MINNESOTA LAWYER

Who decides when a fine is 'excessive'?

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December 5, 2018

Unless you've had an unfortunate encounter with law enforcement, you probably don't give much thought to the Constitution's bar on excessive fines. But the clause is there in the Eighth Amendment, right beside the prohibition on cruel and unusual punishments. And the likelihood that the U.S. Supreme Court will soon rule that the rule applies not just to the federal government but also to the states has occasioned considerablecelebration.

Questions from the justices during last week's oral argument in Timbs v. Indiana make clear that a majority is prepared to reach that result. That's grand news. But even if the court decides that the states, too, are prohibited from demanding excessive fines, judges across the country will still have to figure out when a fine is excessive. On that point, the justices are likely to offer little guidance.

We are speaking here of official fines, not jury awards in private litigation. The bar applies principally to criminal cases, to civil cases brought by the government, and to financial judgments handed down by government agencies. And one needn't be a libertarian to see why excessive fines constitute a serious problem. Government agencies should not be given incentives to take valuable private property for their own gain — exactly what happens in civil forfeiture proceedings. There is evidence aplenty that police forces across the country regularly use forfeiture as a means of enhancing their budgets. 1

The Supreme Court case concerns Tyson Timbs, who was caught dealing heroin and sentenced to probation and payment of a small fine. Subsequently, the state sought to seize his $42,000 Land Rover, purchased with proceeds from his late father's insurance policy, because he had used the car to transport heroin.

Let's concede that Timbs is no hero. He committed a serious crime. Still, the maximum fine a judge could have imposed for his offense was $10,000, less than a quarter of the value of the car. Timbs argued that seizure amounted to a fine of more than $40,000, far more than the offense warranted. The Indiana Supreme Court rejected his claim, ruling that the Constitution's bar on excessive fines applied only against the federal government. 2

There's near unanimity among legal scholars that this is incorrect. And not just among scholars. The Southern Poverty Law Center and the Cato Institute filed a joint brief on Timbs's behalf, and his lengthy list of supporters ranges from the NAACP Legal Defense Fund to the Rutherford Institute. All of these ideologically disparate organizations argued that the excessive-fines clause should apply to the states. And that's almost certainly how the justices will rule.

So far, so good. But remember the business about the pudding and the eating. The problem is how to tell when a fine is unconstitutionally excessive. Over the years, the courts have offered

mostly vagaries: “outrageous” and “unreasonably disproportionate” and the like. What those weasel words have in common is that they impress without providing an actual standard of measurement. The judges are as much as inviting each other to strike down whatever fines they don’t happen to like.

So how best to come up with a standard? One idea that has lately gained currency among legal scholars is to moderate fines according to ability to pay. Certainly there are good arguments that such a practice, familiar in much of the world, would survive constitutional scrutiny in the U.S. To measure fines not by the severity of the offense but by the ability to pay would also align the way we think about fines with the way we are coming to think about bail.

But consider for a moment what this would mean. If you and I commit the identical offense, and you happen to be wealthier than I, your fine is bigger than mine. Three years ago in Sweden, where ability to pay is taken into account, a well-heeled driver was fined 54,000 euros for speeding. Plainly, we would have to consider ability to pay only within a specified range.

There’s another difficulty. Now and then a fine beyond the ability to pay might be a good idea. Everyone hates robo-callers who ignore the federal “Do Not Call” registry, for example. But by a remarkable coincidence, the few caught by the Federal Trade Commission for violations almost always routinely plead that they’re broke. Over the past decade, according to an analysis by the Washington Post, violators have been ordered to pay $300 million in relief and $30 million in civil penalties. Due to poverty-stricken telemarketers, the FTC has collected only $18 million in relief, and not even $1 million in penalties. And yet nobody doubts that they’re deserving of a good swift kick in the deterrence. Taking their financial condition into account seems like a bit of unmerited mercy.

OK, I’m letting emotion interfere with my judgment. And certainly I am not among those who take the view that corporations aren’t legal persons. Still, courts are likely to view their pleas of poverty with some skepticism. In 2010, for instance, a regional water company in Arizona complained that a fine of more than $1.7 million for a safety violation that had resulted in the deaths of two people was too high. (The Arizona state constitution, like the federal constitution, bans excessive fines.) In particular, the company argued that its dire financial condition made payment impossible without reducing the quality of its services. The state court of appeals rejected the claim, and pointed out that the water company was being allowed to pay the fine at the rate of some $17,000 a month, an amount the judges deemed affordable.

And yet in the case before the U.S. Supreme Court, I doubt that the justices would view Timbs’s arguments with any less sympathy had he agreed to pay the state of Indiana $40,000 over a period of years in order to keep the car. So let’s just agree that corporations are a special case and might have to dig into their pockets. For the rest of us, the decision that states can’t impose excessive fines is long overdue.

1. An extreme case is provided by Ferguson, Mo., where a Justice Department investigation after the killing of Michael Brown discovered that police and other officials were rewarded for the revenue they generated.

2. The authors of the Bill of Rights were worried about federal power. Over the years, most of their provisions have nevertheless been held to apply to state and local government, through a process called “incorporation.” Never mind the definition. Let it suffice to say

that incorporation is the reason that the First Amendment's establishment clause, which by its terms prohibits only action by Congress, also restricts what your local government can do. (The Third and Seventh Amendments have never been incorporated. If you read them, you'll see why