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AUTHOR

J.D. 2021, University of Detroit Mercy Law School. This Article is dedicated to my family, especially my parents, Denise and Tony, whose constant guidance and support has made all of my achievements possible. Thank you to the staff of the Liberty University Law Review for their hard work and thoughtful editing that brought this Article to publication. I would also like to thank my sister, Sarah, and friends, Rachel, Victoria, and Stephanie, who have constantly encouraged me in all of my endeavors.

ARTICLE

THE EXCESSIVE FINES CLAUSE: ASSESSING PROPORTIONALITY OF FINES THROUGH CIVIL ASSET FORFEITURE BY MULTI-FACTOR TESTS IN THE WAKE OF *TIMBS v. INDIANA*

Lauren V. Parrottino[†]

ABSTRACT

This article analyzes the approaches to assessing the proportionality of fines imposed by civil asset forfeiture. In many cases, fines imposed by civil asset forfeiture consist of property. Without clear Supreme Court guidance on the matter of evaluating just what makes a fine "excessive," I turned to the proportionality jurisprudence from the Eighth Amendment's Cruel and Unusual Punishments Clause. While many circuits have proposed their own tests for excessive fines imposed through forfeiture, I propose an objective multi-factor test that will measure a fine's proportionality to avoid excessiveness.

I. INTRODUCTION

At the time of his arrest in May of 2013, Tyson Timbs struggled with opioid addiction. To feed his addiction, he unwittingly sold heroin to undercover police officers outside of Indianapolis, Indiana, on three separate occasions.[1] At the time of the last deal, Timbs drove his Land Rover, valued at $42,000, that he bought with the proceeds from his recently deceased

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[1] Timbs v. Indiana, 139 S. Ct. 682, 686 (2019); Annie Depper & J. Blake Hendrix, *Land Rovers, Excessive Fines, and Selective Incorporation: Civil Asset Forfeiture after* Timbs v. Indiana, 54 ARK. LAW. 14, 14–15 (2019).

father's life insurance policy.[2] Before the third deal concluded, police officers arrested Timbs, and he pled guilty to the subsequent felony charges of dealing a controlled substance and conspiracy to commit theft.[3] The court sentenced him to one year of home detention and five years of probation, and he was ordered to pay about $1,200 in fees.[4] In addition, the State of Indiana kept Timbs's Land Rover through a civil process called *in rem* forfeiture.[5] Usually, Indiana's maximum fine for charges like Timbs's would have been valued at $10,000.[6] Because his Land Rover was valued at over four times the $10,000 maximum, Timbs challenged the forfeiture of his car as an excessive fine under the Eighth Amendment of the Constitution, arguing that such a fine was disproportionate compared to his offense.[7]

The State of Indiana's position in the *Timbs* case expressly relied upon the fact that the Eighth Amendment's Excessive Fines Clause did not apply

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[2] *Timbs*, 139 S. Ct. at 686.

[3] *Id.*

[4] Depper & Hendrix, *supra* note 1, at 15.

[5] *Id. See generally* 18 U.S.C. § 981.

> Civil asset forfeiture is a procedure by which law enforcement can seize assets implicated in the commission of a crime. . . . The technical legal rationale is that if the "property is guilty," then the innocence of the owner is irrelevant in an *in rem* action.
>
> Criminal forfeitures, in contrast, are done *in personam* and can be carried out only after the owner of the property has been convicted of a crime. If the property has a sufficiently strong connection to the crime, the forfeiture becomes a part of the criminal punishment carried out. Because of the procedural protections enjoyed by the owner/defendant in [criminal] cases, criminal forfeitures are far less problematic and, of course, far less controversial.

David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?*, 25 GEO. MASON L. REV. 173, 175–76 (2017) (emphasis added) (footnotes omitted).

[6] Depper & Hendrix, *supra* note 1, at 15.

[7] *Id.* The Eighth Amendment of the United States Constitution provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

because, at that time, it remained unincorporated to the states.[8] While this argument was convincing at the state level, Timbs appealed, and the United States Supreme Court granted certiorari in 2018.[9] The Supreme Court held that it was time to incorporate the Eighth Amendment to the states.

Suing for large forfeitures of personal property for smaller offenses, even when there are fines prescribed by law, is not a practice unique to Indiana.[10] Members of the Court have acknowledged that where the value of the property seized is considered a "fine," forfeiture policies are often abused.[11] Excessive fines, even in the form of the value of seized property, may violate the constitutional considerations of proportionality, as *Timbs* displays.[12] Incorporation of the Eighth Amendment to the states is a forfeiture reform for which few scholars and policymakers have called. After *Timbs*, popular opinion on forfeiture reform has been concerned with implementing due process reforms in an effort to make it hard for police to remove personal property.[13] Due to the Court's decision in *Timbs*, legal practitioners can expect new appeals of excessive fines via forfeiture to enter courts around the country.

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[8] Depper & Hendrix, *supra* note 1, at 15.

[9] Timbs v. Indiana, 138 S. Ct. 2650 (2018).

[10] Depper & Hendrix, *supra* note 1, at 15; *see* Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring).

[11] Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring) (first citing Sarah Stillman, *Taken*, THE NEW YORKER, Aug. 5, 2013, at 54–56; then citing Michael Sallah et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, THE WASHINGTON POST, Sep. 6, 2014, at A1, A10) ("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. . . . These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings.").

[12] *See* Timbs v. Indiana, 139 S. Ct. 682 (2019).

[13] *See, e.g.*, Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeit ure's Coffin,* AM. CIV. LIBERTIES UNION (Mar. 15, 2019, 4:45 PM), https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-didnt-put-nail-civil-asset-forfeitures; Adam Brandon, *Time for Congress to Reform Civil Asset Forfeiture After Court Ruling*, THE HILL (Feb. 21, 2019, 7:00 PM), https://thehill.com/opinion/civil-rights/431063-time-for-congress-to-reform-civil-asset-forfeiture-after-court-ruling.

Prohibitions against excessive fines are one of the hallmarks of Anglo-American law.[14] Even so, it took until *Timbs* in 2019 to incorporate the Excessive Fines Clause of the Eighth Amendment to the states. Now that the Excessive Fines Clause is incorporated to the states, Congress should, under the advisement of judiciary and justice committees, institute guidelines regarding the proportionality of excessive fines, specifically in the context of civil asset forfeitures.

Like protections against excessive fines, discussed in Section II, property forfeiture is also a law enforcement practice in Anglo-American legal traditions.[15] The practice of civil asset forfeiture is a common and useful tool for law enforcement, especially with drug-related crimes. Large forfeitures of personal property that result from smaller drug crimes, however, should always be looked at skeptically and weighed in proportion to the severity of the crimes. Asset forfeiture practices have garnered much attention from policymakers and scholars in recent years. In fact, over half of the fifty states have imposed protective legislation that has made it more difficult for law enforcement to take a person's property through civil forfeiture for less serious offenses.[16]

The push for civil forfeiture reform came about because of numerous well-reported abuses, discussed in Section III. The issue closely examined in this Article is how to test for excessive fines arising out of property forfeiture.

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[14] *See The English Bill of Rights*, 1698 § 11, (Eng.) ("And excessive fines have been imposed; and illegal and cruel punishments inflicted."), *reprinted in* JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE: AN INTRODUCTION TO THE CONSTITUTIONAL PRINCIPLES OF AMERICAN GOVERNMENT app. C, at 80–81 (3rd. ed. 2000); *The Virginia Bill of Rights*, 1776, § IX ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 157 (Bruce Frohnen ed., 2002); *The Northwest Ordinance*, 1787, art. 2 ("All fines shall be moderate. . . ."), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 225, 227 (Bruce Frohnen ed., 2002).

[15] *See* Austin v. United States, 509 U.S. 602, 611–12 (1993).

[16] *See Civil Forfeiture: IJ Battles to Stop the Government from Taking Property from People Never Charged with a Crime*, INST. FOR JUST., https://ij.org/issues/private-property/civil-forfeiture/ (last visited Aug. 27, 2022); *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/ (last visited Aug. 27, 2022).

While the Supreme Court's guidance on fines associated with civil forfeitures does not take up a vast expanse on the Court's bookshelf, there is a continuing question (and disagreement) surrounding the issue of "proportionality."

The Court has addressed the principle of proportionality in two major ways. Principally, the form of proportional sentencing practices to crimes committed, and, secondarily, in the matter of fining practices. Fines and periods of confinement may be imposed together as part of a criminal punishment, but civilly speaking, fines are the only form of punishment. Thus, in the civil context, the proportionality element of fines is extremely important. Though not directly related, the Court's guidelines on determining excessiveness in criminal sentencing for noncapital cases, especially the "grossly disproportionate" standard, prove to be informative sources for examining proportionality inquiries sprouting from forfeiture, as discussed in Section IV.[17]

The latter sections of this Article will discuss the Eighth Amendment's Excessive Fines Clause in its relation to civil asset forfeiture, also referred to as statutory *in rem* forfeitures, by proposing an objective multi-factor test to assess the excessiveness of fines imposed by the government.[18] The Supreme Court grappled with these issues in several cases in the 1990s and early 2000s.[19] In these cases, the Court held that property seized in civil *in rem* forfeitures that is converted into a monetary value constitutes a fine.[20] Because of this, it follows that a forfeiture's value as a fine may be considered "excessive" within the scope of the Eighth Amendment's prohibition against excessive fines. The Supreme Court's notable treatment of excessive fines questions, deriving from cases where there was excessive government forfeiture, will be addressed in Section V.

