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State v. Yang: *Excessive Fine or Unconstitutional Tax?*

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STATE V. YANG: EXCESSIVE FINE OR UNCONSTITUTIONAL TAX?

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I. INTRODUCTION

Both the United States Constitution and the Montana Constitution protect citizens from excessive bail, fines, and cruel and unusual punishment.[1] The United States Supreme Court's recent decision in *Timbs v. Indiana*[2] held that the Excessive Fines Clause[3] applied to the states through the Fourteenth Amendment's Due Process Clause. In *State v. Yang*,[4] the Montana Supreme Court was presented with the question of whether a statutorily mandated fine of 35 percent market-value in drug possession convictions proves facially unconstitutional under the state and federal constitutional ban on excessive fines.[5] Recently, in *State v. Tam Thanh Le*, the Court answered that question in the negative under the Montana Constitution.[6] In *Yang* however, the Court was tasked with analyzing the fine after the United States Supreme Court decided *Timbs*, and it reached the opposite conclusion.[7]

This Note analyzes the Court's decision in *Yang* in three distinct areas. First, the Court's decision in *Yang* follows the spirit of the federal and state constitutional bar on excessive fines. Second, despite following the spirit of the constitutional prohibition, the Court's reliance on Yang's facial challenge provides tenuous grounds for its holding. The Court could have reached the same conclusion, but through more robust reasoning, by relying on Yang's as-applied challenge. Finally, by consulting legislative history that demonstrates the Montana Legislature's intent that the fine function as a tax, the Court could have reached the same conclusion and held the fine unconstitutional under existing United States Supreme Court precedent.

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1. MONT. CONST. art. II, § 22; U.S. CONST. amend. VIII.

2. 139 S. Ct. 682 (2019).

3. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Article II, § 22 of the Montana Constitution mirrors this language, with minor stylistic differences.

4. 452 P.3d 897 (Mont. 2019).

5. *Id.* at 899.

6. State v. Tam Thanh Le, 392 P.3d 607 (Mont. 2017).

7. *Yang*, 452 P.3d at 901, 904.

II. Factual and Procedural Background

In December 2016, Ber Lee Yang ("Yang") was a passenger in a vehicle stopped for speeding by a Montana Highway Patrol Trooper.[8] The vehicle was a rental car driven by Yang's ex-husband.[9] The Trooper deployed a drug-sniffing dog based on his interactions with the Yangs.[10] The dog-sniff search yielded over 144 pounds of marijuana from the vehicle's backseat and rear cargo area.[11] Yang and her ex-husband were placed under arrest and eventually charged with felony drug offenses.[12]

The government charged Yang with "one count of felony criminal possession of dangerous drugs with intent to distribute and one count of misdemeanor criminal possession of drug paraphernalia."[13] The Information notified Yang that the maximum term of imprisonment was 20 years, the maximum fine was $50,000, and she would be required to pay an additional assessment of 35 percent of the market value of the drugs, pursuant to § 45-9-130 of the Montana Code Annotated.[14]

Yang entered into a plea agreement for a five-year suspended sentence.[15] The plea left the 35 percent assessment to the district court's discretion.[16] Yang agreed to pay all court costs.[17] The district court accepted the parties' plea and sentenced Yang.[18] As for the assessment, the State argued the drugs' market value equaled $576,000; Yang argued it fell between $144,000 and $300,000.[19] The district court determined the value to be $216,000, midway between the two estimations, and ordered Yang to pay 35 percent of that figure, totaling $75,600, along with $3,830 for interpreter fees and other court costs.[20] Yang appealed, arguing that a mandatory market-value fine that fails to consider the offender's financial resources, "the nature of the crime committed," and "the nature of the burden the required fine would have on the offender" violated her constitutional right against excessive fines.[21]

8. *Id.* at 899.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 900.
19. Brief of Appellee at 5, *State v. Yang*, 452 P.3d 897 (Mont. 2019) (No. DA 18-0072).
20. *Yang*, 452 P.3d at 900.
21. *Id.*

