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CIVIL ASSET FORFEITURE IN MASSACHUSETTS: A FLAWED INCENTIVE STRUCTURE AND ITS IMPACT ON INDIGENT PROPERTY OWNERS

ANDREW CRAWFORD *

Abstract: All fifty states and the federal government have civil asset forfeiture laws that enable law enforcement agencies to seize property that they suspect has been involved in the commission of a crime. Although there are many benefits to the system, there are also many flaws. The entire structure of the civil asset forfeiture system, at both the federal and state levels, creates incentives for abuse by law enforcement. This Note advocates for a series of changes to the current forfeiture law in Massachusetts, including requiring a heightened burden of proof, providing counsel to indigent property owners, and reforming the incentive structure created by the interaction with federal forfeiture law. These statutory safeguards will help reduce the disproportionate impact that Massachusetts's forfeiture law has on lower income parties and the general population overall.

INTRODUCTION

First, envision a million-dollar motel property that had been family-built, owned, and operated since 1955.¹ Then envision the federal government working in conjunction with local law enforcement to seize possession of this mom-and-pop motel.² The motel owners are not connected with any sort of criminal activity.³ Moreover, the seizure takes place without providing any amount of compensation to the owners.⁴ This can occur through a proceeding known as civil asset forfeiture, which allows law enforcement agencies to seize property suspected of being involved in the commission of a crime.⁵ The law enforcement agency responsible for the seizure can subsequently sell the property and use any

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¹ *United States v. 434 Main Street*, 961 F. Supp. 2d 298, 303 (D. Mass. 2013); *Massachusetts Civil Forfeiture: United States v. 434 Main Street, Tewksbury, Mass. (The Motel Caswell): Federal & Local Law Enforcement Agencies Try to Take Family Motel from Innocent Owners*, INST. FOR JUST., <http://www.ij.org/massachusetts-civil-forfeiture> (last visited May 13, 2015) [hereinafter *Massachusetts Civil Forfeiture*].

² See *Massachusetts Civil Forfeiture*, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ Jefferson E. Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 273 (2011).

profits to supplement its budget.⁶ The above-outlined seizure was the nightmare faced by sixty-nine-year-old Russ Caswell and his family, owners of The Motel Caswell (“the Motel”), in Tewksbury, Massachusetts.⁷

Russ Caswell’s father built the Motel in 1955 and the family operated the Motel for two generations.⁸ Russ Caswell took over ownership and operation of the Motel beginning in 1984.⁹ On September 29, 2009, the United States brought a civil forfeiture action against the Motel under the Civil Asset Forfeiture Reform Act (“CAFRA”).¹⁰ The government argued that the Motel had been used to facilitate illegal activity in the form of drug transactions.¹¹ Specifically, the complaint asserted that the Motel should be subject to forfeiture because it had been “used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of [the Controlled Substances Act] punishable by more than one year of imprisonment.”¹²

Leading up to the seizure of the Motel, the city of Tewksbury had become increasingly subject to criminal and drug activity.¹³ The Caswells were aware of this trend, and whenever they became suspicious of potential criminal activity occurring on their property, they notified the police and fully cooperated with them.¹⁴ Neither Mr. Caswell nor anyone in his family had ever been involved in any sort of criminal activity.¹⁵ Although criminal forfeitures occur only after a person has been convicted of a crime, civil forfeitures do not require a conviction, or even that charges be brought against the property owner.¹⁶ The government did not contend that the Caswells were involved in criminal activity; rather, it argued that there was a “substantial connection” between the Motel and certain

⁶ *Massachusetts Civil Forfeiture*, *supra* note 1. Most state civil asset forfeiture laws return forfeiture proceeds to the local law enforcement agency that made the seizure. See Holcomb et al., *supra* note 5, at 277. Forty-two states return at least fifty percent of forfeiture proceeds to law enforcement. *Id.* This creates a clear incentive for local law enforcement to “police for profit” and generate revenue for their departments. See *id.* at 283 (noting that the study results “provide compelling evidence that law enforcement agencies consider the . . . financial rewards . . . in determining how to process asset seizures”); 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, 175 (2001); *Massachusetts Civil Forfeiture*, *supra* note 1.

⁷ 434 Main Street, 961 F. Supp. 2d at 302; *Massachusetts Civil Forfeiture*, *supra* note 1.

⁸ See 434 Main Street, 961 F. Supp. 2d at 303.

⁹ *Id.*; *Fighting Civil Forfeiture Abuse: Federal & Local Law Enforcement Agencies Try to Take Family Motel from Innocent Owners*, INST. FOR JUST., <http://www.ij.org/massachusetts-civil-forfeiture-background> (last visited Apr. 11, 2015) [hereinafter *Fighting Civil Forfeiture Abuse*].

¹⁰ Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983(c)(1) (2012); 434 Main Street, 961 F. Supp. 2d at 301, 302.

¹¹ See 434 Main Street, 961 F. Supp. 2d at 302.

¹² *Id.*; see also 21 U.S.C. § 881(a)(7) (2012).

¹³ See *Fighting Civil Forfeiture Abuse*, *supra* note 9.

¹⁴ *Id.*

¹⁵ 434 Main Street, 961 F. Supp. 2d at 302–03.

¹⁶ Marian R. Williams et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. 1, 9 (Mar. 2010), http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

illegal activity, and therefore the property was subject to forfeiture.¹⁷ In support of this contention, the government pointed to fifteen arrests at the Motel between September 30, 1994 and November 30, 2008.¹⁸ None of these arrests involved Mr. Caswell or any other employee of the Motel.¹⁹ Between 1994 and 2011, the Caswells had rented rooms to over 125,000 guests.²⁰

After the government initiated the forfeiture action against the Motel, the Caswells became locked in a three-year legal battle with the government to keep possession of the Motel.²¹ Mr. Caswell depleted all of his savings on legal counsel, spending over \$100,000 during the course of the dispute.²² Fortunately for Mr. Caswell, after he exhausted all his resources, the Institute for Justice, a national civil liberties law firm, took up his case pro bono.²³ Mr. Caswell could not have continued fighting the government without the assistance of the Institute for Justice.²⁴

After three years, the United States District Court for the District of Massachusetts ruled that the government had failed to meet its burden of proof by a preponderance of the evidence that the Motel was substantially connected to illegal criminal activity.²⁵ The court reached this decision after consideration of a number of factors, including the small number of crimes occurring at the Motel over many years, Mr. Caswell's lack of involvement in any drug-related inci-

¹⁷ *434 Main Street*, 961 F. Supp. 2d at 301, 302–03.

¹⁸ *Id.* at 311–16.

¹⁹ *Id.* at 301.

²⁰ Dick M. Carpenter II et al., *Inequitable Justice: How Federal “Equitable Sharing” Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain*, INST. FOR JUST. 1, 2 (Oct. 2011), http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf.

²¹ See *434 Main Street*, 961 F. Supp. 2d at 302. Civil forfeiture actions are brought directly against the property allegedly involved in the crime, not against the owner of the property. See *id.* at 320 (noting that “civil forfeitures directed in rem are remedial civil sanctions brought directly against the property itself”).

²² Nick Sibilla, *Federal Case Could Make It Easier for Victims to Defend Themselves Against Civil Forfeiture*, FORBES (Nov. 12, 2013, 4:34 PM), <http://www.forbes.com/sites/instituteofjustice/2013/11/12/federal-case-could-make-it-easier-for-victims-to-defend-themselves-against-civil-forfeiture/>.

²³ *Id.*; *About IJ: Our Mission*, INST. FOR JUST., <http://ij.org/about> (last visited Apr. 11, 2015).

²⁴ Press Release, INST. FOR JUST., *IJ Scores Major Federal Court Victory in Massachusetts Civil Forfeiture Case* (Jan. 24, 2013), <http://ij.org/massachusetts-civil-forfeiture-release-1-24-2013> [hereinafter Press Release]. Mr. Caswell stated that it is “hard to believe anything like this goes on in our country, but the government goes after people they think can’t afford to fight. But with IJ’s help, we put up a heck of a fight and have won. The public needs to stand up against these abuses of power.” *Id.*

²⁵ *434 Main Street*, 961 F. Supp. 2d at 319. One year following his legal victory, Mr. Caswell sold the Motel for \$2.1 million to developers. Christopher Scott & Grant Welker, *Owner Plans to Sell Motel Caswell for \$2.1 Million; Bowling Alley, Restaurant Planned*, LOWELL SUN (May 27, 2014, 10:27 PM), http://www.lowellsun.com/breakingnews/ci_25843925/owner-plans-sell-motel-caswell-2-1-million.

dents, and the minor scale of the drug-related crimes.²⁶ The court acknowledged the importance of the Motel to the Caswell family as a multi-generational family business, as well as the fact that the Caswells had worked in conjunction with law enforcement for years to prevent crime on the Motel's property.²⁷ In light of these factors, the court concluded that finding a "substantial connection" between the Motel and drug-related crimes "would be inconsistent with 'both [the] letter and spirit of the law.'"²⁸

Part I of this Note lays out the historical origins and modern day evolution and criticism of civil asset forfeiture law, both nationally and in Massachusetts. Part II focuses on the diverse issues raised by Massachusetts's civil forfeiture law, most notably the disproportionate impact civil forfeiture can have on low-income parties, and the need to reform Massachusetts's law. Part III advocates for several solutions, including the need to provide counsel to indigent parties, the need to eliminate equitable sharing, and the need for a higher standard of proof in Massachusetts. Although this Note focuses in large part on Massachusetts's forfeiture law, the problems and solutions are applicable to a wide variety of state laws.

I. EVOLUTION AND CRITICISMS OF CIVIL ASSET FORFEITURE

Civil asset forfeiture occurs when the government seizes property it believes to be connected to the commission of a crime.²⁹ The government's action is classified as action against the property, rather than the property owner.³⁰ Civil asset forfeiture is therefore based on the notion that property and inanimate objects can commit a wrong or break a law.³¹ This idea can be traced all the way

²⁶ *Id.* The court distinguished the seizure of the Motel from another case where the Kenmore Hotel in Manhattan, NY was successfully seized after several years of investigations by federal and local law enforcement officials. *See id.* at 302 (citing *United States v. 143-147 E. 23rd Street*, 77 F.3d 648, 650-51 (2d Cir. 1996)). There, the government presented evidence of drug trafficking that also implicated the hotel staff: hotel employees accepted bribes to allow certain people into the building. *143-147 E. 23rd Street*, 77 F.3d at 651. In the case of the Motel, the limited number of transactions and small quantity of drugs actually being dealt weighed against finding a "substantial connection" between the Motel and illegal activity. *434 Main Street*, 961 F. Supp. 2d at 319.

²⁷ *434 Main Street*, 961 F. Supp. 2d at 304, 326.

²⁸ *Id.* at 319 (quoting *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939)). The court stated that "[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *Id.* at 317 (quoting *One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. at 226).

²⁹ *See* Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 705 (2011). The federal government and all fifty states have civil asset forfeiture laws. Holcomb et al., *supra* note 5, at 273; *see, e.g.*, 21 U.S.C. § 881(a)(7) (2012).