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[17] *See* Harmelin v. Michigan, 501 U.S. 957, 998–1001 (1991) (Kennedy, J., concurring).

[18] The term "statutory *in rem* forfeitures" is used interchangeably with "civil *in rem*" or "*in rem*" or "civil asset forfeitures" throughout this Article.

[19] *See, e.g.*, Austin v. United States, 509 U.S. 602, 604 (1993); United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[20] *Austin*, 509 U.S. at 604; *Bajakajian*, 524 U.S. at 334.

Section VI of this Article will examine circuit court responses to the need for a bright-line test instead of the current general standard of prohibiting fines that are "grossly disproportionate." Finally, in Section VII, the Article will take approaches articulated by the Supreme Court, circuit courts, and by other advocates to create an objective multi-factor test that measures the proportionality of fines originating from statutory *in rem* forfeitures. A multi-factor test is the best approach to excessiveness questions stemming from forfeitures and should be developed by courts to consider more easily the Supreme Court's proportionality of punishment jurisprudence.

II. THE ANGLO-AMERICAN TRADITION OF PROHIBITING EXCESSIVE FINES

Prohibitions against excessive fines are rooted in Anglo-American legal tradition. This tradition is largely cited as originating from the Magna Carta in 1215 and distilled in the English Bill of Rights of 1689.[21] In 1833, Justice Joseph Story wrote his *Commentaries on the Constitution of the United States* and pronounced that the Eighth Amendment itself would seem:

> wholly unnecessary in a free government . . . that any department of such a government should authorize, or justify such atrocious conduct . . . [but it was] adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England. . . . Enormous fines and amercements were also sometimes imposed [during the Reign of the Stuarts] . . . .[22]

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[21] *See* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1240–42 n.51 (1987); McClellan, *supra* note 14, at 150.

[22] Joseph Story, Commentary, *Commentaries on the Constitution of the United States,* § 1896–97, *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 361 (Bruce Frohnen, ed., 2002) (footnotes omitted). Justice Story discusses historical considerations of the Amendments to the United States Constitution. Section 1897 of Story's *Commentaries* reads:

> It has been held in state courts, (and the point does not seem ever to have arisen in the courts of the United States,) that this clause does not apply to punishments inflicted in a state court for a crime against such state; but

With their roots in Medieval England, clauses prohibiting excessive fines are found throughout America's founding documents.[23]

Though ultimately derived from English common law, and with consistent appearance in state and national constitutions, Excessive Fines Clauses are a hallmark of the American legal system. Like many issues that come before the Supreme Court, the doctrinal questions regarding property forfeiture originate from some ordinary or mundane set of facts with the constitutional question arriving later. The Court's interpretation of the Eighth Amendment's Excessive Fines Clause occurs in light of *in rem* forfeiture cases, where individuals are fined after committing a crime. This section will discuss the history of excessive fine prohibitions in the larger Anglo-American legal history, as well as the Supreme Court's consideration of the Eighth Amendment's clause.

A. *Anglo-American History of Excessive Fines*

Appreciating the long tradition of limiting the government's ability to fine individuals requires a foundational knowledge of the evolution of the court's understanding of fines. In thirteenth century England, "amercements" were payments to the crown "required of individuals who were 'in the King's mercy'" because of some offensive act.[24] These payments were an "all-purpose" royal penalty that generated additional revenue for the crown and could be collected for a wide range of offenses.[25] The Magna Carta limited the crown's amercement[26] practices "by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; [and] by requiring that the

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> that the prohibition is addressed solely to the national government, and operates, as a restriction upon its powers.

Id. § 1897.

[23] *See* sources cited *supra* note 14.

[24] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 269 (1989).

[25] *Id.* at 269–70.

[26] *Id.* at 270–71.

amercement not be so large as to deprive him of his livelihood. . . ."[27] Here, it is clear that the barons at Runnymede meant to establish a connection between the gravity of the offense and the cost of the amercement to protect against the crown's imposition of arbitrary fees.[28] Amercements have largely persisted in modern civil punishment terms as "fines."[29]

Over time, the terms "amercements" and "fines" started to be used interchangeably despite being historically distinct.[30] By the seventeenth and eighteenth centuries, freedom from excessive monetary sanctions was regarded as a central tenet of the established legal system of England and the American Colonies.[31] In 1776, colonial legislatures passed the Virginia Declaration of Rights, which memorialized a freedom from excessive fines being levied against citizens.[32] This propelled other states to pass their own declarations of rights.[33] An excessive fines clause was included in the

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[27] *Id.* at 271. The Magna Carta also supplied that the amount for amercement be "fixed by one's peers" who were sworn to amerce another proportionate to the offense. *Id.* It is important to note that the Magna Carta's amercement limitations did not apply to civilly imposed damages, which was understood at the time. *Id.* at 272. The Court discusses this briefly in *Browning-Ferris* where it declined to apply the Eighth Amendment Excessive Fines Clause to the imposition of punitive damages in a private civil matter. *Id.* at 259–60, 271–72. This is also the Court's first mention of proportionality in the context of excessive fines. *Id.* at 279.

[28] *See id.* at 270–72, 271 n.14.

[29] *Id.* at 291, 295.

[30] "But though fines and amercements had distinct historical antecedents, they served fundamentally similar purposes—and, by the seventeenth and eighteenth centuries, the terms were often used interchangeably in common parlance." Brief for John D. Bessler et al. as Amici Curiae Supporting Neither Party, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), at 22–23 (citing *Browning-Ferris*, 492 U.S. at 290–91 (O'Connor, J., concurring in part and dissenting in part)); *see also* Massey, *supra* note 21, at 1264.

[31] In the Declaration of Rights of 1689, the rights and liberties listed were said to be "undoubted." Brief for John D. Bessler et al. as Amici Curiae Supporting Neither Party, *supra* note 30, at 27; *see* McClellan, *supra* note 14, at 81–82, 189.

[32] *See The Virginia Bill of Rights, supra* note 14.

[33] *See The Supreme Court Rules That the Eighth Amendment's Prohibition Against Excessive Fines Applies to the States*, PRAC. L. GOV'T PRAC. (Feb. 28, 2019) [hereinafter *Excessive Fines Applies to States*].

Northwest Ordinance and then, finally, in the Constitution as part of the Eighth Amendment in 1791.[34] On the eve of ratifying the Constitution, eight of the thirteen states had excessive fines clauses in their state charters.[35] By 1868, thirty-five out of the thirty-seven states banned excessive fines; today, all fifty states have constitutional provisions against excessive fines.[36]

B. *The U.S. Supreme Court and Excessive Fines*

Unlike many topics Congress undertook early in America's founding, the Excessive Fines Clause was not the center of nearly any debate. "At the time of the drafting and ratification of the Amendment, the word 'fine' was understood to mean a payment to a sovereign for some offense."[37] Because of this, the Court has grappled with the question of whether payments in the form of property satisfy the meaning of a fine.[38]

The Eighth Amendment's prohibition against excessive fines has an ancient history, yet it has received remarkably little attention in American jurisprudence.[39] In 1989, the Supreme Court issued its first decision interpreting the Excessive Fines Clause. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the Court did not extend the Excessive

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[34] *See The Northwest Ordinance, supra* note 14; *see also* U.S. CONST. amend. VIII.

[35] *See* Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) (citing Steven G. Calabresi, et al., *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1517 (2012)).

[36] *See Excessive Fines Applies to States*, *supra* note 33.

[37] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264–65 (1989). Congress did not record in detail what the term "fines" meant or whether the protection against "excessive" fines had any application in the civil context. *Id.*

[38] *See, e.g.*, Austin v. United States, 509 U.S. 602, 604 (1993).

[39] *See* David Lieber, *Eighth Amendment—The Excessive Fines Clause*: Austin v. United States*, 113 S.Ct. 2801 (1993)*, 84 J. CRIM. L. & CRIMINOLOGY 805, 808 (1994); Brief for the Respondent, Timbs v. Indiana, 139 S. Ct. 682 (2018) (No. 17-1091), at 71–72 ("The obvious explanation for the historical silence surrounding Excessive Fines Clause limitations on *in rem* forfeitures is that America's lawyers and judges have not understood the federal Excessive Fines Clause—or its state analogues—to apply to these forfeitures. The Clause applies only to punishments, and—as decades of cases and treatises have explained—*in rem* forfeitures are *not* punishments.").

