
Seize the Day: Eliminate Civil Forfeiture in Massachusetts

**Massachusetts Advisory Committee
to the U.S. Commission on Civil Rights**

August 2023

The United States Commission on Civil Rights

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Letter of Transmittal

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The Massachusetts Advisory Committee, as part of its responsibility to advise the Commission on civil rights issues within the state, submits this report, “Seize the Day: Eliminate Civil Forfeiture.” The report was unanimously approved by the Advisory Committee.

Sincerely,

David Harris, *Chairperson*

**Massachusetts Advisory Committee
to the U.S. Commission on Civil Rights**

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Acknowledgments

Staff expresses deep appreciation to the term-limited members of the Massachusetts Advisory Committee for their superb contribution to the U.S. Commission on Civil Rights over the past decade: chair David Harris, vice-chair Martha Davis, Wendy Kaminer and Siobhan Sweeney.

Executive Summary

The commonly accepted rationale for civil asset forfeiture in Massachusetts is to thwart large, profitable criminal enterprises – mainly drug trafficking operations. This rationale includes a determination that those who cannot be punished within the criminal legal system can be countered with the practice of civil asset forfeiture and that this serves the public interest. Proponents of civil asset forfeiture argue that seized assets are directed toward activities that benefit the public good: funding of diversion programs such as addiction treatment, supporting victims, strengthening public community projects, funding infrastructure or other expenses for police departments, and enhancing enforcement of existing laws.

We have found that the practice of civil asset forfeiture is operating in ways that are not in keeping with that goal of disrupting criminal enterprises and this has contributed to systematic violations of the civil rights of citizens of the Commonwealth. The Massachusetts State Advisory Committee to the United States Commission on Civil Rights undertook an investigation of this practice that included analysis of individual and aggregated cases, findings from independent researchers, testimony from non-governmental experts in non-profit organizations, and elected officials with a wide range of experience within the system of civil asset forfeiture in the state. We found that there are serious flaws at all levels of civil asset forfeiture practices and procedures.

We find that civil asset forfeiture in Massachusetts places the burden of proof on individuals to prove their innocence rather than on the state to prove their guilt, implying a presumption of guilt for both people who have been charged with a crime as well as third parties not involved in the specific criminal acts allegedly connected to their property. The lack of the right to counsel for individuals whose property has been seized on the basis of ostensible links to criminal activity means that an individual's right to due process in challenging forfeiture is likely to be hampered, particularly if they lack access to resources or familiarity with the legal process to reclaim seized property. The use of the lowest burden of proof to justify seizures of property coupled with the lack of standardized criteria for seizure creates wide discretion on the part of law enforcement, increasing the opportunity for abuse. We find a breathtaking lack of transparency and accountability in the seizure, retention, and use of seized assets. We are particularly concerned that the practice of civil asset forfeiture may disproportionately affect low-income individuals and People of Color given the widely documented pattern of such disparities.¹

¹ See Bishop, Elizabeth Tsai, Brook Hopkins, Chijindu Obiofuma, and Felix Owusu. "Racial disparities in the Massachusetts criminal system." Criminal Justice Policy Program, Harvard Law School (2020). Available at <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf>

Funds seized from civil asset forfeiture have come to be seen by law enforcement in particular as a source of ongoing revenue for costs that are not available through normal legislative appropriation processes. There are no consistent, state-wide detailed accounting processes for property seized and held by police departments or for how funds raised are used, resulting in a serious lack of transparency that would not be tolerated in other state agencies.

Massachusetts' civil forfeiture laws earned an "F" from the Institute of Justice evaluation of each state's laws.² Our findings confirm this grade is justified. Upon investigation of this practice, the possibility of the state making concrete reforms based on our findings was widely discussed. The entire system of civil asset forfeiture, however, was found to be deeply flawed at all levels. It has resulted in, and continues to create opportunities for, consistent and systematic violations of the civil rights of citizens of the Commonwealth. Given the existing racial and other disparities found throughout the criminal legal system, there is a large likelihood that people of color and other protected groups are experiencing significant civil rights violations in the civil forfeiture process. We have determined that the system of civil asset forfeiture is not reformable. We recommend Massachusetts follow the four other states that have eliminated the practice of civil asset forfeiture.³

Background:

