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Unconstitutionally Fining: Fining People Experiencing Homelessness in the Era of Timbs, 53 UIC J. Marshall L. Rev. 587 (2021)

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UNCONSTITUTIONALLY FINING: FINING PEOPLE EXPERIENCING HOMELESSNESS IN THE ERA OF TIMBS

RAUL AGUILAR

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I. INTRODUCTION: THE LEGAL MURDER OF RUSSELL BARTHOLOW

\$104,000 in fines, 104 days in jail, and 190 individual citations¹—this is what the City of Sacramento believed was owed to them because Russell Bartholow had the audacity to be subjected to poverty and forced to experience homelessness.² Russell’s story began with a 30 day drug-related incarceration.³ While Russell was behind bars, his whole life was turned upside down—his wife and son left him, his parents died, and his relatives sold his house.⁴ Following this initial incarceration, Russell’s life became a revolving tragedy of homelessness and imprisonment.⁵ This cycle of incarceration further aggravated his poverty—Russell missed multiple appointments where he could have been approved for

1. John Flynn & Matt Kramer, *Sacramento’s \$100,000 Homeless Man*, NEWSREVIEW.COM (Feb. 16, 2017), www.newsreview.com/sacramento/sacramentos-100-000-homeless-man/content?oid=23694183. This article illustrates the absurd world we live in, where all types of human behavior are criminalized—from functions such as sleeping to using the bathroom—we impose fines on those who have the least ability to pay them, all because they are poor. *Id.*

2. The term “person experiencing homelessness” is the preferred term amongst homeless advocates. This is because being homeless does not make the identity of a person— they are more than their struggle.

3. Flynn & Kramer, *supra* note 1.

4. *Id.*

5. *Id.*

much needed supplemental disability income due to his brain injury.⁶

The Sacramento Police Department treated Russell's housing insecurity as a game. At times, they would confront him with pre-written citations in hand—sometimes twice a day.⁷ In 2017, Sacramento had eleven municipal codes that were effectively put on the books to fight the most atrocious criminal activity—poverty.⁸ These laws make it even harder for people experiencing homelessness to get out of their situations, as having a criminal record adds further barriers to finding stable employment and housing.⁹

If this sounds wrong and immoral, that's because it is, in addition to being unconstitutional as “[e]xcessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted.”¹⁰ Prior to *Timbs v. Indiana*, the Excessive Fines Clause of the Eighth Amendment was not applicable to the states.¹¹ Thus, people had no constitutional recourse to prevent the states from levying excessive fines on them, but that has since changed.

It is paramount to understand that solving the crisis of homelessness cannot be achieved through fining people experiencing poverty. Between 2015 and 2018, the Austin City Police Department issued more than 10,000 tickets to people experiencing homelessness for “crimes” such as panhandling, sitting on the sidewalk, and erecting tents.¹² Only 31 of those tickets were paid outright, and 70% of those tickets metastasized into arrest warrants.¹³ Additionally, between 2011 and 2015, out of more than 15,000 cases brought, only 21 of those people appeared in front

6. *Id.* (explaining that perpetual police animosity caused Russell to miss eight appointments over the course of thirteen years, where he could have been approved for disability income).

7. *Id.*

8. *Id.* These Sacramento laws criminalized activities that many people experiencing homelessness rely on to simply make it through the next day, such as panhandling, resting, sleeping, and camping in public areas.

9. National Alliance to End Homelessness, *Four Ways to Help People with Criminal Records get a Fair Chance at Housing*, NAEH (Sept. 8, 2016), www.endhomelessness.org/four-ways-to-help-people-with-criminal-records-get-a-fair-chance-at-housing/. This article talks about how obtaining housing and/or employment is harder once you have a criminal record. *Id.*

10. U.S. CONST. amend. VIII (emphasis added).

11. *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019) (holding that the Excessive Fines Clause is incorporated to the states via the Fourteenth Amendment).

12. Andrew Weber, *Austin Reconsiders Homelessness Ordinances as Houston Laws are Challenged in Court*, KUT 90.5 (Oct. 2, 2018), www.kut.org/post/austin-reconsiders-homelessness-ordinances-houston-laws-are-challenged-court.

13. *Id.*

of the Community Court—that is only 0.14%.¹⁴

In Part II, this Comment will explain the specific struggles that people face as a result of experiencing homelessness in America. Further, this section will elucidate how that experience is aggravated via fines for uncontrollable activities, such as sleeping outside, panhandling, and even resting. In Part III, this Comment will analyze how these fines affect people experiencing homelessness. Additionally, this Comment argues that these fines will always be excessive—and thus unconstitutional—when attuned to reflect the material reality of people experiencing homelessness. In Part IV, this Comment will set forth a proposal for the abolition of these fines due to the incorporation of the Eighth Amendment’s “excessive fines” clause to the states via the Fourteenth Amendment.

II. BACKGROUND

This section will focus on the realities of experiencing homelessness and discuss how laws dedicated to criminalizing sleeping, resting, panhandling, and erecting makeshift shelters—even when written neutrally—have a disparate and intentional impact on those experiencing homelessness. This Comment will focus on the laws criminalizing poverty enacted in the five most populated cities in the United States—New York City, Los Angeles, Chicago, Houston, and Phoenix—and explain how those laws have hurt or benefited people experiencing homelessness.¹⁵

The land of the free and the brave has traditionally not cared about its citizens that cannot afford to pay for their representation.¹⁶ Civil infractions, among other cruel tactics, are heavily used to criminalize and oppress the poor people of the world’s richest country.¹⁷ All major cities in the United States have

14. Andrew Weber, *No Sit/No Lie Citations Handed Out by the Thousands, and Most Go Unpaid*, KUT 90.5 (Oct. 5, 2015), www.kut.org/post/no-sitno-lie-citations-handed-out-thousands-and-most-go-unpaid.