³⁰ Rulli, *supra* note 29, at 705.

³¹ *Id.*

back to the Bible.³² By the eleventh century, the notion of property committing a wrong manifested itself in the English Common Law concept of “deodands.”³³ A jury determined that property was a deodand whenever it caused the death of a person.³⁴ Once property was deemed a deodand, it was forfeited to the crown.³⁵ English courts eventually expanded the law of deodands to admiralty law, and the Crown used this power to seize merchant vessels and their cargo.³⁶ Deodands formed the basis for modern forfeiture law.³⁷

A. Evolution of Federal Civil Asset Forfeiture Law

Shortly after the American Revolution, in 1789, the U.S. Congress enacted the first statute authorizing civil asset forfeiture.³⁸ Much like the English Crown, Congress used civil asset forfeiture as a sanction against ships that failed to pay customs duties.³⁹ Justice John Marshall, later the Chief Justice of the Supreme Court, enforced the law and embraced the notion that an inanimate object can commit a wrong: “this is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel”⁴⁰

Civil asset forfeiture laws slowly expanded during the course of the 1800s and early 1900s, but they became a primary tool in combatting illegal activity with the emergence of the war on drugs in the 1970s.⁴¹ In 1970, Congress in-

³² LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 7 (1996). “When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten, but the owner of the ox shall not be liable.” *Exodus* 21:28 (English Standard Version).

³³ Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237, 237 (2005).

³⁴ *Id.* For example, if a person died from being kicked by a horse, the horse became a deodand and was forfeited to the Crown. *Id.* at 238.

³⁵ *Id.* at 237. Deodands could be inanimate objects, animals, or even vessels. OLIVER WENDELL HOLMES, *THE COMMON LAW* 29 (Little, Brown, & Co., 1923) (1881); Pervukhin, *supra* note 33, at 237.

³⁶ Scott Ehlers, *Policy Briefing: Asset Forfeiture*, DRUG POL’Y FOUND. 3 (1999), http://www.drugpolicy.org/docUploads/Asset_Forfeiture_Briefing.pdf. The power was largely abused by the English Crown. *Id.* The Crown’s abuse of this power was a factor in the start of the American Revolution and in the adoption of the Fifth Amendment, which protects citizens from having their property seized without due process. *Id.*; see also U.S. CONST. amend. V.

³⁷ *United States v. U. S. Coin & Currency*, 401 U.S. 715, 720 (1971) (noting that “modern forfeiture statutes are the direct descendants of this heritage”).

³⁸ Act of July 31, 1789, 1 Stat. 39, 47 (1789); DEP’T ATTORNEY GEN., HISTORY OF ASSET FORFEITURE, HAW. CRIM. JUST. DIV., <http://ag.hawaii.gov/cjd/asset-forfeiture-unit/history-of-asset-forfeiture/> (last visited Apr. 11, 2015).

³⁹ HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?* 21 (1995). Import duties made up over eighty percent of revenue in the early years of the federal government. *Id.*

⁴⁰ *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612); see also *U.S. Coin & Currency*, 401 U.S. at 719.

⁴¹ Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 781 (2009). In the 1860s during the Civil War, the federal government used forfeiture actions to seize property of Confederate rebels and their supporters. HYDE, *supra* note 39, at 22. Between 1919 and 1933, dur-

cluded a civil asset forfeiture provision as part of the Comprehensive Drug Abuse Prevention and Control Act.⁴² This provision authorized “the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs.”⁴³ Throughout the late 1970s and early 1980s, Congress continued to expand the government’s power to forfeit drug-related property, using civil asset forfeiture as a powerful weapon in combatting the nation’s drug problem.⁴⁴ In 1984, Congress authorized the forfeiture of real property that was used or intended for use in the commission of a drug offense, or that was purchased with the proceeds obtained from a drug offense.⁴⁵ This statutory scheme provides a useful tool for law enforcement officials to stem the tide of illicit drugs because forfeiture actions reduce the ability of criminals to profit from illegal activity.⁴⁶

Also in 1984, Congress passed the Comprehensive Crime Control Act, which created an equitable sharing program that enabled federal and state law enforcement forces to split the proceeds of any forfeitures.⁴⁷ The division of these assets between law enforcement agencies varies based on the level of local law enforcement’s involvement.⁴⁸ Prior to 1984, state and local law enforcement agencies could not share forfeiture proceeds with the federal government.⁴⁹

ing Prohibition, Congress expanded civil forfeiture laws to include “violations of the Volstead Act . . . [which governed] the production, importation, and consumption of alcoholic beverages.” *Id.* at 23. As of 2011, there are over four hundred federal statutes allowing for civil asset forfeiture. John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent with Guilty*, WALL ST. J., Aug. 22, 2011, <http://online.wsj.com/news/articles/SB10001424053111903480904576512253265073870>.

⁴² 21 U.S.C. § 881 (2012); Mary Murphy, Note, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. C.L. & C.R. 77, 80 (2010).

⁴³ Eric Blumenson & Eva S. Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44 (1998); see also 21 U.S.C. § 881; Murphy, *supra* note 42, at 80.

⁴⁴ See HYDE, *supra* note 39, at 23.

⁴⁵ 21 U.S.C. § 853(b)(1) (2012); *id.* § 881(a)(6)–(7). Real property includes “any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used” in the commission of a violation punishable by a year or more in prison. *Id.* § 881(a)(7).

⁴⁶ *Id.* § 881(1)(6); John L. Worrall & Tomislav V. Kovandzic, *Is Policing for Profit? Answers from Asset Forfeiture*, 7 CRIMINOLOGY & PUB. POL’Y 219, 219 (2008).

⁴⁷ 21 U.S.C. § 881(e)(1)(A)–(e)(3); 18 U.S.C. § 981(e)(2) (2012); Murphy, *supra* note 42, at 81. Under the new Act, states could potentially keep up to eighty percent of the proceeds. U.S. DEP’T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 12 (2009), <http://www.justice.gov/usao/ri/projects/esguidelines.pdf> [hereinafter GUIDE TO EQUITABLE SHARING].

⁴⁸ 21 U.S.C. § 881(e)(3); GUIDE TO EQUITABLE SHARING, *supra* note 47, at 12.

⁴⁹ LEVY, *supra* note 32, at 151.

B. Early Criticism and Federal Reform Movement

Following the changes of the two previous decades, civil asset forfeiture law attracted heavy criticism in the 1990s.⁵⁰ These criticisms were introduced onto the national stage by U.S. Representative Henry Hyde (R-IL), who stated that “our civil asset forfeiture laws are being used in terribly unjust ways, and are depriving innocent citizens of their property with nothing that can be called due process. This is wrong and it must be stopped.”⁵¹ Throughout the 1990s, constitutional challenges to civil asset forfeiture arose under the First, Fifth, Sixth, and Eighth Amendments.⁵² Although civil forfeiture laws were upheld on constitutional grounds, Representative Hyde went on to propose a civil asset forfeiture transformation in 1999—the Civil Asset Forfeiture Reform Act.⁵³

Representative Hyde’s proposed legislation, which passed the U.S. House of Representatives but was amended in the U.S. Senate, created strong protections for property owners.⁵⁴ One of the most significant reforms proposed by Representative Hyde was the appointment of counsel.⁵⁵ The proposed legislation gave courts discretion in determining whether to appoint counsel to an indigent property owner, but the provision did not create an automatic appointment of counsel.⁵⁶ Instead, courts would consider several factors in deciding whether to

⁵⁰ See Rulli, *supra* note 29, at 706. Federal Courts began to express concern about the government’s mounting forfeiture power while media and special interest groups mobilized for reform. *Id.* For example, in 1993 the *Chicago Tribune* “began to raise questions about the propriety of civil forfeiture.” Barclay Thomas Johnson, Note, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1070 (2002); *Blind to Injustice in Forfeitures*, CHI. TRIB., Apr. 1, 1993, http://articles.chicagotribune.com/1993-04-01/news/9304010101_1_cary-copeland-federal-forfeiture-program-asset-forfeiture.

⁵¹ Ehlers, *supra* note 36, at 1; see Roger Pilon, *Foreword to HYDE*, *supra* note 39, at vii (noting that “[i]t is to the credit of Henry Hyde . . . that a spotlight is shining at last on this dark corner of our law”).

⁵² Douglas Kim, Note, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 562–76 (1997). Civil asset forfeiture has been challenged on constitutional grounds under the Fifth Amendment due process clause, double jeopardy clause, takings clause, and self-incrimination violation; under the Eighth Amendment excessive fines clause; under the Sixth Amendment as an appointment of counsel violation; and under the First Amendment as a freedom of speech violation. *Id.* These constitutional challenges, however, have been unsuccessful. *Id.* at 561.

⁵³ See H.R. 1658, 106th Cong. (2000); Kim, *supra* note 52, at 561; Moores, *supra* note 41, at 782.

⁵⁴ See H.R. 1658, 106th Cong. (2000); Rulli, *supra* note 29, at 711.

⁵⁵ See Rulli, *supra* note 29, at 710; Louis S. Rulli, *Access to Justice and Civil Forfeiture Reform: Providing Lawyers for the Poor and Recapturing Forfeited Assets for Impoverished Communities*, 17 YALE L. & POL’Y REV. 507, 518 (1998). Although the Sixth Amendment provides a right to counsel in criminal matters, there is no such guarantee in civil cases. U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); Rulli, *supra* note 29, at 690. Prior to Representative Hyde’s proposed reform, there was no right to counsel in civil forfeiture cases. HYDE, *supra* note 39, at 81.

⁵⁶ See H.R. 1658, 106th Cong. (2000); Rulli, *supra* note 55, at 519. Representative Hyde had proposed reform legislation several years earlier, in 1997, that gave the court discretion to provide counsel to indigent property owners if they requested it. H.R. 1965, 105th Cong. 7 (1997) (“If the person filing a claim is financially unable to obtain representation by counsel and requests that coun-

appoint counsel, such as the claimant's standing and whether or not the claim was made in good faith.⁵⁷ Representative Hyde's bill, with this provision included, overwhelmingly passed the House of Representatives, by a margin of 375 to 48.⁵⁸

Despite Representative Hyde's efforts, the Senate version of the bill rejected the provision that broadly authorized courts to appoint counsel to indigent property owners.⁵⁹ The bill that Congress ultimately enacted, the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), instead provided for the appointment of counsel only in one limited situation: where the indigent property owner's primary residence was the subject of the forfeiture action.⁶⁰ Even with removal of Representative Hyde's provision that broadly granted appointment of counsel, CAFRA still significantly reformed federal civil forfeiture law.⁶¹ Although Representative Hyde's provision left the decision of whether to appoint counsel to the discretion of the court, the text of CAFRA currently *requires* the court to appoint counsel where the property owner requests it.⁶² Further, when the court appoints counsel to an indigent property owner, the government is required to pay "reasonable attorney fees and costs . . . regardless of the outcome of the case."⁶³ The government is also liable for the property owner's attorney fees and other reasonable litigation costs in a challenge where the claimant "substantially prevails."⁶⁴

In addition to appointment of counsel in situations where a primary residence is the subject of forfeiture, one of CAFRA's most important reforms

sel be appointed, the court *may* appoint counsel to represent that person with respect to the claim.") (emphasis added).

