

AN EMPIRICAL ASSESSMENT OF ASSET
FORFEITURE IN LIGHT OF *TIMBS* *v.* *INDIANA*

Brian Kelly

INTRODUCTION 614

I. HISTORICAL ELEMENTS: FROM PROTECTING THE REVENUE TO
FIGHTING CRIME 617

II. MODERN ASSET FORFEITURE AND POLICING 620

III. EMPIRICAL ANALYSIS 623

 A. *Data* 624

 B. *The Scale of Forfeiture* 625

 C. *Seizure and Forfeiture* 630

 D. *What Assets Are Seized and Forfeited?* 632

 E. *What Are the Causes of Action for Forfeitures?* 634

 F. *Who Gets the Money, and What Does This Imply?* 635

CONCLUSION 637

AN EMPIRICAL ASSESSMENT OF ASSET FORFEITURE IN LIGHT OF *TIMBS* *V.* *INDIANA*

Brian Kelly*

The Supreme Court, in Timbs v. Indiana, extended the protections of the Eighth Amendment's Excessive Fines Clause to individual states. Does this extension represent a significant new constraint upon local law enforcement's use of asset forfeiture? I argue that the landscape of asset forfeiture in the United States suggests that the reach of the decision will be modest. Using a combination of federal and state forfeiture databases, I show that the scope of forfeiture likely to be subject to the new protections is very limited. Further, law enforcement agencies respond to incentives; the newly imposed constraints may be further limited due to adaptive behavior by law enforcement. More far-reaching tools for those who favor forfeiture reform will lie with state legislatures.

INTRODUCTION

Police seized Tyson Timbs's Land Rover SUV because of its association with a crime.¹ In particular, the vehicle was used to facilitate a crime—Timbs used it to transport drugs—and was forfeited on that basis.² Timbs sought the return of his property because its value greatly exceeded even the maximum fine for his offense, and the Indiana Trial Court agreed, finding that the forfeiture was grossly disproportionate given the offense and therefore in conflict with the Eighth Amendment's proscription against excessive fines.³ The Indiana Supreme Court reversed, ruling that the Eighth Amendment constrained only federal actions, and the U.S. Supreme Court reversed that decision in turn, ruling that the Eighth Amendment's Excessive Fines Clause applied to the states under the Fourteenth Amendment.⁴ That ruling, in the words of the Court, leaves “no daylight between the federal and state conduct it prohibits or requires.”⁵

Proponents of forfeiture reform welcomed the outcome. While the individual states have their own excessive fines prohibitions, the nature and application of these prohibitions vary greatly. As Tyson Timbs found, in Indiana, an asset value far in excess of the maximum fine for a crime did not

* Associate Professor of Economics at the Albers School of Business and Economics, Seattle University. The author would like to thank the University of Alabama School of Law for hosting the 2020 symposium titled “*Timbs v. Indiana* One Year Later: The Future of Civil Asset Forfeiture” and would like to thank participants for comments on the data that I presented there.

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

2. *Id.* The trial record made clear that the Land Rover could in no way be construed as purchased from the proceeds of a crime; the U.S. Supreme Court noted that Timbs had recently bought it using an inheritance. *Id.*

3. *Id.*

4. *Id.* at 686–87.

5. *Id.* at 687.

prevent forfeiture. The Supreme Court's ruling allowed a check upon excessive forfeitures even if they are permitted by the individual states.

The Court left open what magnitude of forfeiture—or fines more generally⁶—would constitute “excessive.” The Court did refer to *United States v. Bajakajian*, which set out the rule that fines that are grossly disproportionate to the offense are impermissible.⁷ But the Court in *Bajakajian* did not provide guidance on what magnitudes would qualify as grossly disproportionate. The *Timbs* Court also did not explain whether this test requires only weighing the punishment against the seriousness of the offense or whether it is also necessary to consider the impact on the individual involved.⁸ *Bajakajian* presented a straightforward case of the offense being judged minor—a reporting violation—and the penalty being large and easily valued.⁹ But beyond this, there are no landmarks; the federal experience since *Bajakajian* suggests that the courts have been very conservative in reversing property seizures as excessive. Writing in 2013, fourteen years after *Bajakajian*, one authority counted only three federal cases in those fourteen years in which a forfeiture was found excessive.¹⁰

How extensive are forfeitures that are potentially subject to excess fine restrictions? That is, what proportion of state or local forfeitures are likely to be considered excessive? And, what portion of forfeitures, even if excessive by most measures, would not be subject to the *Timbs* ruling? Since the legal reach of the *Timbs* ruling is by no means clear, these are difficult questions, and they do not become easier when one surveys the empirical landscape. Record-keeping for state and local forfeiture varies widely and always leaves much to be desired. In only a handful of states is there even a centralized database of forfeited assets, and in general, the assets cannot be tied back to an individual or to the nature of the offense that gave rise to the forfeiture.¹¹ Fortunately, there is some state-level data, recently collated, that can be parsed for clues concerning the potential reach of *Timbs*.¹² Federal data, at least for the majority of forfeitures that are handled through the Department of Justice's

6. The Court has previously been clear that forfeitures constitute a form of fine, at least to the extent that they are punitive. *Id.* at 690.

7. *Id.* at 687 (citing *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998)).

8. See Wayne A. Logan, *Timbs v. Indiana: Toward the Regulation of Mercenary Criminal Justice*, 32 FED. SENT'G REP. 3, 5–6 (2019). A recent article sketches an approach that would incorporate the individual's situation in the disproportionality test. 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. F. 430, 439–47 (2019).

9. *Bajakajian*, 524 U.S. at 339–40.

10. STEFAN D. CASSELLA, *ASSET FORFEITURE LAW IN THE UNITED STATES* 1017–23 (2d ed. 2013). However, this estimation does not take into account any assets that law enforcement did not seize or seizures that prosecutors chose not to pursue because of concerns that they might be deemed excessive.

11. See LISA KNEPPER ET AL., INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 59–161 (3d ed., 2020), <https://ij.org/wp-content/themes/ijorg/images/pfp3/policing-for-profit-3-web.pdf> for the most comprehensive appraisal of state data.

12. *Id.*

Asset Forfeiture Fund, provide more detail but suffer the drawback that little or nothing is known about the identity of the property owner.¹³ Nevertheless, the federal experience with the Excessive Fines Clause provides some guidance concerning the extent to which forfeitures may be restricted.

How can an empirical examination inform the debate concerning excessive fines? Several distinctions in federal practice provide both some guidance and some data with respect to the possible impact of *Timbs*, and I explore these in Section III below. As an example, federal Eighth Amendment protections under *Bajakajian* applied generally to criminal forfeitures and to some civil forfeitures;¹⁴ following the passage of the Civil Asset Forfeiture Reform Act (CAFRA) in 2001, protections applied to civil forfeitures in general.¹⁵ But while CAFRA extended protections to federal civil in rem actions, and the constitutional protection afforded by the Eighth Amendment applies to such actions “when they are at least partially punitive,”¹⁶ federal courts have questioned whether proceeds of an offense can ever be grossly disproportional to the offense itself.¹⁷ Arguably, since the proceeds flow from the offense, they are by nature proportional to the offense, and their seizure thus cannot be disproportionate.¹⁸ This raises the empirical question: how important are

13. *Id.* at 162–64.

14. *Bajakajian*, 524 U.S. at 331 n.6.

15. Claimants may petition the court to determine if the civil forfeiture is constitutionally excessive; then, the court will compare the forfeiture to the seriousness of the offense. 18 U.S.C. § 983(g) (2016). The claimant bears the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence, and if the court finds in favor of the claimant, it will reduce or eliminate the forfeiture. *Id.*

16. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019). *Indiana* argued that the Excessive Fines Clause does not apply to civil in rem forfeitures, but the Supreme Court held that that issue was not properly before it. *Id.* at 690. “The Excessive Fines Clause is thus incorporated regardless of whether application of the Clause to civil in rem forfeitures is itself fundamental or deeply rooted.” *Id.* at 684. The civil versus criminal status of a state or local forfeiture apparently could still affect its treatment under *Timbs*.

17. In the context of a drug trafficking offense, the Fifth Circuit stated:

Section 853(a) also sets out a limit for alternate *finis* in drug cases: up to twice the gross profits a defendant derives from the offense. The imposition of a fine is in addition to, not in lieu of, the mandatory forfeiture provided for in § 853(a)(1)-(3). Betancourt’s argument that forfeiture of any funds over \$152,000 violates the excessive fines provision of the Eighth Amendment confuses forfeiture of property with the imposition of a fine. This Court has held that the Eighth Amendment has no application to forfeiture of property acquired with drug proceeds. (“[T]he forfeiture of drug proceeds does not constitute punishment, and thus neither the Eighth Amendment prohibition against excessive fines nor double jeopardy analysis is applicable.”)