Fines Clause to cover punitive damage awards between private parties.[40] However, the Court has found in other cases that "excessive" punitive damage awards constitute arbitrary deprivation of property and violate due process.[41] Limiting the nature of excessive fines cases to be only those fines instituted by non-private parties, such as the government, frames the Court's Eighth Amendment Excessive Fines jurisprudence. *Browning-Ferris*'s parameters thus focus Supreme Court Excessive Fines cases on fact patterns where the fine originates from the value of property seized by the government for some illegal behavior.[42]

The Supreme Court's iteration of what constitutes an excessive fine may be more robust than those protections in individual states.[43] In other words, a heavy fine issued for an offense by a state court may not be considered excessive; however, that fine for the same offense may be considered excessive, or at least questionable, by the Supreme Court. Though state and national legal authorities have generally accepted a prohibition against excessive fines, the federal assessment of what constitutes an excessive fine is rather amorphous. Without a bright-line test defining what is excessive and what is proportional, multi-factor tests balancing objective factors should be used as a means of clarity for Eighth Amendment Excessive Fines Clause cases.

III. AMERICA'S CIVIL ASSET FORFEITURE TRADITION

Payments to the government resulting from one's wrongdoing may come through a process called civil asset forfeiture (also known as *in rem* forfeiture). The Court has held that civil *in rem* forfeitures—that is the monetary amount of the value of the property forfeited—are considered fines in lieu of what one may think of as the traditional method of fining an

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[40] *Browning-Ferris*, 492 U.S. at 266.

[41] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[42] *See Austin*, 509 U.S. at 604; United States v. Bajakajian, 524 U.S. 321, 325–27 (1998).

[43] *See* Massey, *supra* note 21.

individual.[44] Thus, for the purposes of this Article, understanding America's forfeiture system is necessary to fully grasp the issue of excessive fines originating from the forfeiture system.

With civil asset forfeiture's modern form in use since the 1970s, it has been a heavily utilized tool of law enforcement to gather evidence and combat drug-related crime. In recent years, much attention has been brought to whether Americans' procedural due process rights are violated by forfeiture.[45] While reform may be necessary, the practice itself is a hallmark of Anglo-American policing, especially in the criminal context.[46]

The forfeiture system today comprises of several modern iterations of English common law tradition.[47] At the time the Eighth Amendment was ratified, three types of forfeiture were commonly practiced: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture.[48] The English statutory forfeiture is the ancestor to the modern forfeiture system in America. "English Law provided for statutory forfeitures of

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[44] Timbs v. Indiana, 139 S. Ct. 682, 690 (2019) ("We thus decline the State's invitation to reconsider our unanimous judgment in [*Austin v. United States*] that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive.").

[45] *See* Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2387 (2018) [hereinafter *How Crime Pays*]; Kelly Milliron, Note, *Addressing Due Process Concerns: Evaluating Proposals for Civil Asset Forfeiture Reform*, 70 FLA. L. REV. 1379, 1383 (2018).

[46] Forfeiture of property usually comes about in the context of being an "instrumentality" of a crime insofar as the property is used in the commission of criminal activity.

[47] *Austin*, 509 U.S. at 611.

[48] *Id.*

> At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand, . . . The value of the instrument was forfeited to the King, in the belief that the King would provide the money for the Masses . . . or insure that the deodand was put to charitable uses.

Id. (quoting Calero v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–81 (1974)). The second type of forfeiture, "forfeiture . . . upon those convicted of a felony or of treason" involved convicting traitor's forfeiting all of their property, real and personal, to the Crown. *Id.* at 611–12. These were also known as forfeitures of estate. *Id.* at 612.

offending objects used in violation of the customs and revenue laws. . . ."[49] The American system followed closely behind the English, keeping with statutes as the method of promulgation.

Early Americans employed statutory forfeitures similarly to their English counterparts—typically bringing actions against ships and vessels for forfeiture of their goods upon discovery of some customs or revenue offense—by exercising *in rem* (against the thing) jurisdiction of the property used to commit the wrongdoing as punishment.[50] "These early statutes permitted the government to proceed *in rem* under the fiction that the thing itself, rather than the owner, was guilty of the crime."[51] Even though suits were derived from criminal acts, they were prosecuted as *in rem* rather than *in personam* (against the person) and thus proceeded civilly without criminal procedure protections.[52]

Statutory forfeiture arrangements were implemented long before America's founding, yet the practice was never especially comforting because it was a constant reminder for early Americans of how easily they could be deprived of property by a distant sovereign.[53] Cases from the Revolutionary Era show that courts were much more skeptical of forfeiture practices in light of British abuses of the system in the years leading up to the Revolution.[54] The statutory forfeiture scheme has continued with little interruption, and the modern statutory forfeiture system presently extends to many types of

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[49] *Calero*, 416 U.S. at 682.

[50] Leonard v. Texas, 137 S. Ct. 847, 848–49 (2017) (Thomas, J., concurring) (respecting the denial of certiorari).

[51] *Id.* at 849.

[52] *Id.*

[53] *Id.* at 848–49.

[54] *See, e.g.*, Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1471–72 (2019). In Colonial America, Writs of Assistance (essentially search warrants with no expiration date or particularized reason) were used by occupying British customs officers and the army to search American ships and seize shipments impeding upon American trade. *See* James Otis, Against Writs of Assistance (February 24, 1761), https://www.sas.upenn.edu/~cavitch/pdf-library/Otis_Against%20Writs.pdf.

property, both real and personal.[55] This system has become what is commonly known as civil asset forfeiture.

Modern civil asset forfeiture is the seizure of property that the government has reason to believe is sufficiently connected to criminal activity and may occur pursuant to either state or federal law.[56] Such a reason to believe property is connected to criminal activity results from two prevailing theories: whether the property is an "instrumentality" of a crime or property that "facilitated" a crime.[57] An instrumentality of a crime refers to someone using the property in the commission of a crime, while facilitating a crime means that the property enabled the crime in the broader context of the crime.[58] Furthermore, these theories allow for, and case law supports, that a criminal conviction is not needed for the seizure of property involved in crimes.[59]

Since its inception, civil asset forfeiture has remained a tool of law enforcement to stop illicit activity with the dual purpose of helping the government raise revenue. There are two instances in U.S. history that expanded the breadth of civil forfeiture practices: (1) the passage of the Eighteenth Amendment, which inaugurated the Prohibition Era, and (2) the

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[55] *Leonard*, 137 S. Ct. at 847–49 (Thomas, J., concurring).

[56] *See How Crime Pays*, *supra* note 45, at 2388. State provisions vary widely on how they treat forfeiture proceedings. Some states have abolished civil asset forfeiture altogether, relying on criminal forfeiture proceedings to pursue property involved in a crime. While other states have opted to tailor their civil asset forfeiture statutes to provide more protections to property owners to eliminate abuses. *Civil Forfeiture Reforms on the State Level*, *supra* note 16.

[57] Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 186 (2011). "The [federal] government must demonstrate that there is a 'substantial connection between the property and the offense' if the government is arguing the property facilitated a crime." *Id.* at 187 (quoting 18 U.S.C. § 983(c)(3) (2006)).

[58] STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 779 (2007).

[59] Austin v. United States, 509 U.S. 602, 616 (1993).

sharp rise in drug trafficking and related violence in the latter half of the twentieth century.[60]

In 1970, due to the influx of crime, lawmakers granted more forfeiture power to federal law enforcement and to federal agencies. As a result, Congress passed the Comprehensive Drug Abuse Prevention and Control Act.[61] This legislation was responsible for expanding asset forfeiture laws and for setting punitive bases for certain drug crimes, all with the goal of equipping law enforcement to directly respond to the increase in crime around the country.[62] By this Act, law enforcement "gained the [broad] power to seize property to be used or intended to be used in the commission of a drug offense punishable by more than one year's imprisonment."[63] In 1984, legislatures empowered the Department of Justice to accumulate the proceeds of and to manage the costs associated with the forfeitures via the creation of the Comprehensive Crime Control Act.[64] Through these federal

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[60] *How Crime Pays*, *supra* note 45, at 2394 (citing HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 23 (1995)). In addition to Prohibition, another spike of forfeiture practices occurred in 1970 when federal legislatures acted affirmatively to expand forfeiture practices in the passage of the Comprehensive Drug Abuse Prevention and Control Act. McCaw, *supra* note 57, at 218–19. This Act responded to the rise in violent crime, especially that crime that was attributed to drugs being part of the federal government's "War on Drugs." Milliron, *supra* note 45.

[61] *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 18 U.S.C. §§ 801–971); Milliron, *supra* note 45. Notably, see 21 U.S.C. § 844(a) (1986), in which the federal government installed a cap for civil penalties on small amounts of certain controlled substances at $10,000. In addition to the Comprehensive Drug Abuse Prevention and Control Act, Congress also passed the Racketeer Influenced and Corrupt Organizations Act in 1970, which targets organized crimes and has been the law behind the breakdown of long-established organized crime associations around the country. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961–68).

