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Kevin Bennardo

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# Restitution and the Excessive Fines Clause

Kevin Bennardo\*

## INTRODUCTION

Restitution is an important component of a criminal offender's sentence. Increasingly, it is imposed mandatorily and encompasses an ever-widening scope of payments.<sup>1</sup> Because courts commonly impose restitution regardless of the offender's ability to pay,<sup>2</sup> it is often the last part of an offender's sentence to be discharged. Yet the constitutional limits of a sentencing court's ability to impose a restitution order on a criminal defendant are murky. The seemingly straightforward question of whether the Excessive Fines Clause of the Eighth Amendment applies to restitution orders has not been answered, despite the fact that both have been around for well over 200 years.

This Article offers solutions to further the conversation regarding the Eighth Amendment's limits on restitution. The Excessive Fines Clause applies to payments that involve sufficient governmental involvement and are at least partially punitive.<sup>3</sup> Criminal restitution satisfies both components and therefore falls within the compass of the Clause. To test for constitutional excessiveness, the amount of the restitution order should be aggregated with other monetary payments that constitute the Eighth Amendment "fine." That cumulative fine should then be weighed against the gravity of the defendant's offense conduct for gross disproportionality. Restitution should not be subjected to a special causation-based excessiveness test because causation is predominantly relevant to the compensatory aspect of restitution, not to its punitive aspect.

Part I of this Article provides an overview of restitution systems and statutes in the United States. Part II provides an overview of the case law interpreting the Excessive Fines Clause of the Eighth Amendment. Part III discusses how the Excessive Fines Clause should be applied to restitution in criminal cases.

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\* Clinical Associate Professor of Law, University of North Carolina School of Law. Many thanks to the editors, participants, and audience members at the Louisiana Law Review and Pugh Institute's joint sentencing symposium for their perspectives.

1. See Cortney E. Lollar, *Punitive Compensation*, 51 TULSA L. REV. 99, 103–04 (2015).

2. See *infra* Part I.

3. See *infra* Part II.A, C.

## I. AN OVERVIEW OF CRIMINAL RESTITUTION

Criminal restitution systems take various forms in the United States. These systems have several defining characteristics: the types of offenses that authorize restitution, the persons who are eligible to receive restitution payments, the types of harms or losses that are recoverable in restitution, and whether an order of restitution is mandatory, discretionary, or subject to exceptions.

In the federal system, a court may order restitution for the violation of any offense.<sup>4</sup> The Mandatory Victim Restitution Act of 1996<sup>5</sup> (“MVRA”) requires mandatory restitution for a wide range of offenses. Examples include crimes of violence;<sup>6</sup> offenses against property; offenses relating to tampering with consumer products; and offenses relating to theft of medical products, as long as at least one identifiable victim has suffered a physical injury or pecuniary loss.<sup>7</sup> Other statutory provisions mandate restitution for specific offenses, including sexual abuse;<sup>8</sup> sexual exploitation and other abuse of children;<sup>9</sup> domestic violence and stalking;<sup>10</sup> telemarketing fraud;<sup>11</sup> peonage, slavery, and human trafficking;<sup>12</sup> and failure to pay child support obligations.<sup>13</sup>

Restitution is generally recoverable by the “victim” of an offense.<sup>14</sup> The MVRA defines a victim as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be

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4. 18 U.S.C. § 3663(a)(1)(A) (2012) (permitting restitution for all offenses under Title 18, violations of the Controlled Substances Act, and criminal violations of Title 49 relating to air piracy); *see also* 18 U.S.C. § 3556 (2012). Restitution may also be ordered as a condition of probation or supervised release. *See* 18 U.S.C. §§ 3563(b)(2), 3583(d)(3) (2012).

5. 18 U.S.C. § 3663A (2012).

6. A crime of violence is an offense that either “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or “is a felony that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16 (2012).

7. 18 U.S.C. § 3663A(c)(1) (2012).

8. 18 U.S.C. § 2248 (2012).

9. 18 U.S.C. § 2259 (2012).

10. 18 U.S.C. § 2264 (2012).

11. 18 U.S.C. § 2327 (2012).

12. 18 U.S.C. § 1593 (2012).

13. 18 U.S.C. § 228(d) (2012).

14. *See, e.g.*, 18 U.S.C. § 3663A(a)(1) (2012).

ordered.”<sup>15</sup> In the case of a scheme or conspiracy, a victim includes “any person directly harmed by the defendant’s criminal conduct in the course of the scheme [or] conspiracy.”<sup>16</sup> The court may appoint another individual to assume the victim’s rights if the victim is a minor or otherwise incompetent.<sup>17</sup> The victim need not be an individual, and the government may be eligible to recover restitution as the victim.<sup>18</sup> If the victim is deceased, restitution is payable to the victim’s estate.<sup>19</sup> The defendant can also agree to pay restitution to persons other than the statutory victim of the offense.<sup>20</sup>

To be recoverable, the loss must be the proximate result of the offense.<sup>21</sup> By the parties’ agreement, the court may order restitution to recompense losses caused by activity for which the defendant was not charged or convicted.<sup>22</sup> For property damage, restitution may take the form of returning the property or compensating the victim for the value of the property.<sup>23</sup> Restitution for bodily injury may include “the cost of necessary medical and related professional services and devices relating to physical,

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15. 18 U.S.C. § 3663A(a)(2) (2012).

16. *Id.*

17. *Id.* The defendant cannot be appointed as the representative of the victim. *Id.*

18. *See* United States v. Ekaheh, 383 F.3d 40, 43–44 (2d Cir. 2004) (affirming order of restitution to the United States Department of Agriculture); United States v. Lincoln, 277 F.3d 1112, 1114 (9th Cir. 2002) (affirming order of restitution to the United States Post Office); *see also* N.J. STAT. ANN. § 2C:43-3(h) (West 2016) (requiring restitution order “[i]n any case where the victim of the offense is any department or division of State government”); N.Y. PENAL LAW § 60.27(9) (McKinney 2016) (defining “victim” to include state law enforcement agencies when the offense is a felony involving the sale of a controlled substance). When multiple victims of an offense in Minnesota exist, non-governmental entities receive priority when ordering restitution. MINN. STAT. ANN. § 611A.045(1)(b) (West 2016).

19. 18 U.S.C. § 3663(a)(1)(A) (2012).

20. 18 U.S.C. § 3663A(a)(3) (2012); *see also* 18 U.S.C. § 3663(a)(1)(A) (2012).

21. *See* 18 U.S.C. §§ 2248(b)(3)(F), 2259(b)(3)(F), 2264(b)(3)(F), 2327(b)(3), 3663A(a)(2) (2012).

22. Under the MVRA, restitution can be mandated when the parties agree that the defendant’s commission of a listed offense gave rise to the plea agreement, even if the conviction is not for a listed offense. *See* 18 U.S.C. § 3663A(c)(2) (2012); *see also* NEB. REV. STAT. ANN. § 29-2280 (West 2016) (permitting an order for restitution of losses “sustained by the victim of an uncharged offense or an offense dismissed pursuant to plea negotiations” with consent of the parties).

