LESSONS FROM FERGUSON: WHAT EVERY GOVERNMENT LAWYER IN TEXAS NEEDS TO KNOW

Written and Presented by:

RYAN KELLUS TURNER
Texas Municipal Courts Education Center
2210 Hancock Drive
Austin, Texas 78756
512.320.8274
rturner@tmcec.com

Co-written by:

BENJAMIN GIBBS
Juris Doctor Candidate, 2017
Baylor Law School
gibbs@tmcec.com

State Bar of Texas
28TH ANNUAL
ADVANCED GOVERNMENT LAW COURSE
July 28 - 29, 2016
Austin

CHAPTER 1

RYAN KELLUS TURNER
Texas Municipal Courts Education Center
2210 Hancock Drive
Austin, TX 78756
(512) 320-8274
Email: RTurner@TMCEC.COM
Twitter: @RKellusTurner

BIOGRAPHICAL INFORMATION

EDUCATION

J.D., Southern Methodist University, Dallas, Texas
B.A., Summa Cum Laude, Psychology, University Honors Program, St. Edwards University, Austin, Texas

PROFESSIONAL ACTIVITIES

General Counsel and Director of Education, Texas Municipal Courts Education Center, Austin, Texas
Adjunct Instructor and Pre-Law Advisor, St. Edward's University, Austin, Texas
Deputy City Attorney, City of Dripping Springs, Dripping Springs, Texas
Associate Judge, Austin Municipal Court, Austin, Texas

PUBLICATIONS, ACADEMIC APPOINTMENTS & HONORS

Contributor with Tom Bridges, "Search Warrants and Related Orders Authorized by the Texas Code of Criminal Procedure," Tom Bridges & Ted Wilson, *Warrants Manual for Arrest Search & Seizure 4th Edition* (2014) Texas County and District Attorney Association at 14.

Ryan Kellus Turner & W. Clay Abbott, *The Municipal Judges Book*, Texas Municipal Courts Education Center & Texas Municipal Courts Association, Austin, Texas (2002) (2005) (2010) (2012) (2014).

Contributing Editor, Robert O. Dawson, *Texas Juvenile Law, 7th Edition (*2008) Texas Juvenile Probation Commission, Austin, Texas.

Contributing Editor, *Texas Criminal and Traffic Law Manual: Judicial Edition (2005-2006 Edition)* Lexis Nexis: Gould Publishing, Charlottesville, Virginia (2005).

David M. Horton & Ryan Kellus Turner, *Lone Star Justice: A Comprehensive Overview of the Texas Criminal Justice System*, Eakin Press, Austin, Texas (1999).

Articles

Alan J. Bojorquez & Ryan Kellus Turner, "The Stars at Night: Local Regulation and Enforcement of Outdoor Lighting Standards (Deep in the Heart of Texas)" *Texas Tech Administrative Law Journal* (Vol. 16, Book 2) Summer 2015.

Ryan Kellus Turner, "Ticketing, Confidentiality, and Special Education Issues," *State Bar Section Report Juvenile Law* (Vol. 26, No. 4) December 2012.

Ryan Kellus Turner and Mark Goodner, "Passing the Paddle: Nondisclosure of Children's Criminal Cases," *State Bar Section Report Juvenile Law* (Vol. 24, No. 4) December 2010.

Ryan Kellus Turner and David Perkins, "The Selective Use of Cinema in Criminal Justice Education," The Journal of Criminal Justice and Popular Culture (Vol. 15, No. 3) SUNY, December 2008.

Ryan Kellus Turner, "Casting Light Upon Shadows: The Role of Municipal Government in Community Traffic Safety," Texas Town and City (October 2006).

Ryan Kellus Turner, "Lower Criminal Courts in America," and "Disorderly Conduct and Disturbing the Peace," *Encyclopedia of Criminology* edited by Richard Wright & J. Mitchell Miller, Routledge Press, New York (2005).

Ryan Kellus Turner, "City-Related Bills of the 79th Regular Legislative Session: The Good, The Bad, and the Money," State Bar of Texas Government Lawyers Section Newsletter, (Vol. 4, Issue 6) Summer 2005.

Ryan Kellus Turner, "Pay or Lay: *Tate v. Short* Revisited," The Texas Prosecutor (Vol. 33, No. 4) July/August 2003.

BENJAMIN GIBBS
Texas Municipal Courts Education Center
2210 Hancock Drive
Austin, TX 78756
(512) 320-8274
Email: Gibbs@TMCEC.COM

EDUCATION

J.D., Baylor Law School, Expected Graduation Date May, 2017
B.A., Southwest Texas State University

PROFESSIONAL ACTIVITIES

Texas Municipal Courts Education Center Fellow, 2015-2016
City of Huntsville, Juvenile Case Manager, 2012-2014
City of Austin, Associate Municipal Court Clerk, - Assistant Juvenile Case Manager, 2007-2011

PUBLICATIONS

Benjamin Gibbs, "Judicial Donation Trust Funds: A Statutory Violation of the Canons of Judicial Conduct?," The Recorder Vol. 25, No. 2 (January, 2016).

TABLE OF CONTENTS

LESSONS FROM FERGUSON: WHAT EVERY GOVERNMENT LAWYER IN TEXAS NEEDS TO KNOW

The authors thank Regan Metteauer for her invaluable assistance in editing, and for comments that greatly improved the manuscript.

I. LESSONS FROM FERGUSON

How much do you know about Ferguson, Missouri?[1]

If you are like most Americans, what you know about Ferguson is limited to what you gleaned from the cable news networks in 2014. Contrasting images of peaceful and violent protests, images of law enforcement at its best and worst. The images broadcast by the media became part of the American consciousness.

On August 9, 2014, Officer Darren Wilson shot and killed 18-year-old Michael Brown, a resident of Ferguson, Missouri. The shooting set off a year of protests that placed a community of 20,000 people at the center of a:

> "vigorous debate in the United States about the relationship between law enforcement officers and African Americans, the militarization of the police, and the use of force doctrine in Missouri and nationwide."[2]

More significantly, the events in Ferguson sparked what has been described as a new civil rights movement throughout the United States.[3] In less than two years, what began as a debate over criminal justice policy has evolved into what, at its core, is a national debate on social justice and economic inequality.

In response to the shooting and subsequent unrest, the U.S. Department of Justice (DOJ) conducted an investigation into the policing practices of the Ferguson Police Department. In March 2015, the DOJ announced that it had determined the Ferguson Police Department had engaged in misconduct against the citizenry of Ferguson by discriminating against African Americans and applying racial stereotypes in a:

> "pattern or practice of unlawful conduct."[4]

While the conclusions of the 100-page report pertaining to law enforcement priorities were widely reported and media accounts predominantly focused on law enforcement practices, the report also detailed practices in the Ferguson Municipal Court that imposed substantial and unnecessary barriers to defendants that undermined the court, eroded community trust, contributed to making policing less effective, and ultimately had devastating consequences for the City of Ferguson and its residents.

