

## Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After *Timbs*

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**ABSTRACT.** In the wake of the Supreme Court’s decision in *Timbs v. Indiana* – which held that the Fourteenth Amendment incorporates against the states the Eighth Amendment’s ban on the imposition of “excessive fines” – it is likely that state and lower federal courts around the nation will be called upon to further develop Excessive Fines Clause doctrine. The Court’s historical exegesis in its *Timbs* opinion, as well as aspects of existing Eighth Amendment doctrine, support an analytical framework under which courts would look to the effects of property forfeiture on individuals and their families – in particular, the infliction of financial hardship – when assessing the severity of a forfeiture in the proportionality review context. In this Essay, we sketch the outlines of a forfeitures jurisprudence that would take into account the ways that property deprivations may restrict employment and educational access, interfere with the ability to meet basic needs (including food, shelter, and medical care), create family and social instability, and impede the ability to satisfy legal obligations.

### INTRODUCTION

When police arrested Tyson Timbs for attempting to sell a small quantity of heroin to an undercover officer, Timbs was driving a \$42,000 Land Rover.<sup>1</sup> Because the Land Rover had been used to drive to the location at which the drug sale was supposed to occur,<sup>2</sup> the State of Indiana claimed that the vehicle should be forfeited on the grounds that it was an “instrumentality”<sup>3</sup> of a criminal

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1. *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019).

2. *Id.*

3. See, e.g., John L. Worrall, *Asset Forfeiture*, U.S. DEP’T JUST. 6 (2008), <https://www.in.gov/ipac/files/DOJ%20Problem%20Oriented%20Policing%20-%20Asset%20Forfeiture.pdf>

offense. Timbs challenged the forfeiture as a violation of his rights under the Eighth Amendment’s Excessive Fines Clause. That challenge found initial success in the state trial court and on appeal,<sup>4</sup> but the Indiana Supreme Court reversed: it held that the Excessive Fines Clause governed only the actions of the federal government, not the states.<sup>5</sup> The U.S. Supreme Court granted *certiorari* and, in its February 2019 decision in *Timbs v. Indiana*, held that the Fourteenth Amendment incorporated against the states the rights protected by the Excessive Fines Clause.<sup>6</sup>

The Land Rover at issue, which Timbs had purchased with insurance proceeds following his father’s death,<sup>7</sup> had particular importance to Timbs in light of his personal economic circumstances. Timbs had no income and few other assets at the time of his sentencing.<sup>8</sup> The Land Rover had been his primary means of transportation. “Without my car,” he later explained, “it is incredibly difficult to do all the things the government wants me to do to stay clean, like visit my probation officer, go to AA, and keep my job[.]”<sup>9</sup> In other words, the vehicle had importance to Timbs for reasons above and beyond its \$42,000 book value, measured in the abstract. The deprivation of the vehicle threatened to impose significant hardship on Timbs as a result of contextual factors – those individualized considerations that can make an item of property particularly important in the hands of one owner, as opposed to another.

Whether a court called upon to assess the excessiveness of a property deprivation under the Excessive Fines Clause should determine the severity of the punishment based solely on the dollar value of the property at issue, or also treat as relevant the hardship imposed through the property deprivation, remains unsettled.<sup>10</sup> The Supreme Court has adopted a gross disproportionality test for

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[<https://perma.cc/A46G-9CKE>] (describing instrumentality or “facilitation” forfeitures); see also IND. CODE ANN. § 34-24-1-1(a) (West 2019).

4. State v. Timbs, 62 N.E.3d 472, 473 (Ind. Ct. App. 2016).
5. State v. Timbs, 84 N.E.3d 1179, 1184 (Ind. 2017).
6. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).
7. *Id.* at 686.
8. Supplemental Opening Brief for Appellees at 22, State v. Timbs, 84 N.E.3d 1179 (Ind. 2017) (No. 27So4-1702-MI-00070); see also State v. Timbs, No. 27So4-1702-MI-70, 2019 WL 5540987, at \*18 (Ind. Oct. 28, 2019) (“The criminal case file (of which the trial court took judicial notice) indicates Timbs was indigent and lacked income and savings.”).
9. Scott Bullock & Nick Sibilla, *The Supreme Court Resuscitates the Eighth Amendment*, ATLANTIC: IDEAS (Mar. 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/unanimous-supreme-court-decision-policing-profit/584506> [<https://perma.cc/2ZXS-ETL8>].
10. See, e.g., Wayne A. Logan, *Timbs v. Indiana: Toward the Regulation of Mercenary Criminal Justice*, 31 FED. SENT. REP. (forthcoming 2019), <https://ssrn.com/abstract=3455645> [<https://perma.cc/ZL38-7K37>] (identifying whether courts should “consider[] the impact of the forfeiture on the particular individual[]” as an issue that *Timbs* left unresolved).

measuring excessiveness, which requires weighing the severity of the punishment against the seriousness of the offense.<sup>11</sup> But the question—as articulated by Chief Justice Roberts during the *Timbs* oral argument—remains: a forfeiture worth “[f]orty-two thousand dollars,” might not “seem excessive to” a multi-millionaire, “and yet, if someone is impoverished, it is excessive? Does that matter?”<sup>12</sup>

On remand following the Supreme Court’s decision in *Timbs*, the Indiana Supreme Court answered that unsettled question by holding that to understand whether a forfeiture is excessive, it is critical “to consider the punishment’s magnitude” for the individual.<sup>13</sup> It went on to explain that “the owner’s economic means—relative to the property’s value—is an appropriate consideration for determining that magnitude.”<sup>14</sup> The Indiana Supreme Court in turn remanded *Timbs*’s case back to the trial court for further consideration, although—as pointed out in a dissent—it did so without providing guidance as to how to value forfeited property beyond stating that an individualized inquiry of the property owner’s circumstances is necessary.<sup>15</sup> This Essay aims to explain why the Indiana Supreme Court’s embrace of an individualized inquiry is warranted, and to offer further guidance on how courts may engage in such an analysis.

We posit that lower courts may—and the Supreme Court ultimately should—adopt a test under which determining the severity of a property forfeiture for purposes of the excessiveness analysis would include both the forfeiture’s dollar value and individual considerations limited to those directly related to its foreseeable consequences for one’s financial condition. Some lower courts have already taken steps toward such an approach, recognizing that “certain property—such as a residence, a vehicle, or other similar necessities in our daily life—carry additional value to the owner and possibly others,”<sup>16</sup> including the imposition of significant hardship to the owner and his or her family.<sup>17</sup>

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11. *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). The question of whether *in rem* forfeitures are separately excessive if there is an insufficient nexus between the property and the offense is outside of the scope of this Essay. See *Timbs*, 2019 WL 5540987, at \*8-10 (holding that “a use-based fine is excessive when the property was not an instrumentality of the underlying offenses”).