⁵⁷ H.R. 1658, 106th Cong. (2000). Representative Hyde's 1997 proposed legislation included consideration of additional factors such as "the nature and value of the property subject to forfeiture, including the hardship to the claimant from the loss of the property seized . . ." H.R. 1965, 105th Cong. 7 (1997).

⁵⁸ Rulli, *supra* note 29, at 711.

⁵⁹ See S. 1931, 106th Cong. 5–6 (1999) (eliminating a provision which allowed for the broad appointment of counsel to indigent property owners); Rulli, *supra* note 29, at 711.

⁶⁰ 18 U.S.C. § 983(b)(2)(A) (2012).

⁶¹ See Rulli, *supra* note 29, at 710; Moores, *supra* note 41, at 782.

⁶² 18 U.S.C. § 983(b)(2)(A). This section provides:

If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall *insure* that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

Id. (emphasis added). In contrast, Representative Hyde's bill proposed that a court *may* authorize counsel to represent an indigent party. See H.R. 1658, 106th Cong. (2000).

⁶³ 18 U.S.C. § 983(b)(2)(B)(ii).

⁶⁴ 28 U.S.C. § 2465(b)(1) (2012). This provision applies whether or not the claimant's attorney is court appointed or not. See *id.*

heightened the government's burden of proof to a preponderance of the evidence.⁶⁵ Previously, the standard was probable cause, and the government only needed to show "a reasonable ground for belief of guilt; supported by less than prima facie proof but more than mere suspicion."⁶⁶ As of 2011, many states, including Massachusetts, still used a probable cause standard for their civil forfeiture laws.⁶⁷

C. *Civil Asset Forfeiture Law in Massachusetts*

Massachusetts's civil asset forfeiture law is a formidable weapon for prosecutors in combatting drug offenses.⁶⁸ The statute provides for the forfeiture of any controlled substances, as well as materials or equipment used in the creation or distribution of controlled substances.⁶⁹ The law also authorizes seizure of any vehicles, money, or real property used in connection with a controlled substance.⁷⁰

Once the Commonwealth commences an action against the property in question, the prosecutor must submit affidavits that establish probable cause "that 'the money [seized] was probably derived from illegal drug transactions.'"⁷¹ Under the probable cause standard, the Commonwealth does not need to establish a connection between the seized property and a particular drug transaction.⁷² Further, the Commonwealth only has the burden to show the "existence of probable cause to *institute the action* . . ."⁷³ The probable cause standard of proof under Massachusetts's civil asset forfeiture law has been found not to vio-

⁶⁵ 18 U.S.C. § 983(c)(1); Rulli, *supra* note 29, at 710.

⁶⁶ *United States v. \$250,000*, 808 F.2d 895, 897 (1st Cir. 1987) (quoting *United States v. \$364,960*, 661 F.2d 319, 323 (5th Cir. 1981)); *see* 19 U.S.C. § 1615 (1982); *\$250,000*, 808 F.2d at 897 ("Section 881(d) directs that the burden of proof in a forfeiture action is controlled by 19 U.S.C. § 1615. Under 19 U.S.C. § 1615, the government must initially show probable cause to believe that the property was connected with illegal drug transactions.")

⁶⁷ *See* MASS. GEN. LAWS ch. 94C, § 47(d) (2012); Holcomb et al., *supra* note 5, at 278.

⁶⁸ *See* John C. McBride, *Civil Forfeitures*, in MASSACHUSETTS SUPERIOR COURT CRIMINAL PRACTICE MANUAL § 24.1 (2006) (stating that "[o]ne of the most potent weapons a prosecutor has in fighting the war on drugs is the Massachusetts Forfeiture Statute, G.L. c. 94C, § 47"); Ernest H. Short, *Civil Forfeiture of Real Property and the Civil Asset Forfeiture Reform Act of 2000*, 73 OKLA. B.J. 1727, 1737 (2002) (noting that "Congress provided law enforcement a powerful weapon" in the use of civil forfeiture).

⁶⁹ MASS. GEN. LAWS ch. 94C, § 47(a)(1)–(2).

⁷⁰ *Id.* § 47(a)(3), (5), (7). The statute indicates that a vehicle or money need not be used in connection with a controlled substance; it is enough if the vehicle or money was "intended for use" in connection with drugs. *Id.* § 47(a)(3), (5).

⁷¹ *Commonwealth v. Brown*, 688 N.E.2d 1356, 1360 (Mass. 1998) (quoting *\$250,000*, 808 F.2d at 900); McBride, *supra* note 68, at 6.

⁷² *Brown*, 688 N.E.2d at 1360.

⁷³ MASS. GEN. LAWS ch. 94C, § 47(d) (2012) (emphasis added); *Commonwealth v. One 2004 Audi Sedan Auto.*, 921 N.E.2d 85, 89 (Mass. 2010).

late a defendant's right to due process under the Massachusetts Constitution.⁷⁴ Once the Commonwealth's initial burden is met, the burden shifts to the property owner to prove that the property is not forfeitable.⁷⁵

The statute further provides that law enforcement in Massachusetts keeps one hundred percent of the proceeds from forfeited property.⁷⁶ The profits are split: half of the proceeds from forfeited property are passed to the prosecutor's office and half go to the local or state police involved in the seizure of the property.⁷⁷ Unlike under federal law, the law in Massachusetts does not provide for a right to counsel or the payment of the property owner's attorney fees in any situation.⁷⁸

D. Basis of the Current Massachusetts Forfeiture Law and Recent Applications

The current civil forfeiture law in Massachusetts is based on pre-CAFRA federal forfeiture law.⁷⁹ In 1989, the statute was amended and the burden of proof for the Commonwealth was lessened to a probable cause standard, which was "virtually identical to the burden of proof imposed on the Federal government in Federal forfeiture actions" at the time.⁸⁰ As Representative Hyde began to garner support for reform in the mid-1990s, Congress responded in 2000 with passage of CAFRA, which altered the federal burden of proof.⁸¹ The Massachusetts Legislature, however, has not raised its burden of proof.⁸² Consequently, because Massachusetts's civil forfeiture law is based on pre-CAFRA federal for-

⁷⁴ *Brown*, 688 N.E.2d at 1362 (noting that the Commonwealth's forfeiture statute provides sufficient procedural safeguards and that "[c]ivil forfeiture proceedings are sufficiently distinguishable from the criminal proceedings . . . to allow the former to proceed under a lesser burden of proof without contravening State due process guarantees").

⁷⁵ MASS. GEN. LAWS ch. 94C, § 47(d).

⁷⁶ *See id.*

⁷⁷ *Id.* There is proposed legislation currently awaiting action that would amend these percentages so that the proceeds of forfeiture actions would be split three ways: 33% to the prosecutor, 33% to the police department, and 34% to a new drug prevention fund. H.D. 1238, 188th Gen. Court (Mass. 2013).

⁷⁸ *See* MASS. GEN. LAWS ch. 94C, § 47 (2012).

⁷⁹ *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89.

⁸⁰ *Id.*; *see* 19 U.S.C. § 1615 (1994); MASS. GEN. LAWS ch. 94C, § 47(d). Before 1989, Massachusetts's civil forfeiture statute required that the Commonwealth prove all material facts by a preponderance of the evidence at trial. MASS. GEN. LAWS ANN. ch. 94C, § 47 (West 1988); *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89.

⁸¹ 18 U.S.C. § 983(c)(1) (2012); *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89; *see* Rulli, *supra* note 29, at 725. CAFRA raised the federal government's burden of proof to a preponderance of the evidence. 18 U.S.C. § 983(c)(1). "Preponderance of the evidence is defined as 'superior evidentiary weight that, though sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.'" *White Collar Crime: Asset Forfeiture*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/investigate/white_collar/asset-forfeiture (last visited Apr. 17, 2015).

⁸² *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89.

feiture law, Massachusetts courts do not look to CAFRA to interpret the Massachusetts statute; instead, courts in Massachusetts look to interpretations of the federal forfeiture statute that preceded CAFRA.⁸³ This is problematic because, although CAFRA has heightened the evidentiary burden in civil forfeiture proceedings for the federal government, Massachusetts is still using a lower standard of proof, thus decreasing protections for Massachusetts property owners.⁸⁴ The legislative history of CAFRA indicates that the burden of proof was raised from probable cause to preponderance of the evidence because “burdens of proof are intended in part to ‘indicate the relative importance attached to the ultimate decision.’”⁸⁵ Given the potential impact of a forfeiture proceeding, Congress determined that “a meager burden of proof like probable cause” was insufficient for federal civil asset forfeitures.⁸⁶

The courts in Massachusetts have recognized that under the forfeiture statute, “the government’s burden is not to prove probable cause but to prove ‘the existence of probable cause to *institute the action.*’”⁸⁷ The Commonwealth can demonstrate “probable cause to institute the action” by presenting sound reason to believe that there is a connection between the property seized and illicit activity.⁸⁸ In demonstrating “sound reason” for the connection, the Commonwealth may use evidence that is traditionally not admissible at trial, namely, hearsay.⁸⁹ The admissibility of hearsay makes the Commonwealth’s burden of proof com-

⁸³ *Id.*

⁸⁴ See *United States v. 434 Main Street*, 961 F. Supp. 2d 298, 318 (D. Mass. 2013); *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89.

⁸⁵ H.R. REP. NO. 106-192, at 15 (1999) (quoting *United States v. \$49,576*, 116 F.3d 425, 429 (9th Cir. 1997)).

⁸⁶ H.R. REP. NO. 106-192, at 15. The House Judiciary noted that “[t]he stakes are exceedingly high in a forfeiture proceeding: [c]laimants are threatened with permanent deprivation of their property, from their hard-earned money, to their sole means of transport, to their homes.” *Id.*

⁸⁷ MASS. GEN. LAWS ch. 94C, § 47(d) (2012); *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89 (emphasis added). In *Commonwealth v. One 2004 Audi Sedan Automobile*, the Supreme Judicial Court noted that “[f]ederal courts that have interpreted the pre-CAFRA language of 19 U.S.C. § 1615, however, have uniformly concluded that, while the Attorney General must have probable cause to institute the forfeiture action, he did not have to prove probable cause until trial.” 921 N.E.2d at 91.

⁸⁸ *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89. The Supreme Judicial Court held that “sound reason” means “more than ‘mere suspicion’ but less than ‘prima facie proof.’ . . .” *Id.* at 49 (quoting *Commonwealth v. \$14,200*, 653 N.E.2d 153, 157 (1995)). Once the prosecution has met its burden of proof, the burden shifts to the claimant to prove by a preponderance of the evidence that the property should not be forfeited. Victoria R. Kelleher, *Collateral Consequences*, in TRYING DRUG CASES IN MASSACHUSETTS 15-1, 15-26 (Stephanie Page ed., 2010). It is important to note that there is a higher burden of proof for claimants (preponderance of evidence vs. probable cause for the Commonwealth). MASS. GEN. LAWS ch. 94C, § 47(d); see Kelleher, *supra*. This is not the case in the federal statute. See 18 U.S.C. § 983(d), (g) (2012).