> "St. Louis County's municipal courts [including the Ferguson Municipal Court] didn't kill Michael Brown. But they were a major contributor to the outrage and distrust that was on display in Ferguson following Brown's death."[5] Activists now contend that local courts throughout the nation are no different from the Ferguson Municipal Court and are operating "debtors' prisons."[6]

The DOJ convened a group of stakeholders at the White House in December 2015 to discuss the challenges surrounding fines and fees. In March 2016, the DOJ Civil Rights Division and Office for Access to Justice issued a letter to state and local courts regarding their legal obligations with respect to the enforcement of fines and fees.[7] NBC News reported that the letters were significant because they signified that DOJ supports activist groups who have sued local judges, and that the letter puts all courts on notice that the "feds are joining the fight" as part of a broader campaign against what Attorney General Loretta Lynch called:

> "the criminalization of poverty."[8]

After Missouri municipal courts were sued for unjust jail sentences, referred to by defense attorneys as "poverty violations,"[9] civil rights attorneys subsequently began using a new strategy to force reform in courts they allege unfairly target the poor: aggressively file lawsuits and work to publicize them in the media. Civil rights attorneys brought law suits in New Orleans; Rutherford County, Tennessee; Biloxi and Jackson, Mississippi; Benton County, Washington; and Alexander County, Virginia.[10]

In Texas, similar lawsuits have been filed against the City of Austin[11] (the suit was later dismissed[12]), the City of Amarillo,[13] and the City of El Paso.[14]

Of course Ferguson is not a city in Texas.[15] Yet, what if this was your hometown? What if this could occur in Texas? What if there is something you can do to prevent a similar tragedy? The DOJ Civil Rights Division's report provides insights that may prevent other cities throughout the United States from experiencing similar tragedies.

The aim of this paper is to assist lawyers in government practice to:

1) Describe the local and national consequences and reforms stemming from the Ferguson tragedy;

2) Explain how Ferguson Municipal Court practices harmed the community and the City of Ferguson; and
3) Identify safeguards in Texas law designed to prevent abuses of power similar to those that occurred in Ferguson.

In the continuing wake of the Ferguson tragedy, two things seem evident:

1) What happened in Ferguson, Missouri is of national significance to all governments (federal, state, and local), and
2) The lessons of Ferguson are a cautionary tale.

If state and local governments choose to ignore the lessons of the Ferguson tragedy, they do so at their own potential peril. Where is the movement born from Ferguson's tragedy heading? No one knows for sure. However, our best guess is the Texas Legislature.

A. LESSON ONE: Focus (Refocus) on the Proper Role of Local Courts

A court is allowed to incidentally generate revenue through the imposition of fines. In fact, despite the recent emergence of rhetoric to the contrary, there is a strong argument to be made for the expanded use of fines and other monetary sanctions in the American criminal justice system.[16]

If, however, a court is viewed by government primarily as a source of revenue (as was the case in Ferguson),[17] the integrity of the judicial system is at grave risk.[18] In the wake of Ferguson-inspired lawsuits, now is an ideal time to remind local officials and employees why judicial independence best serves the interests of the public and the interests of government.[19] It not only ensures that the public has access to fair and impartial judicial proceedings, it is also a primary reason why local governments are not held legally responsible for the decisions of local judges.[20]

Does your city and county have the right attitude about municipal and justice courts?

RIGHT: Public officials and employees view local courts as being essential, independent arbiters of justice. Courts are viewed as institutions necessary to the fair enforcement of laws that preserve public safety and promote quality of life in the community.[21]

WRONG: Judges assess their own job performance based off revenue generation. The courts in your community are viewed as profit centers and judges viewed as debt collectors in robes. Citations are an IOU. When defendants fail to appear in court, their presumption of innocence fails to exist. Similarly, when defendants have arrest warrants issued, despite having never entered a plea, they are no longer presumed innocent. Your local government depends on revenue from the court in order to balance its budget. The court is more focused on revenue than public safety or quality of life. When looking at a diagram of the local government, the court is under the finance department.

Which did you choose? "You must choose, but choose wisely."[22] Ferguson, as the nation now knows, "chose poorly."[23] The question now is what kind of choices will local and state officials make?

There is nothing new about the tension between the express and implicit functions of courts that impose fines as punishment and collect court costs in Texas.[24] Neither is this the first time that imposition of fines at the local government level has been called into question on a national level.[25] What is new, however, is the level of public attention that is being drawn to the "court costs" and other state fees and surcharges that accompany the imposition of fines. Understandably, for most defendants there is no meaningful distinction between "fines," "court costs," and "fees." Regardless of the label chosen by a government, each entails either money coming out of a defendant's pocket or money the defendant does not have and may not be able to pay. Legally, however, in states like Texas, where criminal court costs have dramatically increased 1,760 percent since 1965, it is important that the legislature, the governor, and all members of the Texas judiciary are able to distinguish "fines" from other legal constructs involving the payment of monies.[26]

Each is different. And the difference is becoming increasingly important. In the context of a criminal case:

- *Fines* – Amounts assessed to punish an individual or organization for violating a law following a conviction by a judge.[27]
- *Court Costs* – Amounts prescribed by the legislature, determined on a case-by-case basis and varied in relation to the activities involved in the course of the case (and may include fees, miscellaneous charges, and surcharges.)[28]
- *Fees* – Fixed amounts charged for a service by a governmental entity.[29]

In the United States, terminology and definitions vary from state to state when it comes to terms used to describe court-related revenues.[30] Nationally, however, a general characteristic of such revenues is that they are created by legislative bodies (not courts) and their imposition by courts is mandatory and not subject to the discretion of judges.[31] Furthermore, according to an attorney general opinion, a court may not order a defendant to pay a fine (which is retained by local governments) before court costs (which are remitted to the state treasury).[32] Despite the tendency of the public to conflate fines, court costs, and fees, each is legally

distinct. With noted exceptions, the media has done little to delve into such distinctions or to increase public awareness of how state-mandated court costs and fees are actually utilized in Texas.[33] Nationally, advocacy groups capitalize on this oversight by grouping criminal justice obligations (and the enforcement of lawful criminal court judgments) with private consumer debt (which they contend are enforced through illegal predatory collection practices). These distinctions are increasingly of public importance, particularly amidst sensational claims that municipal courts in Texas are turning jails into "debtors' prisons."[34]

To be clear, the public has long supported the imposition of "fines" (a form of retribution and punishment) for common criminal offenses (regardless of a defendant's socio-economic class). What is unclear is whether the public supports, or is even aware, that "court costs" are being used to pay for governmental expenditures which are debatably not related to the criminal justice system, let alone the matter that landed the defendant in court.[35]

B. LESSON TWO: Understand How Practices in the Ferguson Municipal Court Harmed the Community It Sought to Serve

> "*Those who cannot remember the past are condemned to repeat it.*"[36]

As the City of Ferguson works to rebuild a community that is damaged in multiple ways, the DOJ Civil Rights Division's report and the DOJ letter to state and local courts to stakeholders provides insights that may prevent other cities throughout the United States from experiencing similar tragedies.

Although Texas and Missouri laws are vastly different, governmental legal advisors in Texas should study the DOJ's insights into what happened in Ferguson as a case study in harmful court practices.