12. Transcript of Oral Argument at 28, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091).

13. *Timbs*, 2019 WL 5540987, at \*15.

14. *Id.*

15. *Id.* at \*19 (Slaughter, J., dissenting).

16. *Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 188 (Pa. 2017); see also, e.g., *Stuart v. Dep’t of Safety*, 963 S.W.2d 28, 36 (Tenn. 1998) (looking to whether a forfeiture “will impose an extreme hardship on [the owner] or any other member of his family”).

17. See, e.g., *Nez Perce Cty. v. Reese*, 136 P.3d 364, 371 (Idaho Ct. App. 2006).

The Supreme Court has already begun to forge an interpretive path that leads to this conclusion. As briefly described in Part I, the Court’s repeated reliance on the historical foundations of the Excessive Fines Clause – which have long been closely associated with the preservation of basic economic self-sufficiency – and the Court’s adoption of the gross disproportionality test from the Cruel and Unusual Punishments Clause context, offer a solid doctrinal foundation for taking into account a forfeiture’s real-world consequences. The existing doctrine also suggests important limiting principles that would focus the excessiveness inquiry on mitigating economic insecurity, instability, and impoverishment.

Taking into account the financial hardship inflicted by property forfeitures as part of the excessiveness inquiry will help ensure that the Excessive Fines Clause remains the “constant shield” against “[e]xorbitant tolls” that it has been “throughout Anglo-American history.”<sup>18</sup> To set out the importance of including such considerations, in Part II, we use the specific type of property at issue in *Timbs* – the personal vehicle – as an exemplar of how courts can operationalize subjective inquiries into punishment severity and, importantly, how forfeitures can impede employment and educational attainment, interfere with the ability of property owners and their families to meet basic human needs, undermine familial and social stability, and satisfy other legal obligations including child support orders and probation and parole conditions.

## I. HISTORICAL AND DOCTRINAL FOUNDATIONS

Whether the excessiveness inquiry should take into account a forfeiture’s consequences for a person’s financial condition remains an open question in the Supreme Court’s jurisprudence. Indeed, the Court has only considered what it means for a monetary penalty to be “excessive” on one prior occasion. In *United States v. Bajakajian*,<sup>19</sup> the Court imported the gross-disproportionality test from its Cruel and Unusual Punishments Clause jurisprudence.<sup>20</sup> That test requires courts to assess the severity of the punishment to be imposed, then compare it against the seriousness of the offense. If the punishment is grossly disproportionate to the offense, it is unconstitutionally excessive.<sup>21</sup> To date, the Court has declined to answer the question of whether a deprivation’s consequences to individuals and families are relevant to understanding punishment severity.

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18. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

19. 524 U.S. 321 (1998).

20. *Id.* at 336–37.

21. *Id.*

Although the Court has not decided this issue, both its apparent preference for interpreting the Clause with reference to its historical foundations and its use of the gross disproportionality test support the understanding that an assessment of a punishment's severity should reflect the actual and foreseeable hardship it inflicts.

First, the Court's reliance on the Excessive Fines Clause's history supports the implementation of such a test. The Court has repeatedly drawn on the Clause's historical roots—reaching back in English law at least to Magna Carta in 1215<sup>22</sup>—with records repeatedly describing the relevant inquiry as including considerations of the effects of an economic punishment and not merely its dollar value.<sup>23</sup> In *Timbs*, for example, the Court emphasized Magna Carta's principle that economic sanctions should “not be so large as to deprive [an offender] of his livelihood,”<sup>24</sup> as well as the requirement, outlined in Blackstone's *Commentaries*, that an economic sanction should not be greater than a person's “circumstances or personal estate will bear[.]”<sup>25</sup> The Court also considered principles set forth in colonial-era documents that contemplate taking into account a sanction's effect on a person's financial circumstances.<sup>26</sup>

To be sure, a proportionality jurisprudence that adopts an unlimited subjectivist account of punishment severity might well open the door to valuing mere sentimental attachment, making it difficult for courts to make consistent or coherent judgments. This concern has led some commentators (as well as a limited number of lower courts) to reject the relevance of individualized factors.<sup>27</sup>

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22. See *Timbs*, 139 S. Ct. at 687-88; *id.* at 693 (Thomas, J., concurring in the judgment); *United States v. Bajakajian*, 524 U.S. 321, 335-36 (1998); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-76 (1989); *id.* at 286-97 (O'Connor, J., concurring in part and dissenting in part).

23. For further discussions of the historical reliance on individualized and context-dependent assessments of the severity of economic penalties, see Brief Amici Curiae of Eighth Amendment Scholars in Support of Neither Party, *Timbs*, 139 S. Ct. 682 (No. 17-1091), 2018 WL 4522295; Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013).

24. *Timbs*, 139 S. Ct. at 688.

25. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*372).

26. See, e.g., *id.* at 688 (quoting Pa. Frame of Govt., Laws Agreed Upon in England, Art. XVIII (1682), in 5 FEDERAL AND STATE CONSTITUTIONS 3061 (F. Thorpe ed., 1909)) (“[A]ll fines shall be moderate, and saving men's contentments, merchandize, or wainage.”); see also *Colo. Dep't of Labor & Emp't v. Dami Hosp.*, 442 P.3d 94, 101 (Colo. 2019) (determining that a person's ability to pay is relevant to the excessiveness inquiry based in part on the *Timbs* Court's reliance on historical sources such as Magna Carta and Blackstone).

27. See, e.g., *United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005) (“[W]e are not impressed with [the owner's] reliance upon the sentimental value of his house”); STEFAN D.