[62] Michele M. Jochner, *The Supreme Court Turns Back the Clock on Civil Forfeiture in Bennis*, 85 ILL. BAR J. 314, 316 (1997).

[63] Milliron, *supra* note 45. "This Act helped launch the War on Drugs by targeting instrumentalities, proceeds, and other real property associated with drug crimes." *Id.*

[64] *Id.*

statutes, the amount of property involved in crimes forfeited escalated sharply.[65]

The modern American civil asset forfeiture regime has proved to be more than just the ability to seize property involved in crimes. Through the Comprehensive Crime Control Act, the federal government created an incentive for law enforcement to seize property and to take illegal substances and weapons off the streets. Such an incentive came in the form of equitable sharing programs.[66] Equitable sharing incentivized the forfeiture scheme for local law enforcement because this program allowed federal and state law enforcement agencies to share in the liquidated assets of seized property, which supplied local departments with more funds to equip their officers.

After three decades of expansive civil asset forfeiture practices, federal legislators passed the first civil asset forfeiture reform package. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) included more due process protections, which were largely left out of 1970's and 1984's legislation, and it improved federal civil forfeiture procedures.[67] Specifically, CAFRA raised the federal government's burden of proof and required notice of a forfeiture action within sixty days of the policing encounter.[68]

While forfeiture is useful and is routinely used by law enforcement, abuses of this system are "well-chronicled" and reported upon by many individuals

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[65] *Id.* at 1384.

[66] *How Crime Pays*, *supra* note 45, at 2404. "Equitable sharing allows federal rather than state *in rem* procedures to govern property seized by state or local authorities. It occurs when a state or local authority turns over seized property to a federal agency . . . or works with a federal agency on a joint task force or investigation." *Id.* at 2392 (emphasis added). The state or local agency is then allowed to receive a cut of the proceeds liquidated seized assets. *Id.* Receiving monies from forfeitures allows local and state law enforcement to receive different types of equipment and fund their own departments which does benefit public safety. *Id.* at 2391.

[67] *See* Milliron, *supra* note 45, at 1387. Co-sponsored by Rep. Tim Walberg of the 7th District of Michigan, H.B. 5212 (CAFRA of 2014) was introduced to build upon the reforms from CAFRA 2000. *See, e.g.*, Daniel Reed, *The Next Step in Civil Asset Forfeiture Reform: Passing the Civil Asset Forfeiture Reform Act of 2014*, 66 CATH. U. L. REV. 933, 934 (2017).

[68] Milliron, *supra* note 45, at 1387.

and organizations around the country.[69] Such heavy reporting and heartrending stories about the abuse of forfeiture pushed many state legislatures to limit the use of forfeiture in seizures under a certain dollar amount.[70] For example, Michigan upped its minimum amount to constitute forfeiture to $50,000.[71]

Others have suggested what policymakers can do to fix the forfeiture problem on a larger scale, often citing an increase of due process protections rooted in personal property rights.[72] The courts must evaluate the current understanding of proportionality in terms of fines that are imposed in forfeiture proceedings. After reviewing the historical background of the issues at play, it is clear why *Timbs* was ripe for incorporating an Excessive Fines Clause to the states. Now, states will have to review their own fining practices so that revisions fall in line with constitutionally established prohibitions against excessive fines.

IV. THE PROPORTIONALITY INQUIRY FROM THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE INFORMS ANALYSES OF EXCESSIVENESS FOR THE EIGHTH AMENDMENT

The other part of the Eighth Amendment is the Cruel and Unusual Punishments Clause. Embedded within the clause is a proportionality principle, and this principle has been developed in the Supreme Court's jurisprudence. Proportionality of punishment is an articulation of a

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[69] Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring).

[70] *See* Anne Teigen & Lucia Bragg, *Evolving Civil Asset Forfeiture Laws*, NAT'L CONF. OF STATE LEGS. (Feb. 2018), https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx. Ohio, for example, instituted major reforms to its civil asset forfeiture system. *See also* Nick Wing, *New Ohio Law Stops Cops from Taking Innocent People's Stuff*, THE HUFFINGTON POST (Jan. 5, 2017), https://www.huffpost.com/entry/ohio-civil-asset-forfeiture_n_584ae66be4b04c8e2baf88aa.

[71] *Gretchen Whitmer Signs Bills to Limit Asset Forfeiture in Drug Cases*, DETROIT FREE PRESS (May 9, 2019, 3:03PM), https://www.freep.com/story/news/politics/2019/05/09/gretchen-whitmer-signs-bills-limit-asset-forfeiture-drug-cases/1155329001/.

[72] *See, e.g.*, *How Crime Pays*, *supra* note 45, at 2388; Milliron, *supra* note 45, at 1386; Pimentel, *supra* note 5, at 175.

prohibition against cruel and unusual punishments, so that the punishment fits the crime.[73]

The Court's proportionality inquiry for the Cruel and Unusual Punishments Clause is informative when analyzing excessive fines.[74] Proportionality analyses are most often made in capital cases where the death penalty is a possibility.[75] However, the Court has discussed the broader proportionality principles that encompass different types of punishments, eliciting different responses from Justices over the years.[76]

Since 1910, the Supreme Court has acknowledged a proportionality principle that led to the invalidation of noncapital criminal sentences in some cases for being disproportionate to the crime in question.[77] The Court made its first detailed noncapital proportionality inquiry in *Solem v. Helm*.[78]

By 1975, Helm was convicted of six nonviolent felonies, which included third-degree burglary, grand larceny, and driving while intoxicated.[79] In 1979, he was charged with a seventh offense, "uttering a 'no account' check for $100."[80] He pled guilty to the offense, and ordinarily the maximum

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[73] Mirko Bagaric & Sandeep Gopalan, *Sound Principles, Undesirable Outcomes: Justice Scalia's Paradoxical Eighth Amendment Jurisprudence*, 50 AKRON L. REV. 301, 303 (2016). Like the excessive fine language included in the text of the Constitution, the cruel and unusual language has derived from the English Declaration of Rights and the sentiments can be traced back to the Magna Carta as well. *Id.* at 305–06. In *Trop v. Dulles*, the Court stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 306 (quoting Trop v. Dulles, 356 U.S. 86, 99–100 (1958)).

[74] *Id.* at 312.

[75] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 206 (1976); Pulley v. Harris, 465 U.S. 37 (1984).

[76] *See, e.g.*, Solem v. Helm, 463 U.S. 277, 288–89 (1983) (Justice Powell delivered the opinion for the Court and discussed a multi-factor proportionality analysis); *see also* Harmelin v. Michigan, 501 U.S. 957 (1991).

[77] *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910) (finding that fifteen years in prison, hard labor, and a fine for falsifying government documents is cruel and unusual).

[78] *See Solem*, 463 U.S. at 288–89.

[79] *Id.* at 279–80.

[80] *Id.* at 281.

punishment would have been five years imprisonment and a $5,000 fine.[81] As a repeat offender, however, Helm was subject to South Dakota's recidivist statute.[82]

Recognizing the need for a detailed explanation of how a punishment should be proportionate to the crime, the Supreme Court held that Eighth Amendment proportionality analysis "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[83]

From these factors, the Court explicated that, with objective criteria, proportionality inquiries may find a sentencing significantly disproportionate to the criminal behavior, as the Court found in *Solem*.[84] The first factor is assessed through "widely shared views as to the relative seriousness of crimes."[85] Some crimes are non-violent in nature and other crimes are marked by violence, and courts must gauge the harm caused to a victim or to society by the crime in question.[86] This can influence how a court should evaluate a punishment for a crime based on its seriousness.[87]

Secondly, reviewing the punishment similar to other criminals in the same jurisdiction will help show whether more serious crimes are subject to the same penalty or to less serious penalties.[88] If more serious crimes are subject to the same penalty, this may indicate an excessiveness issue.[89] In previous cases, the Court used this factor to show that a sentence was excessive by

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[81] *Id.*

[82] *Id.*

[83] *Id.* at 292.

[84] Bagaric & Gopalan, *supra* note 73, at 309–11.

[85] *Id.* at 310.

[86] *Id.*

[87] *Solem*, 463 U.S. at 293. Justice Powell writes that different crimes, such as attempts, should be considered "less serious than completed crimes" and "an accessory after the fact should not be subject to a higher penalty than the principal." *Id.* He also notes that the magnitude of the crime may be relevant. *Id.*

[88] *Id.* at 291.