⁸⁹ See *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89–90.

parable to the low burden that is required in seeking an indictment and is a lower burden of proof than that which is required at a probable cause hearing.⁹⁰

Similarly, the pre-CAFRA standards of the federal forfeiture statutes allowed admission of hearsay evidence.⁹¹ The U.S. Court of Appeals for the Eighth Circuit criticized the process, stating that the government “need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest of evidence.”⁹² In line with the Eighth Circuit’s disapproval, the passage of CAFRA in 2000 disallowed the use of hearsay for the purpose of proving the government’s case.⁹³ Massachusetts law, however, continues to allow hearsay evidence—which would be inadmissible in a trial—in forfeiture actions.⁹⁴

Even though the Commonwealth may not have sufficient evidence to prove its case at trial, “the Commonwealth acts responsibly by instituting the action and leaving to a claimant the statutory burden of proving entitlement to the property at issue.”⁹⁵ This is problematic because many claimants do not have the resources necessary to contest a forfeiture.⁹⁶ As a result, in the case of low-income property owners who are unable to challenge forfeitures, hearsay may be the only evidence the Commonwealth needs to successfully seize property.⁹⁷ Additionally, many seizures go unchallenged because the cost of litigation can exceed the value of the property taken.⁹⁸

⁹⁰ *Id.* at 89; *Commonwealth v. \$14,200*, 653 N.E.2d 153, 157–58 (1995). Massachusetts courts have explained this small distinction to mean that “in seeking an indictment . . . the Commonwealth may present reliable hearsay, but at a probable cause hearing it is limited to admissible evidence.” *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89 (citing *\$14,200*, 653 N.E.2d at 157–58).

⁹¹ *United States v. \$12,390*, 956 F.2d 801, 811 (8th Cir. 1992).

⁹² *See id.*

⁹³ *See* 21 U.S.C. § 983(c)(1); *United States v. \$92,203*, 537 F.3d 504, 509 (5th Cir. 2008) (noting that § 983(j) of CAFRA allows the use of hearsay in seeking temporary restraining orders and that it would be unnecessary for § 983(j) to explicitly allow hearsay if Congress intended hearsay to be used in all forfeiture proceedings); *Editor’s Blog: Civil Forfeiture, Summary Procedures and the Hearsay Rule*, FED. EVIDENCE REV. (Nov. 30, 2010), <http://federalevidence.com/blog/2010/november/civil-forfeiture-summary-procedures-and-hearsay-rule>. CAFRA reversed hundreds of years of practice during which the government was allowed to use hearsay to meet its burden of proof. 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, 109 (2001).

⁹⁴ *See One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89.

⁹⁵ *Id.* (citing *\$14,200*, 653 N.E.2d at 158).

⁹⁶ *See* H.R. REP. NO. 106-192, at 17 (1999); HYDE, *supra* note 39, at 81; LEVY, *supra* note 32, at 130. At a Congressional hearing in 1999 before the passage of CAFRA, Representative Hyde was quoted as saying “[i]t isn’t much good to say you have the right to get your property back if you can’t afford a lawyer . . .” Emshwiller & Fields, *supra* note 41.

⁹⁷ *See One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89–90; LEVY, *supra* note 32, at 130.

⁹⁸ *See* HYDE, *supra* note 39, at 81; LEVY, *supra* note 32, at 130; *see also Inequity Seen in Drug Forfeiture Law*, N.Y. TIMES, Sept. 3, 1993, at A17 (reporting that 94% of the more than 6000 forfeiture cases filed by San Jose prosecutors in 1992 involved less than \$5000). One of the main advantages to small seizures for law enforcement is that “claimant challenges to them are impractical

E. General Criticisms of Civil Asset Forfeiture Law

There are many criticisms of civil asset forfeiture laws at both the federal and state levels.⁹⁹ First, civil asset forfeiture laws disproportionately impact low-income property owners.¹⁰⁰ Challenging the government's seizure of property can be incredibly expensive.¹⁰¹ Hiring an attorney is almost a necessity to navigate the complex legal landscape of forfeitures, and there is significant expense involved in doing so.¹⁰² Many lower-income property owners simply do not have the financial resources necessary to challenge the seizures.¹⁰³ Before CAFRA, the U.S. Department of Justice conducted a study that found that "[e]ighty-five percent of the FBI and DEA cases, and nearly ninety-nine percent of the INS cases are uncontested."¹⁰⁴

because they would cost more than the amounts involved." Blumenson & Nilsen, *supra* note 43, at 77 n.154.

⁹⁹ See Ehlers, *supra* note 36, at 8–11; Williams et al., *supra* note 16, at 17. Proponents of civil asset forfeiture argue that the Department of Justice's high success rate in forfeiture proceedings is a sign that the practice is working. Emshwiller & Fields, *supra* note 41. Supporters also maintain that civil asset forfeiture is a good way to compensate victims of a crime. *Id.* For example, authorities have recovered over \$650 million from convicted fraudster Bernie Madoff's assets for victims who lost money in his decades-long Ponzi scheme. Emshwiller & Fields, *supra* note 41; *Wife Says She and Madoff Tried Suicide*, N.Y. TIMES, Oct. 26, 2011, <http://www.nytimes.com/2011/10/27/business/wife-says-she-and-madoff-tried-suicide.html>. Some supporters believe that civil forfeiture actions should occur more often. Emshwiller & Fields, *supra* note 41. Charles Intriago, a former prosecutor and current president of the International Association for Asset Recovery, maintained that "even an imprisoned criminal 'can have a smile on his face because he is going to be able to enjoy the proceeds of his crime when he gets out.'" *Id.*

¹⁰⁰ See HYDE, *supra* note 39, at 32; LEVY, *supra* note 32, at 130 (noting that there is no right to an attorney in civil forfeiture cases and describing how "the government can use forfeiture to deny people the ability to pay lawyers to defend themselves against seizure"); Ehlers, *supra* note 36, at 9.

¹⁰¹ See LEVY, *supra* note 32, at 130; Eric Blumenson & Eva Nilsen, *The Drug War's Hidden Economic Agenda*, NATION, Mar. 9, 1998, at 11, 11–12 (recounting the story of a pilot who incurred over \$85,000 in legal fees and had to file for bankruptcy after a drug dealer chartered his plane and the government brought suit against the plane); Nick Sibilla, *supra* note 22 (noting that Russ Caswell had over \$100,000 in attorney's fees).

¹⁰² See LEVY, *supra* note 32, at 130 (noting that legal fees in a federal forfeiture action can easily reach \$25,000); Chloe Cockburn, *Easy Money: Civil Asset Forfeiture Abuse by Police*, AM. CIV. LIBERTIES UNION BLOG RTS. (Feb. 3, 2010, 1:16 PM), <http://www.aclu.org/blog/criminal-law-reform/easy-money-civil-asset-forfeiture-abuse-police> (noting that a standard retainer fee is \$5000 in Georgia). One defense attorney stated that if the government seizes a person's car, it is not worth suing to get it back: "If they take your car, it's gone. Unless I get pissed off and take a case for the sweet pleasure of revenge, I'm not going to handle anything less than \$75,000 in assets, from which I'd get one-third." LEVY, *supra* note 32, at 130.

¹⁰³ LEVY, *supra* note 32, at 130.

¹⁰⁴ *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 248 (1996). Before CAFRA, in order to challenge a federal seizure of property, the property owner had to first post a bond equal to the lesser of \$5000 or ten percent of the value of the property. 19 U.S.C. § 1608 (1988); HYDE, *supra* note 39, at 82. CAFRA eliminated that requirement. John L. Worrall, *The Civil Asset Forfeiture Reform Act of 2000: A Sheep in Wolf's Clothing?*, 27 POLICING INT'L J. POLICE STRATEGY & MGMT. 220, 230 (2004).

Another common criticism of civil asset forfeiture law is that the burden of proof for the government is too low.¹⁰⁵ The most difficult standard for the government is beyond a reasonable doubt—the standard required in criminal cases.¹⁰⁶ As of 2010, only four states require this high standard for civil asset forfeiture.¹⁰⁷ In contrast, probable cause is the lowest standard of proof as it only requires a reasonable belief that the property is connected to a crime.¹⁰⁸ Fourteen states, including Massachusetts, use this standard of proof for civil asset forfeiture.¹⁰⁹ The most common standard of proof for civil asset forfeiture laws is preponderance of the evidence, which is required by twenty-seven states as well as the federal government.¹¹⁰ This burden of proof is more demanding than probable cause but less than beyond a reasonable doubt.¹¹¹

The low standard of proof for civil asset forfeiture is significant because, along with the federal government, nearly every state uses a standard of proof that falls short of the standard required for a criminal conviction, and criminal activity is the typical justification for the forfeiture in the first place.¹¹² In cases like that of Mr. Caswell, the motel owner whose property was seized under the federal statute, he did not need to be found guilty of a crime for the government to seize his motel and livelihood.¹¹³ Because of the lower burden of proof for civil forfeitures compared to criminal forfeitures, the Institute for Justice found that eighty percent of forfeitures occur without any criminal prosecution.¹¹⁴

¹⁰⁵ *Fighting Civil Forfeiture Abuse*, *supra* note 9.

¹⁰⁶ Williams et al., *supra* note 16, at 20.

¹⁰⁷ *Id.* The study also noted that California only uses civil asset forfeiture laws in certain situations and that North Carolina essentially does not have civil asset forfeitures, only criminal forfeitures. *Id.* at 20, 22. After eliminating these two instances, essentially only two other states require the beyond a reasonable doubt burden of proof. *See id.* at 22.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* States requiring only probable cause prior to civil asset forfeiture include Alabama, Alaska, Delaware, Illinois, Massachusetts, Missouri, Montana, Rhode Island, South Carolina, and Wyoming; additionally, states in which only some property can be seized under a probable cause standard include Georgia, North Dakota, South Dakota, and Washington. *Id.*

¹¹⁰ 18 U.S.C. § 983(c)(1) (2012); Williams et al., *supra* note 16, at 22. The states that use a preponderance of the evidence standard include Arizona, Arkansas, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Washington, and West Virginia. Williams et al., *supra* note 16, at 22.

¹¹¹ Williams et al., *supra* note 16, at 22. This standard “generally equates to the idea that it is more likely than not that the property is related to criminal conduct and thus subject to forfeiture.” *Id.*

¹¹² *Id.*

¹¹³ *See 434 Main Street*, 961 F. Supp. 2d at 319.