United States v. Betancourt, 422 F.3d 240, 250 (5th Cir. 2005) (citations omitted). In *United States v. Black*, the District Court used the fact that the forfeiture removed the proceeds as, *prima facie*, sufficient to demonstrate proportionality: “Here, the amount of forfeiture is directly proportional—the forfeited amount corresponds to the amount that Defendants wrongfully diverted from Hollinger International.” *United States v. Black*, 526 F. Supp. 2d 870, 886 (N.D. Ill. 2007); *see also* CASSELLA, *supra* note 10, at 1018–19.

18. Guidance to federal prosecutors restricts the “grossly disproportional” test for excessiveness to facilitating property: “A property owner may also challenge the forfeiture of facilitating property on grounds that the forfeiture is excessive.” U.S. DEP’T. JUST., ASSET FORFEITURE POLICY MANUAL 99 (2019), <https://www.justice.gov/criminal-afmls/file/839521/download>. In addition to the seriousness of the underlying crime, factors to consider include the knowledge of the owner, the extent of involvement of the

proceeds theories in the overall landscape of forfeiture, relative to the alternative of facilitating properties?

We need also to consider the incentives of property owners and of law enforcement in the face of the extension of excessive fines protections. *Timbs* was argued before the Supreme Court with pro bono representation by the Institute for Justice, a non-profit organization with extensive knowledge of asset forfeiture.¹⁹ However, most property owners will not have access to this quality of representation. Will property owners pursue their rights under *Timbs*, given the costs of pursuing forfeiture cases? We can provide some answers by examining the nature and magnitude of state and local forfeitures.

Law enforcement also responds to incentives. A major focus of criticism of forfeiture has been that, in many cases, the law enforcement agencies involved in forfeiture can keep all or a portion of the assets seized.²⁰ In the case of real or personal property, these assets are usually auctioned for cash,²¹ although there are many instances of law enforcement retaining vehicles in particular.²² Critics charge that this distorts police and prosecutorial incentives, leading to “policing for profit”—the pursuit of financial gain rather than public law enforcement goals.²³ Given this incentive, will law enforcement be able to adapt to any new restrictions created by *Timbs*, altering behavior without sacrificing forfeiture revenue?

I will address these questions in Part III. First, Part I provides the relevant elements in the evolution of American asset forfeiture, and Part II summarizes the status of the modern forfeiture. Following the empirical analysis of Part III, I will conclude with some policy observations.

I. HISTORICAL ELEMENTS: FROM PROTECTING THE REVENUE TO FIGHTING CRIME

The young United States applied forfeiture for several purposes, chief among them being to “collect the revenue,” to assure that tariffs and excise taxes owed to the government were paid.²⁴ A cargo could be seized, and title

property, the effect of the criminal activity on the community and victims, and the value of equity in the property. *Id.* at 99–100.

19. *Timbs v. Indiana*, INST. FOR JUST. (Jan. 1, 2020), <https://ij.org/case/timbs-v-indiana>.

20. KNEPPER ET AL., *supra* note 11, at 10.

21. *Id.* at 19, 34.

22. The Institute for Justice obtained data through Minnesota Government Data Practices Act requests and from the Office of the Minnesota State Auditor website. With permission, the author used the assembled data to determine that over the fifteen-year period from 2004 through 2018, a large sample of Minnesota police agencies retained 525 cars and other vehicles following forfeiture. However, this compares to 39,585 vehicles forfeited but not retained over the same period; asset retention occurs often but is overshadowed by liquidation of assets for cash. Calculations on file with the author.

23. See *infra* notes 48–49 and accompanying text.

24. Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1466 (2019). Arlyck presents extensive, original evidence that forfeiture, in fact, had many targets during the Founding Era, but that “[f]irst

transferred to the federal government, for failure to pay the tariffs due.²⁵ The cases were in rem proceedings brought against the cargo or the ship that carried it, rather than the owners, in part because the latter might not be solvent, present, or even identifiable.²⁶ The essential nature of forfeiture remained much the same until the latter part of the twentieth century, with some broadening of focus such as tax avoidance with respect to distilled spirits.²⁷ With some exceptions,²⁸ federal forfeiture largely occurred when revenues were threatened. While the amount of the forfeiture often exceeded the amount of revenue in question,²⁹ protecting the revenue remained the context for most cases.

Congress greatly expanded the scope of asset forfeiture beginning in 1970. The Racketeer Influenced and Corrupt Organizations (RICO) Act provided for the confiscation of direct and indirect criminal proceeds.³⁰ An early salvo in the federal fight against illicit drugs, the 1970s Comprehensive Drug Abuse Prevention and Control Act provided for the forfeiture of instrumentalities involved in drug trafficking.³¹ In 1978, that Act was amended to make the proceeds of drug crimes subject to forfeiture for the first time.³² The Comprehensive Crime Control Act (CCCA) of 1984 further expanded the offenses subject to forfeiture and included facilitating properties, a somewhat more expansive notion than the older idea of instrumentalities, as subject to forfeiture.³³ The CCCA also introduced one of forfeiture's most controversial elements: authorization for law enforcement agencies to share in the proceeds

and foremost, forfeiture was a tool for enforcing the legislative scheme governing revenue collection—in particular, the customs duties imposed on goods imported into the United States.” *Id.*

25. *Id.* at 1467.

26. *Id.* at 1470.

27. CASSELLA, *supra* note 10, at 29–31.

28. Arlyck lists forfeiture suits for “arms dealing, the slave trade, and violations of U.S. neutrality” in the first few decades of the nation, noting that “such prosecutions were relatively rare.” Arlyck, *supra* note 24, at 1481. He argues that the heavy emphasis on protecting the revenue was not due to concerns about expanding forfeiture so much as “[t]he federal government used forfeiture primarily in support of revenue collection and maritime regulation because those are the things the early government did.” *Id.* Another important but temporary exception arose during the Civil War with the Confiscation Act of 1862. This authorized in rem forfeitures of the property of Southern rebels, arguably because the Confederate government had forbidden the payment of debts due to Union individuals or corporations, instead claiming them for the Confederate treasury. See James G. Randall, *Some Legal Aspects of the Confiscation Acts of the Civil War*, 18 AM. HIST. REV. 79 (1912).

29. Arlyck, *supra* note 24, at 1473–77 (demonstrating that forfeitures often far exceeded the amount of revenues due). However, a punitive element in cases of avoidance still could serve general deterrence goals, helping preserve revenues.

30. 18 U.S.C. § 1963(a)(3) (2018); see also David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L. J. 1, 11 (2012); LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 65–69 (1996) (discussing the legislative history of several forfeiture statutes).

31. Pimentel, *supra* note 30, at 12.

32. *Id.* at 12–13.

33. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified in 18 U.S.C. §§ 1–5042).

of the assets that they seized, including cash.³⁴ While this has become a lightning rod for criticism, proponents viewed it as one of the purposes of the forfeiture provisions in the CCCA, providing incentives to law enforcement to pursue drug crimes. The CCCA also established the Asset Forfeiture Fund (AFF) in the Department of Justice and the Customs Forfeiture Fund in the Department of the Treasury, in which seized assets were held prior to being redistributed to federal agencies involved in forfeiture.³⁵ The funds allowed more systematic management of assets, facilitating forfeiture's expansion.³⁶ Through the CCCA and subsequent legislation, by the 1990s, most federal crimes could lead to civil forfeiture.³⁷ A backlash in the 1990s led to the adoption of the Civil Asset Forfeiture Reform Act in 2000, which provided procedural safeguards in civil forfeiture cases but also greatly expanded the scope of federal criminal forfeiture.³⁸

State and local agencies were deliberately drawn into the federal forfeiture sphere. Authorized by Title VI of the CCCA, the federal government began encouraging states to develop their own forfeiture statutes based on the federal model.³⁹ Importantly, Title III of the CCCA authorized "equitable sharing" payments to state and local law enforcement from the Department of Justice and the Treasury's forfeiture funds.⁴⁰ These payments are of two types. The first rewards state and local police agencies that engage in joint task forces with federal law enforcement, allocating forfeiture proceeds based on relative effort.⁴¹ The second allows for "adoptions" or "adoptive forfeitures," which permit a state or local agency that has made a seizure under state law to send the funds to the federal government for final forfeiture.⁴² The federal government then sends a portion of the funds, generally 80%, back to the

34. *Id.* § 309.

35. *Id.* §§ 310, 317.

36. *Seizing Crime Proceeds and Compensating Victims*, FBI NEWS (Jan. 17, 2017), <https://www.fbi.gov/news/stories/forfeiture-as-an-effective-law-enforcement-tool> ("The FBI, like other federal investigative agencies, began using forfeiture in earnest when Congress passed the Comprehensive Crime Control Act of 1984, which established the Department of Justice's Assets Forfeiture Fund to receive and lawfully manage the proceeds of federal forfeitures.")