[89] *Id.*

generating a list of more serious crimes from that jurisdiction that received less serious penalties.[90]

Finally, the last component of a proportionality inquiry for noncapital cases calls for comparing the sentences imposed for commission of the same crime in other jurisdictions.[91] It is then up to the court to decide whether the jurisdiction in question institutes a disproportionate punishment while considering whether the crime in question presents any aggravating factors.[92]

The Supreme Court's iteration of the proportionality principle implies that proportionality is a part of the Eighth Amendment.[93] "The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."[94] The language used here is that of describing a fundamental constitutional principle, insofar as proportionality of punishments is deeply rooted in tradition and history.[95] This would be a broad interpretation of the Eighth Amendment.

Justices have called into question this injection of proportionality to the Eighth Amendment. Justice Kennedy believed that the Eighth Amendment "encompasses a narrow proportionality principle" where the "Eighth Amendment does not require strict proportionality between [the] crime and [the]

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[90] *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910).

[91] *Id.* at 380–81.

[92] In criminal law, aggravating factors include intentional crimes, with "malice" or "reckless abandon." Such aggravating factors warrant harsher punishments under the law. *See* Gregg v. Georgia, 428 U.S. 153,164–66 (1976); *see also Solem*, 463 U.S. at 293–94.

[93] *See Solem*, 463 U.S. at 290–91. Justice Powell applied proportionality to imprisonment because:

> [The Court] ha[s] recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments . . . . It would be anomalous indeed if the lesser punishment of a fine and greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not.

Id. at 289.

[94] *Id.* at 284. Justice Powell continues: "In 1215 three chapters of the Magna Carta were devoted to the rule that 'amercements' may not be excessive." *Id.*

[95] *Id.*

sentence."[96] "Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[97] Justice Scalia found the Eighth Amendment to only relate to the modes of punishment and not to the disproportionality of the punishment as compared to the crime, and that the Court's criteria in *Solem* actually lacked an "objective standard of gravity."[98] As the statutes that Americans have enacted in different times and in different places demonstrate, opinions vary as to what offenses are considered serious.[99]

As students of the law will be well acquainted, the Court changed its tune in its next case involving a noncapital cruel and unusual punishment challenge, *Harmelin v. Michigan*, in which there was a statutorily-imposed mandatory life sentence without parole.[100] In short, the Court determined that no proportionality *guarantee* lay within the Eighth Amendment or its jurisprudence.[101] Justice Scalia, writing for the Court, argued that the proportionality principle was not a ubiquitous aspect of Eighth Amendment law.[102] Under this view, the Court should only consider proportionality in death penalty jurisprudence.[103]

The bench was not unified, however; Justice Kennedy's concurrence in *Harmelin* particularly states that proportionality also applies to noncapital

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[96] Harmelin v. Michigan, 501 U.S. 957, 997, 1001 (1991) (Kennedy, J., concurring).

[97] *Id.* at 1001.

[98] Bagaric & Gopalan, *supra* note 73, at 312 (citing *Harmelin*, 501 U.S. at 958).

[99] *See Solem*, 463 U.S. at 291.

[100] *Harmelin*, 501 U.S. at 961–62, 985.

[101] *Id.* at 965. Justice Scalia writes extensively on the historical arguments defeating the imposition of a proportionality principle in Excessive Fines cases. *Id.* at 962–63, 965. He finds that the idea of proportionality is vague within the Framers' usage of "cruel and unusual" in the Constitution and only relates to the mode of punishment. *See id.* at 997. Even if the Framers deviated knowingly from English Common Law principles of disproportionality of fines and punishments with the usage of "cruel and unusual," there is not enough evidence to prove that they did. *Id.* at 1011–12. He is, however, outnumbered by Justices who find that there is a narrow proportionality principle in the cruel and unusual punishments clause and that, in this specific case, the dangers of the petitioner's drug offenses and circumstances of his crime demonstrated that Michigan remained within its constitutional bounds. *Id.* at 996–97.

[102] Ewing v. California, 538 U.S. 11, 23 (2003) (quoting *Harmelin*, 501 U.S. at 994).

[103] *Id.*

cases.[104] Justice Kennedy applied the *Solem* Test in recognition of a narrow proportionality principle—the contours of which may be unclear—that prohibits grossly excessive punishments.[105] He named four factors that the Constitution allows when the government is defining and establishing penalties: (1) the "primacy of the legislature" to make such decisions regarding statutory punishments, (2) the "variety of legitimate penological schemes" such as instilling "enhanced" sentences as deterrents, (3) the nature of the federal system, and (4) the requirement that proportionality inquiries are guided by objective factors as in *Solem*.[106] These four factors inform a fifth principle that "the Eighth Amendment does not require strict proportionality between crime and sentence."[107] This leaves states with a wide swath of discretion in inflicting punishments in light of the "grossly disproportionate" standard.[108]

Even without a bright-line test in cases that involve reading in a proportionality factor to the Cruel and Usual Punishments Clause, the Court remains inclined to keep the disproportionate bar high, as is shown in *Ewing* v. *California*.[109] In *Ewing*, the defendant received a conviction of twenty-five

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[104] *Harmelin*, 501 U.S. at 996–97 (Kennedy, J., concurring).

[105] *Id.* at 998.

[106] *Id.* at 1001; *Ewing*, 538 U.S. at 23. Recall Justice Powell's test for proportionality from *Solem* v. *Helm*—the inquiry "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem,* 463 U.S. at 292.

[107] *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

[108] *Id.*

[109] *See Ewing,* 538 U.S. at 30–31; *Harmelin*, 501 U.S. at 997 (citing Rummel v. Estelle, 445 U.S. 263, 271–74 (1980) (acknowledging that the proportionality rule existed for both capital and noncapital cases)); Hutto v. Davis, 454 U.S. 370, 374–75 (1982) (Powell, J., concurring) (recognizing the possibility of proportionality review but holding it inapplicable for 40-year sentence for possession with intent to distribute); *Solem*, 463 U.S. at 303 (holding that life imprisonment without possibility of parole violated the Eighth Amendment because it was "significantly disproportionate" to the crime of recidivism based on seven underlying nonviolent felonies). Though the proportionality analysis may have differed in each case, the

years to life for felony grand theft under California's three strikes law.[110] Justice O'Connor's opinion emphasized the purpose of three strikes laws—to deter recidivism and protect public safety by providing lengthy prison terms for habitual felons.[111]

The Court not only considered Ewing's "third strike" that led to the sentence of twenty-five to life, but it also acknowledged Ewing's long history of convictions for various misdemeanors and felonies.[112] He previously served nine separate terms of incarceration and committed most of his crimes while still on probation or parole.[113] In light of Ewing's previous crimes, felony grand theft was a serious enough crime that comparison of the crime committed and sentence imposed interjurisdictionally or intra-jurisdictionally did not infer a level of gross disproportionality.[114] With this in mind, the Court did not find a sentence of twenty-five years to life grossly disproportionate; in fact, Ewing was the type of defendant the State of California intended to curtail.[115]

Cases from noncapital cruel and unusual punishment jurisprudence, such as *Ewing*, can inform proportionality inquiries for excessive fines cases. Though the Court has not yet established a bright-line test for proportionality inquiries, the Court has relied on multi-factor frameworks to assess the proportionality of sentencing.[116] Such a reliance on multi-factor frameworks to assess excessive sentencing shows that this is the Court's preferred method for proportionality inquiries. Multi-factor assessments like those used by the Court in noncapital proportionality inquiries would be the best vehicle for Eighth Amendment excessive fines questions.

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analyses in *Rummel* and *Davis* were consistent with the proportionality test iterated in *Solem*. *Harmelin*, 501 U.S. at 996–98.

[110] *Ewing*, 538 U.S. at 20.

[111] *Id.*

[112] *Id.* at 29–30.

[113] *Id.*

[114] *Id.* (citing *Harmelin*, 501 U.S. at 1005).

[115] *Id.* at 30–31.

[116] *See* discussion *infra* Section V.

In order to measure whether a fine through forfeiture of property is "grossly disproportionate," the test must encompass objective factors and the circumstances surrounding the crime that prompted the forfeiture to ensure proportionality. This is not a completely novel idea for U.S. courts, as circuit courts have established various multi-factors tests that help give boundaries to the ideas of proportionality and excessiveness.[117]

V. SUPREME COURT TREATMENT OF EXCESSIVE FINES

Incorporation of constitutional guarantees has been the preferred method of the Supreme Court when confronted with questions regarding constitutional protections that states may or may not opt to follow. The Supreme Court commented in *McDonald* v. *Chicago* on the standard for incorporating clauses of the Bill of Rights to apply to the individual states: a protection is incorporated if it is "deeply rooted in this Nation's history and tradition."[118] As one commentator noted, "In deciding if a right is incorporated, the Court does not look at every possible application of that right, just whether the right is fundamental or deeply rooted."[119]

Students of the law, practitioners, and policymakers alike are occasionally surprised to learn (or be reminded) that the Bill of Rights is still not fully incorporated against the states. Cases such as *Timbs* are a galling reminder that selective incorporation enables states to diverge from legal norms encased in the Bill of Rights and thus be allowed to impose otherwise "excessive" fines upon their citizens until the Supreme Court steps in to excoriate such practices as offending deeply rooted fundamental rights.[120]

Such was the Solicitor General of Indiana's argument in *Timbs*.[121] The value of Timbs's Land Rover, approximately $42,000, was essentially forfeited to the State of Indiana instead of leaving the car with its owner and imposing

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[117] *See infra* Section VI.

