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Rebutting Common Myths of Civil Asset Forfeiture

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Key Points

- Forfeiture abuse is not a media fabrication, nor is coverage an excuse not to change the practice.
- Inadequate safeguards currently exist.
- Reform will not result in a public safety funding shortfall.
- Alternatives exist when a conviction is required, but not achievable.

In regard to Texas, civil asset forfeiture is a misnomer. The state's governing statute on the practice, Chapter 59 of the Code of Criminal Procedure, does not once mention the term. Rather, it talks only of criminal forfeiture that, both internally and via referenced statutes, is subject to civil process and held to civil standards of action. Under current law, property may be taken without so much as criminal behavior being alleged, much less substantiated.

Further, civil asset forfeiture is wildly unpopular. In Texas alone, 88 percent of individuals are opposed to its current application (Right on Crime). Results in similar states follow suit: 88 percent of Mississippians reject the practice (Shackford 2016a), as do 84 percent of Floridians and 83 percent of Utahans (Shackford 2016b). Why then does the practice continue unaltered in arguably the most liberty-loving state in the Union?

The *status quo* of civil asset forfeiture in Texas persists due to common myths surrounding the practice and its prospective elimination. Those myths, while false, warrant discussion.

Myth #1: "Forfeiture abuse is a media fabrication."

While it is true that the most pernicious cases of forfeiture abuse are widely covered by the media, these stories represent an infinitesimal portion of all statewide forfeiture actions. Attention-grabbing headlines like "How police took $53,000 from a Christian band, an orphanage and a church" (Ingraham) epitomize the current "clickbait" media engagement strategy, but fail to tell the story of more typical applications of the practice.

The story mentioned above concerns Mr. Eh Wah—a native Burman, a Texan, and a United States citizen. On February 27, 2016, during a concert tour raising money for an orphanage in his homeland, he was pulled over in Muskogee County, Oklahoma, for a broken taillight. After a canine search "hit" on the car, the car was searched. Mr. Wah's concert proceeds, $53,234 in cash, were seized and Mr. Wah was detained before being released without charges.

No official action was taken until April 5, when a Muskogee County judge found probable cause to substantiate an arrest warrant for Mr. Wah. The finding arose from an 86-word affidavit describing the events of February 27:

> *I conducted a traffic stop on a black 4-door Suzuki displaying TX tag DXP0817 for the left brake light being defective. When the vehicle stopped I made contact with the driver Eh Wah. Deputy Sandersfield's K-9 partner had a positive alert on the vehicle. During the search $53,234 cash was found in the vehicle. Due to the inconsistent stories and Wah unable to confirm the money was his. The money was seized for evidence, awaiting for charges to be filed for Possession of Drug Proceeds.* (Fuchs)

This was all the evidence presented against Mr. Wah, and it was enough to convince a county judge that Mr. Wah was likely guilty of criminal activity. Once the media latched on to this case of forfeiture abuse, public scrutiny reached a crescendo and the Muskogee County district attorney terminated proceedings one day later. Months after the stop was made, Mr. Wah's money was rightfully returned, but not before his case was taken up by the Institute for Justice, a liberty-oriented public interest law firm (Fuchs).

continued

This story represents the fallacy of the "media fabrication" myth. Absent media coverage, almost nobody would know of Mr. Wah's case. Once the media coverage started, the case was terminated immediately. Ergo, the forfeiture action was undeterred by the complete lack of evidence of criminal wrongdoing, but could not withstand a torrent of press inquiries. The Western system of law does not qualify justice by whether or not the media knows a particular case.

While this injustice was perpetrated against a Texan, the process was executed in Oklahoma, one of the few states with worse forfeiture laws than Texas. However, given the facts of the case, the incident could just as easily have occurred on this side of the Red River.

Mr. Wah's case is also atypical. The amount seized, $53,234, is a significant one and (while not proof of) appears to be consistent with the volume that large-scale drug traffickers may possess. However, the law is often applied to much smaller, more routine amounts of cash. A case-by-case analysis of all 357 of 2014 forfeitures in Dallas County revealed that over 77 percent of all cash seizures were below $5,000, and of those, 61 percent were below $2,000, hardly worth the media's time and energy investigating and covering. Even if the media were so inclined, only two proceeded to trial (Nicholson).

Lack of constant coverage does not justify perpetuating a vestigial system that offers no practical benefit and opens the door to opacity and abuse.

Myth #2: "Safeguards against civil asset forfeiture abuse already exist."

While there is opportunity for victims of forfeiture abuse to have their day in court, civil forfeiture proceedings hardly resemble its criminal analogue. As I wrote in "Without Due Process of Law: The Conservative Case for Civil Asset Forfeiture Reform," civil forfeiture proceedings are long in the trappings of legal formalism but are short in the observations of due process rights (Cohen).

Put succinctly, Texas' current forfeiture procedure does offer plenty of process, wherein the onus is on the accused to appear at time certain and prove the nonexistence of a criminal nexus, all before the state has prevailed on a single challenged action. That does not describe any defensible safeguard; rather it relies on the beneficence of a district attorney and judge to observe the "accused's" rights.