37. CASSELLA, *supra* note 10, at 33–34.

38. Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97 (2001); John L. Worrall, *The Civil Asset Forfeiture Reform Act of 2000*, 27 POLICING: AN INT'L J. POLICE STRATEGIES & MGMT. 220 (2004).

39. DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 71–84 (3d ed. 2014). Edgeworth notes that forty-eight states have civil in rem forfeiture statutes, most of them being drug forfeiture statutes based on the federal example. *Id.* For a detailed state-by-state account, see KNEPPER ET AL., *supra* note 11, at 60–161.

40. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976; KNEPPER ET AL., *supra* note 11, at 46.

41. MARIAN R. WILLIAMS ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 25 (1st ed. 2010), <https://ij.org/wp-content/uploads/2015/03/assetforfeituretoemail.pdf>.

42. *Id.*

seizing agency, keeping the rest.⁴³ The stated purpose of adoption was to make forfeiture easier for agencies that did not have procedures in place for handling assets, but critics have charged that adoption simply provides a mechanism for local agencies to circumvent restrictive state laws.⁴⁴ For both joint task force and adoptive forfeitures, state and local agencies receive the funds with the provisos that the agencies use the payments for law enforcement and not replace regularly budgeted funds.⁴⁵

II. MODERN ASSET FORFEITURE AND POLICING

Asset forfeiture is the taking of an asset by the government, without compensation, due to its association with a crime. With the legislation of the 1970s and 1980s, forfeiture has become “the taking of property derived from a crime, involved in a crime, or which makes a crime easier to commit or harder to detect.”⁴⁶ That is, forfeiture now includes the proceeds, instrumentalities, and facilitating properties associated with a crime. Asset forfeiture has become a widespread, even routine, part of policing in America. At the federal level, at least fourteen agencies seize assets for forfeiture, with others involved in asset management and liquidation.⁴⁷ Among the states, nearly all allow asset forfeiture by local and state agencies, although states have somewhat scaled back due to a wave of recent reform efforts.⁴⁸ Law enforcement agencies routinely describe forfeiture as vital to effective policing and have resisted efforts to limit its scope.⁴⁹

43. *Id.*

44. See Jefferson E. Holcomb et al., *Civil Asset Forfeiture Laws and Equitable Sharing Activity by the Police*, 17 CRIMINOLOGY & PUB. POL’Y 101, 104 (2018).

45. *Id.*

46. Alice W. Dery, *Overview of Asset Forfeiture*, AM. BAR ASS’N (June 30, 2012), https://www.americanbar.org/groups/business_law/publications/blt/2012/06/02_dery.

47. Nine agencies that seize assets are either in the Department of Justice or participate in the Department’s Asset Forfeiture Program; another four Department of Justice agencies manage litigation, maintain custody of assets, or manage the Department’s forfeiture program. See DEP’T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2019 3 (Dec. 2019), <https://oig.justice.gov/reports/2019/a20014.pdf#page=1>. Four additional agencies that seize assets are either in the Department of Homeland Security or in the Department of the Treasury; assets seized by these agencies are held by the Treasury Forfeit Fund. *Treasury Executive Office for Asset Forfeiture (TEOAF)*, U.S. DEP’T TREASURY, <https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/treasury-executive-office-for-asset-forfeiture-teoaf> (last visited Jan. 13, 2021).

48. The Institute for Justice provides the most complete survey of state forfeiture laws in KNEPPER ET AL., *supra* note 11, at 31, 59–161. Work based upon the Department of Justice’s Law Enforcement Management and Statistics surveys indicates that over 99% of the roughly two thousand regularly surveyed large agencies engaged in forfeiture. Brian D. Kelly & Maureen Kole, *The Effects of Asset Forfeiture on Policing: A Panel Approach*, 54 ECON. INQUIRY 558 (2016).

49. In 2017, then-Attorney General Jeff Sessions argued that “civil asset forfeiture is a key tool that helps law enforcement defund organized crime, take back ill-gotten gains, and prevent new crimes from being committed, and it weakens the criminals and the cartels.” OFF. PUB. AFFS., *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement*, DEP’T JUST. (July 19, 2017),

Scholarly work has followed several paths; those relevant here concern the effects of forfeiture upon policing and upon other aspects of the criminal justice system. These begin with the fact that law enforcement agencies often benefit from the assets that they seize. This implies that law enforcement may pursue crimes that are more likely to yield forfeiture revenues, potentially at the neglect of other policing. Research using data from the 1980s and 1990s suggested that the strong linkage of forfeiture to drug crimes led to more intensive patrolling and arrests for drugs; evidence included the great increase in drug arrests as forfeiture became widespread.⁵⁰ Work using data from the 2000s found a weak incentive effect leading to increased policing of drug crimes.⁵¹ Certainly the proportion of drug possession or trafficking arrests to all arrests has increased greatly from the mid-1980s to the present, but other factors, including public concerns about drug trafficking for much of that period, could help explain this trend.

Quantifying forfeiture, we find that its scale is impressive, although its full extent is not known precisely. At the federal level, the Department of Justice and Treasury Department forfeiture funds have received an average of over \$3 billion annually in recent years from forfeitures.⁵² There is no way to compile

<https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoption-assets-seized-state>. Homeland Security Investigations defends its program in part as follows: “The program adheres to the principal belief that the utilization of consistent and strategic application of asset forfeiture laws is necessary and vital in order to disrupt and dismantle the financial infrastructure of criminal enterprises and other national security threats. Asset forfeiture is an essential element of comprehensive and effective law enforcement.” U.S. ATTY’S OFF., MIDDLE DIST. PA., *Homeland Security Investigations Shares Nearly \$300,000 With Hazleton City Police Department for Assistance In Narcotics Investigation*, DEP’T JUST. (May 10, 2019), <https://www.justice.gov/usao-mdpa/pr/homeland-security-investigations-shares-nearly-300000-hazleton-city-police-department>. A systematic survey analysis is reported in John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 177–82 (2001), which found that police agencies commonly viewed themselves as dependent upon forfeiture revenues.

50. See Bruce Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL’Y REV. 293, 302–08, 310–14 (2009) for a summary of much of this literature. An important early work is Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998). The authors, who may have coined the now ubiquitous “policing for profit” meme, argue that forfeiture’s incentives lead to drug policing at the expense of other police activities. *See id.* at 40. Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2134 (2007) is an empirical study that found that police agencies in a limited set of states respond quite strongly to net federal forfeiture proceeds, increasing policing of drug crimes.

51. Kelly & Kole, *supra* note 48, at 562; *see also* Brian D. Kelly, *Further Results Concerning the Effects of Asset Forfeiture on Policing 1* (Aug. 19, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2647629. The weak association of increased forfeiture with increased drug arrests may not reflect a weakening of the incentive effects so much as the fact that as the proportion of drug arrests to total arrests increases, the opportunity to forfeit funds from additional drug arrests decreases—a common-sense application of diminishing returns.

52. See the sum of the “Donations and Forfeitures” lines from Fiscal Years 2010–2019 in AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2019, *supra* note 46, at 27; DEP’T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2018 28 (Dec. 2018), <https://www.oversight.gov/sites/default/files/oig-reports/a1905.pdf>; DEP’T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR

comparable state and local forfeiture amounts comprehensively. One estimate is that they averaged about \$900 million per year,⁵³ another is that they were

2017 29 (Dec. 2017), <https://www.oversight.gov/sites/default/files/oig-reports/a1805.pdf>; DEP'T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2016 35 (Dec. 2016), <https://www.oversight.gov/sites/default/files/oig-reports/a1706.pdf>; DEP'T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2015 33 (Feb. 2016), <https://www.oversight.gov/sites/default/files/oig-reports/a1604.pdf>; DEP'T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2014 33 (Jan. 2015), <https://www.oversight.gov/sites/default/files/oig-reports/a1508.pdf>; DEP'T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2013 31 (Feb. 2014), <https://www.oversight.gov/sites/default/files/oig-reports/a1408.pdf>; DEP'T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2012 27 (Jan. 2013), <https://www.oversight.gov/sites/default/files/oig-reports/a1307.pdf>; DEP'T JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2011, 29 (Jan. 2012), <https://www.oversight.gov/sites/default/files/oig-reports/a1212.pdf>. See also the sum of the “[f]orfeited currency and monetary instruments” and “[s]ales of forfeited property net of mortgages and claims” lines from Fiscal Years 2010–2019 in TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2019, OFF. INSPECTOR GEN. 25 (Dec. 11, 2019), https://oig.treasury.gov/sites/oig/files/Audit_Reports_and_Testimonies/OIG-20-020.pdf; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2018 25 (Dec. 13, 2018), https://oig.treasury.gov/sites/oig/files/Audit_Reports_and_Testimonies/OIG-19-022.pdf; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2017 27 (Oct. 31, 2017), <https://home.treasury.gov/system/files/246/TFY%20FY%202017%20Accountability%20Report%20Final%2012-13-17.pdf>; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2016 25 (Oct. 31, 2016), <https://home.treasury.gov/system/files/246/TFY%20FY%202016%20Accountability%20Report.pdf>; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2015 25 (Jan. 29, 2016), <https://home.treasury.gov/system/files/246/TFY%20FY%202015%20Accountability%20Report%20Final.pdf>; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2014 25 (Oct. 31, 2014), <https://home.treasury.gov/system/files/246/TFY%20FY%202014%20Final%20Accountability%20Reports%20508.pdf>; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2013 27 (Nov. 13, 2013), <https://home.treasury.gov/system/files/246/TFY%20FY%202013%20Accountability%20Report-Final%2012-9-13-508.pdf>; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2012 31 (Oct. 31, 2012), <https://home.treasury.gov/system/files/246/FY%202012%20Annual%20Report.pdf>; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2011 33 (Oct. 31, 2011), https://home.treasury.gov/system/files/246/FY_2011_ACCOUNTABILITY_REPORT_Final.pdf; OFF. INSPECTOR GEN., TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2010 33 (Oct. 29, 2010), https://home.treasury.gov/system/files/246/FY_2011_ACCOUNTABILITY_REPORT_Final.pdf.