15. *U.S. and World Population Clock*, U.S. CENSUS BUREAU (last visited Aug. 30, 2020), www.census.gov/popclock/?-populous-footnote (this link redirects the reader to current information detailing the population of the United States and the world with more specific breakdowns of populations available).

16. *Gideon v. Wainwright*, 372 U.S. 335 (1963). This case—through the Fourteenth Amendment—incorporated the Sixth Amendment right to legal representation and made it applicable to the several states. *Id.* However, this did not extend the right of legal representation to civil matters. *Id.*

17. See Saoirse Kerrigan, *15 Examples of 'Anti-Homeless' Hostile Architecture That You Probably Never Noticed Before*, INTERESTING ENGINEERING (May 22, 2018), www.interestingengineering.com/15-examples-anti-homeless-hostile-architecture-that-you-probably-never-noticed-before (explaining cruel architecture techniques used by cities against people

civil ordinances that are thinly veiled anti-poor laws.

A. *New York City*

New York City is the most populated city in the United States, with about 8,398,748 inhabitants.¹⁸ On October 10, 2019, there were about 59,960 people experiencing homelessness in New York City shelters.¹⁹ That estimate does not include New York City's street-based people experiencing homelessness.²⁰ Street-based homelessness presents challenges that shelter-based homelessness does not, and among those challenges is the law.

New York City has many laws on the books that are aimed at keeping the poor out of the public parks so that the rich can enjoy their stroll in Central Park without having to grapple with the fact that such great income inequality exists in America.²¹ These laws are codified in the Rules and Regulations of the New York City Department of Parks and Recreation, which was amended in 2007 to allow freer use of the park by dogs and their owners.²² Section 1-04, titled "Prohibited Uses," states that:

Violation of any paragraph or subparagraph of this section shall subject the violator to a civil penalty, as specified in the Department's penalty schedule. In addition, except as otherwise provided below, such violation shall also constitute an offense (classified as a "violation" under the Penal Law), **which can be punished by imprisonment of up to one day or a fine of not more than \$200.** As specified in this section, certain violations of specified paragraphs of this subdivision are classified by the Administrative Code as misdemeanors. Except as otherwise provided in this subdivision, a misdemeanor can be punished by **imprisonment of up to 20 days** or a fine of not more than **\$1,000.** Note that other laws, including but not limited to the Penal Law, may also apply to the conduct described below.²³

The aforementioned penalty schedule includes fines for activities such as storing or leaving personal belongings

experiencing homelessness). Many cities use taxpayer money to make their cities harder for people experiencing homelessness to survive in. *Id.* The technologies used include slanted benches made to be too uncomfortable to sleep on, oddly placed armrests that prevent laying down on benches, spikes on window ledges or on streets, barred corners on buildings, and even go as far as dumping boulders underneath bridges. *Id.*

18. *U.S. and World Population Clock*, *supra* note 15.

19. New York City Dep't of Homeless Serv., *Daily Report*, www1.nyc.gov/assets/dhs/downloads/pdf/dailyreport.pdf (last visited Oct. 11, 2019).

20. *Id.* This number only takes into account the adults and children that are in a shelter on a specific date. *Id.*

21. 56 R.C.N.Y. § 1-04 (2020). This Code has criminalized activities that humans do not have control over, especially if they are unhoused. *Id.*

22. *Id.*

23. *Id.* (emphasis added) (citations omitted).

unattended, urinating or defecating in the parks, using park benches “as to interfere with its use by other persons,” camping, erecting or maintaining a tent on park grounds, and sitting or panhandling in the parks.²⁴ These laws are aimed at behavior that a person experiencing homelessness has no control over, yet they seem like reasonable laws to the sheltered public.

B. Los Angeles

There are over 3,990,456 residents in the City of Los Angeles,²⁵ over 36,000 of whom are experiencing homelessness.²⁶ Approximately 27,221 of these people are unsheltered.²⁷ Anti-poverty laws are a lot more wicked when applied to people who are experiencing homelessness **and** are unsheltered. The City of Los Angeles has sent a clear message to its residents experiencing homelessness—the City made it illegal via its Municipal Code.²⁸ This cruel ordinance has been called “one of the most restrictive municipal laws regulating public spaces in the United States.”²⁹ Since this municipal code is so cruel and restrictive, it is paramount to review the full text of Section 41.18 of the Los Angeles Municipal Code, titled—SIDEWALKS, PEDESTRIAN SUBWAYS – LOITERING:

No person shall stand in or upon any street, sidewalk or other public way open for pedestrian travel or otherwise occupy any portion thereof in such a manner as to annoy or molest any pedestrian thereon or so as to obstruct or unreasonably interfere with the free passage of pedestrians.³⁰

No person shall loiter in any tunnel, pedestrian subway, or on any bridge overpass, or at or near the entrance thereto or exit therefrom, or at or near any abutment or retaining wall adjacent to such entrance or exit, or any retaining wall or abutment adjacent to any freeway, street or highway open and used for vehicular traffic, or adjacent to that portion thereof used for

24. 56 R.C.N.Y. § 1-04 (2020); *see also id.* § 1-07 (2020) (including penalties for violations, such as, unauthorized presence in park when closed to public, storing/leaving unattended personal belongings, unlawful urination/defecation in park, disorderly behavior, obstruction of benches and sitting areas, and soliciting money or property without a permit). All of these violations follow the same penalty schedule of a \$50 fee and a default penalty of \$75. *Id.*

25. *U.S. and World Population Clock*, *supra* note 15.

26. *2019 Greater Los Angeles Homeless Count - City of Los Angeles*, LOS ANGELES HOMELESS SERVICES AUTHORITY (July 29, 2019), www.lahsa.org/documents?id=3421-2019-greater-los-angeles-homeless-count-city-of-los-angeles.pdf

27. *Id.*

28. L.A. MUN. CODE § 41.18 (2020).

29. *Jones v. City of L.A.*, 444 F.3d 1118, 1123 (9th Cir. 2006).