¹¹⁴ Williams et al., *supra* note 16, at 22. In a civil forfeiture action, the piece of property itself is the defendant, rather than the property owner, and the burden is on the government to show by a preponderance of evidence that the property was connected to illegal activity. Emshwiller & Fields, *supra* note 41. Comparatively, in a criminal forfeiture proceeding, the individual must first be convicted, where the burden of proof is higher, before the government can seize property. *Id.*

Further, state and local law enforcement forces have a large financial incentive to abuse civil asset forfeiture laws.¹¹⁵ There is a strong profit motive because civil asset forfeiture laws provide an opportunity for state law enforcement agencies to generate revenue.¹¹⁶ Most state statutes provide for at least 50% of the proceeds from civil asset forfeiture to return to local departments.¹¹⁷ For example, in Massachusetts, 100% of the proceeds of a forfeiture go back to law enforcement—50% to the prosecutor’s office and 50% to the police department involved in the seizure.¹¹⁸ The federal government also views civil asset forfeiture as a means to generate revenue, and often federal law enforcement will collaborate with local law enforcement to seize property.¹¹⁹

A federal policy known as equitable sharing undermines any state’s efforts to mitigate the problem of policing for profit.¹²⁰ Equitable sharing arose out of Congress’s passage of the Comprehensive Forfeiture Act of 1984.¹²¹ When state and federal law enforcement work together in a civil forfeiture, the proceeds are

¹¹⁵ Blumenson & Nilsen, *supra* note 43, at 56 (noting that it is problematic to allow law enforcement to keep the assets they seize and that “[i]t takes no special sophistication to recognize that this incentive constitutes a compelling invitation to police departments to stray from legitimate law enforcement goals in order to maximize funding for their operations”); Worrall, *supra* note 6, at 173 (providing evidence that “a substantial proportion of law enforcement agencies are dependent on civil asset forfeiture, that forfeiture is coming to be viewed not only as a budgetary supplement, but as a necessary source of income”); Ehlers, *supra* note 36, at 10 (noting that “[s]ometimes police are more interested in seizing assets than taking drugs off the streets”).

¹¹⁶ Blumenson & Nilsen, *supra* note 43, at 56; *Fighting Civil Forfeiture Abuse*, *supra* note 9.

¹¹⁷ Williams et al., *supra* note 16, at 17. According to a report by the Institute for Justice, twenty-six states provide in their statutes that one hundred percent of the proceeds of forfeitures go back into state law enforcement. *Id.* Forty-two states see at least fifty percent of proceeds returned to law enforcement, whereas eight states bar the use of proceeds from forfeiture by law enforcement. *Id.*

¹¹⁸ MASS. GEN. LAWS ch. 94C, § 47(d) (2012). A proposed amendment limited the amount of proceeds going back into law enforcement to sixty-six percent. H.D. 1238, 188th Gen. Court (Mass. 2013). In June, 2014, the Massachusetts House placed a “study order” on the bill, which required that the bill be studied during the recess. H.D. 4218, 188th Gen. Court (Mass. 2014). A study order is often used as a quiet means to kill a bill, so it’s unlikely the amendment will pass. See *The Legislative Process*, MASSACHUSETTS BAR ASSOCIATION (Dec. 29, 2014), <http://www.massbar.org/legislative-activities/the-legislative-process>.

¹¹⁹ Johnson, *supra* note 50, at 1069; see Kyla Dunn, *Reining in Forfeiture: Common Sense Reform in the War on Drugs*, PUB. BROADCASTING SERVICE FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html> (last visited Apr. 14, 2015). In *United States v. James Daniel Good Property*, the Supreme Court cited a 1990 memo in which the U.S. Attorney General explicitly addressed the need to increase civil forfeitures in order to reach budgetary projections, stating that “we must significantly increase production to reach our budget target.” 510 U.S. 43, 56 n.2 (1993). The memo noted that “the President’s budget for FY 1990 project[ed] forfeiture deposits of \$470 million. Through the first nine months of the year, deposits total[ed] \$314 million.” See Johnson, *supra* note 50, at 1069 n.123. This demonstrates the federal government’s reliance on forfeiture actions to generate revenue. See *James Daniel*, 510 U.S. at 56 n.2.

¹²⁰ Blumenson & Nilsen, *supra* note 43, at 111; Moores, *supra* note 41, at 794; Ehlers, *supra* note 36, at 11.

¹²¹ 21 U.S.C. § 881(e)(1)(A), (e)(3) (2012); 18 U.S.C. § 981(e)(2) (2012); Moores, *supra* note 41, at 794.

split, with up to eighty percent going to the state law enforcement agency.¹²² Consequently, state attempts to limit the proceeds of forfeitures that are granted to law enforcement can be circumvented by the state law enforcement agency working in conjunction with the federal government.¹²³ Further increasing the seriousness of this issue is evidence that equitable sharing has substantially increased in recent years.¹²⁴ Payments from the federal government to state and local agencies nearly doubled from slightly over \$200 million in 2000 to \$400 million in 2008.¹²⁵

II. CIVIL ASSET FORFEITURE LAWS' CORRUPTING INFLUENCE AND DISPROPORTIONATE IMPACT ON LOW-INCOME PROPERTY OWNERS

Some critics have argued that allowing law enforcement to keep the proceeds of forfeitures presents a significant risk of corrupting values.¹²⁶ The incentive structure created by both federal and state forfeiture laws can lead to prioritization of generating revenue over fair and equitable enforcement of the law.¹²⁷ The monetary influence of civil asset forfeiture is especially problematic for susceptible and vulnerable population segments such as low-income parties.¹²⁸ Indigent property owners, like Mr. Caswell, often lack the resources necessary to combat an unjust seizure of property that arises from the flawed incentive structure that encourages policing for profit.¹²⁹ Accordingly, low-income parties need statutory protections to help guard against potential abuse.¹³⁰ The lack of protections in Massachusetts's law is troubling.¹³¹ Although the Civil Asset Forfeiture Reform Act ("CAFRA") could still be more protective of indigent property

¹²² See *City of Concord v. Robinson*, 914 F. Supp. 2d 696, 703 (M.D.N.C. 2012) (noting that once a forfeiture action is completed, "the local law enforcement agency typically receives a significant portion of the money back for its own use"); GUIDE TO EQUITABLE SHARING, *supra* note 47, at 12.

¹²³ Blumenson & Nilsen, *supra* note 43, at 111; Moores, *supra* note 41, at 794; Ehlers, *supra* note 36, at 11.

¹²⁴ See Williams et al., *supra* note 16, at 32.

¹²⁵ *Id.* As of 2009, 8000 state and local law enforcement agencies had received over \$4.5 billion in forfeited assets from the Department of Justice. Richard Weber, *Foreword* to GUIDE TO EQUITABLE SHARING, *supra* note 47.

¹²⁶ LEVY, *supra* note 32, at 152; see HYDE, *supra* note 39, at 29. Even officials responsible for enforcing forfeiture laws admit that the desire for profit sometimes overrides the fair application of law. HYDE, *supra* note 39, at 106. For example, Michael Zeldin, the director of the Department of Justice's Asset Forfeiture Office under former President Bush, declared that "the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws . . ." *Id.* at 29.

¹²⁷ LEVY, *supra* note 32, at 152.

¹²⁸ See Ehlers, *supra* note 36, at 9.

¹²⁹ See HYDE, *supra* note 39, at 81; Worrall & Kovandzic, *supra* note 46, at 234.

¹³⁰ See HYDE, *supra* note 39, at 81–82; Ehlers, *supra* note 36, at 12–13.

¹³¹ See MASS. GEN. LAWS ch. 94C, § 47 (2012); Williams et al., *supra* note 16, at 65.

owners, it made some important reforms that Massachusetts has not.¹³² Massachusetts must do more to protect low-income parties from unjust civil asset forfeiture.¹³³

A. *The Motel Caswell Demonstrates the Need for Reforming Civil Asset Forfeiture Law*

Russ Caswell, the Tewksbury motel owner discussed in the introduction of this Note, avoided losing his motel because the Institute for Justice represented him pro bono.¹³⁴ Although Mr. Caswell was very fortunate in that respect, many lower-income Americans are not so lucky.¹³⁵ Even the preliminary act of initiating legal action to recover a piece of property that has been seized by the government can cost thousands of dollars, and legal counsel is necessary to navigate the complexities of forfeiture actions.¹³⁶ Many Americans cannot afford the legal assistance essential to contest forfeiture actions and retrieve the property that has been taken from them.¹³⁷

Mr. Caswell's successful fight against the government could easily have resulted otherwise.¹³⁸ Mr. Caswell had limited financial ability to challenge the government.¹³⁹ One of Mr. Caswell's attorneys recognized that "[w]hat the government did amounted to little more than a grab for what they saw as quick cash under the guise of civil forfeiture."¹⁴⁰ The Motel Caswell was just one of the many commercial properties in Tewksbury with crimes committed on its premises.¹⁴¹ Police in Tewksbury had made drug-related arrests at both a nearby Motel 6 and a Fairfield Inn, as well as in Wal-Mart and Home Depot parking lots.¹⁴² Mr. Caswell's attorneys pointed out that those businesses are corporate entities backed by teams of powerful lawyers and other substantial resources that would

¹³² See 18 U.S.C. § 983(b)–(c) (2012); Rulli, *supra* note 29, at 710 (noting that “CAFRA included many important civil legal protections for ordinary citizens, the Act’s expanded right to counsel is considered by some to be among its most important reforms”); Worrall, *supra* note 104, at 221 (highlighting that although CAFRA has made some worthwhile procedural changes, it does not address many of the most serious problems).

¹³³ See HYDE, *supra* note 39, at 81–82; Ehlers, *supra* note 36, at 12–13; Williams et al., *supra* note 16, at 65.

¹³⁴ Sibilla, *supra* note 22; Press Release, *supra* note 24.

¹³⁵ Rulli, *supra* note 55, at 515 (noting that “indigent property owners lack the ability to pay a lawyer and are therefore dependent entirely upon the [limited] availability of free legal assistance in the local community”); Press Release, *supra* note 24.

¹³⁶ See HYDE, *supra* note 39, at 81 (noting that few “people can afford the thousands of dollars in legal fees required to put up a fight”); Cockburn, *supra* note 102 (noting that a standard retainer fee is \$5000 in Georgia).

¹³⁷ HYDE *supra*, note 39, at 81; Cockburn, *supra* note 102.

¹³⁸ See Press Release, *supra* note 24.

¹³⁹ See Sibilla, *supra* note 22.

¹⁴⁰ Press Release, *supra* note 24.

¹⁴¹ *Massachusetts Civil Forfeiture*, *supra* note 1.