Yet, the historical sources relied upon by the Court—and a substantial historical record beyond them<sup>28</sup>—offer important limiting principles that suggest a middle path between, on the one hand, a formalistic approach that would look only to the property’s objective market value and, on the other hand, a valuation that would incorporate all types of idiosyncratic or intangible value. In particular, the historical record suggests that financial hardship is an especially important factor to consider. Courts could, consistent with these records, cabin the assessment of a property’s importance accordingly. For example, a court might account for how the loss of Timbs’s vehicle would impede his ability to maintain employment, without attempting to value and incorporate any idiosyncratic or emotional attachment to the vehicle that might exist given that he purchased it with money inherited following his father’s death.<sup>29</sup>

Second, the Supreme Court’s decision to import the gross disproportionality test from its Cruel and Unusual Punishments Clause cases also supports the constitutional relevance of financial hardship. In addition to other norms embraced by its proportionality jurisprudence,<sup>30</sup> the Court has prized the notion of equality in sentencing, whereby two people equally culpable for the same offense should receive the same punishment.<sup>31</sup> What the Court has not addressed, however, is whether the concept of equality in Eighth Amendment jurisprudence should be understood as formal (for instance, the objective dollar value of Timbs’s vehicle as compared to the value of a vehicle forfeited for an identical crime) or substantive (for instance, the effect of the forfeiture of the two vehicles on the owners and their families). A growing body of theoretical literature devotes itself to this question.<sup>32</sup> This literature, which focuses primarily on disputes regarding the use of subjective considerations in assessing the severity of terms of incarceration,<sup>33</sup> is noteworthy in that, in the context of fines, both

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CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 2-9, at 62 (2007) (dismissing such an approach as simply asking “how . . . the forfeiture make[s] the owner feel”).

28. See Brief Amici Curiae of Eighth Amendment Scholars in Support of Neither Party, *supra* note 23, at 6-32 (discussing other historical sources in English and early American law).
29. See *supra* text accompanying notes 7-9.
30. See Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 46-76 (2018) (discussing, for example, the principle of “comparative proportionality”).
31. See, e.g., *Graham v. Florida*, 560 U.S. 48, 72 (2010) (“[R]etribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.”).
32. See, e.g., Colgan, *supra* note 30, at 51-54 (summarizing literature on subjective versus objective measures of punishment); see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957-60, 1005, 1013 (1982) (observing “that not all object-loss is equally important” and offering the classic account of the ways in which certain “kinds of object relations” are associated with particular “individual and social importance” in the legal context).
33. See, e.g., David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010).

proponents and critics of subjectivist theories agree on incorporating at least some consideration of the real-world consequences of punishment.<sup>34</sup> To do otherwise would, as recently stated by the Indiana Supreme Court in its consideration of the forfeiture of Timbs's vehicle, "generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally."<sup>35</sup>

Beyond the goal of equality in sentencing, the cruel and unusual punishments doctrine's attention to the preservation of a person's dignity and to the utilitarian goals of deterrence and rehabilitation also support including considerations of hardship. The Court has stated that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man"<sup>36</sup>—a principle that, like the Excessive Fines Clause itself, it has tied to Magna Carta.<sup>37</sup> When assessing whether a punishment has violated the dignity demand, the Court has considered whether the punishment resulted in an inability to meet basic human needs<sup>38</sup> or unduly interfered with familial relationships.<sup>39</sup> As detailed below, property forfeitures can profoundly interfere with a person's ability to obtain and maintain employment or public benefits essential to securing basic necessities, interfere with access to food and medical care,<sup>40</sup> and result in family disunification.<sup>41</sup> Along with dignitary effects, such outcomes also implicate a second principle in the gross disproportionality doctrine—deterrence and

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34. See, e.g., Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 956 (2010); Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 6 (2009); Adam J. Kolber, *The Experimental Future of the Law*, 60 EMORY L.J. 585, 587 (2011).

35. *State v. Timbs*, No. 27So4-1702-MI-70, 2019 WL 5540987, at \*15 (Ind. Oct. 28, 2019).

36. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

37. See *id.* Judith Resnik's insightful Essay, which appears as part of this *Forum* Collection, distills from these and other aspects of existing Eighth Amendment doctrine a nascent "anti-ruination" principle in the constitutional regulation of punishment. See Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin"*, 129 YALE L.J. F. 365 (2020).

38. See *Hope v. Pelzer*, 536 U.S. 730, 733, 738, 745 (2002) (holding that chaining a person to a hitching post violated the dignity demand in part because of his inability to use a bathroom).

39. See *Weems v. United States*, 217 U.S. 349, 366–67 (1910) (considering the loss of parental and marital rights along with other aspects of a punishment in determining that it violated the Cruel and Unusual Punishments Clause).

40. See, e.g., *infra* Section II.A.

41. Cf., e.g., Gregory Bonett et al., *Priced Out, Pushed Out, Locked Out: How Permanent Tenant Protections Can Help Communities Prevent Homelessness and Resist Displacement in Los Angeles County* 30 (2019), <http://www.publiccounsel.org/tools/assets/files/1188.pdf> [<https://perma.cc/87X4-LHR4>] (describing how the loss of a home through eviction forced one family to separate in order to obtain alternative housing).

rehabilitation.<sup>42</sup> In many cases, property forfeitures create or exacerbate economic insecurity, which may, in turn, have significant criminogenic effects.<sup>43</sup> Forfeitures may even directly interfere with the possible benefits of other punishments imposed. Again, looking to *Timbs* for an example, a court could consider how the loss of Timbs’s vehicle undermines his sobriety – both a medical issue and deterrence concern. It could also consider how that loss interferes with his ability to meet his probation conditions, which are purportedly intended to aid in his rehabilitation.<sup>44</sup> In other words, the failure to consider whether a deprivation may result in an unduly harsh outcome undercuts the Court’s concerns.<sup>45</sup>

## II. OPERATIONALIZING A FINANCIAL-HARDSHIP ASSESSMENT

Having set out how including the consequences on financial condition and basic well-being in an assessment of property forfeiture severity comports with historical practice and existing jurisprudence, we turn now to that assessment’s operation and importance in a proportionality analysis. In this Part, we focus on one particular type of property – personal automobiles, like the one at issue in *Timbs*.

Although we focus on the automobile here, it is, of course, only one of many types of property subject to forfeiture in the United States, and the loss of other forms of property are also capable of contributing to economic insecurity and declines in well-being. The loss of a home<sup>46</sup> may be particularly destabilizing, entailing “the trauma of being uprooted – of being torn away from a structure, surroundings, and neighborhood with which one’s existence may be

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42. See, e.g., *Graham v. Florida*, 560 U.S. 48, 73 (2010); *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

43. See, e.g., Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 305 (1991) (discussing the link between earnings increases and reductions in future arrests).

