John: Hello and welcome to Episode 9, the final episode of Season 1 of Bound By Oath. If this is your first time listening, please back up and start with Episode 1. Then again, if this next sentence makes sense to you, by all means plow ahead.

> **Justice Ginsburg**: The Eighth Amendment's Excessive Fines Clause, we hold today, is an incorporated protection applicable to the states under the Fourteenth Amendment's Due Process Clause.

John: That's Justice Ruth Bader Ginsburg reading from her opinion for a unanimous court in *Timbs v. Indiana*, an IJ case. Prior to the 14th amendment, the Bill of Rights did not apply to the states. If a state government imposed an excessive fine or violated the right to free speech, the federal constitution had nothing to say about it. You could go to state court to assert your rights under state constitutions, but before and immediately after the Civil War, state courts were not doing a great job of protecting individual rights.

> **Sen. Jacob Howard:** Does a Unionist or a freedman stand much chance for justice in the state courts?

> **Dexter Clapp:** I think not, emphatically. … Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, and of the very many cases of similar treatment of Union citizens in North Carolina, I have never yet known a single case in which the local authorities or police or citizens made any attempt … to redress any of these wrongs or to protect such persons.

John: The Framers of the 14th Amendment wanted to radically alter the structure of the Constitution by giving the federal government the ability to enforce the rights in the Bill of Rights against the states.

> **Sen. Jacob Howard**: To these privileges and immunities, whatever they may be -- for they are not and cannot be fully defined in their entire extent and precise nature -- to these should be added the personal rights guaranteed and secured by the first eight Amendments of the Constitution.

John: But the Supreme Court had other ideas.

> **Prof. Michael McConnell**: Now, unfortunately and very early on the US Supreme Court read the privileges and immunities clause as meaning very little. And so for a very long period of time there was precedent in the Supreme Court that it did not incorporate the Bill of Rights against the states.

John: On this episode, we'll talk about how the Supreme Court began to reverse course on that -- amendment by amendment, clause by clause, case by case. And we'll talk about the latest clause to be incorporated, the Eighth Amendment's Excessive Fines Clause, which the Supreme Court officially declared incorporated one year ago today -- on February 20, 2019 in Timbs v. Indiana. If you are a civil rights litigator or constitutional law enthusiast, that is a pretty exciting development. But if you're someone caught up in the buzzsaw of the criminal justice system, it may be a lifeline.

> **ABC7**: Veronica and Jerome Davis had their car in a shop when one of the repairmen took it for a drive and was later arrested; the car impounded. Davis has been unable to get her car back for nearly a year.

John: Jerome Davis and Veronica Walker-Davis dropped off their car for repairs, and an employee took it for a joyride without their permission. He was caught driving on a suspended license, and the city of Chicago seized the car -- and refused to release it unless the Davises paid more than $1,000. By the time they'd come up with the money, the city had disposed of the car.

> **Veronica**: I feel like I'm a criminal -- a victim turned into a criminal. That's how the city of Chicago made me feel.

John: Might that be an excessive fine?

Wesley Hottot: As a society, we're incentivizing police officers to punish people with valuable property rather than to police for health and safety. give them a direct profit incentive to take property from people. At the federal level, and in most states, police and prosecutors keep 100% of the proceeds of property that they forfeit.

> **Reporter**: That's when the officer confiscated the cash -- $22,000 in all -- based on his suspicion that it was drug money. … But you had no proof that that money was being used for drug trafficking, correct? No proof. **Cop**: And he couldn't prove that he -- it was

legitimate. **Citizen**: I told him that I had active bids on Ebay. That I was trying to buy a vehicle. And they just didn't want to hear it.

Hilda Brucker: I was called into court with no warning and I was sentenced for having crumbles and cracks in my driveway, which is so ridiculous and ludicrous. No one ever asked me to fix the driveway. This is a neighborhood of very old driveways.

John: In 2016, the city of Doraville, Georgia fined a resident and ordered her serve six months of probation, which came with conditions like avoiding alcohol and meeting with a probation officer on pain of incarceration. Over a cracked driveway.

Hilda Brucker: Even before this happened to me I would be out on my morning walk and I would see code enforcement officers skulking around people's front yards taking pictures.

John: In Dunedin, Florida, the city fined a 69-year-old retiree for not cutting his grass for a few months. He was out of state and he hired someone to cut it, but it didn't get done.

Andrew Ward: He thought the fine might be $500 dollars. It was $500 *per day*. In total, the city fined Jim more than $29,000 dollars. He asked the city to reconsider but it refused and yesterday it voted to authorize foreclosure. The city could have just mowed the lawn and sent a bill.

John: Might that be be an excessive fine?

John: In Pagedale, Missouri code enforcement officers ticketed thousands of residents for having mismatched blinds, not having curtains on their basement windows, or failing to have a screen on every window or door facing the outside. They also ticketed people for things that aren't against the housing code like cracked driveways, chipped paint or unstained fences.

> **Vice News**: Valarie Whitner … has received roughly $1,200 in fines annually for the past eight years. **Valarie**: Everybody in Pagedale is in court on Thursday. So you don't have to bother to go to your neighbors' house to see 'em. Go to the court. You'll see all your neighbors…. He gave me a ticket because he wanted me to paint my garage – the brick. Who paints them kind of bricks?

John: Valarie couldn't afford to pay the citations and also make the repairs inspectors demanded, so the city threatened to demolish her home even though it's not dangerous in any way. Might that be an excessive fine?

> **Reason**: As the local newspaper the Desert Sun first reported, the city of Coachella is holding Garcia responsible for paying the cost of his own prosecution.

John: Cesar Garcia built an addition on his home without a permit. He pled guilty, tore down the addition, paid a $900 dollar fine, and then he rebuilt with the proper permits. But then six months later, he got a surprise. A bill for $21,000 dollars from a private law firm hired by the city of Coachella, California to handle the city's code enforcement prosecutions.

Reason: Since Garcia couldn't afford to pay $21,000 in prosecutor's fees within a month the city put a lien on his house. **Garcia**: Was like, you're going to lose your house because you're not paying. It's my house. This is where I live. This is where we feel safety here.

John: Might that be an excessive fine?