Civil asset forfeiture occurs when law enforcement seizes property from an individual and attempts to keep that property based on the allegation that the property is somehow connected to a crime. There is no need to obtain a criminal conviction or even bring any criminal charges in order to pursue civil asset forfeiture. When pursuing civil asset forfeiture, the case is made *in rem*, meaning that it is made against the property itself and not against the owner of the property. It is also important to understand that civil asset forfeitures occur in civil courts and operate under those policies and procedures, including generally lower standards of proof and no right to counsel, at least in Massachusetts.⁴

This is in contrast to criminal forfeiture where someone must be convicted of a crime in order to take their property. In criminal cases, the forfeiture takes place during the sentencing phase when the individual convicted may be sentenced to forfeit some ill-gotten gains from the criminal activity or other

² Institute for Justice. 2020. "Policing for profit: The abuse of civil asset forfeiture, 3rd Edition – Massachusetts." Available at: <https://ij.org/report/policing-for-profit-3/?state=MA>

³ The other states who have eliminated civil asset forfeiture include Maine, North Carolina, Nebraska, and New Mexico. See <https://ij.org/legislative-advocacy/civil-forfeiture-legislative-highlights/>

⁴ Dan Alban, Senior Attorney, Institute for Justice & Co-Director, National Initiative to End Forfeiture Abuse, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, Apr. 27, 2022, transcript. (unedited transcript)

property used to commit the crime for which they have been convicted. There are higher standards of proof in criminal cases as well as a right to legal representation throughout the process. ⁵

The Commonwealth holds the distinction as having the lowest burden of proof of any state for police and prosecutors to confiscate the property of individuals. When the civil forfeiture statute was enacted in 1971, the standard required to seize property was “preponderance of the evidence.” The standard for seizure was lowered in 1989 to “probable cause” and, despite changes in federal law and in other states, Massachusetts has failed to change its standard. Of particular concern, owners, including innocent third-parties, bear the burden of proving their own innocence in order to recover their property.

The Institute for Justice (IJ), a non-profit public interest law firm, has engaged in systematic nationwide research on civil forfeiture. ⁶ It has found that, while many civil forfeiture laws do have a process for innocent owners to reclaim their property, all too often the burden of proof is on the owner—not the government. Therefore, under civil forfeiture, property owners must prove their innocence and that they were not aware of any criminal activity. In 43 states, police and prosecutors can keep anywhere from half to all of the proceeds they take in from civil forfeiture—a clear incentive to police for profit. Nearly all states and the federal government require far less evidence than the “beyond a reasonable doubt” standard for criminal convictions. With regard to Massachusetts, the IJ found that the state has the lowest standard for justifying civil forfeiture: while many states have a preponderance of evidence threshold, Massachusetts is the only state that requires only “probable cause” as the basis for the seizure of assets. ⁷

From 2018-2020, the 11 district attorneys and attorney general seized over \$11,000,000 of total assets through civil forfeiture programs. Such funds are allocated to the Law Enforcement Trust Fund, which is used for other law enforcement purposes, protracted investigations, and distributions to police. ⁸ Law enforcement agencies keep up to 100 percent of asset forfeiture proceeds. In certain instances, civil forfeiture funds allow local police departments to purchase equipment without oversight or approval from elected legislative bodies, circumventing disclosure policies and democratic accountability. ⁹

⁵ Ibid.

⁶ See generally Institute for Justice, *Police for Profit, The Abuse of Civil Asset Forfeiture*, <https://ij.org/report/policing-for-profit-3/>

⁷ Ibid. at <https://ij.org/report/policing-for-profit-3/?state=MA>

⁸ Commonwealth Of Massachusetts. Special Commission To Study Civil Asset Forfeiture Policy And Practice. In *The Commonwealth, Final Report (2021)*. See also Dan Alban *supra* note 4.

⁹ Dooling, Shannon & Christine Willmsen. “Boston police bought spy tech with a pot of money hidden from the public.” WBUR (Dec. 17, 2021) Available at <https://www.wbur.org/news/2021/12/17/massachusetts-cell-site-simulator-civil-forfeitures>

These outdated civil forfeiture laws have a human cost. For example, ProPublica and WBUR report on individuals like 21-year-old college student, Devantee Jones-Bernier, whose phone and ninety-five dollars were taken by police because he happened to be in an apartment where police found marijuana.¹⁰ Although Jones-Bernier had no connection to the drugs and charges against him were later dismissed, he never recovered his iPhone or money. Even more stark, was Laura Wojcechowicz, who had \$4,800 confiscated by police because her husband had been charged with drug dealing. The judge presiding over her husband's case refused to sentence Wojcechowicz's husband before resolving the civil forfeiture issue, which caused Wojcechowicz to give up the \$4,800 that she would never recover.¹¹

