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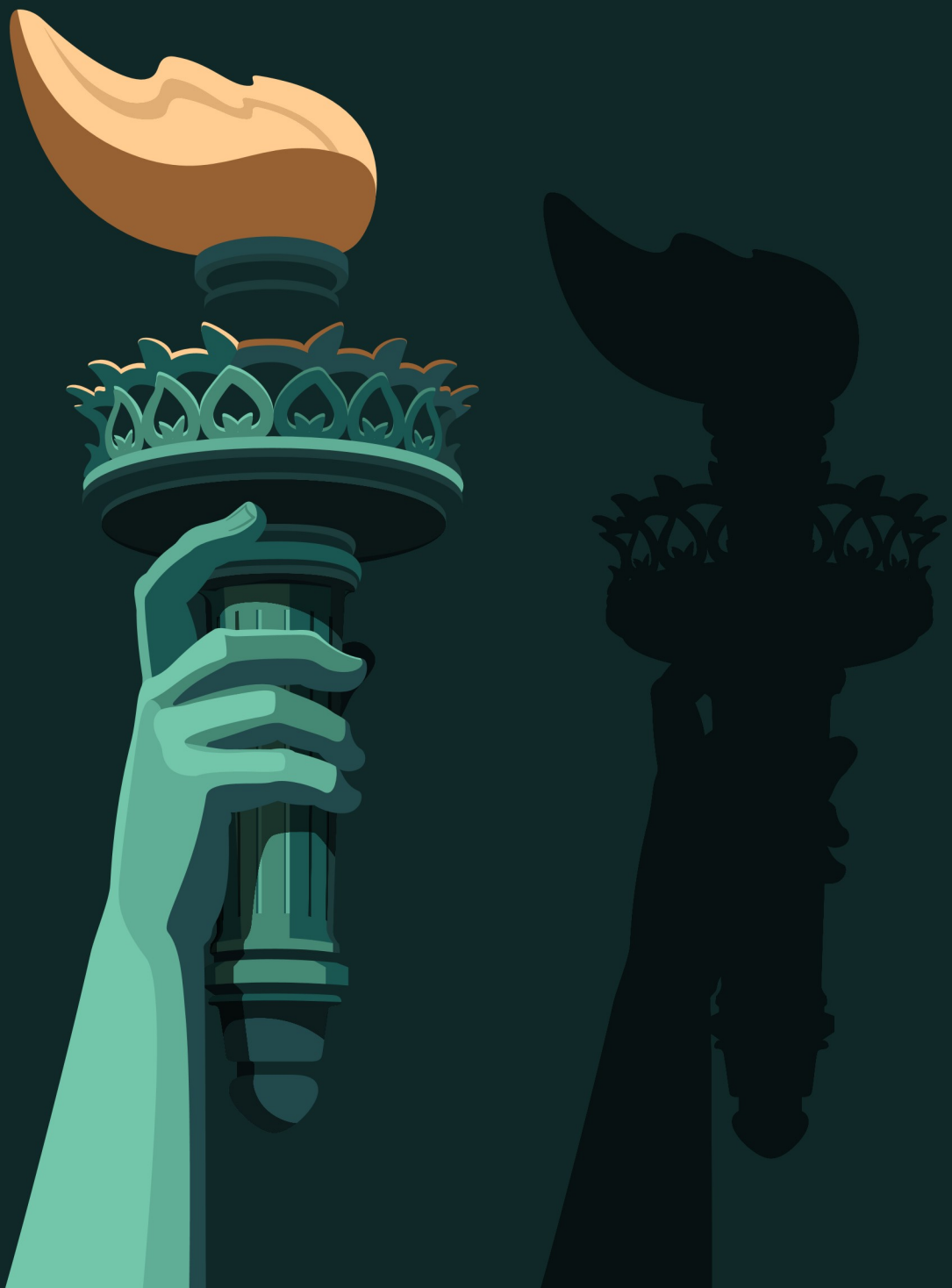
TCCRI
Texas Conservative Coalition Research Institute

CONSTITUTIONAL FREEDOMS TASK FORCE



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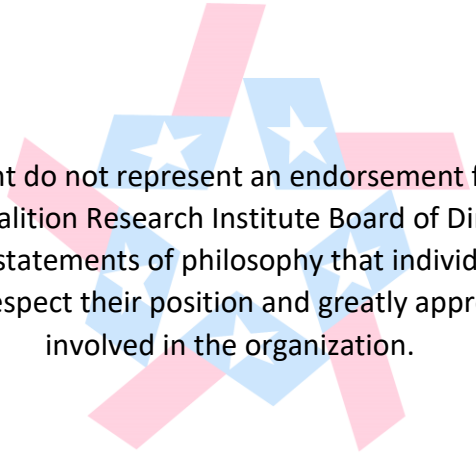