Melisa Ingram: I'm missing doctor's appointments. I'm missing work.

John: Melisa Ingram lent her car to her now ex-boyfriend who got pulled over for slowing down in an area of Detroit known for prostitution. He was never charged with a crime, and Melisa was certainly innocent, but prosecutors won't give her back the car unless she pays over a $1,000 dollars in fees, which she can't afford.

Melisa Ingram: I need my car because my job is suffering...my way of life is suffering.

John: Tammy Williams broke the law. In 1997. She wrote four checks that bounced in order to buy groceries and other essentials. She never committed any new crimes, but for 20 years Sherwood, Arkansas police arrested her over and over for failing to pay court fees and fines stemming from the bounced checks.

Tammy's attorney at oral argument: May it please the court … for 20 years, Tammy Williams, a hardworking woman, a dutiful wife, devoted mother, was hopelessly ensnared in an endless byzantine money trap conceived by the city of Sherwood Arkansas.

John: Police accosted her on the street and at her work demanding money on the spot on pain of arrest. She was arrested her in front of her children and at family gatherings. Each trip to jail or to court resulted in new fines and fees. And even though she paid thousands of dollars and never reoffended, she couldn't get clear of the debt.

Wesley Hottot: That's not good police work. Good police work focuses on the points of leverage where you can ensure that the community remains safe. Good police work focuses on dangerous criminals that commit violent crimes first. And from there focuses on enforcement of less dangerous nonviolent things. But our laws put police in a position of like a Roman army that's being told to live off the land. That has a number of deleterious effects. Not only does it distort the priorities of law enforcement in terms of health and safety, but particularly for heavily policed communities. It erodes trust between law enforcement and the people that they're policing. And it makes everything harder for everyone. It makes it harder for the community to get the kind of police work that they need to remain safe and happy. And it puts police in a position where no one trusts them.

> **Larry Thompson**: And I'm like why would I have a warrant for my arrest? What did I do? Little did I know that they was charging me for not being able to pay money.

John: Orlando police arrested 61-year-old Larry Thompson, who has chronic obstructive pulmonary disease, for not paying court-ordered fines and fees arising out of a conviction for driving on a suspended license.

Larry Thompson: I never knew they would arrest a person in my condition for not being able to pay money. … I went to jail for this already. I did five months in jail. I thought that was payment for what I've done. So I can't see them keep arresting me over and over … when I can't get oxygen in jail like I need it. So they actually issuing me a death sentence.

John: Might that be an excessive fine?

WDRB: WDRB News first reported on the lawsuit in 2017. An inmate spent 14 months in the Clark County, Kentucky jail for a crime he says he never committed. **Lawyer**: The charges against him were dismissed. **News anchor**: But … the jail charged him for his stay. … **Lawyer**: and they sent him a $4,00 bill.

John: Might that be an excessive fine?

NPR: NPR got one year of jail records for Benton County, Washington. … We counted the people who went through the court that handles misdemeanor cases. And we found that, on a typical day, about 25 percent of those people in the county jail, are there not for their misdemeanor offenses but because they failed to pay the court fines and fees.

John: Might that be excessive? You would think so, but surprisingly that's a question the Supreme Court has only just begun to consider 150 years after the ratification of the 14th Amendment.

BBO montage -- justices saying the oath

John: It's 1897 -- 30 years after the ratification of the 14th Amendment. After several severe economic recessions and years of violent labor strikes, the Supreme Court seems to believe that free speech, the right to bear arms, and other rights in the Bill of Rights could embolden dissenters and threaten the Republic. And so, every time a plaintiff has asked the Court to enforce a right in the Bill of Rights against a state or local government, the Supreme Court has turned them aside. But then the Court opens the door to incorporation -- just a little -- in a case where you'd be hard pressed to find the possibility of a threat to public order.

Prof. Robert Thomas: The Chicago, Burlington, and Quincy railroad against the city of Chicago case has always been cited as the first case to incorporate a right under the Bill of Rights against a state government.

John: That's Robert Thomas, who is a property rights litigator and a visiting professor at William & Mary Law School.

Prof. Robert Thomas: This case is always cited in a footnote, in countless cert petitions, Supreme court opinions and otherwise, as the first case that quote unquote incorporated the bill of rights selectively against state governments and their localities. What happened in the case was the railroad company owned an easement that it ironically had acquired by condemnation itself in the western portion of Chicago. This was the time when the city was expanding westward from its core. And so what used, I presume, undeveloped land with a railroad on it suddenly had a grid overlay of paved streets on it. But they couldn't cross a railroad track because of the easement.

John: So the city filed a lawsuit to use eminent domain to open up a right of way over the tracks.

Prof. Robert Thomas: And it went to a jury trial. The jury awarded a single dollar for the railroad's loss of its exclusive right to use the tracks.

John: The case was not about whether the city *could* use eminent domain. The question was: what is a fair amount for the city to pay the railroad for the loss of the exclusive right to the land. And the railroad was like, yeah $1 -- which would be $31 dollars today -- is not fair.

Prof. Robert Thomas: The argument that the property owner raised in this case was, well, $1 violates, through the due process clause of the 14th amendment the right to just compensation.

John: The Fifth Amendment requires just compensation when property is taken for public use, but the railroad did not argue that the Fifth Amendment applied by way of the 14th Amendment. It just said that just compensation is inherent in the idea of due process, so the 14th Amendment's due process clause by itself requires more compensation.

Prof. Robert Thomas: It said, in this case, an essential element of the concept of due process of law includes the concept that you should receive full and fair compensation when your property is taken for public use.

John: And the U.S. Supreme Court agreed. Sort of. The Court agreed that due process requires just compensation. But …

Prof. Robert Thomas: The Court agreed with those arguments that the railroad raised and yet affirmed that a $1 award did not offend notions of fundamental fairness and was not arbitrary and capricious in this case.

John: The opinion did not mention the Fifth Amendment at all. The word incorporation was not used in the opinion.

Prof. Robert Thomas: The court simply said that just compensation is an essential element of the concept of due process in the 14th amendment. So we've always seen it as the first 14th amendment incorporation case, and it's cited like that in probably thousands of modern cases, but technically, I suppose that's not quite correct.

