WHAT IS AN EXCESSIVE FINE? SEVEN QUESTIONS TO ASK AFTER *TIMBS*

Wesley Hottot

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INTRODUCTION

This Article explains how *Timbs v. Indiana* does more than hold that the Eighth Amendment's Excessive Fines Clause applies to state and local authorities.[1] *Timbs* also gives definition to those "excessive fines" the Constitution guarantees "shall not be . . . imposed."[2]

This definition emerges when *Timbs* is read alongside three other decisions: (1) *Austin v. United States*—the Supreme Court's decision holding that forfeitures are "fines" within the meaning of the Excessive Fines Clause;[3] (2) *United States v. Bajakajian*—the only other case in which the Supreme Court has applied the Excessive Fines Clause;[4] and (3) the Indiana Supreme Court's decision on remand in *Timbs*, which surveys all available case law and adopts a helpful framework for determining excessiveness.[5] *Timbs*, *Austin*, and *Bajakajian*, when combined with examples from federal circuit courts and state high courts, represent a cogent standard for excessiveness. This emerging standard can be summarized using the familiar "five W's (and one H)."[6]

There are seven salient questions: *Who* committed *what* offense; *when* and *where*; *what* property is the government taking; *how* was that particular property involved in the offense; and *why* does the government want it? By answering these questions based on all the evidence, courts can determine whether a fine or forfeiture is excessive.

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1. 139 S. Ct. 682, 687 (2019).

2. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

3. 509 U.S. 602, 622 (1993).

4. 524 U.S. 321, 334–44 (1998), *superseded by statute*, 2001 USA PATRIOT ACT, Pub. L. No. 107-56, § 371, 115 Stat. 272, 336–38 (codified as amended at 31 U.S.C. § 5332 (2001)), *as explained in* United States v. Jose, 499 F.3d 105, 110 (1st Cir. 2007); *see also* Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J. F. 430, 433 (2020) (noting that, prior to *Timbs*, the Supreme Court had "only considered what it means for a monetary penalty to be 'excessive' on one prior occasion," in *Bajakajian*).

5. State v. Timbs, 134 N.E.3d 12 (Ind. 2019).

6. Commonly known as the "five Ws"—who, what, where, when, and why (and sometimes how)—the rhetorical device was first described by Aristotle as the "seven circumstances" of ethical behavior, which he thought "should even prove useful to the lawmaker for assigning . . . punishments." Michael C. Sloan, *Aristotle's* Nicomachean Ethics *as the Original* Locus *for the* Septem Circumstantiae, 105 CLASSICAL PHILOLOGY 236, 236 (2010).

Like the five Ws, the seven questions of excessiveness are open-ended by design.[7] The meaning of "excessive fine" has been open-ended and fact-specific for a long time. The Eighth Amendment's standard can be traced through centuries of Anglo-American law. Yet, the standard has never been reduced to strict factors, rigid formulae, or balancing tests. Instead, the "fundamental" and "deeply rooted" right against excessive economic sanctions[8] requires courts to focus on all the circumstances of a particular offense and particular offender. Each case is viewed holistically, considering what punishments are available, those already imposed, the effect that additional economic penalties will have on the offender and her community, the government's motivations, examples in case law, and the historical purposes of the protection against excessive fines. The rich history of that protection, as *Timbs* makes clear, is key to understanding the meaning of both the Excessive Fines Clause[9] and the Fourteenth Amendment[10] that makes it applicable to state and local government (like virtually all Bill of Rights protections).[11]

Each of the seven questions is fleshed out below, with reference to the excessiveness standard announced on remand in *Timbs*, relevant Supreme Court decisions, and examples from lower courts shedding additional light. The result is an Eighth Amendment excessiveness standard with contours and shape but little in the way of firm boundaries. Others have proposed a balancing test;[12] this Article proposes an open-ended inquiry that should be allowed to develop on a case-by-case basis. Put differently, I regard the indeterminate nature of the excessiveness inquiry as a feature, not a bug, of constitutional design.

7. *See id.*

8. Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019).

9. *See id.* at 687–89 (discussing history); *see also* Brief for Petitioner at 11–25, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (explaining how concerns about the government's power to impose economic sanctions motivated adoption of the Excessive Fines Clause in 1791 and the Fourteenth Amendment in 1868).

10. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

11. McDonald v. City of Chicago, 561 U.S. 742, 764 (2010) (observing that the Supreme Court has already "incorporated almost all of the provisions of the Bill of Rights" based on the Fourteenth Amendment); *see also Timbs*, 139 S. Ct. at 687 n.1 (describing the Sixth Amendment's jury unanimity guarantee as the "sole exception" to the principle that incorporated Bill of Rights protections apply identically to federal, state, and local authorities). *But cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1397–98 (2020) (holding that the Sixth Amendment's jury unanimity guarantee applies identically to federal, state, and local authorities).

12. *See, e.g.*, Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 91–109 (2020) (suggesting a balancing test assessing "(1) [w]hether [a] defendant is able to pay the fine; (2) [w]hether fines [and forfeitures] are a significant [source of revenue] in the sentencing jurisdiction; (3) [w]hether other jurisdictions impose similar fines for similar crimes; and (4) [w]hether the sentencing jurisdiction disproportionately imposes fines against minority defendants").

I. BACKGROUND

A lot of people have said a lot about *Timbs*.[13] Having argued the case for Tyson Timbs at the Supreme Court,[14] I agree with those who view the decision as unremarkable in one sense: It comes as no surprise that the Excessive Fines Clause is incorporated against—or applies to[15]—state and local authorities based on the Fourteenth Amendment's Due Process Clause.[16] That is why the Supreme Court unanimously held that the Excessive Fines Clause warrants

13. *See, e.g.*, Harawa, *supra* note 12, at 68 ("*Timbs* made the question of what constitutes an 'excessive fine' constitutionally relevant in all fifty states. State courts need to know how to determine the constitutionality of financial punishment because now . . . defendants can challenge fines imposed against them as violating the Constitution.") (footnote omitted); Rachel J. Weiss, Note, *The Forfeiture Forecast After* Timbs*: Cloudy with a Chance of Offender Ability to Pay*, 61 B.C. L. REV. 3073, 3076 (2020) (describing *Timbs* as "likely to spawn litigation, with mixed outcomes, as individuals seek to prevent the government from effecting excessive forfeitures"); Annie Depper & J. Blake Hendrix, *Land Rovers, Excessive Fines, and Selective Incorporation: Civil Asset Forfeiture After* Timbs v. Indiana, 54 ARK. LAW. 14, 17 (2019) ("The big question left open in *Timbs* is: what exactly counts as 'excessive' in the context of civil *in rem* forfeitures?"); Nora V. Demleitner, *Will the Supreme Court Rein in "Excessive Fines" and Forfeitures?: Don't Rely on* Timbs v. Indiana, 32 FED. SENT'G R. 8, 8 (2019) ("The Court seems disinclined to fill the term *proportionality* with robust meaning or wrestle with Eighth Amendment challenges to fines and fees."); Lisa Soronen, *Why* Timbs v. Indiana *Won't Have Much Impact*, NAT'L LEAGUE OF CITIES (Apr. 12, 2019), https://tinyurl.com/yxaydc8z ("[A]s a practical matter this case is unlikely to have much of an impact."); German Lopez, *Why the US Supreme Court's New Ruling on Excessive Fines is a Big Deal*, VOX (Feb. 20, 2019), https://tinyurl.com/yrcb6thr (describing *Timbs* as "a sweeping ruling that strengthens property rights and could limit controversial police seizures, such as those done through civil forfeiture"); Timbs v. Indiana*: The End of Civil Asset Forfeiture?*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Oct. 4, 2018), https://tinyurl.com/sd7npdzw (predicting *Timbs* "will reopen the question of the constitutionality of civil forfeiture laws after almost twenty years").

14. Transcript of Oral Argument at 1–2, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); *see also* Oral Argument at 00:06, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), oyez.org/cases/2018/17-1091 (audio recording).

15. Incorporation refers to the conclusion that a right found in the Bill of Rights applies to the states based on Section One of the Fourteenth Amendment. Timbs v. Indiana, 139 S. Ct. 682, 683, 686 (2019). A right is incorporated by the Due Process Clause if the Supreme Court finds that "it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" *Id.* at 687.

16. *Id.* at 686–87; *see, e.g.*, Note, Timbs v. Indiana, 133 HARV. L. REV. 342, 347 & n.65 (2019) (describing incorporation holding as "perhaps . . . inevitable" and quoting Justice Gorsuch's incredulity: "[H]ere we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really?" (quoting Transcript of Oral Argument at 32–33, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091)); Demleitner, *supra* note 13, at 8 ("The outcome of the case never seemed in doubt.").

incorporation.[17] In this sense, the only surprising thing about *Timbs* is that the incorporation status of the Excessive Fines Clause was in question.[18]

Two things did surprise me and my exceptional co-counsel, Sam Gedge.[19] The first was Indiana's argument that civil in rem forfeitures[20] are categorically exempt from excessiveness analysis,[21] meaning there would be no limits on what the government could take from a person without convicting them of a crime. Thankfully, the Supreme Court squarely rejected that argument based on its decision in *Austin* that civil forfeitures are "fines" within the meaning of the Excessive Fines Clause.[22] Second, the degree to which the Justices wrestled with the meaning of excessive fine at oral argument was surprising.[23] From my perspective at the podium, the Justices seemed less interested in the incorporation status of the Excessive Fines Clause and comparatively transfixed

17. *Timbs*, 139 S. Ct. at 686–87, 691. Justice Thomas concurred but would have incorporated the right to be free from excessive fines using the Fourteenth Amendment's Privileges or Immunities Clause. *Id.* at 691–93 (Thomas, J., concurring in the judgment); *see also Ramos*, 140 S. Ct. at 1420–25 (Thomas, J., concurring in the judgment) (arguing that the Sixth Amendment's jury unanimity guarantee is incorporated through the Privileges or Immunities Clause); McDonald v. City of Chicago, 561 U.S. 742, 812 (2010) (Thomas, J., concurring in part and concurring in the judgment) (arguing the same with respect to the Second Amendment). In a one-paragraph concurrence, Justice Gorsuch indicated that he may agree with Justice Thomas's view. *Timbs*, 139 S. Ct. at 691 (Gorsuch, J., concurring) (suggesting that the Privileges or Immunities Clause may be "the appropriate vehicle for incorporation," but that "nothing in this case turns on that question"); *see also* Weiss, *supra* note 13, at 3095, 3095 n.134 (describing the decision as "unanimous" and noting Justice Thomas's concurrence in the judgment).