Echoing the problems identified in the WBUR/ProPublica piece, Attorney Joseph Hennessey included several examples in his testimony in which innocent individuals in Worcester, MA lost property to civil forfeiture.¹² In one instance, the wife of an alleged drug dealer was forced to forfeit \$6,409 after her husband accepted a probation offer for a small amount of cocaine discovered in their shared apartment. In another example, after stopping a woman for driving with a suspended license, police confiscated \$4300; the woman was traveling from Connecticut to Massachusetts with cash to make the final payment on her car. While Attorney Hennessey took the case pro bono and recovered the \$4300, it took six months to recover the money, during which the dealership repossessed the vehicle.¹³

As discussed below, Massachusetts's civil forfeiture laws have come under increasing scrutiny in recent years at the federal and state level. During a meeting of the U.S. House of Representatives Subcommittee on Civil Rights and Civil Liberties, Representative Ayanna Pressley (MA) noted that "civil asset forfeiture laws have been weaponized by police and prosecutors... [and] amount to little more than theft."¹⁴ The Boston Globe's Editorial Board has described civil forfeiture as "a perverse system that cries out to be ended."¹⁵ The ACLU of Massachusetts notes that civil forfeiture represents an "alarming threat to due process, made even more startling by the lack of transparency and

¹⁰ Datar, Saurabh & Shannon Dooling. "It's Easy For Police To Seize Money. Worcester's District Attorney Makes It Hard To Get It Back." WBUR (18 August 2021). Available at <https://www.wbur.org/news/2021/08/18/civil-forfeiture-police-money-massachusetts-worcester-joseph-early>

¹¹ Ibid.

¹² Joseph Hennessey, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, April 27, 2022, transcript, page 14. (unedited transcript)

¹³ Ibid.

¹⁴ See *Forfeiting Our Rights: The Urgent Need for Civil Asset Forfeiture Reform*, 117th Cong. (2021), <https://oversight.house.gov/legislation/hearings/forfeiting-our-rights-the-urgent-need-for-civil-asset-forfeiture-reform>

¹⁵ The Editorial Board, *In Mass., authorities can take your money. Or your car. Or your shoes.*, THE BOSTON GLOBE (Dec. 8, 2021), https://www.bostonglobe.com/2021/12/08/opinion/mass-authorities-can-take-your-money-or-your-car-or-your-shoes/?p1=Article_Feed_ContentQuery

accountability.”¹⁶ More recently, other local news outlets and individuals in the legal community have publicly denounced the practice of civil forfeiture.¹⁷

Massachusetts lawmakers responded to this public scrutiny, creating a commission in 2019 to study civil asset forfeiture practices in the Commonwealth.¹⁸ The Special Commission to Study Civil Asset Forfeiture Policies and Practices in the Commonwealth completed its report on civil forfeiture in July 2021. The comprehensive report looked at seven dimensions of the practice, ultimately making a series of six recommendations to the legislature: (1) Raise prosecutors’ burden of proof, (2) Improve reporting requirements, (3) Stay proceedings during the pendency of the criminal case, (4) Establish a minimum threshold value of property subject to seizure, (5) Provide CPCS representation (6) Divert forfeiture funds to the general fund or specific funding areas rather than to law enforcement and prosecutors.¹⁹

The Advisory Committee Investigation of Civil Asset Forfeiture

The State Advisory Committee commissioned a study of the practices and processes of civil asset forfeiture in Massachusetts. We took testimony across four briefings from several individuals with experience and expertise in civil asset forfeiture in MA and providing a range of perspectives. In this process, we gained a better understanding of the process of civil asset forfeiture, including the unregulated or monitored relationship between police departments and District Attorney’s offices.

In addition, we conducted a systematic analysis of a geographically weighted sample of cases of civil asset forfeiture filed across all 11 counties in Massachusetts between January 2019 and June 2022. We reviewed all documents available from the Massachusetts Trial Court website to ascertain the timeline between seizure and forfeiture filing, types of property seized, and the circumstances leading up to the seizure and forfeiture filing. We noted the location of the seizure, the county in which the forfeiture was filed, and any demographic or other characteristics of the individuals from whom property was seized. Given the amount of documents involved, we completed a review of a total of 45 cases during this time period.