44. See *supra* notes 7-9 and accompanying text.

45. See Colgan, *supra* note 30, at 61-68.

46. A number of courts consider the intangible value of a home in assessing forfeiture severity. See, e.g., *von Hofe v. United States*, 492 F.3d 175, 188 (2d Cir. 2007) (finding that forfeiture of a nondefendant spouse’s home would “amount to an eviction, destroying her ‘right to maintain control over [her] home . . . a private interest of historic and continuing importance’” (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993))); *State v. 633 East 640 North*, 994 P.2d 1254, 1258 (Utah 2000) (considering “the intangible, subjective value of the property, e.g., whether it is the family home” (quoting *United States v. 6380 Little Canyon Road*, 59 F.3d 974, 985 (9th Cir. 1995))).



interpenetrated in countless important ways.”<sup>47</sup> Whether owned or not,<sup>48</sup> displacement from one’s home can result in an increased rent burden (that is, an increased percentage of income needed to cover housing costs), which may make it more difficult to meet other basic needs such as food, medical care, and access to public benefits. Housing insecurity has also been tied to family disunification,<sup>49</sup> reduced success in the labor market,<sup>50</sup> and worse health outcomes<sup>51</sup> for adults and their children.<sup>52</sup> The forfeiture of other types of property may also be devastating. Consider, for example, the loss of equipment needed for one’s trade,<sup>53</sup> or the loss of a cell phone, which is increasingly necessary to finding and

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47. Frank I. Michelman, *The Right to Housing*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* 43, 54-55 (Norman Dorsen ed., 1971).
48. Forfeitures might include either forfeitures of real property held in fee simple or of leasehold interests. Cf. *United States v. Robinson*, 721 F. Supp. 1541, 1544 (D.R.I. 1989) (recognizing, in the context of an excessiveness review of a Section 8 leasehold forfeiture, that “[a]n order of forfeiture here would be, in effect, a sentence of homelessness for the defendant and her three young children,” and taking that fact into account); see also Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 190 (1995) (“There seems to be no reason to limit stricter excessiveness review to home forfeitures alone and not to extend it to penalties that threaten certain loss of rented or purchased shelter.”).
49. See, e.g., *supra* note 41 and accompanying text.
50. See, e.g., Joe Graffam et al., *Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals*, 40 J. OFFENDER REHABILITATION 147, 149 (2004) (summarizing studies linking the lack of safe and stable housing to recidivism, particularly for people with substance abuse or mental health issues); Caterina Gouvis Roman & Jeremy Travis, *Taking Stock: Housing, Homelessness, and Prisoner Reentry*, URB. INST. 8 (Mar. 8, 2004), <https://www.urban.org/sites/default/files/publication/58121/411096-Taking-Stock.pdf> [<https://perma.cc/EP9T-J2LW>] (noting that individuals living in temporary shelters upon release from prison have more difficulty finding jobs).
51. See, e.g., Yong Liu et al., *Relationships Between Housing and Food Insecurity, Frequent Mental Distress, and Insufficient Sleep Among Adults in 12 U.S. States, 2009*, 11 PREVENTING CHRONIC DISEASE E37 (2014).
52. See, e.g., David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1847-48 & nn. 478-79 (2013) (surveying the literature regarding the impact of housing instability on children and families); see generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016) (offering a powerful ethnographic account of the impact of housing instability on families).
53. See GSA AUCTIONS, <https://gsaauctions.gov/gsaauctions/gsaauctions> [<https://perma.cc/WC4W-WPEB>] (listing forfeited items for sale including “Agricultural Equipment and Supplies,” “Communication Equipment,” “Computer Equipment and Accessories,” “Construction Equipment,” “Hand Tools & Shop Equipment,” “Industrial Machinery,” “Lab Equipment,” “Medical, Dental, and Veterinary Equipment and Supplies,” and “Office Equipment and Supplies”).

keeping a job and accessing public benefits.<sup>54</sup> Accordingly, by focusing on the automobile we do not mean to suggest that only certain forms of property should trigger the inclusion of subjective considerations. Any property type, the loss of which risks financial hardship, would fall within the concerns established in the Court’s analyses of the Clause to date. Rather, we use the property type at issue in *Timbs*—the personal vehicle—as an illustration of the ways in which courts can incorporate considerations of a forfeiture’s consequences into a severity assessment, and to exemplify the significant harms that forfeitures may inflict beyond mere dollar value.<sup>55</sup>

#### A. *The Assessment of Financial Hardship: A Multifactor Approach*

In the discussion that follows, we consider several factors that, taken together, provide a framework for examining the types of financial hardship that property forfeitures often inflict. This framework is consistent with the Court’s focus on the Clause’s historical foundations and the doctrine’s attention to basic economic self-sufficiency, equality, and dignity, as well as deterrence and

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54. As the Court has noted, “cell phones and the services they provide are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable to participation in modern society.” *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (quoting *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)); see also Fran Kritz, *Expired, Lost and Stolen: Cell Phones, Critical for Homeless People, Can Be Tough to Get and Keep*, CAL. HEALTH REP. (Jan. 11, 2019), <https://www.calhealthreport.org/2019/01/11/expired-lost-stolen-cell-phones-critical-homeless-people-can-tough-get-keep> [<https://perma.cc/96ZM-GJJU>]; Ron Selewach, *Smart Phone Recruiting: Why It’s Essential in Today’s Job Market*, HUMAN RES. MGMT. CTR. (Feb. 22, 2018), <http://www.hrmc.com/smartphone-recruiting-why-its-essential-in-todays-job-market> [<https://perma.cc/G8QQ-4ATX>].
55. Although this Essay sets out the contours of a system for incorporating consideration of the effects of property forfeitures on someone’s financial condition, we recognize that such an inquiry is potentially invasive and may not adequately attend to the effects of structural inequalities. See discussion *infra* note 56; Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 201-04 (2019) (discussing the “invasive techniques” that many jurisdictions employ “to investigate a defendant’s financial resources,” and outlining a number of other important critiques); Brandon Buskey, *A Proposal to Stop Tinkering with the Machinery of Debt*, 129 YALE L.J. F. 415, 421-22 (2020) (observing that “ability-to-pay determinations” may “grant decision-makers . . . relatively unfettered discretion” and that some “jurisdictions place onerous burdens of proof on individuals who assert that they cannot afford court fees”). Whether assessing property forfeitures or any other type of economic sanction, it is critical that attention be paid to such issues as a matter of institutional design. See, e.g., Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 78-86 (2017) (discussing the importance of designing mechanisms that do not artificially inflate a person’s ability to pay through the imputation of income or restrictions on deductions, the need to avoid speculation about future income, and the importance of flexibility to account for special circumstances).

rehabilitation. In particular, we propose that courts, in assessing the severity of a property forfeiture, consider whether and how the deprivation of the property may impede employment and educational access, obstruct the ability to meet basic human needs, interfere with family and social stability, and undermine other legal obligations.