23. *See* 18 U.S.C. §§ 3663(b)(1), 3663A(b)(1) (2012).

psychiatric, and psychological care,”<sup>24</sup> “the cost of necessary physical and occupational therapy and rehabilitation,”<sup>25</sup> and reimbursement for income lost because of the offense.<sup>26</sup> If the offense results in death, a restitution order may include “the cost of necessary funeral and related services.”<sup>27</sup> Regardless of the offense, restitution may include payments to offset other expenses or lost income incurred from participating in the investigation or prosecution of the offense.<sup>28</sup> Certain offenses also lead to the mandatory repayment of other expenses, such as attorney’s fees, temporary housing and child care expenses, and “any other losses suffered by the victim as a proximate result of the offense.”<sup>29</sup> When a restitution order is discretionary, the victim may consent to restitution paid in services instead of money, or paid to another person or organization.<sup>30</sup> When restitution is mandatory, however, whether the victim may decline to receive the payment is unclear.<sup>31</sup>

Some statutes identify circumstances in which the court should refrain from ordering restitution. The MVRA directs courts not to order restitution when “the number of identifiable victims is so large as to make restitution impracticable”<sup>32</sup> or when determining causation or the amount of the victim’s losses would so complicate the sentencing process “that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.”<sup>33</sup> Many states have quasi-mandatory restitution statutes that require the sentencing court to impose restitution unless the

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24. See 18 U.S.C. §§ 3663(b)(2)(A), 3663A(b)(2)(A) (2012).

25. See 18 U.S.C. §§ 3663(b)(2)(B), 3663A(b)(2)(B) (2012).

26. See 18 U.S.C. §§ 3663(b)(2)(C), 3663A(b)(2)(C) (2012).

27. See 18 U.S.C. §§ 3663(b)(3), 3663A(b)(3) (2012).

28. See 18 U.S.C. §§ 3663(b)(4), 3663A(b)(4) (2012).

29. See, e.g., 18 U.S.C. §§ 2248(b)(3), 2259(b)(3), 2264(b)(3) (2012).

30. 18 U.S.C. § 3663(b)(5) (2012).

31. Compare *United States v. Johnson*, 378 F.3d 230, 245 (2d Cir. 2004) (holding that the MVRA “requires restitution regardless of the consent of victims” and that the sentencing court can assign the victim’s interest in the restitution payment to the Crime Victims Fund), with *United States v. Speakman*, 594 F.3d 1165, 1175 (10th Cir. 2010) (holding that “courts are not required to order restitution if the victim declines the restitution without assigning her interest to the [Crime Victims] Fund”). Some state statutes that otherwise mandate restitution explicitly permit a court to decline to order restitution if the victim declines it. See ALASKA STAT. ANN. § 12.55.045(a) (West 2016).

32. 18 U.S.C. § 3663A(c)(3)(A) (2012).

33. 18 U.S.C. § 3663A(c)(3)(B) (2012).

court finds the existence of a circumstance enumerated in state law.<sup>34</sup> For example, in Maryland, a victim who suffered a loss as a result of an offense presumptively has the right to restitution, but the court may decline to order restitution if the offender does not have the ability to pay or if another extenuating circumstance would render restitution inappropriate.<sup>35</sup> In Maine, a court cannot order restitution to be paid to a victim who was an accomplice in the offense or who has been compensated from another source.<sup>36</sup> If a court declines to impose restitution, it is often required to detail its reasons on the record.<sup>37</sup>

Several other considerations guide courts in determining the amount of restitution paid, if any. Numerous statutes direct the court to consider the financial burden of a restitution order.<sup>38</sup> Some states authorize a court

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34. *See, e.g.*, FLA. STAT. ANN. § 775.089(1)(a) (West 2016) (requiring restitution unless the court finds clear and compelling reasons); IDAHO CODE ANN. § 19-5304(2) (West 2016) (requiring restitution unless the court finds it inappropriate or undesirable); KAN. STAT. ANN. § 21-6604(b)(1) (West 2016) (requiring restitution unless the court finds “compelling circumstances which would render a plan of restitution unworkable”); MASS. GEN. LAWS ANN. ch. 276, § 92A (West 2016) (permitting court to decline to impose restitution for motor vehicle theft “in extraordinary cases”); W. VA. CODE ANN. § 61-11A-4(a) (West 2016) (requiring restitution unless the court finds it “to be wholly or partially impractical”).

35. MD. CODE ANN. CRIM. PROC. §§ 11-603(b), 11-605(a) (West 2016).

36. ME. REV. STAT. ANN. tit. 17-A, § 1325(2) (2016). Because Maine recognizes that restitution is “ancillary to the central objectives of criminal law,” Maine authorizes restitution only “when other purposes of sentencing can be appropriately served.” ME. REV. STAT. ANN. tit. 17-A, § 1321 (2016).

37. *See* FLA. STAT. ANN. § 775.089(1)(b) (West 2016); IDAHO CODE ANN. § 19-5304(3) (West 2016); KAN. STAT. ANN. § 21-6604(b)(1) (West 2016); MD. CODE ANN. CRIM. PROC. § 11-605(b) (West 2016); MASS. GEN. LAWS ANN. ch. 276, § 92A (West 2016); ME. REV. STAT. ANN. tit. 17-A, § 1323(2) (2016); MISS. CODE ANN. § 99-37-3(4) (West 2016); UTAH CODE ANN. § 77-38a-302(3) (West 2016); W. VA. CODE ANN. § 61-11A-4(a) (West 2016); WYO. STAT. ANN. § 7-9-103(c) (West 2016).

38. *See* ME. REV. STAT. ANN. tit. 17-A, § 1325(2)(D) (2016) (prohibiting restitution when it would create “an excessive financial hardship on the offender or dependent of the offender”); MISS. CODE ANN. § 99-37-3(2) (West 2016); NEB. REV. STAT. ANN. § 29-2281 (West 2016); S.C. CODE ANN. § 17-25-322(B)(1) (2016); TENN. CODE ANN. § 40-35-304(d) (West 2016); UTAH CODE ANN. § 77-38a-302(5)(c)(ii) (West 2016); WIS. STAT. ANN. § 973.20(13)(a)(2) (West 2016); W. VA. CODE ANN. § 61-11A-5(a) (West 2016); WYO. STAT. ANN. § 7-9-102 (West 2016) (requiring restitution “unless the court specifically finds that the defendant has no ability to pay and that no reasonable probability exists that the defendant will have an ability to pay”).

to order community service or other work instead of restitution when the defendant is unable to pay.<sup>39</sup> Other states disallow the court from considering the defendant's ability to pay<sup>40</sup> or even from considering whether the victim has already received compensation from another source such as insurance.<sup>41</sup> Some offenses carry mandatory minimum restitution amounts, which are required to be paid upon conviction without the victim showing causation or loss.<sup>42</sup> Some statutes apply a multiplier for certain offenses that increases the restitution to several times the actual amount of the victim's losses.<sup>43</sup> For example, in Oklahoma, the general definition of restitution is a payment "to compensate the victim for up to three times the amount of the economic losses suffered as a direct result of the criminal act of the defendant."<sup>44</sup> In many ways, the payments that now fall under the umbrella of restitution

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39. See MONT. CODE ANN. § 46-18-241 (West 2016) (crediting community service against restitution at the rate of the state's minimum wage); N.D. CENT. CODE ANN. § 12.1-32-08(5) (West 2016) (permitting "assigned work" instead of restitution with the consent of the person entitled to receive the restitution); OKLA. STAT. ANN. tit. 22, § 991f(O) (West 2016) (crediting community service against restitution at a rate of five dollars per day); W. VA. CODE ANN. § 61-11A-4(b)(4) (West 2016) (offender may make restitution in services instead of money with consent of the victim or if payments are impossible or impractical).

40. See HAW. REV. STAT. ANN. § 706-646(3) (West 2016); IDAHO CODE ANN. § 19-5304(7) (West 2016); N.H. REV. STAT. ANN. § 651:63(I) (2016); OKLA. STAT. ANN. tit. 22, § 991f(C)(2)(b) (West 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 1106(c)(1)(i) (West 2016).