30. L.A. MUN. CODE § 41.18(a) (2020).

vehicular traffic, or on any public property in the proximity of such bridge, overpass, or retaining wall or abutment.³¹

No person in or about any pedestrian subway, shall annoy or molest another or make any remark to or concerning another to the annoyance of such other person, and no person shall commit any nuisance in or about such subway.³²

No person shall sit, lie or sleep in or upon any street, sidewalk or other public way.³³

Los Angeles publicly presents a very different picture of their attitude towards the housing crisis.³⁴ Mayor Garcetti has even asked “business owner[s] with a parking lot that goes unused at night . . . to open it up to people who live in their vehicles and need a safe place to park.”³⁵ Yet, despite this talk, Section 41.18 of the Los Angeles Municipal Code is still on the books, still being enforced, and the City has even gone as far as settling lawsuits with Angelenos in order to keep these laws from being deemed unconstitutional.³⁶

Further, Los Angeles has created enforcement practices that perpetuate a cycle of arresting and jailing residents experiencing homelessness.³⁷ In 2016, the Los Angeles Police Department (“LAPD”) arrested upwards of 14,000 people experiencing homelessness.³⁸ That same year LAPD arrests of housing-secured people fell by 15%.³⁹ Noteworthy is the fact that the LAPD is intentionally targeting residents experiencing homelessness, as evidenced by the fact that “in 2011, 1 in 10 arrests citywide were of homeless people; in 2016, it was 1 in 6.”⁴⁰ Los Angeles has fifteen separate restrictions on standing, sitting, and resting; eight on

31. *Id.* § 41.18(b) (2020).

32. *Id.* § 41.18(c) (2020).

33. *Id.* § 41.18(d) (2020).

34. See Open Letter from Eric Garcetti, Los Angeles Mayor, to Angelenos (June 19, 2019) www.abc7.com/homelessless-la-los-angeles-homeless-problem-in/5342535/ (presenting Mayor Garcetti’s façade that Los Angeles is a city that cares about all of its residents).

35. *Id.*

36. *Jones v. City of L.A.*, 505 F.3d 1006 (9th Cir. 2007) Here, the City of Los Angeles settled with Mr. Jones, therefore the Ninth Circuit’s opinion—deeming section 41.18 of the Los Angeles Municipal Code unconstitutional as applied to Angelenos experiencing homelessness—was vacated.

37. Gale Holland & Christine Zhang, *Huge Increase in Arrests of Homeless in L.A. — But Mostly for Minor Offenses*, L.A. TIMES (Feb. 4, 2019), www.latimes.com/local/politics/la-me-homeless-arrests-20180204-story.html (explaining that in 2016, 22% of all arrests of people experiencing homelessness were for “failure to show up to court,” 10% for drug possession, 10% for a probation violation, 8% for shoplifting, and 5% for trespassing).

38. *Id.*

39. *Id.*

40. *Id.*

sleeping, camping, and lodging; and nine on panhandling.⁴¹ The City of Los Angeles has also made it illegal to live in your car⁴² and “block” or obstruct the sidewalk.⁴³

C. Chicago

Chicago, the city of broad shoulders,⁴⁴ hosts approximately 2,705,994 residents.⁴⁵ Out of those residents, there were approximately 76,998 people experiencing homelessness in 2018.⁴⁶ Chicago—not to be outdone in cruelty—has also criminalized poverty, going as far as requiring that a person acquire a permit in order to solicit funds on the streets.⁴⁷ But Chicago, after pressure from the Chicago Coalition For the Homeless (“CCH”), the American Civil Liberties Union of Illinois (“ACLU”), and the National Law Center on Homelessness & Poverty (“NLCHP”),⁴⁸ did abandon its panhandling ban.⁴⁹ The ban was repealed after CCH, NLCHP, and the ACLU brought to the City’s attention that panhandling violations are inapposite with the First Amendment and thus unconstitutional.⁵⁰

41. *California’s New Vagrancy Laws: The Growing Enactment and Enforcement of Anti-homeless Laws in the Golden State*, POLICY ADVOCACY CLINIC, U.C. BERKELEY SCH. OF LAW (2016), www.law.berkeley.edu/wp-content/uploads/2015/12/Californias-New-Vagrancy-Laws.pdf.

42. *Guide to Laws Related to Homelessness in Los Angeles*, L.A. LAW SOUP, WWW.la.lawsoup.org/legal-guides/homelessness/ (last visited Aug. 31, 2020) (noting that “the law is set to expire in January 2020, unless the city council extends it”). This article explains how the City of Los Angeles fines people \$25 the first time they are caught living in their car, \$50 the second, and \$75 each subsequent fine. *Id.*

43. *See id.* (explaining Los Angeles laws on sleeping on the street).

44. Carl Sandburg, *Chicago*, POETRY FOUNDATION (1914), WWW.poetryfoundation.org/poetrymagazine/poems/12840/chicago.

45. *U.S. and World Population Clock*, *supra* note 15.

46. *FAQ/Studies*, CHI. COAL. FOR THE HOMELESS, www.chicagohomeless.org/faq-studies/ (last visited Sept. 22, 2020).

47. Chi. Mun. Code § 10-8-080 et seq. (1990), [www.library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title10streetspublicwaysparksairportsand/chapter108useofpublicwaysandplaces?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago_il\\$anc=JD_10-8-180%22%20%5Ct%20%22_blank](http://www.library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title10streetspublicwaysparksairportsand/chapter108useofpublicwaysandplaces?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il$anc=JD_10-8-180%22%20%5Ct%20%22_blank). This is Chicago’s municipal code where it is against the law to panhandle sans permit. *Id.*

48. Letter from Dianne O’Connell, Comm. L., Chi. Coal. for the Homeless, Rebecca Glenberg, Senior Staff Couns., ACLU Ill., and Eric Tars, Senior Att’y, Nat’l Law Ctr. on Homelessness & Poverty to Maggie Sobota, Senior Couns., City of Chi. (Aug. 28, 2018), www.aclu-il.org/sites/default/files/panhandling_demand_chicago.pdf.