53. See Kelly & Kole, *supra* note 48, at 560 n.6. The estimate would amount to about \$1 billion per year based on total state and local law enforcement expenditures. Author's calculation from Shelley S. Hyland, *Justice Expenditure and Employment Extracts, 2016 - Preliminary*, BUREAU JUST. STAT. (Nov. 7, 2019), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6728>; Shelley S. Hyland, *Justice Expenditure and Employment Extracts, 2015 - Final*, BUREAU JUST. STAT. (Nov. 7, 2019), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6727>; Shelley S. Hyland, *Justice Expenditure and Employment Extracts, 2014 - Final*, BUREAU JUST. STAT. (Nov. 7, 2019), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6726>; Jennifer Bronson, *Justice Expenditure and Employment Extracts, 2013 - Final*, BUREAU JUST. STAT. (June 29, 2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6308>; Jennifer Bronson, *Justice Expenditure and Employment Extracts, 2012 - Final*, BUREAU JUST. STAT. (June 29, 2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6307>; Jennifer Bronson, *Justice Expenditure and Employment Extracts, 2011 - Final*, BUREAU JUST. STAT. (June 29, 2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6306>; Tracey Kychkelhahn, *Justice Expenditure and Employment Extracts, 2010 - Final*, BUREAU JUST. STAT. (July 1, 2014), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5049>; Tracey

2021] *An Empirical Assessment of Asset Forfeiture in Light of Timbs v. Indiana* 623

about 20% of the level of Justice and Treasury forfeiture in 2018.⁵⁴ Given the uncertainty of the data and the known variability in forfeiture receipts, these estimates are not at odds⁵⁵ and, in any case, indicate that state and local forfeiture is significant.

The totals are less important for our purposes than is the varied nature of forfeiture. Forfeiture follows upon seizure through administrative, civil judicial, and criminal judicial processes.⁵⁶ These processes and the accompanying burdens and standards of proof vary widely.⁵⁷ The seizures themselves occur under an enormous range of conditions, from roadside stops resulting in a warrantless probable cause search to carefully planned, massive investigations in which assets are among the operation's targets.⁵⁸ The assets seized and forfeited cover a huge range, from ammunition to financial (and musical) instruments.⁵⁹ These and other aspects of forfeiture's vast landscape will affect the reach of *Timbs*. Making sense of this variety and applying that understanding to *Timbs* is the purpose of the next section.

III. EMPIRICAL ANALYSIS

The *Timbs* decision no doubt has great significance as a statement of principle and will address some cases of overreach. However, institutional and

Kyckelhahn, *Justice Expenditure and Employment Extracts, 2009 - Final*, BUREAU JUST. STAT. (July 1, 2014), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5048>; Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2008 - Final*, BUREAU JUST. STAT. (May 30, 2012), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4333>; Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2007*, BUREAU JUST. STAT. (Sept. 20, 2010), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2315>. See *infra* Tables 2, 3 (annual for 2007–2016).

54. See AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2018, *supra* note 52; TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2018, *supra* note 52.

55. Also, the second estimate almost certainly underestimates the relative role of state and local forfeiture. *Id.*

56. *Types of Federal Forfeiture*, DEP'T JUST., <https://www.justice.gov/afp/types-federal-forfeiture> (Dec. 16, 2020).

57. See CASSELLA, *supra* note 10. The standard for the initial seizure of an asset is typically probable cause. *Id.* at 104. If the seizure is not challenged by a claimant, usually the owner, and is not part of an ongoing criminal case, it will be forfeited to the government administratively. *Id.* at 150. If challenged, a civil judicial proceeding requires that the government show, by a preponderance of the evidence, that the asset is connected to a crime. *Id.* at 16. The owner or other claimant has the status of a third-party intervenor, the proceeding being against the asset, not its owner. *Id.* at 15. Criminal forfeiture requires an in personam conviction of an individual for a crime; the forfeiture proceeding then follows, once again using preponderance of the evidence to connect the asset to the crime. *Id.* at 11–12, 570.

58. Compare, for example, the accounts of roadside stops to generate revenue, such as Sarah Stillman's investigative reporting, Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken>, to the "Case Highlights" from the Treasury Forfeiture Fund's Accountability Report for 2016, for example, TREASURY FORFEITURE FUND ACCOUNTABILITY REPORT FISCAL YEAR 2016, *supra* note 52, at 2–8.

59. ASSET FORFEITURE POLICY MANUAL, *supra* note 18, at 46–57, 101; DICK M. CARPENTER II ET AL., INST FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 5, 8 (2d ed. 2015), <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>.

legal aspects of forfeiture suggest that its impact will be limited.⁶⁰ My purpose is to explore empirically, as far as the data permit, the potential application of *Timbs* in forfeiture cases. In doing so, I will provide a landscape of forfeiture as it stands now. Most of the data compilations presented here are new. In addition to the insights they offer on the influence of *Timbs*, they can provide guidance for future legal research into the effects of forfeiture and forfeiture reform.

A. Data

State and local data records with respect to forfeiture can be described as scattered at best. Relatively few states gather even basic information concerning the number and value of assets consistently from one year to the next. Gaining access to whatever data exists is often an arduous matter of filing public record or freedom of information requests with state or local governments. By far the most comprehensive effort to gather state and local information is conducted every five years by the Institute for Justice, the organization that argued on behalf of Tyson Timbs before the Supreme Court. I have used its recently-published 2020 report,⁶¹ data sets that it has generously shared with me, and data that I have developed separately for state and local analysis; the sources are noted individually below.⁶²

Fortunately, most federally forfeited assets, including federal equitable sharing with state and local agencies, are tracked through a management system developed and managed by the Department of Justice, called the Consolidated Asset Tracking System (CATS).⁶³ As noted above, the CCCA established an Asset Forfeiture Fund (AFF) under Department of Justice management. CATS tracks the individual assets seized or maintained by agencies within the DOJ and several of the agencies, as well as some assets ultimately credited to the Treasury Forfeiture Fund. It is comprised of dozens of individual databases, many thinly linked by a common asset identifier that follows an asset through the system.⁶⁴ While CATS represents an enormously useful resource for

60. Here, of course, we are addressing only forfeiture—not fines (where *Timbs* may have a more systematic, powerful influence).

61. KNEPPER ET AL., *supra* note 11.

62. The six states are Arizona, Hawaii, Iowa, Michigan, Minnesota, and Virginia. The small number of states reflects the dearth of comprehensive data at the state level; a major goal of the reform efforts is to require states to maintain better data. In addition, I have obtained useful information for Washington through public record requests.

63. DEPT' JUST., MAJOR INFORMATION SYSTEMS (2014), <https://www.justice.gov/jmd/major-information-systems>.

64. For a schematic of the databases, see DEPT' JUST., CONSOLIDATED ASSET TRACKING SYSTEM (CATS): ENTITY RELATIONSHIP DIAGRAM (2020), <https://www.justice.gov/afms/page/file/1285861/>

2021] *An Empirical Assessment of Asset Forfeiture in Light of Timbs v. Indiana* 625

understanding federal forfeiture, scholars have made little use of it due to its great complexity, various data difficulties, and the lack of clear definition for many of its variables; consequently, most of the federal data analysis provided here is being developed for the first time.

B. *The Scale of Forfeiture*

Numerous prior studies have commented on the scale of and growth in forfeiture in dollar terms. Table 1 provides this overview for twenty fiscal years for the DOJ's Asset Forfeiture Fund, the main repository of federal forfeited assets.⁶⁵ Perhaps more importantly for our purposes, Table 1 also provides the number of asset "disposals"—that is, resolutions—during each fiscal year. This latter information, developed from CATS, demonstrates the sheer scale of forfeiture in a way that the dollar amounts cannot, providing a rough sense of its reach in American law. Table 1 also provides the dollar amounts of assets provided to state or local joint task force members, the number of asset distributions to those agencies, and the dollar value and number of assets that the Department of Justice adopted on behalf of local law enforcement.⁶⁶

download. For a listing of the CATS data sets, the variables that they contain, and the FOIA status of those variables, see DEP'T JUST., CATS: FOIA DISCLOSURE REPORT AS OF 10/3/2020 (2020), <https://www.justice.gov/afp/page/file/441201/download>.