John: And what does the area look like today -- this piece of constitutional history that is cited in a thousand modern cases?

Prof. Robert Thomas: It's a absolutely nondescript industrial area. And what was a street level railroad has now been elevated obviating the need for the street to cross. And the intersection at issue in the case is completely overgrown. You just can't get to the area on foot today unless you have special permission from the surrounding landowners.

John: Or, if you don’t care about property rights, you could hop the fence and trespass. So if you’re an anarchist, have at it. And as it happens, the next case we’re going to discuss, which

has a better claim to being the first incorporation case, arises because of an anarchist. In 1902, New York passed a law criminalizing anarchism.

Prof. Marc Lendler: The criminal anarchy law came into being because McKinley was assassinated in New York and he was assassinated by someone who had some general sympathy to anarchism and specifically had been to at least one speech by Emma Goldman.

John: That's Marc Lendler, a professor of government at Smith College.

Prof. Marc Lendler: Emma Goldman was probably the best known, left-wing radical in the United States, and she calls herself an anarchist. They tended to be very pointed and articulate about what they opposed, but to not be very clear on what their program for where they wanted to go was.

John: And in 1901, a man who had attended one of Emma Goldman's speeches assassinated President William McKinley in Buffalo, New York.

Prof. Marc Lendler: State prosecutors had wanted to prosecute Emma Goldman also. They prosecuted him and he got the death penalty -- Leon Czolgosz, who actually assassinated McKinley. But they were told there was no law under which they could prosecute Goldman. So they wrote one. They couldn't prosecute her because it would have been an ex post facto law, but they thought that that law should be there in case something similar came up.

John: To violate the law, you didn't have to advocate or encourage violence. You just had advocate ideas where the end result, if enough people took you seriously, would be illegal action on a large scale at some point in the future.

Prof. Marc Lendler: If you preach anarchism -- that is, illegal means to change the established government -- you are committing a violation -- however unlikely it is that anybody will act on it. It's the doctrine that is illegal. And at that point, that did not run counter to the accepted legal community's understanding of speech rights.

John: In the decades after the Civil War, the right to free speech did not get a lot of respect. It wasn't a nullity, but courts did not offer a lot of protection for controversial views. The Comstock Act, for instance, which was a federal law passed in 1873, allowed the federal government to prosecute anyone who sent obscene material through the mail, and the government prosecuted not only pornographers but also, for instance, a doctor who mailed medically accurate advice on contraception. So in 1902, it wasn't particularly controversial to criminalize expressing ideas -- obscene or revolutionary. That said, even though the New York law criminalizing anarchy gets put on the books in 1902, state prosecutors don't use it until 1919. They use it prosecute Ben Gitlow, a former state legislator and a Communist.

Prof. Marc Lendler: Ben Gitlow was born here, which made him unusual among early American communists, almost all of whom were immigrants. And that accounted to some degree for his rise at a young age within first the socialist party then the communist party.

John: His parents had fled Russia, in part because his father didn't want to be conscripted in the czar's army.

Prof. Marc Lendler: He was part of the Jewish migrations, migrants, families who came to the lower East side.

John: New York City's lower east side was a hotbed for radical left wing activity.

Prof. Marc Lendler: Lot of ferment, leftism of all sorts of different kinds, socialist, anarchist, communist, liberal. And Gitlow was exposed to that at a very young age.

John: At the age of 25, he's elected to the New York legislature representing the Bronx as a member of the Socialist Party, which campaigned on opposition to America's entry into World War I and against conscription.

Prof. Marc Lendler: He didn't do very much in terms of legislating. He did not notably cooperate with other people in reform programs.

John: None of the bills he sponsored got out of committee, and, according to another lawmaker who didn't much like Gitlow, he mainly just made anticapitalist speeches -- over and over again. He only served one term, and there's no indication he particularly minded losing his reelection campaign because by 1919, he had a new vision for how to achieve his goals.

Prof. Marc Lendler: After the Russian revolution the younger members of the socialist party thought they had seen the future. Their goal was to form some form or sort of American version of the Bolshevik party.

John: Other socialists, though, did not share that vision.

Prof. Marc Lendler: And there was great division among socialists and the left wing in several splinter groups withdrew from the socialist party and/or was kicked out. Communist factions formed within a very short time of each other in 1919, and Gitlow was an important member of one of them.

John: In 1919, a newspaper that Gitlow was associated with -- his name is on the masthead -- publishes what they call the Left Wing Manifesto, urging other leftists to join their faction.

Prof. Marc Lendler: It was written for people who already agreed about everything and knew the language they were communicating in, which was completely undecipherable to anybody who didn't know the arcane language of these left wing debates.

John: For instance, one of the differences between the two communist factions was over whether communism should be brought about by mass action or, alternatively, by action of the masses.

Prof. Marc Lendler: And they debated this at some length.

John: So the Left Wing Manifesto was hardly something you would give to the uninitiated.

Prof. Marc Lendler: Well, among the initiated were people on the Lusk Committee, which was investigating communist and anarchist activity in New York at the time.

John: Formed by the New York legislature to stamp out seditious activity, the committee gave the manifesto a read and had Ben Gitlow and several companions arrested and prosecuted for violating the 1902 criminal anarchy law.

Prof. Marc Lendler: Everybody knew what the verdict was going to be.

John: After a trial, where the judge expounded at length on the dangers of communism, Gitlow is convicted and gets sentenced to five years in prison.

Prof. Marc Lendler: It was five to 10 and he served three years. He served the longest time of any of the defendants.

John: The governor of New York pardoned Gitlow's associates, but Gitlow withdrew his own request for a pardon to allow the ACLU to take his case to the U.S. Supreme Court. And in 1925, by a vote of 7 to 2 -- in an opinion written by Justice Edwin Sanford -- Gitlow loses.

Prof. Marc Lendler: Sanford quite literally said the circumstances don't matter. State legislature has said, this is illegal and who am I to question the New York state legislature? They have their reasons. Responding to the argument that this Left Wing Manifesto was not going to excite

anybody to do anything. They talked about how a single spark smoldering for some time could burst into a conflagration.

John: It didn't matter that the state hadn't shown the manifesto incited anyone to commit an illegal act, as the ACLU argued. Because...