49. *Chicago Becomes Sixth Illinois City to Repeal Panhandling Ordinances, Following Advocacy by CCH and the ACLU*, CHI. COAL. FOR THE HOMELESS (Dec. 6, 2018), www.chicagohomeless.org/chicago-becomes-sixth-illinois-city-to-repeal-panhandling-ordinances-following-advocacy-by-cch-and-the-aclu/.

50. O’Connell, *supra* note 48.

It is important to note that Illinois has a Bill of Rights for the Homeless, which spells out the rights that must be afforded to people experiencing homelessness.⁵¹ Little litigation has come from this Bill of Rights, but it is an Illinois law and thus applicable and enforceable against the City of Chicago.⁵² Chicago currently does not have laws that prevent usage of the streets, as many cities do, which may be attributed to the Bill of Rights for the Homeless.⁵³ Section 10(a)(1) of the Illinois Bill of Rights for the Homeless guarantees a person experiencing homelessness: “the right to use and move freely in public spaces, including but not limited to public sidewalks, public parks, public transportation, and public buildings, in the same manner as any other person and without discrimination on the basis of his or her housing status.”⁵⁴

D. Houston

Houston has approximately 2,325,502 residents.⁵⁵ Out of those residents, approximately 3,938 are experiencing homelessness.⁵⁶ Houston’s population of residents experiencing homelessness has dropped 54% since 2011.⁵⁷ This could be due to their ghoulish laws. Houston has made it illegal to panhandle,⁵⁸ block access to the sidewalk,⁵⁹ erect makeshift shelters on public land,⁶⁰ trespass on private land, have a heating device, and carry belongings that are larger than three feet wide by three feet tall.⁶¹ Houston imposes fines on persons committing the aforementioned activities, with some penalties being as high as \$2,000.⁶² Additionally, Houston has made it illegal to supply food to a group of five or more people experiencing homelessness without a permit.⁶³

Advocates for Houston’s population experiencing homelessness

51. 775 ILL. COMP. STAT. 45 § 10 (2020).

52. *Id.*

53. *Id.*

54. *Id.* § 10(a)(1).

55. *U.S. and World Population Clock*, *supra* note 15.

56. Schaefer Edwards, *New Data Shows Promising Decline in Greater Houston Homelessness*, HOUSTONIA (May 17, 2019), www.houstoniamag.com/news-and-city-life/2019/05/2019-homelessness-count-houston-harris-county-coalition-for-the-homeless-way-home.

57. *Id.*

58. Houston, TX., HOUSTON CODE OF ORDINANCES, No. 2017-256 (2020).

59. Houston, TX., HOUSTON CODE OF ORDINANCES, ch. 40, art. XVI, § 40-352 (2020).

60. Houston, TX., HOUSTON CODE OF ORDINANCES, No. 2017-261 (2020).

61. Meagan Flynn, *It's Close to Impossible to Be Homeless in Houston Without Breaking the Law*, HOUSTON PRESS (Apr. 24, 2017), www.houstonpress.com/news/all-the-ways-homeless-people-can-be-arrested-and-jailed-in-houston-9376854.

62. *Id.*

63. Houston, TX., HOUSTON CODE OF ORDINANCES, No. 2012-269 (2012)

have attempted to fight back against these laws, but the courts have sided with the city.⁶⁴ A noteworthy decision came out in *Kohr v. City of Houston*, which was based on a standing issue, where the court stated that “[a]lthough the named plaintiffs in this case have cited varying degrees of exposure to the rigors of a life of homelessness and to the enforcement of the encampment ordinances, neither has been cited, arrested, prosecuted, or convicted of a violation of any of the ordinances for which they complain.”⁶⁵ This is inapposite to how the majority of people experiencing homelessness have been treated, as Houston has legislated poverty and shelter instability into actionable crimes.⁶⁶

E. Phoenix

Phoenix has a population of 1,660,272 residents.⁶⁷ From 2014 to 2018, the rate of homelessness in Maricopa County, where Phoenix is located, exploded by 149%.⁶⁸ In 2019, in this county, 6,614 residents were experiencing homelessness.⁶⁹ Out of those 6,614 people, 3,426 were sheltered and 3,188 were street-based.⁷⁰ Additionally, there were 182 pets that were accompanying their owners, 10 of which were service animals.⁷¹ The number of people who were experiencing homelessness **and** living unsheltered surged 27% between 2017-2018.⁷² During an eight-month period between 2018 and 2019, there were 1,500 complaints made in Phoenix about encampments.⁷³ Additionally, beds in shelters in Maricopa County have decreased by 30% since 2014, due to a change in spending shifts.⁷⁴

Along with these austerity measures, Phoenix—not to look soft on poverty—has enacted its own laws criminalizing poverty and the

64. *Kohr v. City of Hous.*, No. 4:17-CV-1473, 2017 U.S. Dist. LEXIS 212428 (S.D. Tex. Dec. 28, 2017).

65. *Id.* at 7.

66. Flynn, *supra* note 61.

67. *U.S. and World Population Clock*, *supra* note 15.

68. Fortesa Latifi, *Number of Homeless People Not in Shelters Is Up 27% in Maricopa County*, ARIZONA DAILY INDEP. NEWS NETWORK (Apr. 11, 2018), www.arizonadailyindependent.com/2018/04/11/number-of-homeless-people-not-in-shelters-is-up-27-in-the-past-year-in-maricopa-county/.

69. Press Release, *Point in Time Homeless Count*, MARICOPA ASS'N OF GOV'TS (2019), www.azmag.gov/Portals/0/Documents/MagContent/2019-07-31_PIT-Report.pdf?ver=2019-08-05-135935-200.

70. *Id.*

71. *Id.*

72. Latifi, *supra* note 68.

73. Jessica Boehm, *Phoenix Residents Reported 1,500 Homeless Encampments. See Where They Are*, ARIZONA CENTRAL (May 6, 2019), www.azcentral.com/story/news/local/phoenix/2019/05/06/phoenixhomelessness-increase-reported-encampments-community-services/3410072002/.

