The Supreme Court Resuscitates the Eighth Amendment

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The justices strike a blow against policing for profit.

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Tyson Timbs's story starts, as so many stories do today, with opioids. Following a workplace injury in Ohio, Timbs developed a painkiller addiction, which led him to heroin. When his aunt in Indiana needed help due to illness, Timbs moved in with her and sought to use the transition as an opportunity to get clean.

Then his father died, and Timbs found himself with $73,000 in life-insurance proceeds. He splurged on a Land Rover LR2, which cost him $42,000. In just four months, he blew the rest on opioids and heroin. "I was careless and stupid," he says. "I wonder to myself how I went through all that money."

Broke and addicted, he looked for a new way to support his habit. Timbs followed the advice of a police informant who suggested he start selling drugs. His first two—and only two—consummated sales were to undercover officers. In May 2013, en route to a third possible deal, he was pulled over, arrested, briefly jailed, and had his Land Rover seized. During his entire truncated career as a drug dealer, he sold about four grams of narcotics, worth less than $400.

As months of court proceedings commenced, Timbs checked himself into a free rehab clinic, where a therapist helped him overcome his addiction. He has been clean ever since.

More in this series

In April 2015, Timbs pleaded guilty to one felony count of dealing. Under the plea deal, Timbs was sentenced to one year of home detention and five years on probation, and he agreed to pay more than $1,200 in probation fees as well as court and police costs. The state also filed paperwork to take Timbs's car through what's known as civil forfeiture, in which the government seizes money, homes, vehicles, or other personal possessions, ostensibly as punishment for crimes—though cities are increasingly using the practice as a way to generate revenue.

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In January 2018, Timbs partnered with the Institute for Justice, where we both work, and filed a cert petition asking the U.S. Supreme Court to hear his case. Last summer, the Court granted his petition. And in February, the Supreme Court ruled unanimously in *Timbs v. Indiana* that state and local governments are bound by the Eighth Amendment's ban on excessive fines, setting a historic precedent against policing for profit.

Until now, the excessive-fines clause in the Constitution's Eighth Amendment had languished in obscurity, the Rodney Dangerfield of constitutional rights. The *Timbs*decision has gone some distance to restoring its prominence, but the

Court still needs to address a wide variety of critical issues. What exactly counts as a “fine”? How should courts determine when a fine becomes “excessive”? Should courts consider people’s inability to pay fines or their effect on livelihoods? Ultimately, reining in the systemic abuse of fines and forfeitures will require a combination of further court decisions and legislative action.

“Without my car, it is incredibly difficult to do all the things the government wants me to do to stay clean, like visit my probation officer, go to AA, and keep my job,” Timbs explained to us last spring. “Right now, I’m borrowing my aunt’s car to go to work so we can pay the bills, and she has to take a bus back and forth to her kidney-dialysis appointments. Fighting to stay clean is hard enough, but doing it without my vehicle has been even harder.”

“They knew my vehicle wasn’t bought with drug money,” he said. “I’ve already been punished. So what they’re doing amounts to punishing me a second time and way out of proportion to the crime that I committed.”

In August 2015, an Indiana trial court agreed with Timbs: the Grant County Superior Court ruled that the forfeiture would violate the Eighth Amendment, which says that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” As the U.S. Supreme Court explained in a 1993 decision, the excessive-fines clause “limits the government’s power to extract payments, whether in cash or in kind, as *punishment* for some offense.”

In Timbs’s case, the maximum allowable fine for his crime was $10,000—less than a quarter of the value of his $42,000 vehicle. For these reasons, the Indiana trial court held that forfeiting Timbs’s car would be “grossly disproportional to the gravity of [his] offense.”

But in November 2017, the Indiana Supreme Court overturned the ruling and ordered the car forfeited. The court claimed that the U.S. Supreme Court had not specifically “incorporated” the excessive-fines clause to Indiana, so it was not “enforceable against the states.” As a result, Timbs, along with all other Indiana residents, found himself outside the protection of the excessive-fines clause; the Constitution would not block state law enforcement from seizing Timbs’s car.