Prof. Marc Lendler: At some point, this urging of people to follow the Bolshevik model might be taken up by somebody who took it seriously. And if they did, they would be violating the law fairly massively. Those who were prosecuting Gitlow would throw up their hands in amazement that anybody would say the left wing manifesto, which was openly calling for Bolshevik principles, shouldn't be prosecuted. Why should we as a society tolerate those who want to overthrow the established order? Gitlow and his friends made no secret of the fact that that's what they wanted to do. And at his trial Gitlow said: I am a revolutionist.

John: So, the Supreme Court reasoned, even this small spark was not protected speech. Which was a setback for civil libertarians who were advocating for more robust speech protections of the kind that we enjoy today. But for the legal establishment and respectable opinion generally, the decision was unremarkable. The New York Times editorialized in support of the decision:

> **New York Times**: "Any constituted government is entitled to protect itself against overthrow by violence."

John: The case would be unremarkable except for one thing. Ben Gitlow was prosecuted by a state government for violating a state law. And the Bill of Rights did not apply to the states, so

why was the Supreme Court even hearing argument on the First Amendment? In the very first sentence of the opinion, Justice Sanford writes this:

> **Justice Sanford**: *Assumed,* for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Prof. Marc Lendler: That's why the Gitlow case became so significant. It was the first case, which specifically and by name extended one of the aspects of the bill of rights to protection from state action.

John: Granted, the Court could have been a lot more clear. The Court assumed, for the purpose of one case, that free speech and the free press were incorporated. And there is no discussion in the opinion or in the justices' other writings -- that we know of -- why all of a sudden, they were open to entertaining the possibility of incorporation. But within just a few years, the Court treated its assumption in *Gitlow* as settled law.

Prof. Marc Lendler: There was very little argument about incorporation after that, and what there was within five years was dismissed. And judges then said: settled issue.

John: So Gitlow, even though the Court didn't really announce what it was doing or why, is probably the first incorporation case. But Gitlow lost. The first case, the very first case, in which the Supreme Court finally struck down a state law for violating a right in the Bill of Rights came in 1931. In *Stromberg v. California*.

Prof. Marc Lendler: In the Stromberg case, a law in California, which made it illegal to raise a red flag was struck down.

John: Yetta Stromberg was a 19-year-old camp counselor at a communist youth camp in a remote area in the San Bernardino mountains. According to Yetta's niece, who is making a documentary film about the case, they weren't forming plans to overthrow the government at the camp, they were just trying to live in a different way.

Prof. Marc Lendler: Every morning they would raise the red flag.

John: Which was a communist symbol that was illegal in California and 30 other states for the same reasons Ben Gitlow's manifesto was illegal: the possibility, however small, that it might eventually lead to lawless action. But between 1925, when Gitlow was decided, and 1931, the Court's ideas about protecting unpopular viewpoints had changed.

Prof. Marc Lendler: Stromberg's conviction was overturned. And the issue of whether or not states were permitted to suppress speech was raised very quickly dismissed. In other words, incorporation was upheld again, with almost no argument.

John: And with almost no explanation. But since then, the Court has ruled, repeatedly and definitively, that the Bill of Rights applies to the states through the 14th Amendment's Due Process Clause. Not the Privileges or Immunities Clause, which remains in the constitutional wilderness.

Randy Barnett: It has been all but redacted from the text of the Constitution.

John: But anyway, since *Gitlow*, the Court has -- slowly but surely -- incorporated the Bill of Rights. In the 1930s, it incorporated the First Amendment rights to assemble and to petition. In the 1940s, there was some debate among the justices over whether the entire Bill of Rights should all just be incorporated in one go, but that position did not win the day. In the 1960s, the Court incorporated the Fourth Amendment's protections against unreasonable seizures and warrantless searches as well as the Sixth Amendment's speedy trial requirement and the right to have a lawyer in criminal cases. In 1978, the Court finally got around to formally declaring what it had sort of hinted at in 1897 in the Chicago railroad easement case -- that the Fifth Amendment's Takings Clause applies to the states. In 2010, the Court incorporated the individual right to keep and bear arms. And a year ago today, in 2019, the Court ruled that the Eighth Amendment's protection against excessive fines applies to the states. And that case, Timbs v. Indiana, is an IJ case. The state of Indiana forfeited a $42,000 Land Rover from our client Tyson Timbs. And Tyson argued that that was an excessive fine, grossly disproportionate to the gravity of his offense. Coming up after the break: the Excessive Fines Clause.

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. The Senators and Representatives and the members of the several state legislatures, and all executive and judicial officers, both of the

United States and of the several states, shall be bound by oath or affirmation, to support this Constitution.

Wesley Hottot: Tyson became an alcoholic when he was in high school and then sort of struggled with that for several years before becoming a machinist.

John: That is my colleague Wesley Hottot, who is a senior attorney at the Institute for Justice.

Wesley: And being a machinist is a bit like being a waiter or waitress. You spend the entire day on your feet.

Tyson: My problems started – I have bad feet. I went to the podiatrist and they gave me a prescription for hydrocodone.

Wesley: He very quickly became addicted to those painkillers, and when his doctor cut him off, he started buying them off the street.

Tyson: And eventually there was one day when nobody had any pills and somebody said, Hey, I have some of this stuff that's basically the same thing. It's just better. And I thought, well, I like better, you know? So I did heroin once and I, that was, that was a wrap. That's when things got really bad.

Wesley: Tyson realized his life was unraveling and that he had to make a change. So he moved to Marion, Indiana, where his aunt and elderly grandmother were living, to try to get himself right. And for a time that worked.

John: Unfortunately, his father died during a period when Tyson was clean, and he left Tyson a $70 thousand dollar bequest in life insurance proceeds.

Wesley: I think like a lot of drug addicts are gambling addicts that sort of windfall money he would tell you is more trouble than blessing.

John: He spent $42,000 dollars on the Land Rover and spent most of the rest on drugs. Which ultimately led to his arrest.

Wesley: He was induced by a police informant to engage in this controlled buy that was the beginning of his case. And for the crime of selling a total of four grams of heroin to officers -- a street value of about $500 -- he lost that $42,000 vehicle and still doesn't have it back.