18. *Cf.* Petition for Writ of Certiorari at 13–18, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (citing decisions of two circuits and fourteen state high courts applying the Excessive Fines Clause to state and local authorities). *But see* State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017) (holding the opposite); State v. 2003 Chevrolet Pickup, 202 P.3d 782, 783 (Mont. 2009) (holding the same); One (1) Charter Arms, Bulldog 44 Special v. State *ex rel.* Moore, 721 So. 2d 620, 623 (Miss. 1998) (holding the same); *In re* Forfeiture of 5118 Indian Garden Rd., 654 N.W.2d 646, 648 (Mich. Ct. App. 2002) (holding the same); *In re* Forfeiture of $25,505, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996) (holding the same).

19. *See* Biography of Sam Gedge, INSTITUTE FOR JUSTICE, https://ij.org/staff/sam-gedge.

20. When forfeiture is in rem, the government sues property in civil court, sometimes leading to colorful case names. *See, e.g.*, United States v. An Article of Hazardous Substance Consisting of 50,000 Cardboard Boxes More or Less, Each Containing One Pair of Clacker Balls, 413 F. Supp. 1281 (E.D. Wis. 1976). When forfeiture is in personam, by contrast, the government charges a person criminally and the court takes jurisdiction over the property as a result of its jurisdiction over the person. *See, e.g.*, United States v. Bajakajian, 524 U.S. 321, 331–32, 331 n.6 (discussing the history of this distinction).

21. Transcript of Oral Argument at 44–45, *Timbs*, 139 S. Ct. 682 (2019) (No. 17-1091) (Indiana's Solicitor General conceding, in response to questions from Justice Breyer, that there is no constitutional limitation on the state's power to forfeit an expensive car for driving five miles over the speed limit), https://tinyurl.com/svbp329x; Oral Argument at 4:12–4:24, State v. Timbs, 134 N.E.3d 12 (Ind. 2019) (No. 27S04-1702-MI-70) ("[Solicitor General]: [T]his is the position that we've staked out already in the U.S. Supreme Court, when I was asked by Justice Breyer whether a Bugatti could be forfeited for going five miles an hour over the speed limit, and historically, the answer to that question is yes, and we're sticking with that position here."), https://tinyurl.com/yxy32exe.

22. *Timbs*, 139 S. Ct. at 689–90 (declining "the State's invitation to reconsider our unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive").

23. Demleitner, *supra* note 13, at 9 ("Much of the discussion during oral argument centered around a matter not squarely before the Court: the definition of *excessiveness*.").

by the dividing line between acceptable and impermissible punishments under the Eighth Amendment.[24]

The discussion of excessiveness at argument appears to have influenced Justice Ginsburg's majority opinion, which does a few things to define excessive fine. The Court explains why, for more than 800 years, constitutional protection against excessive economic penalties has remained a constant feature of Anglo-American law.[25] The wording of this protection has changed very little since the 1680s, reflecting suspicion of the sovereign power to fine people and forfeit their property, a concern that persists to this day.[26] The Court emphasizes that judges have essentially always had the power, and the obligation, to strike down excessive economic sanctions.[27] Doing so is, in fact, a basic judicial power reflected in authorities spanning from 1215 to the present day.[28]

What *Timbs* adds is this: The constitutional prohibition on excessive fines still matters. In the words of a recent Ninth Circuit decision, the "right to be free from excessive governmental fines is not a relic relegated to the period of parchments and parliaments, but rather it remains a crucial bulwark against government abuse."[29] Just four words in the Constitution—"nor excessive fines

24. *See, e.g.*, Transcript of Oral Argument at 8, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (Roberts, C.J.) (positing a difference between a $500,000 fine and losing property used in the commission of a crime and observing "[t]he first one sounds, yeah, that's pretty excessive" and "[t]he second one, you can certainly argue, well, that makes a lot of sense"); *id.* at 15–17 (Sotomayor, J.) (questioning why, under current doctrine, an innocent person's property can be forfeited without it being an excessive fine); *id.* at 22–23 (Alito, J.) ("What is the equation between . . . dollars . . . in a fine and time imprisonment?"); *id.* at 24 (Kagan, J.) ("[W]e've made it awfully, awfully hard to assert a disproportionality claim with respect even to imprisonment. And if it's at least equally hard to assert a disproportionality claim with respect to fines, we could incorporate this tomorrow and it would have no effect on anybody."); *id.* at 25 (Roberts, C.J.) (observing that, in incorporating the Excessive Fines Clause, "we don't even know whether it means we're going to decide whether $10,000 is enough or $20,000, or if we're simply going to say something along the lines of *Harmelin* [*v. Michigan*, 501 U.S. 957 (1991)], which it's not just that it's whatever so many grams [of illegal drugs]; it's that it's the third offense"); *id.* at 26 (Alito, J.) (asking whether it matters if the offender is driving "a Land Rover, had been using a 15-year-old Kia or, at the other extreme, suppose that he used a Bugatti, which costs like a quarter of a million dollars"); *id.* at 28 (Roberts, C.J.) (asking whether it makes a difference if "the person doing this . . . was a multimillionaire" or "impoverished"); *id.* at 43–44 (Breyer, J.) (asking Indiana's solicitor general "what is to happen if a state needing revenue says anyone who speeds has to forfeit the Bugatti, Mercedes, or a special Ferrari or even jalopy?" and the state asserting that "there is no excessive fines issue there").

25. *Timbs*, 139 S. Ct. at 687–89 ("For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties.").

26. *See id.*

27. *See id.*

28. *See id.*; *see also* Brief for Petitioner at 11–27, *Timbs*, 139 S. Ct. 682 (2019) (No. 17-1091) (explaining how "[c]oncerns about the abuse of the sovereign power to fine date back at least to Norman times" and tracing those concerns through to today); Colgan & McLean, *supra* note 4, at 434–35, 435 n.28 (discussing the "substantial historical record beyond" even the "historical roots—reaching back in English law at least to Magna Carta in 1215," on which the Supreme Court has repeatedly relied).

29. Pimentel v. City of Los Angeles, 974 F.3d 917, 925 (9th Cir. 2020); *see id.* at 922, 925 (holding that *Timbs* "affirmatively opens the door for Eighth Amendment challenges to fines imposed by state and local authorities" and remanding for a determination of whether L.A.'s parking penalties are excessive).

imposed"—capture a deep well of legal work that remains instructive today.[30] The majority seems to go out of its way to remind bench and bar of the importance of this "crucial bulwark."

What is more, a workable methodology emerges when *Timbs* is read alongside relevant decisions before and after. These decisions helpfully summarize eight centuries of legal history and bring it up to date for twenty-first-century judges and lawyers. The key decisions to read are *Austin*, in which the Supreme Court held that the Excessive Fines Clause applies to modern forfeiture practices;[31] *Bajakajian*, in which it adopted the "gross disproportionality" standard;[32] *Timbs*, in which the Supreme Court explained the origins and purposes of the Excessive Fines Clause;[33] and the Indiana Supreme Court's decision on remand in *Timbs*, which ties together these (and many other) decisions to flesh out what gross disproportionality means.[34] Read together, these decisions show how excessiveness determinations are made on a case-by-case basis depending on all available facts, circumstances, and case law. Yes, this approach is somewhat uncertain, subjective, and tedious. But it also best fulfills the history and purposes of the Excessive Fines Clause: The standard adopted in *Timbs* recognizes the crucial role that judges play in policing the many "[e]xorbitant tolls [that] undermine other constitutional liberties."[35] This standard is supposed to be uncertain. It depends on facts and circumstances that cannot be determined in the abstract. The only real guideposts are history and judicial decisions providing real-world examples of excessiveness.

More judicial engagement is urgently needed. Americans today are subject to serious fines for minor offenses—like sagging pants[36] or enjoying a beer within 150 feet of a grill.[37] And fines have a way of multiplying based on an offender's inability to pay and associated fees, "amount[ing] to perpetual punishment."[38] Even low-level offenders are subject to court monitoring until their fines are paid in full, which for some people can mean the rest of their

30. *Cf.* United States v. Bajakajian, 524 U.S. 331, 335 (1998) ("The text and history of the Excessive Fines Clause demonstrate the centrality of proportionality to the excessiveness inquiry; nonetheless, they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be 'excessive.'").

31. *See* Austin v. United States, 509 U.S. 602, 621–22 (1993).

32. *See Bajakajian*, 524 U.S. at 336.

33. *See Timbs*, 139 S. Ct. at 687–89; *see also* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262–68 (1989) (discussing much of the same history).

34. State v. Timbs, 134 N.E.3d 12, 35–40 (Ind. 2019).

35. *Timbs*, 139 S. Ct. at 689.

36. *See* Jennifer S. Mann, *Municipalities Ticket for Trees and Toys, as Traffic Revenue Declines*, ST. LOUIS POST-DISPATCH (May 24, 2015), https://tinyurl.com/mj833pvk.

37. *See* Jennifer S. Mann, *Lawsuit Filed Against Pagedale for Ticketing High Grass and Other Code Violations*, ST. LOUIS POST-DISPATCH (Nov. 4, 2015), https://tinyurl.com/mj833pvk.

38. ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 2 (1st ed. 2016).

lives.[39] This gives people, and the poor in particular, a feeling of "invisible handcuffs" with "life-altering consequences for those who can least afford them."[40]

While today's fines are bad enough, civil forfeiture is out of control. Civil forfeiture gives law enforcement the power to seize a person's property—and keep it permanently—based on mere suspicion that the property is connected to crime.[41] As you might predict, "[i]t can be punitive and profitable: punitive for those whose property is confiscated; and profitable for the government, which takes ownership of the property."[42] In almost every state and under federal law, no criminal charges are needed, let alone conviction based on proof beyond a reasonable doubt.[43] In the words of Justice Thomas, "This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses."[44] Whatever else it may do, *Timbs* warns that if left unchecked, government can be expected to abuse the power to punish using economic sanctions.[45] A certain perverse logic confirms: "[F]ines may be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money.'"[46] Even today, "[t]his concern is scarcely hypothetical."[47]

A. The Law of Excessiveness Before Timbs

The history and purposes of the Excessive Fines Clause featured prominently in three decisions predating *Timbs*.