The most salient characteristic of the cases examined is the lack of consistency in all aspects of seizure and forfeiture complaints, both across and within different counties. There is no standardized procedure for conducting or reporting asset forfeiture within the state. There are significant variations

¹⁶ Rahsaan Hall, District Attorneys and Civil Asset Forfeiture, ACLU OF MA (Apr. 2, 2018), <https://www.aclum.org/en/news/district-attorneys-and-civil-asset-forfeiture>

¹⁷ See, e.g., Board of Editors, Time to revisit state civil forfeiture law, MASS LAWYERS WEEKLY (Nov. 14, 2019), <https://masslawyersweekly.com/2019/11/14/time-to-revisit-state-civil-forfeiture-law/>

¹⁸ Commonwealth Of Massachusetts. Special Commission To Study Civil Asset Forfeiture Policy And Practice. *Supra* note 8.

¹⁹ *Ibid.*

in terms of, among other things, the timeline in which complaints are filed, the types of assets forfeited, and the circumstances leading up to the forfeiture. The following sections analyze different aspects of this inconsistency along with some general trends across the counties.

1. Racial/ethnic patterns

The only element that appears to hold across counties is the way in which ethnic or racial descriptors are used within the police reports or affidavits attached to the complaints for forfeiture. Except in one case, race is only mentioned if the individual was Hispanic or to highlight the fact that the individual “was not Hispanic” (without specifying the individual’s race).²⁰ However, since the ethnicity/race of the individual is not mentioned even when they have a potentially Spanish surname, it raises the question of why race/ethnicity is mentioned at all. Further, even within the same county, not all police reports/affidavits will mention the ethnicity of the individuals involved. There is no apparent relationship between the size of the Hispanic/ Latino population in the counties where this practice was seen. We could find no reason to account for this inconsistency in the data we reviewed.

In hearing testimony, we learned that some police departments do not collect race/ ethnicity data on individuals stopped unless a search results in an arrest or criminal complaint.²¹ The lack of consistent data on the demographic characteristics of people whose property was taken and subject to forfeiture was also noted by the Special Commission.²² The lack of data makes it difficult to determine whether, or to what extent, protected groups experience disparate treatment in this arena. Several proponents of civil asset forfeiture stated they are concerned about potential racial or other disparities and support data collection of such information by the courts. One of the barriers to tracking and sharing such data across the criminal legal system is the age of the information management systems. At the same time, law enforcement participants in our hearings asserted that it is more appropriate for the courts to collect such information.²³

2. Objects seized

In our sample, most cases involve the seizure of money (71%), with vehicles being the second most common object seized (11%) followed by cash and vehicles (7%). This is also consistent with

²⁰ In this one exception, occurring in Barnstable County, the individual was described as a “Black Female.”

²¹ Michael Morrissey, District Attorney, Norfolk County, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Aug. 2, 2022. It is also worth noting that in an analysis of civil asset forfeiture filings in Worcester county found that at 24% of the cases were not associated with a criminal charge at the time of the filing and an additional 9% of cases where there was no charge at all. See Datar & Dooling, “It’s Easy For Police to Seize Money” supra note 10.

²² Commonwealth Of Massachusetts. Special Commission To Study Civil Asset Forfeiture Policy And Practice. Supra note 8.

²³ Michael Morrissey, District Attorney, Norfolk County, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Aug. 2, 2022, transcript, p.12 (unedited script)

testimony provided by Chief Robert J. Ferullo, Jr., Executive Director of the Municipal Police Training Committee.²⁴

Across our sample, the average amount of cash seized for forfeiture was \$10,182 with a median of \$235. The smallest amount seized was \$0.38 and the largest was \$256,677. Our sample included 51 cases of seizures that occurred prior to the 2018 reporting reforms (discussed below). If these cases are excluded, the average seized in investigation was \$22,472 with a median of \$6,937. Excluding those cases, the smallest amount of cash seized was \$280 with the largest still being \$256,677.

There is significant variation across counties in the amounts seized for forfeiture. They ranged from an average of \$1,966 in Barnstable County to \$187,765 in Norfolk County. Even the smallest cash values seized varied significantly with \$280 in Franklin County (excluding the outlier forfeiture case discussed in detail below) to \$118,853 in Norfolk County. Overall, the amounts of cash submitted for forfeiture are generally very modest for allegedly enterprise level crime.