Tyson: I never denied what I did. I always, from day one, yeah, I did it. I sold drugs to the cops, the only people I sold drugs to, but I still sold drugs to the cops. I pled guilty. And I never had a problem with that. You know, I did the crime. I'll raise my hand. I did it. I spent six months on house arrest and then the rest was suspended. I got to do on probation, which I'm still currently serving until October of 2020.

John: It took a while, but Tyson got clean.

Tyson: Luckily, my defense attorney knew about a rehab that was free. I checked in January 15th of 2015. My counselor, he had me write down everything I lost. All the money I spent, all the relationship I had ruined. And when you see it written down, that hit me, just everything that I had lost – and not even lost. I gave it up voluntarily. That's what it took for me to realize that this is too much for me to do by myself.

John: And since then, he's been sober, and he is back at work as a machinist.

Tyson: I've done everything that they've asked me to do. I've never failed a drug screen. It got to a point where probation actually called me because they would have a person that was struggling.

John: But the county is using civil forfeiture to keep the Land Rover.

Wesley: He paid about $1,500 in fines and costs associated with the criminal action. And I think it's clear from that type of sentence that the judge regarded this first time offense as being relatively minor. The state, nevertheless, in a separate civil process, hired an outside lawyer, a private for profit attorney working on contingency -- to get one third of whatever the proceeds of a forfeiture would ultimately be -- they filed a civil forfeiture action after the criminal case had concluded.

Tyson: It's supposed to be about rehabilitation. To me, it doesn't make sense if they're trying to rehabilitate and help me help myself why do you want to make things harder? They ask people

to go to recovery programs and do counseling. And come to probation and they want you to get a job. Well, how am I supposed to get all these places? They took my transportation. Now, luckily I have an Aunt Wendy who had a vehicle that didn't mind if I used it. We don't all have Aunt Wendys. It's not just the guy that's like me. It's the people around this that my aunt suffers too. You know, she has to do things that she shouldn't have to do because of this. My aunt has to ride the bus to dialysis because I have to take the car to work.

John: When the state, acting through a private attorney working on commission, filed a forfeiture action, an Indiana trial court and an Indiana appeals court both said: that's excessive, and it violates the Eighth Amendment.

Wesley:The trial court held that it would be grossly disproportionate to the gravity of this relatively minor offense to take away this vehicle. I think everyone recognizes that these were the actions of an addict more than they were the actions of a drug dealer. And I think everybody recognizes that taking the vehicle away from Tyson was gonna make it harder for him to comply with his obligations under the criminal sentence. That is to say, maintain a job, attend substance abuse counseling, attend meetings with his probation officer. And the state appealed the trial court's ruling that this violated the excessive fines clause. The court of appeals affirmed in a divided opinion. And the state appealed again to the Indiana Supreme court.

John: And the Indiana Supreme Court said, you know what, the U.S. Supreme Court has never held that the Excessive Fines Clause applies to the states. Point of fact, most state judiciaries have just treated the clause like it does apply. But not all of them. So Tyson and IJ asked the U.S. Supreme for a definitive ruling, and the justices took the case.

Justice Roberts: We'll hear argument this morning in Case 17-1091, Timbs versus Indiana. Mr. Hottot.

Wesley Hottot: Mr. Chief Justice, and may it please the Court: The freedom from excessive fines applies to the states.

John: The idea of excessive fines dates back to Magna Carta. In addition to demanding due process, the barons at Runnymede forced King John to promise not to impose excessive fines. So back in 1215, what made a fine excessive? Here's Magna Carta.

Voice actor reading Magna Carta: Liber homo non amercietur pro parvo delicto nisi secundum modum ipsius delicti, et pro magno delicto ….

John: That is not what I meant.

Voice actor: Oh wait hang on. Sorry. I got it. A freeman shall only be amerced …

John: What's amerced?

Voice actor: Fined. We would now call an amercement a fine. **Magna Carta**: A freeman shall only be amerced for a small offence according to the measure of that offence. And for a great offence he shall be amerced according to the magnitude of the offence, saving his contenement; and a merchant, in the same way, saving his merchandize. And a villein, in the same way, if he fall under our mercy, shall be amerced saving his wainage.

John: So there's two pieces to that. First, the fine should be proportional to the gravity of the offense. Small offense, small fine. And second, even for a serious offense there is an idea that you shouldn't strip peoples' livelihoods away from them. People should be able to recover from the fine, and there should be some sort of individualized assessment about the ability to recover. If you're a serf, you get to keep your wainage -- that is, your farming implements. For merchants, same thing; seizing all your wares would be excessive. And if you're a nobleman, you shouldn't lose your whole estate. Which makes sense, if a fine is so large that people can't recover from it, they won't be able to feed themselves and their families and they'll be a burden on society or turn to crime.

Prof. Beth Colgan: So it's it's perhaps no surprise that often times constitutional principles aren't always lived up to.

John: That's Beth Colgan, a professor of law at the University of California Los Angeles. As we mentioned on Episode 6, Magna Carta didn't really stick. King John reneged on his promises almost immediately. And hundreds of years later when England erupted into civil war, one of the things people were upset about were outrageous fines.

Prof. Beth Colgan: One of the things that was happening in England was that the Stuart Kings were charging a huge amercements -- so amercements is a predecessor to a fine -- against essentially their political enemies and crippling them financially.

John: And so when the English adopt their bill of rights in 1689, they include a prohibition on excessive fines. And in America, when the Founders wrote the Constitution they had the evils of the Stuart Kings keenly in mind. And they included in the Eighth Amendment the exact same language on excessive fines that's in the English Bill of Rights. And that language is short, sweet, and to the point. Actually the whole Eighth Amendment is pretty short:

> **Magna Carta**: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

John: Excessive fines shall not be imposed. That sounds important. It's been in the Constitution since 1791. So you would think, even if it didn't apply to the states, that the Supreme Court has wrestled with what exactly is a fine and what makes a fine excessive.

Prof. Beth Colgan: Unfortunately, no. So they're actually five Supreme court opinions about the excessive fines clause.