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I. Free Speech on College Campus

A. Introduction

TCCRI has taken note of the increasing problem of suppressed speech on colleges campuses since at least January 2017, in which a TCCRI white paper titled "Campus Free Speech Protection" explained that "the rights to speak freely and to freely associate on college campuses are in peril."[i] Indeed, the paper argued:

> The Legislature should re-affirm the state's commitment to open and robust dialogue on college campuses, including speech some may find offensive. Interacting with students from different walks of life who hold different views on a broad array of topics is one of the many benefits of higher education, and students should not be sheltered from or denied that opportunity because the views of some students are unpopular or controversial.[ii]

Institutions of higher education have a longstanding reputation as places where contrasting ideas are exchanged freely. Students attending those schools are exposed to ideas they may disagree with, but they need to be taught to tolerate and be respectful of different views, even if those views are offensive and hurtful. The marketplace of ideas has a long, successful history of good ideas prevailing over bad. The practices of disinviting provocative speakers, punishing speech with overly broad "speech codes," and relegating free speech to designated "zones" are not in line with the historical role institutions of higher education have played in fostering a robust and rich public discourse.

B. Speech as Violence

A lack of tolerance is part of the problem, but there is a growing movement to categorize certain kinds of speech as violence. Indeed, this "speech-violence" theory has been on prominent display in the *New York Times*, where *Times* fellow Amanda Hess explains "violence is embedded in everything from our social structures to our speech — that speech itself can be a form of violence, one every bit as meaningful as the physical kind."[iii] This fallacy was rebutted in a recent article by Josh Craddock, a Harvard Law School student and Editor-In-Chief of the *Harvard Journal of Law & Public Policy*:

> Speech-violence theories are dangerous because they undermine free-speech norms, which are central to a political life of civic republicanism and virtuous self-government. If utterances of speech are truly violence, then government can ban them as criminal conduct, just as we prohibit other forms of private violence.[iv]

Nevertheless, the word-violence theory persists, resulting in requirements for "trigger warnings" and "safe spaces" on college campuses. Greg Lukianoff and Jonathan Haidt explain the problem with these practices in "The Coddling of the American Mind":

> The dangers that these trends pose to scholarship and to the quality of American universities are significant; we could write a whole essay detailing them. But in this essay we focus on a different question: What are the effects of this new protectiveness on the students themselves? Does it benefit the people it is supposed to help? What exactly are students learning when they spend four years or more in a community that polices unintentional slights, places warning labels on works of classic literature, and in many other ways conveys the sense that words can be forms of violence that require strict control by campus authorities, who are expected to act as both protectors and prosecutors?[v]

The development of these attitudes on college campuses has coincided with an increased level of thought and speech policing. Students are shielded from provocative speakers, and they are often muted or prevented outright from being provocative themselves.

C. Recent Incidents Regarding Speech on College Campuses

Two years ago, at Texas State University, an independent student newspaper called *The University Star* published a provocative opinion editorial by Rudy Martinez entitled "Your DNA is an abomination."[vi] The November 28, 2017 piece argued that race and "whiteness" are social constructs meant to oppress non-whites.[vii] Thus, the concept of whiteness should be destroyed.[viii] The piece contained provocative wording directed at "whites," including the following:

> [R]emember this: I hate you because you shouldn't exist. You are both the dominant apparatus on the planet and the void in which all other cultures, upon meeting you, die.[ix]

The piece made national headlines, and amidst the pressure, Texas State University President Denise Trauth issued a statement denouncing the piece and called upon the Star editors to "exercise good judgment in determining the content they print."[x] Student Government President Connor Clegg issued a press release calling for Martinez's resignation and he threatened to help defund the Star if resignation did not occur.[xi] The University "investigated" the matter, and the School of Journalism and Mass Communications formed a committee to examine the *Star*'s editorial process.[xii] *The University Star* ultimately fired Martinez on November 30, 2017—two days after the initial publication.[xiii]

The experience of Martinez is not uncommon. Despite protections of free speech in the U.S. and Texas Constitutions, university campuses are becoming among the least tolerant settings for the free exchange of ideas. Examples of individuals punished or prevented from sharing their ideas include students like Martinez, but they also include faculty and administrators, as well as guest speakers.

