at 420.

134. *Tillman*, 221 F.3d at 419–21.

135. *Id.* at 419.

136. Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101 (Colo. 2019) (holding the state must "bring Colorado law into conformity with federal law and hold that the proper standard for determining whether a regulatory penalty amounts to a constitutionally excessive fine in violation of the Eighth Amendment is whether it is grossly disproportional to the gravity of the underlying offense"); *Fourteenth Amendment — Due Process Clause — Incorporation Doctrine —* Timbs v. Indiana, 133 HARV. L. REV. 342, 349 (2019); Eisen, *supra* note 25.

In *Tillman v. Lebanon County Correctional Facility*, Leonard Tillman brought suit against a county jail in a § 1983 action alleging that the $10 *per diem* charge he incurred while incarcerated violated: the Eighth Amendment's clause forbidding Cruel and Unusual Punishment, the Eighth Amendment's clause forbidding Excessive fines, and the Fourteenth Amendment's Equal Protection Clause.[137]

In pertinent part, the *Tillman* court found, "[i]f the assessments and confiscations under the Cost Recovery Program 'can only be explained as serving in part to punish,' they are 'punishment' for purposes of the Excessive Fines Clause, even if they may also be understood to serve remedial purposes."[138] The court went on to note the fees charged to inmates under such a program were not "fines" under the meaning of the Eighth Amendment in that "[a] prisoner's term of incarceration cannot be extended, nor can he be reincarcerated, for failure to pay a negative balance. The daily fees do not vary with the gravity of the offense . . . . [T]he undisputed evidence shows that the fees are designed to teach financial responsibility."[139] And those charges could not be fines where "they merely represent partial reimbursement of the prisoner's daily cost of maintenance . . . ."[140]

Additionally, the court explained that the $4,000 Tillman was charged for his stay in the county jail was far less than the allowed fine for his crime, $100,000.[141] Further, the court in this case cited the Supreme Court's ruling in *Bajakajian* as discussed in Section II.B of this Note; the *Tillman* court's discussion of that case leads to two important points of reasoning that will be the subject of the remainder of this Note.[142]

Walking through the reasoning of that case, the court first observed the *Bajakajian* ruling was reached in light of the principle of "proportionality" regarding "'the gravity of the offense that it is designed to punish.'"[143] The court noted that Tillman's offense, possession with intent to deliver, carried a statutory maximum fine of $100,000 but that he had only accumulated a debt of $4,000 while imprisoned in Lebanon County.[144] Therefore, the court reasoned, "the legally permissible fine" was not "'grossly disproportional to the gravity of [his] offense,'" and, thus, the charges were not in violation of the Excessive Fines Clause.[145]

This case provided two elements for courts to walk through. First, the charges accumulated by inmates can be considered "fines" under the meaning of

137. *Tillman*, 221 F.3d at 413–18.

138. *Id.* at 420 (quoting Austin v. United States, 509 U.S. 602, 610, 620–21 (1993)).

139. *Id.*

140. *Id.*

141. *Id.* at 420–21. Here, the court cited *Bajakajian*, but the court asserted it would "not speculate on the result we would reach where the offense was significantly less serious, or where the daily fees or total debt were significantly higher." *Id*. at 421.

142. *Id.* at 420–21; *see* discussion *supra* Section III.B.

143. *Tillman*, 221 F.3d at 420 (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)); Michtom *supra* note 27, at 190.

144. *Id.* at 420–21.

145. *Id.* at 421 (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)).

the Eighth Amendment.[146] The court can then reach the issue of whether such fines were in excess of what justice would allow.[147] Even though the *Tillman* court's decision stands unaltered, it does not apply to courts outside of the Third Circuit; and, given the broad reaching language used by the Court in *Timbs*, the two-step analysis of *Bajakajian* and *Tillman* may not be as difficult for former inmates to make out in state courts as one might imagine.[148]

2. The Far-Reaching Nature of Timbs v. Indiana

As noted above, the Supreme Court incorporated the Eighth Amendment against the states for the first time in 2019 through its holding in *Timbs*.[149] The Court did so emphatically by grounding its decision not only in the Constitution itself, but the Magna Carta, the Virginia Declaration of Rights, and by noting the history of excessive fines as a means of oppression during the Jim Crow Era.[150] In using such broad ranging language, this Note argues, the Court gave states good reason to reconsider their statutory schemes for inmate debt in order to avoid future litigation.[151]

First, it ought to be noted the Court unanimously held in *Timbs*[152] that the Eighth Amendment's Excessive Fines and Fees Clause was "'fundamental to our scheme of ordered liberty,' with 'dee[p] root[s] in [our] history and tradition.'"[153] As the Court's decision was unanimous and its language was broad reaching, the argument for *Timbs* having application beyond specifics of the case itself, this Note argues, is strong.[154]

In the opinion, Justice Ginsburg wrote for the Court grounding the decision in ancient doctrine, writing "the protection against excessive fines and fees has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties."[155] Justice Ginsburg also traced the provision's history to the Magna Carta which, as noted above, stipulated punishments for crimes must be tied to the severity of the crime and, Ginsburg continued, such penalties must "not be so large as to deprive [an offender] of his livelihood."[156]

146. *Id.* at 420.