John: The fifth one, the most recent one, is the *Timbs* case. Which didn't say anything about what the Clause means. It just says it applies to the states. So that leaves four opinions.

Prof. Beth Colgan: We only have four opinions -- the first one was decided in 1989 and the last one in 1998 -- that actually do work interpreting the clause.

John: In 1989, the Supreme Court considered the question of what makes a fine a fine, which you need to address before you get to whether the fine is excessive or not. In the case, a waste

disposal company in Burlington, Vermont reduced its prices, purportedly in order to drive a smaller competitor out of business and thereby obtain a monopoly. The plan backfired and actually the larger company, which was called Browning Ferris, gave up and exited the market. But in the meantime, the smaller company had sued, and a federal court ordered Browning Ferris to pay a $6 million dollar penalty to the smaller company for federal antitrust violations and on state tort law claims. Browning Ferris argued that that was an excessive fine.

Prof. Beth Colgan: And in the opinion the Court looks -- engages, as I should say -- in an originalist analysis of the meaning of what the word fine, how it would have been understood at the time of ratification.

John: And there is not much to go on.

Prof. Beth Colgan: There's almost no congressional record or debate regarding excessive fines clause. There's nothing really to go on there.

John: Back when the Founders were hashing out what would go in the Bill of Rights, excessive fines barely got mentioned. The entirety of the discussion in the congressional record about excessive fines is just two sentences.

Voice actor: What is understood by excessive fines? It lies with the court to determine it.

John: That’s the whole thing. So, in addition to the Congressional record, the Supreme Court looked at some old dictionaries and how they defined a fine.

Prof. Beth Colgan: They looked at three dictionaries, one published shortly before ratification, and then two others have published roughly 40 to 60 years after ratification.

John: And they also looked back at the English Bill of Rights and how fines were used to punish political enemies.

Prof. Beth Colgan: And so all of that taken together the court essentially adopts two components to determine whether or not something was a fine. And the first one is whether or not it's at least partially punitive.

John: The Court makes a distinction between penalties that are punitive on the one hand and remedial on the other. If a penalty is purely remedial, it's not considered a fine and can't be excessive. If police catch you with a brick of cocaine, it is remedial to take that from you. But most penalties are a mix of remedial and punitive.

Prof. Beth Colgan: Remedial could be something, for instance, that helps the government recoup costs. So if it's a fee that's used for the cost of your public defender, that's something that many states impose.

John: A fee for a public defender is remedial because it's helping to fund the court's operations. But it's also punishment, especially if you can't pay it. And in many cases it's not possible to cleanly separate punitive penalties from remedial penalties. As Justice Anthony Kennedy wrote in a later case:

> **Justice Kennedy**: “It is a mark of the Court’s doctrinal difficulty that we must speak of non-punitive penalties, which is a contradiction in terms.”

John: Fortunately, in *Browning-Ferris* and in a later case decided in 1993, the Court said we’re not going to worry too much about the distinction between remedial and punitive. As long as the penalty is at least a little bit punitive, then it’s a fine and falls under the scope of the excessive fines clause.

Prof. Beth Colgan: And that's really important because otherwise you get into this morass of, um, you know, if something's labeled civil, do we consider it a fine or not?

John: So as of 1993, in a case called *Austin v. United States*, the Supreme Court has said civil forfeiture is sufficiently punitive that it falls under the scope of the excessive fines clause. But that said, the Court hasn’t definitively ruled on lots of other kinds of penalties. It’s never said fees for a public defender or probation fees or jail fees can be unconstitutionally excessive.

> **Larry Thompson**: Why would I have a warrant for my arrest? What did I do? Little did I know that they was charging me for not being able to pay money.

John: We played that clip at the beginning. That gentleman got charged a fee for his public defender, a fee for the cost of his prosecution for driving on a suspended license, which he’d lost because he was too poor to pay other fees. He was charged a fee for processing his arrest warrant, a fee for the arrest itself, a fee for the local criminal justice fund, a fee for not paying his

fees, and more. It's still an open question whether any of those fees fall under the scope of the excessive fines clause. You'd think so, but the Court hasn't said. But back to *Browning Ferris* in 1989.

Prof. Beth Colgan: The second restriction that comes out of Browning Ferris is that to be a fine, the money has to be made payable to the sovereign or to the government. That's really important. It's based on almost nothing, again, in the historical record.

John: And that ruling means that Browning-Ferris, the waste disposal company, lost its case. The money it was ordered to pay for antitrust violations went to the smaller company and not to the government, so it wasn't a fine and there was no need to determine if it was excessive.

Prof. Beth Colgan: And that's really important if you think about it going forward, because of course it, it knocks out punitive damages, which are paid to a private party. But it also knocks out things like fees you might have to pay, for instance, as a condition of your probation.

John: Private probation companies often charge monthly supervision fees, fees for drug tests, fees for wearing an ankle monitor. Other fees might go to a private doctor who is providing mental health care. Right now, those court-ordered fees -- that go to a private party and in many states come with the threat of jail for noncompliance -- are outside the scope of the excessive fines clause.

Prof. Beth Colgan: There's a lot of attention on private companies because it feels especially problematic. But all the practices private probation companies are doing, are also done by government collections entities.

John: So the point isn't that private probation is better or worse than public probation. It's that it's weird that only one of them falls under the scope of the excessive fines clause.

Prof. Beth Colgan: There have been a couple of lower courts saying this just opens the door for the government to sidestep the excessive fines clause by privatizing services like electronic ankle monitoring, drug testing, other kinds of programs that might normally have been handled by a public entity. Now, the Court has subsequently itself called into question whether they might need to rethink that. So I suspect that that is something that the Court really will pay attention to if the right case gets up to them.

John: So there are some things the Supreme Court has said aren't fines that probably should be considered fines. But anyway, aside from the question of what exactly counts as a fine, there is also the question of how to determine whether a fine is excessive.

Prof. Beth Colgan: So the Court has actually only reached the question of what it constitutes to be excessive one time, and that was in 1998 in a case called Bajakajian. And that involved the criminal forfeiture of $350,000 that Mr. Bajakaian was transporting overseas. It was legally owned money, but he did not fill out the paperwork to report that he was transporting it. And so as a result, the government sought the forfeiture of the entire amount.

