

Pension Forfeiture: A Legislative Framework for Circumventing the Eighth Amendment

*Joshua Halma**

| | |
|--|-----|
| I. INTRODUCTION | 93 |
| II. INCORPORATION OF THE EXCESSIVE FINES CLAUSE..... | 98 |
| A. Types of Forfeitures That are Subject to the Excessive Fines Clause: <i>Timbs v. Indiana</i> | 99 |
| B. Test for Violating the Excessive Fines Clause – <i>Bajakajian</i> Test | 101 |
| C. Application of the Excessive Fines Clause for Public Service Employment Pensions Across the Circuit Courts | 102 |
| III. HISTORY OF N.J.S.A. 43:1-3.1 AND NEW JERSEY PENSION GARNISHMENT | 106 |
| A. New Jersey’s Test for Determining Forfeitures in Violation of the Excessive Fines Clause Prior to N.J.S.A. 43:1-3.1: <i>Uricoli</i> Factors | 106 |
| B. Forfeitures Under N.J.S.A. 43:1-3.1 | 108 |
| IV. N.J.S.A. 43:1-3.1 DISREGARDS ECONOMIC PRINCIPLES AND QUANTIFIABLE PROPERTY INTERESTS | 109 |
| A. Time Value of Money | 109 |
| B. Inflation..... | 110 |
| C. Prevailing Wage | 111 |
| D. Opportunity Cost..... | 112 |
| E. Disregarding of Economic Principles..... | 112 |
| V. UNJUST CONSEQUENCES OF COMPLETE DEFERENCE AS A PRIMARY POLICY – <i>STATE V. ANDERSON</i> | 115 |
| VI. FINES DEFINED BY PURPOSE AND EFFECT PROTECT RATIONAL, WELL-UNDERSTOOD PROPERTY RIGHTS | 120 |
| VII. CONCLUSION | 121 |

2023]

HALMA

93

I. INTRODUCTION

The use of monetary penalties as criminal punishment is a tradition as old as the criminal justice system itself.¹ Fines have long been viewed as an effective tool not only to disincentivize criminal activity and remediate damages of aggrieved parties, but also to provide needed revenue for the state to carry out its policing function.² For this reason, legislatures largely prefer fines over other available criminal deterrents, such as incarceration or probation, which necessarily involve additional costs to the taxpayer.³ This preference has culminated in the continual and vast expansion of judicially induced fines, particularly in the last decade.⁴ Such prevalent use of fines, however, accentuates a concern that is pervasive in all criminal justice systems: proportionality.

While the implementation of sentencing guidelines and the Model Penal Code aimed to bring uniformity to incarceration terms across the states, little has been done to promote the same uniformity for criminal fines.⁵ Further, fines have more proclivity for misuse when compared to other types of criminal penalties.⁶ As a revenue stream, legislatures have the perverse incentive to increase monetary penalties in response to rising state budgets; consequently, these increases can often come without concern for the underlying crimes the legislatures intended to punish.⁷

This worry over the misuse of fines to pursue revenue generation has grown in recent years following the Department of Justice's ("DOJ")

*Joshua Halma, J.D., Class of 2023, Seton Hall University School of Law.

¹ NAT'L INST. OF JUST., U.S. DEP'T OF JUST., PUB. NO. 136611, *Foreword to DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS* (1992).

² Kiren Jahangeer, *Fees and Fines: The Criminalization of Poverty*, AMERICANBAR.ORG. (Dec. 16, 2019), https://www.americanbar.org/groups/government_public/publications/public_lawyer_articles/fees-fines/.

³ *See id.*

⁴ Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, BRENNAN CTR. FOR JUST. 6 (Nov. 1, 2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf (citing Matthew Shaer, *How Cities Make Money by Fining the Poor*, N.Y. TIMES MAG. (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html>).

⁵ *See generally* Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 AM. CRIM. L. REV. 333, 337, 350–55 (2018).

⁶ *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991).

⁷ *See generally* Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1882 (2018); Michael Waldman, *Perverse Financial Incentives in Criminal Justice*, BRENNAN CTR. FOR JUSTICE (July 8, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/perverse-financial-incentives-criminal-justice>

2015 investigation into Missouri’s Ferguson Police Department.⁸ Following the shooting of Michael Brown by Ferguson Police officer Darren Wilson, the DOJ uncovered “a pattern of racially discriminatory practices . . . rooted in the city’s dependence on the criminal justice system to raise revenue.”⁹ State legislatures and courts across the country have since been increasingly criticized for their mass expansion of monetary and criminal penalties.¹⁰ New Jersey is no stranger to these criticisms.¹¹ In 2017, the New Jersey State Bar Association’s Subcommittee on Judicial Independence in the Municipal Courts launched its own independent review in response to rising public criticism in the form of a series of local newspaper articles questioning the State’s current fine practice, and two recent municipal court decisions.¹² The State Bar identified significant problems with the courts’ existing fine structure, prompting the New Jersey Supreme Court to appoint its own commission.¹³ Subsequently, the New Jersey Supreme Court formed a Committee on Municipal Court Operations, Fines, and Fees and tasked it with “conducting a reform-minded review” to ameliorate these observed shortcomings.¹⁴ While substantial changes have followed since the creation of this Committee, such as setting monetary caps for statutory violations, most of New Jersey’s criminal fine practice remains untouched.¹⁵

⁸ N.J. CTS., REPORT OF THE SUPREME COURT COMMITTEE ON MUNICIPAL COURT OPERATIONS, FINES AND FEES 1, 1 (2018), <https://www.njcourts.gov/courts/assets/supreme/reports/2018/sccmcoreport.pdf>.

⁹ *Investigation of the Ferguson Police Department*, FINES AND FEES JUST. CTR. (Mar. 1, 2015), <https://finesandfeesjusticecenter.org/articles/investigation-ferguson-police-department/>.

¹⁰ See Matthew Mendez et al., *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUSTICE 6 (Nov. 21, 2019) <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> (commenting on the expansion of monetary criminal penalties); U.S. Dep’t of Justice, *Attorney General Holder Delivers Update on Investigation in Ferguson, Missouri*, JUSTICE.GOV (Mar. 4, 2015) <https://www.justice.gov/opa/speech/attorney-general-holder-delivers-update-investigations-ferguson-missouri#:~:text=Our%20investigation%20showed%20that%20Ferguson,using%20unreasonable%20force%20against%20them;Komala%20Ramachandra,%20The%20Need%20to%20Abolish%20Extortionate%20Criminal%20Fines%20and%20Fees,JURIST> (Oct. 1, 2020, 3:23 PM) <https://www.jurist.org/commentary/2020/09/komala-ramachandra-abolish-extortionate-criminal-fees/> (criticizing the expansion of fees and fines as a method for generating revenue).

¹¹ N.J. CTS., *supra* note 8, at 12.

¹² N.J. CTS., *supra* note 8, at 5–6.

¹³ N.J. CTS., *supra* note 8, at 1.

¹⁴ N.J. CTS., *supra* note 8, at 1.

¹⁵ See Colleen O’Dea, *Municipal Courts too Quick to Levy Fines and Need Major Reforms* — Report, N] SPOTLIGHT NEWS (July 18, 2018),

The Framers of the U.S. Constitution anticipated the proclivity for misuse of monetary criminal penalties and, drawing on the 1689 English Bill of Rights, protected the citizenry through ratification of the Eighth Amendment's Excessive Fines Clause.¹⁶ The Clause strictly forbids "excessive fines imposed" relative to the prosecution of a crime.¹⁷ Yet, while the Excessive Fines Clause has existed as a prohibition against the federal government since the United States' infancy, it did not apply to the states until 2019 as a result of *Timbs v. Indiana*.¹⁸ The *Timbs* decision implemented the gross disproportionality test from the Court's decision in *United States v. Bajakajian*.¹⁹ The *Bajakajian* test measures a criminal punishment as "excessive" when "it is grossly disproportional to the gravity of a defendant's offense."²⁰ During oral argument for *Timbs*, the Supreme Court inquired into whether a defendant's individual capacity to pay a fine was a necessary part of the gross disproportionality test but ultimately withheld any conclusion.²¹ On remand of *Timbs*, the Indiana Supreme Court found such an inquiry to be a necessary part of the protection afforded by the Excessive Fines Clause.²² This individualized analysis, however, has been inconsistently applied across the Circuit Courts.²³

New Jersey has its own constitutional prohibition against imposing excessive fines, as codified in its Constitutional Rights and Privileges under Article I Paragraph 12, which states, "excessive fines shall not be imposed."²⁴ The test for violating the New Jersey Constitution, as reaffirmed by the New Jersey Supreme Court's August 2021 decision in

<https://www.njspotlightnews.org/2018/07/18-07-17-municipal-courts-too-quick-to-levy-fines-need-other-reforms-report/>.

¹⁶ Craig S. Lerner, *Does the Magna Carta Embody a Proportionality Principle?*, 25 GEO. MASON U. CIV. RTS. L. J., 271, 275 (2015).

¹⁷ U.S. CONST. amend. VIII.

¹⁸ *Timbs v. Indiana*, 139 S. Ct. 682, 689–90, 698 (2019).