III. HOLDING

A. Justice McKinnon's Majority Opinion

Yang argued on appeal that the statute was both unconstitutional as applied and facially unconstitutional.[22] In her as-applied constitutional challenge, Yang argued that the $75,600 fine and other court costs were unconstitutional given her personal financial circumstances.[23] The Montana Supreme Court rejected this challenge, finding that Yang waived her as-applied challenge when she failed to raise it before the district court.[24] Although the Court rejected Yang's as-applied challenge, it concluded that Yang's facial challenge merited review despite her failure to raise it below.[25]

The Court proceeded to compare § 46-18-231(3), which requires a sentencing judge to consider the nature of the offender's crime, their financial resources, and the nature of the burden that a fine would impose, with § 45-9-130, which mandates the sentencing judge levy a 35 percent market-value fine against every individual found to have possessed or stored dangerous drugs.[26] The Court concluded that the requirements of § 46-18-231(3) ensure that a fine is not grossly disproportionate, therefore protecting against excessive fines, and is clearly evinced by the legislative intent.[27]

The Court read § 46-18-201, which outlines the sentences a judge may impose upon conviction, in conjunction with § 46-18-231(3) as a requirement that the judge consider the factors in § 46-18-231(3) when imposing any fine.[28] The Court's reading rested on the legislative history of the bill that enacted § 46-18-231 and amended § 46-18-201 to include "payment of a fine as provided in [§] 46-18-231."[29] The Court viewed this amendment as demonstrative of the Legislature's intent that the factors in § 46-18-231(3) be taken into consideration upon sentencing.[30] Conversely, the absence of a maximum penalty and the mandatory language of § 45-9-130 troubled the Court.[31] The Court concluded that the statute was facially unconstitutional because no situation existed in which the district court could compare the proportionality of the fine to the gravity of the offense.[32]

22. *Id.* at 901.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 902.
27. *Id.* at 902–03.
28. *Id.* at 903.
29. *Id.*
30. *Id.*
31. *Id.* at 904.
32. *Id.*

The Court concluded by distinguishing Yang's case from *State v. Tam Thanh Le*,[33] where the Court upheld § 45-9-130 because Le's fine was below the statutorily authorized maximum fine for his offense, while Yang's was far above that maximum.[34] Finally, the Court concluded that, because the case was already remanded for recalculation of Yang's fine, the district court could also consider Yang's ability to pay the court costs and interpreter's fees.[35]

B. Justice Baker's Concurring and Dissenting Opinion

Justice Baker's concurring and dissenting opinion agreed with the majority opinion that Yang was entitled to review of her constitutional challenges, but would limit that review to her as-applied challenge.[36] Justice Baker concluded that the Court could review the merits of Yang's as-applied challenge, which she had failed to preserve, by applying the plain error doctrine.[37] The plain error doctrine allows the Court to review unpreserved issues that implicate violations of fundamental constitutional rights.[38] Under the plain error doctrine, when an argument is made for the first time on appeal, the Court first determines whether the defendant's fundamental constitutional rights have been implicated.[39] Next, the Court considers whether a failure to review would result in a miscarriage of justice, raise questions of fairness, or undermine the integrity of the judicial process.[40]

Justice Baker reasoned that Yang's claim clearly implicated her constitutional rights and had no trouble concluding that failure to review the claim would satisfy the second prong of the plain error standard.[41] Because of the factual determinations necessary to determine whether a fine is excessive, Justice Baker would not review Yang's as-applied constitutional claim on appeal.[42] Instead, she would remand the case for a new sentencing hearing where the district court could consider whether § 45-9-130 would impose an excessive fine given Yang's circumstances.[43]

33. 392 P.3d 607 (Mont. 2017).
34. *Yang*, 452 P.3d at 904.
35. *Id.* at 905.
36. *Id.* at 905 (Baker, J., with Sandefur, J., concurring in part and dissenting in part).
37. *Id.* at 905–06.
38. *Id.* at 906.
39. *Id.* (citing State v. Lawrence, 385 P.3d 968, 971 (2016)).
40. *Id.*
41. *Id.* 906–07.
42. *Id.* at 907.
43. *Id.*