The Court's first and most complete treatment of the history of the Excessive Fines Clause remains *Browning-Ferris Industries of Vermont, Inc. v. Kelco*

39. *Id.* at 16.

40. Sarah Schirmer & Shayne Kavanagh, *Commentary: Chicago's Over-Reliance on Fees Needs Reform. Now.*, CHI. TRIB. (Dec. 3, 2020), https://tinyurl.com/35za3djv.

41. *See* LISA KNEPPER ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 5 (3d ed. 2020), https://tinyurl.com/29xdmpe6 (analyzing the civil forfeiture laws of all fifty states, the District of Columbia, and federal government and describing those laws as "allowing police and prosecutors to seize and permanently keep Americans' cash, cars, homes and other property suspected of being involved in a crime—without regard to the owners' guilt or innocence").

42. State v. Timbs, 134 N.E.3d 12, 20–21 (Ind. 2019).

43. KNEPPER, *supra* note 41, at 6.

44. Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari) (describing how modern civil forfeitures "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings").

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

46. *Id.* at 689 (stating that "it makes sense to scrutinize governmental action more closely when the State stands to benefit" (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991)).

47. *Id.* ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue." (quoting Brief for American Civil Liberties Union et al. as Amici Curiae at 7, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091))).

Disposal, Inc.[48] In that case, the Court held that civil punitive damages are not fines within the meaning of the Excessive Fines Clause.[49] Four Terms later, in *Austin v. United States*, the Supreme Court held that the Excessive Fines Clause applies to civil forfeiture because, as practiced today, forfeiture is at least partly punitive.[50] This follows from the fact that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'"[51] For this reason, the Excessive Fines Clause applies where economic sanctions are only partially punitive,[52] even if they may serve other purposes, such as so-called remedial forfeitures intended to take property that had been used (and could again be used) for illegal purposes.[53]

Five Terms after *Austin*, the Supreme Court applied the Excessive Fines Clause for the first time in *Bajakajian*,[54] when it determined that a fine or forfeiture is unconstitutional when it is "grossly disproportional to the gravity of a defendant's offense."[55] As discussed below, this formulation suggests that the Excessive Fines Clause requires the property owner to bear some culpability—she must have committed the offense or somehow acquiesced in the misuse of her property.[56]

Each of these decisions "draw[s] on the Clause's historical roots."[57] Why, then, has the Supreme Court so far declined to adopt a test for excessiveness?

In *Austin*, the Court declined an invitation to adopt a multi-factored test.[58] In *Bajakajian*, the Court adopted the "gross disproportionality" standard, while emphasizing that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise."[59] And despite the Justices' interest in line drawing in *Timbs*, our appeal did not present the

48. 492 U.S. 257, 264–68 (1989); *see also Timbs*, 139 S. Ct. at 687–88 (relying on *Browning-Ferris* in recounting the history of the Excessive Fines Clause).

49. *See Browning-Ferris*, 492 U.S. at 263–64, 277–78.

50. Austin v. United States, 509 U.S. 602, 621–22 (1993).

51. United States v. Bajakajian, 524 U.S. 321, 327–28 (1998) (quoting *Austin*, 509 U.S. at 609–10).

52. State v. Timbs, 134 N.E.3d 12, 21 (Ind. 2019); *see also Bajakajian*, 524 U.S. at 331–32, 331 n.6 (describing how modern forfeitures have "blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture").

53. *See Austin*, 509 U.S. at 604–05, 621–22 (defining forfeiture as "payment to a sovereign as punishment for some offense" and holding that forfeiture of a mobile home and autobody shop where drugs were sold was subject to the Excessive Fines Clause).

54. *See supra* note 4.

55. *Bajakajian*, 524 U.S. at 334.

56. *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 466–72 (1996) (Stevens, J., dissenting) (arguing that it is always excessive to forfeit an innocent person's property); Cnty. of Nassau v. Canavan, 802 N.E.2d 616, 623–24 (N.Y. 2003) (striking down forfeiture procedures on their face because they allowed for the punishment of innocent people).

57. Colgan & McLean, *supra* note 4, at 434 & n.22 (citing Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019); *Timbs*, 139 S. Ct. at 693 (Thomas, J., concurring); *Bajakajian*, 524 U.S. at 335–36; Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264–76 (1989); *id.* at 286-97 (O'Connor, J., concurring in part and dissenting in part)).

58. 509 U.S. at 622–23.

59. 524 U.S. at 336.

question of what standard applies—the Indiana Supreme Court had held the Excessive Fines Clause did not apply to state and local authorities—and accordingly, the Supreme Court did not directly address the standard.

Nevertheless, *Timbs* signals the Court's agreement that certain issues are pertinent to excessiveness analysis, such as the government's interest in pursuing fines and forfeitures as a means of raising revenue and the effect that a particular economic sanction will have on the offender and community.[60] Perhaps the Supreme Court has not adopted a test more specific than gross disproportionality because no more specific test has yet captured the expansive history and authority marking the line between excessive and appropriate economic sanctions. Lower courts have been left to give what definition they can to this uncertain standard,[61] perhaps because uncertainty is the standard, because courts are supposed to decide what constitutes an excessive fine on a case-by-case basis.

B. The Indiana Supreme Court's Decision on Remand

On remand from the U.S. Supreme Court, the Indiana Supreme Court read *Austin* and *Bajakajian* to establish an analytical framework for determining excessiveness based on all the circumstances of a given case.[62]

First, the court rejected the State's argument that no proportionality assessment is permitted—and therefore, no in rem forfeiture is ever excessive—when the property at issue was used in the commission of a crime.[63] Having dispatched this so-called instrumentality theory of excessiveness, the court proceeded to flesh out the *Bajakajian* test for gross disproportionality.[64] I call the resulting analysis the *Timbs* standard.

The "touchstone" of the *Timbs* standard "is the principle of proportionality,"[65] which is "fact intensive" and based on "the totality of the circumstances."[66] Given the fact-intensive standard, the Indiana Supreme Court

60. *See Timbs*, 139 S. Ct. at 687 (observing that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense") (quoting *Bajakajian*, 524 U.S. at 327) (internal quotation omitted)).

61. *See* State v. Timbs, 134 N.E.3d 12, 23 (Ind. 2019) ("Because the Clause has received little attention in Supreme Court precedent, courts in recent decades have been grappling with the question of what makes an *in rem* fine excessive.").

62. *See id.* at 25–26 ("To understand and resolve the [parties'] disagreement over the appropriate measure of excessiveness, we first review Supreme Court guidance in *Austin* and *Bajakajian*.").

63. *See id.* at 26–27 (collecting cases "almost uniformly" holding that the Excessive Fines Clause includes a proportionality limitation in the circumstances of so-called instrumentality or use-based forfeitures).

64. *See id.* at 21, 35–38 (answering the question of how courts should determine when a forfeiture is an excessive fine "with an analytical framework similar to those of almost all courts to have addressed the issue").

65. *Id.* at 25–26 (quoting *Bajakajian*, 524 U.S. at 334).

66. *Id.* at 35–36.

chose not to resolve the merits of the case, remanding to the trial court for application of "the proportionality test to the facts of this case."[67]

In adopting the *Timbs* standard, the Indiana Supreme Court framed the gross disproportionality standard of *Bajakajian* in terms of three broad considerations: the harshness of the punishment, severity of the offense, and culpability of the property owner.[68] Within each broad category, several lesser-included considerations are also relevant.

When evaluating the "harshness of [a] punishment,"[69] courts should consider:

- "the extent to which the forfeiture would remedy the harm caused;
- the property's role in the underlying offenses;
- the property's use in other activities, criminal or lawful;
- the property's market value;
- other sanctions imposed on the [property owner]; and
- effects the forfeiture will have on the [property owner]."[70]

Considering the "severity of [an] offense,"[71] courts should consider:

- "the seriousness of the statutory offense, considering statutory penalties;
- the seriousness of the specific crime committed compared to other variants of the offense, considering any sentences imposed;
- the harm caused by the crime committed; and
- the relationship of the offense to other criminal activity."[72]

And, considering the *culpability of the property owner*, courts should consider:

- the owner's blameworthiness; and
- where the owner falls on the spectrum of culpability from being innocent of the criminal use of their property to willfully and repeatedly using it for criminal purposes.[73]

It seems wrong to call this a test. It is more so a list of open-ended questions that may be helpful in placing a given fine or forfeiture to one side of the constitutional line. "Test" connotes a rigid procedure. But the *Timbs* standard depends on context so that, at times, only a few of many possible considerations come into play. At other times, one consideration is virtually dispositive. For example, if the owner of property is entirely blameless, forfeiture may be

67. *Id.* at 39.
68. *See id.* at 35–38.
69. *Id.* at 36.
70. *Id.*
71. *Id.* at 37.
72. *Id.*
73. *Id.* at 37–38.

excessive per se[74]—that is, none of the other circumstances are likely to matter if the property owner did nothing wrong.[75]

The dissent on remand expressed concern that the majority's methodology is subjective and leaves too much discretion to lower courts.[76] But the indeterminate standard of the Excessive Fines Clause is a feature of constitutional dynamism, not a bug of subjectivity. If the methodology is subjective, it is because it is supposed to be, in part, to take account of the individual circumstances of the person whom society is punishing.[77] The result is a standard that is less a test than a heuristic inquiry performed anew in each case. In other words, only by amassing a rich body of case law will courts develop anything more concrete.