147. *See id.* at 421.

148. *See* United States v. Bajakajian, 524 U.S. 321, 331–37 (1998); discussion *infra* Section III.C.2. Jones v. Clark Cnty., No. 2018-CA-001710-MR, 2020 WL 757095 (Ky. Ct. App. Feb. 14, 2020); State v. Richey, 569 S.W.3d 420, 425 (Mo. 2019); State v. Timbs, 84 N.E.3d 1179, 1182 (Ind. 2017).

149. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

150. *Id.* at 687–89.

151. *See id.* at 687.

152. Though there was no dissenting vote in the case, Justices Gorsuch and Thomas wrote in separate concurrences. *Id.* at 691–98 (Gorsuch, J., concurring) (Thomas, J., concurring).

153. *Id.* at 686–87 (majority opinion) (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010)).

154. *See id.*

155. *Id.* at 689.

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

It may be argued, however, that *Timbs* only applies in cases brought by states against property of convicted prisoners *in rem* for the purpose of civil forfeiture because this was the way in which the matter reached the Court.[157] But this argument is belied by two holdings of the Court.

First, the final sentence of the opinion reads: "[R]egardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged."[158] This suggests that no matter why the state is seeking to take the valuable property of an inmate, including currency, the Amendment still applies.

Second, the Court also noted that the trial court found the forfeiture of the $42,000 vehicle was "more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction;" and, therefore, it was "grossly disproportionate to the gravity of Timbs' offense, and unconstitutional under the Eighth Amendment's Excessive Fines Clause."[159] The trial court's decision was overruled by the Supreme Court of Indiana on the grounds that the "Excessive Fines Clause constrains only federal action."[160] The Court then clearly stated, "The Excessive Fines Clause is . . . incorporated by the Due Process Clause of the Fourteenth Amendment."[161] Because of this language, it would appear that any fine levied by states against citizens, including those assessed under pay-to-stay schemes, are subject to the Court's holding in *Timbs* and *Bajakajian*.[162]

D. Applying the Reasoning of Timbs*, Supreme Court Case Law and Policy Research to Pay-to-Stay Schemes*

As the Eighth Amendment has been incorporated, this Note must assess the Court's ruling in *Timbs* and other Supreme Court case law regarding its effect on prior decisions by lower courts in two ways.[163] First, it will address the impact of *Timbs* on the statutes discussed above in Section II.B as they presently stand.[164] Second, it will address the public policy justifications in favor of pay-to-stay schemes as laid out in Section II.A.[165] Finally, this Note will end by recommending that states must reconsider their present statutory provisions or do away with them entirely in order to bring their laws in line with the holding of the Court in *Timbs*.[166]

1. Application of Timbs Ruling and Other Supreme Court Jurisprudence to

157. *Id.* at 685–86, 690.
158. *Id.* at 691.
159. *Id.* at 686.
160. *Id.*
161. *Id.* at 687.
162. *Id.* at 687 (quoting United States v. Bajakajian, 524 U.S. 312, 327–28 (1998)).
163. *See* discussion *infra* Section III.D.1.
164. *See* discussion *infra* Section III.D.1.
165. *See* discussion *infra* Section III.D.2.
166. *See* discussion *infra* Part IV.

Current Statutory Schemes

Two important aspects of the decisions in *Timbs*, and other case law, will instruct the rest of this Note's inquiry.[167] First, *Timbs* grounded its reasoning in the Court's earlier decision in *Austin* in which the court held civil forfeitures could violate the Eighth Amendment where they were at least in part punitive.[168] Additionally, the Third Circuit in *Tillman* noted that the fines were allowable because they were not punitive, but, rather, were meant to teach the inmate financial responsibility and thus serve a rehabilitative function, a common rationale in these decisions.[169] These points, though they are properly taken as one point, will be addressed in the final subpart of this Section in the realm of public policy arguments against the use of pay-to-stay schemes.[170]

Second, both the *Tillman* court and the Court in *Timbs* reasoned that a fine may be excessive where it exceeded the statutory provision for assessment of fines against a person convicted of a given crime.[171] The statutes examined in Section II.B of this Note clearly show that the pay-to-stay fees potentially charged by several states far exceed the maximum fine for an inmate given the crimes they were jailed for.[172] To demonstrate this fully, the Court's precedence and reasoning must be applied to such schemes.