65. The Table represents the Author's calculations based on data obtained through CATS. The Table encompasses all data from the beginning of operations for CATS through the fiscal year 2016.

66. Both joint-task-force shares and adoptive remittances to local agencies are considered equitable sharing. See DEP'T JUST. & DEP'T TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 4–6 (2018), <https://www.justice.gov/criminal-afmls/file/794696/download>.

Fiscal Year of Disposition	Assets Disposed Through the AFF		Joint Task Force Distributions		Adoptive Distributions	
	Number	Value	Number	Value	Number	Value
1997	18,502	167,546,763	6,382	34,716,384	1,269	11,071,508
1998	36,473	378,260,198	21,100	108,956,014	4,382	41,601,136
1999	50,508	831,628,748	28,481	225,670,976	5,881	60,939,010
2000	57,275	780,215,219	28,008	164,598,319	5,285	55,550,608
2001	34,644	601,240,824	31,041	173,132,321	4,816	42,348,026
2002	36,171	766,586,466	26,127	183,585,927	4,032	38,079,043
2003	48,596	747,536,893	30,916	186,879,854	5,552	51,762,314
2004	41,530	802,530,066	31,365	210,087,129	5,610	55,866,241
2005	35,600	965,554,661	32,594	249,340,972	5,291	63,122,026
2006	38,500	1,422,510,851	35,735	330,631,535	4,912	66,686,108
2007	69,001	1,893,541,517	34,979	365,678,875	5,545	73,398,988
2008	46,888	1,748,500,970	37,379	462,325,080	5,368	69,373,865
2009	53,190	1,923,551,735	40,191	388,397,156	5,807	84,190,376
2010	54,069	2,317,384,058	38,635	570,207,976	5,367	68,833,494
2011	51,152	2,459,764,077	40,555	416,078,982	6,487	73,548,314
2012	57,520	5,013,104,685	44,340	736,927,985	6,866	74,623,426
2013	57,118	2,352,054,443	52,683	463,903,716	6,278	65,637,342
2014	57,593	5,113,372,423	58,748	391,920,304	5,466	57,841,928
2015	66,941	2,319,088,086	54,442	340,511,036	3,713	36,780,046
2016	50,089	2,312,725,918	46,681	150,770,167	566	3,789,524
Total	961,360	34,916,698,601	720,382	6,154,320,708	98,493	1,095,043,323

Table 1 Source: Department of Justice, Consolidated Asset Tracking System, compilations by the Author.

State and local forfeiture that lacked any federal involvement occurred during this period in all states but was systematically reported only by some. Jurisdictions that did report such information reported it based on values and only rarely with the number of assets involved. Overall, an estimate of state and local forfeitures in 2018 with relatively complete data finds that they amounted to about 20% of the federal total, which includes the Treasury forfeiture fund as well as the AFF.⁶⁷ There is great variation from state to state and over time; moreover, this estimate understates the state and local amounts, since the federal data are known to be complete, but this is far less certain with the state data.⁶⁸ Not included in this estimate is New York state,⁶⁹ a special case in that

67. This statistic is based on the Author's calculations from data provided in KNEPPER ET AL., *supra* note 11, at 15. Figures from this source show that forfeitures through the Treasury forfeiture fund have averaged about 40% of the level of those through the AFF during the last 20 years. *See id.* at 162.

68. *See id.* at 15.

69. *Id.*

2021] *An Empirical Assessment of Asset Forfeiture in Light of Timbs v. Indiana* 627

it recorded over \$17 billion in forfeiture revenue in just two years, 2014 and 2015.⁷⁰

Forfeiture may occur under three very different processes: administrative, civil judicial, or criminal judicial.⁷¹ Administrative forfeiture occurs when the seizure of an asset is not correctly challenged by the property owner or other claimant.⁷² The asset then is forfeited to the government, possibly directly to the law enforcement agency that is credited with the seizure, to a fund that is then (partly) distributed to law enforcement, or to general revenues. Civil judicial forfeiture generally occurs after a seizure has been challenged. If the property is found “guilty” under the relevant law, it is forfeited by the court’s ruling.⁷³ Finally, criminal forfeiture occurs as part of the punishment phase of an in personam conviction of an individual for a crime. If the asset is linked to the crime—at the federal level by preponderance of the evidence—it is forfeited by the trial court’s ruling.⁷⁴ This division among paths to forfeiture relates to the Excessive Fines Clause in at least two ways. First, recourse to the excessive fines restrictions will occur only under judicial forfeiture. If an interested party does not challenge a seizure and the asset is forfeited administratively, it does not matter whether the asset’s value is excessive or not. Second, the size of the assets involved matters; the owner has to undertake the legal expenses of trying to regain it, and the courts have to view it as large enough to be excessive.

For federal data, we can quantify these distinctions. Table 2 provides the division among administrative, civil judicial, and criminal judicial forfeited assets at the federal level for the period 1997 – 2016, both overall and for assets involved in equitable sharing. The Table also provides the average and median values per asset. Several things are worth noting. Administrative forfeiture, which does not involve judicial processes and therefore would not be the subject of excessive fines adjudication, forms the large majority of assets disposed through the AFF by number—69%—even though these comprise only 25% by value of the total assets disposed. This is in turn reflected in the average asset values, which are much lower for administrative forfeiture than for the judicial forfeiture categories. Perhaps more telling is the comparison of

70. *Id.* at 124. The surge in New York state forfeiture was due to settlements in the B.N.P. Paribus fraud case, under which \$8.33 billion in 2014 and \$8.33 billion in 2015 were paid to New York County. N.Y. DIV. CRIM. JUST. SERVS., ASSET FORFEITURE REPORTING PROGRAM (2015), <https://www.criminaljustice.ny.gov/crimnet/ojsa/2015-asset-forfeiture-annual-report.pdf> [hereinafter N.Y. DIV. CRIM. JUST. SERVS. 2015]; N.Y. DIV. CRIM. JUST. SERVS., ASSET FORFEITURE REPORTING PROGRAM (2014), <https://www.criminaljustice.ny.gov/crimnet/ojsa/2014-asset-forfeiture-annual-report.pdf> [hereinafter N.Y. DIV. CRIM. JUST. SERVS. 2014]. New York County retained about 10% of these proceeds, with the majority going to New York state general funds and roughly a quarter paid for damages or restitution to victims. N.Y. DIV. CRIM. JUST. SERVS. 2015, *supra*, at Attachment A; N.Y. DIV. CRIM. JUST. SERVS. 2014, *supra*, at Attachment B.

71. *See* CASSELLA, *supra* note 10, at 9–17.

72. *Id.* at 10–11.

73. *Id.* at 17.

74. *Id.* at 14.

average and median values for the assets: the latter is much lower for all three categories of forfeiture. This means that the distribution of asset values is highly skewed, most assets having decidedly modest valuations.⁷⁵ For adoptive forfeitures, perhaps the closest proxy for local forfeiture activity, administrative forfeitures make up about 80% of the total. Mean and median values are low, suggesting limited scope for an excessive fines review at best.⁷⁶

75. Some assets are destroyed rather than converted to cash, including most weapons and ammunition; these assets are numerous and are typically valued at a nominal \$1, so, for some purposes, they can be seen as distorting the averages and medians. (This does not affect the joint task force and adoptive forfeiture amounts, since there are no funds associated with these assets to distribute to state and local agencies.) Destroyed assets are coded as such in CATS. Removing these from the Table 2 figures for Assets Disposed Through the AFF increases both the means (for codes B, C, and D, the new figures are \$20,493, \$179,931, and \$71,767, respectively) and the medians (in the same order, 2,780, 5,863, and 1,499). The distributions are still highly skewed—a large portion of assets being of relatively low value—when these assets are removed. Also, the destruction of an asset does not mean that the asset lacked value in the market or to its owner. The asset may be destroyed because agencies are prohibited from reselling certain assets, and the acts of seizure and storage themselves may destroy an asset's value.

76. The Department of the Treasury forfeitures follow a more extreme pattern. The Institute for Justice has obtained Treasury's Seized Assets and Case Tracking System through litigation. The Institute calculates that 96% of forfeitures managed by the Treasury system were administrative, 2% were civil judicial, and 2% were criminal. KNEPPER ET AL., *supra* note 11, at 24 fig. 8.