74. *Id.*

homeless experience.⁷⁵ Violating a Phoenix City ordinance carries a Class 1 misdemeanor penalty, at minimum, which is punishable by up to six months in prison and a fine of up to \$250.⁷⁶ For example, Phoenix has mandated that blocking the sidewalks or jaywalking is punishable by a fine of up to \$250.⁷⁷ Loitering in a public area, even for the purpose of panhandling, is illegal as well.⁷⁸ Staying at a public park after it has closed is an actionable offense.⁷⁹ Sleeping in public is made illegal by two separate laws in Phoenix.⁸⁰ There is an “urban camping” law, which outlaws sleeping, laying down, storing belongings, erecting a tent, and parking a car with the purpose of sleeping in public areas.⁸¹ The second law is a “sit/lie law” which makes it illegal to “sit, lie or sleep on a public street, sidewalk or alley.”⁸² Thus, in Phoenix, the crime of being too poor to afford shelter carries with it the charge of a Class 1 misdemeanor.⁸³ Soliciting donations at night, or from people in vehicles, is also illegal and can carry a charge of a Class 1 misdemeanor and community service.⁸⁴ Entering a non-public—and more secluded and habitable—area of a Phoenix park is also illegal and carries with it a charge of a Class 1 misdemeanor, and the court *must* further fine you \$50.⁸⁵

The aforementioned laws effectively make experiencing homelessness illegal and are used to penalize vulnerable people into a non-stop cycle of incarceration. America has criminalized poverty. In the ten years between 2006 and 2016, there was a 69% increase in the criminalization of camping on public lands and a 40% increase in cities that have implemented bans on panhandling.⁸⁶ This is a purposeful pattern.

III. ANALYSIS

As shown in the Background section of this Comment, the

75. *Homeless in Phoenix: Know Your Rights*, AM. C. L. UNION OF ARIZ. (2011), www.acluaz.org/sites/default/files/field_documents/homeless_rights_in_phoenix.pdf.

76. Phx., AZ., PHX. CITY CODE § 1-5 (1962).

77. *Id.* § 23-9 (1962).

78. *Id.* § 23-8(a-c) (1962).

79. *Id.*

80. *Id.* §§ 23-30(a-b), 23-48.01 (1962).

81. *Id.* § 23-30(a-b) (1962).

82. *Id.* § 23-48.01 (1962).

83. *Id.* §§ 23-30(a-b), 23-48.01 (1962).

84. *Id.* §§ 23-7(A)(1), 23-7(B) (1962).

85. *Id.* § 24-36 (1962).

86. Press Release, *Housing Not Handcuffs*, NAT'L LAW CENTER ON HOMELESSNESS AND POVERTY (2019) www.nlchp.org/housing-not-handcuffs/ (detailing a comprehensive study on the fact that cities across America are criminalizing poverty more than ever). We are moving in a cruel, unusual, and immoral direction. *Id.*

criminalization of poverty is on the rise.⁸⁷ This approach is incongruent with the solutions to homelessness.⁸⁸ But a more nuanced reading of the Eighth Amendment can partially address this problem.

This section of the Comment will first look at the history of the Eighth Amendment Excessive Fines Clause,⁸⁹ followed by an analysis of the incorporation of the Excessive Fines Clause via *Timbs*,⁹⁰ and will conclude with a cursory analysis of the financial state of people experiencing homelessness.

A. *Excessive Fines—A History*

The Eighth Amendment states that, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁹¹ This language does not set limits, define, or include a referent to “excessive.” Due to the lack of clarity in the plain text,⁹² this Comment will look to the past to determine what is excessive.

1. *England*

The Excessive Fines Clause is not native to the American Constitution, but comes verbatim from the English Bill of Rights.⁹³ The cornerstone of the Excessive Fines Clause of the Eighth Amendment is the term “Salvo Contenemento Suo,” which

87. See *Criminalization of Poverty as a Driver of Poverty in the United States*, HUMAN RIGHTS WATCH (Oct. 4, 2017), www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states (explaining how the poor continue to be targeted legislatures throughout America).

88. See *Ending Chronic Homelessness Saves Taxpayers Money*, NAT’L ALL. TO END HOMELESSNESS (Nov. 6, 2015), www.endhomelessness.org/resource/ending-chronic-homelessness-saves-taxpayers-money/ (explaining that “[a] chronically homeless person costs the taxpayer an average of \$35,578 per year. Costs on average are reduced by 49.5% when they are placed in supportive housing. Supportive housing costs on average \$12,800, making the net savings roughly \$4,800 per year”).

89. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”) (emphasis added).

90. *Timbs*, 139 S. Ct. 682 (2019).

91. U.S. CONST. amend. VIII (emphasis added).

92. *Weems v. United States*, 217 U.S. 349, 369 (1910) (wondering, “[w]hat is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines?”).

93. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 266 (1989) (explaining that, “it is clear that the Eighth Amendment was ‘based directly on Art I, § 9, of the Virginia Declaration of Rights,’ which ‘adopted verbatim the language of the English Bill of Rights’”).

translates to “saving his livelihood.”⁹⁴ This protection against being fined into poverty is a right that was originally enshrined in the Magna Carta.⁹⁵ Historically, the protection against excessive fines has been a two-pronged analysis.⁹⁶ Both prongs are centered around proportionality. First, there is a proportionality element, which tries to attach an equitable fine to the charged offense.⁹⁷ Second, there is a limiting principle, which looks at the imposed fine and the defendant’s financial situation.⁹⁸ The basic purpose of this wide and generous protection is “to save a man’s ‘contentment’ [] to leave him sufficient for the sustenance of himself and those dependent on him.”⁹⁹ Historically, there can be no debate as to whether there was an intent to fine people without ruining their lives.¹⁰⁰

2. *The United States of America*

The Virginia Declaration of Rights of 1776 can be viewed as the mother of the Eighth Amendment.¹⁰¹ This Declaration of Rights, however, did not declare what constitutes excess.¹⁰² The Supreme Court has also not dealt with what constitutes “excess” under the Excessive Fines Clause.¹⁰³ Additionally, the Court has only recognized one prong of the traditional excessive fine analysis—the proportionate penalty to offense prong.¹⁰⁴

United States v. Bajakajian was the first instance of the Court deeming a fine excessive under the Eight Amendment.¹⁰⁵ In

94. *Jones v. Commonwealth*, 5 Va. 555, 556-57 (1799) (stating that “the clause of the Bill of Rights, prohibiting excessive fines, . . . and founded on the spirit of it, and providing, that the fine should be according to the degree of the fault and the *estate of the offender*”) (emphasis added).