Because the Court in *Timbs* incorporated the Eighth Amendment's Excessive Fines Clause, state courts are now bound by the full force of the Supreme Court's case law relating to this section of the Constitution, sparse as it may be.[173] Having outlined the Court's case law above, two key principles can be distilled and synthesized into a test: the assessment of a charge against someone convicted of a crime is a fine under the meaning of the Eighth Amendment where it is used in part to punish; and such a fine is an unconstitutional violation of the Eighth Amendment's Excessive Fines Clause where it is "grossly disproportionate" to the traditional fine allowable under statute.[174]

First, the Court in both *Bajakajian* and *Timbs* stressed where the monetary penalty assessed against a defendant serves to punish, it is considered a "fine" under the meaning of the Excessive Fines Clause.[175] On this point, the *Timbs* Court quoted from *Bajakajian*, holding "the phrase 'nor excessive fines . . . limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'"[176]

167. *Timbs*, 139 S. Ct. at 686; Tillman v. Leb. Cnty. Corr, Facility, 221 F.3d 410, 421 (3d Cir. 2000).

168. Austin v. United States, 509 U.S. 602, 604 (1993); *Timbs*, 139 S. Ct. at 689 (2019).

169. *See Tillman*, 221 F.3d at 420; discussion *infra* Section III.D.

170. *See* discussion *infra* Section III.D.2.

171. *Timbs*, 139 S. Ct. at 686; *Tillman*, 221 F.3d at 420–21.

172. *See supra* Section III.C.2.

173. United States v. Bajakajian, 524 U.S. 321, 327 (1998) ("This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause.").

174. *See Timbs*, 139 S. Ct. at 686; discussion *supra* Sections III.B–C.

175. *Bajakajian*, 524 U.S. at 331 (noting that where forfeitures "were viewed as nonpunitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause"); *Timbs*, 139 S. Ct. at 687.

176. *Timbs*, 139 S. Ct. at 687 (quoting *Bajakajian*, 524 U.S. at 327–28).

Given the state statutory schemes as they presently stand, there can be little doubt that pay-to-stay fines are a punishment for the former inmates who are made to pay them in addition to whatever other fines were assessed against them by the trial court.[177] For example, in Michigan, a former inmate might be made to pay nearly fifteen times the statutorily allowable fine for a given offense in pay-to-stay bills, over and above the fines and costs attendant to their conviction.[178]

Second, such a statutory scheme also runs afoul of the reasoning the Third Circuit reiterated in *Tillman*.[179] In *Tillman* the court found that, because the former inmate was made to pay only $4,000 in *per diem* fees for his incarceration and this was below the statutory maximum fine for his crime, $100,000, the charge was not "grossly disproportional" to his offense.[180] Therefore, the court reasoned, the charges did not violate the Excessive Fines Clause.[181] On the point of disproportionality, the Court in *Timbs* noted that the Indiana Court of Appeals, in affirming the reasoning of the trial court, had ruled that where a forfeiture "[is] grossly disproportionate to the gravity of Timbs's offense," it is "unconstitutional under the Eighth Amendment's Excessive Fines Clause."[182]

The Court itself adopted this "grossly disproportionate" standard in *Bajakajian*, but the Court did not specifically reaffirm this standard in *Timbs* because the Supreme Court of Indiana, rather than itself ruling on the test, held that the Excessive Fines Clause did not apply as against the states, and this constitutional question was the point at issue in the Court's ruling on the case.[183] Given the far reaching language of *Timbs*, there is no question the Court disagreed with the Indiana Supreme Court on the constitutional question, however, it remains to be seen if the Court would reaffirm a grossly disproportionate standard as part of its own jurisprudence going forward.[184]

Assuming the Court would reaffirm the grossly disproportionate standard, the statutory schemes currently employed by states are still in violation of the Excessive Fines Clause, even using such a high bar.[185] As explained at length above, these charges can be anywhere from fifteen times—in the case of Michigan—to as much as ninety one times—in the case of Kentucky—higher than the maximum allowable fines under the statutory compilations of those states.[186] Thus, such fines are somewhere in between the disproportionality of those in *Bajakajian*—where the maximum allowable fine was $5,000 and the government seized $357,144—and *Timbs*—where the maximum allowable fine was $10,000

177. *See* discussion *supra* Section II.B.

178. *See* discussion *supra* Section II.B.2.

179. Tillman v. Leb. Cnty. Corr. Facility, 221 F.3d 410, 420–21 (2000).

180. *Id.* at 417, 420–21.

181. *Id.* at 421.

182. Timbs v. Indiana, 139 S. Ct. 682, 686 (2019).

183. *Id.*; United States v. Bajakajian, 524 U.S. 321, 334 (1998).

184. *Timbs*, 139 S. Ct. at 686–87 ("The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.").

185. *Id.* at 686 (holding a forfeiture "four times" higher than the statutorily allowed fine violated the Excessive Fines Clause).