Ferguson municipal court practices imposed substantial and unnecessary barriers to the challenge or resolution of municipal code violations.[37]:

1) Court practices and procedural deficiencies created a lack of transparency regarding rights and responsibilities.[38]
2) Needlessly requiring in-court appearances for most code violations imposed unnecessary obstacles to resolving cases.[39]
3) Driver's license suspensions mandated by state law were unnecessarily prolonged by the court, which made it difficult to resolve a case and imposed substantial hardship.[40]
4) Court operations imposed obstacles to resolving even those offenses that did not require an in-person court appearance.[41]
5) High fines, coupled with legally inadequate ability-to-pay determinations and insufficient alternatives to immediate payment, imposed a significant burden on people living in or near poverty.[42]

The Ferguson Municipal Court imposed unduly harsh penalties for missed payments or appearances.[43]

1) Arrest warrants were used primarily as a means of securing payment.[44]
2) Bond practices imposed undue hardship on those who sought to secure release from the Ferguson City Jail.[45]

C. LESSON THREE: Identify Ferguson-Related Legislative Reforms

Nine months after Michael Brown's death, the Missouri legislature passed S.B. 5 (effective August 28, 2015), which, among other things, authorized payment plans, community service for indigent defendants, capped the amount of revenue that municipalities can collect in traffic cases, prohibited jail sentences for common traffic offenses, and abolished the offense of failure to appear for traffic violations.[46] After he signed the legislation into law, Governor Jay Nixon said that when:

> "the practices of municipal courts fail the basic tests of fairness and equality — those failings reflect on our entire judicial system."[47]

Forward Through Ferguson: A Path Toward Racial Equity (The Ferguson Commission Report) was issued on September 14, 2015. The 197-page report is structured in the form of four priorities and four sets of "calls to action" to guide legislation and community action in order to improve racial equality in the region. The Commission calls for the elimination of incarceration for all minor offenses, for such offenses to be decriminalized, and for such offenses to be collected in the same manner as civil debts.[48] While the report does not define "minor offenses," anecdotally it includes traffic offenses (*e.g.*, Driving While License Suspended, Expired License Plates, No Insurance, and Speeding).[49] To avoid assessing a fine or fee a person cannot afford, municipal courts should be required to determine a defendant's ability to pay at the defendant's first court appearance and all subsequent hearings.[50]

II. GOING FORWARD: ASSESSING NEEDS AND PERILS

The events in Ferguson; the shooting of Tamir Rice; the tragic suicide of Sandra Bland; we are seemingly at a flashpoint in American legal history. Criminal justice reform is a national movement. Ideologues on each side of America's polarized, political divide routinely tout the "bipartisan" nature of criminal justice reform. Currently, in addition to the issues addressed in this paper, the movement seems focused on bail reform, mental health treatment access, and civil asset forfeiture.

Advocates for criminal justice reform in the United States, such as the American Civil Liberties Union (ACLU), deserve the lion's share of credit for increasing public awareness of the plight of the indigent in the American criminal justice system. Real change, particularly in the criminal justice system, seldom occurs from the top down and it never occurs when people just observe and remain idle. It occurs from the bottom up—when people stand up and speak out against injustice.

Two examples of how real change came about involve cases that began at the local level of government and were argued all the way to the U.S. Supreme Court. These two decisions remain of paramount importance to the civil liberties of indigent defendants and are at the heart of the debate brewing throughout the country involving local courts. Both decisions are generally referenced or alluded to in media coverage. Notably, the first case is from Texas and began in the Houston Municipal Court.

- *Tate v. Short* (1971) - The Equal Protection Clause of the 14th Amendment prohibits states from imposing a fine as a sentence and automatically converting it to a jail term solely because the defendant is indigent and cannot pay the fine in full.[51]

- *Bearden v. Georgia* (1983) - A sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was somehow responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence, and hence, the trial court erred in automatically revoking petitioner's probation and turning the fine into a prison sentence without making such a determination.[52]

These two decisions are at the core of Ferguson-inspired debates elsewhere in the nation and here in Texas.

Taken collectively, these two decisions can be construed to stand for the propositions that:

1) The 14th Amendment requires defendants accused of fine-only offenses be provided "alternative means" of discharging the judgment to avoid incarceration (via time-payment plans or discharge through community service); and
2) That converting a fine and/or court costs into a term of confinement without a judicial inquiry into the reasons for nonpayment and whether nonpayment was willful violates notions of fundamental fairness.

A defendant who is indigent may only be committed to jail if afforded an alternative means of discharging fines and costs.[53]

A. Assessing Needs

> *"Seek first to understand, then to be understood."*[54]

Before leaping to action, law- and policy-makers would be wise to seek information and understanding of the problems facing courts and defendants. In that interest follows a brief survey of some of those problems. Before solutions can be planned, the problems must be thoroughly understood.

1. A Call to Judicial Action

Judges are not immune to the human tendency to form opinions based on their own experiences. As Dr. Steven Covey explains in the "5th Habit" of his book The 7 Habits of Highly Effective People, people can look at the same thing from completely different perspectives because they understand "autobiographically." In order to effectively handle Ferguson-related issues locally and at the state-level, it is important for the Texas judiciary to take the time to understand what organizations like the ACLU are claiming is happening in municipal courts in America. In that interest, the ACLU's written statement before the U.S. Commission on Civil Rights hearing on Municipal Policing and Courts is particularly illuminating (March 18, 2016).[55] What is reported to have occurred in Ohio, Georgia, Mississippi, and Washington is very disturbing. The statement provides a high-level view of events in other states that judges in Texas may not otherwise be privy to. While the word "Texas" does not appear in the ACLU's written statement, it, like the DOJ Ferguson report, describes misconduct and an attitude about local courts that cannot be tolerated in Texas. The key to preventing the rise of this kind of misconduct is increased awareness and vigilance.

In Texas, leadership on these issues is needed at all levels of the judiciary and at all levels of government. However, once again, real change, in local courts, seldom occurs from the top down. It will not occur if

local judges observe and remain idle. It will occur from the bottom up. The good news is that leadership efforts by members of the local judiciary are underway. In a state as big as Texas, the continuation of this process will require the support of judicial education organizations funded by grants from the Texas Court of Criminal Appeals and the support of the Texas Judicial Council.

Less than six months after the DOJ Ferguson Report was published, the Texas Municipal Courts Education Center (TMCEC) launched "Lessons from Ferguson," an on-line and live-training education awareness campaign for judges, court staff, prosecutors, and peace officers. Near the one year anniversary of the release of the DOJ Ferguson report, TMCEC began an on-line initiative called "Shared Solutions: Fines, Costs, and Fees," an on-line resource to help courts prepare local forms and handouts to help defendants understand their rights and responsibilities, and the court's procedures.

The judiciary has been entrusted by the public to see that justice is done. Incarceration of indigent defendants solely for inability to pay is discrimination against poor defendants.[56] A former member of the State Commission on Judicial Conduct (SCJC), Judge Edward Spillane, is the Presiding Judge of the College Station Municipal Court and President of the Texas Municipal Courts Association. Judge Spillane has stated that:

> "Neither judges, nor members of the public, should tolerate this kind of judicial misconduct. Regardless if it is because of ignorance or indifference, people who do not comply with safeguards in Texas law aimed at protecting indigent defendants should not be allowed to serve in the Texas judiciary."[57]

The Code of Judicial Conduct is clear: ignorance or indifference is no defense; it is a violation of the Code.

> "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[58]

Canon 3 of the Code of Judicial Conduct requires judges to perform their duties impartially. In terms of adjudicative responsibilities, judges are supposed to maintain professional competence in the law and shall not be swayed by partisan interests, public clamor, or fear of criticism.[59] In performing judicial duties, a judge shall neither manifest bias nor prejudice, including bias or prejudice based upon socioeconomic status, nor shall the judge knowingly permit staff, court officials, and others subject to the judge's direction and control to do so.[60] Similarly, judges are required to give any person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.[61]

In municipal courts with more than one judge, presiding judges with supervisory and performance oversight over other judges should be mindful that Canon 3(C)(3) states that a:

> "judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities."