The examples are myriad. On October 9, 2017, amidst student protests and ultimately action by the president of the university, Briscoe Cain—a lawyer and an elected State Representative in the Texas Legislature—was prevented from speaking at a planned Federalist Society presentation at Texas Southern's Thurgood Marshall School of Law.[xiv] That same month, Texas Southern University disinvited U.S. Senator John Cornyn from speaking at a graduation ceremony. A petition to remove Cornyn as the keynote speaker provided the following explanation:

> The decision to host Mr. Cornyn, as a keynote speaker sends the message that the policies and views he has advocated and supported, including both discriminatory policies and politicians, are acceptable by the university and subsequently the student body.[xv]

A planned event featuring noted white-supremacist Richard Spencer was cancelled by Texas A&M University in September 2017, citing safety concerns.[xvi]

These examples took place in Texas only in the last 12 months, but examples go back much further. The University of Texas even disinvited former Secretary of State Henry Kissinger from speaking on campus in 2000, citing safety concerns amidst planned protests.[xvii] Today, the University of Texas has a "Campus Climate Response Team," which investigates offensive parties and general campus climate incidents.[xviii] The team investigated 104 reports of "bias incidents" in 2014-15, 20 percent of which stemmed from a single party.[xix]

D. Campus Disinvitations

The examples cited above are just a handful of examples of speaker disinvitations. The *Foundation for Individual Rights on Campus* (*FIRE*) tracks "disinvitations" from speaking on campuses. *FIRE*'s "disinvitation database" cites 360 disinvitations or attempted disinvitations (not all are successful) nationwide going back to 2003.[xx] A particularly interesting feature of the database is the ability to filter disinvitations "from the left" and "from the right."[xxi] Doing so reveals that 104 of 360 disinvitations come "from the right," with the remaining 223 coming "from the left."[xxii] While one may be tempted to point out that twice as many attempts to silence speech from guest speakers come from one particular side of the ideological spectrum, the larger point is that this is a problem for both the left and the right.

E. Speech Codes

The act of disinviting or preventing speakers from conveying their messages is only one part of the problem. Schools across the nation have restrictive "codes," that outlaw otherwise constitutionally protected speech, expression, and association. Indeed, *FIRE* defines speech codes as "any university regulation or policy that prohibits expression that would be protected by the First Amendment in society at large."[xxiii] Importantly, "[a]ny policy—such as a harassment policy, a protest and demonstration

policy, or an IT acceptable use policy—can be a speech code if it prohibits protected speech or expression."[xxiv] One of the worst aspects of speech codes is their broad wording, which translates to broad application beyond what one might expect is the intent of the "code."

FIRE has developed a simple metric for designating problematic speech codes. A "Red Light" school is defined as:

> [A]n institution with at least one policy that both clearly and substantially restricts freedom of speech. A "clear" restriction is one that unambiguously infringes on what is or should be protected expression. In other words, the threat to free speech at a red light institution is obvious on the face of the policy and does not depend on how the policy is applied.[xxv]

A "Yellow Light" school is defined as:

> [An] institution is one whose policies restrict a more limited amount of protected expression or, by virtue of their vague wording, could too easily be used to restrict protected expression. For example, a ban on "posters containing references to alcohol or drugs" violates the right to free speech because it unambiguously restricts speech on the basis of content and viewpoint, but its scope is very limited. Alternatively, a policy banning "verbal abuse" could be applied to prohibit a substantial amount of protected speech, but is not a clear violation because "abuse" might refer to unprotected speech, such as threats of violence or harassment as defined in the common law. In other words, the extent of the threat to free speech depends on how such a policy is applied.[xxvi]

Lastly, a "Green Light" school has policies that "do not seriously imperil speech."[xxvii] The following table[xxviii] highlights public institutions of higher education in Texas and how FIRE rates them. Note that Texas A&M is the only college or university—public or private—in Texas with a green rating from FIRE.

Sam Houston State University
University of Houston
University of North Texas
University of Texas at Austin
University of Texas at Dallas
Angelo State University
Tarleton State University
Texas A&M University – College Station
Texas Southern University
Texas State University – San Marcos
Texas Tech University
Texas Woman's University

University of Texas at Arlington
University of Texas at El Paso
University of Texas at San Antonio
University of Texas at Tyler

The "Red Light" schools are particularly troublesome. Sam Houston State, for instance, prohibits "any petition, handbill, or piece of literature, work, or material that is obscene, vulgar, or libelous." [xxix] The University of Texas has a policy in place defining sexual misconduct to include the "telling of jokes or anecdotes of a sexual nature in the workplace, office, or classroom, even if such conduct is not objected to by those present." It also requires students to "[b]e civil. Do not send rude or harassing correspondence."[xxx] Even the Yellow light schools are problematic. Texas Woman's University, for instance, forbids campus-wide emails of commercial or political nature.[xxxi]

The Legislature should take note of speech code practices and consider legislation to supersede these codes with standards in line with state and federal constitutional guarantees.