John: Word to the wise: You probably know that you're required to declare currency you bring into the country, but there is also a requirement -- that they don't tell you about -- if you are taking cash out of the country. If you're leaving the country with $10,000 or more, you have to declare that too. Mr. Bajakajian didn't know about the requirement, and the government said it could take all $350 thousand dollars that he had on him. There was no evidence that he was using the money for something shady or that he had earned it illegally or that he knew about the requirement and ignored it. The forfeiture was a penalty just for not filling out paperwork.

Prof. Beth Colgan: And so the Court, in the opinion written by Justice Thomas, determined that that was in fact an excessive fine. And they began by trying to look at the historical record just as they had done for the meaning of fine and found even less to go on there.

John: So the Supreme Court announced: there is no precise formula for determining excessiveness, but courts must compare severity of the punishment to the gravity of the offense.

Prof. Beth Colgan: How much harm is caused, what's really going on, how culpable a particular person is for the crime. And if the punishment severity is grossly disproportionate to the seriousness of the offense, it's unconstitutional.

John: And the Court said indeed, $350 thousand dollars is grossly disproportionate for a guy in Mr. Bajakajian's shoes. Which is great for him, but the test of what makes a fine excessive is still underdeveloped. Would it have been excessive to forfeit $100,000 dollars for not doing paperwork? $15,000 dollars? Nor did the Court address the idea -- that dates back to Magna

Carta -- of whether courts need to assess if a fine will leave intact a person's ability to recover from the fine.

Prof. Beth Colgan: Mr. Bajakajian did not raise a claim about how the loss of the money would affect his financial condition. Still very much an open question as to whether or not that's relevant -- that type of ability to pay or financial impact analysis would be relevant to assessing the constitutionality.

John: So between 1791 and 1989 there is just this huge gap. The historical record is sparse, and the Court hasn't had much to go on. Enter Professor Colgan.

Prof. Beth Colgan: So a few years ago, after thinking about these opinions and how they were using history, it dawned on me that there might be more of a historical record there that we could use to determine, did the Court get this right? When they're thinking about how to determine what a fine is, and even though they didn't identify much of a historical record and the excessiveness context, is there more we could pull from the record about that?

John: And the answer is yes.

Prof. Beth Colgan: And so I went back and read several thousand colonial statutes dating from each colony's inception. So early 16 hundreds for Connecticut, for example, all the way through 1791 and then beyond, 10 or so years beyond, because of course there could be some change that happens at ratification: Now suddenly we're thinking about things differently.

John: And there was a ton of stuff on the books that is directly relevant to the interpretation of excessive fines today.

Prof. Beth Colgan: It was really fascinating to look through all of these old documents and see how fines were used in different ways. I mostly focused on statutes. I did look at a handful of court cases. There wasn't much in court records that I could glean though, because oftentimes the records would just say the name, the charge, the amount of the fine with no explanation. But the statutes, it turned out had a wealth of information in them.

John: For instance, the Supreme Court in 1993 was on solid ground ruling that civil forfeitures are subject to the excessive fines clause.

Prof. Beth Colgan: The words fine and forfeiture were used interchangeably in many jurisdictions.

John: A New York law from 1785 said that anyone caught setting fire to the woods would have to quote “forfeit” five pounds and then the law went on to specify what would happen if someone couldn’t afford to pay that quote “fine.” There are lots of other examples -- like a Delaware law from 1782 that imposed a quote “fine and forfeiture” for refusing to enter military service.

Prof. Beth Colgan: And so, I think the court has been consistent with the historical record when they say even a civil forfeiture would be, would've been understood as a fine.

John: Another thing that is clear is that remedial penalties that were used to fund colonial court operations were considered fines. Fines paid for expert witness testimony. Fines paid for prosecutors, who back then weren't employed by the state.

Prof. Beth Colgan: Literally anyone in the community could be the prosecutor in this era. They would then be paid a portion of the fine. These were always understood, no matter how ultimately they're distributed at the end of the day that this was punishment. This was *the* punishment.

John: So the modern Court doesn't need to tie itself in knots figuring out just how punitive a penalty has to be before it's a fine. Another thing that's clear from the historical record is that for a penalty to be considered a fine, there was no need for the money to be paid to the government.

Prof. Beth Colgan: With respect to this restriction the Court has drawn -- that fines would have been understood at the moment of ratification to be limited to monies paid to the government -- that's just demonstrably untrue. That's not likely what people would have understood.

John: Fines were paid to prosecutors, who were private individuals. Fines were paid to doctors, who testified as expert witnesses. Fines were paid to crime victims and their families. A New York law from 1787 required sheriffs, if they vexatiously arrested someone, to pay a fine to that person. A Delaware law from 1766 required fines to be paid to an orphan by their guardian in cases of neglect.

Prof. Beth Colgan: Fines were routinely paid to people that were not part of the government.

John: So the Court may want to reconsider its 1989 ruling that fines paid to private parties are outside the scope of the excessive fines clause. That said, the historical record doesn't have a straightforward answer to everything we might care about today. And the big thing it doesn't answer is what makes a fine excessive as a constitutional matter.

Prof. Beth Colgan: In the historical record, I did not find situations where people were articulating that a fine should be handled in a particular way as a matter of constitutional excessiveness.

John: The evidence on what makes a fine excessive is kind of mixed. There were lots of laws that quoted Magna Carta and prohibited fines that would impoverish defendants. But on the other hand, putting people in jail because they couldn't pay a fine was pretty common as well. So was sentencing people to forced labor or slavery.

Prof. Beth Colgan: Another potential punishment for nonpayment would be corporal punishment. That might involve things like a loss of a body part, like an nose or an ear, being placed in the stocks, being whipped, et cetera.

John: So it's not really possible to look to what was considered excessive in 1791 and just say, that's what we're going to do now. We're not going to force people into servitude or cut off their nose if they can't pay a fine.

Prof. Beth Colgan: These are not comparable historical eras in that sense for all of these different forms of punitive action that were taken against people these were also ways we handled people who were orphaned, right? They might also be put into servitude. They might also be, um, subject to some type of institutionalization. And so all of these things suggest that even though they might have been seen as reasonable responses, that doesn't mean that we should take that to understand that the inability to pay now isn't relevant to constitutional excessiveness.