The *Timbs* standard, in my opinion, does a masterful job of distilling the history and case law pertinent to the constitutional meaning of "excessive fines." It does so by paying special attention to the Supreme Court's signals in *Bajakajian*, *Austin*, and *Timbs*; by considering authorities from federal and state courts across the country; and by refuting alternative approaches in open and honest debate. The result is the clearest and most comprehensive articulation of "excessive fines" which "shall not be . . . imposed" based on the Eighth Amendment.[78] Other courts should adopt the *Timbs* standard.[79]

C. The Trial Court Determines That Forfeiture Would Be Excessive, Again, and the State Appeals, Again

1. Timbs's Second Victory in the Trial Court

Following the Indiana Supreme Court's remand, the trial court held an evidentiary hearing to weigh the new proportionality test and "determine whether Timbs has overcome his burden to establish that the harshness of the forfeiture's punishment is not only disproportional, but grossly disproportional,

74. *See id.* at 34.

75. *See, e.g.*, Transcript of Oral Argument at 17–18, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (discussing a situation in which a vehicle is stolen from its owner and used to commit a bank robbery).

76. *See* State v. Timbs, 134 N.E.3d at 40–41 (Slaughter, J., dissenting).

77. *See* Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 188 (Pa. 2017) (holding that the Excessive Fines Clause requires both objective and subjective considerations).

78. U.S. CONST. amend. VIII.

79. The Institute for Justice is currently urging two other state high courts to adopt the *Timbs* standard. *See* Brief for the Institute for Justice as Amici Curiae Supporting Neither Party at 12–15, State v. Anderson, 230 A.3d 324, No. A-4289-18T3 (N.J. filed Dec. 23, 2020), https://tinyurl.com/9r5um34x; Brief of Respondents at 35–41, Richardson *ex rel.* 15th Jud. Cir. Drug Enf't Unit v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars ($20,771.00), No. 2017-CP-26-07411 (S.C. July 15, 2020), https://tinyurl.com/nvmhdmyc.

to the gravity of the underlying dealing offense and his culpability for the Land Rover's corresponding criminal use."[80]

This hearing took place in February 2020 and, two months later, the trial court issued findings of fact and conclusions of law.[81] In its findings, the court marched through the "framework for evaluating gross disproportionality set out in the Indiana Supreme Court's remand decision," including each of the considerations outlined above.[82] Accordingly, the court weighed Timbs's culpability,[83] the harshness of his punishment,[84] and the severity of his offense,[85] being careful to do so with reference to the evidence and all the circumstances of the offense and offender.[86]

The contextual nature of this approach is evident. For example, the court deemed it relevant that "Timbs became dependent on opiates after his podiatrist prescribed him hydrocodone for persistent foot pain."[87] "Eventually, his dependency on narcotic pain medication escalated to a dependency on a far more dangerous opiate: heroin."[88] It concluded that "Timbs's transgression was minor when compared to other variants of the same offense."[89] The seizure of his vehicle "had a particularly negative effect on Timbs"[90] and "made it harder for him to maintain employment."[91] Forfeiture would only "serve[] as an impediment to his recovery from opiate dependency by making it more difficult for him to get to and from treatment programs."[92]

Based on these (and other) findings, the court concluded "by a significant margin" that Timbs "establish[ed] that the harshness of the forfeiture of his 2013 Land Rover is grossly disproportional to the gravity of the underlying dealing offense and his culpability for the Land Rover's corresponding criminal use."[93] Accordingly, the court ruled in favor of Timbs and ordered that his vehicle be "released . . . immediately."[94]

80. State v. Timbs, 134 N.E.3d 12 at 39 (Ind. 2019).

81. Findings of Fact, Conclusions of Law and Judgment at 1, 14, State v. Timbs, No. 27D01-1308-MI-92 (Grant Cnty., Ind., Super. Ct. Apr. 27, 2020).

82. *Id.* ¶¶ 37–41, at 8–9.

83. *Id.* ¶ 42, at 9 (observing that "[t]he easiest part of the framework for the Court to address is Timbs's blameworthiness or culpability for the property's use as an instrumentality of the underlying offense" and concluding that "his culpability is at the high end of the spectrum").

84. *Id.* ¶¶ 43–45, at 10–12 (concluding that "the seizure of the Land Rover was excessively punitive and unduly harsh").

85. *Id.* ¶¶ 46–50, at 12–13 (concluding that "the crime Timbs committed was of minimal severity").

86. *See id.* ¶¶ 21–36, at 5–8.

87. *Id.* ¶ 9, at 3–4.

88. *Id.* ¶ 9, at 4.

89. *Id.* ¶ 47, at 12–13.

90. *Id.* ¶ 44(d), at 11.

91. *Id.*

92. *Id.*

93. *Id.* at 14.

94. *Id.*

A month later, the state returned the Land Rover to Timbs, marking the first time in almost seven years he had access to the vehicle.[95]

2. The State's Pending Appeal

The State has appealed.[96] When this is over, the five justices of the Indiana Supreme Court will have heard the case three times. Here we are, long after Timbs pleaded guilty to crimes he committed in May 2013; he has served his time and moved on with life; yet litigation continues over his property right to the possession of a car everyone knows he purchased with the proceeds from his father's life insurance policy. As our latest brief puts it: "Enough."[97]

At this stage, the State's case for forfeiture is dancing on the head of a pin. The State argues that the "Court should overturn its prior decision [and] hold that the Excessive Fines Clause imposes no proportionality requirement on *in rem* forfeitures."[98] In other words, the State is urging the Indiana Supreme Court to "overturn its prior decision" of October 2019 and, in a 180-degree turn, hold there is "no proportionality requirement" when the government takes property using civil forfeiture.[99] The State's brief devotes comparatively few pages to what the trial court supposedly did wrong in applying the excessiveness standard that it was required to use in light of the high court decision.[100]

As of this writing, the State's appeal remains pending. Oral argument was held on February 4, 2021.[101] A ruling is expected before the end of June 2021. Assuming the State loses, we anticipate that it will seek certiorari on the question of how courts are to determine "excessive fines." We are confident, however, that the trial court's most recent ruling will be affirmed and that *Timbs* will not be returning to One First Street.

We can afford to be confident in part because the Indiana Supreme Court did such a great job describing the test for excessiveness with reference to all available sources. While nuanced and correct, however, the *Timbs* standard is

95. John Kramer, *Indiana Returns Vehicle in Landmark Civil Forfeiture Case, But Government Continues its Appeal*, INST. FOR JUST. (May 27, 2020), https://tinyurl.com/dry8upx6.

96. The State invoked the Indiana Supreme Court's mandatory jurisdiction over appeals from decisions declaring state statutes unconstitutional. Brief of Appellant at 11, State v. Timbs, No. 20S-MI-00289 (Ind. Aug. 17, 2020) (citing Ind. R. App. P. 4(A)(1)(b)); *see also* State v. Timbs, 84 N.E.3d 1179 (Ind. 2017) (rejecting incorporation); State v. Timbs, 134 N.E.3d 12 (Ind. 2019) (applying excessiveness standard).

97. *See* Response Brief of Appellees at 17, State v. Timbs, No. 20S-MI-00289 (Ind. Sept. 16, 2020). This brief (like most briefs in *Timbs*) was written by my super talented co-counsel, Sam Gedge.

98. Brief of Appellant at 62, State v. Timbs, No. 20S-MI-00289 (Ind. Aug. 17, 2020).

99. *See id.* at 33–62 (developing this argument); *but cf.* Response Brief of Appellees, *supra* note 97, at 15–17 (urging adherence to the law of the case and affirmance of the trial court's ruling).

100. *See* Brief of Appellant, *supra* note 98, at 19–33 (disputing the trial court's conclusions of law based on the framework described in the Indiana Supreme Court's October 2019 decision). *But cf.* Response Brief of Appellees, *supra* note 97, at 17–35 (noting that the State does not contest any of the trial court's factual findings and demonstrating how the conclusions of law are consistent with the October 2019 decision).

101. See Video of Oral Argument, *Timbs*, No. 20S-MI-00289, https://tinyurl.com/yd7vqr75.

prolix and hard to work with anywhere but within the four corners of a legal brief. For that reason, I propose a simplification. Below, I have attempted to summarize the *Timbs* standard for everyday use by judges and lawyers.

II. THE SEVEN QUESTIONS OF EXCESSIVENESS

The test for excessiveness adopted by the Indiana Supreme Court weighs all the circumstances of a particular offense and particular offender. It is helpful to think of the relevant questions in terms of the five Ws (and one H), the rhetorical tool often associated with journalism. The relevant questions are: *Who* committed *what* offense; *when* and *where*; *what* property is the government taking; *how* was that particular property involved in the particular offense; and *why* does the government want it? By answering these questions based on the facts of a particular case, courts can reach principled outcomes about whether a fine or forfeiture is constitutionally excessive.

Each of the seven questions is discussed below with reference to the *Timbs* standard and decisions from elsewhere that help illustrate the holistic nature of the excessiveness inquiry.

A. ***Who*** *Is the Government Punishing?*

What does the evidence tell us about the person from whom the government is taking property or on whom a fine is being imposed? Is it the same person who committed the offense or someone else? How culpable or blameless is the offender in relation to other offenders encompassed within the law and compared to typical offenders in the community? If the offender and the property owner are different people—say, the innocent spouse of a person who used marital property to commit an offense[102]—how culpable or blameless is the property owner herself? What other sanctions have been imposed and what additional impact will a fine or forfeiture have—in terms of the penal goals of retribution and rehabilitation and in terms of the impact on the property owner, her family, and society? For example, will the property owner become destitute or desperate in some way that burdens society? Will the offender be less likely to reoffend? Does the economic punishment fit the crime considering all of these (and any other) circumstances?