[118] McDonald v. Chicago, 561 U.S. 742, 767 (2010).

[119] *Excessive Fines Applies to the States*, *supra* note 33 (citing *McDonald*, 561 U.S. at 754, 767).

[120] Depper & Hendrix, *supra* note 1, at 15.

[121] Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).

the state maximum fine of $10,000 for Timbs's offenses.[122] At the time of the oral argument for Timbs's case, Indiana had a valid argument for the forfeiture of the vehicle because the Court had not yet recognized the Excessive Fines Clause as incorporated to the states. In other words, if Indiana had no laws restricting the imposition of a $42,000 fine in the form of a civil forfeiture of property, then law enforcement did not commit any wrongdoing. A decision supporting the State of Indiana's argument was issued by the state's highest court.[123] However, once the case reached the Supreme Court, the Justices took the opportunity to recognize the Excessive Fines Clause as incorporated to the 50 states.[124]

Though the Supreme Court has only just recognized the Excessive Fines Clause as incorporated to the states, it has dealt with the question of excessive fines in the past and, rather than placing quantitative limits on the issuing of fines**,** it has placed loose substantive limits on what constitutes "excessive."[125] An excessiveness inquiry in cases like *Timbs* is a qualifying proportionality protection that need not be read into the Constitution as the Court has read it into the Cruel and Unusual Punishments Clause.[126]

The Supreme Court has also defined what a "fine" means in terms of payments in the case of forfeitures, including differences in criminal forfeiture standards and civil forfeiture standards as well as limiting the occasions when fines are appropriate as punitive damages in a private action.[127] In the past, these limits only applied to federal courts; however, after *Timbs v. Indiana*, the Excessive Fines Clause is now incorporated against the states, and the Court's substantive limitations also apply to state governments.

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[122] Depper & Hendrix, *supra* note 1.

[123] *See* Brief for the Respondent, *supra* note 39, at 15.

[124] *Id.* at 685–86.

[125] *See, e.g.,* David Pimentel, *Forfeiture and the Eighth Amendment: A Practical Approach to Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 542 (2017).

[126] *See* Harmelin v. Michigan, 501 U.S. 957, 957 (1991) (stating that there is no proportionality guarantee in the Constitution, our legal tradition, or history).

[127] *Excessive Fines Applies to the States*, *supra* note 33.

A. Austin's *Groundwork for Proportionality Inquiries in Finding a Fine Imposed by Forfeiture Excessive*

Excessive Fines case law has been developing since 1833.[128] By 1994, the Supreme Court established that criminal fines, civil penalties, civil forfeitures, and taxes are all sanctions subject to constitutional constraints by both the Excessive Fines Clause and the Cruel and Unusual Punishments Clause of the Eighth Amendment.[129] The Court was on both sides of the fence as to whether civil forfeitures were fines based on their remedial, as opposed to punitive, nature, but Justice Blackmun's majority opinion in *Austin* concluded this discussion.[130]

The punitive and remedial natures of forfeitures exist together in today's civil asset forfeiture system. Fines usually have both a punitive and remedial nature, with one nature usually winning out over the other depending on what the fine is for.[131] If a fine is punitive, it constitutes a punishment.[132] If a fine is remedial, it constitutes compensation for some other issue caused by a person's wrongdoing.[133] The *Austin* Court treated forfeitures as fines; forfeiture has a punitive nature in that it punishes wrongdoing through the seizure of real or personal property.[134] In terms of the remedial nature of forfeiture, the government in *Austin* argued that "the forfeited assets serve to

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[128] *See Ex parte* Watkins, 32 U.S. 568, 573–74 (1833).

[129] Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 778 (1994). There is one major limitation, however—the Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989). Thus, the Supreme Court has held that the Constitution's provision against excessive fines is limited to those directly imposed by, and payable to, the government. *Id.* at 268.

[130] Austin v. United States, 509 U.S. 602, 610–11 (1993) (citing United States v. Halper, 490 U.S. 435, 447–48 (1989)).

[131] United States v. Halper, 490 U.S. 435, 447–48 (1989).

[132] *Id.* at 448.

[133] *See id.* at 442–43. Other reasons are investigation into criminal behavior undertaken by the government or prosecutorial costs expended on behalf of the government. *See id.* at 445–46 n.6.

[134] *See Austin*, 509 U.S. 602, 609–10, 618.

compensate the Government for the expense of law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade."[135] The Court was not convinced by the remedial arguments made in this case because the forfeiture of the property was a penalty that did not have any correlation to the cost of enforcing the law, nor did it mimic traditional civil damages.[136]

Austin, an owner of a body shop and mobile home, pled guilty to possessing cocaine with intent to distribute.[137] The facts of the case are such that when the time came for Austin to sell cocaine, Austin left his body shop, went to his mobile home, and then returned to the body shop to complete the sale.[138] When law enforcement searched Austin's shop and home they found cash, drugs, and weapons, which prompted them to then bring a civil *in rem* forfeiture action against Austin's body shop and mobile home as "instrumentalities" in Austin's commission of his crime.[139] Austin challenged the *in rem* proceeding (something not often challenged) under the Eighth Amendment's Excessive Fines Clause, and the Supreme Court held in his favor, reasoning that the body shop and mobile home were not considered instrumentalities of the crime in this case and thus constituted excessive fines.[140]

The Supreme Court determined in *Austin* that a civil forfeiture may violate the Eighth Amendment's proscription in the Excessive Fines Clause even if the forfeiture itself is otherwise understood to be appropriate.[141] Austin*'s analysis recognizes the purpose of civil forfeiture fines as punitive rather than solely remedial.*[142] In his opinion for *Austin*, Justice Blackmun wrote, "[w]e

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[135] *Id.* at 620 (citing Brief for the United States at 25, 32, Austin v. U.S., 509 U.S. 602 (1993) (No. 92-6073), at 39).

[136] *Id.* at 621.

[137] *Id.* at 604; *See* Milliron, *supra* note 45, at 1384.

[138] *Austin*, 509 U.S. at 605.

[139] *Id.* at 604–05.

[140] *Id.* at 604–05, 621.

[141] *Id.* at 604.

[142] *Id.* at 614, 621–22.

find nothing in these provisions or their legislative history to contradict that historical understanding of forfeiture as punishment."[143] In addition,

> Congress has chosen to tie forfeiture directly to the commission of drug offenses . . . under [a federal statute], [and] a conveyance is forfeitable if it is used or intended for use to facilitate the transportation of controlled substances, their raw materials, or the equipment used to manufacture or distribute them.[144]

The legislative history continues to support the use of civil forfeiture to deter the transportation of drugs. A Senate Report from 1983 (before the Comprehensive Crime Control Act was passed) states, "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs" and thus, the forfeiture of personal and real property was believed to be a supplementary yet "powerful" deterrent.[145]

Using its decision from *Halper v. United States*, the *Austin* Court relied on previous opinions to determine that the monetary value of forfeited property constitutes nothing other than a fine.[146] "A civil sanction that cannot fairly be

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[143] Austin v. United States, 509 U.S. 602, 619 (1993).

[144] *Id.* at 620.

[145] *Id.* (quoting S. REP. NO. 98-225 (1983)).

[146] *Id.* at 621–22 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)); *see* Reply Brief of Petitioner, Austin v. United States, 509 U.S. 602 (1993) (No. 92-6073), at 14–15 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)). In *Mendoza-Martinez*, the Court cited seven objective factors (a list that is non-exhaustive and non-exclusive) that evidence forfeitures as punitive penalties. *Mendoza-Martinez*, 372 U.S. at 168–69. The list includes the following, all of which are "relevant to the inquiry, and [which] may often point in differing directions":

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding or scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may relationally be

said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[147] By these terms, according to the Court in *Austin*, forfeitures constitute payment (a fine, in this case) to a sovereign as punishment for some offense, and are thus subject to the limitations of the Eighth Amendment's Excessive Fines Clause.[148] The *Austin* Court, however, was disinclined to create a multi-factor test to determine the excessiveness of fines imposed by the government via civil forfeitures.[149] Questions of excessiveness belong under the overall proportionality evaluation of forfeiture fines, and such questions should be considered according to the multi-factor test the Court outlined in *Bajakajian*.

B. Bajakajian *Adopts the Proportionality Standard*

The Supreme Court has struck down federal forfeiture actions as violations of the Excessive Fines Clause, and this first occurred in *United States v. Bajakajian*.[150] In *Bajakajian*, the lower court found forfeiture of the money—stemming from a federal charge of traveling with $350,000 of unreported currency—was appropriate because the money was involved in the offense.[151] The Supreme Court, applying the holding from *Austin*, held

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> connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id.