Ultimately, however, it is the responsibility of judges in Texas to monitor and enforce the Code of Judicial Conduct. Judges who know of misconduct have disciplinary responsibilities. A judge who receives information clearly establishing that another judge has committed a violation of the Code should take appropriate action.[62] A judge who knows that another judge has committed a violation of the Code which raises a substantial question as to the other judge's fitness for office is obliged to inform the SCJC or take other appropriate action.[63]

The SCJC has issued private admonitions and private reprimands coupled with orders of judicial education to judges who ignored Texas procedural safeguards pertaining to the imposition of fines, capiases pro fine, indigency issues, and commitment to jail.[64]

However, are private measures and additional education enough? Because of the public significance of criticism of judges in the wake of Ferguson and in order to ensure public confidence in the judiciary, the SCJC should make a public statement. Judges who have engaged in such misconduct should receive public sanctions, resign in lieu of discipline, or face formal proceedings.

Can the Canons of Judicial Conduct be used to help rid the judiciary of people who cast discredit on courts and do not comply with safeguards in the law aimed at protecting indigent defendants? It has happened in other states.[65] It has happened in Texas.[66]

2. The Role of Education

Public education of voters as to what the law requires is the best way to ensure that bad judges are neither elected nor appointed to the office. This education will provide increased awareness about the proper and improper use of courts. As previously explained, there is nothing wrong with local governments retaining fines, but such revenue must be viewed as an incidental byproduct of justice. Courts should not be viewed by local or state governments as profit centers.

Judicial education is equally important. As previously described, public awareness efforts are underway in Texas. However, there is more to be done. Legislation is not necessary for judges to share best practices, such as the use of "safe harbor" and other practices aimed at reducing the number of people arrested. Judicial education is the key to teaching judges how technology, such as the living wage calculator,[67] can assist judges in determining whether a defendant is indigent.

3. Collaboration on Public Policy in Texas

Collaboration is encouraged. This year, the William Wayne Justice Center for Public Interest Law at the University of Texas at Austin hosted and facilitated two stakeholder conversations on collections, fines, and fees. A wide range of key stakeholders, including members of the judiciary, state and regional government representatives, civil rights advocates, and public policy experts were invited. The goal of the stakeholder conversations was to facilitate discussion, create space for an open exchange of ideas, and identify shared priorities with an eye toward the 85th Texas Legislature in 2017.

Consensus is possible. The stakeholder conversation revealed that even in a crowded room of differing opinions there is plenty of room for agreement on matters of public policy. Five particularly promising examples are presented here.

a. Better Tools for Determining Indigence

How is a judge to know if a defendant is indigent? This has long remained an unanswered question.[68] Judges need tools and standards for determining if a defendant sentenced to pay a fine and court costs is indigent. While the Legislature should not mandate a rigid test, which would likely have unintended consequences, it should facilitate the development of standards to assist judges in making such determinations.

b. Expand the Meaning of "Alternative Means" for Indigent Defendants and Access to Community Service

Currently, under Texas law, alternative means consists of installment payments,[69] community service,[70] and for children, tutoring in lieu of community service.[71] Within the bounds of the Code of Judicial Conduct, judges should be given more leeway as to what else might constitute "alternative means." By conceptualizing a broader meaning of "community service," the Legislature could authorize mentoring, job training, and other means that benefit the defendant and society. Depending on where you are in Texas, community service opportunities may vary greatly. More can be done to help local courts and defendants identify and access community service opportunities. In the age of the internet, technology is the key and state government is in the best position to establish and operate a statewide community service opportunity bank.

c. Broaden the Use of "Show Cause" Hearings

To comply with one of the requirements of *Bearden*, Chapter 45 of the Code of Criminal Procedure already requires courts to give defendants an opportunity to explain themselves at a "show cause" hearing. This is intended to avoid the prospect of possible arrest for failure to submit proof of completion of a driving safety course,[72] or failure to submit proof of compliance with the terms of deferred disposition.[73] It is an oversight in Texas that there is no similar statutory requirement that defendants be afforded an opportunity to "show cause" prior to the issuance of a capias pro fine. Similarly, defendants, particularly if they are indigent, after the imposition of judgment should statutorily be provided an opportunity to request a hearing before the court where their financial circumstances can be considered. Defendants should have the ability to access courts regardless of financial condition and the posting of a bond or other form of security should not be required.

d. Time Payment Fees

Installment payments are a type of "alternative means" contemplated in *Tate v. Short*.[74] Indigent defendants in Texas should not necessarily have to pay more in court costs, specifically the time payment fee,[75] simply because they cannot satisfy a judgment (in terms of paying fines, costs, and restitution) in its entirety prior to the 31st day after judgment.

e. Stop State Programs that Hinder

Lawmakers are right to call for the end of the Driver Responsibility Program.[76] It has only compounded problems in Texas, not just for indigent people but also for law enforcement and courts. It should be repealed. In the same vein, the Collection Improvement Program (CIP), if not repealed, should be overhauled to address criticisms levied by municipal judges.[77] Local courts and governments understand that the State of Texas is legally entitled to receive state-mandated court costs. The Texas Legislature needs to understand how the CIP came to be perceived as promoting impropriety and overreach by the State of Texas.

B. Perils to Progress

Despite the recent success of stakeholder conversations in facilitating discussion and the identification of promising public policy reforms that have broad consensus, efforts to change Texas law in the upcoming 85th Legislature may be endangered for two reasons.

1. The Danger of Sweeping Generalizations

Municipal courts in Texas, like municipal courts in other states, have been subject to a steady barrage of mostly negative media coverage in the last year. Advocacy groups tend to welcome such public clamor because it has the potential to influence public opinion and pave the way for changes in public policy.[78] However, it is possible, particularly in Texas, that sensational and inaccurate headlines coupled with sweeping generalizations could derail reform efforts.

Consider the following headline from BuzzFeed in October 2015:

> "THEIR CRIME: BEING POOR
> THEIR SENTENCE: JAIL
>
> People in Texas get thrown in jail just because they can't afford their traffic tickets."[79]

To set the record straight: It is not a crime to be poor in Texas, and no one in Texas is sentenced, let alone thrown in jail, for being poor. People alleged to have committed criminal traffic offenses are more often issued citations in lieu of being taken before a magistrate. Just because people receive citations does not mean they are guilty or even that they will pay a fine or court cost. In Texas, everyone who receives a citation is presumed innocent and has the right to be tried by a jury of his peers.[80]

The Buzzfeed headline not only misrepresents Texas law as it applies to local courts, it overshadows the meritorious work of its own journalists. On a lighter note, such BuzzFeed headlines are hard to reconcile with others, such as:

> "50 SURE SIGNS THAT TEXAS IS ACTUALLY UTOPIA
>
> Texas is the best place on Earth, and real humble about it to boot."[81]

In an age where it pays to play to people's biases, digital ink costs nothing and clickbait has proven to be profitable. Content aimed at generating advertising revenue comes at the expense of accuracy. This appears particularly true when it comes to headline writing.[82] When a municipal judge from Texas recently wrote an editorial for the Washington Post, headline writers chose a headline that attributed words to the judge that were not part of the editorial.[83] In the age of Facebook and Twitter, success in the age of new media is being measured by the number of reads, shares, likes, and re-tweets and makes it easy to lose sight of what has traditionally been considered the attributes of good journalism.[84]

The problem with debtor prison rhetoric (including "for-profit policing" and "ticket debt") is that it is misleading, portrays defendants (convicted and accused) as powerless victims in a criminal process void of due process, and encourages an "us-against-them" mentality.[85] While incendiary, such sweeping generalizations do nothing to help us distinguish between people who are being committed to jail unlawfully and people who have been given the opportunity to discharge fines and costs through alternative means but who willfully do not and are being lawfully committed to jail.