¹⁹ *Id.* at 686–87; *United States v. Bajakajian*, 524 U.S. 321, 333–34 (1998), *superseded by statute*, 31 U.S.C.S. § 5332.

²⁰ *Bajakajian*, 524 U.S. at 334.

²¹ Transcript of Oral Argument at 28, *Timbs*, 139 S. Ct. 682 (No. 17–1091); Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After Timbs*, 129 YALE L.J. 430, 433 (Jan. 3, 2020).

²² *State v. Timbs (Timbs II)*, 134 N.E.3d 12, 32 (Ind. 2019) (citing *Timbs*, 139 S. Ct. 682, 687–88).

²³ David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L. & POL'Y REV. 541, 543–44 (2017) (explaining that the Supreme Court's hope that lower courts could create a standard approach has not come to fruition as different circuits apply different standards).

²⁴ N.J. CONST. art. I, § 12.

State v. Anderson,²⁵ is on par with that under the United States Constitution. While this may be the case, the New Jersey Supreme Court and other like-minded courts have managed to circumvent these constitutional protections entirely in the case of public service employment contracts.²⁶

By acquiescing to a legislative sleight-of-hand, these courts evade constitutional questions for pension seizures of public officials when made pursuant to a state public pension forfeiture provision.²⁷ These forfeiture provisions apply when a public official receives a conviction for an offense related to the duties of their position.²⁸ Upon conviction, the provisions operate by statutorily divesting a public employee's property interest in their appreciated pension funds.²⁹ Therefore, the law no longer considers the pension property of the employee, and without being considered property of the employee, the forfeiture cannot be subject to the protections of the Excessive Fines Clause.³⁰ The New Jersey Supreme Court's *Anderson* holding provided the state legislature with the tools and guidance for sidestepping the constitutional prohibition against imposing "grossly disproportionate" fines relative to a charged offense.³¹

This rationale contradicts not only the management of New Jersey's state pension plans, but also the practical effect of pension forfeitures. In *Anderson*, the aggrieved public official worked in Jersey City for thirty-eight and a half years.³² *Anderson*'s employment contract required that he make annual contributions to the Employees' Retirement System of Jersey City.³³ Following his retirement, *Anderson* pled guilty to a single \$300 bribe he took in 2012 to rezone a property from a two-unit to a three-unit dwelling.³⁴ The criminal liability for this action resulted in a \$3,100 fine and five months of probation.³⁵ The New Jersey Supreme Court, however, allowed for a complete forfeiture of his

²⁵ *State v. Anderson*, 256 A.3d 981, 989 (N.J. 2021).

²⁶ *See id.* at 993–94; *see also* *Hopkins v. Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162–63 (10th Cir. 1998); *Hames v. City of Miami*, 479 F. Supp. 2d 1276, 1287–88 (S.D. Fla. 2007), *aff'd* 281 F. App'x 853 (11th Cir. 2008).

²⁷ *Anderson*, 256 A.3d at 992–93.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *See id.* at 998.

³² *Id.* at 985.

³³ *Anderson*, 256 A.3d at 987 n.4.

³⁴ *Id.* at 985.

³⁵ *Id.* at 986.

2023]

HALMA

97

pension valued at over one million dollars subject to N.J.S.A. 43:1-3.1(a).³⁶

Such grossly disproportionate punishment was made possible only by the deference afforded to the state legislature in defining and redefining which monetary criminal penalties can and cannot implicate constitutional protections. This Comment argues that the New Jersey Supreme Court should reevaluate what it classifies as a fine necessary to implicate the protections of both the New Jersey Constitution and the Eighth Amendment's Excessive Fines Clause. Repudiation of such blind assent to the legislature's chosen statutory language when determining what constitutes a "fine" would furnish needed curtailment of legislative overreach by preventing the state legislature from imposing grossly disparate punishment not intended as remedial in any appreciable part.

While misconduct by public officials is a serious concern that the legislature ought to possess substantial power to curtail, the legislature should not have permission to violate the Constitution in this pursuit by redefining a statutory fine as an unvested forfeiture under N.J.S.A. 43:1-3.1(a). Instead, the New Jersey Supreme Court should determine the implication of the fundamental protection against excessive fines by the effect and purpose of a monetary criminal penalty. Defining what constitutes a fine by this standard allows for more consistent, just protection of a constitutional right.

In addition, pension programs act as deferred payment schedules of current income, and statutory law should consider them equivalent to garnishments of current wages with respect to any fines levied. This is because employees select jobs and make future financial plans predicated on the fact that their pension money will be available to them—a fact that holds true regardless of whether employment is through the government or a private actor. Therefore, the absolute forfeiture of these funds forces great hardship on the afflicted, and the legislature should only impose it where warranted, unlike New Jersey's current statutory language, which is plainly overinclusive. Turning public pensions into a quasi-contractual reward does not further any legitimate interest because such classification goes far beyond any rational remedial or deterrent goal. Moreover, New Jersey precedent in other public service cases and family law cases subjecting pension funds to equitable distribution strengthens the case for recognizing a vested interest in these pensions even further.³⁷

³⁶ *Id.* at 995 (Albin, J., dissenting).

³⁷ See *L.M. v. Div. of Med. Assistance & Health Servs.*, 659 A.2d 450, 458 (1995); see also *Whitfield v. Whitfield*, 535 A.2d 986, 991 (N.J. Super. Ct. App. Div. 1987).

This Comment proceeds in five parts. Part II begins with a brief discussion of the historical background of the Eighth Amendment's Excessive Fines Clause and its modern-day application. Part III looks at the history of N.J.S.A. 43:1-3.1(a) and New Jersey court precedent recognizing a vested interest in public officials' employment contract pensions. Part IV details how N.J.S.A. 43:1-3.1(a) ignores certain fundamental economic principles. Part V contends that the holding in *Anderson* is an overly deferential decision by the New Jersey Supreme Court to its state legislature, leading to inappropriate outcomes that violate constitutional protections. Finally, Part VI concludes that the best way to adhere to constitutional safeguards is by defining fines through their practical effect and purpose. This definition of a fine would require the Court to find a present property interest in all employment contract pensions.

II. INCORPORATION OF THE EXCESSIVE FINES CLAUSE

The protections afforded by the Eighth Amendment's Excessive Fines Clause can be traced back to the signing of the Magna Carta in 1215.³⁸ Chapter twenty of the Magna Carta encapsulates the Eighth Amendment's proportionality principle, stating that, "[a] free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense; and for a serious offense he shall be amerced according to its gravity, saving his contentment."³⁹ The Eighth Amendment was "based directly" on antecedent documents that sought to defend this principle, most specifically Article I, § 9, of the Virginia Declaration of Rights of 1776, which had copied verbatim § 10 of the English Bill of Rights of 1689.⁴⁰ The United States Supreme Court has recognized and emphasized that the Eighth Amendment was adopted "with the particular intent of placing limits on the powers of the new Government."⁴¹ In addition to the Federal Constitution, all fifty states now have a recognized constitutional provision against the levying of excessive fines.⁴²

³⁸ See *Eighth Amendment's Prohibition on Excessive Fines Applies to the States*, CAL. PEACE OFFICER'S ASS'N (Feb. 22, 2019), <https://cpoa.org/eighth-amendments-prohibition-on-excessive-fines-applies-to-the-states/> (stating the "venerable lineage" of the Excessive Fines Clause can be traced back to the Magna Carta in 1215).

³⁹ Lerner, *supra* note 16, at 279; *English Translation of Magna Carta*, BRIT. LIBR., <http://www.bl.uk/magnacarta/articles/magna-carta-english-translation> (providing a full-text translation of the 1215 edition of the Magna Carta).

⁴⁰ *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 266 (1989) (citing *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983)).

⁴¹ *Id.*

⁴² See *Timbs v. Indiana*, 139 S. Ct. 682, 690–91 (2019).

With its origins dating back over eight hundred years, there is often a presumption that the relevant case law for determining which criminal punishments implicate the Excessive Fines Clause also spans back many hundreds of years, but this is not the case. In the 2019 case of *Timbs v. Indiana*,⁴³ the United States Supreme Court established a new precedent by recognizing the prohibition against excessive fines as a fundamental right incorporated against the states through the Fourteenth Amendment's Due Process Clause.⁴⁴ The Supreme Court's decision in *Timbs* drew its test for determining which criminal penalties violate the Excessive Fines Clause from the Court's holding in *United States v. Bajakajian*,⁴⁵ another relatively recent case decided in 1998.⁴⁶ *Timbs* has since become the recognized standard for penalties implicating the Excessive Fines Clause.⁴⁷

A. Types of Forfeitures That are Subject to the Excessive Fines Clause: Timbs v. Indiana

In *Timbs*, petitioner Timbs "plead[] guilty in Indiana State Court to dealing in a controlled substance and conspiracy to commit theft."⁴⁸ After his conviction, Timbs was ordered to serve one year of at-home detention, five years of probation, and pay fines totaling just over \$1,200.⁴⁹ Timbs's lawsuit, however, centered on the seizure of his \$42,000 Land Rover, which police confiscated in connection with the drug charge.⁵⁰ This was four times higher than the possible maximum penalty allowed for the drug charge of \$10,000.⁵¹ The Indiana Supreme Court, however, declined to evaluate the penalty subject to the Excessive Fines Clause, finding the Clause only constrained federal actions and not those undertaken by the state.⁵²

⁴³ *Id.*

⁴⁴ *See id.*

⁴⁵ *United States v. Bajakajian*, 524 U.S. 321 (1998).