TABLE 2					
Assets Separated By Forfeiture Types					
Time period: FY 1997 - 2016					
Assets Disposed Through the AFF					
CATS Code	Description	Number	Value	Average	Median
B	Administrative	658,647	8,665,572,425	13,157	500
C	Civil/Judicial	114,367	16,917,007,468	147,919	2,962
D	Criminal	188,318	9,334,101,458	49,566	300
	Total	961,332	34,916,681,351		
Joint Task Force Distributions					
CATS Code	Description	Number	Value	Average	Median
B	Administrative	505,439	3,874,125,319	7,665	944
C	Civil/Judicial	104,995	1,326,147,991	12,631	189
D	Criminal	109,949	954,048,147	8,677	498
	Total	720,383	6,154,321,457		
Adoptive Forfeiture					
CATS Code	Description	Number	Value	Average	Median
B	Administrative	79,924	891,767,827	11,158	2,486
C	Civil/Judicial	15,794	178,664,649	11,312	1,324
D	Criminal	2,775	24,610,849	8,869	1,531
	Total	98,493	1,095,043,325		

Table 2 Source: Department of Justice, Consolidated Asset Tracking System, compilations by the Author.

We have data for a small number of states that allow us to distinguish criminal from civil forfeiture at the state and local levels. In the three states for which we have this information, civil forfeiture—the combination of administrative and civil judicial takings—far outweighs criminal forfeiture.⁷⁷ In one state, Minnesota, we can identify cases initiated as judicial proceedings and compare these to administrative initiations. The former constitutes only 7% of assets, the latter 76%, with the remainder either classified as unknown or including settlements and agreements outside the forfeiture process.⁷⁸ As with the federal government, but even more so, state and local procedures and prosecutions are heavily civil and heavily administrative. Also, as with federal

77. *Id.* at 26–27. The three states are Arizona (93% civil, 3% criminal, 4% unclassified), Connecticut (71% civil, 29% criminal), and Oregon (74% civil, 26% criminal). *Id.* at 27 fig. 12.

78. *Id.* at 28 fig. 13.

assets, state and local median asset values are remarkably low—in most states for which information is available, \$1,000 or less.⁷⁹

C. *Seizure and Forfeiture*

A forfeiture begins with the seizure of a piece of property, an asset. The seizure may occur for one of several reasons. For example, it may be the object of an investigation, such as in cases of financial fraud, with the goal not only of arresting the perpetrators but of recovering the ill-gotten property, perhaps for distribution to victims of the crime. It may follow from an investigation but be incidental to the pursuit of in personam proceedings against individuals. It may be incidental to an unplanned arrest made in the course of routine patrol or in response to a complaint. And it may be the object of police stops, or incidental to them, but with no accompanying arrest.

No databases allow a comprehensive assessment of the relative importance of these seizures. However, again from an analysis of the AFF, including the Department of Justice's equitable sharing, we can gain some notion of the procedural background to property seizures, overall and resulting from joint operations and adoptions.

79. *Id.* at 60–164. Of the twenty-one states for which the Institute could calculate medians, thirteen of them had a median forfeiture value below \$1,000. *Id.* Comparing the median amounts to minimal legal expenses for challenging a forfeiture, the Institute concluded that the median value was insufficient to justify legal challenge, even with a certainty of winning, in twenty of the twenty-one states. *See id.* at 20–21.

TABLE 3					
Number and Value of Assets by Seizure Method,					
with the Corresponding Equitable Sharing Amounts					
Seizure Method		Assets Disposed Through the AFF		Joint Task Force Distributions	
CATS Code	Description	Number	Value	Number	Value
A	Adoption	116,350	1,595,653,988	98,478	1,094,694,366
B	Indictment	32,846	2,568,115,164	27,767	259,885,466
C	Search Warrant	147,133	2,329,577,239	216,331	1,103,759,160
D	Seizure Warrant	54,957	4,160,984,775	59,722	328,059,715
E	Warrant in Rem	6,996	2,846,255,332	5,336	60,969,182
F	Warrantless/PC	491,683	4,310,520,621	276,347	1,944,653,449
G	Referral	21	4,282		
H	Judgment	22,814	2,585,161,355	8,621	308,047,481
I	Incident Arrest	13,732	228,042,090	18,826	54,883,808
J	Civil Complaint	7,847	4,152,381,369	8,189	206,698,379
K	4th Waiver Such	997	22,927,906	2,600	13,971,680
L	Probation Such	362	7,745,903	751	4,391,276
M	Plea Agreement	6,835	2,029,198,997	5,206	146,103,574
N	Consent	34,011	3,672,502,300	70,721	1,003,517,768
O	Other	22,612	4,109,560,224	18,405	699,263,724
P	Warrant - Federal Seizure	19	383,860	10	21,094
Q	Warrant - State Seizure	2	13,167		
R	Warrant - Federal Search and Seizure	30	725,434	2	0
	Not Specified	2,113	298,530,309	1,564	20,444,659
	Total		34,918,284,315		7,249,364,781

Table 3 Source: Department of Justice, Consolidated Asset Tracking System, compilations by the Author.

Table 3 provides a breakdown of AFF dispositions and equitable sharing by the procedural basis for seizures, again using dispositions for Fiscal Year (FY) 1997–2016.⁸⁰ The Table is useful in understanding the nature of federal forfeiture. However, because adoptive forfeiture is a category of its own without a further breakout, the data do not provide a clear window into those purely local seizures. Anecdotally, at least, disproportionate, large seizures occur most heavily with Incident Arrests (CATS category I)—this was the case with Tyson Timbs—and Consent Searches (CATS category N), both heavily associated with roadside stops. But there is an additional message here. In general, the seizures themselves are not subject to Eighth Amendment protections; indeed, it is not clear that this could be done coherently, except

80. Seizure precedes forfeiture, of course. In the CATS data, the average lag between the seizure date and the disposition date is roughly one year. See *supra* Table 1 (Author's calculations from CATS). The data in Table 3 is for the same universe of dispositions as in Tables 1 and 2, but the seizures related to those assets occurred, on average, one year before the FY 1997–2016 span of the dispositions. See *supra* Table 3.

possibly through a skeptical judge's review of a seizure warrant. A seizure freezes an asset prior to its disposition, whether by forfeiture, destruction, or return to the owner or another claimant. This introduces a substantial shortcoming of the Eighth Amendment protections: they would protect against and provide redress for inappropriate forfeitures, not seizures. The time from seizure to forfeiture can be substantial, averaging about a year for the assets processed through the Asset Forfeiture Fund,⁸¹ and, of course, that period would be greater were a party forced to challenge the seizure in court to prevent a subsequent forfeiture. This suggests the need for rapid interlocutory appeals that assess the flight risk of the asset, much as a bail hearing assesses the flight risk of an individual.

D. *What Assets Are Seized and Forfeited?*

Tyson Timbs's vehicle was forfeited, and many of the investigations concerning overreach by law enforcement involve vehicles.⁸² Cash is another important example; the landmark *Bajakajian* case involved the seizure of cash for a reporting violation.⁸³ Do the nature and value of seized assets provide definitive answers concerning possible excessive forfeitures? Unfortunately not; again, we do not have information concerning the identity of the property owners nor even the exact nature of the offense. But clearly some assets (vehicles) are more likely to be subject to disproportionate forfeiture than others (ammunition). We can take a productive look at the nature of the assets forfeited.

Table 4 provides the number of assets, the total value of assets, and the median values for the asset categories recorded in the Asset Forfeiture Fund. It includes the breakout for joint task forces and adoptive seizures of the previous Table. The values shown are for the asset as liquidated, which usually means converted to cash (sold) for personal and real property. The joint task force and adoptive values reflect asset values by property category, but again the actual distributions are usually in cash.⁸⁴ Cash and financial instruments—commonly bank accounts—dominate the forfeited values. While personal property,

81. See *supra* Table 1 (Author's calculations from CATS).

82. See John Ross, *More Glimpses of Washington, D.C.'s Civil Forfeiture Nightmare*, REASON (Jan. 19, 2013, 3:00 PM), <https://reason.com/2013/01/19/washington-dcs-civil-forfeiture-nightmar>, for examples from Washington D.C. For a description of 2019 Michigan reforms and examples of automobile seizures in Michigan, previously one of the most active states in vehicle seizures, see C.J. Ciaramella, *Michigan Police Won't Be Able to Seize People's Cars for Suspected Drug Crimes Anymore*, REASON (May 10, 2019, 9:45 AM), <https://reason.com/2019/05/10/michigan-police-wont-be-able-to-seize-peoples-cars-for-suspected-drug-crimes-anymore>.