186. *See* discussion *supra* Section II.B.

and the government seized $42,000.[187] Therefore, even using the grossly disproportionate standard, these fines are unconstitutional.[188]

It might be argued that pay-to-stay fines should be considered a wholly different class of fines than the *in rem* forfeitures addressed by the Court in *Austin*, *Bajakajian*, and *Timbs*.[189] But, this would be ignoring two key issues: the Court's language in the *Timbs* holding is broad ranging and abundantly clear; and the lack of Supreme Court jurisprudence that this decision comes with leaves state courts with but little other guidance on how to proceed given the incorporation of the Excessive Fines Clause.

In *Timbs*, Justice Ginsburg wrote that, where an amendment is incorporated, "there is no daylight between the federal and state conduct it prohibits."[190] The Court gave no indication that it viewed this as a narrow opinion noting, "[d]irectly at issue here is the phrase 'nor excessive fines imposed,' which 'limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense."[191] There seems to be little room for misunderstanding that charges assessed by states against inmates are anything other than "payments," extracted from citizens "in cash," by the government.[192] Whether that government is federal, state, or local is no longer at issue; the Amendment applies to all equally.[193]

Because of this, states with these pay-to-stay schemes are in a precarious position and appear to be running afoul of Supreme Court jurisprudence.[194] Although states may not have been liable for suits before the *Timbs* decision, the Court's enthusiasm in incorporating the Amendment against them suggests that the Court opposes any fines far exceeding the statutorily provided maximum.[195]

2. Addressing the Public Policy Arguments of Pay-to-stay Practices

Beyond the case law that comes with the incorporation of the Excessive Fines Clause, there is also a great deal of public policy research suggesting these statutory schemes not only serve no real rehabilitative purpose, but also fail to recuperate any meaningful amount of money to pay for the imprisonment of the person convicted.[196] As noted in Section II.A, there are four chief justifications for using pay-to-stay statutory schemes: (i) "the revenue stream helps to offset expensive incarceration budgets," (ii) "charging inmates for their stay is

187. *Bajakajian*, 524 U.S. at 337 ("If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."); *Timbs*, 139 S. Ct. at 686.

188. *Timbs*, 139 S. Ct. at 686.

189. Austin v. United States, 509 U.S. 602, 604 (1993); *Bajakajian*, 524 U.S. at 330; *Timbs*, 139 S. Ct. at 689.

190. *Timbs*, 139 S. Ct. at 687.

191. *Id.* (quoting *Bajakajian*, 524 U.S. at 327–28).

192. *Id.*

193. *Id.*

194. *Id.*; *see* U.S. CONST. amend. VIII.

195. *Timbs*, 139 S. Ct. at 687–89.

196. *See* discussion *infra* Sections III.D.2.i–ii.

grounded in rehabilitation or deterrence," (iii) "policy makers, judges, and sheriffs can often gain the support of constituents by supporting" these schemes, and they can reduce (iv) "frivolous requests for services by inmate."[197] The remainder of this Section will rebut these justifications by outlining the current research from the field addressing criminal justice reform. But first, the above four justifications must be modified in part.

Regarding (iii), although there may be independent arguments for this justification, it will be lumped together with the discussion of revenue building and addressed by the rebuttal to the first justification. This is primarily for two reasons. First, the general justification represented by fiscal responsibility for the government goes to a long-standing political stripe running through the country, that of the budget hawk.[198] Second, although there may be some political value for the policy, it seems that much of the value would come from politicians pontificating on belt tightening and financial temperance rather than being an independent justification in and of itself.[199] Afterall, one of the chief selling points of statutory fines and fees is that they remain unseen by the general public.[200]

Additionally, with regard to (iv), as noted in Section II.A, fees for services may well be an interesting area for research and scholarship, but it is not within the scope of this Note.[201] While these types of charges have similar justifications as pay-to-stay fines, they are distinct in that they do not, generally, require inmates to pay simply for staying in incarceration and thus would require a different theoretical framework than the present discussion.[202] These fees bind inmates to pay a set amount for a given service that the inmate either requires or requests from her jailers rather than requiring inmates to pay simply for the pleasure of staying in a state or county penal institution.[203] Therefore, this justification will not be discussed herein.

i. Revenue Helps Offset Expensive Incarceration

According to a survey conducted in 2018 by the advocacy organization Alabama Appleseed, "38% of respondents . . . committed another crime to pay off

197. Eisen, *supra* note 25.

198. Fabrizio Zilibotti, Andreas Müller & Kietil Storesletten, *The Political Colour of Fiscal Responsibility: Trump's Fiscal Policy Is in the Wake of Republican Tradition*, VOX EU (Nov. 12, 2019), https://voxeu.org/article/political-colour-fiscal-responsibility [https://perma.cc/Q7HU-VGWS].