C. Justice Rice's Dissent

Justice Rice's dissent argued that the Court's holding in *Le* should have definitively precluded Yang's facial constitutional challenge and that finding for Yang implicitly overturned *Le*.[44] He concluded that the majority's constitutional analysis was an inappropriate *sua sponte* declaration unsupported by briefs or application to the case, and conflicted with the variant legislative intent of the sentencing statutes.[45] Further, he found the majority's focus on Yang's personal circumstances misplaced and irrelevant to the proportionality test.[46] Finally, he concurred with the Court that Yang's as-applied challenge could not be addressed on appeal, but argued that, if the claim were addressed in the future, Yang would likely be unable to establish that her sentence proved grossly disproportionate given the facts of her crime and possible penalties.[47]

IV. ANALYSIS

The majority opinion's requirement that a sentencing judge consider the nature of the crime, the defendant's resources, and the burden of a fine imposed on the defendant capture the spirit of the Eighth Amendment; however, the opinion ultimately rests on the tenuous grounds of Yang's facial constitutional challenge, an issue resolved (and dismissed) by *Le*. Yang's as-applied challenge was the more apt ground on which to overturn Yang's fine. Finally, if the Court wished to declare the mandatory fine unconstitutional, it could have found steadier ground by analyzing it as a tax.

A. Consideration of Individual Income in Excessive Fine Analysis is Historically Favored

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."[48] The language of the English Bill of Rights arose after the reign of James II; many of the King's judges imposed severe fines on his enemies, and several opponents of the King were forced to remain in prison because they could not pay the substantial monetary penalties that had been assessed.[49] Both Article II, § 22 of the Montana Constitution and the Eighth Amendment received little debate in their respective constitutional conventions. The delegates of the Montana Constitutional Conven-

44. *Id.* (Rice, J., with Sandefur, J., dissenting).
45. *Id.* at 908.
46. *Id.*
47. *Id.* at 909.
48. Solem v. Helm, 463 U.S. 277, 285 n.10 (1983).
49. Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 267–68 (1989).

tion retained, unchanged, the language of Article II, § 22 from the 1889 Constitution, and approved it 95-0, with two votes excused and three votes absent.[50] As for the federal constitution, the debate over the Eighth Amendment concerned cruel and unusual punishment, citing concerns that such terms were too indefinite; excessive fines were understood to remain to the courts to determine.[51]

The United States Supreme Court has not been directly presented the question of whether "wealth or income are relevant to the proportionality determination," or whether the fact that a fine will "deprive [an offender] of his livelihood" proves relevant to the constitutionality of the fine.[52] The Court's jurisprudence on the Excessive Fines Clause has produced the gross proportionality test: the amount of the fine "must bear some relationship to the gravity of the offense it is designed to punish," and if the fine stands grossly disproportional to the defendant's offense, it violates the Excessive Fines Clause.[53]

However, writing for herself and Justice John Paul Stevens in *Browning-Ferris*, Justice Sandra Day O'Connor concluded that a state may increase the size of a penalty in response to a defendant's wealth.[54] In reaching this conclusion, Justice O'Connor noted that the Eighth Amendment is only a "ceiling on the *amount* of a monetary sanction" and "does not require the States to subscribe to any particular economic theory."[55] She further noted that history favored consideration of a person's income.[56] The Magna Carta's requirement that amercements (civil fines paid to the Crown) be proportionate and not destroy a person's livelihood stemmed from frequent and abusive amercements for arbitrary amounts enforced by the King and his officers.[57] Moreover, Blackstone believed that fines and the value of money vary individually and cannot be ascertained by any invariable law.[58] O'Connor rooted her argument in the original meaning and purpose of constitutional prohibitions on excessive fines and argued that a strict construction of the plain language of the Excessive Fines Clause allowed states leeway to consider individual circumstances. While Justice O'Connor did not speak for the Court, her opinion in *Browning-Ferris* provides the strongest argument that a state should consider income and other individual circum-

50. V Montana Constitutional Convention, Verbatim Transcript 1771 (1979); VII Montana Constitutional Convention, Verbatim Transcript 2650–51 (1979).

51. Weems v. United States, 217 U.S. 349, 368–69 (1910).

52. United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998).

53. *Id.* at 334–35.

54. Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300–01 (1989) (O'Connor, J., concurring in part, dissenting in part).

55. *Id.* at 300.

56. *Id.* at 287, 300.

57. *Id.* at 287–89, 300.

58. *Id.* at 300 (citing William Blackstone, Commentaries 4 at *371).

stances. O'Connor's argument served as a precursor for the Montana Supreme Court to go one step further in *Yang* and conclude that a state *must* consider the fine in light of a defendant's income.

B. Facial Challenges Rarely Win, and Le *Precluded* Yang*'s Facial Challenge*

The United States Supreme Court generally disfavors facial challenges.[59] This assertion rests "on the assumption that facial challenges are and ought to be rare."[60] The assertion has been challenged and argued to be "false as an empirical matter and highly dubious as a normative proposition."[61] While the assertion may prove false for the Supreme Court of the United States, it generally remains true for the Montana Supreme Court. A brief, non-exhaustive analysis found that the Montana Supreme Court rejected facial challenges in 80 percent of cases.[62] Including *Yang*, the Montana Supreme Court found a statute or ballot measure facially unconstitutional in only seven cases.[63] In 28 other cases, the Montana Supreme Court rejected facial challenges or found other grounds on which to resolve the case.[64] While the sample size is small, it reflects the Montana Supreme

59. Citizens United v. FEC, 558 U.S. 310, 398 (2010) (Stevens, J., with Ginsburg, Breyer and Sotomayor, JJ., concurring in part and dissenting in part).

60. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 917 (2011).

61. *Id.* at 917.

62. In 28 of 35 applicable results on Westlaw, the Montana Supreme Court rejected facial challenges.

63. State v. Yang, 452 P.3d 897, 905 (Mont. 2019); Espinoza v. Montana Dep't of Revenue, 435 P.3d 603 (Mont. 2018) (finding state tax credit program facially unconstitutional; overturned by Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020)); Reichert v. State ex rel. McCulloch, 278 P.3d 455 (Mont. 2012) (finding ballot measure affecting election of Montana Supreme Court justices facially unconstitutional); MEA-MFT v. McCulloch, 291 P.3d 1075 (Mont. 2012) (finding ballot measure on tax credit facially unconstitutional); Caldwell v. MACo Workers' Comp. Tr., 256 P.3d 923 (Mont. 2011) (finding statute categorically eliminating rehabilitation benefits to claimant facially unconstitutional); State v. Stanko, 974 P.2d 1132 (Mont. 1998) (finding 'reasonable and proper' speed limit facially vague and unconstitutional); State v. Helfrich, 922 P.2d 1159 (Mont. 1996) (finding criminal defamation statute facially overbroad).

64. Citizens for a Better Flathead v. Bd. of Cty. Comm'rs of Flathead County, 386 P.3d 567, 572–80 (Mont. 2018) (rejecting a facial challenge to a zoning amendment); City of Missoula v. Mountain Water Co., 419 P.3d 685 (Mont. 2018) (rejecting facial challenge to statutory cap on attorney fees and expenses); State v. Coleman, 431 P.3d 26 (Mont. 2018) (rejecting facial challenge to sentencing statute because defendant did not raise it); Robinson v. State Comp. Mut. Ins. Fund, 430 P.3d 69 (Mont. 2018) (rejecting facial challenge to statute allowing workers' compensation insurers to obtain multiple medical examinations of a claimant); Matter of S.M., 403 P.3d 324 (Mont. 2017) (rejecting facial challenge to statute prohibiting a person from waiving the right to counsel in a civil commitment proceeding); Montana AFL-CIO v. McCulloch, 380 P.3d 728 (Mont. 2016) (declining to address facial challenge after resolving case on other grounds); Montana Cannabis Indus. Ass'n v. State, 368 P.3d 1131 (Mont. 2016) (rejecting facial challenge to law prohibiting probationers from becoming registered cardholders for medical marijuana); State v. Spottedbear, 380 P.3d 810 (Mont. 2016) (rejecting facial chal-

Court's general aversion to finding statutes or ballot measures facially unconstitutional.