Just as it is wrong for judges to make sweeping generalizations about indigent defendants, it is wrong for critics of courts to make similar sweeping generalizations about the law, courts, and judges.

State laws differ. As a consequence, so do municipal courts. This is important and often-overlooked by the national media. Although most states have municipal courts, these courts are not governed by a single set of laws. Thus, it is improper to attribute the statutorily authorized acts of one municipal court in one state to all municipal courts in the United States. Municipal court jurisdiction in America varies widely. While some municipal courts have jurisdiction over fine-only misdemeanors (*e.g.*, Texas[86]), others have jurisdiction over misdemeanor offenses punishable by a sentence of jail (*e.g.*, Mississippi[87] and Missouri[88]). Municipal courts in states like Texas are part of the state judiciary; most facets of their existence are governed by state law. In states like Missouri, prior to what happened in Ferguson and changes to state law in 2015, municipal courts were predominantly vestiges of municipal government and operated in the shadows of state laws.[89] Accordingly, when assessing courts and their treatment of indigent defendants, the laws of each state must be considered independently.

Likewise, when discussing *Argersinger v. Hamlin* (1971),[90] *Scott v. Illinois* (1979),[91] and other Supreme Court decisions relating to the right to counsel, it is important to distinguish between different types of misdemeanor sentences and not make sweeping generalizations. Defendants in Texas accused of Class C misdemeanors (offenses punishable by fine only) have the right to counsel.[92] However, a sentence consisting only of the imposition of fine and costs is not a deprivation of liberty.[93] Commitment to jail for either willful nonpayment or failure to discharge through alternative means is not the same as a jail sentence and does not trigger the right to *court-appointed* counsel.[94]

Criticisms aimed exclusively at local courts are misdirected. It is important to distinguish judicial acts from judicial discretion. Judges have legal and ethical obligations to follow the law. The law does not always allow judicial discretion. Nevertheless, since Ferguson, judges have been widely criticized for complying with laws they did not create. Court costs being too high[95] and particular offenses which should not be criminal,[96]

for example, are not issues the judiciary can solve. These are legislative matters.

Bad judges are not indicative of the judiciary. The inappropriate acts of a judge or a court in any state should be punished. They should not be attributable to all judges and all courts in that state (let alone throughout the country). All states have a process for handling judicial misconduct. Judges who disregard or ignore laws which serve as safeguards for indigent defendants should not be on the bench.

High-flung rhetoric is nothing new. More than two decades ago in *Bearden*, the Court warned that the issues "cannot be resolved by resort to easy slogans or pigeonhole analysis."[97] In the context of the "criminalization of poverty" and other hyperbole, the danger of such sweeping generalizations is that critical consumers of information are left with the responsibility of separating facts from opinions and distinguishing isolated incidents from normal practices. This can have unintended consequences. When key decision-makers become fatigued, deceived, and divided along ideological lines, effective reforms are less likely.

2. The Danger of Inverse Discrimination

The solution to discrimination in the legal system is not replacing it with a different type of discrimination. Proposals aimed at making indigent defendants categorically immune to legal penalties do not advance the cause of equal protection under law, they undermine it. Amidst all the hoopla about "debtors' prisons" and touting of the holding in *Tate v. Short*, part of the *Tate* decision is regularly overlooked.

The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.[98]

Citing *Williams v. Illinois* (1970),[99] the Court, in qualifying its mandate that alternative means be provided to indigent defendants, acknowledged the existence of a valid state interest in enforcing payment of fines. The Court also emphasized that its holding did not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor was the *Tate* decision to be understood:

> "as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means."[100]

In reiterating the holdings of *Williams* and *Tate*, the Court, in *Bearden v. Georgia*, also:

> "recognized limits on the principle of protecting indigents in the criminal justice system."[101]

In the aftermath of Ferguson and the DOJ report, such limits may be put to the test in state legislatures and in local governments.

What constitutes "alternative means" may be getting turned on its head. In the emerging canon of modern "debtors' prison" literature, seldom do writers acknowledge:

> "The *Bearden* line of cases thus endeavors to shield criminal justice debtors making a good faith effort to pay, while leaving willful nonpayment unprotected."[102]

Rather, Professor Neil Sobol at Texas A&M School of Law wrote:

> "given the return of debtors' prisons as well as the historical concerns that led to calls for their abolition, it is time to implement more effective alternatives to reduce the incarceration of individuals who are unable to pay legal financial obligations."[103]

Professor Sobol describes three general classes of alternatives proposed by criminologists and legal professors:

a) abolishing monetary sanctions,
b) basing fines on defendant's earnings, and
c) developing "a more effective system for enforcing existing laws designed to prevent incarceration of indigents."[104]

A general critique of the proposed alternatives: First, "alternative means" does not mean eliminating punitive consequences for criminal behavior on the basis of socioeconomics. That is tantamount to inverse discrimination. Under *Bearden*, "alternative means" are "alternative punishments."[105] Second, while custom tailored fines are preferable, the Constitution does not require a fine be custom tailored to avoid disproportionate burdens on low-income defendants. In *San Antonio Independent School District v. Rodriguez* (1973), the Court, citing Williams and Tate, stated that it had:

> "not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound

> judicial discretion rather than by constitutional mandate."[106]

In cases decided after *Williams* and *Tate*, the Court rejected poverty as a suspect classification.[107] Third, in the context of court-ordered fines and court costs, alternative means can entail either a non-monetary substitute or, as the Court stated in *Tate*:

> "a procedure for paying fines in installments."[108]

Alternative means do not, however, mean preventing the lawful incarceration of indigents.

Similarly, it is important for people in the public policy arena to realize that it does not mean indigent defendants cannot have their driver's licenses suspended for failing to avail themselves of alternative means. It does not mean that indigent defendants who repeatedly and habitually violate the law are entitled to waiver of fines and fees because alternative means (e.g., community service) pose an inconvenience or because of the sum total amounts in the judgments.[109]

This is not the first time the status of a defendant has been the rallying cry of reformers, nor is it the first time municipal courts in Texas have been caught in the maelstrom. *Powell v. Texas*,[110] holding that Texas law criminalizing public intoxication did not constitute cruel and unusual punishment, began in the Austin Municipal Court and was decided by the Supreme Court in 1968. [For insights into the similarities, *see* David Robinson, Jr., *Powell v. Texas: The Case of the Intoxicated Shoeshine Man Some Reflections a Generation Later by a Participant*].[111] This is also not the first time people have argued that society loses its moral justification for punishing poor criminal defendants when it refuses to remedy the conditions of inequity and that poverty should be a defense to non-violent crimes, victimless crimes, and "crimes of poverty."[112] In the same vein, a socioeconomic status defense, dubbed "affluenza," received national attention for its role in the prosecution of Fort Worth teen, Ethan Couch, who killed four people and injured two others while driving drunk.[113] People were outraged.

