Exploring the Eighth Amendment: Forfeiture and Excessive Fines

By Cory H. Morris

Local law enforcement, including New York police and sheriff departments as well as prosecutors, can impact the lives of arrestees and others by using asset forfeiture. According to the Institute for Justice, "New York's civil forfeiture laws are not the nation's worst…but law enforcement is able to bypass them through equitable sharing activity so extensive it is surpassed by that of only two states…"[1] From the New York City Police Department[2] to Syracuse, those estimates are a bit higher, "allow[ing] local police to get up to 80 percent of money or property seized, with the rest going to the federal government for their role in the investigations and for administering the program."[3]

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the states through the Fourteenth Amendment.[4] "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[5] With the holding in *Timbs v. Indiana*, 138 S. Ct. 2650 (2018), the excessive fines clause has caused quite a stir as it relates to vehicle forfeiture and should be examined further on a case-by-case basis. The concerns raised by forfeiture can have very palpable impact. The case of Justin Lucas, a man who attempted to post bail for his brother when the money was seized by the Ostego County Sheriff's deputies, was cited as one of "117 in the 32-county Northern District of New York over the past five years in which the federal government used the law to seize $43 million in assets without having to charge the owners with a crime."[6]

Unlike other forms of punishment that impose costs on government, fines create revenue.[7] Municipalities are engaging in everything from speed cameras,[8] administrative fees,[9] taking phones,[10] booting cars,[11] draconian late fees,[12] asset forfeiture(s),[13] daily municipal fines,[14] and property tax hikes[15] to greatly increasing deed recording fees[16] in order to generate revenue. Some of these asset forfeitures do not even involve a crime. In the name of safety or regulation, municipalities have utilized civil forfeiture indiscriminately among those who may suffer from, among other things, mental illness and chemical dependency.

The Eighth Amendment

The founders of this country did not want excessive fines imposed, nor cruel and unusual punishments inflicted upon human beings with diminished culpability: "American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,' and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing."[17] As the Court explained in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"[18]

Decades before George H.W. Bush signed the Americans with Disabilities Act (ADA) as well as the several state, federal and local laws echoing its purpose and expanding its scope, *Robinson v. California,* 370 U.S. 660, 667 (1962), struck down a statute making narcotics addiction a crime, even though such addiction "is apparently an illness which may be contracted innocently or involuntarily," under the Eighth Amendment. Similarly, in *Weems v. United States,* the Court invalidated a statute making it a crime for a public official to make a false entry in a public record but not requiring the offender to «injur[e] any one by his act or inten[d] to injure any one."[19] The Supreme Court employed a similar approach in *Godfrey v. Georgia,* 446 U. S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect a "consciousness materially more 'depraved' than that of any person guilty of murder."

For the accused suffering addiction or forms of chemical dependency, our social mores, values and what society considers cruel and unusual, are evolving. "A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."[20] In upholding the Constitutional rights of our clients, lawyers must not forget that the collateral impact of certain convictions, whether it be a sex offense or a substance abuse related crime, are often laden with diagnoses, mental health and counseling requirements imposed by the state and sometimes lifelong determinations that are later used for either further punishment or regulation.

The Supreme Court has held that drugs and addiction are without doubt a serious societal problem that cannot simply be jailed or punished away. Indeed,

> To justify such a harsh mandatory penalty as that imposed here, however, the offense should be one which will *always* warrant that punishment. Mere possession of drugs—even in such a large quantity—is not so serious an offense that it will always warrant, much less mandate, life imprisonment without possibility of parole. **Unlike crimes directed against the persons and property of others, possession of drugs affects the criminal who uses the drugs**

> **most directly. The ripple effect on society caused by possession of drugs, through related crimes, lost productivity, health problems, and the like, is often not the direct consequence of possession, but of the resulting addiction,** something which this Court held in *Robinson v. California,* 370 U. S., at 660-667, cannot be made a crime. *Harmelin v. Michigan*, 501 U.S. 957, 1022-1023 (1991) (emphasis in original, external quotation marks omitted and internal citations).

This understanding of addiction and chemical dependency cannot exist in a vacuum. Oftentimes law enforcement is aware of the chemical dependency and mental illness surrounding the purported crime(s) and provides services to help as opposed to further punish the accused. When it comes to civil forfeiture and punishment, it is incumbent upon the defense attorney to highlight the myriad requirements placed upon a chemically dependent defendant before the very same criminal act is utilized to, among other things, take a defendant's Land Rover.

Excessive Fines: *Timbs v. Indiana*

The Petitioner in *Timbs v. Indiana*, 138 S. Ct. 2650 (2018) ("*Timbs*"), Tyson Timbs, was a first-time offender suspected of drug sale. After "Timbs … pleaded guilty….Indiana moved to forfeit the car he was driving when he was arrested: a $42,000 Land Rover, which he had bought with money from his father's life insurance policy."[21] In addition to a punishment and the fines Tyson Timbs paid, Indiana utilized civil forfeiture after the guilty plea to obtain the car; however, as noted by others, "[v]ery often, law enforcement will seize assets of the accused without an actual conviction."