Who questions, such as these, are just examples. Doubtless, there are others. My point is not to list every relevant question but to provide a rhetorical device for thinking about something not always perfectly captured by language. This is necessary because, again, the standard for "excessiveness" described in the

102. *See, e.g.*, Bennis v. Michigan, 516 U.S. 442 (1996) (holding that the joint owner of a vehicle primarily used by the husband could be forfeited without providing the innocent wife with a means of contesting forfeiture).

case law has never been governed by a strict balancing of factors; rather, courts have emphasized the need for these and other similar "considerations" designed to account for the real-world circumstances of each case.[103] At the same time, the excessiveness standard does not reside only within the eye of the beholder. It is not something a judge knows only when she sees it.[104]

Like the six other categories of questions discussed below, *who* questions emphasize the fact-intensive nature of the excessiveness standard.[105] Courts apply that standard correctly only when they have weighed all the circumstances of *who* committed the offense and *who* owns the property. The Indiana Supreme Court captured this when it held that determining the harshness of the punishment requires an assessment of the "effects the forfeiture will have on the [property owner]" and "other sanctions imposed on the [property owner],"[106] while culpability requires an assessment of each person's "blameworthiness" and where the property owner falls on the spectrum of culpability from being innocent to willfully and repeatedly using their property for criminal purposes.[107] Any one of these considerations can be dispositive, as the court observed, "it may be that . . . if the owner is completely blameless for the property's criminal 'taint,' the forfeiture is necessarily excessive—because it punishes someone who has done nothing wrong."[108]

Blameless property owners—those whom no one alleges have done anything wrong—have featured in some of the most important cases in this area. Tina Bennis, the wife of John Bennis, is the paradigmatic example.[109] Detroit police found John Bennis having sex in the family vehicle with a prostitute;[110] no one suspected Ms. Bennis of complicity or of having given her consent for her car to be used illegally in this way.[111] Yet, the Supreme Court upheld the forfeiture of her joint interest in the car,[112] based on her husband's violation of a Michigan nuisance-abatement law, which (to this day) authorizes

103. *See* State v. Timbs, 134 N.E.3d 12, 35–36 (2019) (holding that "[w]hile the gross-disproportionality assessment is fact intensive and depends on the totality of the circumstances, it involves three considerations," namely, the harshness of the punishment, severity of the offenses, and claimant's culpability).

104. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (famously describing the Justice's standard for delineating between unprotected hard-core pornography and protected speech as "I know it when I see it").

105. *See* Harawa, *supra* note 12, at 81–91 (explaining the highly contextual analysis called for by *Timbs*, *Bajakajian*, and the history of the Excessive Fines Clause); *see also* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 845–46 (2013) (stating that, prior to *Timbs*, "each circuit . . . develop[ed] its own version of the *Bajakajian* . . . multi-factor 'gross disproportionality' test, with the 'gross disproportionality' determination often characterized as an inherently fact-intensive inquiry").

106. *State v. Timbs*, 134 N.E.3d at 36.

107. *Id.* at 37–38.

108. *Id.* at 34.

109. I had the privilege of meeting Tina Bennis at her home in December 2019.

110. Bennis v. Michigan, 516 U.S. 442, 443 (1995).

111. *Id.* at 445–46.

112. *Id.* at 446.

seizure and forfeiture based on sex-work, without a criminal conviction and without an opportunity to contest forfeiture when the property owner is someone other than the offender.[113]

The fractured decision in *Bennis v. Michigan* illustrates the important role *who* questions can play in forfeiture cases. No one thought that Tina Bennis had done anything wrong, yet five Justices ruled that the Fourteenth Amendment's Due Process Clause did not prevent her half interest in the family vehicle from being forfeited.[114] She was, in the words of the Indiana Supreme Court in *Timbs*, "completely blameless" and free of "taint," so that forfeiting her property ought to have been "necessarily excessive—because it punishes someone who has done nothing wrong."[115]

But Ms. Bennis did not bring an excessiveness challenge, which could have made all the difference according to Justice Stevens's three-Justice dissent.[116] Similarly, Justice Kennedy's solo dissent argues that substantive due process prohibits the government from taking property from people absent a showing of their personal culpability.[117] Justice Thomas concurred with the majority opinion but wrote separately to emphasize the fact that Mr. Bennis was the primary user of a car that he co-owned with his wife—put differently, the car had been "entrusted by its owner to one who uses it for crime[.]"[118] He expressed concern that "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."[119] Justice Ginsburg concurred only because she disagreed with the dissenters that Michigan was actually punishing innocent owners; rather, as her concurrence points out, state courts had equity powers to conform forfeitures to reason and justice and, anyway, the car was only worth $600, so it was unlikely that there would have been any half-interest to return once the vehicle had been sold and costs deducted.[120]

113. *Id.* at 444; *see also* First Amended Complaint at 56–57, Ingram v. Wayne Cnty., No. 2:20-cv-10288 (E.D. Mich. May 11, 2020) (challenging the constitutionality of the same law).

114. *Bennis*, 516 U.S. at 442.

115. State v. Timbs, 134 N.E.3d 12, 34 (2019); *see also* Transcript of Oral Argument at 15–17, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (Sotomayor, J., questioning why, under current doctrine, an innocent person's property can be forfeited without it being a per se excessive fine).

116. *See Bennis*, 516 U.S. at 458–72 (Stevens, J., dissenting) (arguing that it is always excessive to forfeit an innocent person's property).

117. *Id.* at 472–73 (Kennedy, J., dissenting) (arguing that due process prohibited forfeiture of the vehicle because "[n]othing . . . indicates that the forfeiture turned on the negligence or complicity" of Ms. Bennis).

118. *Id.* at 456 (Thomas, J., concurring).

119. *Id.*

120. *Id.* at 457–58 (Ginsburg, J., concurring) (observing that "Michigan . . . has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment." (internal citation omitted)).

The diversity of opinions in *Bennis* helps illustrate how the U.S. Supreme Court arrived at the (perhaps) counterintuitive conclusion that state and local governments can constitutionally deprive innocent people of their property. At least five Justices believed that the government cannot forfeit the property of an innocent person without some legal protection—for Justices Stevens, Souter, and Breyer, it was the Excessive Fines Clause;[121] for Justice Kennedy, it was the substantive due process protections of the Fourteenth Amendment;[122] and, for Justice Ginsburg, it was the equity power of state courts to prohibit forfeitures they deemed unjust or disproportionate to the owner's culpability.[123] Justice Thomas expressed concern about the potential for forfeiture to "become more like a roulette wheel employed to raise revenue from innocent but hapless owners."[124] With six votes in *Bennis* pointing to serious constitutional problems with the forfeiture of an innocent person's property, in an appropriate case, the Supreme Court should reconsider *Bennis* and hold that it is always excessive to forfeit a person's property unless the government has proved some culpability on the part of that person.

More recent cases demonstrate how excessiveness analysis changes the outcome in favor of the innocent property owner. In *von Hofe v. United States*,[125] the Second Circuit reviewed the forfeiture of a married couple's home after police discovered marijuana growing in hidden compartments in the basement.[126] Several drug transactions involving the couple's son had also taken place at the home.[127] After a jury rejected Ms. von Hofe's innocent-owner defense, the district court conducted an evidentiary hearing to determine whether forfeiture of the house would violate the Excessive Fines Clause,[128] later holding in a detailed opinion that it would not.[129]

The Second Circuit reversed as to Ms. von Hofe's interest in the home[130] and affirmed as to her husband.[131] Walking through the relevant considerations, the court emphasized the "impossibility of establishing a formula for an excessive fine with surgical precision" and that "[d]etermining the excessiveness

121. *Id.* at 471.

122. *Id.* at 473.

123. *Id.* at 457–58.

124. *Id.* at 456 (Thomas, J. concurring); *cf.* Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari) (describing how modern civil forfeitures have come to "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings" leading to "egregious and well-chronicled abuses.").

125. 492 F.3d 175 (2d Cir. 2007).

126. *Id.* at 180.

127. *Id.*

128. *Id.* at 181.

129. *Id.* (citing United States v. 32 Medley Lane, 372 F. Supp. 2d 248 (D. Conn. 2005)).

130. *von Hofe*, 492 F.3d at 188–91.

131. *Id.* at 186–88.

of a civil *in rem* forfeiture is necessarily fact-intensive."[132] Looking at all the relevant facts, the court determined that Ms. von Hofe bore "minimal blame for the criminal activity that occurred"[133]—not *no* blame, *minimal* blame. The court acknowledged that Ms. von Hofe "both knew of the marijuana plants and, upon learning about their presence in the basement, did nothing to stop her husband's horticultural hobby."[134] But what was she supposed to do, when Mr. von Hofe "did not need his wife's permission to use the property" and made the "decision, almost thirty years into his marriage . . . to cultivate marijuana that put his wife in the present position"?[135] These circumstances placed Ms. von Hofe's culpability "at the low end of the scale" akin to "turning a blind eye to her husband's marijuana cultivation in their basement."[136] The court held that, "[o]n balance" forfeiture of Ms. von Hofe's $124,000 equity in the home was an excessive fine, observing that the "government cannot justify forfeiture of Mrs. von Hofe's interest in 32 Medley Lane, for the punishment bears no reasonable correlation either to her minimal culpability or any harm she caused."[137] It then remanded to the district court to determine how the forfeiture should be reduced or eliminated to avoid violating the Excessive Fines Clause.[138]

Similarly, in *United States v. Ferro*,[139] the Ninth Circuit considered how excessiveness should be determined when the offender dies and his widow seeks to keep some portion of property linked to the man's crimes—in *Ferro*, it was the couple's $2.55 million gun collection.[140] The district court found that the entire collection could be forfeited because the wife was not "innocent," in the sense that she knew something about her husband's extensive gun collection and that he had been found guilty of weapons offenses that made it illegal for him to possess firearms.[141] On reconsideration, the district court applied the Excessive Fines Clause and ordered the Government to return 10% of the value of the gun collection to the widow because forfeiting 100% was "marginally disproportionate to the crimes" committed by her husband.[142] The

132. *Id.* at 186 (observing that excessiveness analysis is fact-intensive "and the 'quantum, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law'" (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *371)).

133. *Id.* at 188.

134. *Id.* at 189.

135. *Id.*

136. *Id.*

137. *Id.* at 191; *see also id.* at 188 (noting the value of her interest).

138. *Id.* at 191 (relying on the provision of the Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983(g)(4), which provides, "If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution").

139. 681 F.3d 1105 (9th Cir. 2012).

140. *Id.* at 1110.

141. *Id.* at 1109.