F. Speech Zones

Nicole Sanders is a former student at Blinn College who spoke in public about gun rights.[xxxii] In 2015, school administrators told her that she needed permission before expressing those views.[xxxiii] An administrator and three armed policemen informed her of the need to get "special permission" to advocate for campus concealed carry.[xxxiv] On one occasion, it took her six weeks to get administrator approval to hand out materials on campus explaining the Fourth and Fifth amendments.[xxxv] She was told that she could speak without prior approval in designated "Free Speech Areas," which were small spaces of 16 feet by 11 feet.[xxxvi] Sanders sued, and won. The Blinn Board of Trustees settled her suit, agreed to revise its policies in order to comply with the First Amendment, and paid her $50,000 for damages and attorney's fees.[xxxvii]

Speech "zones" like those offered to Ms. Sanders are a common practice. They have the appearance of allowing speech, but are often times placed in low traffic areas of campus, and are geographically small spaces—like the parking spot sized rectangle offered to Ms. Sanders. Speech zones are not a new form of speech suppression, as an August 2017 article from the National Constitution Center explains:

> The subject of free-speech zones on campus remains a sore point. The zones started during the Vietnam War era, when universities needed a way to safely contain anti-war protests. Some states and public universities are either eliminating free-speech zones or scaling back their use. North Carolina, Tennessee and Arizona recently passed laws that protect the rights of speakers of all viewpoints and restrict the use of free-speech zones. But some of these laws include sanctions against people who interrupt the First Amendment rights of speakers on campus.[xxxviii]

Former U.S. Attorney General Jeff Sessions delivered a speech on the importance of free speech on college campuses in late 2017 and addressed many of the issues highlighted in this report, including free speech zones. General Sessions stated the following:

> In addition to written speech codes, many colleges now deign to "tolerate" free speech only in certain, geographically limited, "free speech zones." For example, a student recently filed suit against Pierce College, a public school in southern California, alleging that it prohibited him from distributing Spanish-language copies of the U.S. Constitution outside the school's free speech zone.
>
> The size of this free speech zone? 616 square feet—an area barely the size of a couple of college dorm rooms. These cramped zones are eerily similar to what the Supreme Court warned against in the seminal 1969 *Tinker v. Des Moines* case about student speech: "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven."[xxxix]

Attorney General Sessions was, and is, absolutely correct in his assessment. Approximately 10 percent of colleges use free speech zones.[xl] Texas should assess this practice in the Lone Star State and take steps to remedy it.

G. <u>Policy Recommendation</u>: Adopt the "Campus Free Speech Act," model legislation from the Goldwater Institute

Free speech is a fundamental right, specifically spelled out in the First Amendment to the U.S Constitution and Article 1, Section 8 of the Texas Constitution. These guarantees are not being honored on colleges campuses. The committee is correct to explore this issue, and the Legislature should consider adopting legislation to further buttress these protections. One option is the Goldwater Institute's "Campus Free Speech Act," (the Act) which "ensures the fullest degree of intellectual freedom."[xli] Among other things, the Act would protect the right to demonstrate on campus, but it subjects individuals to sanction if they interfere with the right of others to do the same. It would also prevent disinvitations to invited speakers.[xlii] It also provides a fair adjudicative process and legal recourse to any student whose rights have been violated.[xliii]

H. <u>Policy Recommendation</u>: Adopt Legislation that Reaffirms the Right to Free Speech on Campus

While the Goldwater Institute's model bill should serve as a guidepost and starting point for campus free speech legislation, it is not the only option. Representative Bill Zedler has filed House Bill 1373 (86R), which reaffirms the importance of protecting free speech on college campuses by prohibiting speech zones, subject to narrowly tailored and content-neutral time, place, and manner restrictions. It also

requires institutions of higher education to adopt a policy that "encourages the free and open exchange of ideas, including unpopular, controversial, or offensive ideas[.]" The policy must also prohibit schools from punishing students "in any manner" for engaging in protected First Amendment activities. It must also prohibit schools from disinviting speakers. Perhaps most importantly, the policy must establish disciplinary sanctions for students or employees "who unduly interfere with the expressive activities of others on campus." HB 1373 would also create a cause of action for a student whose speech rights have been violated. Senator Kirk Watson has filed a similar bill (SB 447), which illustrates that the problems associated with speech on colleges campuses are now recognized as a bipartisan issue. Either bill would be an important reaffirmation of the importance of free speech on college campus.

II. Civil Asset Forfeiture

A. Introduction and Background

Central to the concepts of liberty and private property is the Fifth Amendment to the United States Constitution, which provides that there shall be no deprivation of "life, liberty, or property without due process of law[.]"[xliv] Similarly, the Texas Constitution protects "life, liberty, and property . . . except by the due course of the law of the land."[xlv] The notion that the government may seize private property through civil asset forfeiture, often times without formally accusing the owner of a crime, poses a great danger to these concepts. Indeed, writing in a dissent from a decision by the Texas Supreme Court, Justice Don Willett described the practice of civil asset forfeiture as follows:

> A generation ago in America, asset forfeiture was limited to wresting ill-gotten gains from violent criminals. Today, it has a distinctive 'Alice in Wonderland' flavor, victimizing innocent citizens who've done nothing wrong. To some critics, 21st-century excesses are reminiscent of pre-Revolutionary America, when colonists chafed under the slights and indignities inflicted by King George III and Mother England—among them, "writs of assistance" that empowered government to invade homes and seize suspected contraband. Legal scholars have declared these writs "among the key grievances that triggered the American Revolution.[xlvi]

Indeed, while *criminal* asset forfeiture is considerably less objectionable because it requires due process through a criminal conviction before property if forfeited to the government, civil asset forfeiture does not have such protections. This has resulted in well-documented abuses, which is why the Republican Party of Texas, in its 2018 platform, has called "upon the Texas Legislature to abolish civil asset forfeiture and to ensure that private property only be forfeited upon a criminal conviction."[xlvii] Similarly, the Texas Democratic party, in its 2018 platform, calls for "ensuring civil asset forfeiture only upon a criminal conviction."[xlviii] Thus, reforming civil asset forfeiture reform is now a bipartisan issue.

Nevertheless, proponents of civil asset forfeiture argue that it is a necessary tool used to fight organized crime, cartels, and gangs. The Federal Bureau of Investigation describes asset forfeiture as a tool to punish criminals, deter illegal activity, disrupt criminal organizations, remove the tools of the trade from criminals, to return assets to victims, and to protect communities.[xlix] The Institute for Justice explains law enforcement opposition is common and fierce:

> In 2015, 13 bills were introduced to reform civil forfeiture in Texas— one of the worst states in the country on this issue—but massive pushback from state and local law enforcement killed every one of them. Such opposition to change will likely intensify in the coming years.[l]

The 2015 prediction rang true, as a number of bills were filed in the 85th Legislative Session by strong leaders on both ends of the political spectrum (e.g. Senator Konni Burton (R), Representative Matt Schaefer (R), Senator Don Huffines (R), and Representative Senfronia Thompson (D)).

B. The Process of Civil Asset Forfeiture

Civil and criminal asset forfeiture are powerful tools that allow law enforcement agencies to seize and appropriate property that was used in or connected with a crime. There are two kinds of "asset forfeiture" in Texas (and elsewhere in the United States). Criminal forfeiture involves property seized from a defendant convicted of a crime. In civil forfeiture cases, however, the government may seize property and assets based on suspicion of its involvement in criminal activity. Civil forfeiture proceedings are legal proceedings not against the alleged *criminal*, but against allegedly offending *property* involved in alleged criminal wrongdoing.

Chapter 59 of the Texas Code of Criminal Procedure governs civil asset forfeiture in Texas. Law enforcement officers in Texas may seize property if they have probable cause to believe that the property is "contraband." Contraband is defined as (1) any property used in the commission of or to facilitate a crime; (2) the proceeds of a crime; or (3) property derived from or purchased with the proceeds of a crime. The contraband can include any real or tangible property, including but not limited to real estate, vehicles, and money. The owner of the property does not have to be charged with a crime for the property to be considered contraband.

Once property is seized by law enforcement, the state has 30 days to file a forfeiture action (in other words, a lawsuit) against the property and to give notice to all persons who have an interest in the property. The state must prove by a "preponderance of the evidence" that the seized property is subject to forfeiture. This means that the state must show that it is "more probable than not" that the property is contraband (as defined). If property is deemed "contraband," then a person with an interest in the property (in other words, its owner) may still keep possession of it, *but only if he proves he is an "innocent owner" by a preponderance of the evidence*. This is a burdensome process that runs contrary to the presumption of innocence that defendants are entitled to in the U.S. criminal justice system.

C. Civil Asset Forfeiture Abuse is Well Documented

While the publicly stated motivations behind civil asset forfeiture are well-intentioned, it is clear that the practice incentivizes abuse. Indeed, as Kevin D. Williamson of National Review explains in "Civil Asset Forfeiture: Where Due Process Goes to Die," civil asset forfeiture is "one of the most abused powers enjoyed by American government[.]"[li] When the U.S. Supreme Court declined to review a forfeiture case from Texas, *Leonard v. Texas*, Justice Clarence Thomas wrote a dissent that lays out the facially unjust results from such a process:

> This system — where police can seize property with limited judicial oversight and retain it for their own use — has led to egregious and well-chronicled abuses. According to one nationally publicized report, for example, police in the town of Tenaha, Texas, regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights. In one case, local officials threatened to file unsubstantiated felony charges against a Latino driver and his girlfriend and to place their children in foster care unless they signed a waiver. In another, they seized a black plant worker's car and all his property (including cash he planned to use for dental work), jailed him for a night, forced him to sign away his property, and then released him on the side of the road without a phone or money. He was forced to walk to a Wal-Mart, where he borrowed a stranger's phone to call his mother, who had to rent a car to pick him up. These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.[lii]