According to one state official, “in Massachusetts, the law only focuses on drug dealers and traffickers. And I repeat dealers and traffickers. The mere possession of drugs is not enough to subject you to forfeiture of any personal property. And the only forfeiture that can occur is when we are able to establish that nexus of the drugs to the illegal gains and profits.”²⁵ Because police reports or affidavits are often not included in publicly available court documents, it is difficult to confirm whether this is the case.

When it comes to seizures involving narcotics, there are significant variations in terms of how drug seizures are reported. Not all counties use a standardized unit of measurement when reporting the amount seized. The use of “bags” as a unit of measurement is remarkably unprecise and intangible, especially given that a person’s tangible property may be seized and held for an indefinite amount of time. Even in those cases using standardized units of measurement, counties vary between using imperial units of measurement and metric units, pointing, again, to the lack of consistency in practices within the state.

Many cases involve charges for trafficking in/possession with intent to distribute marijuana. Yet these do not specify the amount of marijuana using standard units of measurement, which means that we have no way of knowing the amount of possession, certain amounts of which is legal in Massachusetts as of 2016. In our review of available police reports or affidavits, while it is evident that

²⁴ Robert J. Ferullo, Jr., Executive Director of the Municipal Police Training Committee, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Nov. 1, 2022, transcript, p. 10.

²⁵ Michael Morrissey, District Attorney, Norfolk County, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Aug. 2, 2022, transcript, p. 3 (unedited script)

many cases involved the seizure of narcotics or related objects, those narcotics were not included in the filed forfeiture complaint.

This illustrates one of the many troubling inconsistencies in the civil asset forfeiture system and raises many questions. Are there requirements around the objects that have to be reported or included in the forfeiture complaint and if there are, what are they? Such missing information provides no ability to examine the depth and scale of alleged narcotics trafficking, which seems inimical to the rationale of combatting enterprise level drug trafficking through the practice of civil asset forfeiture.

3. Time elapsed between the seizure and the forfeiture complaint

Unlike other states, Massachusetts does not have any required timelines for filing for forfeiture. We found significant variation in the amount of time between seizures and filing a complaint for forfeiture. In some cases, it is only a matter of months, while in the most extreme case 32 years passed between the seizure and filing the complaint. On average, 34 weeks pass between seizures and the start of the forfeiture process in our sample. There was significant variation across counties, with an average of 4 weeks in Suffolk County to 101 weeks in Barnstable County. In Franklin, 51 cases of civil asset forfeiture from 1988 to 2017 were filed in 2020, illustrating the lack of clear timelines required for reporting property seized.

These results raise concerns over how the length of time between seizure and filing for forfeiture bears on cases where default judgment is entered for the Commonwealth because they could not find the owners of the property. In the Franklin County forfeiture case involving 51 separate seizures over 32 years, every single individual listed in the complaint was described as having an “address currently unknown.”

Similarly, the variation in the amount of time elapsed points to the possibility that there may not be any standardized requirements or standardized practices with which police departments must comply while they keep custody over the seized objects before the forfeiture complaint is filed. If such a requirement does exist, disparities in time between seizure and filing complaints for forfeiture suggest that they are not being adhered to, which is yet another problematic aspect of the civil asset forfeiture process.

The time it takes to file for forfeiture raises significant concerns for third parties whose property is seized, particularly vehicles. There is no requirement in Massachusetts for law enforcement to pay the towing or storage fees of vehicles that are ultimately returned to their owner. Chief Ferullo stated that his department paid those fees for any vehicles that were wrongly held or ordered returned by the courts.²⁶ However, this is not the practice across the Commonwealth. As a result, individuals whose

²⁶ Chief Robert J. Ferullo, Jr., *supra* note 24 at p. 38.

vehicles are supposed to be returned to them are unable to retrieve them because they are unable to pay the fees charged by the towing company.²⁷ To the extent that there are racial or other disparities in the civil asset forfeiture process, the costs imposed on individuals seeking to retrieve property wrongly held – including the possibility of losing their vehicles – simply adds insult to injury.