In pursuing changes to Texas law, one of the greatest potential perils to progress is if parties deviate from what the Supreme Court referred to in *Williams* as the:

> "basic command that justice be applied equally to all persons."[114]

Society cannot allow people to act only in accord with their own subjective moral code. Equal justice under law means that no person, regardless of socioeconomic status, is exempt from the rule of law. Pursuing public policy reforms to improve the lives of people who live in poverty does not have to entail asking society to make choices that are contrary to other compelling interests (e.g., public safety). Unquestionably, justice must be seasoned with mercy. Criminal justice, however, is not social justice. Not to say that restorative justice cannot play a part, but criminal law is retributive and not necessarily compatible with advancing social welfare.

III. LESSONS FROM TEXAS

How much do you know about Texas? More specifically, how much do you and other members of the public know about Texas law governing the imposition of fines and costs and their enforcement? Even more importantly, how much do your local and state elected leaders know?

When poverty-related issues raised by the events in Ferguson come to the courthouse, city hall, and Capitol Building, where will the Texas public and their elected officials get their information? Will it be the internet, the media, or advocacy groups? As consumers of information, our message is simple: caveat emptor.[115]

Are Texas laws similar to the laws of Missouri? No [See APPENDIX A, *infra*]. However, some advocates for change appear to be banking on the possibility that the Texas Legislature, or Governor Abbott, or possibly some city councils will not appreciate key differences.

A. Compared to Other States, Texas Law is Either Best or Better than Most

Neither a hundred articles on the internet nor public outrage rooted in sweeping generalizations about the dysphemism of "debtors' prisons" changes the fact that Texas law does not authorize some of the more contentious practices authorized by other state courts. For example, Texas law does not authorize the use of for-profit probation vendors. Similarly, Texas criminal judgments do not accrue interest.

In its report, *In for a Penny: The Rise of America's New Debtor's Prisons*, the ACLU did not include Texas among the states where required indigency inquiries are not occurring.[116] That report found the *Bearden* protections guaranteed through determinations of indigency to be absent in Louisiana,[117] Michigan,[118] Ohio,[119] Georgia,[120] and Washington.[121] On March 18, 2016, in its written statement to the United States Commission on Civil Rights, the ACLU did not identify Texas among the states accused of operating debtors' prisons.[122]

Why wasn't Texas identified by the ACLU as a state which operated debtors' prisons? To borrow a familiar clickbait phrase:[123] the answer may surprise you.

Texas has not had debtors' prisons since 1971, in large part because of the ACLU.[124]

In 1969, Preston Tate was committed to the prison farm of the City of Houston by virtue of a capias pro fine from six traffic convictions with aggregate fines totaling

$425. The Court of Criminal Appeals, in overruling Tate's contention, held that Tate's status as an indigent did not render him immune from criminal prosecution and that imprisonment was not unconstitutional merely because Tate was too poor to pay his traffic fines.[125] The Supreme Court, however, disagreed. In reversing the Court of Criminal Appeals, it held that the Equal Protection Clause of the 14th Amendment prohibits states from imposing a fine as a sentence and automatically converting it to a jail term solely because the defendant is indigent and cannot pay the fine in full.[126] In terms of the interplay between the use of fines in criminal cases and the potential use of incarceration, *Tate v. Short* is a seminal case in American jurisprudence.

One of the reasons Texas may be further ahead than other states when it comes to indigence issues in local municipal courts may be attributed to the fact that Preston Tate was from Texas. With the assistance of the ACLU and others, Texas was the first state to change its laws in order to comply with the Supreme Court holding. By the time the case was remanded to the Court of Criminal Appeals, the Texas Legislature had already revised the Code of Criminal Procedure to permit courts to order payments be made immediately, later, or in intervals.[127] While *Tate* held that indigent defendants may not be jailed without first allowing the defendant an alternative means of discharging the fine, on remand, the Court of Criminal Appeals, in acknowledging the holding in *Tate*, reiterated that the state is not powerless to enforce its judgments against those who are financially unable to pay a fine, and that *Tate* did not preclude imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means.[128]

The problem in Texas law, prior to the U.S. Supreme Court decision in *Tate v. Short*, was that the Texas Legislature had decided its penology interests did not require incarceration for "fine only" offenses, but imposed incarceration on indigent defendants because of their inability to pay. This violated Equal Protection required under the 14th Amendment. That problem no longer exists in Texas law. Texas law was changed within four months of *Tate* being handed down in 1971. In contrast, Colorado law did not prohibit judges from sending people to jail simply because they were too poor to pay fines and fees until May, 2014.[129]

Under current Texas law, indigent defendants are not incarcerated because of their inability to pay. Rather, incarceration is a possibility if an indigent defendant has been given an alternative means of discharging fines and costs, but fails to make a good-faith effort.[130] When Texas courts provide alternative means for indigent defendants, they are providing the equal protection required by the Constitution. Notably, to avoid the equal protection issue and because liberty is a common denominator of which rich and poor can be deprived, Justice Blackmun, in his concurring opinion in *Tate*, encouraged governments who were serious about ending the carnage on highways to stop using fines and to have jail as the punishment for traffic offenses.[131]

As a consequence of the Texas Legislature's hurried effort to fix provisions of Texas law, some of the principles of *Tate v. Short* were nowhere to be found in the Code of Criminal Procedure.[132] In Texas, this was true for 36 years. Texas judges who were unaware of the holding in *Tate* had imperfect statutory guidance in terms of what *Tate* requires. With input from the judiciary, criminal defense lawyers, and advocacy groups such as the Texas Fair Defense Project, H.B. 3060 was, in part, a collaborative effort to put the missing principles of *Tate* into the Code of Criminal Procedure.[133] The changes to Texas law were made to prevent the kind of abuses which subsequently occurred in Ferguson, Missouri and that the ACLU reports show occur in several other states.

1. Installment Payments

The changes made to the Code of Criminal Procedure in 1971 as a result of *Tate* authorized alternative sentencing, what the Court called:

> "a procedure for paying fines in installments."[134]

Ideally, upon entering the judgment, a defendant will pay the court in the manner specified by the judgment (i.e., immediately, later, or in intervals).[135] Notably, in Texas, a defendant need not be deemed indigent by the court in order to receive a payment plan. In fact, in some courts, a payment plan is more akin to a convenience for the defendant than a mechanism for accommodating indigent defendants. Nevertheless, with the addition of Article 45.041(b-2) in 2011, if a court determines that the defendant is unable to immediately pay the fine and costs, the judge is legally obligated to allow the defendant to pay the fine and costs in designated intervals.[136]

2. Community Service

It wasn't until 2015, one year after the events in Ferguson, that Missouri law authorized indigent defendants to discharge fines and costs by performing community service.[137] Under Texas law, in lieu of installment payments, defendants who fail to pay a previously assessed fine or have insufficient resources or income to pay a fine or court costs may be ordered to discharge all or part of it by performing community service.[138] An order to perform community service does not preclude the defendant from choosing to subsequently pay fines and costs.[139] A defendant is considered to have discharged not less than $50 of fines or costs for each eight hours of community service

performed.[140] Under Texas law, a defendant may not be ordered to perform more than 16 hours of community service per week unless a judge has determined that additional hours will not impose a hardship on either the defendant or the defendant's dependents.[141]