To establish a facial challenge to a statute's constitutionality, the challenger must show that no set of circumstances exist where the statute could remain valid.[65] In other words, the law proves unconstitutional in all applications.[66] Legislative acts are presumed valid, and a facial challenge does not depend on a particular case's facts.[67] The majority opinion in *Yang* fails to reconcile these canons of interpretation with its holding in *Le*.

The facts of *Le* are strikingly similar to *Yang*. Police stopped Le's vehicle, and a search yielded 23 pounds of marijuana.[68] He was charged with felony drug possession and sentenced to a six-year deferred sentence, with a $1,500 fine payable to the Eastern Montana Drug Task Force and a $15,000 fine pursuant to § 45-9-130.[69] On appeal, represented by the same lawyer as Yang was on her appeal, Le argued that the $15,000 fine required by § 45-9-130 violated the Excessive Fine Provision of the Montana Constitution.[70]

lenge to statute criminalizing threats and other improper influence); State v. Spady, 354 P.3d 590 (Mont. 2015) (declining to address facial challenge due to Legislative amendment and defendant's concession that the challenge was unnecessary); State v. Dugan, 303 P.3d 755 (Mont. 2013) (finding prima facie provision of Privacy in Communications statute facially overbroad, but rejecting that entire statute was entirely facially unconstitutional); Walters v. Flathead Concrete Products, Inc., 249 P.3d 913 (Mont. 2011) (rejecting facial challenge to Workers' Compensation Act); Disability Rts. Montana v. State, 207 P.3d 1092 (Mont. 2009) (rejecting facial challenge to statute limiting disclosure of final report on child abuse allegations); Rohlfs v. Klemenhagen, LLC, 227 P.3d 42 (Mont. 2009) (rejecting facial challenge to Dram Shop Act notice requirement); State v. Strong, 203 P.3d 848 (Mont. 2009) (rejecting facial challenge to sentencing statute which treated adults and criminally convicted youths differently); State v. Knudson, 174 P.3d 469 (Mont. 2007) (declining to reach facial challenge after finding statute unconstitutional as-applied); State v. Price, 57 P.3d 42 (Mont. 2002) (rejecting facial challenge to custodial interference statute) (overturned by City of Helena v. Frankforter, 423 P.3d 581 (Mont. 2018)); Pengra v. State, 14 P.3d 499 (Mont. 2000) (declining to address facial challenge because it was not raised below); State v. Dixon, 998 P.2d 544 (Mont. 2000) (rejecting facial challenge because defendant lacked standing); State v. Lancione, 956 P.2d 1358 (Mont. 1998) (finding defendant did not have standing to raise facial vagueness claim); State v. Nye, 943 P.2d 96 (Mont. 1997) (rejecting facial challenge to malicious intimidation statute); State v. Stubblefield, 940 P.2d 444 (Mont. 1997) (finding defendant did not have standing to bring facial vagueness challenge to DUI statute); Gulbrandson v. Carey, 901 P.2d 573 (Mont. 1995) (rejecting facial challenge to statute regarding retired judges' retirement benefits); State v. Martel, 902 P.2d 14 (Mont. 1995) (rejecting facial challenge to stalking statute); State v. Ross, 889 P.2d 161 (Mont. 1995) (rejecting facial overbreadth challenge to intimidation statute); Monroe v. State, 873 P.2d 230 (Mont. 1994) (rejecting facial challenge to statute permitting Montana residents hunting licenses if they have been a resident for six months); State v. Lilburn, 875 P.2d 1036 (Mont. 1994) (overturning district court's ruling that statute prohibiting hunter harassment was unconstitutional); Stuart v. Dep't of Social and Rehab. Servs., 846 P.2d 965 (Mont. 1993) (rejecting to address facial challenge because plaintiff lacked standing); Broers v. Montana Dep't of Revenue, 773 P.2d 320 (Mont. 1989) (rejecting facial vagueness challenge to alcohol licensing statute).

65. United States v. Salerno, 481 U.S. 739, 745 (1987).

66. *Id.*

67. *Citizens for a Better Flathead*, 386 P.3d at 581.

68. State v. Tam Thanh Le, 392 P.3d 607, 608–09 (Mont. 2017).

69. *Id.* at 609.