¹⁴² *Id.*

enable them to contest a potential seizure; this is in stark contrast to the family-owned Motel Caswell.¹⁴³

One of Mr. Caswell's attorneys at the Institute for Justice declared that "[t]his case epitomizes what an aggressive U.S. attorney wielding these laws can do to a small property owner like Russ Caswell."¹⁴⁴ Representative Hyde, who proposed reform legislation two decades ago, foresaw the Caswells' problem exactly: in a 1999 speech he described the forfeiture of a hotel that the government seized because drug dealers conducted illegal transactions on the premises.¹⁴⁵ Although Representative Hyde eventually achieved reform of forfeiture law on the federal level, Massachusetts's state forfeiture law remains unchanged over the past two decades.¹⁴⁶

B. *The Civil Asset Forfeiture System's Flawed Incentive Structure*

Perhaps the biggest criticism of the entire civil asset forfeiture system is its incentive structure.¹⁴⁷ Critics argue that the system encourages policing for profit because proceeds gained from forfeiture actions go directly back to law enforcement to fund a variety of needs.¹⁴⁸ The problem with this type of system is that it creates a conflict of interest and grants more power to overzealous police departments against innocent victims.¹⁴⁹ One influential scholarly article noted that "[i]t takes no special sophistication to recognize that this incentive consti-

¹⁴³ *Id.*

¹⁴⁴ Press Release, *supra* note 24.

¹⁴⁵ Representative Henry Hyde, Chairman, House Judiciary Comm., Statement at the Cato Institute, Forfeiture Reform: Now, or Never? (May 3, 1999), available at <https://www.aclu.org/statement-rep-henry-hyde-forfeiture-reform-now-or-never?redirect=technology-and-liberty/statement-rep-henry-hyde-forfeiture-reform-now-or-never>.

¹⁴⁶ See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 5, 114 Stat. 202, 214; Commonwealth v. One 2004 Audi Sedan Auto., 921 N.E.2d 85, 89 (2010).

¹⁴⁷ Blumenson & Nilsen, *supra* note 43, at 56. With the current incentive structure,

law enforcement has the incentive to confiscate property first and ask questions later when there is a doubt as to whether the property is legally subject to forfeiture. From their point of view, there is an 80 percent chance that an owner will not contest a seizure. In the likely event an owner does not contest the forfeiture, whether law enforcement possessed the requisite level of suspicion to seize the property is irrelevant, as it will never become an issue.

Moore, *supra* note 41, at 798.

¹⁴⁸ Blumenson & Nilsen, *supra* note 43, at 56. A 2001 survey of 770 police department managers found that nearly forty percent of police departments rely on civil forfeiture proceeds as a necessary budgetary supplement. Worrall, *supra* note 6, at 177, 179. Another convincing piece of evidence that civil forfeiture is necessary to generate revenue is the extensive political pressure the enforcement lobby has applied in order to prevent any reforms to asset forfeiture laws at both the federal and state levels. Holcomb et al., *supra* note 5, at 275.

¹⁴⁹ HYDE, *supra* note 39, at 30 (noting that "[i]t goes without saying that allowing law enforcement agencies to keep any cash or property they confiscate creates a built-in conflict of interest"); Blumenson & Nilsen, *supra* note 43, at 56.

tutes a compelling invitation to police departments to stray from legitimate law enforcement goals in order to maximize funding for their operations.”¹⁵⁰ The article asserted that law enforcement agencies target certain types of criminals in order to maximize their forfeiture profits.¹⁵¹ For example, law enforcement targets drug buyers instead of sellers because they have cash, which can be retained by law enforcement agencies, whereas the drugs found on sellers must be destroyed.¹⁵² According to one former law enforcement officer, “[t]his strategy was preferred by every agency and department with which I was associated because it allowed agents to gauge potential profit before investing a great deal of time and effort.”¹⁵³ For years, critics relied predominantly on anecdotal examples to demonstrate that the forfeiture system encourages policing for profit.¹⁵⁴ However, the question of whether law enforcement is motivated by financial gains in initiating forfeiture actions is ultimately an empirical one.¹⁵⁵

In recent years, several studies have produced substantial empirical evidence to support the contention that law enforcement at both the federal and state levels use civil forfeiture laws to “police for profit.”¹⁵⁶ In 2008, one ground-breaking study (the “Worrall study”) examined the effect of restrictive state forfeiture laws on law enforcement’s use of equitable sharing with the federal government.¹⁵⁷ The study examined 572 law enforcement agencies across the United States.¹⁵⁸ It found that local law enforcement agencies in states with generous forfeiture laws received significantly fewer equitable sharing payments

¹⁵⁰ Blumenson & Nilsen, *supra* note 43, at 56. The report argued that when fundraising prospects incentivize law enforcement to defer drug-related arrests until after sales take place, target less culpable offenders, give leniency to dealers with more assets to bargain with, and when eighty percent of civil forfeitures are unaccompanied by a criminal charge, that there must be something wrong with the system. *Id.* at 77. It stated that police officers appear to sacrifice legitimate law enforcement goals in order to maximize profits. *Id.* at 56.

¹⁵¹ *Id.*

¹⁵² *See id.* at 67.

¹⁵³ *Id.*

¹⁵⁴ *See* Worrall & Kovandzic, *supra* note 46, at 222. One anecdotal example is the story of Donald Scott. *See* Blumenson & Nilsen, *supra* note 43, at 73. Mr. Scott owned a two hundred acre ranch in Malibu, California. *Id.* Law enforcement received a tip that he was growing a sizeable amount of marijuana on the property. *Id.* Federal and state law enforcement used air and ground surveillance in an attempt to confirm the tip they received, however, they were unsuccessful. *Id.* at 73–74. Despite the fact that police were unable to identify any of the thousands of marijuana plants allegedly being grown on the property, police raided Mr. Scott’s land and home, killing Mr. Scott in the process. *Id.* at 74. The District Attorney’s office launched an investigation into the incident and the report concluded that a purpose of the operation was to “garner the proceeds from the forfeiture of Scott’s \$5 million ranch.” *Id.* at 74–75. Documents distributed to law enforcement officials before the raid included property appraisals and a statement that the ranch would be seized if fourteen or more marijuana plants were found. *Id.* at 75.

¹⁵⁵ Holcomb et al., *supra* note 5, at 282; Worrall & Kovandzic, *supra* note 46, at 222.

¹⁵⁶ *See* Holcomb et al., *supra* note 5, at 282, 283; Worrall & Kovandzic, *supra* note 46, at 234.

¹⁵⁷ *See* Worrall & Kovandzic, *supra* note 46, at 225.

¹⁵⁸ *Id.* at 228.

than local agencies in states with restrictive forfeiture laws.¹⁵⁹ This finding demonstrates that law enforcement agencies consider the financial gains when instituting a forfeiture action.¹⁶⁰ According to the study, local law enforcement will partner with federal officials in order to circumvent restrictive state forfeiture laws, which allows them to maximize profits for their departments under the federal equitable sharing program.¹⁶¹

In 2011, another study (the “Holcomb study”) built on the Worrall study’s findings by examining several other potential factors in a law enforcement agency’s decision to institute a forfeiture action.¹⁶² In addition to the percentage of forfeiture proceeds returned to law enforcement, the Holcomb study also measured the extent to which a state’s burden of proof requirements affected local law enforcement’s choice to pursue forfeiture actions through federal equitable sharing.¹⁶³ The Holcomb study confirmed the findings of Worrall’s 2008 study: law enforcement agencies in states with forfeiture statutes that are less generous to police departments pursue forfeiture actions through the federal equitable sharing avenue more often than their counterparts in states with generous forfeiture laws.¹⁶⁴ Additionally, the Holcomb study hypothesized that local law enforcement agencies in states with lower burdens of proof for forfeiture actions will pursue fewer forfeitures through federal equitable sharing.¹⁶⁵ The study confirmed this hypothesis, finding that law enforcement agencies in states with higher burdens of proof received more proceeds from federal equitable sharing.¹⁶⁶

The findings of both the Holcomb and Worrall studies suggest that local law enforcement agencies pursue forfeitures through federal equitable sharing to circumvent their own state’s forfeiture laws when the state’s laws are more burdensome or less financially rewarding than the federal alternative.¹⁶⁷ The study

¹⁵⁹ *Id.* at 237. Generous forfeiture laws are those that reward law enforcement with the proceeds of a forfeiture action. *Id.* at 225. For example, Missouri’s forfeiture law does not allow forfeiture proceeds to go back into law enforcement. MO. REV. STAT. § 513.623 (2000). If the local law enforcement agency teams up with federal authorities for a forfeiture, however, the local Missouri agency can collect up to eighty percent of the proceeds under the federal equitable sharing program. GUIDE TO EQUITABLE SHARING, *supra* note 47, at 12. This increase of profits for the local agency incentivizes local law enforcement to circumvent restrictive state forfeiture laws. *See* Holcomb et al., *supra* note 5, at 282; Worrall & Kovandzic, *supra* note 46, at 234.

¹⁶⁰ Worrall & Kovandzic, *supra* note 46, at 237.

¹⁶¹ *Id.* at 234.

¹⁶² *See* Holcomb et al., *supra* note 5, at 273.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 280.

¹⁶⁵ *Id.* at 279.

¹⁶⁶ *Id.* at 280.

¹⁶⁷ *Id.* An investigation in Missouri following a change in Missouri’s forfeiture law provided additional evidence that policing for profit occurs. *See* Dunn, *supra* note 119. In 1993, Missouri passed a forfeiture law requiring criminal convictions of property owners before seizure of the property can occur and further requiring all proceeds to go directly into a state education fund, rather than

provides empirical evidence that state law enforcement agencies are influenced by financial incentives when deciding how to initiate a forfeiture action.¹⁶⁸ In other words, they “police for profit” and seek to generate the greatest revenue from their forfeiture operations, using a variety of tactics to do so.¹⁶⁹ The financial motivations behind forfeiture actions have the potential to disproportionately impact lower income parties.¹⁷⁰ This is because one way for law enforcement agencies to generate profits is to target low-income parties who are financially incapable of challenging seizures.¹⁷¹

There is limited evidence that police target low-income parties, but information obtained under the Freedom of Information Act in 1992 revealed some targeting of low-income property owners.¹⁷² Michigan law enforcement agencies seized 54 homes with an average value of \$15,881 at a time when the nation’s house price was over \$100,000.¹⁷³ They also seized 807 automobiles with an average value of \$1412.¹⁷⁴ The incentive structure built in to the civil asset forfeiture system encourages this type of targeting.¹⁷⁵ One goal of forfeiture actions is to generate revenue, and targeting low-income parties is an easy way to accomplish that goal.¹⁷⁶

III. STATUTORY PROTECTIONS NEEDED TO REDUCE CORRUPTION AND PROTECT INDIGENT PROPERTY OWNERS IN MASSACHUSETTS

The low burden of proof in Massachusetts, the financial incentives built into the civil asset forfeiture system, and the high cost and complexity of initiating legal action to reclaim seized property are all problematic aspects of the Massachusetts’s civil asset forfeiture practice.¹⁷⁷ This is especially true considering

back into law enforcement. *Id.* Following passage of the law, Missouri law enforcement implemented a practice where instead of seizing cash themselves, they would “call a federal agent to the scene to perform the seizure, virtually guaranteeing that the case will be processed under federal law and that their department can receive a share of the proceeds instead of sending those proceeds to the state education fund.” *Id.* A state audit found that eighty-five percent of Missouri’s forfeiture property and money was handled under federal forfeiture law. *Id.* This demonstrates Missouri law enforcement’s calculated move to circumvent the state law in order to maximize revenues for themselves. *Id.*

¹⁶⁸ See Holcomb et al., *supra* note 5, at 283.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*; Worrall & Kovandzic, *supra* note 46, at 234; Ehlers, *supra* note 36, at 9.