Texas law authorizes all criminal trial courts to waive the fine and costs of a defendant who defaults in payment of a fine or costs imposed on a defendant if:

a) The defendant is either indigent or was a child at the time of the offense; and
b) Discharging the fine and costs through community service or as otherwise authorized by the Code of Criminal Procedure would impose an undue hardship.[142]

These provisions were intended to provide judges with the discretionary authority to waive the payment of fines and costs on a case-by-case basis and only when all other alternative means authorized by the code would be an undue hardship.[143]

Community service is nationally recognized as a staple of restorative justice.[144] Yet some have argued that poverty, particularly combined with the inconvenience it can cause defendants, legally constitutes an undue hardship and that judges should be compelled not only to waive the fine and court costs, but also community service. The argument that equal protection somehow mandates waiver is simply not supported by the law. First, *Bearden* contradicts the notion of waiving community service.[145] Second, the waiver authorized by Texas law is not required by either *Tate* or *Bearden* and is completely outside the scope of constitutionally mandated alternative means. Third, even under Texas law, waiver is not considered an alternative sentencing means. Rather, it is a statutorily authorized form of mercy. Fourth, the legislative intent of Article 45.049(d) of the Code of Criminal Procedure is clear: 16 hours or less of community service per week is not to be presumed an undue hardship. To be clear, judges should be considerate of the burdens that can accompany court-ordered community service and the waiver of fines and costs has its place in Texas law. Such waiver, however, should be made by judges in light of specific circumstances, on a case-by-case basis, not solely because a defendant is indigent.

3. Other Texas Safeguards

While municipal and justice courts serve the express function of preserving public safety, protecting the quality of life in Texas communities, and deterring future criminal behavior, there is no denying the implicit, though significant, function of revenue generation. In an effort to regulate such tension, the Texas Legislature has set caps on how much revenue traffic fines can generate.[146] Texas law also prohibits municipalities and counties from either formally or informally establishing a plan to evaluate, promote, compensate, or discipline a judge or peace officer based on either the number of citations issued or fines collected.[147] Local government officials and employees are statutorily prohibited from expecting, requiring, or even suggesting that a judge collect a predetermined amount of money from persons convicted of a traffic offense during any period of time.[148] City councils are prohibited from considering the amount of revenue collected by municipal courts for purposes of determining reappointment.[149] A violation of these prohibitions by an elected official is misconduct and a ground for removal from office and a violation of the law by a person who is not an elected official is a ground for removal from the person's position.[150]

B. Not "Actually a Utopia" (Yet)

Texas isn't half bad. But it can do better.

The Texas Legislature should take a hard look at whether state government has developed an unhealthy addiction to court costs. Although it is not likely to happen overnight, it is possible for state government, as a long-term goal, to wean itself from its dependency on revenue generation. The first step is for Texas to admit it has a problem: specifically, the Driver Responsibility Program and Collection Improvement Programs. Both programs deserve continued public scrutiny. Each is less than 20 years old and has created problems that did not exist prior to implementation. What happened in Ferguson has exposed that it is not just local governments with the wrong attitude about local courts when it comes to revenue generation. This is not just a matter of public perception. It is possible that state officials will conclude that Texans were better off before these programs existed.[151]

Local governments likewise need to be educated about the proper role of local courts. Tax payers need to be more vigilant about how both local and state governments utilize court generated revenue, come budget time.

In Texas courts, where fines are imposed as the punishment, there is room for improvement when it comes to sentencing. Texas is unlikely to retire regressive fines in favor of progressive European-influenced day-fines[152] any time in the near future. Judges should be encouraged to make meaningful use of the fine range. Fine schedules have their utility but they also have inherent limitations. Similar to writing prospective fine amounts on arrest warrants prior to a judgment, such practices may also suggest to the public that there is no fine range and that judges are not willing to consider the full range of punishment. Due process requires trial judges to be neutral and detached in assessing punishment.[153] A trial court denies a defendant due process when it arbitrarily refuses to consider the entire range of punishment or imposes a predetermined punishment.[154]

C. Texas does Not have "Very, Very Minor Offenses."

When it comes to poverty-related criminal justice issues like those that arise from Ferguson, rather than taking a close look at state laws and public policy underlying the state law, some critics have made the mistake of taking a satellite view of Texas law.

In some other states, similar prohibited acts may be classified as "infractions" or result in "civil penalties." Texas, however, emphasizes that these are *crimes*. Like fire ants, Class C misdemeanors may seem small but it is a mistake to underestimate the power of their punitive sting. Class C misdemeanors run the gamut of Texas law. Few people in Texas are aware of the extent of the part Class C misdemeanors play in our day-to-day lives. As of 2015, there were 1,299 Class C misdemeanor offenses in state law. Ostensibly, there are thousands of additional Class C misdemeanors promulgated as city ordinances and county regulations. Whether states, including Texas, have "overcriminalized" certain behaviors is an important public policy matter, but generally outside the purview of the judiciary.[155]

In Texas, Class C misdemeanors permeate Texas law and play an understated, yet incredibly important, role in providing consequences and ensuring compliance with the most fundamental notions of social order. Since the events in Ferguson, a disturbing and distinct trend has developed. Without grasping the full scope of what is punishable by the imposition of a fine in Texas (building code, fire safety regulation, sanitation issues, traffic offenses, and environmental regulations), some civil rights activists and members of the media have belittled the importance of Class C misdemeanors and the significance of local courts.[156]

Glaringly absent from most media accounts is the slightest acknowledgment of the harms and dangers of the crimes pigeonholed as "minor offenses" (or as Jonathan Smith, former Chief of the Special Litigation Section of the DOJ Civil Rights Division described them, "very, very minor offenses." [157]) These are perhaps the most irresponsible and sweeping generalizations to result from Ferguson. For example, which of the following is a "minor offense:"

1) A teenager driving under the influence of alcohol;[158]
2) Failing to restrain a child while operating a motor vehicle;[159]
3) Speeding through a school zone;[160]
4) Selling cigarettes to children;[161]
5) Distributing abusable synthetic substances;[162]
6) Public intoxication;[163]
7) Assault;[164]
8) Disorderly conduct;[165] or,
9) Theft of under $100?[166]

Society should tolerate neither judicial misconduct nor police misconduct. Should society have to tolerate "minor crimes?"

1. "Don't Mess with Texas"

Littering is a Class C misdemeanor in Texas.[167] Is littering a "victimless" crime? What if the money spent picking up litter were used on early child education, mental health services, dropout prevention, or child protective services? Since 1986, Texas taxpayers have spent $969.9 million, or an average of $32.33 million a year, to pick litter up off of Texas highways.[168] On those highways and streets, on average, a person is killed every two and a half hours, and injured every two minutes.[169] The driving behaviors most likely to result in injury or death are Class C misdemeanors. Texas hasn't had a day without a traffic fatality in more than 15 years, during which time more than 50,000 people have been killed.[170] Last year, in Austin, there were 102 people killed, a record number of traffic fatalities. 34 percent of the fatalities involved a person who was not authorized to operate an automobile.[171] Statistically, a person is more likely to be killed by a driver running a red light and crashing into the side of a vehicle than by a terrorist bomb on an aircraft.[172] Yet neither a dollar amount nor a statistic can adequately convey the grief, the personal loss, or the tragedy inflicted on victims and their families because of such "minor offenses."