41. See, e.g., 18 U.S.C. § 2248(b)(4) (2012).

42. See ALA. CODE § 15-18-68(b) (2016) (requiring restitution of at least \$50,000 for a capital offense and \$10,000 for first-degree rape); IOWA CODE ANN. § 910.3B(1) (West 2016) (requiring restitution of at least \$50,000 for felony conviction that caused the death of another person); N.D. CENT. CODE ANN. § 12.1-32-16 (West 2016) (requiring restitution of at least \$250 when a person whose license has been suspended for non-payment of child support is convicted of engaging in activity for which the license was required); S.D. CODIFIED LAWS § 23A-28-13 (2016) (requiring restitution of at least \$50 and attorney's fees and costs for unlawfully taking money from a store or mercantile establishment).

43. N.Y. PENAL LAW § 60.27(12) (McKinney 2016) (allowing restitution to property owner up to three times the stumpage value of the stolen timber); 18 PA. STAT. AND CONS. STAT. ANN. § 1107 (West 2016) (mandatory restitution for theft of standing timber in an amount twice the value of the timber taken).

44. OKLA. STAT. ANN. tit. 22, § 991f(A)(1) (West 2016); see also WASH. REV. CODE ANN. § 9A.20.030(1) (West 2016) (capping restitution at double the amount of the defendant's gain or the victim's loss).

are much broader than the traditional repayment or disgorgement of ill-gotten gains.<sup>45</sup>

## II. AN OVERVIEW OF THE EXCESSIVE FINES CLAUSE

The Eighth Amendment instructs that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>46</sup> The Excessive Fines Clause has attracted decidedly less attention than the prohibition against cruel and unusual punishments. Although most excessive fines cases deal with traditional fines or forfeiture orders, challenges under the Clause to criminal restitution orders have increased. Lower courts, however, have not converged on a uniform treatment of restitution under the Excessive Fines Clause.<sup>47</sup> This Part begins with an overview of Supreme Court jurisprudence on the Excessive Fines Clause, then turns to a discussion of lower courts’ attempts to apply that jurisprudence to criminal restitution orders, and concludes by discussing recent dicta that may foreshadow how the Supreme Court would apply the Clause to restitution.

### *A. The Excessive Fines Clause at the Supreme Court*

The Supreme Court allowed the Excessive Fines Clause to speak for itself for approximately 200 years before deciding the case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* in 1989.<sup>48</sup> The *Browning-Ferris* Court held that punitive damage awards in civil litigation between private parties are not “fines” within the Excessive Fines Clause.<sup>49</sup> The Court noted that its Eighth Amendment jurisprudence had “long understood” the amendment “to apply primarily, and perhaps exclusively, to criminal prosecutions and punishment,”<sup>50</sup> but found it unnecessary to create a bright-line barrier restricting the Excessive Fines Clause only to criminal prosecutions.<sup>51</sup> Instead, the Court focused on the

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45. See *United States v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (labeling the MVRA as “[f]unctionally . . . a tort statute”); Lollar, *supra* note 1 (chronicling the transformation of restitution into “punitive compensation”); Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 101–05 (2014).

46. U.S. CONST. amend. VIII.

47. See *infra* Part II.B.

48. 492 U.S. 257, 262 (1989) (noting that “this Court has never considered an application of the Excessive Fines Clause”).

49. *Id.* at 268, 275.

50. *Id.* at 262.

51. *Id.* at 263.

identity of the payee in the *Browning-Ferris* dispute.<sup>52</sup> As a check on governmental abuse of its prosecutorial power, the Court found that the Excessive Fines Clause was directed at limiting “payment to a sovereign as a punishment for some offense,”<sup>53</sup> or at least was not implicated “when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”<sup>54</sup> Thus, the Clause did not encompass a punitive civil damage award payable to a private party.<sup>55</sup>

The Court revisited the Clause several years later in the twin cases of *Austin v. United States*<sup>56</sup> and *Alexander v. United States*<sup>57</sup> and determined that forfeitures fall within its scope. The distinction between the two cases is the nature of the forfeiture order: *Austin* dealt with an in rem forfeiture that was civil in nature, whereas *Alexander* dealt with an in personam forfeiture that was the product of a criminal judgment.<sup>58</sup> The Court held that the Excessive Fines Clause applies to both types of forfeitures.

In *Austin*, the petitioner, Richard Lyle Austin, pleaded guilty in South Dakota state court to one count of possessing cocaine with intent to distribute.<sup>59</sup> The federal government then filed a civil action in federal court seeking in rem forfeiture of Austin’s mobile home and auto body shop under a federal statute that provided for forfeiture of conveyances and real property used in connection with controlled substance offenses.<sup>60</sup> Austin argued that forfeiture of this property would violate the Excessive

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52. *Id.* at 268.

53. *Id.* at 265. Although the Court agreed that punitive damage awards “advance the interests of punishment and deterrence,” it focused on the lack of “a positive step to punish” by the government in the case before it. *Id.* at 275. Dissenting in part, Justices O’Connor and Stevens opined that punitive damages, which both punish and deter, were sufficiently criminal in nature to warrant the application of the Excessive Fines Clause. *Id.* at 287–99 (O’Connor, J., concurring in part and dissenting in part) (applying the factors developed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to determine that punitive damage awards are penal).

54. *Browning-Ferris*, 492 U.S. at 264.

55. The Court explicitly left open the question of whether the Excessive Fines Clause would apply to *qui tam* suits, in which a private party brings a civil suit in the name of the United States and shares in any award of damages. *Id.* at 275 n.21.

56. 509 U.S. 602 (1993).

57. 509 U.S. 544 (1993).

58. *Id.* at 558; *Austin*, 509 U.S. at 614–18.

59. *Austin*, 509 U.S. at 604.

60. *Id.* at 604–05, 605 n.1.

Fines Clause.<sup>61</sup> The district court ordered the property to be forfeited and the Eighth Circuit affirmed.<sup>62</sup>

The Supreme Court characterized *Browning-Ferris* as recognizing the following limitation: “[T]he Excessive Fines Clause does not limit the award of punitive damages to a private party in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages.”<sup>63</sup> Thus, although governmental involvement is necessary to trigger the Excessive Fines Clause, a criminal prosecution is not.<sup>64</sup> Aside from sufficient governmental involvement, the key determinant in whether the Excessive Fines Clause applies is whether the payment is “punishment,” not whether it is criminal.<sup>65</sup> Recognizing that sanctions often serve multiple purposes, the Court further stated that the Excessive Fines Clause applies if an ordered payment “can only be explained as serving *in part* to punish.”<sup>66</sup> A civil sanction that serves not only a remedial purpose, but also furthers deterrence or retribution, is punishment in part.<sup>67</sup>

The Court analyzed whether *in rem* forfeiture was understood at least in part as punishment when the Eighth Amendment was ratified and whether the applicable modern federal forfeiture statutes were similarly understood as at least partially punitive.<sup>68</sup> The Court answered both questions in the affirmative and thus found that the Excessive Fines Clause applied to the civil *in rem* forfeiture of Austin’s mobile home and auto body shop.<sup>69</sup> The Court ducked the question of what test to apply to measure whether the forfeiture was constitutionally excessive. Although determining the proper test to use is purely a legal question, the Court

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61. Austin dealt a total of two grams of cocaine during the deal for which he was convicted. *Id.* at 605.

62. See *United States v. One Parcel of Property*, 964 F.2d 814 (8th Cir. 1992).

63. *Austin*, 509 U.S. at 606.

64. *Id.* at 607.

65. *Id.* at 610 (“[T]he question is not, as the United States would have it, whether forfeiture under [the relevant statute] is civil or criminal, but rather whether it is punishment.”).

66. *Id.* (emphasis added).

67. *Id.* at 621 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989), *abrogated by Hudson v. United States*, 522 U.S. 93 (1997)).

68. *Austin*, 509 U.S. at 610–11.