Myth 3: "Reforming civil asset forfeiture will result in a massive shortfall in public safety funding."

If the common rejoinder from forfeiture proponents that "[I/my DA/my police department] never forfeit[s] property without being able to prove criminal activity" is to be believed, then this myth is wholly moot. Property forfeited pursuant to a criminal conviction would be forfeited and disbursed exactly as is done currently under the *status quo*.

But for the sake of discussion, assume that a conviction requirement will bring to light less-than-scrupulous forfeiture practices. If a police department or district attorney's office were in the habit of making unjustified seizures and forfeitures, they might see a decline in *discretionary* funding, the largest non-appropriated source of funding to prosecutors in Texas (Kepple). Police departments, too, might see supplemental funds decline. This means that good prosecutors who may have never processed a forfeiture case would be unduly penalized. Well-meaning rookie cops, those most likely to walk a beat, might be deprived of funds to cover bulletproof vests.

This highlights the problem that the reliance on forfeiture funds has caused: it has started to supplant work-critical items that should have been funded through general appropriation. The availability of a police officer's bulletproof vest or a prosecutor's pens should not stem from the volume of perfected forfeitures during the previous year.

Secondarily, this myth also supposes that public funds, even those with limited purpose such as those held in Chapter 59-regulated accounts, are being efficiently spent. Forfeiture proponents cite reforms made under Senate Bill 316, passed during the 82nd Legislature, that curtailed controversial practices like the roadside waiver of rights and prohibited

purchases of frivolous items like margarita machines using forfeiture funds. However, Chapter 59 funds are still being spent on items of questionable value to the pursuit of law enforcement.

A 2014 open records request included, in some cases, itemized expenditures from Chapter 59 accounts. The district attorney's office for one major county showed the purchase of several microwave ovens, a 42-inch LED smart TV, and thousands of dollars to local restaurants and retailers for various monthly meetings, just to name a few notable expenses. While these types of expenses are allowed under current law, they represent office luxuries that do not tangentially relate to law enforcement.

Myth #4: "It's not always possible to secure a conviction, even in the face of overwhelming evidence of criminal activity."

This myth is simply a contradiction in terms. For criminal evidence to be overwhelming and not simply circumstantial, its credibility must be vetted and subject to due scrutiny. A single affidavit, absent criticism, does not substantiate this. However, in the legal fiction undergirding forfeiture, since the property is being charged with criminal activity rather than the owner who is being divested of it, the standards for proving a case do not rise to the threshold established in criminal procedure.

While mostly false, this myth does have a kernel of truth to it. Due to current case law and statute, there are some cases in which criminal behavior is apparent but charges are unable to be brought. Most notably, a conviction may be difficult or impossible if the accused is dead or has absconded. Such contingencies could be easily addressed through an exception to conviction requiring the state to prevail in a finding that the accused is unable to stand trial.

For cases in which a person can be held to account for criminal activity, achieving a conviction may still not be possible. Perhaps the facts of the case suggest criminal activity was afoot, though a jury reasonably doubted that the accused was guilty. If it were not for the legal fiction underpinning civil forfeiture–that property can be separately guilty of a crime under a lower burden of proof, while the owner is not guilty– it would not be possible to strip owners of their property once the trial were concluded.

Conclusion

The framework of civil asset forfeiture in Texas has simply outlived its usefulness as a crime-fighting tool and perpetuates as a quick fix to help fund prosecuting attorneys and law enforcement outside of the rightful appropriations process. Asset forfeiture can be persevered as criminal forfeiture dependent upon a conviction, thereby allowing police and district attorneys to continue intervening in criminal enterprise without jeopardizing the rights of innocent property owners.

The myths listed herein do not justify a system in which fundamental property rights can be ignored, no matter how trivial the amount seized. This is the system that is currently put in place by Chapter 59 of the Code of Criminal Procedure, one that puts good police and good prosecutors in ethically dubious situations because it is easier to pad budgets through forfeiture than to justify a general appropriations request. The Legislature should end forfeiture without a conviction.

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Cohen graduated with a B.S. in Criminal Justice from Bowling Green State University and an M.S. in Criminal Justice from the University of Cincinnati, where he is currently completing his Ph.D. dissertation on the long-term costs and outcomes associated with correctional programming. His academic work can be found in *Policing: An International Journal of Police Strategies & Management* and the forthcoming *Encyclopedia of Theoretical Criminology* and *The Oxford Handbook on Police and Policing*, and has scholarly articles currently under review. He has presented several papers to the American Society of Criminology, the Academy of Criminal Justice Sciences, and the American Evaluation Association on the implementation and outcomes of various criminal justice policy issues.

Prior to joining the Foundation, Cohen was a research associate with University of Cincinnati's Institute of Crime Science. He also taught classes in statistics, research methods, criminal procedure, and corrections.

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