¹⁷¹ See HYDE, *supra* note 39, at 32, 81; Ehlers, *supra* note 36, at 9.

¹⁷² HYDE, *supra* note 39, at 32.

¹⁷³ *Id.*

¹⁷⁴ *Id.* Another study revealed that in Virginia in 1996, 268 cars were seized with an average value of \$1683. See Williams et al., *supra* note 16, at 30.

¹⁷⁵ See HYDE, *supra* note 39, at 32; Holcomb et al., *supra* note 5, at 283; Worrall & Kovandzic, *supra* note 46, at 234.

¹⁷⁶ See HYDE, *supra* note 39, at 32; Holcomb et al., *supra* note 5, at 283; Worrall & Kovandzic, *supra* note 46, at 234.

¹⁷⁷ See LEVY, *supra* note 32; Holcomb et al., *supra* note 5, at 280, 282 (noting that results from the study demonstrate that proceeds to law enforcement and burden of proof impact the extent to

forfeiture laws' disproportionate harm to lower income parties.¹⁷⁸ There are a number of solutions that could ameliorate these problems.¹⁷⁹ First, in states such as Massachusetts, where there is a low burden of proof required, the burden of proof should be raised.¹⁸⁰ Second, equitable sharing between states and the federal government should be eliminated in order to limit state law enforcement's ability to police for profit.¹⁸¹ At a minimum, the percentage of proceeds that can be returned to the states should be decreased.¹⁸² Finally, providing counsel to indigent property owners in Massachusetts in civil asset forfeiture cases would greatly reduce the disproportionate impact that seizures have on low-income parties.¹⁸³

A. Raising the Burden of Proof in Massachusetts

Under Massachusetts's forfeiture law, the Commonwealth's burden of proof is only "the existence of probable cause to *institute the action . . .*"¹⁸⁴ Probable cause is the lowest burden of proof in any state's civil asset forfeiture law.¹⁸⁵ In meeting this low hurdle, the Commonwealth may rely on hearsay evidence that would be otherwise inadmissible in a trial.¹⁸⁶ The ease with which the Commonwealth may initiate and succeed in a forfeiture action, coupled with the

which state law enforcement agencies choose to pursue forfeiture through equitable sharing with the federal government); Williams, et al., *supra* note 16, at 65.

¹⁷⁸ See HYDE, *supra* note 39, at 32; Ehlers, *supra* note 36, at 9.

¹⁷⁹ See 18 U.S.C. § 983 (2012); H.R. REP. No. 106-192, at 14–15, 17 (1999); Moores, *supra* note 41, at 798–99.

¹⁸⁰ See *Commonwealth v. One 2004 Audi Sedan Auto.*, 921 N.E.2d 85, 89 (Mass. 2010); H.R. REP. No. 106-192, at 15 (noting that because of the potential impact of a forfeiture proceeding, "a meager burden of proof like probable cause" was insufficient for federal civil asset forfeitures); Williams et al., *supra* note 16, at 65 (noting that Massachusetts has a "terrible" civil forfeiture law in part because the government "need *only* show probable cause that your property was related to a crime to forfeit it") (emphasis added).

¹⁸¹ See Holcomb et al., *supra* note 5, at 280, 283 (finding evidence that law enforcement agencies consider the burden of proof and financial rewards of their state laws compared to those under the federal law in deciding whether to pursue forfeitures through federal equitable sharing); Blumenson & Nilsen, *supra* note 43, at 54 (arguing that "[t]he profit and ease of federal adoption has led to widespread circumvention of stricter state forfeiture laws"); Worrall & Kovandzic, *supra* note 46, at 234 (finding that "police agencies circumvent their restrictive state laws and pursue adoptive forfeitures so they can receive more forfeiture revenue"); Ehlers, *supra* note 36, at 13.

¹⁸² See Holcomb et al., *supra* note 5, at 280; Worrall & Kovandzic, *supra* note 46, at 220.

¹⁸³ See H.R. REP. No. 106-192, at 17; Rulli, *supra* note 29, at 710.

¹⁸⁴ MASS. GEN. LAWS ch. 94C, § 47(d) (2012) (emphasis added); *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89.

¹⁸⁵ See Holcomb et al., *supra* note 5, at 278. The probable cause standard is used to justify search warrants and "means merely that the government has a reasonable belief that a person has committed a crime." Williams et al., *supra* note 16, at 22. Comparatively, most states use a preponderance of the evidence standard, which requires "that it is more likely than not that the property is related to criminal conduct and thus subject to forfeiture." *Id.*

¹⁸⁶ See *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89; see also HYDE, *supra* note 39, at 57 (noting that "[p]robable cause can be established by little more than rank hearsay, gossip, or rumor").

financial motivations built into the forfeiture system, is problematic because it incentivizes law enforcement to target low-income parties.¹⁸⁷ One way to resolve this problem is to raise the burden of proof in Massachusetts.¹⁸⁸

As described above, the low burden of proof for civil forfeiture in Massachusetts is based on federal forfeiture law as it was prior to the passage of the Civil Asset Forfeiture Reform Act (“CAFRA”).¹⁸⁹ When CAFRA was adopted, federal law enforcement’s burden of proof was raised from probable cause to a preponderance of the evidence because of the exceedingly high stakes involved in a forfeiture proceeding.¹⁹⁰ However, Massachusetts law has not followed the federal changes that occurred in 2000 with CAFRA’s passage and the burden of proof remains low.¹⁹¹ At a minimum, Massachusetts should follow the federal government’s example and raise its burden of proof to a preponderance of the evidence.¹⁹² This would be logical given that Massachusetts’s statutory scheme regarding forfeiture actions was initially modeled after federal law.¹⁹³

To best protect property owners and low-income parties with reduced resources, Massachusetts should raise its burden of proof to the highest standard: beyond a reasonable doubt.¹⁹⁴ Beyond a reasonable doubt should be the burden of proof in a civil forfeiture action because criminal activity is the justification for initiating a forfeiture action and to punish individuals for criminal activity, the state must prove its case beyond a reasonable doubt.¹⁹⁵ The Due Process Clause requires proof beyond a reasonable doubt before imposition of a criminal punishment because of the significant potential loss.¹⁹⁶ The same potential for significant loss arises in civil forfeiture cases—deprivation of a property owner’s home or livelihood, as demonstrated by Mr. Caswell’s case.¹⁹⁷ The government

¹⁸⁷ See HYDE, *supra* note 39, at 32; Holcomb et al., *supra* note 5, at 283; Kelleher, *supra* note 88, at 26 (“Civil forfeitures are appealing to the Commonwealth for a number of reasons. First, the standard of proof is easy to satisfy.”).

¹⁸⁸ See H.R. REP. No. 106-192, at 14; HYDE, *supra* note 39, at 80–81; Scott Bullock, *Foreword to Williams et al.*, *supra* note 16, at 9.

¹⁸⁹ *Commonwealth v. Brown*, 688 N.E.2d 1356, 1359 (Mass. 1998) (quoting *Commonwealth v. \$14,200*, 653 N.E.2d 153, 157 (Mass. 1995)) (noting that Massachusetts’s forfeiture statute was “virtually identical to the Federal forfeiture statutes, 21 U.S.C. § 881(a)(6) and 19 U.S.C. § 1615, and, based on that determination, concluded that it was ‘reasonable to think that the Legislature revised § 47(d), to achieve the result reached by the Federal statutes as construed by the Federal Courts’”).

¹⁹⁰ H.R. REP. No. 106-192, at 15.

¹⁹¹ See *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89.

¹⁹² See 18 U.S.C. § 983(c)(1) (2012); H.R. REP. No. 106-192, at 15.

¹⁹³ See *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89; *Brown*, 688 N.E.2d at 1359.

¹⁹⁴ See Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 330 (1992); Murphy, *supra* note 42, at 98.

¹⁹⁵ See Williams et al., *supra* note 16, at 22.

¹⁹⁶ U.S. CONST. amends. V, XIV, § 1; *United States v. Regan*, 232 U.S. 37, 49 (1914) (noting that a greater deal of probability should be required in criminal cases because they affect life and liberty); Stahl, *supra* note 194, at 301, 337.

¹⁹⁷ See *United States v. 434 Main Street*, 961 F. Supp. 2d 298, 303 (D. Mass. 2013); H.R. REP. No. 106-192, at 15.

should not be able to avoid this due process requirement “simply by labeling a sanction civil when it is truly criminal in nature.”¹⁹⁸

Raising the burden of proof in Massachusetts would help reduce the harmful impact of forfeiture actions on low-income property owners: a higher burden would make it more difficult for the Commonwealth to succeed.¹⁹⁹ Making success more difficult disincentivizes law enforcement from initiating actions that amount to an easy grab for cash, and consequently protects low-income individuals who would otherwise not have the resources to defend against these actions.²⁰⁰

B. Diverting Forfeiture Proceeds Away from Law Enforcement and Eliminating Equitable Sharing Used to Circumvent Stringent State Laws

Empirical evidence in the studies described above strongly suggests that state law enforcement agencies seek to generate revenue through forfeiture actions and that they use a variety of tactics to do so.²⁰¹ One way for law enforcement agencies to generate profits is to target low-income parties who are financially incapable of challenging seizures.²⁰² The incentive structure built into the civil asset forfeiture system encourages this type of targeting.²⁰³ If one goal of forfeiture actions is to generate revenue, then targeting the poor is an easy way to accomplish this goal.²⁰⁴ In order to eliminate the potential targeting of indigent

¹⁹⁸ Stahl, *supra* note 194, at 337.

¹⁹⁹ See Worrall, *supra* note 104, at 232 (noting that “a higher standard of proof than ‘preponderance of the evidence’ would certainly result in fewer forfeitures”); Moores, *supra* note 41, at 800. Currently, the burden on the government is easy to satisfy: “[t]o justify its seizure of property . . . government need only present evidence of what its agents see as “probable cause”—the same minimal standard required to obtain a search warrant, which allows police only to seek evidence of a crime, not to permanently take property.” Worrall, *supra* note 104, at 225 (quoting Representative Henry Hyde, *supra* note 145). Critics have pointed out that “as a practical matter, the government usually meets the initial burden of proof of probable cause simply by filing a verified complaint.” Jack Yoskowitz, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROB. 567, 575 (1992); see also Worrall, *supra* note 104, at 225.

²⁰⁰ See HYDE, *supra* note 39, at 81; Worrall, *supra* note 104, at 232; Press Release, *supra* note 24.