70. *Id.* at 608–10.

The Court rejected that argument and concluded that the $15,000 fine was not grossly disproportional to the gravity of his offense.[71] In other words, the Court held that, as applied to Le, § 45-9-130 was constitutional. The holding in *Le* necessarily means that § 45-9-130 is not unconstitutional in *all* applications, as required for Yang to succeed on a facial challenge.

The Court's decision in *Yang* proves distinguishable for two reasons: first, the grossly disparate amounts between each defendant's fine; and second, the Court's decision in *Yang* hinges on the ability of the sentencing judge to consider proportionality factors for any defendant, rather than analyze the amount of the fine for each defendant. Nevertheless, these distinctions bring the Court's holding in *Yang* into conflict with *Le*. The Court's opinion in *Yang* fails to explicitly overturn *Le* to reach its result. With a facial challenge that *Le* should have precluded, *Yang* would have been better resolved by considering the as-applied challenge. However, there is another ground on which Yang could have succeeded: urging the Court to view § 45-9-130 as a tax.

C. Section 45-9-130 Looks Like a Tax and Acts Like a Tax

None of the three opinions address an argument briefly discussed in Yang's appellate briefs: § 45-9-130 functions as a punitive tax and is therefore constitutionally questionable, at a minimum.[72] Taxes that are levied on goods that the taxpayer neither owns nor possesses when the tax is imposed have an "unmistakable punitive character," and the imposition of such taxes upon criminals and no others render these taxes "a form of punishment."[73] By properly viewing § 45-9-130 as a tax, the Court could have overturned the mandatory fine statute and kept with precedent; indeed, viewed in this light, the Court's decision was roughly 25 years in the making.

In 1995, the Montana Legislature, reacting to the Supreme Court's decision in *Montana Department of Revenue v. Kurth Ranch*, passed § 45-9-130.[74] *Kurth* overturned a state tax imposed on the possession and storage of dangerous drugs, reasoning that the tax was the functional equivalent of a successive criminal prosecution that violated double jeopardy.[75] The legislative history of § 45-9-130 indicates that the Legislature viewed the law as

71. *Id.* at 611.

72. Appellant's Opening Brief at 21, *State v. Yang*, 452 P.3d 897 (Mont. 2019) (No. DA 18-0072); Appellant's Reply to Appellee's Response Brief at 11, *State v. Yang*, 452 P.3d 897 (Mont. 2019) (No. DA 18-0072).

73. Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 783 (1994).

74. S. 219, 54th Leg. Reg. Sess. (Mont. 1995); *see also Minutes*, S. Taxation Comm., 54th Leg. Reg. Sess. 10 (Mont. Mar. 13, 1995).

75. *Kurth*, 511 U.S. at 784.

a way around the Supreme Court's decision in *Kurth*.[76] In support of the bill, Senator Steve Doherty of Great Falls expressed that "a wiser course would be to change the tax to a fine."[77] Another representative noted that the fiscal note says, "the bill will be challenged in court and there is a significant chance that the state will lose."[78] In effect, the Legislature took the idea of the property tax, dressed it up as a mandatory fine, and then recognized that such a ploy might not work. To circumvent these concerns, one amendment struck the title language of "[a]n annual property tax on" and replaced it with "[a] mandatory fine for."[79]

A comparative analysis of the statute overturned in *Kurth*, § 15-25-111, with § 45-9-130 shows the two statutes effectively functioned the same: as punitive measures for drug possession. Section 15-25-111 provided that any person possessing or storing dangerous drugs was liable for the tax and that the tax was due payable on the date of the assessment.[80] Section 15-25-111 assessed the value of fine through two methods: either a statutorily mandated value or a determination of value by the Montana Department of Revenue.[81] The legislative history of § 15-25-111 demonstrates another similarity between the statutes: the legislative uncertainty over what to call the assessment. In a Senate hearing, one senator expressed concern with the word "tax" and asked whether the term "penalty" could be used instead; the bill's sponsor rejected the suggestion because the effect of the bill was to be a tax.[82] Regardless of the intent, the United States Supreme Court overturned the statute because it functioned as a punitive measure.[83] Section 45-9-130 is a punitive measure, assessed only upon conviction of a criminal offense. Comparatively, the only functional difference between the statutes lies in the power to determine the drug's value. Rather than allowing the Montana Department of Revenue to value it, § 45-9-130 leaves that power to the sentencing judge.[84]