4. Traffic stops versus cases following narcotics investigations

In some counties (such as Suffolk County), forfeiture cases appear to originate mainly in traffic stops whereas in other counties, forfeiture cases clearly originate²⁸ from cases connected to narcotics investigations. It seems highly unlikely, however, that no traffic stops are resulting in seizures in certain counties. This raises questions about why these cases are not showing up on the dockets. Further, most of the cases following narcotics investigations do not always provide information on the background circumstances that led to the investigation preceding the seizure. Such background circumstances might include probable cause, but without the provision of such information, it is impossible to determine with any consistency whether seizures are justified.

Because demographic information about the individuals whose property was seized is lacking, we cannot confirm whether either traffic stops or narcotics investigations disproportionately impact particular populations. However, given the widely known racial disparities in traffic stops, it is likely that people of color are disproportionately impacted by seizures or forfeitures involving them.²⁹

5. Judicial procedures, reporting, and accounting: variabilities and inconsistencies

In our review, we found inconsistent transparency around important issues such as the basis of probable cause justifying the seizure, the precise nature and quantity of assets seized, and what happens to property after seizure. One troubling finding is wide inconsistency in what information is provided in the court dockets of civil asset forfeiture. Some counties include police reports regularly, while others do not; it is not clear why this is the case. Without the ability to review the police reports connected to civil asset forfeiture cases, evaluating the substantive situational factors in the civil asset forfeiture process, most importantly the point of police contact and seizure, makes confirming whether or not there are potential civil rights violations very difficult.

The 2018 updates to Chapter 94 section 47, mandate annual reporting of specific categories of expenditures of funds derived from forfeitures. The District Attorneys comply with all reporting

²⁷ Joseph Hennessy, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, April 27, 2022, transcript, p. 20.

²⁸ Chief Robert J. Ferullo, Jr., *supra* note 24, p. 30.

²⁹ Bishop, Brook, Obiofuma, & Owusu. "Racial disparities in the Massachusetts criminal system." *Supra* note 1.

requirements and have always done so. They also do not object to them.³⁰ In addition, these individuals also testified that there is oversight of the forfeiture process by the courts and additional oversight on spending through regional law enforcement partnerships like the Northeast Metropolitan Law Enforcement Council.³¹

Several law enforcement proponents of civil asset forfeiture who testified before the Committee stated that the Commonwealth provides judicial accountability at all levels of the process of civil asset forfeiture. At the same time, we learned that the police departments, which are the agencies that execute seizures, are not subject to any state mandated reporting requirements. Police departments are required to log seizures as evidence. It was the practice of the City of Woburn under Chief Ferullo to provide a voucher to the individual describing the cash or objects seized.³² However, it is still unclear whether there is a standard procedure whereby the District Attorneys are notified of a seizure to beginning the forfeiture process.

Several proponents of civil asset forfeiture asserted that these funds were critical sources of funding for law enforcement agencies as well as victim services, drug treatment, and diversion programs they supported. The arguments made implied that if District Attorney offices do not get to keep the money from seizures, it will reduce the incentive and efforts to dismantle large criminal organizations.

Services for victims of drug trafficking, public parks, or drug addiction rehabilitation services that may be funded through civil forfeiture certainly have value. Yet, the use of funds for these purposes, however much they are in the public interest, does not supersede the *a priori* question of whether civil asset forfeiture, as practiced in Massachusetts, violates the civil rights of those whose assets are seized or whether they operate in a racially disparate manner. It sets a very dangerous precedent if the state seizes assets for public use because such uses have high moral, ethical or practical value without consideration or protection of constitutionally guaranteed civil rights of those whose assets are forfeited.³³

Another concern raised by the testimony and the reports reviewed is the potential perverse incentives created by civil asset forfeiture. Once agencies become reliant on seized assets to fund their

³⁰ Michael Morrissey, District Attorney, Norfolk County, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Aug. 2, 2022, transcript, p. 3. (unedited transcript)

³¹ Chief Robert J. Ferullo, Jr., *supra* note 24, p. 41 (unedited transcript)

³² *Ibid*, p. 35. (unedited transcript)

³³ Nelson, Caleb. "The constitutionality of civil forfeiture." *Yale Law Journal*, Forthcoming, Virginia Public Law and Legal Theory Research Paper 2 (2016). Available at <https://www.yalelawjournal.org/feature/the-constitutionality-of-civil-forfeiture>; Matthews, Merrill. "Civil Asset Forfeiture and the Constitution" *Institute for Policy Innovation Ideas* 70 (2016): 2016. Available at https://ipi.org/ipi_issues/detail/civil-asset-forfeiture-and-the-constitution

activities, there is a clear motive for continuing and even enhancing the practice, especially under conditions of fiscal austerity. Much of the testimony from law enforcement focused on the social programs funded arguing that spending on diversion programs in particular would decline significantly. “... if you took forfeiture away from us, that would be catastrophic ...”³⁴