199. Michelle Levi, *Boehner: Government Needs to Tighten Its Belt*, CBS NEWS (Mar. 8, 2009, 12:34 PM), https://www.cbsnews.com/news/boehner-government-needs-to-tighten-its-belt/ [https://perma.cc/W7DE-VEE3].

200. Monica C. Bell, Response, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 8 (2018) ("But another hidden law with which reformers must reckon is that the overwhelming majority of people under penal control—people who are not contemplated in the litigation surrounding rights to counsel and fines and fees—are punished because they are poor.").

201. *See* discussion *supra* Section II.A.

202. *See* discussion *supra* Section II.A.

203. *See* discussion *supra* Section II.A.

the fines and fees they already had."[204] Though these data regard court fines generally, they show that excessive fines are—at least in over one third of cases in Alabama—not only failing to teach fiscal responsibility,[205] but fostering future criminal activity.[206]

Additionally, Justice Ginsburg noted in *Timbs* that, historically, even though many states had and continue to have constitutional amendments mirroring the Eighth Amendment's prohibition on excessive fines, problems remain.[207] In the opinion Justice Ginsburg wrote, "[N]otwithstanding the States' apparent agreement that the right guaranteed by the Excessive Fines Clause was fundamental, abuses continued."[208]

The primary argument underlying this first justification is that states would not otherwise be able to afford their penal systems if they were disallowed from charging some amount of money to inmates serving out their sentences within the confines of the institutions.[209] This argument has "been made since the practice became legal" in many states and continues to be the leading argument for the practice.[210]

In her article, "The US Inmates Charged Per Night in Jail," Jessica Lussenhop quoted an Ohio jail administrator, as arguing that pay-to-stay "offsets the expenses that the taxpayers are required to have . . . . The more revenue I can generate within a facility, the less the taxpayers have to pay."[211] While this and similar arguments may seem solid on their face, there is one major flaw: although state and county officials may champion the pay-to-stay programs for the revenue they provide, there is actually very little evidence that they provide much revenue at all.[212]

The same jail administrator quoted in the above article went on to note that "while the programme bills for about $2m a year, they collect only about $60,000–$70,000. That's about a 3% collection rate."[213] The jailor continued, "[i]f we lost the ability to have a pay-for-stay programme here I'm not going to

204. Izabela Zaluska, *Pay-to-Stay Fees Put Some Wisconsin Inmates in Sizable Debt*, ASSOCIATED PRESS (Sept. 15, 2019), https://www.apnews.com/bb127e19eb454354ab1776d360fa4971 [https://perma.cc/96XM-JLGQ]; *see* ALA. APPLESEED, *supra* note 18, at 4.

205. Tillman v. Leb. Cnty. Corr. Facility, 221 F.3d 410, 419, 423 (3d Cir. 2000).

206. ALA. APPLESEED, *supra* note 18, at 4; Crowder & Nelson, *supra* note 18.

207. Timbs v. Indiana, 139 S. Ct. 682, 688.

208. *Id.* ("Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy.")

209. *See* Crumm, *supra* note 53 ("[S]aid Oakland County Sheriff Michael Bouchard. 'Why should taxpayers pay? The way to avoid the bill in jail is don't break the law.'"); Eisen, *supra* note 25; Ted Roelofs, *We Hope You Enjoyed Your Stay at the County Jail. Here's Your Bill,* BRIDGE MICH. (Dec. 13, 2016), https://www.bridgemi.com/michigan-government/we-hope-you-enjoyed-your-stay-county-jail-heres-your-bill [https://perma.cc/3LSX-CMQA] ("Macomb County Sheriff Tony Wickersham . . . . [said] 'Those individuals who are sentenced to the county jail have to pay their fair share.'").

210. Jessica Lussenhop, *The US Inmates Charged Per Night in Jail*, BBC NEWS (Nov. 9, 2015), https://www.bbc.com/news/magazine-34705968 [https://perma.cc/H2UV-882M].

211. *Id.*

212. *See, e.g.*, *id.*; Lynn, *supra* note 65 ("While the [revenue] numbers sound good, [Jailer] Leavell said collecting the money would probably be next to impossible in most cases.").

213. Lussenhop, *supra* note 210.

have any huge heartache over the loss of it."[214] This sentiment is not uncommon among prison officials who in one breath praise these programs for their revenue generating potential and in the next admit that they do not truly provide much of a return for the counties and states.[215]

This all comes at a great cost to the inmates who suffer under the debt generated by their stays in institutions across the nation and leads to formerly incarcerated persons feeling the burden of their time in jail long after they leave.[216] The ACLU of Ohio released a study of the consequences of the state's pay-to-stay policy, reporting that much of the debt accrued by former inmates during their time in jail was sent to collection agencies.[217] This meant that not only were they faced with the challenges of reentering society confronted by all formerly incarcerated persons, they were also plagued by harassing phone calls from collection agencies attempting to recuperate what money they could from them after purchasing their debt from the government.[218]