95. *Id.*

96. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L. Q. 833, 835 (2013).

97. *Id.*

98. *Id.*

99. JOHN LACKLAND, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 293 (William S. McKechnie, 2d ed. 1914).

100. McLean, *supra* note 96, at 856-57.

101. *See* Va. Declaration of Rights, § 9 (1776) (stating that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).

102. *Id.*

103. *Dep’t of Revenue of Mont. v. Ranch*, 511 U.S. 767, 803 n.2 (1994) (Scalia, J., dissenting) Here, Justice Scalia explains that the Excessive Fines Clause “was rescued from obscurity only after Halper was decided”.

104. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (stating, “[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”).

105. *Id.* at 344 (Kennedy, J., dissenting). Justice Kennedy explained that “[f]or the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment.”

Bajakajian, Justice Thomas stated that the Supreme Court “has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause.”¹⁰⁶ Additionally, Justice Thomas explained that “at the time the Constitution was adopted, ‘the word “fine” was understood to mean a payment to a sovereign as punishment for some offense.’”¹⁰⁷ The Excessive Fines Clause thus “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’”¹⁰⁸ The Court did note that the protection against excessive fines has roots in the Magna Carta—where it was meant to protect a person from being fined out of their livelihood.¹⁰⁹ However, the Court failed to extend that prong to its own analysis of the Eighth Amendment.¹¹⁰

The Court’s application of only the first prong of the historical understanding of what constitutes an “excessive fine” has resulted in lower courts holding that “excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender.”¹¹¹ However, this may be an incorrect application of *Bajakajian*, for both historical and logical reasons.¹¹² Additionally, under more recent Supreme Court cases adjudicated under the Eighth Amendment, there is the suggestion that a defendant’s personal circumstances should be taken into

106. *Id.* at 327. Here, the Court applied the Eighth Amendment to forfeitures for the first time and held that a \$357,144 fine was excessive for failing to report traveling with more than \$10,000 per 18 U.S.C. § 1001. *Id.* at 344.

107. *Id.* at 327.

108. *Id.* at 328.

109. *Id.* at 335. Here, Justice Thomas explained that the “Magna Charta—which the Stuart judges were accused of subverting—required only that amercements (the medieval predecessors of fines) should be proportioned to the offense and *that they should not deprive a wrongdoer of his livelihood . . .*” (emphasis added).

110. *Id.* at 337 (holding that “[i]f the amount of the forfeiture is grossly disproportionate to the gravity of the defendant’s offense, it is unconstitutional”).

111. *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999) (holding that a defendant’s inability to pay a fine has no bearing on whether the fine is excessive or not). *See also United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998); *United States v. Smith*, 656 F.3d 821, 828-29 (8th Cir. 2011) (both similarly holding that a defendant’s inability to pay a fine has no bearing on whether the fine is excessive or not).

112. *Bajakajian*, 524 U.S. at 340 n.15 (stating that “[r]espondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood and the District Court made no factual findings in this respect”) (citation omitted). *See also United States v. United Mine Workers*, 330 U.S. 258, 304 (1947) (describing that while analyzing fines in a contempt situation, the Court noted that “[i]t is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant’s financial resources and the consequent seriousness of the burden to that particular defendant”).

consideration, as a “basic precept of justice.”¹¹³

3. *Indiana, Excessive Fines, and Tyson Timbs*

Historically, no firm evidence existed to answer the question of whether the Excessive Fines Clause of the Eight Amendment was incorporated to the several states via the Fourteenth Amendment.¹¹⁴ The Supreme Court finally gave a firm answer on February 20, 2019, pontificating the declaration that “[t]he Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.”¹¹⁵ What follows is a brief recitation of the facts of *Timbs* and a synopsis of the Court’s legal framework explaining the newly incorporated Excessive Fines Clause.

a. Facts of *Timbs*

In November of 2013, Tyson Timbs plead guilty to dealing heroin and conspiracy to commit theft, and was subsequently sentenced to one year of house arrest and five years of probation.¹¹⁶ As a result of the arrest, the police seized his Land Rover SUV—worth \$42,000 and purchased with money from his father’s life insurance policy.¹¹⁷ The state of Indiana kept the SUV as a forfeiture, arguing that it qualified as such since it was used to sell heroin.¹¹⁸ Indiana charged Timbs with a Class B felony, which carried a maximum fine of \$10,000.¹¹⁹ The Land Rover was worth more than four times the maximum penalty.¹²⁰ The trial court ordered the Land Rover be released to Mr. Timbs; the State appealed.¹²¹ The appellate court had a very important question to address—whether the Excessive Fines Clause of the Eighth Amendment applied to the states via the Fourteenth Amendment—

113. *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (stating that, with regards to the Eight Amendment, “[t]hat right, we have explained, ‘flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’” *to both the offender and the offense*”) (emphasis added). While *Miller* is about applying the life sentence without parole to juveniles, the proposition still stands and follows that when looking to adjudicate a matter under the Eighth Amendment, the courts should look at *both the offender and the offense*, while maintaining their commitment to the application of proportionality. *Id.*

114. *See Timbs*, 139 S. Ct. at 686 (ruling that the Excessive Fines Clause of the Eighth Amendment applies to the States via the Fourteenth Amendment).