²⁰¹ Holcomb et al., *supra* note 5, at 282; Worrall & Kovandzic, *supra* note 46, at 234. Even the Supreme Court has acknowledged that generating revenue is an attractive quality of asset forfeiture: “[t]he Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains . . . [t]he sums of money . . . are substantial, and the Government’s interest in using the profits of crime to fund these [law enforcement] activities should not be discounted.” Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 629 (1989).

²⁰² See HYDE, *supra* note 39, at 32; Moores, *supra* note 41, at 798.

²⁰³ See HYDE, *supra* note 39, at 32; Moores, *supra* note 41, at 798; *The Civil Asset Forfeiture Reform Act Before the H. Comm. on the Judiciary*, 105th Cong. 102 (1997) (statement of Nadine Strossen, President, American Civil Liberties Union) [hereinafter Strossen].

²⁰⁴ See Holcomb et al., *supra* note 5, at 283; Moores, *supra* note 41, at 798; Strossen, *supra* note 203 (noting that without CAFRA’s appointment of counsel provision, many of the protections provid-

property owners, the incentive structure of the civil asset forfeiture system must be changed.²⁰⁵

One way to alter the incentive structure behind the current civil forfeiture policy is to eliminate the use of forfeiture proceeds for law enforcement.²⁰⁶ In Massachusetts, 100% of forfeiture proceeds are awarded to law enforcement.²⁰⁷ The Massachusetts Legislature has proposed an amendment reducing that number to 66%, while the remaining 34% would be directed into a drug prevention fund.²⁰⁸ Although this would be a step in the right direction, ideally the entirety of forfeiture proceeds would be directed somewhere besides law enforcement, into areas such as the state's general treasury fund.²⁰⁹ By directing forfeiture proceeds into a state's general treasury fund rather than directly back into law enforcement, the incentive for law enforcement to "police for profit" is decreased.²¹⁰ Removing the financial incentives from forfeiture actions would help guard against corrupting law enforcement values.²¹¹

Equitable sharing, however, provides a means for local law enforcement to circumvent state laws that attempt to cut down on policing for profit.²¹² Therefore, in order for states to be effective in their efforts to reduce the financial incentives within the forfeiture system, the equitable sharing program must be eliminated.²¹³ At a minimum, the percentage of proceeds that can be returned to the states through equitable sharing should be decreased.²¹⁴ Currently, states are able to realize returns of up to eighty percent from the federal government.²¹⁵ If the amount of return were reduced to a lesser percentage, that would help mini-

ed to property owners will be meaningless because property owners will be unaware of their existence and unable to avail themselves of their benefits).

²⁰⁵ See Ehlers, *supra* note 36, at 12; Williams et al., *supra* note 16, at 14.

²⁰⁶ Ehlers, *supra* note 36, at 12; Williams et al., *supra* note 16.

²⁰⁷ MASS. GEN. LAWS ch. 94C, § 47(d) (2012).

²⁰⁸ H.D. 1238, 188th Gen. Court (Mass. 2013).

²⁰⁹ See Ehlers, *supra* note 36, at 12; Williams et al., *supra* note 16.

²¹⁰ Blumenson & Nilsen, *supra* note 43, at 77 n.152; GREGORY M. VECCHI & ROBERT T. SIGLER, ASSETS FORFEITURE: A STUDY OF POLICY AND ITS PRACTICE 133–34 (2001). The level for potential abuse of forfeiture actions is proportional to the agency's personal interest in the action. VECCHI & SIGLER, *supra*, at 133. The more removed a law enforcement agency is from forfeiture proceeds, the more effective the system. *Id.* Distancing an agency's personal interest reduces the temptation to manipulate the forfeiture process. *Id.* at 133–34.

²¹¹ See LEVY, *supra* note 32, at 152; VECCHI & SIGLER, *supra* note 210, at 133–34; Blumenson & Nilsen, *supra* note 43, at 77 n.152.

²¹² See Blumenson & Nilsen, *supra* note 43, at 112; Holcomb et al., *supra* note 5, at 274; Worrall & Kovandzic, *supra* note 46, at 234.

²¹³ Blumenson & Nilsen, *supra* note 43, at 111 (noting that "[n]o state law reform can be effective, however, so long as federal adoption continues to provide an escape route from state requirements").

²¹⁴ See Ehlers, *supra* note 36, at 13 (arguing that "funds transferred to the states under equitable sharing should be disbursed according to state law").

²¹⁵ GUIDE TO EQUITABLE SHARING, *supra* note 47, at 12.

mize the loophole that allows local law enforcement to circumvent more stringent state forfeiture laws.²¹⁶

C. Providing Counsel to Indigent Property Owners in Civil Forfeiture Cases in Massachusetts

One way to reduce the potentially disproportionate impact on low-income parties is to provide counsel to parties that are unable to independently retain representation.²¹⁷ Representative Hyde's proposed legislation included a provision providing legal counsel to anyone unable to afford it.²¹⁸ The legislative history of the bill acknowledged the importance of such a provision, even though there is no Sixth Amendment right to counsel in civil cases.²¹⁹ Further, the House Committee on the Judiciary recognized that the lack of counsel for indigent property owners was "undoubtedly one of the primary reasons why so many civil seizures are not challenged."²²⁰ The Committee believed that civil forfeiture proceedings were extremely punitive in nature and consequently recommended that counsel should be made available for indigent property owners.²²¹

Massachusetts's law currently does not provide counsel to indigent property owners, regardless of the situation.²²² Enacting a provision providing counsel to indigent property owners would greatly alleviate the disproportionately harmful impact of forfeiture laws on lower income parties.²²³ Given that the Massachusetts law was modeled after pre-CAFRA federal law, Massachusetts should at the very least follow the changes to federal law instituted by CAFRA by providing counsel to indigent property owners when the subject of the forfeiture is a primary residence.²²⁴ Further, Massachusetts should encourage expanded access

²¹⁶ See Holcomb et al., *supra* note 5, at 274, 275; Worrall & Kovandzic, *supra* note 46, at 234; Ehlers, *supra* note 36, at 13.

²¹⁷ See H.R. REP. No. 106-192, at 17 (1999); HYDE, *supra* note 39, at 81; Strossen, *supra* note 203.

²¹⁸ H.R. 1658, 106th Cong. (2000).

²¹⁹ See U.S. CONST. amend. VI; H.R. REP. No. 106-192, at 17.

²²⁰ H.R. REP. No. 106-192, at 17. The House Committee noted that:

The reason [civil asset forfeitures] are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle.

Id. (quoting the 1996 H. Comm. on the Judiciary testimony of E.E. Edwards III, David Smith & Richard Troberman, Co-Chairs of the National Association of Criminal Defense Lawyers' Forfeiture Abuse Task Force).

²²¹ *Id.*

²²² See MASS. GEN. LAWS ch. 94C, § 47 (2012).

²²³ See H.R. REP. No. 106-192, at 14; HYDE, *supra* note 39, at 81; Strossen, *supra* note 203.

²²⁴ See 18 U.S.C. § 983(b)(2)(A) (2012); *One 2004 Audi Sedan Auto.*, 921 N.E.2d at 89; Strossen, *supra* note 203. Additionally, CAFRA authorizes federal courts to appoint counsel for indigent prop-

to counsel by authorizing an award of attorney's fees to a property owner who "substantially prevails" in a civil forfeiture proceeding.²²⁵ This provision helps lessen the impact forfeiture laws have on low-income parties because it encourages lawyers to represent indigent property owners.²²⁶ Even though an indigent property owner cannot pay for counsel, an award of attorney's fees provides a financial incentive for lawyers to aid indigent property owners in forfeiture actions if they believe the property owners can prevail.²²⁷

Massachusetts should adopt a provision providing counsel for indigent property owners in all civil forfeiture actions, as recommended for CAFRA by the House Committee on the Judiciary.²²⁸ The punitive and potentially devastating nature of forfeiture actions on low-income parties makes statutory reform in Massachusetts a necessity.²²⁹ At the very least, the Massachusetts Legislature should follow the path established by CAFRA over one decade ago.²³⁰ The provisions created by CAFRA establish important protections that help reduce the disproportionate impact of forfeiture actions on indigent property owners.²³¹

CONCLUSION

Massachusetts's civil asset forfeiture scheme disproportionately impacts indigent property owners. Modeled after the federal civil asset forfeiture law, which has since undergone significant reforms with the passage of the Civil Asset Forfeiture Reform Act ("CAFRA"), Massachusetts's law remains largely unmodified. The significant protections extended to low-income parties by CAFRA have not been adopted by the Massachusetts Legislature. The low burden of proof in Massachusetts, the financial incentives built into the civil asset forfeiture system, and the high cost and complexity of initiating legal action to reclaim seized property are all problematic, especially for low-income parties.

Allowing law enforcement to keep the proceeds of forfeitures that they attain presents a significant risk of corruption. The financial incentive behind forfeiture actions could lead law enforcement to initiate frivolous actions that generate revenue but are legally deficient. Because low-income parties often lack the resources to challenge such actions, statutory protections are necessary to

erty owners who are accused of a crime related to the subject of the civil forfeiture proceeding and are represented by court-appointed counsel in the underlying criminal case. 18 U.S.C. § 983(b)(1)(A).

²²⁵ 28 U.S.C. § 2465(b)(1) (2012); Rulli, *supra* note 29, at 713–14 (noting that "CAFRA's grant of authority to a claimant who substantially prevails in civil forfeiture litigation . . . expands the potential for recovery of attorney's fees against the federal government").

²²⁶ See Rulli, *supra* note 29, at 713–14.

²²⁷ See 28 U.S.C. § 2465(b)(1); Rulli, *supra* note 29, at 713–14.

²²⁸ See H.R. REP. No. 106-192, at 17.

²²⁹ See *id.* at 15, 17; Williams et al., *supra* note 16, at 65.

²³⁰ See 18 U.S.C. § 983(b); H.R. REP. No. 106-192, at 17.

²³¹ See 28 U.S.C. § 2465(b)(1); 18 U.S.C. § 983; Rulli, *supra* note 29, at 710, 713–14; Strossen, *supra* note 203.

help guard against potential abuse. The lack of protections in Massachusetts's law is troublesome. Massachusetts law enforcement keeps one hundred percent of the proceeds from forfeited property. Unlike the federal law, Massachusetts law does not provide for a right to counsel or the payment of the property owner's attorney's fees in any situation. The burden of proof is also the lowest in the country.

To remedy these concerning issues, there are several reforms that should occur. First, in Massachusetts specifically, the burden of proof should be raised to a more protective standard: beyond a reasonable doubt. Second, providing counsel to indigent property owners in civil asset forfeiture cases would greatly ameliorate the disproportionate impact that seizures have on lower income parties. Finally, equitable sharing between states and the federal government should be eliminated. State efforts to reform civil forfeiture law are undermined by the process of equitable sharing. Equitable sharing provides a vehicle for local law enforcement to circumvent more stringent state laws and it should therefore be eliminated. At a minimum, the percentage of proceeds that can be returned to the states should be decreased. Without these reforms, the civil asset forfeiture regime enables overzealous law enforcement agencies to pad their budgets at the expense of low-income property owners.