142. *Id.* at 1110.

government and the widow both appealed. The Second Circuit reversed in favor of the widow, holding that the district court had failed to determine her personal culpability and remanding for a determination of excessiveness based on her responsibility for the specific crimes on which forfeiture was based.[143]

A few state courts have gone further. In *County of Nassau v. Canavan*, New York's high court struck down the state's forfeiture procedures on their face, in part because they allowed for forfeiture of a person's property without proof of the culpability of the owner, in violation of the Excessive Fines Clause.[144] In *State v. Yang*, the Montana Supreme Court held that the state's forfeiture statute, on its face, violated the Excessive Fines Clause "because it completely prohibits a district court from considering whether [a] 35%-market-value fine is grossly disproportionate to the offense committed".[145] And, in the South Carolina Supreme Court, the Institute for Justice is currently defending a trial court decision striking down the state's forfeiture procedures on their face, in part, because they violate the Excessive Fines Clause.[146] That case was argued January 13, 2021.[147]

There was no question about innocence in *Timbs* and, still, the proportionality protections of the Excessive Fines Clause applied.[148] Timbs had been convicted for selling heroin and had used the vehicle in connection with at least one of those transgressions.[149] As a result, his culpability is more analogous to the international traveler in *Bajakajian* than the innocent wives in *Bennis*, *von Hofe*, and *Ferro*. Like in *Bajakajian*, Timbs was both owner and offender. Yet, in both situations, the Supreme Court recognized that excessiveness protections apply.[150] A person does not lose his property rights when he commits a crime any more than the Excessive Fines Clause allows,[151] just as a person does not lose his liberty rights any more than the Bail Clause or the Cruel and Unusual Punishment Clause allow.

The emphasis placed on the property owner's blameworthiness in *Bajakajian* has led lower courts to strike down forfeitures, and even forfeiture statutes on their face, when the personal culpability of the property owner is

143. *Id.* at 1114–17 (discussing *von Hofe* and explaining the necessary focus on *who* the government is taking property from and what their personal culpability is in relation to the offense on which the forfeiture action is based).

144. 802 N.E.2d 616, 624 (N.Y. 2003).

145. 452 P.3d 897, 904 (Mont. 2019).

146. *See* Initial Brief of Respondents at 35–41, Richardson ex rel. 15th Jud. Cir. Drug Enf't Unit v. Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars ($20,771.00), No. 2017-CP-26-07411 (S.C. filed July 15, 2020).

147. *See* Video of Oral Argument, *Richardson*, No. 2017-CP-26-07411, https://tinyurl.com/y9bum3bu.

148. *See* State v. Timbs, 134 N.E.3d 12, 21–22 (Ind. 2019).

149. *Id.* at 29.

150. United States v. Bajakajian, 524 U.S. 321, 325, 331–33 (1998); Timbs v. Indiana, 139 S. Ct. 682, 689–90 (2019); *see also Timbs*, 134 N.E.3d at 25–26.

151. *See State v. Timbs*, 134 N.E.3d at 34–35 (holding that even the instrumentalities of crimes are subject to proportionality review).

not properly accounted for. These decisions illustrate how the Eighth Amendment excessiveness standard requires courts to take account of *who* owns the property and *who* is responsible for its misuse. When the property owner is blameless, economic sanctions are virtually per se unconstitutional. When the property owner is the offender or someone else who bears some culpability, the Excessive Fines Clause requires a careful assessment of proportionality based on all the other relevant considerations.

B. ***What*** *Offense Was Committed and With* ***What*** *Property?*

What does the evidence tell us about the seriousness of the offense? What is the property worth, both in terms of market value and the owner's personal needs? What is the relationship between the property's value and the seriousness of the offense? What other economic sanctions are available and which of those has the government used? What can be done to make the economic sanction more proportional to the offense—for example, can the property be divided between the government and the owner?

The Indiana Supreme Court captured these considerations as, first, the "severity of the underlying offenses," with reference to the seriousness of the offense in the abstract, the seriousness of the particular offense, compared to other possible offenses under the same law, and the actual sentence imposed;[152] and, second, the "harshness of the punishment," with reference to the market value of the property and the effect that its forfeiture would have on the property owner.[153]

These and other *what* questions are designed to focus courts on the balance between the seriousness of a crime and the real-world price of an economic sanction. In evaluating a crime's severity, courts should look to the statutory framework for punishment—for example, if the underlying crime is a misdemeanor parking violation, even a fine less than $100 is potentially excessive.[154] By contrast, a law may impose severe penalties for a broad range of conduct, with the offender falling on the low end of the scale.[155] Lawmakers, after all, set maximum sentences with an eye toward "the worst offenders and offenses."[156] As the Utah Supreme Court has observed, the fact that someone more reprehensible might earn a harsher sentence "has limited relevance in

152. *Id.* at 37.

153. *Id.* at 36.

154. *See* Pimentel v. City of Los Angeles, 974 F.3d 917, 925 (9th Cir. 2020) (holding that L.A.'s $63 penalty for late payment of parking fines is subject to proportionality assessment under the Excessive Fines Clause).

155. *See* von Hofe v. United States, 492 F.3d 175, 189 (2d Cir. 2007) (describing Ms. von Hofe's culpability as being at the low end of the scale of offenders who might knowingly abet the growing of marijuana in their home); *cf.* State v. Timbs, 134 N.E.3d at 37 (noting that "the maximum statutory penalty for an offense suggests the appropriate sentence for those who commit the worst variants of the crime").

156. Johnson v. State, 830 N.E.2d 895, 898 (Ind. 2005).

determining proportionality."[157] Sentencing guidelines, too, can provide a useful baseline for determining the severity of a person's offense.[158] But courts should be careful in exercising deference to legislative determinations of severity.[159] The constitutionality of any particular economic sanction cannot be determined based solely on the blunt tools the legislature has provided to address a wide range of criminal activity.[160] Statutory penalties may be helpful, but they are far from dispositive.

Deference to the legislature is not definitive. In *Bajakajian*, the Supreme Court said that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature."[161] But it went on to emphasize that sentencing policy alone "cannot override the constitutional requirement of proportionality review."[162] And it went on to hold that "forfeiture of [Bajakajian's] entire $357,144 would violate the Excessive Fines Clause" in part because the maximum sentence he could have received, had he been criminally prosecuted, was six months and the maximum fine was only $5,000.[163]

Such a disconnect can run in the other direction, as well.[164] That is why, in *Timbs*, it mattered that the maximum criminal sentence would have been 20 years and a $10,000 fine, but Timbs was sentenced only to one year of home detention and no criminal fine.[165] Instead, the state sought civil forfeiture of Timbs's $42,000 Land Rover (about four times the maximum criminal fine).[166] It is highly relevant to excessiveness analysis when a major disconnect of this kind exists between the value of property and the statutory framework for punishing people who commit the same crime on which forfeiture is based. Any other approach risks arbitrariness, making forfeitures a punishment only for those who happen to have valuable property with them at the time of their offense.

157. *See* State v. 633 E. 640 N., 994 P.2d 1254, 1261 (Utah 2000).

158. *State v. Timbs*, 134 N.E.3d at 40.

159. *See* United States v. Bajakajian, 524 U.S. 331, 339 n.14 (1998) (noting that sentencing guidelines "cannot override the constitutional requirement of proportionality review"). *But see* City of Seattle v. Long, 467 P.3d 979, 991 (Wash. App. 2020) (holding that when penalties are authorized by statute or ordinance, "a strong presumption exists that the penalties were not excessive"), *review granted*, 2020 WL 7060850 (Table) (Wash. Dec. 2, 2020). *Long* is currently set for argument in March 2021. WASH. COURTS, *Supreme Court Docket*, https://tinyurl.com/aj7ydmhn.

160. *See* David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 561 (2017) ("If the Court defers to Congress for the decision of what is proportional . . . the Court may be failing to perform its constitutional duty, offending separation of powers principles in its failure to check congressional power.").

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

162. *Id.* at 339 n.14.

163. *Id.* at 331–32.

164. *Id.* at 337–38.

165. *See* Findings of Fact, Conclusions of Law and Judgment at 11–13 ¶¶ 44(b), 46–47, State v. Timbs, No. 27D01-1308-MI-92 (Grant Cnty., Ind., Super. Ct. Apr. 27, 2020), tinyurl.com/y43jacv9.

166. State v. Timbs, 134 N.E.3d 12, 22 (Ind. 2019).

A major disconnect between statutory penalties and the value of property can render a forfeiture an "excessive fine" without more, either because the property is very valuable and the available criminal penalties are comparatively minor (like in *Bajakajian*) or because the property is moderately valuable and the criminal penalties, while potentially severe, are not pursued to their fullest extent (like in *Timbs*). Because context matters, the baseline for a penalty's excessiveness is not the maximum criminal penalty for the most severe offender imaginable; rather, courts should focus on the actual penalties imposed in relation to available penalties. Sometimes, like in *Bajakajian* and *Timbs*, this comparison reveals a gross disproportionality between the offender's real-world culpability and the value of the property.

Civil forfeiture cases warrant special scrutiny. With civil forfeiture, the government alleges that property is connected to a crime and seeks to forfeit the property in civil court, based on a preponderance of the evidence linking the property and the alleged criminal acts.[167] In such cases, courts should ask why the government is not pursuing criminal penalties, in criminal court, where its burden of proof would be beyond a reasonable doubt. Where the government *has* pursued criminal penalties, courts should ask to what degree and whether the penalties pursued are proportional to the economic sanctions being imposed.[168]

Sometimes, a disproportional fine or forfeiture can be modified to better comport with the Excessive Fines Clause. For example, in *von Hofe*, the court held that a portion of the couple's equity had to be returned to Ms. von Hofe because she was comparatively blameless, while the entirety of her husband's interest could be forfeited because he used the house to conceal his criminal activity.[169] And, in *Ferro*, the district court was made to consider the widow's personal culpability and, in light of that, whether some portion greater than 10% of her husband's gun collection should be returned to her.[170] Consistent with these decisions, in *Bajakajian*, the Supreme Court signaled that it might have been proportional to forfeit *some* amount of Hosep Bajakajian's $350,000 when it noted that the possible reduction of the forfeiture was a question not properly before it.[171]

As we emphasized at oral argument in *Timbs*, "[t]his isn't an all-or-nothing thing."[172] It depends on *what* the government seeks to take away from a person based on *what offense*. Thus, a court could "find that a partial forfeiture of a

167. *See* KNEPPER, *supra* note 41, at 9–10, 39.