115. *Id.* at 687.

116. *Id.* at 686.

117. *Id.*

118. *Id.*

119. *State v. Timbs*, 84 N.E.3d 1179, 1181 (Ind. 2017).

120. *Id.*

121. *Id.*

and ruled that it did not.¹²² The Supreme Court of Indiana also held that the Excessive Fines Clause *did not apply* to the states.¹²³ Subsequently, the Supreme Court of the United States of America granted certiorari to answer the question of selective incorporation.¹²⁴

b. The Law of *Timbs*

Within the first two pages of the Court's opinion, Justice Ginsberg expressed that the Excessive Fines Clause is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition."¹²⁵ Subsequently, Justice Ginsberg addressed the history of the Excessive Fines Clause—explaining that the "Magna Carta required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'"¹²⁶ But, paramount to this Comment is one of the citations that Justice Ginsberg included—"But cf. *Bajakajian*, (taking no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine)."¹²⁷ She followed with more historical analysis—importantly, quoting the statement included in five of the Colonial constitutions: "[a]ll fines shall be moderate, and saving men's contentments, merchandize, or wainage."¹²⁸ This statement is followed by another history lesson in how minorities and the disenfranchised have been subjected to state violence via excessive fines.¹²⁹ The Court then held that the full protections of the Eighth

122. *Id.* at 1181-82. "Before addressing whether forfeiture of *Timbs*'s Land Rover would be an excessive fine, we must decide the antecedent question of whether the Excessive Fines Clause applies to forfeitures by the State. Whether a Bill of Rights provision applies to the States is a purely legal question" *Id.* at 1181.

123. *Id.* at 1182-84. Here, the Supreme Court of Indiana explained that the Bill of Rights originally applied strictly to the Federal government. *Id.* To rectify this, the Fourteenth Amendment was ratified and selective incorporation began. *Id.* Subsequently, the Bill of Rights began the long and ongoing process of selective incorporation. *Id.*

124. *Timbs*, 139 S. Ct. at 2650.

125. *Timbs*, 139 S. Ct. at 686-87 (citation omitted) (this language is the determining factor of whether the Court will incorporate a right enumerated in the Bill of Rights and apply it to the states via the Fourteenth Amendment). See also *McDonald v. City of Chi.*, 561 U.S. 742, 759-70 (2010) (explaining the different theories of incorporation of the Bill of Rights).

126. *Id.* at 688.

127. *Id.* (citation omitted). *But cf. Bajakajian*, 524 U.S. at 340 n.15 (noting that, "[r]espondent does not argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood . . . and the District Court made no factual findings in this respect").

128. *Timbs*, 139 S. Ct. at 688. This phrase has been used to mean that one's livelihood should not be threatened by state fining schemes. *Id.*

129. *Id.* at 688-89. Here, Justice Ginsberg discusses how excessive fines

Amendment were incorporated through the Fourteenth Amendment.¹³⁰ Two Justices subsequently concurred,¹³¹ simply to argue which was the correct vehicle for incorporation of the Eighth Amendment—the Due Process Clause or the Privileges and Immunity Clause of the Fourteenth Amendment.¹³²

IV. PROPOSAL

The final section of this Comment will focus on what implementation of an originalism application of the Eighth Amendment would look like.¹³³ First, this section will look back to the increasing criminalization of poverty, as well as municipalities' abysmal return rate on these fines. Second, this section will look to how an originalism approach to the Eighth Amendment would affect people experiencing homelessness. Third, this Comment will postulate how *Timbs* can aid in the realization of promised constitutional protections, as applied to people experiencing homelessness, via the abolition of civil fines.

A. Criminalization of Poverty

As noted earlier, there is a notable rise throughout America of cities criminalizing poverty.¹³⁴ In turn, this has led to people experiencing homelessness being fined more and more, for less and less—remember Russell Bartholow?¹³⁵ This has further led to cities

were used to subjugate newly freed people to slave labor at the hands of the state. *Id.*

130. *Id.* at 691 (Gorsuch, J., concurring).

131. *Id.* (stating, “As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment’s Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause”).

132. *Id.* (Thomas, J., concurring) (stating that “[i]nstead of reading the Fourteenth Amendment’s Due Process Clause to encompass a substantive right that has nothing to do with ‘process,’ I would hold that the right to be free from excessive fines is one of the ‘privileges or immunities of citizens of the United States’ protected by the Fourteenth Amendment”).

133. See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U.L. REV. 1243, 1245-46 (2019) (explaining that “[w]hen ‘originalism’ is used in academic discourse as the name for a constitutional theory without qualification, the word should be used to refer to members of the family of constitutional theories that affirm both the Fixation Thesis (the meaning of the constitutional text is fixed at the time each provision is drafted) and the Constraint Principle (constitutional practice should, at a minimum, be consistent with the original meaning . . .), and that offer a reasonable account of original meaning . . .”).

134. HUMAN RIGHTS WATCH, *supra* note 87.

135. Flynn & Kramer, *supra* note 1 (explaining the plight of Russell Bartholow, who was constantly harassed and fined by the Sacramento Police Department and eventually died of cancer after the police department poisoned

using cruel tactics in order to prevent vulnerable citizens from using the city as a form of shelter.¹³⁶ On top of these architectural deterrents to shelter, cities have also implemented fees for activities that are byproducts of existing without a home.¹³⁷ However, trying to do away with homelessness and poverty through economic fines does not work—a person cannot afford to pay a fine, when they cannot even afford shelter, clothing, or food.¹³⁸ This is counterintuitive, even at the most cursory level of analysis. Cities—if they actually cared about the problem of homelessness, and not just about the aesthetics of the city—could save money by providing housing instead of using taxpayer money to harass the most vulnerable sects of our population.¹³⁹ People experience homelessness because those in power allow them to. The cities know the solutions, but they simply do not care enough to implement them. However, there is potential to offer at least a little relief to people experiencing homelessness—the Excessive Fines Clause of the Eighth Amendment.