⁴⁶ Brandon Buskey, *A Proposal to Stop Tinkering with the Machinery of Debt*, 129 *YALE L. J.* 415, 417–18.

⁴⁷ *See* Judith Resnick, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin"*, 129 *YALE L. J.* 365, 366; *see also* Scott Bullock & Nick Sibilla, *The Supreme Court Resuscitates the Eighth Amendment*, *THE ATLANTIC* (Mar. 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/unanimous-supreme-court-decision-policing-profit/584506/> (stating that due to the holding in *Timbs*, "the Eighth Amendment's protection against excessive fines... covers all Americans under the Fourteenth Amendment).

⁴⁸ *See Timbs*, 139 S. Ct. at 686.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

On appeal, the Supreme Court vacated and remanded the Indiana Supreme Court's holding.⁵³ The Court found the Excessive Fines Clause to be both "fundamental to our scheme of ordered liberty" and "deep[ly] root[ed] in [this Nation's] history and tradition"; therefore, it necessarily incorporated the Clause against the states as part of the Fourteenth Amendment's Due Process Clause.⁵⁴ As such, the Supreme Court held that *Timbs's* forfeiture was subject to the Excessive Fines Clause, and if *Timbs's* forfeiture violated its protections, it would be unconstitutional.⁵⁵

The justices also noted the heightened proclivity for misuse of criminal fines as a state revenue source.⁵⁶ This perverse incentive on the part of the state legislature is entirely separate from any remedial or punitive effect of a fine imposed.⁵⁷ In support of the heightened scrutiny required due to this perverse incentive, the Court cited Justice Scalia's statement that "it makes sense to scrutinize governmental action more closely when the State stands to benefit."⁵⁸

Justice Ginsburg's majority opinion in *Timbs* also reaffirmed "that civil *in rem* forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive."⁵⁹ This was the Court's holding in the 1993 case of *Austin v. United States*,⁶⁰ where the Court found a statutory forfeiture pursuant to 21 U.S.C. §§ 881(a)(4) and (a)(7) was subject to the limitations of the Excessive Fines Clause.⁶¹ The lower courts indicted the defendant in *Austin* for violating South Dakota's drug laws, and the federal government commenced an *in rem* action seeking the forfeiture of his mobile home and autobody repair shop.⁶² The Court stated that even where a civil sanction forfeiture serves a remedial purpose, if the forfeiture provision cannot "fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes," the forfeiture is a punishment and subject to the Excessive Fines Clause.⁶³

⁵³ *Id.* at 691.

⁵⁴ *Timbs*, 139 S. Ct. at 686–87.

⁵⁵ *Id.* at 691.

⁵⁶ *See id.* at 689 (citing *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991)).

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *Id.* at 690.

⁶⁰ *Austin v. United States*, 509 U.S. 602 (1993).

⁶¹ *Id.* at 621–22.

⁶² *Id.* at 604–05.

⁶³ *Id.* at 621 (citing *United States v. Halper* 490 U.S. 435, 448 (1989) (emphasis added), *overruled on other grounds by Hudson v. United States*, 522 U.S. 93 (1997)).

2023]

HALMA

101

The *Timbs* Court rejected the invitation by the Indiana state legislature “to reconsider [its] unanimous judgment in *Austin*.”⁶⁴ The Court then vacated the Indiana Supreme Court’s judgment and remanded the case for a proper analysis under the Excessive Fines Clause jurisprudence.⁶⁵

B. Test for Violating the Excessive Fines Clause – Bajakajian Test

On remand, the Indiana Supreme Court employed a two-part test to determine whether *Timbs*’ forfeiture violated the constitutional prohibition.⁶⁶ First, the forfeiture must be a “fine,” traditionally understood as a “payment to a sovereign as punishment for some offense.”⁶⁷ Payment requires that the forfeited asset is property of the forfeitee, and punishment requires that it be recompensed for the commission of an offense.⁶⁸ Second, the forfeiture must be “excessive.”⁶⁹ A court finds excessiveness where the punitive forfeiture “is grossly disproportional to the gravity of a defendant’s offense.”⁷⁰ Courts usually break up the excessiveness analysis into four factors: the nature and circumstances of the offense; whether it was related to any other illegal activities; the potential aggregate maximum sentence; and the harm resulting from the offense.⁷¹

The Supreme Court established this test in *Bajakajian v. United States*.⁷² In *Bajakajian*, the defendant violated a federal reporting law requiring him to notify when he was transporting more than \$10,000 outside the United States.⁷³ The question was whether forfeiting the entire amount he failed to report, \$357,144, as required by 18 U.S.C. § 982(a)(1), would violate the Excessive Fines Clause.⁷⁴ Finding that the currency was the defendant’s property and the seizure was punishment for running afoul of the statute, the Court held that the forfeiture

⁶⁴ *Timbs*, 139 S. Ct. at 690.

⁶⁵ *Id.* at 691.

⁶⁶ *State v. Timbs*, (*Timbs II*), 134 N.E.3d 12, 34 (Ind. 2019).

⁶⁷ *State v. Anderson*, 256 A.3d 981, 990 (N.J. 2021) (citing *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989))).

⁶⁸ *Id.* (citing *Austin v. United States*, 509 U.S. 602, 609–10 (1993); *Hopkins v. Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162 (10th Cir. 1998); *Bajakajian*, 524 U.S. at 328).

⁶⁹ *Anderson*, 256 A.3d at 990.

⁷⁰ *Bajakajian*, 524 U.S. at 334.

⁷¹ *United States v. Cheeseman*, 600 F.3d 270, 283–84 (3d Cir. 2010) (citing *Bajakajian*, 524 U.S. at 337–39); accord *United States v. Viloski*, 814 F.3d 104, 110 (2d Cir. 2016).

⁷² *United States v. Bajakajian*, 524 U.S. 321 (1998).

⁷³ *Id.* at 324.

⁷⁴ *Id.*

constituted a fine within the meaning of the Excessive Fines Clause.⁷⁵ The Court also held the forfeiture to be excessive.⁷⁶ The offense was the “willful failure to report the removal of currency from the United States,” but the currency itself had been lawfully obtained by the defendant.⁷⁷ The maximum penalty for such an offense was six months imprisonment and a \$5,000 fine.⁷⁸ This significant discrepancy between the maximum penalty and harm caused by the defendant’s offense when compared to the value of the forfeiture led the Court to conclude that this fine would violate the Excessive Fines Clause.⁷⁹

Using the *Bajakajian* test, the Indiana Supreme Court held the forfeiture of Timbs’ \$42,000 Land Rover violated the Excessive Fines Clause.⁸⁰ While Timbs’ culpability was sizable, having sold two grams of heroin to an undercover officer, the “forfeiture was highly punitive and thus overly harsh.”⁸¹ Timbs received the minimum possible sentence for his crimes when convicted and was an inexperienced, inconsequential drug dealer.⁸² Furthermore, the Court found that Timbs’s car was his only appreciable asset and its forfeiture would cause him great individual strife.⁸³ The Court evaluated the forfeiture under the totality of Timbs’s circumstances and determined that it would violate his constitutional rights.⁸⁴

C. Application of the Excessive Fines Clause for Public Service Employment Pensions Across the Circuit Courts

In spite of these recent decisions, there is still ambiguity over how to evaluate whether a forfeited asset is the property of the defendant such that the Eighth Amendment’s protections apply.⁸⁵ While the Supreme Court has not yet issued a direct ruling on the matter, its

⁷⁵ *Id.* at 334.

⁷⁶ *Id.* at 337.

⁷⁷ *Id.* at 337–38.

⁷⁸ *Bajakajian*, 524 U.S. at 338–39.

⁷⁹ *Id.* at 339–40.

⁸⁰ *See id.*; *State v. Timbs (Timbs III)*, 169 N.E.3d 361, 377 (Ind. 2021).

⁸¹ *Timbs III*, 169 N.E.3d at 376.

⁸² *Id.* at 375–76.

⁸³ *Id.* at 376.

⁸⁴ *See id.* at 376–77.