While all 50 states have a prohibition against the imposition of excessive fines, *Timbs* is characterized as "a sweeping ruling that strengthens property rights and could limit controversial police seizures, such as those done through civil forfeiture, nationwide."[22] Its application to the states in *Timbs*, like Supreme Court decisions such as *Mapp v. Ohio* (4th Amendment) and *McDonald v. City of Chicago* (2nd Amendment), should reverberate the message that states cannot police for profit and unconstitutional governmental fines and seizures will be challenged.

Until *Timbs* v. *Indiana*, the Supreme Court of the United States "never…decided whether…the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause."[23]

The Excessive Fines Clause was taken verbatim from the English Bill of Rights of 1689. "One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison."[24] The Supreme Court in *Browning-Ferris* observed that "that the [Excessive Fines] Clause derives from limitations in English law on monetary penalties exacted in civil and criminal cases to punish and deter misconduct." The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'"[25] This "notion of punishment . . . cuts across the division between the civil and the criminal law."[26]

The Cruel and Unusual Punishment Clause prevents the imposition of a punishment which is "grossly disproportionate" to the crime committed. Three factors are relevant to this inquiry: (1) the inherent gravity of the offense; (2) the sentences imposed for similarly grave offenses in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions.[27] The Supreme Court in *Browning-Ferris* has recognized that the Excessive Fines Clause is an essential check on the government's tendency to "use the civil courts to extract large payments or forfeitures for the purpose of raising revenue."

Therefore, the first question in an excessive fines case is whether the fine at issue is punishment. The second step of the excessive fine inquiry is whether the fine is in fact excessive. The Supreme Court in *Bajakajian* has explained that a fine imposed as punishment is excessive under the Excessive Fines Clause only "if it is grossly disproportional to the gravity of a defendant's offense." "The touchstone of the constitutional inquiry under the Excessive Fines Clause," moreover, "is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." While not addressed in *Timbs* before the Supreme Court, costs associated with punishment are likely to become subject to constitutional scrutiny, thus bringing the issue out of the Supreme Court and into our local courts.

Courts have questioned the motives of local agencies pursuing penalties in the name of public safety. In *Dubin v. The County of Nassau*, No. 16-CV-4209 (JFB)(AKT) (E.D.N.Y. Sept. 27, 2017) ("*Dubin*"), Judge Joseph F. Bianco allowed excessive fines claims against the Nassau County Traffic and Parking Violations Agency (TPVA) to survive a motion to dismiss. At issue in *Dubin,* the Nassau County TPVA Driver's Responsibility Fee (Nassau County Ordinance 190-2012), was charged as a non-discretionary penalty imposed merely for having been issued a ticket. Bizarre as it might seem, the complaint from which the TPVA sought dismissal in *Dubin* alleged that the fine "is an excessive fine issued against those whose only improper action is simply being issued a ticket," and that "[b]y charging a penalty after the charges/accusatory instrument have been dismissed, defendants have violated the Eighth Amendment's prohibition upon excessive fines in comparison to the accused actions." In acknowledging the applicability of the Excessive Fines Clause, Judge Bianco noted it was based upon the allegations and not the argument that the fine was unconstitutionally excessive or disproportionate.

"The misuse of the forfeiture statutes has become epidemic among local and state police departments[…]it leads

to baroque corruption, and it also functions as a backdoor way to fund basic services in municipalities that don't have the guts to ask their citizens for tax increases."[28] Evident in municipalities other than New York, a recent challenge under the Excessive Fines Clause in Florida arises from $30,000 of fees associated with having long grass[29] and yet another over "overzealous ticketing"[30] in Georgia.

"Police agencies have used hundreds of millions of dollars taken from Americans under federal civil forfeiture law in recent years to buy guns, armored cars and electronic surveillance gear. They have also spent money on luxury vehicles, travel and a clown named Sparkles."[31] In Florida, reversing on the basis of *Timbs v. Indiana, supra*, it was held that "[s]imilarly, the Escalade's forfeiture in this case may be grossly disproportionate to the gravity of the two misdemeanor offenses to which the defendant pleaded or even the felony charges for which she was arrested."[32] The Florida Court remarked that in refusing grant a judicial seal approval, "[t]he Indiana trial court denied the State's request to forfeit the $42,000 vehicle finding the forfeiture to be grossly disproportionate to the gravity of the offenses."[33]

Most recently, "In oral arguments before the Indiana Supreme Court [], Indiana Solicitor General Thomas Fisher said the state's position that it would be constitutional to seize any and every car that went over the speed limit—a line of argument that elicited laughter from the nation's highest court last year—hasn't budged."[34] Whether the subject of laughter, satirism or common sense, forfeiture programs have served to enrich local municipalities perhaps with some deterrent impact but with, at best, the recognition of rampant use, abuse and addiction of alcoholism/drugs to which such regular forfeitures occur in the name of safety but in the reality of enterprise and profit.