83. See *generally* *United States v. Bajakajian*, 524 U.S. 321 (1998).

84. As an important example, local agencies, in seeking adoption, can specify receiving the actual asset versus the cash amount after it is liquidated. Well over 99% of all assets are requested as cash. See *supra* Table 1 (Author's calculations from CATS).

including vehicles, remains important, the median values are strikingly low, with the exception of aircraft. Overall, the numbers suggest that excessive fine recourses based purely on asset value, without consideration of the harm to the owner of the forfeiture, will be the exception, at best.⁸⁵

TABLE 4
Nature of Assets Processed through the Asset Forfeiture Fund and the Associated Equitable Sharing Amounts

CATS Code	Description	Assets Disposed Through the AFF			Joint Task Force Distributions			Adoptive Forfeiture		
		Number	Value	Median	Number	Value	Median	Number	Value	Median
AL	Alcohol	2,689	3,163,958	171	157	28,593	0			
AM	Ammunition	86,128	5,846,259	1						
AN	Animals	953	7,334,441	63	178	36,739	0			
AR	Aircraft	421	123,045,746	57,675	978	7,100,275	507	5	12,946	1,618
BI	Business Inventory	2,308	157,795,680	10	255	79,218,962	309			
BU	Commercial Business	182	863,932,772	81,602	289	5,217,706	1,902			
CA	Cash/Currency	223,391	12,131,461,614	8,009	463,863	4,015,854,028	1,230	86,683	1,051,817,680	2,376
CH	Chemicals	7,045	26,222,523	50	24	27,391	0	1	2,352	2,352
CL	Clothing	4,781	22,222,568	269	497	214,530	41	5	4,837	676
DR	Drug Paraphernalia	1,109	5,829,325	3	67	413	0	7	4,742	225
EL	Electronic Equipment	33,329	26,126,683	10	2,429	391,647	0	123	40,633	0
EX	Explosives	8,370	3,628,413	10	42	442	0			
FI	Financial Instrument	58,633	16,277,042,876	3,296	59,446	1,529,127,833	623	2,911	18,324,963	1,132
FO	Food	99	19,644,903	8	2	1,027,714	513,857			
GE	Growth Equipment	1,483	1,154,194	5	88	15,822	0	13	0	0
GS	Gambling Devices	1,128	47,127,706	388	195	281,942	69	15	12,324	0
HG	Furniture/Habit Item	4,683	6,414,894	95	608	353,713	0	15	7,153	346
HM	Heavy Machinery	894	11,223,250	5,500	1,270	1,698,781	451	59	232,580	1,241
IA	Intangible Asset	75	8,438,700	1	15	30,688	0			
JE	Jewelry/Precious Item	41,541	410,317,227	398	18,688	44,493,900	305	461	1,612,977	257
JU	Judgment	13	388,150	50	4	1,917	479			
OT	Other	16,904	542,705,951	80	3,212	4,985,948	81	146	343,766	500
PO	Pornography	491	23,020	1	1	0	0			
RP	Real Property	14,155	2,527,065,668	70,000	29,345	335,138,932	1,927	451	6,902,114	4,872
TO	Tobacco	26,548	22,038,031	0	4,139	311,430	0	4	0	0
VH	Vehicles	217,802	1,371,075,264	1,800	129,757	116,875,765	182	7,418	15,380,673	641
VS	Vessels	2,501	121,870,502	7,000	3,782	9,584,668	163	105	239,802	729
WA	Art Work/Collection	9,116	107,583,681	120	996	2,301,679	5	65	64,287	0
WE	Firearms	194,588	65,976,602	150	56	0	0			
	Total	961,360	34,916,698,601		720,383	6,154,321,458		98,489	1,095,003,829	

Table 4 Source: Department of Justice, Consolidated Asset Tracking System, compilations by the Author.

State data sets tell a simpler story. Here, cash and vehicles account for the large majority of forfeitures. Vehicle forfeitures often result from driving-while-intoxicated charges; when forfeiture is not a consequence of DWIs, cash tends to form the overwhelming majority of forfeitures both in number and value.⁸⁶

The importance of cash—and financial instruments—also suggests that the reach of *Timbs* may be restricted. Cash is often seized because it is considered evidence of a crime, especially if a dog has signaled drug residue.

85. Somewhat tangentially, real property and commercial businesses are interesting categories that deserve separate analysis with better (not-yet-existent) data. In both cases, the danger of fugitive assets—one of the main justifications for exclusionary seizures—is largely nonexistent.

86. Across fifteen states for which there is good data, the Institute for Justice calculates that currency accounts for about 70% of forfeited property, vehicles account for 16%, real property accounts for 1%, and the remaining 13% consists of unspecified property. KNEPPER ET AL., *supra* note 11, at 19.

This is a proceeds theory. Even in cases where some portion of the money is intended to buy further drugs for trafficking, thus being a potential instrumentality for a future crime, police and prosecutors may well have the alternative of charging it as proceeds and thus avoiding an excessive fines review. While this would not be universally true—for example, legal funds used to launder illicit money would be seized as a facilitating property—it would be widespread. Given the importance of cash in seizures, this distinction suggests that a wide range of forfeitures may not be subject to Eighth Amendment review. This point is expanded in Part III.E.

E. What Are the Causes of Action for Forfeitures?

We would like a sense of the extent to which assets are forfeited under a theory of facilitating devices (including instrumentalities) or proceeds, because the latter will rarely if ever be subject to excessive fines limitations. There is no comprehensive way to determine this from existing databases, at least those available under the Freedom of Information Act. We face a similar problem in trying to identify the gravity of the underlying offense. However, we can systematically identify the statutory basis for a subset of civil forfeitures at the federal level, which sheds some light on these questions as well as being of independent interest.

CATS maintains a record of the statutes under which an asset is seized and under which an asset is forfeited.⁸⁷ Unfortunately, the relevant data fields are often not coded precisely; this imprecision is especially a problem for criminal forfeiture. Here, we have calculated and reported what the data allow. Table 5 provides a partial cut, civil forfeiture under the primary civil forfeiture statute, 18 U.S.C. § 981. While only one section of the many that apply to forfeiture in the United States Code, § 981 is an important one numerically, accounting for about half of the properties forfeited to the AFF during our twenty-year period. Table 5 allows some idea of the division between facilitating property and proceeds, as well as showing the data difficulties facing coherent public policy discussion. Subsection 981(a)(1)(A) concerns “property, real or personal, involved in a transaction or attempted transaction in violation of” specified code sections.⁸⁸ Subsections 981(a)(1)(B) through 981(a)(1)(F) concern proceeds. As shown in Table 5, the data are only partially coded in CATS; often just a generic section number 981 or 981(A)(1) is provided by the individual coding the asset. But enough remains to be illustrative. Of the total under 18 U.S.C. § 981, slightly under 10% concerns facilitating property and is thus

87. MAJOR INFORMATION SYSTEMS, *supra* note 63.

88. 18 U.S.C. § 981(a)(1)(A) (2016).

2021] *An Empirical Assessment of Asset Forfeiture in Light of Timbs v. Indiana* 635

subject to the Excessive Fines Clause; nearly 60% concerns proceeds and thus likely is not.⁸⁹

Title	Section	Basis	Number	Value	
18 USC	981	Not Specified	27,540	4,934,417,246	31.0%
18 USC	981(A)(1)	Not Specified	499	35,531,808	0.2%
18 USC	981(a)(1)(A)	Facilitating Assets	2,377	1,524,821,547	9.6%
18 USC	981(a)(1)(C)	Proceeds	17,831	9,378,815,402	59.0%
18 USC	981(a)(1)(D)	Proceeds	48	4,669,096	0.0%
18 USC	981(a)(1)(E)	Proceeds	7	29,420,214	0.2%
18 USC	981(a)(1)(F)	Proceeds	6	158,311	0.0%
			48,308	15,907,833,624	

Table 5 Source: Department of Justice, Consolidated Asset Tracking System, compilations by the Author.

We do not have similar breakdowns for state and local law enforcement. As noted above, cash is by far the most important asset seized, with vehicles a rather distant second. There may be a tendency for cash to be forfeited under proceeds theories, or at least be forfeitable under such theories, and for vehicles to more often be seized as facilitating devices, such as driving-while-intoxicated transgressions or transporting drugs, but data do not allow us to test this tendency.

F. Who Gets the Money, and What Does This Imply?

Asset forfeiture provides revenues directly through seizures of cash and financial instruments. Personal and real property is sometimes retained by law enforcement at the state and local levels, but in general is sold with the revenues after sales expenses, then remitted to forfeiture funds or directly to law enforcement agencies. From CATS, we can largely trace the destination of equitable sharing funds distributed to state and local agencies.

89. There are literally hundreds of provisions of federal law for seizures and for forfeitures. CATS tends to have more thorough coding of the former. The Author's understanding is that judicial forfeitures often invoke more than one statutory provision, and U.S. attorneys' offices consequently tend to default to more generic coding for CATS. A full breakdown by statutory provision for seizures and for forfeitures is available from the Author upon request.

Table 6		
Equitable Sharing Amounts by Agency Type		
Agency Type	Value	Pct. of Total State & Local
Police & Sheriff:	4,431,174,443	71.4%
Prosecutors:	509,302,417	8.2%
Task Forces:	568,161,811	9.2%
National Guard:	22,006,781	0.4%
Other Local:	34,167,580	0.6%
Other State:	641,368,690	10.3%
Total	6,206,181,722	100.0%

Table 6 Source: Department of Justice, Consolidated Asset Tracking System, compilations by the Author.