The example of Tenaha, Texas is well known. Over the course of three years, more than $3 million in money and property was seized from hundreds of drivers who were never charged with a crime.[liii]

D. The "Innocent Owner" Burden

In another example of civil asset forfeiture abuse in Texas, a used car salesman sold an automobile to a man arrested for drunk driving. The man was also in possession of cocaine. Local law enforcement began civil forfeiture proceedings against the truck, which the salesman had sold to the man on a line of credit. When asserting the "innocent owner" defense in Texas, as the salesman did, such a person has the burden of proving no knowledge of the crime that was committed. Justice Willett dissented from the Texas Supreme Court's decision not to review the case, and explained:

> The current Texas civil-forfeiture law, enacted in 1989, greatly expanded both the scope of forfeiture (now including most felonies and some misdemeanors) and the types of property that can be seized (now including homes, land, vehicles, etc.). The government's burden is slight while the citizen's burden is significant. Law enforcement can seize property it believes is "contraband," something it need only show by a preponderance of the evidence. If the property owner doesn't answer the State's forfeiture action, the State keeps the seized property. If the owner has the wherewithal to challenge the seizure, he can assert an "innocent owner" defense, which requires him to prove he "did not know or should not reasonably have known of the [allegedly criminal] act or omission."[liv]

E. Policy Recommendation: Shift the burden of proof in an "innocent owner" defense from the person alleging the defense, to the government.

While it makes sense in *criminal* asset forfeiture for the owner to prove innocence, that is because the defendant is the person who has been charged with a crime. Such is not the case in an innocent owner defense asserted by a person not alleged to be part of the crime, much less charged. That the burden is on the person alleging an innocent owner defense instead of law enforcement is part of the reason why Texas has earned a rating of "D+" from the Institute for Justice in its nationwide grades issued for civil asset forfeiture laws:

> Texas has terrible civil forfeiture laws, earning a D+. The standard of proof required to forfeit property in Texas is just preponderance of the evidence, and an innocent owner bears the burden of proving that she was not involved in any crimes associated with her property before she can get it back. In addition, law enforcement agencies enjoy a strong incentive to seize property. In cases where a default judgment is entered—as is the case in the majority of forfeiture actions—agencies retain up to 70 percent of forfeiture proceeds. In contested cases—those in which the property owner challenges the basis for the seizure—agencies retain up to 100 percent of proceeds.[lv]

In the 85th Legislative Session, Senator Bob Hall filed Senate Bill 1714, which would have shifted the burden of proof in an innocent owner defense from the owner to the government, and imposed a clear and convincing standard of evidence for the government to prove the property is subject to seizure and forfeiture. Sixteen states and the district of Columbia require the government to prove that a person asserting innocent ownership was connected with the alleged crime.[lvi] Passage of such a bill in the 86th Legislative Session would make Texas the 17th. It would be a meaningful reform that wouldgo a long way towards protecting private property and valuing due process.

F. Policy Recommendation: Abolish the Practice of Civil Asset Forfeiture in Texas

According to the Institute for Justice, fifteen states require a criminal conviction for "most or all" forfeiture cases. Since 2013, three states—North Carolina, New Mexico, and Nebraska—have abolished civil asset forfeiture entirely, allowing the forfeiture process only in criminal proceedings.[lvii] Several attempts have been made in Texas to eliminate the practice entirely. In the 85th Legislative Session, Senator Konni Burton filed Senate Bill 380, which would have repealed the process of civil asset forfeiture. The following provisions were included in the bill:

- Specification of what property is subject to forfeiture and what is exempt
- It provided that there is no property right in contraband and that contraband is subject to seizure;

- The bill required the conviction of a crime subject to forfeiture, including a sentence of community supervision or deferred adjudication, be obtained prior to forfeiture of the property;
- The bill raised the standard of proof required to "clear and convincing" evidence in most cases;
- It prohibited the forfeiture of homestead properties, motor vehicles valued at less than $10,000, and currency totaling less than $200;
- It set out the process by which property may be forfeited and provides safeguards for the taking of property that has a bona fide security interest or that of innocent owners;
- It established procedures for a proportionality hearing to determine whether the forfeiture is unconstitutionally excessive in proportion to the alleged crime;
- It required that all forfeited property and currency be delivered to the county treasurer in the county in which the property was seized and that property be disposed of by public auction; currency and the proceeds of the auction are to be deposited into the general fund of the county;
- It required annual reporting on the number of forfeitures, the value of each category of property forfeited, and the total number of offenses underlying the forfeitures;
- It provided for the speedy return of property to its rightful owner when charges are dropped or the owner is acquitted, as well as when the court determines that an owner has a bona fide security interest;
- It provided for a substitution of assets if the state shows the defendant intentionally transferred, sold, or deposited the property with a third party to avoid the court's jurisdiction; and
- It allowed for the retention of a civil process in case where the defendant cannot be put on trial; for example, if the individual is deceased or if the individual has absconded, the state must only prove by a preponderance of the evidence that the defendant is unavailable for trial.