69. *Id.* at 622 (finding that the forfeitures qualified as “payment to a sovereign as punishment for some offense”).

thought it best to “allow the lower courts to consider that question in the first instance.”<sup>70</sup>

In concurrence, Justice Scalia noted that the test for excessiveness should be different for in rem forfeitures than for fines.<sup>71</sup> Justice Scalia opined that the offense of conviction was irrelevant for in rem forfeitures because the relevant question is whether the property is “tainted” by unlawful use, not whether the forfeited property’s value is proportional to the offense of conviction.<sup>72</sup> Thus, “[s]cales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal.”<sup>73</sup> Therefore, according to Justice Scalia, the test for constitutionality would ask “not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.”<sup>74</sup>

The *Alexander* case, decided on the same day as *Austin*, was an appeal from an in personam forfeiture ordered as part of a criminal sentence.<sup>75</sup> The petitioner, Ferris J. Alexander, Sr., was convicted of 17 counts of obscenity and three racketeering offenses predicated on the obscenity convictions.<sup>76</sup> As part of his sentence, the district court ordered forfeiture of Alexander’s adult entertainment wholesale and retail businesses as well as nearly \$9 million acquired through racketeering.<sup>77</sup> The Eighth Circuit held that the forfeiture did not violate the Eighth Amendment.<sup>78</sup> The court did not review for excessiveness, however, because it found that the Eighth Amendment did not contain any proportionality principle for sentences less severe than life imprisonment without the possibility of parole.<sup>79</sup>

The Supreme Court held that the in personam forfeiture was “clearly” a monetary punishment akin to a traditional fine and therefore within the scope of the Excessive Fines Clause.<sup>80</sup> The Court again declined to specify

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70. *Id.* at 622–23.

71. *Id.* at 627 (Scalia, J., concurring).

72. *Id.*

73. *Id.*

74. *Id.* at 628.

75. *Alexander v. United States*, 509 U.S. 544, 558 (1993).

76. *Id.* at 547.

77. *Id.* at 548. The court also sentenced Alexander to six years in prison and fined him \$100,000. *Id.*

78. *Id.* at 549.

79. *Alexander v. Thornburgh*, 943 F.2d 825, 836 (8th Cir. 1991).

80. *Alexander*, 509 U.S. at 558–59.

the appropriate test to measure for excessiveness and instead remanded the matter back to the court of appeals.<sup>81</sup>

In *United States v. Bajakajian*, the Court finally provided guidance on how to measure excessiveness under the Excessive Fines Clause.<sup>82</sup> The respondent, Hosep Bajakajian, pleaded guilty to one count of willfully failing to report that he was transporting more than \$10,000 out of the country.<sup>83</sup> Customs inspectors caught Bajakajian attempting to board an international flight with \$357,144 on his person and in his checked baggage.<sup>84</sup> Although the district court found that the currency was not otherwise connected to unlawful activity, the entire amount was statutorily forfeitable because it was connected to the offense of failing to report.<sup>85</sup> The court found that forfeiture of the full amount would be grossly disproportionate to the offense conduct and instead ordered Bajakajian to forfeit \$15,000 in addition to a fine of \$5,000 and a probationary sentence of three years.<sup>86</sup>

In reviewing the forfeiture order, the Ninth Circuit applied a forfeiture-specific test for excessiveness. This test asked whether the forfeited property was an instrumentality of the offense and whether the forfeited property's value was proportional to the owner's culpability.<sup>87</sup> The court found that the currency was not an instrumentality of the offense and therefore was not forfeitable.<sup>88</sup> The Ninth Circuit found that the offense of failing to report currency was directed at the withholding of information, not the transportation of money.<sup>89</sup> Because Bajakajian did not challenge the forfeiture through a cross-appeal, however, the court lacked jurisdiction to set aside the \$15,000 forfeiture order.<sup>90</sup>

Reviewing its thin Excessive Fines jurisprudence, the Supreme Court noted that it had "never actually applied" the Clause.<sup>91</sup> Citing *Browning-Ferris* and *Austin*, the Court stated that the Clause limits the government's power to extract payments as punishment and found that forfeiture fell

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81. *Id.* at 559.

82. 524 U.S. 321 (1998).

83. *Id.* at 325.

84. *Id.* at 324–25.

85. *Id.* at 325–26.

86. *Id.* at 326.

87. *See United States v. Bajakajian*, 84 F.3d 334, 336 (9th Cir. 1996).

88. *Id.* at 337–38.

89. *Id.* at 337.

90. *Id.* at 338.

91. *Bajakajian*, 524 U.S. at 327.

within the Clause's scope.<sup>92</sup> The Court rejected the government's argument that the currency forfeiture was remedial and noted that even if the forfeiture was remedial, it would still be punitive in part and thus within the Clause's purview.<sup>93</sup>

The Court then addressed how to measure excessiveness. Stating that the principle of proportionality is the "touchstone" of the constitutional inquiry, the Court held that a forfeiture order violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense."<sup>94</sup> Lacking guidance from the text or history of the Clause, the Court viewed that the legislature deserves deference regarding appropriate punishment and that judicial measurement of the gravity of an offense is "inherently imprecise."<sup>95</sup>

Applying the test, the Court found that a forfeiture of \$357,144 would be grossly disproportional to Bajakajian's offense.<sup>96</sup> In making this determination, the Court seemed to base its decision on its intuitive judgment. The Court limited its analysis to the offense conduct and did not consider the defendant's wealth as a factor, noting that the defendant's ability to pay had not been argued below or found by the lower courts.<sup>97</sup> The Court noted that the harm caused by Bajakajian's conduct was relatively minor and that the amount of currency unreported is not inherently proportional to the harm caused by the failure to report it.<sup>98</sup> The Court mentioned that Bajakajian was "not a money launderer, a drug trafficker, or a tax evader" and did not "fit into the class of persons for whom the statute was principally designed."<sup>99</sup> This finding supported the Court's determination that forfeiture of the entire amount would be constitutionally excessive in relation to the offense's gravity and would bear "no articulable correlation to any injury suffered by the Government" because of Bajakajian's failure to report the currency.<sup>100</sup>

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92. *Id.* at 327–28.

93. *Id.* at 329 & n.4.

94. *Id.* at 334.

95. *Id.* at 336.

96. *Id.* at 337.

97. *Id.* at 340 n.15.

98. *Id.* at 339.

99. *Id.* at 338.

100. *Id.* at 339–40.

*B. Restitution and the Excessive Fines Clause in the Lower Courts*

The Supreme Court's interpretation of the Excessive Fines Clause as a limit on "the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense'"<sup>101</sup> has created disagreement among the lower courts regarding whether restitution falls within the compass of the Eighth Amendment. Under this test, the salient questions are whether a restitution order involves sufficient governmental conduct and whether a restitution order is punishment.

Many lower courts have found that restitution falls outside the bounds of the Excessive Fines Clause. For example, some courts have found that restitution is not part of an Eighth Amendment "fine" because it is paid to a private victim rather than to the sovereign.<sup>102</sup> Other courts have held that restitution is purely remedial or compensatory in nature and therefore is not "punishment" implicating the Eighth Amendment.<sup>103</sup> Some courts have reached the opposite conclusions, finding that the Excessive Fines Clause does apply to restitution orders because the prosecution of the offense constitutes sufficient governmental involvement<sup>104</sup> and the

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101. *Bajakajian*, 524 U.S. at 328 (quoting *Austin v. United States*, 509 U.S. 602, 609–10 (1993)).

102. *See, e.g., Benton v. State*, 711 A.2d 796, 799 (Del. 1998) (finding that restitution order was not "to be paid for the benefit of a sovereign" and thus not a fine); *State v. DeAngelis*, 747 A.2d 289, 296 (N.J. Super. Ct. App. Div. 2000) ("Restitution is paid to the victim, not the State.").