### 1. *Employment and Educational Access*

Property forfeitures' potential interference with employment and educational access falls easily within the economic self-sufficiency concerns seen in the Clause's historical roots and in the gross-disproportionality doctrine. Therefore, it is appropriate for courts assessing punishment severity to consider how a forfeiture may undermine one's ability to obtain or maintain employment and educational services, including access to childcare that makes engagement in work and school feasible.

The loss of an automobile provides a key example of how forfeiture can interfere with employment and educational attainment.<sup>56</sup> Even setting aside commercial vehicles or those used in connection with ride-sharing services, having the ability to commute via automobile significantly increases employment and educational opportunities in many communities.<sup>57</sup>

Put simply, there is "virtually no alternative to the automobile" to reach most destinations needed to secure employment and educational resources.<sup>58</sup> While access to public transportation may serve as a substitute in some cases,<sup>59</sup> it has

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56. Although research shows a significant relationship between automobile access and employment outcomes, other factors—such as racially discriminatory hiring practices and educational attainment—also play an important role in employment success. See, e.g., Judith K. Hellerstein et al., *Spatial Mismatch or Racial Mismatch?*, 64 J. URB. ECON. 464 (2008); Brian S. McKenzie, *Neighborhood Access to Transit by Race, Ethnicity, and Poverty in Portland, OR*, 12 CITY & COMMUNITY 134 (2013); Paul M. Ong & Douglas Miller, *Spatial and Transportation Mismatch in Los Angeles*, 25 J. PLAN. EDUC. & RES. 43, 52 (2005).

57. See, e.g., Neil Bania et al., *Welfare Reform and Access to Job Opportunities in the Cleveland Metropolitan Area*, CTR. FOR URB. POVERTY & SOC. CHANGE 35-36 (1999) (finding that "auto commuting provides access to roughly six times as many job opportunities as commuting by public transportation" during peak-commute times in Cleveland, Ohio); see generally *Stypmann v. City & Cty. of San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977) (recognizing that "[t]he private interest in the uninterrupted use of an automobile is substantial" and that "[a] person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed").

58. John Pucher & John L. Renne, *Socioeconomics of Urban Travel: Evidence from the 2001 NHTS*, 57 TRANSP. Q. 49, 58 (2003).

59. See, e.g., Kilian Heilmann, *Can Public Transport Investment Relieve Spatial Mismatch? Evidence from Recent Light Rail Extensions* 3 (Sept. 20, 2014) (unpublished working paper), [https://econweb.ucsd.edu/~kheilman/pdfs/pt\\_poor.pdf](https://econweb.ucsd.edu/~kheilman/pdfs/pt_poor.pdf) [<https://perma.cc/8PVE-JBEM>]

failed to adequately address the “spatial mismatch” between job and education sites and housing across the United States, leaving access to an automobile paramount to avoiding the hardship created by exclusion from employment opportunities and educational attainment. In some locales, access to public transit is significantly limited. For example, public transportation is often poorly equipped to allow commuting from inner cities to suburban job locations<sup>60</sup> or to allow cross-suburban commuting,<sup>61</sup> something that is increasingly problematic given the rise in poverty in suburban communities.<sup>62</sup> The value of public transportation availability may also depend on individual circumstances in a given case, such as a person with ambulatory disabilities for whom para-transit services are necessary,<sup>63</sup> or a single parent who must contend with multiple trips to various locations to attend work or school or obtain child care.<sup>64</sup>

While public transportation is limited in some locales, in others it simply does not exist. Forty percent of people in rural areas have no access<sup>65</sup> and a recent study of one hundred metro areas across the United States showed that, while transit coverage varies within metro areas, people without automobiles

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(summarizing studies indicating that light-rail improvements in Minneapolis-St. Paul, Minnesota, and Phoenix, Arizona, improved accessibility between jobs).

60. Yingling Fan et al., *Spatial and Skills Mismatch of Unemployment and Job Vacancies: Opportunities for Integrated Transit Planning and Workforce Development*, CTR. FOR TRANSP. STUD. 19 (May 2016), <https://www.issuelab.org/resources/29549/29549.pdf> [<https://perma.cc/U9X6-4PHK>]; Adie Tomer et al., *Missed Opportunity: Transit and Jobs in Metropolitan America*, BROOKINGS INSTITUTION 13 (May 2011), [https://www.brookings.edu/wp-content/uploads/2016/06/0512\\_jobs\\_transit.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0512_jobs_transit.pdf) [<https://perma.cc/D4DU-XSQD>].
61. See Evelyn Blumenberg & Gregory Pierce, *The Drive to Work: The Relationship Between Transportation Access, Housing Assistance, and Employment Among Participants in the Welfare to Work Voucher Program*, 37 J. PLAN. EDUC. & RES. 66, 67-68 (2017).
62. See Elizabeth Kneebone & Emily Garr, *The Suburbanization of Poverty: Trends in Metropolitan America, 2000 to 2008*, BROOKINGS INSTITUTION (2010), [https://www.brookings.edu/wp-content/uploads/2016/06/0120\\_poverty\\_paper.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0120_poverty_paper.pdf) [<https://perma.cc/LXX2-R2QP>].
63. Cf. Asha Weinstein Agrawal et al., *Getting Around When You're Just Getting By: The Travel Behavior and Transportation Expenditures of Low-Income Adults*, MINETA TRANSP. INST. 29 (2011) (regarding Santa Clara Valley Transportation Authority's provision of para-transit services).
64. Evelyn Blumenberg & Michael Manville, *Beyond Spatial Mismatch: Welfare Recipients and Transportation Policy*, 19 J. PLAN. LIT. 182, 189 (2004).
65. Dennis M. Brown & Eileen S. Stommes, *Rural Governments Face Public Transportation Challenges and Opportunities*, 2 AMBER WAVES, Feb. 2004, at 11, <https://www.ers.usda.gov/amber-waves/2004/february/rural-governments-face-public-transportation-challenges-and-opportunities> [<https://perma.cc/C49T-KCQH>].