On this point, Lussenhop wrote in her article for the BBC, the president of debt-collection agency Intellitech said that his company ran "pay-to-stay programs in 12 counties in Ohio and in six other states," and that it had become "the 'Walmart' of pay-to-stay collections," which had made "the practice viable for counties," that couldn't directly collect from the former inmates.[219] These practices were described by one former inmate from Marion County, Ohio, who told the ACLU, the Ohio practice "gives you a sense of hopelessness when someone's on the phone telling you you'll never get a house until you pay this. It made me feel like less of a man or person."[220] Furthermore, the practice can also give former inmates "[a] bad credit rating from missed payments on a jail housing bill," making it difficult to find housing, obtain employment, or purchase a car as they attempt to reenter society.[221]

Although county and state officials may argue that these fees are necessary to finance state penal systems,[222] it is clear that not only do these systems not accomplish this goal, but they continue to punish inmates long after they have paid their debt to society making it more difficult for them to become functioning members of that society.[223] Even if this system did provide some significant

214. *Id.*

215. *See* discussion *infra* Section III.D.i; Riley, *supra* note 53 ("One jail administrator told us, 'It's like getting blood from a turnip.' These responses reflect the fact that criminal offenders are more likely to be poor, which makes it unlikely they will fund county treasuries.").

216. In fact, it is astonishing just how much debt is held by formerly incarcerated persons. Jessica Lussenhop wrote, "There's an estimated $10bn worth of criminal justice debt in the US, held by 10m men and women who have had some interaction with the criminal justice system." Lussenhop, *supra* note 210.

217. ACLU of Ohio, *In Jail & In Debt: Pay-to-Stay Fees*, ACLU OHIO, 1 (2015) ("Once released from jail, the debts are often handed over to collections agencies that hound the person until they pay."), https://www.acluohio.org/wp-content/uploads/2015/11/InJailInDebt.pdf [https://perma.cc/NMZ7-MHYB] [hereinafter ACLU].

218. *Id.* at 12 ("Collections phone calls are frequent and a 'harsh and degrading' reminder . . . .").

219. Lussenhop, *supra* note 210.

220. ACLU, *supra* note 217, at 12.

221. Roelofs, *supra* note 209.

222. Crumm, s*upra* note 53.

223. Roelofs, s*upra* note 209.

source of revenue to local and state governments, it would be hard to justify the harms it causes. But, because they do not provide such benefit, they are made doubly cruel for those people caught in the system.

ii. Rehabilitation and Deterrence

Moving to the second policy justification for these fees, some legislators and administrators argue that such fees represent either a way for inmates to learn fiscal responsibility and thus rehabilitate themselves in some way, or that they serve to deter future crime because of the high cost of recovering from previous incarceration.[224] In defending the practice of pay-to-stay incarceration, many policymakers suggest that inmates should be forced to pay for the price of their incarceration as part of the punishment they receive for the harm they have caused to society and, if they wish to avoid such fees, they should simply avoid wrongdoing in the future.[225] But, charging inmates for the cost of their own incarceration subverts the truism "do the crime, do the time," by drawing out the punishment indefinitely.[226]

Returning to the state statutory schemes analyzed in Part II of this Note, each of the three states discussed had a clearly delineated structure for which punishment was appropriate for each level of offense against the state.[227] These punishments were deemed as fitting the crimes they were tied to by each state's legislature; adding to these punishments by requiring formerly incarcerated persons to pay for the cost of their own incarceration after they have been released, takes that punishment out of the jail cell and into the world beyond where people are supposed to be able to rejoin society as fully functioning members.

These statutes mean, at least implicitly, that once out of prison the formerly incarcerated have neither truly paid their debt to society nor been "redeemed" of the harm they caused; rather, they must continue to pay for a crime to which they have already given months or years of their freedom.[228] In general, the purpose of imprisonment itself is seen as twofold: "the deterrence of crime . . . and the reduction of crime through incapacitation . . . ."[229] States construct their statutes to accomplish these goals through imprisonment, by restricting the liberty of those convicted of crimes in order to deter others from doing similar acts, and fines, by charging those convicted of crimes for committing those crimes.[230] Both of these means of punishment are provided for in the statutes covered in this Note and in other similar criminal statutes in every state.[231]

224. Tillman v. Leb. Cnty. Corr. Facility, 221 F.3d 410, 419 (3d Cir. 2000); Eisen, *supra* note 3, at 5.

225. Eisen, *supra* note 25.

226. Rebecca McCray, *Do the Crime, Do the Time—and Then Pay the Price*, TAKEPART (June 9, 2016), http://www.takepart.com/article/2016/06/09/felony-fines-and-fees/ [https://perma.cc/UD25-XXK3].

227. *See* discussion *supra* Section II.B.