103. *See, e.g., State v. Cottrell*, 271 P.3d 1243, 1253–54 (Idaho Ct. App. 2012) (finding that restitution in Idaho, which is imposed separately from the sentence, is compensatory in nature and not subject to the Excessive Fines Clause); *Benton*, 711 A.2d at 799 (holding that a restitution order was not a fine because its purpose "was remedial and compensatory," not to "vindicate public justice"); *People v. Stafford*, 93 P.3d 572, 574 (Colo. App. 2004) (finding that "for purposes of Eighth Amendment analysis, restitution is not the equivalent of a fine" because "[a] fine is solely a monetary penalty, while restitution serves to make the victim whole"); *DeAngelis*, 747 A.2d at 296 ("[R]estitution is not meant to punish, but rather to rehabilitate the criminal."); *United States v. Marron*, Nos. CRIM.A. 93-90, CIV.A. 95-2231, 1996 WL 677511, at \*7 (E.D. Pa. Nov. 22, 1996) ("[A]n order to pay restitution is not punishment; rather, restitution is ordered in order to put the victim in the position she would have been in had the violation not occurred.").

104. *See Montana v. Good*, 100 P.3d 644, 649 (Mont. 2004) (finding that restitution ordered as part of a criminal judgment is within the purview of the Excessive Fines Clause); *see also United States v. Dubose*, 146 F.3d 1141, 1144–46 (9th Cir. 1998) (ruling on the merits of the claim that restitution order violated

purpose of the restitution order is at least partially punitive.<sup>105</sup> In short, no unified approach has emerged from the lower courts regarding restitution and the Excessive Fines Clause in the years since *Bajakajian*.<sup>106</sup>

### C. *The Paroline Dicta*

In April 2014, the Supreme Court decided *Paroline v. United States*<sup>107</sup> and resolved a divisive issue regarding federal restitution to victims of child pornography offenses.<sup>108</sup> Although the Court's task was to identify what, if any, causal relationship between the defendant's conduct and the victim's harm must be established to warrant restitution under the federal Mandatory Restitution for Sexual Exploitation of Children Act, the opinion contains relevant dicta on restitution and the Excessive Fines

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the Excessive Fines Clause without addressing issue of sufficient governmental involvement).

105. See, e.g., *Dubose*, 146 F.3d at 1144 (finding that restitution orders under the federal Mandatory Victims Restitution Act are "punishment because the MVRA has not only remedial, but also deterrent, rehabilitative, and retributive purposes"); *Good*, 100 P.3d at 649 (finding that restitution is an "aspect of" an offender's punishment and therefore punitive in part); see also *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000) (finding that payments into Washington's Crime Victim's Compensation Fund were punitive and subject to Eighth Amendment scrutiny); *United States v. Siegel*, 153 F.3d 1256, 1259–60 (11th Cir. 1998) (finding that restitution under the federal Mandatory Victims Restitution Act is a criminal penalty for purposes of ex post facto clause analysis); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997) (same).

106. The lower courts' treatment of the Excessive Fines Clause following *Bajakajian* has been described as "disorder" and "a quagmire." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 295 & n.92 (2014).

107. 134 S. Ct. 1710 (2014).

108. In the years leading up to the Supreme Court's decision in *Paroline*, the issue of the appropriate amount of restitution for possessors of child pornography spawned a small canon of literature. See, e.g., Paul G. Cassell, James R. Marsh & Jeremy M. Christiansen, *The Case for Full Restitution for Child Pornography Victims*, 82 GEO. WASH. L. REV. 61 (2013); Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. CRIM. L. & CRIMINOLOGY 343 (2013); Jennifer A.L. Sheldon-Sherman, *Rethinking Restitution in Cases of Child Pornography Possession*, 17 LEWIS & CLARK L. REV. 215 (2013); Jonathan R. Hornok, Note, *A Right to Contribution and Federal Restitution Orders*, 2013 UTAH L. REV. 661; Melanie Reid & Curtis L. Collier, *When Does Restitution Become Retribution?*, 64 OKLA. L. REV. 653 (2012); Dennis F. DiBari, Note, *Restoring Restitution: The Role of Proximate Causation in Child Pornography Cases Where Restitution is Sought*, 33 CARDOZO L. REV. 297 (2011).

Clause.<sup>109</sup> The issue arose when an individual portrayed in images of child pornography sought a restitution award of nearly \$3.4 million from an offender convicted of possessing the pornographic material.<sup>110</sup> The district court denied the restitution request and found that the defendant, who played no role in producing the pornography and had never met the victim, did not proximately cause the victim's harm.<sup>111</sup> Acting en banc, the Fifth Circuit disagreed and held that, under the federal statute, the defendant had to pay restitution for the full amount of the victim's losses without any showing of proximate causation.<sup>112</sup> The Fifth Circuit dispatched concerns from both the government and the defendant that a restitution order without proximate causation would violate the Excessive Fines Clause. Reasoning that the purpose of restitution "is remedial, not punitive," the court held that the Excessive Fines Clause was not implicated.<sup>113</sup>

Despite the Supreme Court's review being limited to the issue of whether the statute required proximate causation,<sup>114</sup> the Court's opinion in *Paroline* contains meaningful dicta regarding the Excessive Fines Clause. The Court rejected the victim's requested approach, which would hold each possessor of child pornography responsible for restitution for all the harms associated with the creation and circulation of the images.<sup>115</sup> The Court stated that this approach is "so severe it might raise questions under

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109. *Paroline*, 134 S. Ct. at 1725–26.

110. *Id.* at 1718.

111. *See* United States v. Paroline, 672 F. Supp. 2d 781, 791–93 (E.D. Tex. 2009).

112. *See* In re Amy Unknown, 701 F.3d 749, 772–73 (5th Cir. 2012).

113. *Id.* at 771.

114. *Paroline v. United States*, 133 S. Ct. 2886 (2013) (granting certiorari and limiting the question presented).

115. The Court adopted an approach "[i]n this special context" of harms caused by the continued circulation of images of child pornography "where it is impossible to trace a particular amount of those losses to the individual defendant" in which a court "should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." *Paroline*, 134 S. Ct. at 1726. This approach has been widely criticized as essentially unworkable by sentencing courts. *See, e.g.*, United States v. Baslan, No 13 CR 220(RJD), 2015 WL 1258158, at \*4 (E.D.N.Y. Mar. 17, 2015) ("District courts have proven quite frustrated by the restitution assessment instructions laid out in *Paroline*." (collecting cases)); Paul G. Cassell & James R. Marsh, *Full Restitution for Child Pornography Victims: The Supreme Court's Paroline Decision and the Need for a Congressional Response*, 13 OHIO ST. J. CRIM. L. 5, 5 (2015) ("Exactly what [the *Paroline*] holding means is not immediately clear, and lower courts are currently struggling to interpret it.").

the Excessive Fines Clause of the Eighth Amendment.”<sup>116</sup> The Court noted that although criminal restitution is not payable to the government, it nevertheless implicates the government’s prosecutorial powers, and thus appears to fall within the scope of the Excessive Fines Clause.<sup>117</sup> The Court also noted that restitution serves punitive purposes even though its “primary goal” is remedial or compensatory.<sup>118</sup> Citing *Bajakajian*, the Court stated that the partially punitive purpose of restitution “may” be sufficient to render it subject to the Excessive Fines Clause.<sup>119</sup>

### III. APPLYING THE EXCESSIVE FINES CLAUSE TO RESTITUTION

The *Paroline* dicta strongly suggests that restitution ordered after a criminal conviction is within the scope of the Excessive Fines Clause. This result is sensible. Although restitution is paid to the victim, the restitution order results from the government’s power to criminally prosecute. As a check against abuse of governmental power, the Excessive Fines Clause limits the government’s ability to extract restitution payments from criminal defendants.<sup>120</sup> And, as the *Paroline* Court rightly noted, restitution orders serve punitive as well as compensatory purposes.<sup>121</sup> Restitution orders not only deter offense conduct, but also are a component of an offender’s punishment and may further rehabilitation.<sup>122</sup> Indeed, many

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116. *Paroline*, 134 S. Ct. at 1726.