frequently live in suburban neighborhoods without transit coverage.<sup>66</sup> In other cases, transit exists but is unavailable at the times travel is required. Transit systems may limit hours to only weekday coverage,<sup>67</sup> or have limited hours of operation during off-peak commute times,<sup>68</sup> which is particularly problematic for people living in poverty who make up a higher percentage of off-peak than peak commuters.<sup>69</sup> Even when people have the ability to travel during peak commuting times, public transportation can fall short. One recent study of the one hundred largest metropolitan areas (including city centers and suburban neighborhoods) in the United States showed that over two-thirds of available jobs “are inaccessible within an hour and a half by way of existing transit systems.”<sup>70</sup> When high-skilled jobs are excluded, the problem of relying on public transportation becomes even more pronounced, as it places approximately seventy to ninety-five percent of low- and medium-skilled jobs out of reach depending on geographic region.<sup>71</sup> This problem has gotten worse over time; “[b]etween 2000 and 2012, the number of jobs within the typical commute distance for residents in a major metro area fell by 7 percent” and suburban job sites became more spread out, resulting in reduced employment access.<sup>72</sup>

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66. Adie Tomer, *Transit Access and Zero-Vehicle Households*, BROOKINGS INSTITUTION 4-6 (Aug. 2011), [https://www.brookings.edu/wp-content/uploads/2016/06/0818\\_transportation\\_tomer.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0818_transportation_tomer.pdf) [<https://perma.cc/EC6X-WU8V>].
67. Patrick J. Kiger, *Providing Rides Along Rural Roadways*, AARP LIVABLE COMMUNITIES (Mar. 2019), <https://www.aarp.org/livable-communities/getting-around/info-2019/feonix-mobility-rising.html> [<https://perma.cc/QG6J-HZ8C>] (“[M]ore than 70 percent of rural public transit agencies only provide service Monday through Friday.”).
68. Charles L. Baum, *The Effects of Vehicle Ownership on Employment*, 66 J. URB. ECON. 151, 151 (2009); Blumberg & Manville, *supra* note 64, at 191-92.
69. Bania et al., *supra* note 57, at 37; Pucher & Renne, *supra* note 58, at 65.
70. Tomer et al., *supra* note 60, at 12.
71. *Id.* at 17-19.
72. Elizabeth Kneebone & Natalie Holmes, *The Growing Distance Between People and Jobs in Metropolitan America*, BROOKINGS INSTITUTION 1, 4-6 (Mar. 2015), [https://www.brookings.edu/wp-content/uploads/2016/07/Strvy\\_JobsProximity.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/Strvy_JobsProximity.pdf) [<https://perma.cc/2DUS-B4DJ>]; see also Evelyn Blumenberg & Margy Waller, *The Long Journey to Work: A Federal Transportation Policy for Urban Families*, BROOKINGS INSTITUTION 4-6 (July 2003), [https://www.brookings.edu/wp-content/uploads/2016/06/20030801\\_Waller.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/20030801_Waller.pdf) [<https://perma.cc/RFM4-HMZS>] (reporting that employers and welfare administrators often report that their locations are inaccessible via public transit). There is, of course, significant regional and local variation in the extent of spatial mismatch between home and work. See, e.g., Kneebone & Holmes, *supra*, at 5-6, 8. For example, spending ninety minutes on public transportation during peak commute hours allows one to access nearly 60% of jobs in Honolulu, Hawaii, but only 7.4% of jobs in Palm Bay-Melbourne-Titusville, Florida. See Tomer et al., *supra* note 60, at 15.

In light of the mismatch between housing and job and education sites, it is unsurprising that “[a]utomobile ownership is associated with higher employment rates, weekly hours worked, and hourly earnings” and “reduces racial disparities in employment rates . . . and unemployment duration.”<sup>73</sup> Automobile ownership is also associated with increased employment attainment and decreased dependence on government assistance for people receiving public benefits.<sup>74</sup>

In short, under this proposal, courts would consider the foreseeable hardships created as the result of a forfeiture by assessing whether the loss of the forfeited property would impede access to employment or educational services. In doing so, courts would not be required to assign a specific dollar value to those lost opportunities; rather, they need only recognize the hardship as an addition to the dollar value of the property when weighing punishment severity against the seriousness of an offense.

## 2. Meeting Basic Human Needs

It is inconceivable that the historical focus on securing a livelihood and the modern doctrine’s attention to equality, dignity, and rehabilitation would foreclose consideration of whether a forfeiture interfered with one’s ability to meet basic human needs, including food, hygiene, housing, and necessary medical care.

Take, for example, how the deprivation of an automobile through forfeiture may impact one’s ability to obtain food. While losing a vehicle could significantly harm the economic well-being of a person or his or her family, the negative implications extend beyond the labor market, also reducing access to basic human needs. Public services have decentralized away from public housing,<sup>75</sup> and may be distant from rural areas,<sup>76</sup> making it more difficult for people who rely on government benefits to access food. Losing a car can therefore make it particularly difficult to seek assistance from government agencies and nonprofits that provide similar services.<sup>77</sup> One national survey of people who rely on food banks

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73. Blumenberg & Pierce, *supra* note 61, at 68; *see also* Ong & Miller, *supra* note 56, at 51-53 (finding that “access to a vehicle independently contributes to improved labor market outcomes,” thereby supporting the conclusion that transportation mismatch is a more important factor than noncontextual spatial mismatch).

74. *See* Cynthia Bansak et al., *Cars, Employment, and Single Mothers: The Effect of Welfare Asset Restrictions*, 49 J. ECON. & SOC’Y 321, 322, 339-40, 342-43 (2010); Baum, *supra* note 68, at 152, 156-59.

75. Pucher & Renne, *supra* note 58, at 73.

76. Brown & Stommes, *supra* note 65, at 11.

77. AGRAWAL ET AL., *supra* note 63, at 35.

and emergency kitchens, for example, found that “transportation problems are the most common contributing factor” preventing people from accessing those services.<sup>78</sup> Similarly, grocery stores are often distant from residential neighborhoods, creating “food deserts” where access to healthy food is effectively nonexistent.<sup>79</sup> For people who live in or near those areas, losing an automobile has significant effects on the ability to obtain healthy food.<sup>80</sup> In turn, a lack of nutritious food has been linked to chronic health conditions, such as diabetes, that can significantly alter a person’s long-term well-being.<sup>81</sup>

Similarly, the loss of a vehicle through forfeiture may create serious obstacles to obtaining necessary medical care. Studies investigating the relationship between vehicle access and health care “suggest that lack or inaccessibility of transportation may be associated with less health-care utilization, lack of regular medical care, and missed medical appointments, particularly for those from lower economic backgrounds,”<sup>82</sup> and that approximately 3.6 million adults and children miss at least one medical appointment per year due to a lack of transportation.<sup>83</sup> Unsurprisingly, people who miss appointments due to transportation problems are more likely than the general population to have significant medical and mental-health needs.<sup>84</sup> While reduced access to medical treatment can be particularly devastating for people with chronic conditions such as diabetes, asthma, heart conditions, HIV/AIDS, and cancer that require regular checkups,<sup>85</sup> it can be problematic for any patient because delays in care can result in both the “accumulat[ion] and worsen[ing] of health outcomes.”<sup>86</sup>

Again, as with employment and educational access, in cases where the loss of property may interfere with the ability of a person or his or her family to meet

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78. Ronette Briefel et al., *The Emergency Food Assistance System—Findings from the Client Survey*, U.S. DEP’T AGRIC. 2 (July 2003), [https://www.ers.usda.gov/webdocs/publications/46706/52132\\_fanrr32.pdf](https://www.ers.usda.gov/webdocs/publications/46706/52132_fanrr32.pdf) [<https://perma.cc/XWK4-RFA5>].