The Table indicates the range of beneficiaries of equitable sharing, including not only police and sheriffs⁹⁰ but also prosecutors, standing task forces,⁹¹ and a wide variety of state and local agencies, such as state highway patrol, probation offices, and corrections departments. Forfeiture has many stakeholders.

The flow of funds can rarely be traced from state data. For three states, Arizona, Michigan, and Washington, we were able to obtain the recipient of the funds by type of agency. In Arizona, local police (including sheriffs) received 66% of the forfeited funds and prosecutor or county attorney offices received 34%, with other state agencies and task forces receiving less than 1% each.⁹² In Michigan, the coded agency type indicated that local police and sheriffs received 73%, prosecutors 1%, and task forces 26%.⁹³ And in Washington state, local

90. The distinction is that police forces are typically associated with municipalities and sheriff offices with counties, although there are exceptions.

91. The term “task force” covers a wide range of entities, from temporary cooperative arrangements among law enforcement agencies with a particular goal to standing bodies with a continuing existence and usually a broad mandate, such as drug enforcement, within a particular geographic area. Agencies that contribute personnel to task forces may receive equitable sharing funds directly, which would be reflected in the “Police & Sheriff” lines. *See supra* Table 6. Equitable sharing funds received by task forces may then be distributed to the contributing agencies. *See supra* note 39. But task forces also keep the funds in many cases, and indeed, some task forces are “self-funded,” deriving their revenue entirely from forfeitures.

92. Author’s calculations are from *RICO Forfeiture Order Report*, ARIZ. CRIM. JUST. COMM’N, <http://staging.azcjc.gov/content/rico-forfeiture-order-report> (last visited Jan. 15, 2021).

93. Author’s calculations are from data obtained by Institute for Justice through FOIA requests with the Michigan State Police for annual local government forfeiture reports pursuant to MICH. COMP. LAWS § 333.7524a (2000) (repealed 2015). Data provided to Author by Institute for Justice via private correspondence.

police and sheriffs received 58%, the state 11%, and task forces 33%.⁹⁴ As with the equitable sharing data, the lesson is the variety of stakeholders in forfeited funds.

CONCLUSION

In the short time since the *Timbs* decision, some have raised doubts about its impact,⁹⁵ doubts that I share. My concerns are born of the data and the incentives that law enforcement face with forfeiture, incentives that I maintain will be little affected by the decision.

The data analysis shows that *Timbs* will likely apply to a small subset of forfeitures. At the federal level, already subject to the Excessive Fines Clause, proceeds rationales appear to dominate. At state and local levels, the ubiquity of cash forfeiture suggests that the same will be true, that treatment as proceeds will avoid Eighth Amendment limitations. Even if cash is seized as an instrumentality—intended for a drug buy, for example—it may likely be finally forfeited as a proceed, unless its owner can trace its provenance to legal activities. Vehicle seizures are common by state and local law enforcement, and this may be an area where *Timbs* sees occasional impact. However, asset values are surprisingly low, suggesting both that property owners may not pursue redress even if the forfeiture is clearly excessive,⁹⁶ and that excessive forfeiture with respect to an asset clearly linked to a crime may be uncommon. The manifold interests that benefit from forfeiture—police, prosecutors, task forces that may depend upon it, and state agencies including state attorneys general offices—imply that there will not be a constituency within law enforcement pushing for a vigorous implementation of *Timbs*.

Vigorous implementation of *Timbs* will likely lie more with state legislatures. Several elements could go into a determination that a forfeiture (or a fine) is grossly disproportionate to the underlying transgression. First, as already noted, there may not be an underlying transgression, in which case a common-sense interpretation of *Timbs* would suggest that any forfeiture (or fine) is excessive. This suggests that state legislatures and possibly trial courts

94. Author's calculations are based on data provided in response to public records requests filed with the Washington State Department of Revenue.

95. See Brandon Buskey, *A Proposal to Stop Tinkering with the Machinery of Debt*, 129 YALE L.J.F. 415, 415 (2019); Nora V. Demleitner, *Will the Supreme Court Rein in "Excessive Fines" and Forfeitures? Don't Rely on Timbs v. Indiana*, 32 FED. SENT'G REP. 1, 8–14 (Oct. 2019); S. Matthew Krsacok, *Excessive to Whom?: Why Courts Should Adopt a Means-Based Proportionality Framework Under the Excessive Fines Clause*, 17 DRUG ENF'T & POL'Y CTR. 1, 1–2 (Mar. 2020).

96. A low vehicle value does not mean that the forfeiture is not excessive. As an important example, the forfeiture of an innocent owner's asset that is not tied to a crime may be difficult to redress under state laws but would appear to be excessive on its face, since neither the owner nor the asset had been implicated in wrongdoing. But given the expense of regaining the asset versus the low value of most assets seized by state and local authorities, use of *Timbs* protection in states with poor innocent owner protections may remain rare, even if excessive forfeitures are common.

should lean more heavily on the demonstration of the existence of a crime, a separate demonstration from an asset's linkage to that crime. To some extent, state reforms have already raised the standard of proof required in these respects,⁹⁷ and courts—cognizant of Eighth Amendment protections—may wish to enforce their rules of evidence to place the burden clearly with the prosecution. Second, the seriousness of the underlying crime should matter. Forfeiture statutes are often very broadly written, allowing the same response—an asset's forfeiture—to a wide variety of crimes. State legislatures can use the idea of proportionality in revising their forfeiture statutes, and courts can use the seriousness of the underlying crime in applying the Excessive Fines Clause. Third, legislatures and courts may wish to consider the impact of the forfeiture on the individual involved.⁹⁸ Upon remand from the Supreme Court, Indiana courts have combined these latter two considerations—gravity of the offense and impact upon the property owner—in deciding that Timbs should be allowed to keep his vehicle.⁹⁹ Fourth, as the Indiana trial court reasoned initially, if there is a punishment for a specific crime, the value of assets seized should not greatly exceed the maximum extent of that punishment. Indeed, if a court imposes a punishment for an offense that it deems appropriate, any punitive purpose to forfeiture would seem to be excessive. Finally, and to my knowledge not part of the discussion, the boundaries of facilitating properties and proceeds may need to be defined more clearly. If law enforcement can forfeit something deemed proceeds but not forfeit an identical property that is deemed a facilitating asset, this leaves a worrisome incentive in place in charging an individual (and the property) when the property is valuable and, as is often the case with cash, potentially characterized either way.

This Article and its preparation motivate a plea for better data, not just for the use of after-the-fact researchers trying to parse facts, but for public servants trying to determine the effectiveness of policies and reforms. This is not a new observation; indeed, better record-keeping has been the chief example of state forfeiture reforms in the last decade.¹⁰⁰ The minimal elements of such reform are clear. States should maintain centralized records and have enforceable requirements that local agencies participate. The assets should be individually identified, which is already required for police inventory and evidentiary purposes. The causes of the seizure, including the circumstances, should be

97. *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/#:~:text=In%202014%2C%20I%20launched%20its,and%20courts%20of%20public%20opinion> (last visited Jan. 15, 2021).

98. This is argued in Buskey, *supra* note 95, at 423. Buskey in fact goes somewhat further, arguing that the gross proportionality test should be replaced with the proportionality test contained in the Excessive Bail Clause. *Id.* at 427.

99. *State v. Timbs*, No. 27D01-1308-MI-92 at 13 (Grant Cty. Super. Ct. Ind., Apr. 27, 2020), *remanded by State v. Timbs*, 134 N.E.3d 12 (Ind. 2019).

100. KNEPPER ET AL., *supra* note 11, at 43.

noted, including whether an arrest was made and under what authority. The resolution of seizures, including the presence and resolution of any charged crimes, should be associated with the assets in the record-keeping. And some identification of property owners should be made. Considerable information is available upon arrest without revealing the individual's identity; a limited version of the same could be put in place for asset seizures.

The data demonstrate that the direct effects of *Timbs* will be modest. Most forfeitures likely will not be subject to the Excessive Fines Clause, because they are classified as proceeds or because they are forfeited administratively and never see a courtroom. Many others will never be considered judicially because even if they are excessive, as in the seizure of an innocent asset from an innocent owner, the cost to the owner of regaining the asset exceeds its value. And of course, many will be adjudged not to be excessive, even if the owner feels otherwise. Police and prosecutors share in forfeiture proceeds, eroding the checks that this separation should provide. And to some extent, law enforcement may be able to work around the new restrictions by restyling facilitating properties, especially cash, as proceeds. But its limited immediate reach may not give justice to *Timbs's* eventual impact. For the agencies that have abused forfeiture, *Timbs* serves notice that forfeiture is not only a source of funds limited by the energy of law enforcement but is also increasingly subject to constitutional safeguards.