⁸⁵ *Compare Hopkins v. Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162–63 (10th Cir. 1998) (holding public pensions are not considered property of a public official when subject to statutory forfeiture) *and Hames v. City of Miami*, 479 F. Supp. 2d 1276, 1288 (S.D. Fla. 2007), *aff’d* 281 F. App’x 853 (11th Cir. 2008) *and State v. Anderson*, 256 A.3d 981, 990–91 (N.J. 2021), *with Public Emp. Ret. Admin. Comm’n v. Bettencourt*, 47 N.E.3d 667, 683 (Mass. 2016) (holding that a public pension subject to a statutory forfeiture retains its status as property of the public official).

holding in *Austin* requires that any property subject to forfeiture must be property of the forfeitee in order to transgress the Excessive Fines Clause.⁸⁶ Most notably, this is frequently at issue where the forfeited asset is a public service employment pension.⁸⁷ When considering this issue, the lower courts have looked to the definition of the forfeited asset under the applicable state property law to determine whether the Excessive Fines Clause applies.⁸⁸ These courts, however, have reached conflicting conclusions depending on which state property law they applied.⁸⁹ The U.S. Court of Appeals for the Tenth Circuit and the U.S. District Court for the Southern District of Florida held that statutory forfeiture provisions for public officials preclude any vested interest a public official may have in their pension when they apply.⁹⁰ In contrast, the Massachusetts Supreme Court has held that these statutory forfeiture provisions do not change the nature of the property interest a public official has in their pension; therefore, the forfeiture must not violate the protections of the Excessive Fines Clause.⁹¹

The Tenth Circuit's holding from 1998 relied on Oklahoma property law.⁹² In *Hopkins v. Oklahoma Pub. Emps. Ret. Sys.*,⁹³ the Tenth Circuit found that, pursuant to OKLA. STAT. TIT. 51 § 24.1(A), the pension forfeited had been "contingent on maintaining honorable service during [the public official's] tenure in office."⁹⁴ Hopkins served twenty-two years as an Oklahoma Congressman and then spent four subsequent years on the Oklahoma Corporation Commission, a statewide elected board that regulates Oklahoma's public utilities.⁹⁵ In 1994, a federal court convicted Hopkins for "accepting a bribe in connection with his vote in 1989 on a matter then being considered by the Corporation Commission."⁹⁶

Pursuant to the above statute, the Tenth Circuit concluded that Hopkins' conviction following retirement had removed any property

⁸⁶ See *Austin v. United States*, 509 U.S. 602, 614–15 (1993).

⁸⁷ See *Hopkins*, 150 F.3d 1155; see also *Hames*, 479 F. Supp. 2d 1276; *Anderson*, 256 A.3d 981; *Bettencourt*, 47 N.E.3d 667.

⁸⁸ *Anderson*, 256 A.3d at 990.

⁸⁹ See generally *Hopkins*, 150 F.3d 1155; *Hames*, 479 F. Supp. 2d 1276; *Anderson*, 256 A.3d 981; *Bettencourt*, 47 N.E.3d 667.

⁹⁰ *Hopkins*, 150 F.3d at 1162; *Hames*, 479 F. Supp. 2d at 1288.

⁹¹ *Public Emp. Ret. Admin. Comm'n v. Bettencourt*, 47 N.E.3d 667, 683 (Mass. 2016).

⁹² *Hopkins*, 150 F.3d at 1162.

⁹³ *Hopkins v. Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155 (10th Cir. 1998).

⁹⁴ *Id.* at 1162; OKLA. STAT. TIT. 51 § 24.1(A).

⁹⁵ *Id.* at 1157.

⁹⁶ *Id.* at 1157–58.

interest Hopkins had in his pension.⁹⁷ The Tenth Circuit stated the pension had not vested and therefore could not be considered the defendant's property.⁹⁸ It necessarily followed that if the forfeited property could not be considered the defendant's, the Excessive Fines Clause did not apply.⁹⁹ The Tenth Circuit declined to address whether the value of the defendant's pension that accumulated under a different job title—separate from the title under which the infraction occurred—had vested.¹⁰⁰ The forfeiture resulted in the estimated loss of over seven hundred thousand dollars of pension funds in addition to criminal fines in excess of seventy-thousand dollars and a jail term of thirty-three months.¹⁰¹

The U.S. District Court for the Southern District of Florida's holding, which was later affirmed by the Eleventh Circuit, was issued in 2007 and based on Florida property law.¹⁰² In *Hames v. City of Miami*,¹⁰³ Hames, a retired police officer, pleaded guilty to charges of conspiracy to obstruct justice and deprive citizens of their civil rights.¹⁰⁴ The officer gave false statements to cover up a string of police shooting deaths commonly referred to as the "I-395 shootings."¹⁰⁵ Hames and a fellow officer chased two suspects by car, ultimately shooting and killing both suspects.¹⁰⁶ The fellow officer then proceeded to place weapons—intended to appear as if they belonged to the suspects—at the scene of the crime to justify the shootings.¹⁰⁷ In the investigation following this event, Hames stated to investigators that the suspects possessed the planted weapons at the time of the shooting.¹⁰⁸

The District Court held that Hames's conviction stripped him of any property interest in his employment pension.¹⁰⁹ The District Court, drawing on the Tenth Circuit's *Hopkins* decision, recognized the specific offenses leading to complete forfeiture under the Florida statute if committed before the public official's retirement.¹¹⁰ Thus, the District

⁹⁷ *See id.* at 1162.

⁹⁸ *Hopkins*, 150 F.3d at 1162.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1163 (finding failure to raise argument at trial precluded the analysis).

¹⁰¹ *Id.* at 1158.

¹⁰² *Hames v. City of Miami*, 479 F. Supp. 2d 1276, 1280 (S.D. Fla. 2007), *aff'd*, *Hames v. City of Miami*, 281 F. App'x 853 (11th Cir. 2008).

¹⁰³ *Hames v. City of Miami*, 479 F. Supp. 2d 1276 (S.D. Fla. 2007).

¹⁰⁴ *Id.* at 1280.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1282.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1282.

¹⁰⁹ *Hames*, 479 F. Supp. 2d at 1288.

¹¹⁰ *Id.*

Court concluded that Hames’s “pension always was contingent on maintaining honorable service during [his] tenure in office.”¹¹¹ Consequently, because Hames committed one of the enumerated offenses, the Excessive Fines Clause could not apply to the forfeiture because it was not his property.¹¹² Hames’s forfeiture resulted in the loss of his lump sum pension payment in excess of \$282,000.¹¹³

The Massachusetts State Supreme Court came to a contradictory holding in 2016 in *Pub. Emp. Ret. Admin. Comm’n v. Bettencourt*¹¹⁴ based on its state property law.¹¹⁵ Like the defendants in the Tenth Circuit and Florida District Court cases, the lower court convicted the defendant in this Massachusetts case of a crime “involving violation of the laws applicable to [the employee’s] office,” and pursuant to a state statute, was required to forfeit his entire pension.¹¹⁶ Bettencourt was a police officer convicted of twenty-one counts of unauthorized access to a computer system.¹¹⁷ The Public Employee Retirement Administration Commission cited both *Hopkins* and *Hames* in addition to a ruling from the Pennsylvania Appellate Court in support of its position that Bettencourt’s conviction divested his property interest in his employment pension.¹¹⁸

The Massachusetts Supreme Court found these cases to be unpersuasive,¹¹⁹ recognizing “that a public employee who is a member of a retirement system holds an interest in retirement benefits that originates in a ‘contract’ and in substance amounts to a property right.”¹²⁰ It stated that while pension benefits may rightly be subject to forfeiture due to misconduct, the misconduct does not in itself transform the “fundamental character of the contract right or property

¹¹¹ *Id.* (quoting *Hopkins v. Oklahoma Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1162 (10th Cir. 1998) (citing *Austin v. United States*, 509 U.S. 602, 604 (1993))).

¹¹² *Id.* at 1287.

¹¹³ *Id.* at 1282.

¹¹⁴ *Pub. Emp. Ret. Admin. Comm’n v. Bettencourt*, 47 N.E.3d 667, 670 (Mass. 2016).

¹¹⁵ *Id.* at 675.

¹¹⁶ *Id.* at 670.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 675–76.

¹¹⁹ *Id.* at 676.

¹²⁰ *Bettencourt*, 47 N.E.3d at 675 (MASS. GEN. LAWS ch. 32, § 15 (2012), “involves the forfeiture of property.”) (quoting *Garney v. Massachusetts Tchr. Ret. Sys.*, 14 N.E.3d 922 (Mass. 2014)); *see also Collatos v. Boston Ret. Bd.*, 488 N.E.2d 401, 402 (Mass. 1986); *cf. MASS. GEN. LAWS ch. 208, § 34* (2011) (stating that property constituting marital estate is subject to division in divorce includes vested and unvested retirement benefits); *Krapf v. Krapf*, 786 N.E.2d 318, 323 (Mass. 2003) (mentioning that pension rights “often constitute valuable marital assets.”)).

interest.”¹²¹ Rather, the Massachusetts Supreme Court stated that MASS. GEN. LAWS ch. 32, § 15, like any other statutory provision requiring complete forfeiture of a state pension, is a penalty for misconduct.¹²² *Bajakajian* explicitly stated that a currency forfeiture qualifies as punishment sufficient to trigger protections under the Excessive Fines Clause when the forfeiture is “imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner.”¹²³ The Massachusetts Supreme Court found the state statute to operate as “an automatic legal consequence of conviction of certain offenses.”¹²⁴ The forfeiture, therefore, met both the vested property interest and payment as punishment requirements, constituting a fine under the Eighth Amendment.¹²⁵ Additionally, the Massachusetts Supreme Court found that the fine was excessive under the *Bajakajian* test.¹²⁶ The Court’s holding saved the defendant from a forfeiture loss of no less than \$659,000 for criminal misdemeanors, which in aggregate could have resulted in 630 days in jail and \$21,000 in fines.¹²⁷

III. HISTORY OF N.J.S.A. 43:1-3.1 AND NEW JERSEY PENSION GARNISHMENT

A. *New Jersey’s Test for Determining Forfeitures in Violation of the Excessive Fines Clause Prior to N.J.S.A. 43:1-3.1: Uricoli Factors*

In 2007, the New Jersey legislature adopted N.J.S.A. 43:1-3.1 as part of a legislative restructuring of public pension contracts.¹²⁸ Prior to the adoption of N.J.S.A. 43:1-3.1, the New Jersey Supreme Court’s 1982 holding in *Uricoli v. Board of Tr., Police and Firemen’s Ret. Sys.*,¹²⁹ operated as the standard for determining whether a public pension forfeiture transgressed the protection of the Excessive Fines Clause.¹³⁰ The *Uricoli* case implemented a balancing approach by listing factors that a court should consider in any public pension forfeiture.¹³¹ These factors are:

¹²¹ *Bettencourt*, 47 N.E.3d at 676.