168. *See State v. Timbs*, 134 N.E.3d at 35; *see, e.g.*, Findings of Fact, Conclusions of Law and Judgment at 11–13 ¶¶ 44(b), 46–50, State v. Timbs, No. 27D01-1308-MI-92 (Grant Cnty., Ind., Super. Ct. Apr. 27, 2020), tinyurl.com/y43jacv9.

169. von Hofe v. United States, 492 F.3d 175, 188–91 (2d Cir. 2007).

170. *See* United States v. Ferro, 681 F.3d 1105, 1110, 1114–17 (9th Cir. 2012).

171. United States v. Bajakajian, 524 U.S. 331, 337 n.11 (1998).

172. Transcript of Oral Argument at 30, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

Bugatti is appropriate in light of the severity of an offense, but return to the owner sufficient funds from the Bugatti's sale to purchase a Kia so that employment or other needs are not interrupted."[173] Because the Constitution prohibits excessiveness, the solution sometimes lies in allowing some economic sanction, while disallowing anything more. This is just the common-law work of judicial line drawing.

C. ***Where*** *and* ***When*** *Is the Economic Sanction Being Imposed?*

Taking account of all the circumstances requires courts to consider the impact that a given economic sanction will have on the community where the crime occurred. Will a fine or forfeiture help fulfill the community's interest in punishing crimes and rehabilitating offenders? Or would economic sanctions make matters worse by, for example, depriving someone of the use of their only vehicle so that they can no longer work? Is the property being forfeited especially important to a person's life, like a family's house or only means of transportation? How will the offender go about fulfilling his obligations to society if the fine is imposed or the forfeiture carried out?

When and *where* questions such as these take account not only of the offense and offender, but also the impact that an economic sanction will have on the community. In this way, the questions of *where* and *when* an economic sanction is imposed dovetail with the question, addressed below, of *why* the government is punishing the person in the first place.

Where and *when* questions require courts to consider the effect an economic sanction is likely to have in the real world.[174] In addition to an objective valuation of property, this requires what the Pennsylvania Supreme Court called a "subjective non-pecuniary valuation of the property."[175] This means that "certain property—such as a residence, a vehicle, or other similar necessities in our daily life—carry additional value to the owner and possibly others" and so its "subjective non-pecuniary valuation" matters just as much as the market value of the property.[176] This principle recognizes that even if society is well-served by remedial forfeitures—for example, taking away the gun used to commit murder—it may not be well-served by other forfeitures that leave a person destitute—for example, taking away the murderer's home and evicting

173. Colgan & McLean, *supra* note 4, at 488; *see also* Transcript of Oral Argument at 26, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (Alito, J., asking whether it matters if the offender is driving "a Land Rover, had been using a 15-year-old Kia or, at the other extreme, suppose that he used a Bugatti, which costs like a quarter of a million dollars").

174. *See generally* Colgan & McLean, *supra* note 4, at 437–47 (discussing the impact that economic sanctions may have on employment and education access, basic human needs, family and social stability, and satisfying legal obligations).

175. Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 188 (Penn. 2017).

176. *Id.*

his family.[177] The penal goals of retribution and rehabilitation are only less likely to be fulfilled if courts make it harder for an offender to return to the straight and narrow—for example, taking away an offender's car so that he cannot maintain honest employment, fulfill his legal obligations, and improve himself.[178]

A destitute person is more likely to reoffend, at the expense of everyone.[179] And it is always undesirable to punish the family of an offender.[180] That is why Anglo-American law has recognized for centuries the principle of "saving [the] contenement"[181]—or the prohibition on taking away a person's means of survival and of lawfully providing for themselves.[182] Included in Magna Carta, the principle of saving the contenement became firmly established in English law in the seventeenth and eighteenth centuries. It "required, among other things, that a defendant not be fined an amount that exceeded his ability to pay."[183]

Across the Atlantic, the Supreme Court has acknowledged, but not yet adopted, the Anglo-American tradition of saving the contenement.[184] The high courts in at least seven states have, however, held that ability to pay is an essential consideration in applying the Excessive Fines Clause. Those states are

177. *See id.* at 177–78 (noting that "in our society, a home and a vehicle are often essential to one's life and livelihood"); *see also* United States v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it."); *see also* Colgan & McLean, *supra* note 4**Error! Bookmark not defined.**, at 437–39 (documenting the ways in which the "loss of a home may be particularly destabilizing" (footnote omitted)).

178. *See, e.g.*, Findings of Fact, Conclusions of Law and Judgment at 11–12 ¶ 44(b), (d), State v. Timbs, No. 27D01-1308-MI-92 (Grant Cnty., Ind., Super. Ct. Apr. 27, 2020), tinyurl.com/y43jacv9 (concluding that "unlike the seizure of an automobile from a person of means, the seizure of the Land Rover from a destitute man like Timbs constituted a life-altering sanction that made it difficult for him to maintain employment and seek treatment for his addiction").

179. Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 411 (2005).

180. Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 863–64 (2013).

181. Translated from Latin, *salvo contentemento suo*. *See id.* at 835.

182. State v. Timbs, 134 N.E.3d 12, 36 (Ind. 2019) ("To conduct a proportionality analysis at all, we need to consider the punishment's magnitude. And the owner's economic means—relative to the property's value—is an appropriate consideration for determining that magnitude. To hold the opposite would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally.").

183. McLean, *supra* note 180, at 835.

184. *See* Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) ("Magna Carta required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'" (alteration in original) (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989))); United States v. Bajakajian, 524 U.S. 321, 340 n.15 (1998) (noting that the property owner did not "argue that his wealth or income are relevant to the proportionality determination or that full forfeiture would deprive him of his livelihood").

Colorado,[185] Indiana,[186] Minnesota,[187] Montana,[188] New York,[189] Pennsylvania,[190] Tennessee,[191] and Utah.[192]

It seems like a matter of time until the Supreme Court adopts ability to pay as part of the "gross disproportionality" standard. The Court has placed great emphasis on the historical purposes of the Excessive Fines Clause and "the historical roots of the Excessive Fines Clause reveal concern for the economic effects a fine would have on the punished individual."[193] Given the Supreme Court's heavy reliance on the historical purposes of the Excessive Fines Clause in *Timbs*,[194] it seems essential that courts consider ability to pay.[195] When the financial impact of the fine or forfeiture is ignored, courts fail to weigh all the circumstances of the particular offense and offender, as excessiveness analysis requires.[196] And when courts ignore relevant circumstances, fines and forfeitures run the risk that "in justice[,] the punishment is more criminal than the crime."[197]

D. ***How*** *Was the Property Used?*

What role did the property play in the offense? Was it instrumental, like a boat smuggling drugs,[198] or incidental, like a home where the owner's grandson sometimes sold drugs?[199] If the property *was* instrumental, just how instrumental was it? Was the property essential to the commission of the offense or was their relationship attenuated or accidental? Does the property represent the proceeds of crime, like money earned selling stolen goods? Or

185. Colo. Dep't. of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101–02 (Colo. 2019).

186. *State v. Timbs*, 134 N.E.3d at 36–37.

187. State v. Rewitzer, 617 N.W.2d 407, 415 (Minn. 2000).

188. State v. Yang, 452 P.3d 897, 905 (Mont. 2019).

189. County of Nassau v. Canavan, 802 N.E.2d 616, 622 (N.Y. 2003).

190. Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 188 (Penn. 2017).

191. Stuart v. State Dep't. of Safety, 963 S.W.2d 28, 36 (Tenn. 1998).

192. State v. 633 East 640 North, 994 P.2d 1254, 1260 (Utah 2000).

193. State v. Timbs, 134 N.E.3d 12, 37 (Ind. 2019).

194. Timbs v. Indiana, 139 S.Ct. 682, 688 (2019).

195. *See* Colo. Dep't. of Lab. & Emp. v. Dami Hosp., LLC, 442 P.3d 94, 101–02 (Colo. 2019) (noting a person's ability to pay is an important additional consideration); *see also* Colgan & McLean, *supra* note 4, at 437 (discussing the necessity of assessing an offender's ability to pay in light of *Timbs* and the history on which it relied).

196. *State v. Timbs*, 134 N.E.3d at 36–37.

197. *Id.* at 28 (alteration in original) (quoting United States v. 829 Calle de Madero, 100 F.3d 734, 738 (10th Cir. 1996)).

198. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683–84 (1974) (holding that a boat used to transport illegal drugs could be forfeited although the leasing company that owned it was not suspected of complicity in the crime).

199. *See, e.g.*, Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 158–59, 196–98 (Penn. 2017) (holding that it may violate the Excessive Fines Clause to allow forfeiture of the home belonging to the seventy-one-year-old grandmother and remanding for the trial court to weigh all of the circumstances of the case).

was the property legally obtained, only to later become the actual means by which a crime is committed?

In *Timbs*, the Indiana Supreme Court explained that such questions go to the "nexus between the property and the offense."[200] There must be *some* nexus between the property and the offense or it will be per se excessive to forfeit the property.[201] The government could not, for example, forfeit a person's bank account because illegal drugs were found in her car—not without more. As a threshold matter, the government must show a connection between the property and the crime.[202] This is often called the instrumentality requirement.[203]

The Supreme Court has said that property is an instrumentality of crime only if "it was the actual means by which an offense was committed."[204] This means that, in all circumstances, "a claimant may establish excessiveness by showing that the property was not the actual means by which any of the crimes on which the government based its case were committed."[205] The Indiana Supreme Court's decision on remand in *Timbs* notes several useful examples of "what does—and does not—meet the actual-means requirement" under Supreme Court decisions.[206]

It does not take much to meet this requirement, however. We were not able to establish excessiveness on that basis in *Timbs*. The Indiana Supreme Court held that the Land Rover was the "actual means" because Timbs "used the vehicle not only to get himself and the drugs to the location where the deal would take place, but also to obtain the drugs for the sale."[207] Accordingly, the vehicle was the "actual means by which the predicate crime was committed" even though Timbs could have easily walked or ridden his bicycle to the only transaction in question.[208] But the Indiana Supreme Court went on to hold, contrary to the State's argument, that the Excessive Fines Clause imposes a proportionality limitation even in cases of "instrumentality forfeitures."[209]

200. *State v. Timbs*, 134 N.E.3d at 27.