Representative Senfronia Thompson filed an identical bill in the House during the 85th Legislative Session, and she recently filed House Bill 404 in the 86th Legislative Session, which is nearly identical. Passage of HB 404 should be given serious consideration by the 86th Legislature.

III. Protecting Life

The current national platform for the Democratic party pledges to fight for "safe and legal" abortion, with no limitations.[lviii] Similarly, the Democratic party platform in Texas pledges to "preserve confidential, unrestricted access to affordable, high quality . . . reproductive services, contraception and abortion[.]"[lix] Recent legislation introduced in both New York and Virginia would expand access to abortion through the third trimester—well beyond the point of viability. The author of the Virginia bill, Kathy Tran, described her bill has allowing abortion up through the point of the woman being *in labor*.[lx] The Democratic Governor of Virginia, Ralph Northam, explained what the bill would permit in terms of denying medical care to a newborn:

> The infant would be delivered. The infant would be kept comfortable. The infant would be resuscitated if that's what the mother and the family desired, and then a discussion would ensue between the physicians and the mother.[lxi]

These comments suggest that the bill would allow the delivery of a live newborn infant, and then permit the physician and mother to allow a post-birth abortion. Governor Northam has suggested that his remarks were misconstrued, but he said them nonetheless. And such remarks are consistent with the general casualness in which abortion advocates discuss abortion. Planned Parenthood, for example, lists among the reasons that 1 in 4 women will have an abortion by the age of 45 as "they just don't want to be a parent."[lxii] Such is the current debate over the importance of unborn life.

A. Science is on the Side of Life

While abortion advocates often argue the importance of abortion after viability based on the health of the mother or the unborn child, the existing medical literature does not support such claims. The Guttmacher Institute—a pro-abortion rights organization—contradicts claims that abortions after 20 weeks are often medically necessary, explaining instead that "most women seeking later terminations are not doing so for reasons of fetal anomaly or life endangerment."[lxiii]

Several physicians have testified before Congress that abortion is never necessary in terms of saving the mother's life. Anthony Levatino explained to Congress that during his time at the Albany Medical Center, he managed hundreds of high-risk cases by "terminating" pregnancies to save mother's lives, but "[i]n all those cases, the number of unborn children that I had to deliberately kill was zero."[lxiv] Dr. Oma Hamada went further:

> I want to clear something up so that there is absolutely no doubt. I'm a Board Certified OB/GYN who has delivered over 2,500 babies. There's not a single fetal or maternal condition that requires third trimester abortion. Not one. Delivery, yes. Abortion, no.[lxv]

While this argumentative playing field takes place in the context of late-term abortions, that is because society has allowed the debate to shift there. However, science is firmly settled on the fact that life begins at conception.[lxvi] Therefore, the debate should be less about the extreme circumstances in which abortion is permitted, but, rather, to what extent a society is willing to protect the life of the unborn.

B. Polling Consistently Supports a View in Favor of Restrictions on Abortion

A 2013 Gallup poll shows three-quarters of Americans oppose abortion after the first trimester.[lxvii] Only 14 percent of Americans support third trimester abortions.[lxviii] The poll further shows that 79 percent of people identifying as pro choice object to third trimester abortions.[lxix]

The Gallup results are consistent with other polling. An annual Marist poll sponsored by the Knights of Columbus also shows that a strong majority of Americans favor restricting abortion to the first trimester of a pregnancy.[lxx] The Marist poll is particularly interesting because it includes oft-cited data showing that—in some years—more Americans identify as pro-choice than pro-life.[lxxi] However, over 60 percent of those identifying as pro-choice tell pollsters that they favor restricting abortion to the first three months of a pregnancy.

C. The Current State of Abortion in America

Nationally, America's abortion policy is one of the most liberal in the world. America is one of only seven countries that allows abortion after 20 weeks.[lxxii] Since the *Roe v. Wade* decision in 1973, roughly 61 million unborn children have been aborted in the United States.[lxxiii] While down from the peak of roughly 1.5 million abortions per year in the late 1980's there are still between 650,000 and 950,000 abortions every year in the United States, based on estimates from the Guttmacher Institute and the Centers for Disease Control.[lxxiv] That amounts to roughly 1,800 to 2,600 abortions *per day* in the United States.[lxxv]

D. Policy Recommendation: Prohibit Infanticide for Aborted Babies Born-Alive

Following Virginia Governor Ralph Northam's comments that appeared to defend infanticide as protected by the Virginia abortion bill, United States Senator Ben Sasse introduced a bill that would create criminal penalties for doctors who allow infants to die when born alive during an abortion procedure. It requires the doctor to provide the same level of care to any other live infant at risk of death. Under the bill, intentionally killing a live baby in an abortion procedure would carry a criminal penalty of up to five years' in prison. Nothing in the bill restricts the right to an abortion, but it reaffirms the right of a baby born alive to live.