B. SCOTUS v. *The Excessive Fines Clause*

As discussed in the Analysis section of this Comment, the Excessive Fines Clause that is present in the United States Constitution’s Bill of Rights was also present in the English Bill of Rights, as well as in the Magna Carta.¹⁴⁰ This right was intended to direct courts to apply fines based on the proportionality requirements as to the offense and what the offender could afford.¹⁴¹

Imagine if a court in New York were to look at what a person experiencing homelessness could actually afford before mandating them to pay the fine for “[u]nauthorized presence in park when closed to public,” or “[s]toring/leaving unattended personal belongings,” or “[o]bstruction of benches/ sitting areas,” or “[s]oliciting money or property without permit,” or even before they are convicted of “[d]isorderly behavior—fee evasion” and face a fee

his crops).

136. Kerrigan, *supra* note 17 (illustrating how cities go out of their ways to implement cruel architectural measures that prevent people experiencing homelessness from using the city as a rudimentary but necessary form of shelter).

137. 56 R.C.N.Y. §§ 1-04, 1-07 (2000).

138. Weber, *supra* note 14 (explaining that, between 2011 and 2015, out of more than 15,000 cases against people experiencing homelessness, only 21 of those people appeared in front of the Community Court—that is 0.14%).

139. NAT’L. ALL. TO END HOMELESSNESS, *supra* note 88.

140. *Bajakajian*, 542 U.S. at 335-36.

141. *Jones*, 5 Va. at 556-57 (stating that “the clause of the Bill of Rights, prohibiting excessive fines, and founded on the spirit of it, and providing, that the fine should be according to the degree of the fault and the *estate of the offender*”) (emphasis added).

of \$50, which balloons to \$75 if not paid in a timely manner.¹⁴² Instead of having to pay these fees—or face imprisonment—a person experiencing homelessness could use this money for shelter, food, clothes, or other expenses necessary for survival. Under an originalism approach to the Eighth Amendment, or if Justice Ginsberg had read the footnotes in *Bajakajian*, people experiencing homelessness would not be held responsible for fines that take from the little money they have.

The Court—in the genesis of “Excessive Fine” jurisprudence—did not apply this two-factor approach, simply because Mr. Bajakajian did not argue that the fine would impede with his livelihood,¹⁴³ along with the Supreme Court’s penchant for narrow opinions. This is congruent with legal precedent, as the contemporaneous objection rule prevents litigants from raising arguments that were never made at trial.¹⁴⁴ However, Mr. Bajakajian’s failure to litigate a prong of the excessiveness analysis should not close that door for subsequent litigants, specifically when Justice Thomas noted that the Court did not grapple with the question of whether the fine would hinder Mr. Bajakajian’s livelihood.¹⁴⁵ In *Timbs*, Justice Ginsberg addresses the same question as Justice Thomas did in *Bajakajian*—what is excessive?¹⁴⁶ They both analyzed the question through a historical lens, as this question—as it relates to fines—is a novel one for the Court. Both historical analyses came to the similar conclusion that “no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear.”¹⁴⁷ However, Justice Ginsberg erroneously stated that the proportionality of a person’s livelihood had not been something that the Court was interested in because of Justice Thomas’ opinion in *Bajakajian*.¹⁴⁸

C. The Eighth Amendment’s Future

While the Court has not adjudicated the Eighth Amendment

142. 56 R.C.N.Y. §§ 1-04, 1-07 (2000).

143. *Bajakajian*, 542 U.S. at 340 n.15.

144. *Puckett v. United States*, 556 U.S. 129, 134 (2009) (citing *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

145. *Bajakajian*, 542 U.S. at 340 n.15.

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

147. *Compare Timbs*, 139 S. Ct. at 688 (citing the history of the Eighth Amendment and explaining that the second prong of Eighth Amendment analysis is not used because the Court did not use it in *Bajakajian*), with *Bajakajian*, 542 U.S. at 335 (citing the history of the Eighth Amendment and explaining that the prong that calls for fines being proportional to the offender’s financial status is not applicable because Mr. Bajakajian never asserted that the fine would ruin his livelihood).

148. *State v. Timbs*, 84 N.E.3d 1179, 1181-82 (Ind. 2017) (explaining selective incorporation of the Bill of Rights).

as the framers intended them to, the door to do so is not permanently closed. Jurisprudence regarding the Excessive Fines Clause is in its infancy. Additionally, the Supreme Court has adjudicated matters erroneously previously.¹⁴⁹ The Court has and will rectify its own mistakes, and within the Excessive Fines Clause lies that opportunity.¹⁵⁰ The Court should take that opportunity, and prevent the various jurisdictions from harassing people who cannot afford basic necessities by means of economic penalties, which in turn metastasizes these fines into something that is per se unconstitutional.

V. CONCLUSION

The Eighth Amendment was intended to be a generous protection— a protection that was to be an equalizer of justice, so that a rich man is impacted by a speeding ticket the same as anyone else who gets caught speeding on the same street. Laws are written to be neutral, to not take sides, and to not hurt one more than the other. However, the law is not applied in this egalitarian matter. The Court and the Eighth Amendment should stop the harassment of the country's most vulnerable people. When a city fines a person experiencing homelessness—a person without enough financial resources to shelter, feed, or clothe themselves—for a civil infraction, such as sitting on a bench for too long, it should be deemed per se unconstitutional under the Eighth Amendment. Abolition of these fines is what the Constitution demands.

149. *See e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (bringing down the Court's infamous separate but equal opinion in regard to racially segregated schools).

150. *See e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954) (reversing the Court's racist ruling in *Plessey*, because separate but equal was patently false, and the segregated schools infringed upon the Fourteenth Amendment rights of the kids going to the sub-par segregated schools).