201. *Id.* (holding that to "stay within the bounds of the Excessive Fines Clause . . . the property must be the actual means by which an underlying offense was committed"); *see also* 1997 Chevrolet, 160 A.3d at 178 (holding that the Excessive Fines Clause requires, "as a threshold matter, the property at issue to be an instrumentality of the underlying offense").

202. *State v. Timbs*, 134 N.E.3d at 27.

203. *See id.* at 30.

204. United States v. Bajakajian, 524 U.S. 321, 333 n.8 (1998).

205. *State v. Timbs*, 134 N.E.3d at 30 (citing *Bajakajian*, 524 U.S. at 333 n.8).

206. *State v. Timbs*, 134 N.E.3d at 30 (citing J.W. Goldsmith, Jr.—Grant Co. v. United States, 254 U.S. 505, 512–13 (1921)) (holding that concealing goods in a vehicle to avoid taxes makes the vehicle an instrumentality); Austin v. United States, 509 U.S. 602, 627–28 (1993) (Scalia, J., concurring in part and in the judgment) (suggesting that the scales used to measure out illegal drugs would be an instrumentality); *Bajakajian*, 524 U.S. at 334 n.9 (holding that the mere presence of property in a crime does not make the property an instrumentality).

207. *State v. Timbs*, 134 N.E.3d at 30–31.

208. *Id.* at 31.

209. *Id.*

To be clear, I do not quarrel with the sovereign power to forfeit the proceeds and instrumentalities of crime when the crime has been proven beyond a reasonable doubt and the property has been shown to be, in fact, the proceeds or instrumentality of crime. My quarrel is with the civil forfeiture laws that allow the government to forfeit property without charging, let alone convicting, anyone of a crime—and to do so by proving a nexus by a mere preponderance of the evidence. What the decision in *Timbs* adds is that not everything is an instrumentality. Only the actual means by which the underlying crime was committed can be deemed an instrumentality and, therefore, forfeiture is never appropriate when the property is not the actual means by which a crime was committed.[210] It may sound basic, but it is worth keeping in mind that property can only be deemed the instrumentality of a crime when there is evidence establishing a nexus between the property and an actual crime. When that nexus is absent, forfeiture will always be excessive.[211]

When property is the actual means by which a crime was committed, courts must consider whether forfeiture would be proportional to the extent to which the property was used for unlawful purposes.[212] Unlike the instrumentality determination, this proportionality assessment allows the government to rely on other crimes—that is, crimes other than those on which forfeiture is based—when the property has been used in a pattern of illegal activity.[213] In criminal forfeiture cases, where the property owner has been shown to be guilty of a crime beyond a reasonable doubt, only the crime so proven should be considered in weighing the gravity of the offense.[214] But in civil forfeiture cases, where the property owner often is not charged with, let alone convicted of any crime the excessiveness inquiry "considers the gravity of the predicate offenses and the owner's culpability for the property's use in that criminal enterprise."[215] In this way, once again, civil forfeiture treats property owners worse than convicted criminals. But the next consideration—why the government wants the property—should prompt skepticism of civil forfeiture actions.

E. ***Why*** *Is the Government Seeking Economic Sanctions?*

Finally, courts should consider *why* the government is seeking economic sanctions. Is the government seeking to take property for reasons other than

210. *Id.* at 31, 39–40.

211. *See* Commonwealth v. 1997 Chevrolet, 160 A.3d 153, 178–79 (Penn. 2017); *State v. Timbs*, 134 N.E.3d at 34.

212. *State v. Timbs*, 134 N.E.3d at 39–40.

213. *Id.* at 29 (holding that "other related criminal conduct may affect the proportionality portion of the excessiveness analysis; but the instrumentality portion focuses solely on the crimes the government establishes to prove the property was used in a crime").

214. *Id.* at 35.

215. *Id.*

punishment—for example, is the property contraband and therefore unlawful to possess in all circumstances (e.g., methamphetamine or a sawed-off shotgun)?[216] Is the government taking property that was not used in the commission of a crime—in which case, as discussed above, forfeiture is always excessive. If property has been used in the commission of a crime (e.g., the getaway car used in a bank robbery or the Land Rover in *Timbs*), would its forfeiture be proportional to the severity of the offense under all the circumstances? One circumstance that matters a lot is whether the government is taking property essentially for selfish reasons—that is, to make money for the government.[217]

Timbs makes clear that courts should be on alert for this possibility. The Supreme Court noted examples spanning centuries of government abusing the power to fine and forfeit.[218] This history teaches it is "scarcely hypothetical" that the power to fine and forfeit property will be abused.[219] In fact, police and prosecutors sometimes take property, not so much as to address societal harm, but rather to raise revenue for the benefit of police and prosecutors.[220]

Like everyone else in the world, police and prosecutors respond to incentives. And forfeiture statutes offer compelling incentives for law enforcement—in most states and under federal law—allowing the seizing agency to keep most of the proceeds from successful forfeiture actions.[221] The financial incentive to forfeit property is, in turn, an incentive for law enforcement to adopt interpretations of the nexus requirement that tend to sweep in too much property, too loosely connected to crime, and about which the government has too little evidence to win in a fair fight.

But civil forfeiture is hardly a fair fight. When the government seizes property, it has every incentive to press full speed toward becoming the legal owner of that property. The vast majority of property owners do not contest

216. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (defining contraband as property that is inherently illegal, the mere "possession of which, without more, constitutes a crime"); *see also* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) (holding that forfeiture of contraband is not subject to Eighth Amendment scrutiny).

217. *See State v. Timbs*, 134 N.E.3d at 21 (noting that forfeiture can be "profitable for the government, which takes ownership of the property").

218. *See* Timbs v. Indiana, 139 S. Ct. 682, 687–89 (2019); *see generally* Brief for Eighth Amendment Scholars as Amici Curiae Supporting Neither Party at 8–25, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 4522295 (recounting how thirteenth and seventeenth century abuses by English kings led to the excessive-fines protection of the English Bill of Rights); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 336 (2014) (recounting similar abuses).

219. *See Timbs*, 139 S. Ct. at 689 (describing concern that fines will "be employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue,' while other forms of punishment 'cost a State money'") (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)).

220. *See* KNEPPER, *supra* note 41, at 15–21 (examining how forfeiture is lucrative for law enforcement nationwide).

221. *Id.* at 21, 34–35 (surveying financial incentives in the forfeiture laws of 50 states, the District of Columbia, and under federal law).

seizures, leading to the government becoming the owner of the property with zero judicial oversight.[222] The burden of litigation is effectively on the property owner, who must go to great lengths to prevent a forfeiture by default. An effective defense almost always requires the assistance of a lawyer—at a cost that can very quickly become unaffordable for most. At some point, it becomes irrational—financially speaking—to seek the return of property the value of which is less than the expense of continuing to litigate. At this point—we estimate it to be around $3,000 in a typical case—you might say that it becomes "insanely expensive" to do anything but walk away when the government seeks to forfeit property through litigation.[223] The resulting imbalance of resources and incentives between the government and property owner makes it critical that courts investigate the government's motivation for seeking forfeiture.

And forfeiture activity has exploded in recent years.[224] In 2018 alone, the year for which we have data from the greatest number of states, 42 states, the District of Columbia, and the federal government forfeited over $3 billion.[225] In 2014, police and prosecutors took in more than $5 billion from forfeiture, outpacing (by $1.5 billion) the value of all burglaries in the United States that year combined.[226] Our data show that, since 2000, states and the federal government have forfeited $68.8 billion.[227]

Why does the doctrine of excessiveness still matter today? Because, historically, Anglo-Americans have feared the sovereign impulse to use fines and forfeitures as a means of raising revenue, exerting political control, and punishing the disfavored.[228] Absent meaningful judicial constraint, this impulse will lead to abusive fines and forfeitures.[229] We see this happening today with an explosion of fines and forfeitures imposed without criminal conviction and sometimes based on the thinnest of pretenses.[230] History shows that such abuses will continue, unless judges and lawyers stop them.

222. *Id.* at 23–28 (describing the ways in which forfeiture is easy for the government and hard for owners).

223. *Id.*

224. *Id.* at 15–18.

225. *Id.* at 5.

226. Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, WASH. POST WONKBLOG (Nov. 13, 2015), tinyurl.com/q4de5yq.

227. KNEPPER, *supra* note 41, at 5.

228. *See Timbs*, 139 S. Ct. at 687–89; *id.* at 693–98 (Thomas, J., concurring).

229. *Id.* at 689; *see also* Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.) (observing that "it makes sense to scrutinize governmental action more closely when the State stands to benefit").

230. Harawa, *supra* note 12, at 72–80 (describing the ubiquity of financial punishments and their far-reaching consequences).

CONCLUSION

Timbs raises many questions about what constitutes an "excessive fine" for purposes of the Eighth Amendment. But the decision also points the way to answers. Courts across the country are beginning to apply the principles of *Timbs* and, for the most part, they have reached principled answers based on the Supreme Court's limited jurisprudence. Taken together, these cases represent a well-established doctrine rooted in the history and traditions of 800 years of Anglo-American law. This doctrine empowers courts to strike down arbitrary, unjust, and affirmatively harmful economic sanctions. There is no small amount of such sanctions today. And courts should be more active in policing the constitutional line.

What we know about the line demarcating "excessive fines" from constitutionally allowable fines is that it depends on factual circumstance and context. Whether a particular confiscatory sanction is unconstitutional depends on *who* committed *what* crime, with *what* property, in what community, *where* and *when*, *how* the property was used, and *why* society is punishing the offender.

There is no way to develop such a standard with any bright-line rule or multi-factored test. The only way to develop such a standard is case by case, in the common law tradition. With time, courts will develop a body of law that brings us closer to the true meaning of excessiveness. Like an asymptote, we may never touch that true meaning, but, as with so many things, the idea is to get closer to perfect in an imperfect world.