117. *Id.*

118. *Id.*

119. *Id.*

120. Aside from the *Paroline* dicta, the historical record raises questions about the accurateness of restricting the application of the Excessive Fines Clause to payments to the government. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 299 (1989) (O’Connor, J., concurring in part and dissenting in part) (opining that “the identity of the recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty”); Colgan, *supra* note 106, at 300–10 (surveying the historical record and finding that “[t]he actual practice in the colonies and early American states belies the Court’s restriction of fines to sanctions payable to the sovereign”).

121. *Paroline*, 134 S. Ct. at 1726; *cf.* Colgan, *supra* note 106, at 310–19 (drawing from historical records to question whether a punitive purpose is a proper component of the Excessive Fines Clause analysis).

122. See *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1986) (“Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused.”) (cited by *Paroline*, 134 S. Ct. at 1727); see also N.H. REV. STAT. ANN. § 651:61-a(I) (2016) (noting that restitution to the victim “can operate to rehabilitate the offender”); Note, *Victim*

restitution statutes require the court to consider whether an order will further these punitive goals.<sup>123</sup> Under the Supreme Court's interpretation of the Eighth Amendment to date, the partially punitive nature of restitution and the government's role in its imposition are sufficient to implicate the Excessive Fines Clause.<sup>124</sup>

### A. Identifying the Test

If restitution orders are subject to the Excessive Fines Clause, the next major determination to tackle is identifying what test applies to measure their constitutionality. One option is to apply the same "gross disproportionality" test that was applied in *Bajakajian* in the context of a criminal forfeiture.<sup>125</sup> Another option is to craft a new test specific to restitution.

Fines, forfeitures, and restitution orders are similar in that they all deal in money or assets. They are all also criminal punishments, at least in part.

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*Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931, 937–41 (1984) [hereinafter *Victim Restitution*] (explaining restitution's ability to achieve deterrent, rehabilitative, and retributivist objectives); see also Lollar, *supra* note 45, at 117 (noting that "the lack of concrete or consistent methodology for calculating restitution" under the current statutory schemes creates an opening "for moral condemnation to slip in to criminal restitution decisions").

123. See N.H. REV. STAT. ANN. § 651:61-a(I) (2016) (finding in statement of purpose "that repayment, in whole or in part, by the offender to the victim can operate to rehabilitate the offender"); MISS. CODE ANN. § 99-37-3(2)(c) (West 2016) (requiring the court to taken into account "[t]he rehabilitative effect on the defendant of the payment of restitution and the method of payment"); N.D. CENT. CODE ANN. § 12.1-32-08(1)(c) (West 2016) (requiring courts to consider "[t]he likelihood that attaching a condition relating to restitution or reparation will serve a valid rehabilitational purpose in the case of the particular offender considered"); S.C. CODE ANN. § 17-25-322(B)(3) (2016) (permitting courts to consider "the anticipated rehabilitative effect on the defendant regarding the manner of restitution or the method of payment"); see also TENN. CODE ANN. § 39-11-118(a) (West 2016) (clearly stating that restitution "is a part of the punishment for any offense committed in this state"); *Victim Restitution*, *supra* note 122, at 939 n.64 (collecting statutes).

124. See Lollar, *supra* note 45, at 149 (urging the Supreme Court to "take the next step and recognize the constitutional protections that must adhere to criminal restitution [in] light of its punitive character."); see also *id.* at 154 (noting that "*Paroline* has given even greater weight to the argument that criminal restitution, in its current form, needs the protections offered by the Eighth Amendment's Excessive Fines Clause").

125. See *supra* Part II.A.

Beyond those similarities, however, the three sanctions are implemented very differently. Like a sentence of imprisonment, a sentencing court usually selects an appropriate criminal fine from the legislatively authorized range associated with the offense of conviction.<sup>126</sup> Within that range, the imposition of a fine is largely a matter of judicial discretion.<sup>127</sup>

Sentencing courts are often granted much less discretion when it comes to asset forfeiture and restitution. In forfeiture, the key inquiry is whether the asset is contraband or the instrumentality or proceeds of a criminal offense.<sup>128</sup> If the asset falls within one of those categories, then the asset is forfeitable.<sup>129</sup> In restitution, the key inquiry is whether the victim's harm was a proximate result of the offense of conviction.<sup>130</sup> If it was, the offender is usually ordered to compensate the victim for the full extent of the harm.<sup>131</sup> These key inquiries are both binary—yes or no—and are based on the facts of the case rather than the judgment of the sentencing court. These decisions differ significantly from the selection of the amount of a criminal fine, which is largely dependent on the sentencing court's evaluation of just punishment for the offense of conviction.<sup>132</sup>

This distinction does not appear to be meaningful for the Excessive Fines Clause. In the forfeiture context, the Supreme Court did not adopt an excessive fines test that depends upon the asset's relationship to the offense conduct.<sup>133</sup> It declined to adopt Justice Scalia's "scales of gold" test from his concurrence in *Austin*.<sup>134</sup> The Court refused to ignore "how

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126. See, e.g., 18 U.S.C. § 3571(b) (2012) (setting forth fine ranges for federal offenses).

127. See 18 U.S.C. § 3571(a) (2012) (making the imposition of a fine permissive rather than mandatory); see also *S. Union Co. v. United States*, 132 S. Ct. 2344, 2353 (2012) (noting a sentencing court's authority to impose judgment within the statutory range of permissible punishments). Note, however, that a sentencing court lacks the authority to find facts that would increase the maximum fine applicable to the defendant. See *S. Union Co.*, 132 S. Ct. at 2354–57 (applying the rule from *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to criminal fines).

128. See, e.g., 18 U.S.C. §§ 981, 982 (2012); 21 U.S.C. §§ 853(a), 881(a) (2012).

129. See, e.g., 18 U.S.C. § 982(a) (2012); 21 U.S.C. § 853(a) (2012) (using the mandatory word "shall" with regard to criminal forfeitures).

130. See *supra* Part I.

131. See *supra* Part I.

132. See 18 U.S.C. § 3553(a) (2012) (setting forth the factors sentencing courts consider in imposing a sentence).

133. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

134. See *United States v. Austin*, 509 U.S. 602, 627 (1993) (Scalia, J., concurring), discussed *supra* Part II.A.

*much*” the confiscated property was worth.<sup>135</sup> Rather, the Court adopted a “gross disproportionality” test that weighs the value of the monetary penalty against the gravity of the offense conduct.<sup>136</sup> In *Bajakajian*, the binary inquiry of whether the asset had a sufficiently close relationship to the offense conduct was not part of the constitutional analysis.<sup>137</sup> The concept of excessiveness is inherently quantitative; proportionality is key to the analysis.<sup>138</sup>

The same treatment should apply to restitution orders. Restitution’s causal question—whether the victim’s harm resulted from the offense—is statutory, just like forfeiture’s binary question—whether the asset had a sufficient nexus to the offense—is also statutory. The relevant *constitutional* inquiry, however, is always quantitative under the Excessive Fines Clause: whether the amount of the constitutional “fine” is excessive.<sup>139</sup>

Some lower courts have unfortunately handled Eighth Amendment challenges to restitution orders by effectively merging the constitutional inquiry of excessiveness with the statutory element of causation. These decisions hold that “where the restitution order reflects the amount of the victim’s losses no constitutional violation has occurred.”<sup>140</sup> According to

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135. *Id.* at 628.