79. Pucher & Renne, *supra* note 58, at 49, 53; Michael J. Widener et al., *Using Urban Commuting Data to Calculate a Spatiotemporal Accessibility Measure for Food Environment Studies*, 21 HEALTH & PLACE 1, 1 (2013).

80. See Michael J. Widener et al., *Spatiotemporal Accessibility to Supermarkets Using Public Transit: An Interaction Potential Approach in Cincinnati, Ohio*, 42 J. TRANSP. GEOGRAPHY 72, 80 (2015) (comparing public-transit accessibility to automobile accessibility and finding that it “unsurprisingly reveals that driving results in more access to supermarkets”).

81. See, e.g., Widener et al., *supra* note 80, at 72.

82. Samina T. Syed et al., *Traveling Towards Disease: Transportation Barriers to Health Care Access*, 38 J. COMMUNITY HEALTH 976, 987 (2013).

83. Richard Wallace et al., *Access to Health Care and Nonemergency Medical Transportation*, 1924 TRANSP. RES. REC.: J. TRANSP. RES. BOARD 76, 77-79 (2005).

84. *Id.* at 79-80, 82.

85. *Id.* at 76, 82-83.

86. Syed et al., *supra* note 82, at 976.

basic human needs, a court should consider that hardship along with the dollar value of the property when weighing the severity of the punishment against the seriousness of the offense.

### 3. *Family and Social Stability*

As discussed in Part I, financial hardship created by the loss of property through forfeiture can disrupt a person's access to family and other social supports, which in turn can be criminogenic.<sup>87</sup> Thus, where it is foreseeable that a property forfeiture will cause such a disruption, it directly undermines the Court's interest in deterrence and rehabilitation.

Again, the loss of an automobile provides an example of how property forfeitures can have detrimental consequences for familial and social stability of the kind already recognized in some courts. Take, for example, an opinion by then-Judge Sotomayor in a case arising under the Due Process Clause, in which the Second Circuit noted the following when assessing the private interest affected by an instrumentality forfeiture program:

Valerie Krimstock, for example, states that the seizure of her vehicle hindered her from traveling from her residence in the Bronx to her job in North Tarrytown and from visiting her daughter who suffers from mental illness and lives in Pennsylvania. The seizure and retention of Clarence Walters' vehicle made it difficult, he reports, to reach his construction job sites—some located in areas of Long Island or New Jersey inaccessible by mass transit—and as a consequence he lost a certain amount of work. James Webb, a 77-year-old retiree, states that the seizure and retention of his vehicle made it difficult for him and his wife to see their doctors and to visit friends, and prevented him from driving his granddaughter to school.<sup>88</sup>

In addition to literally cutting off access to family and social networks, the way in which the loss of an automobile reduces employment opportunities and thus income can undermine a parent's ability to pay child support. Failure to pay is routinely prosecuted under state criminal laws, which often leads to incarceration and familial destabilization,<sup>89</sup> thus undermining the Court's treatment of deterrence as relevant to proportionality.

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87. See *supra* notes 41-45 and accompanying text.

88. *Krimstock v. Kelly*, 306 F.3d 40, 62 (2d Cir. 2002).

89. See generally Cortney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125 (2018) (discussing the degradative effects of prosecuting poor fathers who are unable to pay child support because of poverty).



Therefore, as with previous categories, it is reasonable for courts to consider the manner in which a property forfeiture will disrupt family and social networks and interfere with the ability to pay child support when assessing punishment severity.

#### 4. *Satisfying Legal Obligations*

Along with the obligation to pay child support, property forfeitures may also interrupt other legal obligations in ways that undermine the Court's interest in deterrence and rehabilitation. Most notably, property forfeitures can make it extremely difficult, and in some cases impossible, to adhere to standard conditions of probation and parole. For example, the loss of an automobile may interfere with conditions requiring attendance at work or school,<sup>90</sup> meetings with probation and parole staff,<sup>91</sup> mental health or chemical dependency treatment,<sup>92</sup> as well as the payment of supervision fees,<sup>93</sup> made more difficult by a loss of employment due to the deprivation. By making compliance infeasible, property forfeitures may leave people in an impossible position, as was the case for Timbs, given that the loss of his vehicle interfered with his ability to meet conditions related to employment, attending AA meetings, and more,<sup>94</sup> thus interfering with any rehabilitative value such conditions may have. As Timbs himself explained:

To me it doesn't make sense; if they're trying to rehabilitate me and help me help myself, why do you want to make things harder by taking away the vehicle I need to meet with my parole officer or go to a drug recovery program or go to work? You need a car to do all these things. Forfeiture only makes it more challenging for people in my position to clean up and remain a contributing member of society.<sup>95</sup>

In short, as with the factors noted above, considering the manner in which property forfeitures interfere with one's ability to satisfy legal obligations is

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90. See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 310-14 (2016).

91. See *id.* at 316-17.

92. See, e.g., 18 U.S.C. § 3563(b)(9).

93. See Doherty, *supra* note 90, at 314.

94. Bullock & Sibilla, *supra* note 9.

95. J. Justin Wilson, *With Indiana Supreme Court Ruling, Tyson Timbs Is One Step Closer to Getting His Car Back*, INST. FOR JUST. (Oct. 28, 2019), <https://ij.org/press-release/with-indiana-supreme-court-ruling-tyson-timbs-is-one-step-closer-to-getting-his-car-back> [<https://perma.cc/F93U-5UYF>].

consistent with the excessive fines doctrine to date, and should be considered in assessing punishment severity.

*B. The Assessment of Financial Hardship: A Limited Approach*

The multifactor approach detailed above allows for a more robust understanding of the severity of property forfeitures that takes into account the real-world hardships such forfeitures may create, but it is limited in important ways.