228. McCray, *supra* note 226.

229. Steven Shavell, *A Simple Model of Optimal Deterrence and Incapacitation*, 42 INT'L REV. L. & ECON. 13, 13 (2015).

230. *See* discussion *supra* Section II.B.

231. *See* discussion *supra* Section II.B.

But, pay-to-stay statutes allow the state—acting through county and local governments—to charge former inmates for the cost of one form of punishment, imprisonment, with another form of punishment, a fine.[232] The fact that these statutes allow for such pay-to-stay fines far in excess of what statutes provide for as punishment adds insult to the injury of incurring the charges in the first place. Beyond this, because the charges incurred are in excess of the fines provided for by statute, they also seem to run afoul of even the Third Circuit's holding in *Tillman*.[233]

Finally, it must not be overlooked that pay-to-stay statutes, like the criminal justice system generally, disproportionately affect those in society who can least afford it.[234] There are dozens of examples of lives that have been ruined by these fines, from lost opportunities to invest in their future[235] to plaguing calls from collections agencies, the consistent story of former inmates saddled with the debt is one of a punishment that goes on without foreseeable end.[236] Though their incarceration may be over, they continue to pay in ways beyond pecuniary loss.

Given the above considerations, the arguments in favor of pay-to-stay schemes simply do not hold water. Not only do these schemes haunt the lives of former inmates *ad infinitum*, they also mean the debts these people have paid to society through imprisonment and statutory fines are not enough. Therefore, these schemes can be viewed as nothing if not punitive,[237] and, in light of present case law and sound public policy, they must be radically reconsidered or ended out right in order to bring state law in line with the Constitution and fundamental morality.

IV. RECOMMENDATION

Each constitutional Amendment has a certain right or set of rights it seeks to protect against maladministration from the state. For example, the First Amendment protects the rights of citizens to communicate and associate with one another as they choose; the Third and Fourth Amendments protect the privacy of our homes from the intrusion of the military and other agents of the state;

232. *See* discussion *supra* Section II.B.

233. Tillman v. Leb. Cnty. Corr. Facility, 221 F.3d 410, 420 (3d Cir. 2000) (holding the court did not need to decide on the plaintiff's claim of an Excessive Fines Clause violation because "[t]he plaintiff's underlying offenses included a conviction for possession with intent to deliver . . . which allows for a fine not to exceed $100,000," which was far higher than the $4,000 Tillman incurred while incarcerated).

234. Eisen, *supra* note 3, at 8 ("Chasing down formerly incarcerated people, the majority of whom are poor, to collect these debts is often ineffective.").

235. ACLU, *supra* note 217, at 10 ("These fees have stopped Derrick from pursuing his dreams. He would like to start his own business but knows it is next to impossible to receive a loan with these fees on his credit report.").

236. *Id.* at 12 ("Collections phone calls are frequent and a 'harsh and degrading' reminder he says. 'It gives you a sense of hopelessness when someone's on the phone telling you you'll never get a house until you pay this. It made me feel like less of a man or person.'").

237. *Tillman*, 221 F.3d at 420; Austin v. United States, 509 U.S. 602, 610 (1993) ("We, however, must determine that [the forfeiture] can only be explained as serving in part to punish. We said in Halper that 'a civil sanction that cannot fairly be said solely to serve a remedial purpose . . . is punishment, as we have come to understand the term.'" (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).

and the Fifth and Sixth Amendments protect those accused of crimes from improper coercion during the process of criminal litigation.[238]

The Eighth Amendment, like the other amendments in the Bill of Rights, has its own niche: it is meant to protect the rights of citizens when they have been convicted.[239] For those citizens who find themselves incarcerated by the government or convicted of a crime against the state, this amendment provides protections that are simple but powerful.[240] Once a person is incarcerated, they must not be charged with "excessive bail," and they may not be subjected to "cruel and unusual punishments" or "excessive fines."[241]

Constitutional protection continues before and after a person has been adjudicated guilty in a court of law and forbids the exercise of improper government power; yet it still recognizes that state power can be used to rightly, justly, or usefully punish by using language like "unusual" and "excessive."[242] The language of the Eighth Amendment, like that of the entire Constitution, is a careful balancing act between placing limits and control on the power of the state to curtail the liberty of citizens and the need of the government to control in some way the actions of the few to the benefit of the many.