John: In any event, the Court has plenty of work to do interpreting the Clause. But one thing that it no longer has to decide is whether it applies to the states. Here's Justice Gorsuch at oral argument in the Timbs case addressing the lawyer for Indiana.

> **Justice Gorsuch**: Can we just get one thing off the table? We all agree that the Excessive Fines Clause is incorporated against the states…. Can we at least -- can we at least agree on that?
>
> **Thomas Fisher**: I have two responses to that. First, with --
>
> **Justice Gorsuch**: Well, I -- I think -- I think a "yes" or "no" would probably be a good starting place. (Laughter.)

John: In a unanimous decision released a year ago today, the Supreme Court declared the Excessive Fines Clause applies to the states.

> **Justice Ginsburg**: The Eighth Amendment's Excessive Fines Clause, we hold today, is an incorporated protection applicable to the states under the Fourteenth Amendment's Due Process Clause.

John: The court looked at the history of excessive fines and how they were used to punish political opponents.

> **Justice Ginsburg**: Excessive fines historically were used to retaliate against or chill the speech of the sovereign's political adversaries.

John: But the justices also said fines can be abusive even if there is no political motive.

> **Justice Ginsburg**: Even absent a political motive, the government may employ fines in a manner out of accord with the penal goals of retribution and deterrence. The temptation to do so is real for fines are a source of revenues in contrast to common forms of punishment, imprisonment or supervised release that costs a state money.

John: Because that temptation is real, it was a big deal for the Court to hold that the Excessive Fines Clause applies to the states. And now that it’s done, the Supreme Court will hopefully further refine its ideas about what makes a fine a fine and what makes a fine excessive. But for now those are issues that lower courts will get a first stab at, which brings us back to Tyson Timbs. His case went back to the Indiana Supreme Court so that it could address the issue of whether the forfeiture he suffered was excessive. The state of Indiana still wants to keep the Land Rover, and it argued that even if the excessive fines clause applies to the states, it is never excessive for a state to forfeit a piece of property if that property is somehow connected to a

crime. Earlier, at the U.S. Supreme Court, Justice Stephen Breyer asked the lawyer for Indiana if that meant the state could take a car anytime someone is caught speeding.

> **Justice Breyer**: So what is to happen if a state -- needing revenue -- says anyone who speeds has to forfeit the Bugatti, Mercedes, or a special Ferrari or even jalopy? (Laughter.)
>
> **Thomas Fisher**: There is no excessive fines issue there….
>
> **Justice Breyer**: And by the way, it was only five miles an hour above the speed limit.
>
> **Thomas Fisher**: Well the answer is yes. … Yes it's forfeitable.

John: Back at the Indiana Supreme Court, the state stuck to that position. Anytime there's a crime -- no matter how minor -- the state can seize the property connected to that crime.

> **Thomas Fisher**: When I was asked by Justice Breyer whether a Bugatti could be forfeited for going five miles an hour over the speed limit, and historically the answer to that question is yes, and we're sticking with that position here.

John: The Indiana Supreme Court did not agree with that position. Instead, in October of 2019, it adopted the test that IJ argued for, and then sent the case down to the original trial court to apply that test. Here's my colleague Wesley again.

Wesley: There's no mathematical equation for determining when a fine or forfeiture is or is not excessive. And so weaving together all of the available case law across the country that's out there we asserted that the best test is a totality of the circumstances test that courts have to look at the particular crime, the particular offender, the impact on the community, the value of

the property, the economic circumstances of the offender, what effect the forfeiture would have on him or her and on society at large. And arguably courts should also look at who stands to benefit. I mean would we even be dealing with this if it weren't a valuable car? And had a private lawyer involved who stood to get a third of whatever is forfeited.

John: What is excessive and what isn't is not always going to be an easy question. But it's a question that people have a right to ask and courts need to seriously consider.

Wesley: One of the rewarding things about this case is that we've been able to establish through the Indiana Supreme court's decision on remand is that the excessiveness analysis takes account of a person's economic circumstances. If I commit a white collar crime and have four SUVs at home, it makes a difference that taking away one of those SUVs has a minimal impact on me. If by contrast, I'm a single mom and a $2,000 minivan, you are in effect punishing the entire family and making all of life's necessities harder if you take away the minivan. In fact, what you're doing is you're incentivizing recidivism. You're putting a person in a position where they just can't survive in a lawful way in our society.

John: To ensure that the newly incorporated right is a meaningful one, IJ has begun to file aggressive new cases. We're currently suing Detroit and Chicago, both of which are seizing people's vehicles on a massive scale even if those people are completely innocent of wrongdoing.

Wesley: Nothing about our argument prevents the government from imposing serious fines. Our whole point in Timbs versus Indiana was that there are limits. And that those constitutional limits have to be calibrated to the circumstances of a specific case. The state's position and the original position of the Indiana Supreme court was simply that there are no limits.

Conclusion: So this week, IJ and Tyson are going to be back in court -- at an Indiana trial court -- where we will argue that totality of the circumstances test the Indiana Supreme Court adopted last year means that the forfeiture of Tyson's Land Rover is an excessive fine. Stepping back to the incorporation of the Bill of Rights, there are now only a handful of clauses that haven't been applied to the states. The most important is probably the Sixth Amendment's guarantee of a unanimous jury verdict. The Supreme Court heard oral argument about whether to incorporate that provision last fall, and we should have a decision soon. Other rights probably won't be incorporated anytime soon. There's the Third Amendment right not to quarter soldiers in your home. The Fifth Amendment right to be indicted by a grand jury, that hasn't been incorporated. The Seventh Amendment right to a jury trial in civil cases hasn't been applied to the states, and there is concern that if it was it might interfere with small claims courts and other state courts that don't have juries and maybe have good reasons for not having juries. So, while there's still an enormous amount of work left to do to fulfill the promise of the Fourteenth Amendment and live up to the ideals of the Declaration of Independence, we're probably close to the end of the story when it comes to incorporation. And, conveniently, it's also the end of season one of Bound by Oath. Thanks for listening, and be on the lookout for season 2, which we'll release this fall.

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