[147] *Austin*, 509 U.S. at 621 (emphasis omitted) (quoting *Halper*, 490 U.S. at 448).

[148] *Id.* at 622; Deborah F. Buckman, *When Does Forfeiture of Real Property Violate Excessive Fines Clause of Eighth Amendment—Post-*Austin *Cases*, 168 A.L.R. FED. 375, at 2 (2018). In *Alexander v. United States*, the Court held that the Excessive Fines Clause also applies to criminal *in personam* forfeitures and referred to its holding in *Austin* regarding the necessary proportionality analysis within the context of evaluating the totality of the defendant's crime. *Id.*; *see also* Alexander v. United States, 509 U.S. 544, 558–59 (1993).

[149] *Austin*, 509 U.S. at 622–23.

[150] United States v. Bajakajian, 524 U.S. 321, 324 (1998).

[151] *Id.* at 325–26.

that civil forfeiture proceedings were subject to the Excessive Fines Clause.[152] Justice Thomas, writing for the majority, provided the standard for excessiveness that *Austin* lacked.[153] Using the "grossly disproportionate" standard to provide a benchmark, Justice Thomas measured five characteristics from the offense: (1) "the technical nature of the crime;" (2) "the trial court's finding that the crime was unrelated to other illegal activities;" (3) the defendant's status as a member of groups targeted by the statute prohibiting travelling with undeclared funds such as drug traffickers; (4) the recommended sentence under the Sentencing Guidelines; and (5) the level of harm to the government caused by the defendant's non-reporting of funds.[154]

In this framework, the Court held that the $350,000 fine for carrying unreported currency was excessive because of the technical nature of the crime, but transporting cash was otherwise perfectly legal.[155] The facts showed the crime was unrelated to other criminal activities, the defendant was not a member of the groups the statute was designed to target, the

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[152] *Id.* at 334–37.

> We must therefore rely on other considerations in deriving a constitutional excessiveness standard, and there are two that we find particularly relevant. The first, which we have emphasized in our cases interpreting the Cruel and Unusual Punishments Clause, is that judgements about the appropriate punishment for an offense belong in the first instances to the legislature . . . The second is that any judicial determination regarding the gravity of a particular criminal offense will inherently be imprecise. Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and *we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents.*

Id. at 336 (emphasis added) (citations omitted).

[153] *Id.*

[154] Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 52 (2008). The "grossly disproportionate" standard is further discussed. *See* discussion *infra* Section VI.

[155] Frase, *supra* note 154, at 52 (discussing *Bajakajian*, 524 U.S. at 325).

Sentencing Guidelines (six months incarceration and a $5,000 fine) provided a better measure of culpability than the penalty originally imposed by the lower court, and minimal harm was caused to the government by the defendant's crime.[156] Evaluation of these factors led the Court to decide that the punishment imposed was disproportionate to the offense and therefore excessive.[157] The *Bajakajian* multi-factor assessment, though particularized to the case and the crime in question, is indicative of the Court's preference for multi-factor proportionality analysis.[158]

Through *Austin* and *Bajakajian*, the Court articulates that fines through forfeiture of property must ensure a certain level of proportionality. However, those cases indicate that the way to find a proportional solution to an excessive fine challenge may not be as simple as determining whether the property forfeited facilitated a crime or is profit of a crime.

VI. CIRCUIT COURTS' MULTI-FACTOR ASSESSMENTS MEASURE PROPORTIONALITY FOR FINES IMPOSED THROUGH CIVIL ASSET FORFEITURE

The Supreme Court in *Austin* determined that both civil and criminal forfeitures under federal statutes constitute punitive fines and therefore must be limited by the Excessive Fines Clause.[159] The *Austin* Court did not establish a bright-line test for excessive forfeitures. Instead, the Court simply called for forfeitures to be proportional and provided some guidelines for the inquiry into excessive forfeitures.[160] In *Bajakajian*, the Court utilized the "grossly disproportionate" standard and previewed a multi-factor assessment to show excessiveness.[161] Some U.S. circuit courts have responded in kind. The circuits have also been hesitant to establish tests that diverge from the Supreme Court's imprecise guidance on the matter of the proportionality of

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[156] *Id.*

[157] See *Bajakajian*, 524 U.S. at 324-25, 334–40. The Court also noted how a forfeiture of property for a crime may surpass serving a valid remedial or punitive purpose. *Id.* at 343–44.

[158] *Id.*

[159] Buckman, *supra* note 148, at 2.

[160] *See* Austin v. United States, 509 U.S. 602 (1993).

[161] Buckman, *supra* note 148, at 2.

fines by way of forfeitures.[162] The U.S. Circuit Courts of Appeals have developed three approaches for analyzing whether fines in the form of forfeited property are excessive.[163]

The first approach is a proportionality test akin to the inquiry used in challenges to the Cruel and Unusual Punishments Clause.[164] By comparing the proportionality of a proposed forfeiture to "the gravity of the offense, the relationship of the property to the offense, and the harm caused to the community," a fine could then be found to be "grossly disproportionate" or within proportional bounds.[165] This is the approach taken by the *Austin* Court, with the qualification that the creation of any multi-factor tests for excessive forfeiture are up to lower court discretion.[166] "This proportionality approach acknowledges that, despite the historical underpinnings of *in rem* forfeiture, no offense can occur without some human participation, and, therefore, the extent of the property owner's involvement in an offense is an essential element."[167]

In addition to being favored by the Supreme Court, this approach has been adopted by the Eighth and Tenth Circuits.[168] In *United States v. Bieri*, the Eighth Circuit evaluated the circumstances of the illegal activity in question, the extent and duration of the defendants' criminal drug activities, and the value of the property.[169] If a court is considering whether a forfeiture is excessive under this analysis, the court could order a forfeiture that is less than the whole so that it is proportional under the Constitution.[170] The

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[162] *See id.*

[163] *Id.*

[164] *Id.* at 2 n.6.

[165] *Id.*

[166] *See Austin*, 509 U.S. 602, 622.

[167] Buckman, *supra* note 148, at 2 (emphasis added).

[168] *Id.* at 3, 5–6.

[169] United States v. Bieri, 68 F.3d 232, 236 (8th Cir. 1995).

[170] *See id.* at 234–36.

proportionality test measures more than whether the property was involved in a crime, which differs from an instrumentality approach to the crime.[171]

The second approach is based on whether the property was employed as an instrumentality of criminal activity and is thus subject to forfeiture.[172] Present in Scalia's *Austin* concurrence, the instrumentality approach inquires only into the relationship between the property and the offense.[173] "Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been 'tainted' by unlawful use."[174] In sum, "[t]he question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense."[175]

The third approach to determining excessiveness of forfeitures is a hybrid of the proportionality and the instrumentality approaches to excessiveness inquiries.[176] The hybrid analysis is presented primarily in the form of various

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[171] *See* United States v. Alexander, 108 F.3d 853, 856–57 (8th Cir. 1997). The Eighth Circuit held that making a determination of a grossly proportionate forfeiture is dependent upon demonstrating "the extent and duration of [a defendant's] criminal activities with the amount of property forfeited." *Id.* at 855. The Eighth Circuit found that Alexander did not meet this burden. *Id.* at 854. *Alexander* came before the Supreme Court where it was remanded to the Eighth Circuit. *Id.* at 858.

[172] Buckman, *supra* note 148, at 2.

[173] Austin v. United States, 509 U.S. 602, 628 (1993) (Scalia, J., concurring). *United States* v. *Chandler* proposed a three-part instrumentality test, with no one part being dispositive, that further breaks down the relationship between the property and the offense. United States v. Chandler, 36 F.3d 358, 365 (4th Cir. 1994). The first three factors of this test form the first tier: "(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder." *Id.* In addition to these factors, there is a second tier of five additional factors that are more detailed and facilitated the first-tier instrumentality analysis. *Id.*; *see also* Buckman, *supra* note 148, at 4.

[174] *Austin*, 509 U.S. at 627 (Scalia, J., concurring). The forfeiture that took place in *Timbs* is statutory *in rem* forfeiture. Timbs v. Indiana, 139 S. Ct. 682, 690–91 (2019).

[175] *Austin*, 509 U.S. at 628.