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Timbs’s Land Rover widened a major split between state and federal courts on how to apply the Bill of Rights. With its decision, the Indiana Supreme Court joined the Montana Supreme Court, the Mississippi Supreme Court, and the Michigan Court of Appeals in ruling that the excessive-fines clause does not apply to the states. But the high courts for 14 other states—Alabama, California, Delaware, Georgia, Idaho, Illinois, Kentucky, Massachusetts, Minnesota, Nevada, Ohio, Pennsylvania, Utah, and West Virginia—as well as the Eighth and Ninth U.S. Circuit Courts of Appeals, had all ruled that the clause is, in fact, incorporated and therefore does apply to the states.

At the *Timbs* oral argument before the U.S. Supreme Court in November, both progressive and conservative justices expressed sharply worded skepticism toward civil forfeiture. Justice Sonia Sotomayor blasted many forfeitures as being "grossly disproportionate to the crimes being charged" and compared civil forfeiture to the Star Chamber, the infamous English court that's become a byword for unjust profiteering. Justice Neil Gorsuch expressed his disbelief that the excessive-fines clause was even an issue: "Here we are in 2018, still litigating incorporation of the Bill of Rights. Really?" Justice Brett Kavanaugh echoed that sentiment. In an exchange with Justice Stephen Breyer, the Indiana solicitor general conceded that without the excessive-fines clause, nothing in the Constitution prevents the state from forfeiting a Bugatti or a Ferrari caught speeding "only five miles an hour above the speed limit."

The Court's decision was unanimous. "For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history," Justice Ruth Bader Ginsburg wrote in an opinion signed by eight of the nine justices. "Exorbitant tolls undermine other constitutional liberties."

"In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming," Ginsburg wrote. "Protection against excessive punitive economic sanctions secured by the Clause is, to repeat, both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"

Thanks to this ruling, the Eighth Amendment's protection against excessive fines now covers all Americans under the Fourteenth Amendment. But further strengthening the excessive-fines clause is crucial to restraining the grasping hand of the government—because predatory policing remains widespread, part of a broader trend toward monetizing the U.S. criminal-justice system, with an increasing number of cities and private firms viewing fines and fees as a revenue source.

A groundbreaking investigation by *The Washington Post* in 2014 revealed that local and state agencies, working with federal officials, had taken $2.5 billion in some 62,000 different cash seizures on America's highways and elsewhere since 9/11. All of those seizures were conducted "without search warrants or indictments." Even a minor misdemeanor charge can send families scrambling to cover their expenses; money that would otherwise be spent on rent, food, or medical costs instead pays off criminal-justice debt. Failure to pay can incur severe consequences, from a suspended driver's license (a fate shared by up to 7 million drivers in nearly 40 states) to incarceration in a modern-day debtors' prison.

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Many people oppose tax hikes, but revenues collected through the criminal-justice system, from people the government has branded as "criminals," get public support. So if a city is short on cash, it can pressure law enforcement to vigorously crack down on conduct—like traffic infractions, code violations, or drug offenses—that is

punished with fines. One study of North Carolina found that a 10 percent drop in a county's revenue resulted in officers writing 6 percent more traffic tickets.

Something similar happens with property seized from the drug trade. A recent reportby economists at Clemson University and George Mason University found that "drug arrests increase in counties where local governments are running deficits"—but only black and Hispanic drug arrests, and only in states where police departments can keep forfeiture proceeds. Similarly, numerous cities in Southern California saw "forfeiture revenue spike immediately after police budgets were cut" following the recession, according to a 2015 study by the Drug Policy Alliance.

Perhaps unsurprisingly, law-enforcement agencies have a powerful financial incentive to pursue forfeiture cases when they can keep what they seize. Looking for a way to expand the war on drugs without raising taxes, Congress and many state legislatures passed bills during the Reagan era that let law enforcement keep the proceeds of forfeited property, rather than have the money deposited into the general treasury. This allowed agencies to self-finance their operations, without having to rely on a democratically elected (and politically accountable) body.

Revenue skyrocketed. In 1985, the Justice Department's Assets Forfeiture Fund brought in $27 million; by 2017, that figure topped $1.6 billion. At the state level, reported forfeiture revenue more than doubled across 14 states between 2002 and 2013.