In *Kurth*, the United States Supreme Court applied a two-part test: first, whether the penalizing features of the tax cause it to lose its character and become a penalty with the characteristics of regulation and punishment; second, the Court analyzed several factors to determine whether a tax should be considered punitive.[85] Those factors include examining whether

76. *Minutes*, Montana House Comm. on Taxation, 54th Leg. Reg. Sess. 3 (Mar. 31, 1995).
77. *Id.*
78. *Id.* at 4.
79. *Minutes*, S. Taxation Comm., 54th Leg. Reg. Sess. 17 (Mont. Mar. 13, 1995).
80. MONT. CODE ANN. § 15-25-111 (repealed 1995).
81. *Id.*
82. *Minutes*, Montana S. Comm. on Taxation, 49th Leg. Reg. Sess. 6 (Mar. 25, 1987).
83. Kurth v. Montana Dep't of Revenue, 511 U.S. 767, 784 (1994).
84. MONT. CODE ANN. § 45-9-130, *held unconstitutional by* State v. Yang, 452 P.3d 897 (Mont. 2019).
85. *Kurth*, 511 U.S. at 779–83.

the tax (1) was motivated by revenue-raising, rather than punitive purposes; (2) is remarkably high; (3) serves an obvious deterrent purpose; (4) is conditioned on the commission of a crime; (5) is enacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation; and (6) is levied on goods the taxpayer neither owns nor possesses when the tax is imposed.[86] The Court further noted that the market value of an illegal substance was one of two alternative measures of the tax.[87]

In treating § 45-9-130 as a tax and applying those factors to *Yang*, all are present. The legislative history of § 45-9-130 indicates that it was not motivated by revenue-raising—a Department of Revenue representative testified that the statute in *Kurth*, which § 45-9-130 attempted to remedy, collected approximately $100,000 over six years, and recognized that "most people who are caught do not have much money."[88] In *Kurth*, the Supreme Court determined that a 10 percent tax was too high.[89] Similarly, the fine assessed under § 45-9-130 is 35 percent of the market value, a "remarkably high" amount.[90] The fine in § 45-9-130 also serves a deterrent purpose—it is meant to be imposed in addition to other punishments.[91] The fine is clearly conditioned on the commission of a crime because it is only imposed after the defendant has been arrested, and it is only levied on goods that the defendant no longer owns nor possesses. Moreover, the nature of the fine requires the judge to calculate the market value of a substance that cannot be legally marketed, a characteristic that the United States Supreme Court deemed "curious" in striking down Montana's mandatory tax in *Kurth*.[92] Under this analysis, if § 45-9-130 is viewed as a tax, it would prove unconstitutional under *Kurth*. Armed with this knowledge and history, the Court might have reached the same conclusion but on sturdier reasoning.

V. Conclusion

The spirit of constitutional prohibitions on excessive fines is not served by imposing an exorbitant fine on a non-English speaking immigrant, regardless of guilt. However, the Court's reasoning in finding a statute imposing a mandatory fine on defendants convicted of drug possession unconstitutional was flawed and amounted to a legal shortcut. Yang's as-

86. *Id*.
87. *Id.* at 783 n.23.
88. *Minutes*, Montana House Comm. on Taxation, 54th Leg. Reg. Sess. 4 (Mar. 31, 1995).
89. *Kurth*, 511 U.S. at 784.
90. *Id*. at 780; State v. Yang, 452 P.3d 897, 904 (2019).
91. *Yang*, 452 P.3d at 904.
92. *Kurth*, 511 U.S. at 783 n.23.

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applied challenge proved more apt to overturn the excessive fine; her facial challenge should have been precluded by a case decided not even two years prior by a Montana Supreme Court comprised of mostly the same members. Through the as-applied challenge, the Court could have reached the same conclusion, but on more solid ground, by reviewing the legislative history and treating the fine as a tax.