¹²² *Id.* at 677.

¹²³ *Id.* (quoting *United States v. Bajakajian*, 524 U.S. 321, 328 (1998)).

¹²⁴ *Id.* (quoting *MacLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1057 (Mass. 2000)).

¹²⁵ *Public Emp. Ret. Admin. Comm’n v. Bettencourt*, 47 N.E.2d 667, 677 (Mass. 2016).

¹²⁶ *Id.* at 680–81.

¹²⁷ *Id.* at 678–79.

¹²⁸ *See generally* *State v. Anderson*, 256 A.3d 981, 993 (N.J. 2021).

¹²⁹ *Uricoli v. Bd. of Trs., Police & Fireman’s Ret. Sys.*, 449 A.2d 1267, 1276 (N.J. 1982), *superseded by statute*, N.J.S.A. 43:1-3.1.

¹³⁰ *Anderson*, 256 A.3d at 990–91.

¹³¹ *Uricoli*, 449 A.2d at 1275.

2023]

HALMA

107

- (1) the employee's length of service;
- (2) the basis for retirement, *i.e.*, age, service, disability, etc.;
- (3) the extent to which the employee's pension has vested;
- (4) the duties of the particular employment;
- (5) the employee's public employment history and record;
- (6) the employee's other public employment and service;
- (7) the nature of the misconduct or crime, including the gravity or substantiality of the offense, whether it was a single or multiple offense and whether it was continuing or isolated;
- (8) the relationship between the misconduct and the employee's public duties;
- (9) the quality of moral turpitude or the degree of guilt and culpability, including the employee's motives and reasons, personal gain, and the like;
- (10) the availability and adequacy of other penal sanctions; and
- (11) other personal circumstances relating to the employee bearing upon the justness of forfeiture.¹³²

Using this "flexible approach," the New Jersey Supreme Court held that Uricoli's forfeiture violated the constitutional prohibition against excessive fines.¹³³

Uricoli first worked as a patrolman for the police in the city of Orange in 1952 and finished his career as the Orange chief of police in 1976.¹³⁴ The trial court convicted Uricoli of a single ticket-fixing incident in 1972, where he had illegally disposed of a careless driving ticket issued to the son of his personal friend.¹³⁵ Uricoli was subsequently dismissed from the police department for his conviction and sentenced to a one-year suspended jail term and the option to pay a \$1,000 fine in lieu of two-years' probation.¹³⁶ When he submitted for disability retirement in 1979, the Police and Firemen's Retirement System board of trustees denied his application because of this conviction.¹³⁷

The New Jersey Supreme Court stated that pensions "are contractual in nature and constitute deferred compensation for services rendered."¹³⁸ They are "designed to induce individuals to enter public service through its guarantee of payment for services and retirement

¹³² *Id.* at 1275-76.

¹³³ *Id.* at 1276.

¹³⁴ *Id.* at 1268.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Uricoli*, 449 A.2d at 1269.

¹³⁸ *Id.* at 1272.

security.”¹³⁹ Further, public pensions are also shielded from change through collective employment negotiations under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-8.1.¹⁴⁰ The design of removal of public officials’ pension funds from negotiation guarantees that state employees’ entitlement to these funds are secure.¹⁴¹ The New Jersey Supreme Court also found that the forfeiture statute did not unambiguously require absolute forfeiture of Uricoli’s pension.¹⁴² Lastly, the Court found that other “adequate alternative penal sanctions were available and ha[d] been applied.”¹⁴³

The congruence of these factors led the New Jersey Supreme Court to conclude that total, automatic forfeiture of Uricoli’s pension funds was unwarranted.¹⁴⁴ After twenty years of service, he committed a single infraction of which there was no evidence of a “continuing criminal scheme or any showing of extensive corruption[.]”¹⁴⁵ Nor was there any personal benefit obtained from the transaction.¹⁴⁶ The misconduct, on balance, did not warrant the forfeiture.¹⁴⁷ After this holding, *Uricoli* subsequently became the standard under which pension forfeitures were evaluated outside clear legislative intent to require mandatory forfeitures.¹⁴⁸

B. Forfeitures Under N.J.S.A. 43:1-3.1

Adopted in 2007, N.J.S.A. 43:1-3.1 modified the standard for evaluation of a public official’s employment pension when subject to statutory forfeiture.¹⁴⁹ The legislature added the statute with the intent of removing discretion previously afforded to the judiciary when evaluating these forfeitures.¹⁵⁰ The statute’s adoption, in part, codified the New Jersey Supreme Court’s *Uricoli* holding and, in other parts,

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1273.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1274.

¹⁴³ *Uricoli*, 449 A.2d at 1276.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1275; *Debell v. Bd. of Trs., Pub. Employees’ Ret. Sys.*, 815 A.2d 997, 999 (N.J. Super. Ct. App. Div. 2003) (observing that Court’s eleven-factor test for determining forfeiture of public pension in *Uricoli*, 91 N.J. 62 (1982) was incorporated by Legislature in N.J.S.A. 43:1-3).

¹⁴⁹ *See generally* *State v. Anderson*, 256 A.3d 981, 993 (N.J. 2021).

¹⁵⁰ *Id.* (stating that judicial discretion was eliminated with the 2007 legislative decision).

removed the analysis of the *Uricoli* factors entirely upon the commission of certain offenses.¹⁵¹

Finding public official misconduct especially grave when the crime or offense “involves or touches such office, position or employment,”¹⁵² the New Jersey legislature acted unambiguously to exclude any fact-based balancing test entirely in such cases.¹⁵³ N.J.S.A. 43:1-3.1(a) now requires that pension forfeitures due to this form of misconduct are automatic.¹⁵⁴ This is without regard to severity, connection to other crimes, or any other evaluating factor—such as the *Uricoli* factors listed in N.J.S.A. 43:1-3.1(c).¹⁵⁵ In section 43:1-3.1(b), the legislature proceeds to list twenty-three separate infractions that result in complete pension forfeiture.¹⁵⁶ This statute effectively turns a public official’s pension into a quasi-contractual right to be given as a reward for the official’s good behavior.¹⁵⁷

IV. N.J.S.A. 43:1-3.1 DISREGARDS ECONOMIC PRINCIPLES AND QUANTIFIABLE PROPERTY INTERESTS

This quasi-contractual nature is unsupported by the way employment contracts and their attached pension benefits operate for the employees entitled to them. This is because it does not account for two separate types of monetary expenditures that should amount to a recognized property interest for an employee: first, that employer pension contributions are part of an employee’s salary, and second, forgone spending by an employee to obtain their employment contract benefits. Neglecting these two expenditures ignores foundational economic principles such as the time value of money, inflation, prevailing wages, and opportunity cost.

A. Time Value of Money

One can simply state the time value of money as the principle that money available today is worth more than money available tomorrow. In other words, “all deferred payment transactions include interest, either explicitly or impliedly.”¹⁵⁸ When money is accessible, it allows the

¹⁵¹ *Id.* at 992 (stating that the factors listed in N.J.S.A. 43:1-3(c) reflect the considerations from the *Uricoli* holding) (citing *Uricoli*, 449 A.2d at 1275-76)).

¹⁵² N.J.S.A. 43:1-3.1.

¹⁵³ *See Anderson*, 256 A.3d at 992-93.

¹⁵⁴ *Id.* at 993.

¹⁵⁵ *Id.*

¹⁵⁶ *See* N.J.S.A. 43:1-3.1(b)(1-23).

¹⁵⁷ *Anderson*, 256 A.3d at 993.

¹⁵⁸ Lawrence Lokken, *The Time Value of Money Rules*, 42 TAX L. REV. 1, 11 (1986).

holder to spend it at their leisure. If the money is inaccessible, the holder cannot spend the money until some later point when the money becomes accessible. The foregoing of this ability by the holder of the money to spend it at their leisure constitutes a loss of value to the holder.