But while heavy reliance on fines, fees, and forfeitures can swell municipal coffers, it can actually *weaken* public safety. By giving law enforcement and incentive to pursue cases that can generate revenue, cities divert scarce resources from investigating more serious crimes. The Drug Policy Alliance found that during the last recession, the small Southern California city of West Covina cut 37 positions from an already understaffed police department—yet in 2014, the city's drug-crimes unit still had as many officers as the unit handling homicide, sex crimes, robbery, and assault. Around that same time, the nearby town of La Verne increased by 100 percent the number of officers assigned to drug task forces—even as it slashed its overall police staff by 20 percent, and emergency-response times doubled. Nationwide, a recent study comparing U.S. Census Bureau data on city revenue streams with local crime clearance rates collected by the FBI found that a 1 percent increase in a city's share of revenue from fines and fees was associated with an astonishing "6.1 percentage point decrease in the violent crime clearance rate and an 8.3 percentage point decrease in the property crime clearance rate."

In jurisdictions where agencies benefit from the revenue they collect from fines and fees, they have an incentive to seek the harshest penalty possible. "It makes sense," the late Justice Antonin Scalia wrote in a 1991 opinion that Ginsburg cited in her *Timbs* decision, "to scrutinize governmental action more closely when the State stands to benefit," since fines may be used "in a measure out of accord with the penal goals of retribution and deterrence."

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Protection against excessive fines is deeply rooted in Anglo-American law. Bound up with the excessive-fines clause is the centuries-old principle of *salvo contenemento suo*, or "preserving one's livelihood." Essentially, the principle holds that no fine should be so severe that it prevents someone from earning a living.

As Ginsburg recounted in her *Timbs* decision, the excessive-fines clause traces its origins to the Magna Carta, which restricted the king's power to issue "amercements," a type of monetary penalty. Under the charter, a "freeman" could only be amerced "in accordance with the gravity of the offense, yet saving always his *contenement*." Even in the 13th century, English jurists recognized that a government-imposed penalty should be proportional and should not completely ruin an offender.

Four centuries later, the 1689 English Bill of Rights declared the freedom from excessive fines to be one of several "ancient rights and liberties" and voided "all grants and promises of fines and forfeitures of particular persons before conviction." In turn, the English Bill of Rights heavily influenced the Virginia Declaration of Rights, from which the language of the excessive-fines clause (and the rest of the Eighth Amendment) was derived in 1791.

In his *Commentaries,* William Blackstone, the jurist most frequently cited by the Founding Fathers, wrote that *salvo contenemento* was an "ancient practice" for juries to determine how much a man could pay the king each year in imposed fines, while still preserving a "maintenance" for the offender to sustain himself, his wife, and his children. "The value of money itself changes from a thousand causes," Blackstone noted; "What is ruin to one man's fortune may be [a] matter of indifference to another's."

If properly applied, the concept of *salvo contenemento* should offer major protection for Americans' homes and cars, and against heavy fines, especially for the poor. Yet before the *Timbs* case, only once in its 229-year history had the Supreme Court rejected a fine or forfeiture for violating the excessive-fines clause: *United States v. Bajakajian*, in 1998, which saw Justice Clarence Thomas side with the Court's liberal wing against a ludicrously high criminal forfeiture brought by the Clinton administration.

Hosep Bajakajian, an Armenian immigrant who owned several gas stations in Hollywood, was headed to Cyprus with his family in 1994 to pay back a debt. But while they were waiting for their flight at LAX, customs investigators, who used dogs specially trained to sniff out cash, found more than $230,000 in the family's checked luggage. (They would later find another $127,000 in the Bajakajians' carry-on bags.)

Agents told Bajakajian that under federal law he was required to report if he were transporting more than $10,000 in cash out of the country. Bajakajian had said that he was only carrying $8,000 and that his wife had $7,000. Ironically, Bajakajian later

said he failed to report because he was afraid that government agents in Cyprus might take the cash. A federal judge would later note that Bajakajian had developed a "distrust of the government" from growing up as an Armenian in Syria.

Bajakajian was arrested and pleaded guilty to one charge of failing to report, which at the time carried a maximum $5,000 fine. But the federal government wanted to claim *all* of the cash he was carrying in his checked and carry-on luggage—$357,144 in total—even though none of his cash was linked to any criminal activity.