136. *See Bajakajian*, 524 U.S. at 334.

137. *Id.* at 334–44.

138. The Supreme Court has employed a similar “gross disproportionality” test to some sentences of imprisonment under the Eighth Amendment’s prohibition against “cruel and unusual punishments.” *See Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (“The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”); *see also* Michael J. Zydney Mannheim, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 81–85 (2012) (overviewing the Supreme Court’s opinions regarding the role of gross disproportionality in assessing whether a term of incarceration constitutes cruel and unusual punishment). Using the same test to measure the constitutionality of punishment under both clauses raises the problem of redundancy. If a punishment that is grossly disproportional to the gravity of an offense is cruel and unusual, then the excessive fines clause is essentially redundant because all excessive fines would also be cruel and unusual. A flaw lies either in the drafting of the Eighth Amendment or its interpretation.

139. *See* U.S. CONST. amend. VIII; *Bajakajian*, 524 U.S. at 334.

140. *United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011); *see also* *United States v. Arledge*, 553 F.3d 881, 899 (5th Cir. 2008) (“[S]o long as the government proved that the victim suffered the actual loss that the defendant has been ordered to pay, the restitution is proportional.”); *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) (“[I]n the restitution context, because the full amount of

the First Circuit, “[t]his is not surprising, as restitution is inherently proportional, insofar as the point of restitution is to restore the victim to the status *quo ante*.”<sup>141</sup> One federal district court even stated that “[b]y choosing his target [in the case of arson], the defendant is the one who essentially determines his restitution obligation.”<sup>142</sup> Although this approach does not render causation a constitutional requirement, it does render causation constitutionally sufficient. This analysis compares the size of the “fine” to the amount of the victim’s loss. In doing so, it skews the analysis away from excessiveness to causality and focuses on the wrong type of proportionality. Rather than comparing the restitution order to the gravity of the offense conduct, it compares the restitution order to the extent of the victim’s loss.

This approach overlooks the key component of the Excessive Fines Clause—proportionality with the gravity of the offense conduct<sup>143</sup>—and instead creates a self-fulfilling feedback loop between the statutory authorization for restitution and the constitutional inquiry. As long as the sanction is at least partially punitive, the excessiveness inquiry is unconcerned with why the money was ordered to be paid. Only the amount matters. The causation requirement built into restitution statutes is a reflection of the compensatory or remedial aspect of restitution, whereas the Excessive Fines Clause focuses on the punitive aspect of monetary

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restitution is inherently linked to the culpability of the offender, restitution orders that require full compensation in the amount of the loss are not excessive.”); *United States v. Lessner*, 498 F.3d 185, 205 (3d Cir. 2007); *United State v. Dighlawi*, 452 Fed. App’x 758, 760 (9th Cir. 2011) (finding that restitution order was proportional in Eighth Amendment analysis because it “was directly based upon the losses the victims suffered as a result of the criminal conspiracy that would not have been successfully accomplished without [the defendant’s] participation”); *Benton v. State*, 711 A.2d 792, 799 (Del. 1997) (finding that because a restitution order “was based directly on the actual losses” that it was therefore proportionate to the defendant’s conduct).

141. *Newell*, 658 F.3d at 35.

142. *United States v. Dean*, 949 F. Supp. 782, 786 (D. Or. 1996) (imposing restitution obligation of \$121,403 for losses caused by defendant’s arson). The court further explained that “[w]here the amount of restitution is geared directly to the amount of the victim’s loss caused by the defendant’s illegal activity, proportionality is already built into the order.” *Id.*

143. See *Bajakajian*, 524 U.S. at 334 (“The 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.”).

sanctions. Constitutional excessiveness is concerned with monetary quantity weighed against culpability, not against causation.<sup>144</sup>

Proportionality with the victim's losses is a remedial or compensatory aspect of restitution, not a punitive one. As in tort law, this type of proportionality ensures that the victim is not overcompensated nor the offender overcharged. Non-punitive aspects of restitution have no place in the constitutional inquiry. Rather, the governing inquiry is the punitive question: whether the payment is proportionate to the gravity of the offense. In many cases, the two questions will overlap because the gravity of the offense is not wholly divorced from the injuries proximately caused by the offense. Keeping the statutory and constitutional inquiries conceptually distinct, however, is important.<sup>145</sup>

### *B. Establishing the "Fine"*

When applying the gross disproportionality test, the court must first establish the amount of the constitutional "fine." The term "constitutional fine" is used here as a distinct entity from the fine portion of a criminal sentence, which is referred to as a "criminal fine." To properly calculate the constitutional "fine," the court should engage in "fine pooling"—aggregating all monetary sanctions that compose the constitutional "fine" under the Eighth Amendment. These sanctions often include a criminal fine, an asset forfeiture order, and an order of restitution.<sup>146</sup> It is nonsensical for a court to separately analyze in the same prosecution whether a forfeiture order violates the Excessive Fines Clause and whether

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144. *See id.*

145. Hypotheticals can be conjured involving minor offense conduct that is the proximate result of large economic losses or harms. One example is making a right turn on red and consequently running over the Mona Lisa. Improperly disposing of an unextinguished cigarette butt and unintentionally starting a forest fire is another.

146. The Excessive Fines Clause "fine" may also include other monetary consequences of conviction. *See Wright v. Riveland*, 219 F.3d 905 (9th Cir. 2000) (finding that a Washington statute imposing a 5% deduction from all funds that inmates receive from outside sources as a contribution to a victim compensation fund was subject to Excessive Fines Clause); *see also Colgan*, *supra* note 106, at 286–88 (describing types of fees and costs); *cf. United States v. Brown*, 423 F. App'x 264, 267–68 (4th Cir. 2011) (expressing doubt that federal special assessment of \$100 per felony conviction implicates the Excessive Fines Clause and finding that, regardless, it would not be excessive).

a restitution order violates the Excessive Fines Clause.<sup>147</sup> To analyze excessiveness, all economic sanctions must be aggregated together because they collectively constitute the “fine” under the Eighth Amendment.

### C. *Weighing the Fine Against the Gravity of the Offense*

The Supreme Court purposefully padded the gross disproportionality standard, leaving room for judicial discretion.<sup>148</sup> According to the Court, two principles support the gross disproportionality standard rather than a standard of strict proportionality: first, “judgments about the appropriate punishment for an offense belong in the first instance to the legislature,” and second, “any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.”<sup>149</sup>

One set of guideposts that courts traditionally use to measure the gravity of an offense are the statutory penalties, usually the maximum term of incarceration or the maximum fine. Indeed, the Supreme Court stated that “[i]n considering an offense’s gravity, the other penalties that the Legislature has authorized are certainly relevant evidence.”<sup>150</sup> Unfortunately, some courts read this statement too expansively and find that any monetary fine within the statutory limits is inherently non-excessive and constitutional.<sup>151</sup> The Seventh Circuit has summarized this approach: “[W]e can’t say the fine is grossly disproportionate to the gravity of the offense when Congress has made a judgment about the appropriate punishment.”<sup>152</sup>

As with the error of engrafting the statutory causation standard into the constitutional test,<sup>153</sup> the approach of total deference to the legislature in defining appropriate punishment improperly collapses the constitutional inquiry into a statutory one. A fine is not inherently non-excessive simply

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147. See, e.g., *United States v. Bollin*, 264 F.3d 391, 417–19 (4th Cir. 2001) (separately analyzing a \$1.2 million forfeiture order and a \$783,545 restitution order for constitutional excessiveness).

148. *Bajakajian*, 524 U.S. at 336–37.

149. *Id.* at 336.