[176] Buckman, *supra* note 148, at 2.

multi-factor tests.[177] This approach examines the "nexus" between the property and the offense, so courts analyze the connection between the crime and the property along with the proportionality of the fine imposed through the forfeiture of property.[178]

The petitioners in *Austin* laid out the following multi-factor test, which included a threshold for a showing of excessiveness.[179] The *Austin* petitioners stated:

> A prime facie or threshold determination that the forfeiture is excessive shall be established if: 1. the value of the property seized is excessive compared to the value of the controlled substances involved in the statutory violation; and, 2. the value of the property seized is excessive relative to the financial condition of the owner.[180]

The petitioners in *Austin* argued this threshold would reduce the need for a deeper excessiveness inquiry when the amount of drugs was "substantial" or only a relatively small part of the owner's assets.[181]

Should the threshold finding of excessiveness be made, then the government must "show that the property ordered forfeited is not so grossly disproportionate to the offense committed as to violate the Excessive Fines Clause."[182] There are additional factors that courts should then consider under this test for a potential showing of a grossly disproportionate forfeiture, which include:

> Whether the property seized constitutes the owner's livelihood or means to earn a living[;] . . . [t]he degree to which the owner's property has been involved in drug activity, and

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[177] *Id.*

[178] *Id.*

[179] Brief for Petitioner, Austin v. United States, 509 U.S. 602 (1993) (No. 92-6073), at 71–72.

[180] *Id.* at 71.

[181] *Id.*

[182] *Id.*

> whether the property has been purchased or obtained through the proceeds of drug activity[;] . . . and [t]he extent of the criminal behavior of the owner of the property and the need for deterrence.[183]

The Second Circuit has adopted multi-factor tests that combine instrumentality and proportionality approaches as well.[184] In the Second Circuit, an instrumentality-proportionality test determining whether a proposed statutory *in rem* forfeiture violates the Excessive Fines Clause is set out this way:

> (1) [T]he harshness of the forfeiture (e.g., the nature and value of the property and the effect of forfeiture on innocent third parties) in comparison to (a) the gravity of the offense, and (b) the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense, including whether use of the property in the offense was (a) important to the success of the illegal activity, (b) deliberate and planned or merely incidental and fortuitous, and (c) temporally or spatially extensive; and (3) the role and degree of culpability of the owner of the property.[185]

While this test considers more circumstances than just a proportionality or an instrumentality approach alone, it still sets a high bar for a finding of excessiveness.[186]

Courts differ on the inclusion of a factor measuring the value of the property in multi-factor tests.[187] The Ninth Circuit found that "a proportionality approach is appropriate to determine whether an *in rem* forfeiture, proper

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[183] *Id.* at 72.

[184] Buckman, *supra* note 148, at 4.

[185] United States v. Milbrand, 58 F.3d 841, 847–48 (2d Cir. 1995).

[186] *See id.* at 842–43, 848 (holding that seizure of an 85-acre farm in light of the criminal activity the Petitioner's son committed was not excessive and did not violate the Eighth Amendment's Excessive Fines Clause).

[187] Buckman, *supra* note 148.

under an instrumentality test, violates the Excessive Fines Clause."[188] The proportionality prong serves as a check on the occasionally harsh instrumentality test, especially in conjunction with the following three factors used to determine the potential excessiveness of a forfeiture: "(1) the fair-market value of the property; (2) the intangible, subjective value of the property . . . ; and (3) the hardship to the defendant, including the effect of the forfeiture on the defendant's family or financial condition."[189]

Even though this test was made for forfeitures of real estate, factors like (2) and (3) from the Ninth Circuit are included to supply for loss of a person's assets and land.[190] For example, factor (2), "intangible, subjective value of the property," could be an ancillary consideration for courts in an objective analysis. It is clear from *Timbs*, however, that a factor measuring the intangible value of the property may be appropriate even in statutory *in rem* forfeitures that are not real estate because they can constitute a substantial sum of money.[191]

Piecing together guidance from the Supreme Court through proportionality inquiries informed by noncapital Cruel and Unusual Punishments Clause jurisprudence, instrumentality inquiries, and well-developed proposals from the petitioners in *Austin* and other circuit courts shows there is a gap in American jurisprudence. With the widespread practice and reliance on

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[188] United States v. 6380 Little Canyon Rd., 59 F.3d 974, 985 (9th Cir. 1995).

[189] *Id.* at 983, 985. In order to measure the culpability of the owner, the Court names the following three factors:

> (1) whether the owner was negligent or reckless in allowing the illegal use of his property; or (2) whether the owner was directly involved in the illegal activity, and to what extent; and (3) the harm caused by the illegal activity, including (a) (in the drug trafficking context) the amount of drugs and their value, (b) the duration of the illegal activity, and (c) the effect on the community. The *owner's* culpability is relevant because it is the owner who is punished by the forfeiture.

Id. at 986.

[190] This test also resembles the Petitioner's test from *Austin*. Both cases dealt with the forfeiture of real estate and engender some of the same concerns in creating a just test with sound, desirable legal outcomes. *See* Brief for Petitioner, *supra* note 179.

[191] *See* Timbs v. Indiana, 139 S. Ct. 682, 686 (2019).

forfeitures in America's law enforcement system, it is logical that an objective test fitting most statutory *in rem* forfeitures must be developed to help adjudicators assess the excessiveness of fines and assist lawyers in advocacy.

VII. AN OBJECTIVE MULTI-FACTOR TEST

Considering other factors along with those in the proportionality and instrumentality approaches will clarify questions of excessive fines and expose exorbitantly high forfeitures in cases where illegal activity has clearly taken place and the magnitude of the forfeiture is not apparent. Multi-factor analysis will make excessiveness inquiries more efficient and provide worthwhile recourse for defendants who may have been subjected to an excessive fine.[192]

The multi-factor test that will best answer whether a fine is grossly disproportionate to the gravity of the offense and embody the proportionality goals present in the Eighth Amendment will build upon the Court's *Austin* guidelines and the traditional instrumentality doctrine by analyzing: (1) the gravity of the offense; (2) the owner's relationship with the property—such that the property facilitated the crime—and whether the property was deliberately used to commit the crime; (3) the harm the illegal activity caused to the community; (4) the fair market value of the property; (5) whether the person will be deprived of their livelihood that was otherwise legal and whether such deprivation is appropriate in the instant case; and (6) the "grossness" of the fine in light of the owner's total assets. With each factor given equal weight, should the forfeiture be shown to be "grossly disproportionate" in nature compared to the circumstances of the crime, a showing of excessiveness avails.

These factors are present within the *Austin* petitioners' suggestion and many of the circuit court approaches discussed above. Advocates and adjudicators need not shy away from multi-factor analyses in forfeiture cases;

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[192] It is a common vein in Civil Asset Forfeiture Reform thought that most forfeited property is valued so highly as to be worth pursuing a case in court, the expense of representation, etc. However, with clearer pathways to show excessiveness and a more fact-intensive analysis, this could broaden the scope of recourse in proportionality inquiries while not lowering the standard of excessiveness.

these tests do not let alleged criminals off the hook, they are merely a more detailed, careful approach to proportionality inquiries. A more detailed approach behooves courts to ensure uniformity for their own districts and circuits now that the Excessive Fines Clause is incorporated to the states. Detailed analyses through multi-factor tests will dissuade appeals with fact intensive, factor-by-factor analyses and will allow defendants and the government to state their cases thoroughly.

VIII. CONCLUSION

Proportionality is an essential consideration in fining practices, especially when considering those fines in the form of real or personal property. The Supreme Court has acknowledged this, and yet there is no bright-line test defining when forfeitures are proportional and when they may be excessive.[193] Excessiveness inquiries for forfeitures vary, primarily in the three approaches previously explained, and multi-factor tests are the most holistic approach to excessiveness inquiries.

As the Court showed in *Bajakajian*, a multi-factor test is the most holistic approach to forfeiture because it considers, at a minimum, the circumstances of the illegal activity, the relationship of the property to the illegal activity, and the value of the property seized.[194] This keeps criminals from profiting from their crimes and does not allow for grossly disproportionate fines in the criminal or civil context. Utilizing multi-factor tests centers on the type of crime committed and the punishment inflicted, not the ancillary property surrounding the crime.

Cases like *Timbs* will not need to reach the Supreme Court if multi-factor tests are developed in courts because such tests provide clearer guidelines on how to find a fine excessive or "grossly disproportionate." Though the Supreme Court has ruled that a principle of proportionality is present in the Excessive Fines Clause, the most reasonable protection, which balances the public's concerns that the civil asset forfeiture system is currently being

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[193] "Excessive" is to be construed as equivalent to any sentence or fine that would violate a "grossly disproportionate" standard.

[194] *See* United States v. Bajakajian, 524 U.S. 321, 334, 337–39 (1998).

abused with the necessity of fining as a hallmark of law enforcement, is a multi-factor analysis that will inflict appropriate penalties.

Adjudicators can supplement recent civil asset forfeiture policy reforms—which center on forfeiture ceiling and due process protection—with caps on property value and requirements of convictions. However, adjudicators can also leave open the question of a forfeiture ceiling because, within the framing of a multi-factor test, which takes into consideration the factors listed above, a forfeiture beyond any proposed "ceiling" might still be a proportionate penalty. With a broader view of the circumstances surrounding a forfeiture, greater protections will surround personal property. Hopefully, this will allow fewer cases like *Timbs* to come through the legal pipeline.[195]

[195] *See generally* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019).