Ultimately, his case made it to the U.S. Supreme Court. Writing for the majority, Justice Thomas noted that the Court "has never actually applied the Excessive Fines Clause" and that the text of the clause and its history shed little light on "just how proportional to a criminal offense a crime must be." So the justices had to create a new standard, which they centered around "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," Thomas wrote. In Bajakajian's case, his failure to report caused a "minimal" amount of harm that only affected the federal government "in a relatively minor way," while the forfeiture was "many orders of magnitude" larger than the imposed fine. By a vote of 5 to 4, the Supreme Court ruled that forfeiting the $357,144 would be "grossly disproportional to the gravity of his offense."

Bajakajian marked a watershed moment for the excessive-fines clause—but the Supreme Court failed to subsequently clarify what counts as excessive. Because its standard was so vague, the decision failed to turn the tide against police profiteering. Consider the case of Mark Brewer, a decorated Air Force veteran who during a traffic stop in Nebraska in 2011 had $63,530 in cash confiscated, which the government would later claim was either proceeds from a drug transaction or money to facilitate a drug transaction. Brewer claimed that forfeiting his money would violate the excessive-fines clause since he was never actually charged with a crime—not even a traffic ticket. Yet in 2015, the Eighth Circuit Court of Appeals argued that Brewer had "presented no evidence regarding the amount of the fine in relation to the crime it is designed to punish" and upheld the civil forfeiture against his savings.

Nor did the *Bajakajian* ruling resolve whether or not courts should abide by *salvo contenemento* for excessive-fines claims. Although the decision did cite the Magna Carta's limits on amercements (which "should be proportioned to the offense and … should not deprive a wrongdoer of his livelihood"), since Bajakajian didn't claim "that full forfeiture would deprive him of his livelihood," the Supreme Court left for another day whether or not a defendant's "wealth or income are relevant to the proportionality determination."

In the two decades since *Bajakajian,* the Supreme Court hasn't issued any other excessive-fines cases that could be clarifying. Amid this vacuum, as one recent law-review article noted, "the large majority of lower courts" have just ignored a defendant's personal financial situation.

Louis Rulli, a law professor at the University of Pennsylvania, has sharply criticized courts and prosecutors that "want to reduce the excessive-fines clause to a mathematical comparison between" the maximum legal amount for a criminal fine and the market value of the personal property. As Rulli pointed out in a 2017 law-review article, accepting this framework would mean that "the Eighth Amendment's protection will turn mostly on the [property's] market value." That would leave lower-income Americans far more vulnerable to abuses of the state. It would also lead to some perverse results, since under that model, "the very same underlying criminal conduct results in constitutional protection for wealthy families with expensive homes while denying similar protection to families of modest means."

Fortunately, a small number of federal and state courts have recognized the importance of *salvo contenemento*. The First Circuit has ruled that the *Bajakajian* test implies that "a forfeiture is excessive under the Eighth Amendment when it effectively would deprive the defendant of his or her livelihood." The Second Circuit echoed that sentiment, but it held that "courts need not consider" the potential deprivation of one's livelihood in all cases. As a result, "a forfeiture that deprives a defendant of his livelihood might nonetheless be constitutional, depending on his culpability or other circumstances."

Read: Justice Thomas's doubts about civil forfeiture

One of the most encouraging decisions for those hoping to revive the excessive-fines clause comes from the Pennsylvania Supreme Court, which recently sided with a 71-year-old grandmother fighting to save her home and her car from civil forfeiture.

For more than 40 years, Elizabeth Young lived in the same house in West Philadelphia. In 2009, she was hospitalized for blood clots and had to rely on her adult son, Donald Graham, to do basic tasks. But while his mother was recovering, Graham was secretly selling small amounts of marijuana (less than $200 in total) in and around her house and her 1997 Chevrolet minivan.

In 2010, Graham was caught by undercover officers and pleaded guilty to two minor drug charges. His mother was never accused of any criminal wrongdoing. Yet she faced the harsher punishment: Prosecutors demanded that she forfeit her home and her car, even though Graham paid no fine and was—rather ironically—sentenced to 11 to 23 months of house arrest.