Bonds provide a good illustration of this principle. Assuming that a corporation issues a ten-year bond with a face value of \$1,000 bearing no interest, meaning that in ten years, the purchaser of this bond will be able to present it to the corporation and receive \$1,000.¹⁵⁹ Because the bond bears no interest, no purchaser would pay \$1,000 in order to obtain this bond.¹⁶⁰ Doing so would result in the purchaser getting the exact same \$1,000 back after having lost the availability of those funds for ten years.¹⁶¹ Instead, the cost of the bond must be reduced—discounted—by some amount to attract purchasers.¹⁶² If, for example, the prevailing interest rate on other similarly situated investments is nine percent, the purchaser can expect to obtain this bond at the present-day value of \$415.¹⁶³ This is not unlike how a bank account operates.¹⁶⁴ If a \$415 deposit is placed into an account paying nine percent interest on both the original deposit and its accumulated interest, in ten-years' time the value of that deposit would be \$1,000.¹⁶⁵ The difference between the amount spent, \$415, and the face value of the bond, \$1,000, is the time value of the money connected to the purchase.

B. Inflation

Inflation, put simply, is the principle that the value, or purchasing power, of money erodes over time; or, in other words, \$100 spent today can buy you more than the same \$100 spent tomorrow. This phenomenon results from the “continuously rising prices, or equivalently, [the] continuously falling value of money.”¹⁶⁶ When money is printed, or overall demand in an economy increases, the prices of goods and services rise in response.¹⁶⁷ This is why the average movie ticket price in 1980 was \$2.89, while in 2019, the average price was

¹⁵⁹ *See id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Lokken, *supra* note 158, at 11.

¹⁶⁵ Lokken, *supra* note 158, at 11.

¹⁶⁶ David Laidler & Michael Parkin, *Inflation: A Survey*, 85 THE ECON. J. 741 (1975).

¹⁶⁷ *Id.* at 742.

2023]

HALMA

111

\$9.16.¹⁶⁸ The United States Federal Reserve (“FED”) targets a two percent overall increase in prices as its yearly inflation goal.¹⁶⁹

Returning to the bond purchasing example, let us say the same \$1,000 face value bond now carries an interest rate of six percent. Each year, the holder of that bond will receive an interest payment equal to six percent of the face value, sixty dollars. Let us also assume that there is now two percent inflation per year, as targeted by the FED. As a result of this inflation, the value of this bond and its interest payment do not retain the same purchasing power as they did at the time of the bond’s purchase. First, the purchasing power of the sixty-dollar interest payment per year decreases at a rate of two percent. This means that the first interest payment in one year, holding all else equal, will only be able to purchase \$58.82 worth of goods that it could have bought at the time the bond was purchased. This effect is compounding as the following year, two years from the purchase of the bond, the same sixty-dollar interest payment will only purchase \$57.67 worth of goods it could have at the time of the bond’s purchase and so on decreasing a further amount for each additional year. Second, the purchasing power of the \$1,000 face value of the bond also erodes due to inflation. In one year, the bond’s \$1,000 face value will only have the purchasing power of \$980 at an annual two percent inflation rate. In ten years, the purchasing power will only be \$820.35.

C. Prevailing Wage

Prevailing wages is the principle that an employee’s wage is not simply denoted by the salary in their paycheck.¹⁷⁰ Instead, an employee’s prevailing wage is made up of two components: the employee’s basic hourly rate or salary plus their fringe benefits.¹⁷¹ Fringe benefits are any compensation provided to an employee in addition to their paycheck, such as life, disability, and health insurance, tuition reimbursement, education assistance, retirement benefits, etc.¹⁷² The prevailing wage rate considers these factors because this is the

¹⁶⁸ John Schmidt, *How Inflation Erodes the Value of Your Money*, FORBES, <https://www.forbes.com/advisor/investing/what-is-inflation/> (Aug. 5, 2022, 5:07 AM).

¹⁶⁹ Jamie McGeever, *Column: Fed’s Inflation Target Ambiguity Risks Market Misstep*, REUTERS, <https://www.reuters.com/business/finance/feds-inflation-target-ambiguity-risks-market-misstep-2022-06-30/> (June 30, 2022, 9:00 PM).

¹⁷⁰ See generally U.S. DEPT. OF LABOR, *PREVAILING WAGE RESOURCE BOOK, DBA/DBRA COMPLIANCE PRINCIPLES* (May 2015).

¹⁷¹ See generally *id.*

¹⁷² See generally *id.*

actual cost by the employer to retain the services of the employee.¹⁷³ If an employer were to reject providing fringe benefits to an employee, the market would require that the employer pay a higher paycheck salary.¹⁷⁴ This is because the employee would receive more value for their work from an employer also providing fringe benefits.¹⁷⁵ In order to offset this and attract employees, the employer would offer a higher salary to the employee in lieu of these additional benefits.¹⁷⁶

D. Opportunity Cost

The last principle, opportunity cost, is the lost value of the next-best alternative after deciding.¹⁷⁷ Stated another way, in making a decision, one must decline other possible options in favor of that choice. The value of these forgone choices is the opportunity cost of that decision.¹⁷⁸ For example, to eat at one restaurant for lunch, you must forgo eating at another restaurant, or to wear one pair of shoes, you must forgo wearing another pair. This cost associated with the loss of other opportunities exists with any decision.

In the case of employment, when an employee selects to work at one job, they incur the opportunity cost of declining other possible employment. Rather than accept the terms of other jobs with different salaries and sets of benefits, an employee forgoes these other options to accept the compensation of the employer they choose to work for. In the case of pension contributions, this opportunity cost exists because of other opportunities sacrificed when making the contribution. This is money that, at the time of the contribution, could have been spent investing, buying goods, or even used for leisure, but instead, these options are relinquished to provide pension benefits at some future date.

E. Disregarding of Economic Principles

Pension contributions are two-sided transactions. One side entails the contributions made by the employer, and the other are those contributions made by the employee. Each of these contributions is affected by the abovementioned principles and results in a tangible

¹⁷³ See generally *id.*

¹⁷⁴ See generally *id.*

¹⁷⁵ See generally *id.*

¹⁷⁶ U.S. DEPT. OF LABOR, *supra* note 170.

¹⁷⁷ Doreen Fagan, *Real-Life Examples of Opportunity Cost*, FED. RESRV. BANK OF ST. LOUIS. (Jan. 29, 2020), <https://www.stlouisfed.org/open-vault/2020/january/real-life-examples-opportunity-cost>.

¹⁷⁸ *Id.*

2023]

HALMA

113

property loss to the employee. The time value of money and inflation principles impact both types of contributions generally, while the prevailing wage principle applies to employer contributions, and opportunity cost applies to the employee contributions.

Beginning with those principles affecting both contributions generally, these principles illustrate that the longer ago someone makes a pension payment, the larger the tangible property interest taken from an employee forced to forfeit pension funds. The time value of money creates a cost to the employee because both the employer's and employee's contributions are present-value cash expenditures made subject to pension payment schedules. Therefore, each payment has a time value associated with it. As each payment occurs in the present time, said payment's value erodes, or alternatively, its cost increases to the employee the longer ago it occurred. This increase in cost results from the pension payment being inaccessible to the employee for a longer period. The same sort of effect can be said to occur because of inflation. The longer ago a contribution occurred, the more its value has been eroded by inflation. Just as the time value of money, inflation acts to decrease the present value of prior contributions, although maintaining the same absolute value.

The erosion of value over time means that when an employee receives the absolute value of their pension funds, it ignores the lost value associated with the inability to have and use these funds in the present time. This lost value compounds further when considering that only the absolute value of the employee's contributions returns subject to forfeitures under N.J.S.A. 43:1-3.1(c).¹⁷⁹ This lost property value to the employee manifests itself as a loss of their prevailing wage for employer contributions and opportunity cost for their own contributions.

Prevailing wage necessitates that employer contributions are a form of additional compensation forgone and diverted from the employee's use because it is a cost associated with their employment, or alternatively, a benefit of their job. Therefore, these contributions constitute the loss of a present, vested property interest: a higher wage. When an employee accepts this deferred form of payment as part of their employment contract, it comes at the forfeiture of a higher wage. Subject to the time value of money and inflation, the longer ago these contributions occurred, the higher this vested value forgone by the employee.

¹⁷⁹ N.J.S.A. 43:1-3.1(c).

Loss of an employee's own contributions, however, create opportunity cost for the employee to invest their wages elsewhere. Employees forgo current expenditures of other economic benefits in the form of investments, leisure, and other similar present-value possibilities when making mandatory contributions to their pension funds. Further, subject to the time value of money and inflation, the value of opportunities forgone earliest by the employee are greatest. Their value is not the absolute value of the contributions in the present day.

The New Jersey Supreme Court's focus of its analysis on whether the asset has vested to determine its status as property of the employee ignores this lost present value of lost wages from the employee entirely. This is not to say that a public employee should be entitled to their pension's entire value upon the commission of a predicate statutory offense, but it does follow that this taking does constitute a loss of property on the part of the employee that should be applied to the excessive fines analysis.

This understanding of present property value finds support in other New Jersey Supreme Court holdings pertaining to pension assets. As recently as 2015, in *Burgos v. State*,¹⁸⁰ the New Jersey Supreme Court reiterated the oft-rendered understanding of public pension funds as deferred compensation, which the employee earned as part of their current wages.¹⁸¹ A public pension fund, in part, acts to compensate for services already rendered.¹⁸² The New Jersey Supreme Court previously discussed public pension forfeiture policy as "penal in nature and has as its objectives the same considerations underlying all such schemes."¹⁸³

New Jersey family law cases moreover express this view of public pension contracts. *Whitfield v. Whitfield*,¹⁸⁴ a leading case on equitable distribution decided in the state appellate division, found that pension plan interest accrued during a marriage "unquestionably" constitutes property, even before vesting.¹⁸⁵ While the court in this case still looked to the relevant statutory language to determine whether the pension was the property of the employee, it recognized that a pension's future

¹⁸⁰ *Burgos v. State*, 118 A.3d 270, 274 (N.J. 2015).