Senator Sasse rightfully describes a vote for his bill as being "against infanticide."[lxxvi] Indeed, given that life begins at conception, it surely continues outside of the womb. While our policy debates over the

unborn continue to progress, there should be no disagreement of the right to life once outside the womb. Texas should follow Senator Sasse's lead and file state-level legislation protecting the life of the already born.

Current provisions in statute could potentially serve as the basis for prosecuting the killing of a born-alive aborted child, but those statutes do not speak directly to the situation described. For instance, Section 171.045 of the Health and Safety Code requires a physician performing an abortion to terminate the pregnancy in a manner that "provides the best opportunity for the unborn child to survive." Partial-birth abortions are prohibited in Texas, save for an exception in order to save the life of the mother.[lxxvii] The Occupations Code also prohibits licensed physicians from performing an abortion on a woman pregnant with a viable unborn child during the third trimester of pregnancy, with certain limited exceptions.[lxxviii] A violation of Texas's prohibition on partial-birth abortion carries both criminal and civil penalties.[lxxix]

The language used in Texas's partial-birth abortion ban requires an "overt" act by a physician to kill a "partially delivered living fetus." It does not speak directly to an aborted baby born alive, which is where Senator Sasse's bill enters the debate. The full text of the bill is included in Appendix A at the end of this Report, but key provisions include:

- Physicians must exercise the same level of skill to preserve the life of an aborted baby born alive as they would exercise in any other childbirth;
- A fine, imprisonment for five years, or both, for any physician who "intentionally performs or attempts to perform an overt act that kills a child born alive[.]"
- A civil action for damages by the mother against a physician that performs an abortion in which the child was born alive and then killed after birth.

Texas should continue to protect the lives of aborted babies born alive and adopt its own version of the Born-Alive Abortion Survivors Protection Act.

IV. Appendix A: The "Born-Alive Abortion Survivors Protection Act"

"Requirements pertaining to born-alive abortion survivors

"(a) Requirements for health care practitioners.—In the case of an abortion or attempted abortion that results in a child born alive:

"(1) DEGREE OF CARE REQUIRED; IMMEDIATE ADMISSION TO A HOSPITAL.—Any health care practitioner present at the time the child is born alive shall—

"(A) exercise the same degree of professional skill, care, and diligence to preserve the life and health of the child as a reasonably diligent and conscientious health care practitioner would render to any other child born alive at the same gestational age; and

"(B) following the exercise of skill, care, and diligence required under subparagraph (A), ensure that the child born alive is immediately transported and admitted to a hospital.

"(2) MANDATORY REPORTING OF VIOLATIONS.—A health care practitioner or any employee of a hospital, a physician's office, or an abortion clinic who has knowledge of a failure to comply with the requirements of paragraph (1) shall immediately report the failure to an appropriate State or Federal law enforcement agency, or to both.

"(b) Penalties.—

"(1) IN GENERAL.—Whoever violates subsection (a) shall be fined under this title, imprisoned for not more than 5 years, or both.

"(2) INTENTIONAL KILLING OF CHILD BORN ALIVE.—Whoever intentionally performs or attempts to perform an overt act that kills a child born alive described under subsection (a), shall be punished as under section 1111

of this title for intentionally killing or attempting to kill a human being.

"(c) Bar to prosecution.—The mother of a child born alive described under subsection (a) may not be prosecuted for a violation of this section, an attempt to violate this section, a conspiracy to violate this section, or an offense under section 3 or 4 of this title based on such a violation.

"(d) Civil remedies.—

"(1) CIVIL ACTION BY A WOMAN ON WHOM AN ABORTION IS PERFORMED.—If a child is born alive and there is a violation of subsection (a), the woman upon whom the abortion was performed or attempted may, in a civil action against any person who committed the violation, obtain appropriate relief.

"(2) APPROPRIATE RELIEF.—Appropriate relief in a civil action under this subsection includes—

"(A) objectively verifiable money damage for all injuries, psychological and physical, occasioned by the violation of subsection (a);

"(B) statutory damages equal to 3 times the cost of the abortion or attempted abortion; and

"(C) punitive damages.

"(3) ATTORNEY'S FEE FOR PLAINTIFF.—The court shall award a reasonable attorney's fee to a prevailing plaintiff in a civil action under this subsection.

"(4) ATTORNEY'S FEE FOR DEFENDANT.—If a defendant in a civil action under this subsection prevails and the court finds that the plaintiff's suit was frivolous, the court shall award a reasonable attorney's fee in favor of the defendant against the plaintiff.

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