Moreover, it appears as if accounting practices in the use of forfeited assets are not as stringent as they ought to be given the civil rights implications of civil asset forfeiture. Despite the apparent reliance on civil asset forfeiture, we heard that there is no practice of accounting for this in the annual budgets of at least one District Attorney’s office.³⁵ In one case, an expense of \$300,000 was reported for community use, without any details provided.³⁶ Moreover, despite claims that forfeiture funds are important to support community uses and diversion programs, the Special Commission found that only 1.5% of funds were used on community grants in 2020 and never more than 12% of expenditures in the reporting provided. Instead, the three most common uses of civil asset forfeiture funds were “other law enforcement purposes”, protracted investigations, and distribution to police.³⁷

The Special Commission also could not determine whether all of the funds seized are deposited in the Law Enforcement Trust Fund, whether they are sent directly to police departments, or someplace else.³⁸ The inconsistency and lack of detail in reporting on both seizure and use of forfeited assets is unacceptable given the scope of asset forfeiture and the resources it brings under state control. The lack of transparency in the use of forfeited funds also prevents us from confirming whether the communities most impacted by drug crimes, and specifically communities of color, are actually benefitting from the seizures occurring in their communities.³⁹

While we heard testimony that there is significant judicial oversight throughout the civil asset forfeiture process, there is no right to counsel for individuals whose property is subject to forfeiture, even though all of these cases are required to have a nexus to criminal activity. This may explain why

³⁴ Michael Morrissey, District Attorney, Norfolk County, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Aug. 2, 2022, transcript, p. 19. (unedited transcript)

³⁵ Michael Morrissey, District Attorney, Norfolk County, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Aug. 2, 2022, transcript, p. 14-19. (unedited transcript)

³⁶ Jay Livingstone, House of Representatives for 8th MA district, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Aug. 2, 2022, transcript, p. 6. (unedited transcript)

³⁷ Commonwealth Of Massachusetts. Special Commission To Study Civil Asset Forfeiture Policy And Practice. Supra note 8.

³⁸ Rahsaan Hall, member of the Special Commission to Study Civil Asset Forfeiture Policies and Practices in the Commonwealth, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, April 28, 2023, transcript, p. 8 (unedited transcript)

³⁹ Michael Morrissey, District Attorney, Norfolk County, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, Aug. 2, 2022, transcript, p. 23-24. (unedited transcript)

somewhere between 72 percent to 80 percent of civil forfeiture cases defaulted and permanently forfeited their property.⁴⁰

Conclusion

The lack of transparency in the seizure, processing, or allocation of property taken through civil asset forfeiture “deprives the public of information that allows us to have confidence that law enforcement is appropriately handling these funds, and that they're being accountable to the public.”⁴¹ Given that the majority of cases we found in our analysis were related to drug crimes, and drug cases disproportionately impact Black and Latinex people, it is unlikely that there are no racial disparities in the operation of civil asset forfeiture.

Civil asset forfeiture is supposed to be a tool to disrupt criminal enterprises. This appears to be operating in regard to the Human Trafficking Trust Fund, which is funded through forfeiture from organized sex or labor trafficking activities. Such forfeitures are not a stable source of funding and so are not relied on for personnel or similar ongoing programmatic costs.⁴² What is unclear, however, is whether the assets seized that eventually go into the Human Trafficking Trust Fund rely on *civil asset forfeiture* or on *criminal forfeiture*.

This distinction is important because, with only one exception in our analysis, the crime invoked in all of the civil asset forfeiture cases were drug crimes, and primarily “possession with intent to distribute.” It appears that the focus on enterprise level crimes that were the focus of Chief Ferullo’s and District Attorney Morrissey’s testimony is not what is happening in practice across the Commonwealth. We found no cases of money laundering, enterprise level human trafficking, or even repeat drunk driving. The amounts typically seized in court records appear to be too small to meet the articulated goals of civil asset forfeiture. It stretches credulity to think that the seizure of even \$20,000 in cash and one vehicle will disrupt a drug trafficking ring.