¹⁸¹ *Burgos*, 118 A.3d at 274.

¹⁸² See *State v. Anderson*, 256 A.3d 981, 996 (N.J. 2021) (Albin, J., dissenting) (stating "[p]ensions for public employees . . . are in the nature of compensation for services previously rendered and act as an inducement to continued and faithful service.") (citing *Steinmann v. Dep't of Treasury*, 562 A.2d 791, 795 (N.J. 1989) (quoting *Geller v. Dep't of Treasury*, 252 A.2d 393 (N.J. 1969))).

¹⁸³ *Eyers v. State, Bd. of Trs.*, 449 A.2d 1261, 1264 (N.J. 1982).

¹⁸⁴ *Whitfield v. Whitfield*, 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987).

¹⁸⁵ *Id.* at 991.

2023]

HALMA

115

benefits come at the cost of current wages.¹⁸⁶ The New Jersey Supreme Court echoed this sentiment in *L.M. v. Div. of Med. Assistance and Health Servs.*,¹⁸⁷ stating that public pension plan funds are “additional compensation” for current work by the employee, therefore constituting a property right acquired during a marriage.¹⁸⁸

The reasoning in these holdings extends beyond mere statutory language and acknowledges a present value interest in an employee’s pension funds predicated on these lost additional wages and lost opportunity costs. Additionally, The New Jersey Appellate Court and Justice Albin, who authored the dissent in *Anderson*, found these case precedents to be dispositive of the property issue in *Anderson*.¹⁸⁹ Both also took great exception to the idea that N.J.S.A. 43:1-3.1(a) makes public officials’ pensions property for one purpose, yet not for another whether predicated on the statutory language used or not, with the explicit objective of circumventing constitutional protections intended “to limit the government’s power to punish.”¹⁹⁰

V. UNJUST CONSEQUENCES OF COMPLETE DEFERENCE AS A PRIMARY POLICY – STATE V. ANDERSON

The New Jersey Supreme Court’s holding in *Anderson* is enough to shock the conscience by any standard. While permitted to retain the absolute value (i.e., the initial amount he contributed) of his mandatory contributions, Bennie Anderson lost all remaining value in his pension fund, valued at over one million dollars, absent any constitutional analysis.¹⁹¹

Anderson was first employed by Jersey City in 1978.¹⁹² After holding a variety of different positions, he took his final post in 1990 as an employee in the Tax Assessor’s office.¹⁹³ By the time of his

¹⁸⁶ *Anderson*, 256 A.3d at 996 (Albin, J., dissenting) (citing *Geller v. Dep’t of the Treasury*, 252 A.2d 393, 396 (N.J. 1969); *Spina v. Consol. Police & Firemen’s Pension Fund Comm’n*, 197 A.2d 169, 174 (N.J. 1964)).

¹⁸⁷ *L.M. v. Div. of Med. Assistance & Health Servs.*, 659 A.2d 450 (N.J. 1995).

¹⁸⁸ *Id.* at 458.

¹⁸⁹ *See Anderson*, 256 A.3d at 996–97 (Albin, J., dissenting); *see also State v. Anderson*, 230 A.3d 324, 332–33.

¹⁹⁰ *Id.* at 996–97 (Albin, J., dissenting) (quoting *Austin v. United States*, 509 U.S. 602, 609 (1993)).

¹⁹¹ *Anderson*, 256 A.3d at 987 n.4 (acknowledging that Anderson’s “individual contributions toward his pension are returned upon forfeiture.”); *Anderson*, 256 A.3d at 995 (Albin J. dissenting) (valuing the pension at “over one million dollars”).

¹⁹² *State v. Anderson*, 230 A.3d 324, 327 (N.J. Super. Ct. App. Div. 2020).

¹⁹³ *Id.*

retirement, Anderson earned pension disbursement payments of \$60,173.67 per year.¹⁹⁴

In December of 2012, twenty-two years after taking his post, a Jersey City property owner approached Anderson seeking a zoning board variance to convert his property from a two-unit dwelling to a three-unit one.¹⁹⁵ In exchange for a mere three hundred dollars, Anderson agreed to change the tax description of the property without the necessary approval from the Jersey City Zoning Board.¹⁹⁶

Anderson retired in 2017 after working thirty-eight and one-half years for Jersey City.¹⁹⁷ Later that year, Anderson was charged with violating 18 U.S.C. § 1951(a)—interference with commerce by extortion under color of official right.¹⁹⁸ The maximum sentence for such an offense is twenty years and carries a maximum fine of either \$250,000, twice the pecuniary benefit gained, or twice the pecuniary benefit lost to others, whichever is greatest.¹⁹⁹ After pleading guilty, the United States District Court for the District of New Jersey sentenced Anderson to two years of probation, five months of home detention, a fine of three thousand dollars, and a special assessment of one hundred dollars.²⁰⁰

The Board of Trustees of the Employees' Retirement System of Jersey City then held a hearing to adjust Anderson's pension payments subject to the new infraction.²⁰¹ The hearing resulted in a reduction of the payout from \$60,173.67 to \$47,918.76 per year in annual disbursement compensation.²⁰² Then, in 2019, the New Jersey State Legislature filed an action in the state superior court to have Anderson's pension forfeited entirely subject to N.J.S.A. 43:1-3.1(a).²⁰³ The Superior Court held the 2007 amendment now preempted the *Uricoli* standard, thus removing judicial discretion to evaluate a pension forfeiture when the forfeitee committed any of the twenty-three enumerated infractions in N.J.S.A. 43:1-3.1(b).²⁰⁴ The Court found the statute unambiguously

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Anderson*, 230 A.3d at 327 (declaring that “[d]efendant was promptly charged and pled guilty to a single count of 18 U.S.C. § 1951(a).”).

¹⁹⁹ *State v. Anderson*, 256 A.3d 981, 985–86 (N.J. 2021).

²⁰⁰ *Id.* at 986.

²⁰¹ *Id.*

²⁰² *State v. Anderson*, 256 A.3d 981, 985–86 (N.J. 2021).

²⁰³ *Id.* at 984.

²⁰⁴ *Id.* at 993.

2023]

HALMA

117

intended that the commission of certain offenses result in mandatory and absolute pension forfeiture.²⁰⁵

Finding *Uricoli* preempted, the New Jersey Supreme Court exhibited absolute deference to the legislature's redefining of an employee's pension as a quasi-contractual right.²⁰⁶ The Court asserted that a public employee's interest in their pension funds is entirely rooted in the statute and they have no protected property interest in those funds.²⁰⁷ Since the defendant had committed his crime after the 2007 amendment to the pension law, absolute forfeiture was warranted.²⁰⁸ The Court drew additional support for its quasi-contractual right approach from the *Hopkins* and *Hames* holdings, each of which found pension forfeitures pursuant to state statutes did not implicate the Excessive Fines Clause.²⁰⁹ The Court also found any reliance on family law to be misplaced, stating, "[t]hat case law does not and cannot convert a public pension into a nonforfeitable property right."²¹⁰ Anderson was not required to forfeit the absolute value of his contributions, but he was required to forfeit all employer contributions and all appreciated gains on his own money.²¹¹ This single infraction after almost four decades of employment cost him over one million dollars in retirement funds.²¹²

The New Jersey Supreme Court's reasoning that the state family case law "does not and cannot convert a public pension into a nonforfeitable property right" is misplaced.²¹³ The family case law makes immediately apparent what is evident in all employment contracts: employees have a quantifiable property interest in their future delayed benefits. It does not make the asset a "nonforfeitable property right" but instead merely provides that any taking of the employee's retirement funds be subject to constitutional prohibitions against gross proportionality.²¹⁴ The only mechanism altering the

²⁰⁵ *Id.* at 992.

²⁰⁶ *See id.* at 993.

²⁰⁷ *Id.*

²⁰⁸ *Anderson*, 256 A.3d at 993.

²⁰⁹ *See id.* (asserting that "New Jersey's approach to treat public pensions as quasi-contractual rights rooted in statute, and not as property rights, is consistent with the majority of courts to have addressed this issue.").

²¹⁰ *Id.* at 994.

²¹¹ *Id.* at 987 n.4 (acknowledging that Anderson's "individual contributions toward his pension are returned upon forfeiture").

²¹² *Id.* at 995, 998 (Albin, J., dissenting).

²¹³ *Id.* at 994.

²¹⁴ *See United States v. Bajakajian*, 524 U.S. 321, 324 (1998) (holding failure to report the transport of more than \$10,000 in currency in violation of 31 U.S.C.S. 5316(a) was insufficient for respondent to forfeit his \$357,144 pension and would violate the

nature of any property right is the statutory language of N.J.S.A. 43:1-3.1(a), which redefines an employee's pension as a reward and not as the employee's retirement savings.