But the statutory schemes requiring inmates to pay for their own incarceration are not so carefully written and seem to be, as noted above, in violation of the Eighth Amendment as applied against them by the Court.[243] Because of this, all states that currently use a scheme to charge inmates for their own incarceration must reevaluate these statutes and either bring them into line with the Court's ruling in *Timbs* or do away with them all together if they are to stay in line with the current interpretation of the Constitution.[244]

There are three primary justifications for this assertion. First, the ruling in *Timbs* clearly incorporates the Eighth Amendment against the states and thus brings with it the weight of federal case law.[245] Chief among the cases that come with incorporation are *Bajakajian* and *Austin*, which consider how exactly courts should interpret the Amendment regarding issues of fines and forfeitures that may have mixed purposes.[246]

Second, the Supreme Court gave no sign in that opinion that they viewed their holding as a narrow one, rather, the Court founded its decision in over 800

238. *See* U.S. CONST. amends. I, III–VI.
239. U.S. CONST. amend. VIII.
240. *See id.*
241. *See id.*
242. *See id.*
243. Timbs v. Indiana, 139 S. Ct. 682, 691 (2019); *see* discussion *supra* Section III.D.
244. *See* discussion *supra* Section III.D.
245. *Timbs*, 139 S. Ct. at 687.
246. Austin v. United States, 509 U.S. 602, 610 (1993) ("We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish."); United States v. Bajakajian, 524 U.S. 321, 336–37 (1998) (holding that an asset forfeiture was unconstitutional where it was "grossly disproportional to the gravity of the defendant's offense").

years of Anglo-American rights theory and tradition underscoring the fundamental nature of the Excessive Fines Clause in our system of just punishment.[247] Because of this, even though that decision specifically regarded the *in rem* forfeiture of civil assets, it should be seen as applying to all forms of government fines and fees under the criminal law.[248]

Third, the statutory schemes for pay-to-stay imprisonment as they currently stand are in clear violation of both the principle of proportional justice and the test for "grossly disproportionate fines" iterated by the Court as evidenced by the statutory maximum fines in each state.[249] Furthermore, they are in violation of public policy.[250]

Finally, whatever argument may be made regarding the need for incarceration facilities to fund their operation or the rehabilitative nature of fines, there is sound policy research showing that charging inmates for their stay in prison by way of excessive pay-to-stay fees and fines does nothing of the kind.[251] Pay-to-stay schemes do not work to fill the coffers of county jailhouses, but they do serve to further "devastate [the] lives" of people who have already paid their debts to society through their incarceration.[252]

Taking all of this into consideration, this Note recommends that states must restructure or abolish the fines assessable against inmates in their penal institutions currently allowed under statute and should forgive debt which prisoners currently owe to states for stays in jail. In doing so, states will not only be able to stave off any future litigation that may follow from such charges but will also bring their statutes in line with clear morality as evidenced by the long tradition of prohibiting the charging of excessive fines.[253]

V. CONCLUSION

States must redesign their statutory schemes for jail reimbursement in order to bring those statutes in line with the Court's recent holding in *Timbs* and with the spirit of the Eighth Amendment expressed therein.[254] Although there may be some room for charges to inmates, carte blanche charges for simply existing within a prison cell as they currently stand are simply no longer an option for states given the incorporation of the Excessive Fines Clause and the Supreme Court jurisprudence that comes with it.

The *Timbs* decision unabashedly incorporated the Eighth Amendment's Excessive Fines Clause against states.[255] That decision also clearly laid out a broad historical framework for the purpose of that Amendment.[256] Beyond this,

247. *Timbs*, 139 S. Ct. at 686–87.
248. *See id.*
249. *See id.* at 688; Porter, *supra* note 20, at 433; discussion *supra* Section III.C.
250. *See* discussion *supra* Section III.D.2.
251. *Bajakajian*, 524 U.S. at 336–38; *see, e.g.*, ALA. APPLESEED, *supra* note 18, at 4.
252. ACLU, *supra* note 217, at 10 ("How Pay-to-Stay Fees Devastate Lives: Profiles.").
253. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019); Eisen, *supra* note 3, at 8.
254. *See Timbs*, 139 S. Ct. at 687.
255. *See id.*
256. *Id.* at 687–89.

the schemes clearly violate traditional notions of proportional justice dating back to the Magna Carta.[257] Furthermore, the espoused justifications for pay-to-stay schemes are dead on arrival given recent studies and surveys showing that the imposition of excessive fines leads not only to devastated lives, but to the commission of further crimes.[258]

Given all of this, states must now reassess and remedy their statutory schemes in order to avoid the litigation that may come if nothing is changed. These inmates have paid their debt to society and should not be forced to pay for the pleasure of having done so in a manner that negatively affects their own lives and the lives of their families long after they have stepped beyond the jailhouse door.

257. *Id.* at 687.

258. *Fines, Fees, and Financial Security in the US South*, ALA. APPLESEED CTR. FOR L. & JUST. (Jan. 15, 2020), https://www.alabamaappleseed.org/category/fines-and-fees/ [https://perma.cc/D6QQ-ZE8H] ("In Alabama, thousands are trying to balance the costs of fines and other expenses and needs. A survey by the Alabama Appleseed Center for Law and Justice found that for those with outstanding court debts . . . [a]lmost 40% committed a crime to pay off their debt."); ACLU, *supra* note 217, at 10.