150. *Id.* at 336 n.14.

151. Federal appellate courts have rejected all Excessive Fines Clause challenges when the fine imposed fell within statutory boundaries. Colleen P. Murphy, *Reviewing Congressionally Created Remedies for Excessiveness*, 73 OHIO ST. L.J. 651, 701 (2012).

152. *Kelly v. U.S. EPA*, 203 F.3d 519, 524 (7th Cir. 2000); see also Murphy, *supra* note 151, at 698–99 & n.262 (2012) (listing cases).

153. See *supra* Part III.A.

because the legislature has authorized it as punishment for the convicted offense, and total deference to the legislature is generally inappropriate.<sup>154</sup> Although elected through a democratic system, the legislature is an arm of the government. As a check on governmental power, the Eighth Amendment places limits on the legislature's ability to punish excessively. Indeed, the Supreme Court did not resolve *Bajakajian* on the ground of whether the legislature authorized the forfeiture—that is, whether the \$357,144 was an instrumentality of the offense of failing to report taking it out of the country.<sup>155</sup> Rather, the Court offered its independent judgment about whether forfeiture of the full amount would be grossly disproportionate to the gravity of the offense.<sup>156</sup>

Moreover, statutory categories of offenses are broad, and the harshest authorized punishment for an offense may be excessive when applied to an offender who commits the offense's least severe version.<sup>157</sup> The sentencing guidelines of many jurisdictions would provide a more nuanced guidepost for determining the seriousness of offense conduct. For example, in the federal system the United States Sentencing Commission Guidelines Manual provides an advisory punishment range based on the intersection of the seriousness of an offender's offense conduct, the "offense level," and past criminal convictions, the "criminal history category."<sup>158</sup> Offense levels are graded on a scale of one to 43.<sup>159</sup> Each offense is assigned a "base offense level."<sup>160</sup> The base offense level may then be increased or, less commonly, reduced based on specific offense characteristics or other adjustments to arrive at the total offense level.<sup>161</sup> A defendant's total offense level provides a more refined window into the seriousness of a specific defendant's offense conduct

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154. See Colgan, *supra* note 106, at 347 (noting an "overreliance on legislative enactments" in measuring for excessiveness).

155. *Bajakajian*, 524 U.S. at 337–40.

156. *Id.*

157. For example, a person who willfully violates securities law may be fined up to \$5,000,000. 15 U.S.C. § 78ff(a) (2012). For an organizational defendant, the fine may be up to \$25,000,000. *Id.* Such a maximum fine may be excessive when imposed for the least serious versions of these offenses.

158. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, cmt. n.1 (U.S. SENTENCING COMM'N 2015).

159. *Id.*

160. *Id.* ch. 2, introductory cmt.

161. *Id.* For example, the offense of kidnapping carries a base offense level of 32 and additional offense levels may be warranted depending upon the extent of the victim's injuries, whether ransom was demanded from the government, the length of the kidnapping, and other factors. *Id.* § 2A4.1.

than a broad and generic statutory range does.<sup>162</sup> The Guidelines also provide an advisory fine range based on the defendant's offense level.<sup>163</sup> These ranges, although quite wide,<sup>164</sup> provide further insight into what the Commission deems to be an appropriate fine for each level of offense conduct.

In the final analysis, judges should be allowed to exercise their own judgment in determining the constitutionality of the aggregated monetary sanction. Although the statutory maximum and the Guidelines provide *ex ante* guidance on offense gravity, these guideposts should not end or even necessarily dominate the inquiry. Even if offense gravity was quantifiable with precision, balancing it against the dollar amount of a monetary sanction is inherently imprecise. Judges must be trusted to apply the gross disproportionality standard, which was purposefully devised so that the concept of "gross" functions as a cushion.<sup>165</sup> Only utterly disproportionate fines are constitutionally excessive.<sup>166</sup> In sentencing, judicial discretion is

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162. The *Bajakajian* Court recognized this principle and referenced the defendant's maximum sentence under the Guidelines as confirmation that he had "only a minimal level of culpability." *Bajakajian*, 524 U.S. 321, 338–39; *see also* *United States v. Bollin*, 264 F.3d 391, 418 (4th Cir. 2001) (noting the defendant's maximum term of imprisonment and fine under the Guidelines as support for its determination regarding the gravity of the offense).

163. U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(c)(3) (U.S. SENTENCING COMM'N 2015).

164. The fine table for individual defendants generally provides a fine range with a ceiling that is ten times larger than the floor. *Id.*

165. *Bajakajian*, 524 U.S. at 336.

166. One point of contention has been what role, if any, the defendant's ability to pay should play in the inquiry. The Supreme Court sidestepped the issue in *Bajakajian* because the defendant did not raise it and the district court made no factual findings on the issue. *Id.* at 340 n.15. Some courts have held that the ability to pay is relevant to a fine's constitutionality. *See, e.g., United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996) ("In imposing a fine . . . ability to pay becomes a critical factor."). Other courts have found that the defendant's ability to pay is completely irrelevant to the excessiveness inquiry, at least for forfeitures. *See, e.g., United States v. Dicter*, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) ("[W]e do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment."); *see also City & Cty. of San Francisco v. Sainez*, 92 Cal. Rptr. 2d 418, 432 (Cal. Ct. App. 2000). Other courts have inquired into whether the payment would deprive defendants of their livelihoods when reviewing the constitutionality of forfeiture orders. *See, e.g., United States v. Levesque*, 546 F.3d 78, 83–84 (1st Cir. 2008). The basis for finding ability to pay to be relevant springs from analysis of the English Bill of Rights of 1689 and the Magna Carta. *See id.*; *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257,

often treated as a cause for concern.<sup>167</sup> In response to concerns about the disparate treatment of similarly situated offenders,<sup>168</sup> legislatures enacted stiffer mandatory minimum sentences and binding sentencing guidelines.<sup>169</sup> The totality of the circumstances must govern the gross disproportionality test, however, and that totality cannot be predicted and quantified in advance. No guidelines are necessary to accomplish this task, nor would they be adequate. Rather, an able judiciary must bring its own independent judgment to bear.

#### CONCLUSION

Restitution is a component of criminal defendants' punishment and the product of government action. Therefore, restitution, along with traditional criminal fines and forfeitures, falls within the compass of the Excessive Fines Clause of the Eighth Amendment. When testing for constitutionality, courts should aggregate all economic sanctions and then test for gross disproportionality between the total amount of the aggregated constitutional "fine" and the gravity of the defendant's offense conduct. Although certain guideposts may aid courts in the gross disproportionality inquiry, courts should not abdicate their decision-making duty by simply accepting legislatively prescribed ranges of appropriate punishment. Rather, judges should exercise their sound judgment in the matter.

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289 (1989) (O'Connor, J., concurring in part and dissenting in part). Scholars have uncovered contemporaneous statutes and judicial decisions to support inquiry into the defendant's ability to pay. *See* Colgan, *supra* note 106, at 330–35 (concluding that "the idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment"); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 835 (2013) (finding the First Circuit's approach "significantly more faithful to the history and purpose of the Excessive Fines Clause"). Given the recent depth of scholarly treatment on the topic, this Article has little to add to the discussion of whether inquiry into the defendant's ability to pay is relevant. However, if ability to pay is relevant (and a strong historical basis appears to support that it was relevant at the time of the Bill of Rights), then the "fine pooling" approach described in this Article should be used to ensure that the full amount of the Eighth Amendment "fine" is considered in the analysis.

167. *See* NORA V. DEMLEITNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 139–220 (3d ed. 2013) (chronicling the regulation of judicial discretion in non-capital sentencing).

168. *See* MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

169. *See* DEMLEITNER ET AL., *supra* note 167, at 145–49, 161–67.