From a practical perspective, this strained interpretation of a public official's employment contract pension makes even less sense when assessing how these pensions operate. Looking at Jersey City Employees' Retirement System ("JCERS") Financial Statements for December 31, 2019, and 2018, Note Six of the document states that the system secures available interest rates for present-day loans against an employee's vested pension benefits.²¹⁵ Vesting, as defined in the JCERS's member handbook, occurs after attaining "10 years of service credit" and "[b]eing vested in the [JCERS] means that you are guaranteed the right to receive a retirement benefit."²¹⁶ If there was not an ascertainable present interest in these funds, New Jersey state employees would be incapable of securing loans against their vested value, as the State allows. Further, the Department of Labor states that defined benefit plans (JCERS is a defined benefit pension plan) require that the vested benefit accrual be "the amount of contributions and earnings that have accumulated... minus any fees charged to your account by your plan."²¹⁷ It is this exact interest that should be subject to the Excessive Fines Clause analysis.

Note Eight of the JCERS's Member Handbook also details how the funding of the pension fund is to occur, providing annual percentage rates for all members.²¹⁸ The New Jersey Supreme Court found that Anderson was entitled to the total value of his contributions, but, as stated previously, this does not fairly equate to the actual value taken from Anderson.²¹⁹ Anderson's deferred payment schedule, in addition to any acknowledged present-day discount rate, included a lost

Excessive Fines Clause, as the amount of forfeiture must be in proportion to the gravity of the offense).

²¹⁵ CITY OF JERSEY CITY, CITY OF JERSEY CITY EMPLOYEE'S RETIREMENT SYSTEM NOTES TO FINANCIAL STATEMENTS DECEMBER 31, 2019 AND 2018 16 (2020), http://publicplansdata.org/reports/NJ_JERSEYCITY-MERP_CAFR_2019_202.pdf.

²¹⁶ *Id.*; see N.J. DEP'T OF PENSION AND BENEFITS, PUBLIC EMPLOYEES' RETIREMENT SYSTEM (PERS) MEMBER GUIDEBOOK 13 (2022), <https://www.nj.gov/treasury/pensions/documents/forms/sp0774.pdf> (noting the borrowing limit for these loans is one-half of the of the employee's posted contributions to the account).

²¹⁷ U.S. DEP'T OF LABOR EMP. BENEFITS SEC. ADMIN., FAQs ABOUT RETIREMENT PLANS AND ERISA 3, <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf>.

²¹⁸ CITY OF JERSEY CITY, *supra* note 215.

²¹⁹ *State v. Anderson*, 256 A.3d 981, 986-87 at n.4 (N.J. 2021) (declaring that "[a]s readily acknowledged by the State, defendant's individual contributions toward his pension are returned upon forfeiture.").

2023]

HALMA

119

economic opportunity cost associated with the funds. Anderson's required payments took from him the opportunity for other expenditures and investments during his employment to fund his pension returns.²²⁰ The design of this funding system intends to be offset by the employee's purchase of a present property interest in future pension benefits. It is not some intangible reward set aside for good behavior; it is a vested interest in a future payout intended to protect the retirement of the employee.

Finding that N.J.S.A. 43:1-3.1(a) violates the Excessive Fines Clause does not and would not remove forfeiture as an appropriate remedy for certain instances of misconduct.²²¹ It would only disallow the blanket prohibition requiring absolute forfeiture of a public employee's pension when committing any of the twenty-three separate infractions listed in N.J.S.A. 43:1-3.1(a) without any constitutional analysis under the Excessive Fines Clause.²²² As shown in the *Anderson* decision, these infractions sometimes capture criminal behavior that creates a grossly disproportional payment as criminal punishment.²²³

Bennie Anderson paid into the State pension fund for over thirty-eight years before becoming eligible to receive disbursement payments.²²⁴ A one-time infraction made after thirty-three years of faithful service to the city resulted in the absolute forfeiture of one million dollars in his pension account.²²⁵ Anderson forwent higher wages or other employment benefits and purchases of other possible investments subject to the property right in his pension contract.²²⁶ The state commandeered Anderson's property right without a rational evaluation of his ascertainable property interest.²²⁷ The holding in Anderson's case ignores all of these facts in favor of finding that N.J.S.A. 43:1-3.1(a) can redefine fundamental protections at its leisure.²²⁸

²²⁰ See generally *State v. Anderson*, 256 A.3d 981 (N.J. 2021).

²²¹ See *Anderson*, 256 A.3d at 998 (Albin, J., dissenting) (reviewing Anderson's fine to see if it is in violation of gross disproportionality standard after implicating the Eighth Amendment).

²²² See generally *State v. Anderson*, 256 A.3d 981 (N.J. 2021).

²²³ See *id.* at 998–99 (Albin J. dissenting) (noting Anderson only received a benefit of \$300 for accepting one bribe throughout his almost four-decade career).

²²⁴ *Id.* at 985.

²²⁵ See *id.* at 994, 999 (Albin, J., dissenting).

²²⁶ See generally *id.* at 999 n.4.

²²⁷ See *Anderson*, 256 A.3d at 994 (Albin, J., dissenting) (stating that “the majority has denied Anderson the protections afforded by the Federal Constitution by failing to call a fine by its true name and by characterizing state law in a way that seemingly evades federal review.”).

²²⁸ See *id.* at 992–93.

VI. FINES DEFINED BY PURPOSE AND EFFECT PROTECT RATIONAL, WELL-
UNDERSTOOD PROPERTY RIGHTS

Defining a fine by its purpose and effect to determine its status as payment and punishment under *Bajakajian* best fits the protections the holding intended to support.²²⁹ Under a purpose and effects test, the New Jersey Supreme Court would ask what the legislative purpose was in enacting any asset forfeiture when determining its punitive nature. The public employee's reduction in useable, tangible value presently afforded to him via the future asset in addition to any value foregone, such as use as collateral for loan funds and other financial opportunities, would determine the effect of the fine.

Naturally extending the Supreme Court's holding in *Bajakajian*, which requires that the fine be punishment for a convicted wrong, a court should begin by evaluating the purpose of a fine to determine its implication of the Excessive Fines Clause.²³⁰ If the law intends a civil forfeiture as a punishment, the law should evaluate it as one.²³¹ The New Jersey Supreme Court should not allow the legislature to stretch the statutory language to avoid this rational conclusion.²³² As the United States Supreme Court stated in *Austin*, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment[.]"²³³ By evaluating the purpose of the monetary criminal penalty, and not simply how the legislature has chosen to describe the governmental taking, the New Jersey Supreme Court would better adhere to the United States Supreme Court's prior holdings on the Excessive Fines Clause.²³⁴

The effects analysis ensures an assessment of property rights, such as those present in a pension as part of a public employment contract. The analysis bars the legislature from describing what does and does not constitute property of the defendant solely based on statutory diction.²³⁵ Instead, the court would undergo the necessary evaluation,

²²⁹ See *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (stating a fine is "imposed at the culmination of a criminal proceeding . . . and it cannot be imposed upon an innocent owner").

²³⁰ *Id.*

²³¹ See *Anderson*, 256 A.3d. at 998-99 (Albin, J., dissenting).

²³² See *id.* at 999.

²³³ *Austin v. United States*, 509 U.S. 602, 610 (1993) (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)).

²³⁴ See, e.g., *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019); *Bajakajian*, 524 U.S. at 328; *Austin*, 509 U.S. at 609-10.

²³⁵ Compare *Hopkins*, 150 F.3d at 1162-63 (holding public pensions are not considered property of a public official when subject to statutory forfeiture) and *Hames*,

2023]

HALMA

121

which should attend any asset forfeiture in determining what property rights are present and who has them. If a monetary criminal penalty garnishes present property interest, measuring the effect of such a penalty will capture this interest. This analytical concept best promotes economic consistency and rationality. It makes the law easiest to understand and applies it more evenly across varying factual structures because the state property law is rooted in this appreciable interest, as are pension property rights generally.

VII. CONCLUSION

The New Jersey Supreme Court should find that N.J.S.A. 43:1-3.1(a) violates both the United States and New Jersey constitutional prohibitions against the levying of excessive fines. The New Jersey Supreme Court's decision in *Anderson* does not properly capture the intended scope of the *Timbs* holding incorporating the Excessive Fines Clause against the states as a fundamental right. This is because the Court found the statutory language controlling as opposed to defining a fine by its operative nature. By defining a fine's status as a payment for punishment under the purpose of its implementation and effect of its enforcement, the Court would promote proper protection of constitutional rights.

This is not to suggest that the legislature can never enact laws curtailing public official's malfeasance. Nor is this to suggest that the legislature not implement possible pension forfeiture for said malfeasance. This Comment instead suggests that criminal punishments, which are intended to be punitive in nature and strip away a tangible present value—a property interest—from a defendant, be subjected to the test against gross disproportionality.

Further, the New Jersey Supreme Court should recognize a protected property interest in all employment contract pensions as they exist through deferment of present wages and is supported by how such pension funds operate.

479 F. Supp. 2d at 1288 *and Anderson*, 256 A.3d at 990–91, *with Bettencourt*, 47 N.E.3d at 670 (holding that a public pension subject to a statutory forfeiture retains its status as property of the public official).