Young argued that forfeiting her home and her only means of transportation would be an excessive fine. But a trial court ruled against her. Since the maximum possible fine that could have been imposed on Graham was $80,000—higher than the $54,000 appraised value of Young's home—the court ruled that the forfeiture wasn't disproportionate, and rejected her Eighth Amendment claim.

Young was just one of many innocent residents caught in one of the most abusive forfeiture regimes in the nation. From 2002 to 2014, Philadelphia collected more than $72 million in forfeiture revenue from 23,000 residents, confiscating some 3,500 cars

and more than $50 million in cash. In one case, police seized a piggy bankthat held a little girl's birthday money. The city also evicted hundreds of families each year by filing civil-forfeiture petitions against homes. In order to reenter their home after it had been seized, many homeowners were compelled to waive their constitutional rights; prosecutors required owners to give up their Eighth Amendment right to challenge the forfeiture as an excessive fine. All told, Philadelphia forfeited nearly 1,250 homes and other real-estate properties. In one infamous case, the city tried to forfeit a $300,000 house belonging to Christos and Markela Sourovelis because one of their sons sold $40 worth of drugs.

Philadelphia's forfeiture machine has recently been halted. First, in 2017, the Pennsylvania Supreme Court handed Elizabeth Young a landmark victory. In a unanimous ruling, the state supreme court held that under the excessive-fines clause, courts must consider "whether the forfeiture would deprive the property owner of his or her livelihood, i.e., his current or future ability to earn a living."

"The loss of one's home, regardless of its monetary value, not only impacts the owner, but may impact other family members, and one's livelihood," Justice Debra Todd wrote for the court. "In our society, a home and a vehicle are often essential to one's life and livelihood," and carry far more value than their price tag. If courts were to recognize that subjective value, it would further rein in excessive fines.

In September 2018, as part of a separate class-action lawsuit filed by the Institute for Justice, Philadelphia reached a sweeping settlement that ended many of the city's abusive practices; law enforcement was banned from funding itself through forfeiture. Thanks to the state supreme court and the settlement agreement, Pennsylvania homeowners now have some of the strongest protections against civil forfeiture and excessive fines. Critically, the ruling was only possible because the Pennsylvania Supreme Court held that the excessive-fines clause did in fact apply to the states. The *Timbs* ruling at the U.S. Supreme Court lays the groundwork for further constitutional challenges in other states.

While the battle over the excessive-fines clause continues to play out in the courts, legislative reforms can strengthen this forgotten constitutional right in four ways.

First, the rules for whether a fine should be imposed at all need to be rewritten. How harmful is the offense? Is the crime really something that should be punished by the justice system?

Second, for offenses that do merit fines, courts should establish hearings to gauge someone's capacity to pay. As the UCLA assistant law professor Beth Colgan has written, courts can readily use "objective measurements of well-being, such as income and basic living expenses" to determine the ability to pay. Meanwhile, any imposed fines must not be so punitive that they infringe on the ability to earn an honest living. If the courts deem fines and fees excessive, they must lower these fees accordingly, and they should also offer community service as a viable alternative.

Third, in keeping with the spirit of *salvo contenemento*, states should repeal laws that end up impeding a person's livelihood unnecessarily. California, Maine, Mississippi, and Washington, D.C., have all stopped suspending driver's licenses for unpaid debt. And since 2015, 18 states have eased occupational-licensing barriers for ex-offenders.

But above all, reformers should eliminate the profit incentive that drives municipal gouging. Traffic and code violations should be handled by state courts (as in Kentucky), rather than city or municipal courts, since they are further removed from a city's desire to profit from excessive fines.

Over the summer, San Francisco became the first city in the country to repeal its locally imposed criminal-justice fees, although defendants will still have to pay any fines and fees mandated by state law. San Francisco is also expected to wipe awaymore than $15 million in court debt for 20,000 people, a move that would only costing the local government $1 million in foregone revenue, thanks to low collection rates. More cities should follow suit.

Moreover, any and all revenue from forfeitures, fines, and fees should be sent to a neutral fund, overseen by a democratically elected body that the public can hold accountable at the ballot box. For instance, under the North Carolina Constitution, "the clear proceeds of all civil penalties, forfeitures, and fines" must be deposited into the state's public-school fund.

"In a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen," Supreme Court Justice Joseph Story wrote in 1833. "One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers."

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