In *Timbs,* it was argued that the car in rural Indiana was "incidental not instrumental" to the sale of drugs. Perhaps this argument will hold water not just in rural Indiana but in New York, another area where those without access to mass transit must use a motor vehicle. "*[I]n rem* forfeitures [are] intended not to punish the defendant but to compensate the Government for a loss or to restore property to its rightful owner [and, therefore] fall outside the scope of the Excessive Fines Clause."[35] "A forfeiture is unconstitutionally excessive 'if it is grossly disproportional to the gravity of a defendant's offense.'"[36] Only case law will determine whether it is the quality (i.e. a car), quantity (i.e., dollar value) or subject of punishment (i.e. chemically dependent persons) that will be guiding light of what does or does not violate the Eighth Amendment.

Civil Punishment for the Chemically Dependent Is Excessive, Cruel and Unusual

Persons addicted to substances or chemically dependent persons should not be subjected to additional punishment in the way of, *inter alia,* forfeiture.[37] The analysis as to whether one would be entitled to a civil remedies and accommodation(s) in the civil context for substance abuse/addiction reviews the very same symptoms and manifestations of chemical dependency that appears to subject one to additional fines and forfeiture in the criminal context.

As Chief Justice Warren said in an oft quoted phrase, "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[38] A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment."[39] The overbearing upon those who are clearly, by virtue of committing the crime, chemically dependent if not characterized as an alcoholic or drug addict are subject to "punishment, of course, [that] was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles."[40]

Treatment courts and the recognition of chemical dependency by the prosecuting body or agent are now commonplace. Oftentimes it is a presentence report created by law enforcement that highlights the very argument which defense counsel should reverberate—a recognized, readily accepted, diagnosis of some mental illness or varying degree of substance abuse disorder/chemical dependency behind the crime(s) at issue. The Eighth Amendment still applies. "The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity."[41] The recognition of human dignity is evolving, as we can see from the Supreme Court decision recognizing same-sex marriage.

The substantive limits imposed by the Eighth Amendment on what can be made criminal and punished were discussed in *Robinson v. California,* 370 U.S. 660 (1962) and deserve revisiting. The Court found unconstitutional a state statute that made the status of being addicted to a narcotic drug a criminal offense. It held, in effect, that it is "cruel and unusual" to impose any punishment at all for the mere status of addiction. The cruelty in the abstract of the actual sentence imposed was irrelevant: "Even one day in prison would be a cruel and unusual punishment for the `crime' of having a common cold." *Id.,* at 667. Similarly, such additional civil punishment would have little if any deterrent effect, is excessive and will likely be seen as cruel and unusual.[42]

In *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 464 (1947), for example, the unsuccessful electrocution, although it caused "mental anguish and physical pain," was the result of "an unforeseeable accident." Had the failure been intentional, however, the punishment would have been, like torture, so degrading and indecent as to amount to a refusal to accord the criminal human status. Indeed, a punishment may be degrading to human dignity solely because it *is* a punishment. A state may not punish a person for being "mentally ill, or a leper, or . . . afflicted with a venereal disease," or for being addicted to narcotics or

alcohol.[43] To inflict punishment for having a disease is to treat the individual as a diseased thing rather than as a sick human being.

Certainly municipalities have the ability if not the duty to regulate the safety of its streets and make provisions for forfeiture on a case by case basis; however, it is worth repeating that even if the punishment is not severe, "in the abstract," is irrelevant; "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, at 667. "Finally, of course, a punishment may be degrading simply by reason of its enormity," such as the loss of the major asset one owns.[44]

A punishment is excessive under this principle if it is unnecessary: the infliction of a severe punishment by the state cannot comport with human dignity when it is nothing more than the pointless infliction of suffering.

By now, deterrence of crime by forfeiture has taken effect in these municipalities with known forfeiture statutes and one must recognize that the civil remedies, forfeiture, available for municipalities are simply not impacting those who are suffering from disorder, disease, substance abuse or substance use disorders, inclusive if not dominated by alcoholism and drug addiction. "The misuse of the forfeiture statutes has become epidemic among local and state police departments. Too often, it leads to baroque corruption, and it also functions as a backdoor way to fund basic services in municipalities that don't have the guts to ask their citizens for tax increases."[45]

Where the incorporation of the Second Amendment to the states has recently led to a Federal District Court declaring that the nunchaku ban is void as violative of the Second Amendment,[46] perhaps we will see the regular forfeiture of vehicles in driving while intoxicated cases, the doubling and tripling of traffic fines or the threat of daily fines offered by municipal entities be addressed in the years to come.

In a country that was founded by those who did not want to pay tax for tea,[47] perhaps people in the 21st century will challenge the regular forfeiture employed against those suffering from various degrees of chemical dependency.

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Endnotes

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