One other important area of concern from a civil rights perspective is the use of civil asset forfeiture processes as a bargaining tool in criminal cases. We heard and read stories of innocent third parties being compelled to drop their attempt to regain their seized property in order to gain a favorable plea deal for a family member.⁴³ Even while emphasizing that civil asset forfeiture should be targeted to

⁴⁰ Chief Robert J. Ferullo, Jr., *supra* note 4, p. 26-27 (unedited transcript)

⁴¹ Rahsaan Hall, member of the Special Commission to Study Civil Asset Forfeiture Policies and Practices in the Commonwealth, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, April 28, 2023, transcript, p. 6 (unedited transcript)

⁴² Liam Lowney, Executive Director, Massachusetts Office for Victim Assistance, testimony before the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, briefing, November 1, 2022, transcript (unedited transcript)

⁴³ Joseph Hennessy, *supra* note 11.

“enterprise crime, not to try to arrest a kid dealing eight balls out of the glove compartment so we can steal his Camaro,” even Chief Ferullo admitted that it can be used as a tactic to gain the cooperation of a potential witness.⁴⁴ The potential coercion in the practice of civil asset forfeiture, in addition to the likely racial and other disparities and other civil rights issues already raised, requires more than modifications at the edge of this policy.

Recommendations

It appears that to truly protect the civil rights of all of the Commonwealth’s residents, particularly federal and state protected status groups, is for Massachusetts to join Maine, Nebraska, North Carolina, and New Mexico and abolish the practice entirely. Abolishing civil asset forfeiture and maintaining criminal forfeiture would still allow law enforcement to pursue criminal enterprises and seek forfeiture of assets of ill-gotten gains or property used in criminal activity.

One concern that was raised was that abolishing civil asset forfeiture at the state level would not prevent local law enforcement from working with federal law enforcement and profiting from equitable sharing agreements. So, abolishing civil asset forfeiture must also be coupled with prohibitions on participating in equitable sharing agreements with federal agencies. This would still allow local law enforcement to cooperate with and support federal investigations.

Barring abolishing civil asset forfeiture, preventing potential or actual civil rights violations would require the adoption of several recommendations to provide oversight, accountability, and control over the use of seizure, processing, and allocation of property allegedly connected with criminal activity.

These include:

1. Adopt the following recommendations made by the Special Commission:
 - a. Raise prosecutors’ burden of proof to a minimum of preponderance of the evidence.
 - b. Establish a minimum threshold value of property subject to seizure that is more in alignment with enterprise level criminal operations.
 - c. Provide for a right to counsel for indigent property owners.
 - d. Divert forfeiture funds to the general fund or specific funding areas rather than to law enforcement and prosecutors.
2. Institute prompt post-seizure hearings to allow the property owner the ability to challenge the seizure and determine who gets to keep the property during the pendency of the forfeiture proceeding.

⁴⁴ Chief Robert J. Ferullo, Jr., *supra* note 24, p. 30 (unedited transcript).

3. Collect and regularly analyze data on the demographics of owners of property seized.
4. Return of cash should include interest incurred through the entire time the property was held.
5. Require that the seizing agency assume any expenses for the storage of assets held, including towing and storage costs.
6. Greater and more regular funding of drug prevention, treatment, and rehabilitation through other state agencies with more expertise on these issues.
7. Standardize documents and information required in the court documents, including:
 - a. Police reports and affidavits that describe the probable cause justifying the seizure and the exact description and quantity of assets seized.
 - b. Standard units of measurements for drugs seized.
8. More detailed reporting on the use of funds obtained through civil asset forfeiture.
9. Require police departments to regularly report property seized in a standard manner regardless of whether civil asset forfeiture is pursued. Such reporting should include, at a minimum:
 - a. The demographic characteristics of the owner of the property.
 - b. A description of the probable cause justifying the seizure.
 - c. The exact description and quantity of assets seized.
10. Institute a statute of limitation on pendency for forfeiture.

These recommendations would only begin to provide some opportunity for greater transparency and accountability. However, we note that implementing any of these would incur greater costs on law enforcement agencies, require more time for compliance, incur costs to develop new practices and to hire compliance and oversight professionals; they would involve much more bureaucracy and may have the unintended consequence of creating incentives for even more abusive behaviors. The most efficient route to upholding the civil rights of the Commonwealth's protected status groups would be to eliminate civil asset forfeiture entirely.