First, the approach does not require an assessment of idiosyncratic value detached from the concerns of the Clause's historical foundations and the existing doctrine. As noted above, our proposed test would not, for example, require a court to assess the extent to which Timbs held particular emotional attachment to the vehicle given its link to his father's death. It would instead focus only on the consequences to his financial condition, such as his ability to travel to work, attend his mandated probation meetings, and undergo addiction treatment.<sup>96</sup>

Second, the approach does not require an assessment of the property's loss in a vacuum, but rather in light of the owner's broader economic condition. As a result, a person who owns multiple vehicles or has the means to replace a forfeited automobile would still be able to rely on the dollar value of the vehicle, but have a less compelling subjective argument that the forfeiture is excessive because its loss would not foreseeably result in hardship.<sup>97</sup> In contrast, the loss of a vehicle for someone without access to another car or the means to replace it would have a strong likelihood of creating or exacerbating financial instability for the owner and his or her family.

Third, a hardship assessment may not be necessary in all cases. In some situations, the excessiveness of the forfeiture will be evident from the property's dollar value alone. For example, in May 2019 a Virginia state trial court issued a thoughtful and noteworthy decision that concluded that the Excessive Fines Clause prohibits the forfeiture of a \$53,000 vehicle as punishment for the unlawful distribution of about \$200 worth of cocaine.<sup>98</sup> Based on the vehicle

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<sup>96.</sup> See *supra* notes 8-9, 29, and accompanying text.

<sup>97.</sup> It is consistent with the history of the Excessive Fines Clause and the Supreme Court's due process case law that when a given person is approaching the margins of subsistence, the interest in individual well-being appropriately takes on a particularly important role in the overall evaluation of constitutional excessiveness. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976) (emphasizing the special status of "persons on the very margin of subsistence"); *United States v. Bikundi*, 926 F.3d 761, 796 n.5 (D.C. Cir. 2019) (discussing the potential relevance in the Excessive Fines Clause context of ensuring that a person can maintain "the ability to secure the necessities of life").

<sup>98.</sup> See *Commonwealth v. One 2016 Chevrolet Tahoe*, No. CL-2018-3474, 2019 WL 2269901 (Va. Cir. Ct., May 24, 2019).

owner's limited culpability as compared to the \$53,000 book value of the vehicle, the court concluded that the forfeiture would be grossly disproportionate under the circumstances of the case.<sup>99</sup>

Fourth, determining that the forfeiture of property is disproportionate is not an all-or-nothing proposition.<sup>100</sup> A court might determine that only a partial forfeiture is appropriate, allowing for a portion of the sale of a vehicle to be returned to the owner sufficient to obtain a less valuable replacement. In other words—to borrow a comparison offered by Justice Alito during the *Timbs* oral argument<sup>101</sup>—a court could, in a given case, find that a partial forfeiture of a Bugatti is appropriate in light of the severity of an offense, but return to the owner sufficient funds from the Bugatti's sale to purchase a Kia so that employment or other needs are not interrupted.<sup>102</sup>

Finally, we note that taking consequences related to financial condition and basic well-being into account in addition to the dollar value of the forfeited property may, but does not necessarily, mean that a particular forfeiture would be found to be constitutionally excessive. Even under a framework such as the one we propose here, there may well be instances in which a person's "culpability . . . far outweighs the intangible value of the property" at issue.<sup>103</sup> One court, for example, has suggested that a "property's character as a residence and the effect of forfeiture on innocent occupants are factors whose importance diminishes as the duration and extent of the defendant's culpability and use of the property to facilitate criminal conduct rises."<sup>104</sup> As a general matter, once the dollar value and the likely consequences of the forfeiture are ascertained, a court would still engage in the standard gross disproportionality evaluation, weighing the severity of the forfeiture against the seriousness of the offense and the individual's culpability for it.<sup>105</sup> Along these lines, even those lower courts that have begun to incorporate considerations of hardship and intangible value into the proportionality analysis have nevertheless upheld the constitutionality of forfeitures when, for example, the property at issue is directly linked to particularly

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99. *Id.*

100. Transcript of Oral Argument, *supra* note 12, at 29.

101. *Id.* at 28:5-14.

102. *See id.* at 26:13-18. In doing so, courts should be careful that the amount returned is not so low that the only possible replacement would be an unreliable vehicle, which may also negatively affect employment outcomes and the periodic loss of access to basic needs as families redirect funds to secure repairs. Cynthia Needles Fletcher et al., *Transportation Hardship: Are You Better Off with a Car?*, 26 J. FAM. & ECON. ISSUES 323, 337 (2005).

103. *United States v. Bieri*, 68 F.3d 232, 237-38 (8th Cir. 1995).

104. *Id.* at 237.

105. *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998).

serious wrongdoing.<sup>106</sup> But in a world in which property deprivations can, and often do, have devastating and long-term consequences, courts ought to take such foreseeable real-world effects into account.

## CONCLUSION

Property forfeitures—like fines, fees, and other forms of economic sanctions—have consequences that often extend well beyond the dollar value of the deprivation. Whether the loss at issue stems from the forfeiture of an automobile—or from any deprivation that restricts employment and educational access, limits the ability to meet basic needs, creates family and social instability, and impedes the ability to satisfy legal obligations—the punishment can result in the imposition of significant financial hardship disproportionate to the person’s culpability for the offense. In this Essay, we have outlined and developed a test for assessing punishment severity that is sensitive to those real-world effects. In addition to considering the dollar value of the forfeited property, this approach includes the risk of hardship within the assessment of the severity of a property forfeiture—thus avoiding the difficulties that may be created by an unlimited assessment of the idiosyncratic, subjective values that the forfeited property may hold for a person. Such an approach is consistent with the venerable history of the Excessive Fines Clause, and with the doctrinal path that the Supreme Court has already begun to forge.

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106. See, e.g., *United States v. Real Prop.* Located at 24124 Lemay St., 857 F. Supp. 1373, 1382-83 (C.D. Cal. 1994) (observing that although “[t]his Court is mindful of the intangible value of a person’s home,” the court “nevertheless must evaluate the harshness of the penalty in comparison with the inherent gravity of the offense” and that “[c]laimant in this instance was convicted of two serious felony drug offenses for activity occurring on his property” and concluding that “[c]laimant’s direct involvement in the criminal activity occurring on his property weighs in favor of finding that the forfeiture is not excessive”); *United States v. 45 Claremont St.*, 395 F.3d 1 (1st Cir. 2004) (holding that the seriousness of the underlying drug offenses outweighed the severity of the forfeiture of the home, regardless of the fact that it was where the owner and her children lived and rented rooms for income).