> "Traffic safety is a public health issue. Given the inequity in access to safe streets and the disparities in fatalities and injuries among minorities, traffic safety is also a social justice issue."[173]

2. A Different Ferguson Effect

The Ferguson effect is the proposition that increased scrutiny of law enforcement has led to increased crime rates in major metropolitan cities in the United States.[174] Perhaps, however, there is a different kind of Ferguson effect; an effect which causes state and local governments to reconsider what, until recently, was the proper and lawful use of police powers. Consider the following examples:

- A proposed law in Philadelphia would permit police to issue civil citations instead of criminal summonses for certain low-level offenses. The legislation "would decriminalize certain violations such as disorderly conduct, refusing to disperse, and public drunkenness."[175]

- In New York City, the police will no longer arrest people for minor infractions such as drinking alcohol in public, urinating in public or littering in

> Manhattan. The District Attorney's Office will no longer prosecute most "quality of life" violations.[176]

- The Mayor and City Council of New York are working on a plan to purge "needless warrants" for "small crimes."[177]

Similarly, in Texas, the Texas Criminal Justice Coalition has called on the Texas Legislature to implement a number of related strategies, including prohibiting arrests for "non-jailable" offenses.[178] This is not the first time in Texas that the use of peace officer discretion to cite or arrest has been the subject of debate in either the public policy or legal arena.[179]

Most of these kinds of reform seem aimed at "Broken Windows" policing. While in recent years critics have claimed that is discriminatory and being used to target minorities, one of the authors of the Broken Windows theory, George L. Keeling, maintains that it is misunderstood by critics, has been misused by some in law enforcement, and continues to be needed. Keeling asserts that quality of life crimes are not victimless; they harm whole neighborhoods, and in New York City, the Broken Window approach saved lives – most of them minority – cut that jail population, and reknit the social fabric.[180]

The consequence of switching-up police power tactics is not entirely understood. In San Francisco, California, a:

> "city, known for a political tradition of empathy for the downtrodden, is now divided over whether to respond with more muscular law enforcement or stick to its forgiving attitudes."

One member of the local government says that:

> "San Francisco at times is a consequence-free zone;"

another says:

> "We are not going to criminalize people for being poor."[181]

The debate brewing in San Francisco seems all too familiar.

Since 1791, the 10th Amendment of the U.S. Constitution has provided that the powers not delegated to the Federal Government are reserved to the states.[182] These powers include police power, the authority of each state to regulate behavior and enforce order within its territory for the betterment of the health, safety, morals, and general welfare of its inhabitants. [183]

In the wake of the events in Ferguson, it is not just notions of equal protection and due process that are in question; it is the use of police powers and the meaning of the 10th Amendment. Our society regularly endeavors to strike a sound balance between individual and societal interests. The question in Texas is can we better serve the interest of the poor while maintaining public safety and order in our communities. Do we need more laws or do we need to do a better job of enforcing the ones we have?

---

[1] Mary Delach Leonard, *Ferguson's Yesterdays Offer Clues to the Troubled City of Today*, http://news.stlpublicradio.org/post/fergusons-yesterdays-offer-clues-troubled-city-today.

[2] Wikipedia, *Ferguson Unrest*, https://en.wikipedia.org/wiki/Ferguson_unrest (last visited June 16, 2016).

[3] DeRay McKesson, *Ferguson and Beyond*, The Guardian (August 9, 2015, 6:30 AM), http://www.theguardian.com/commentisfree/2015/aug/09/ferguson-civil-rights-movement-deray-mckesson-protest; Shannon Luibrand, *How a Death in Ferguson Sparked a Movement in America*, CBS News (August 7, 2015, 5:39 AM), http://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later/; Rebecca Onion, *Are We In the Midst of A new Civil Rights Era?*, Slate.com (August 6, 2015, 3:26 PM), http://www.slate.com/articles/news_and_politics/history/2015/08/ferguson_and_black_lives_matter_are_we_in_the_midst_of_a_new_civil_rights.html.

[4] U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 9-15, 62-78 (2015).

[5] Julia Craven, Mariah Stewart, Ryan J. Reilly, *The Ferguson Protests Worked*, The Huffington Post (August 5, 2015). http://www.huffingtonpost.com/entry/ferguson-protests-municipal-court-reform_us_55a90e4be4b0c5f0322d0cf1.

[6] Van Jones and Jessica Jackson, *Are Debtors' prisons Returning?*, CNN (December 4, 2015, 4:25 PM), http://www.cnn.com/2015/12/04/opinions/jones-debtors-prisons/; Whitney Benns and Blake Strode, *Debtors' Prison in 21st-Century America*, The Atlantic (February 23, 2016) http://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/.

[7] *See*, *The Recorder* (April 2016) at 5.

[8] "[T]he U.S. Department of Justice has thrown its weight behind civil rights groups who have accused local judges of operating modern-day 'debtors' prisons.' Until now, the effort has been led by organizations like the American Civil Liberties Union, the Southern Poverty Law Center and Human Rights Watch, which have sued courts around the country to force reforms. But Monday's letter from the Justice Department's Civil Rights Division put chief justices and court administrators on notice that the feds are joining the fight. The missive — a rare move, as it presses for changes in

courts it does not control — is part of a broader campaign against what Attorney General Loretta Lynch called 'the criminalization of poverty.'" Jon Schuppe, *Civil Rights Advocates Applaud Feds' Fight Against "Debtors' Prisons,"* NBC News (March 14, 2016). http://www.nbcnews.com/news/us-news/activists-applaud-feds-fight-against-debtors-prisons-n537916.

[9] Aja Romano, *Missouri Municipal Courts Sued for Unjust Jail Sentences*, The Daily Dot – The Kernal (February 10, 2015, 5:02 PM), http://www.dailydot.com/politics/ferguson-lawsuit-poverty-violations-jail/; Joseph Shapiro, *Civil Rights Attorneys Sue Ferguson Over "Debtors' Prisons,"* NPR Morning Edition (February 8, 2015, 9:03 PM), http://www.npr.org/sections/codeswitch/2015/02/08/384332798/civil-rights-attorneys-sue-ferguson-over-debtors-prisons (One of the plaintiffs in the Ferguson lawsuit stated "We're not criminals. It's just driving … And we're paying these big punishments. It's not fair. It's holding us back. It's like a cycle. Once you put us in trouble for something so petty ... [it's] just digging a hole and putting us in it." He said, "he can't work because of the arrest warrants. He painted houses. But when he lost his driver's license, he lost his truck and now can't get to work.").

[10] Joseph Shapiro, *Lawsuits Target "Debtors' Prisons" Across the Country*, NPR Morning Edition (October 21, 2015, 4:36 PM), http://www.npr.org/2015/10/21/450546542/lawsuits-target-debtors-prisons-across-the-country; Rick Anderson, *Debtors Prison a Thing of the Past? Some Places in America Still Lock Up the Poor*, LA Times (June 8, 2016, 3:00 AM) http://www.latimes.com/nation/la-na-debtors-prison-20160607-snap-story.html.

[11] Katie Hall, *Suit Alleges Austin's Municipal Court Turns Jail into Debtors Prison*, Austin American Statesman – My Statesman (October 27, 2015, 5:28 PM), http://www.mystatesman.com/news/news/local-govt-politics/suit-alleges-austins-municipal-court-turns-jail-in/nn9wq/.

[12] *Harris v. City of Austin*, No. A-15-CA-956-SS, 2016 U.S. Dist. LEXIS 33694, at *1 (W.D. Tex. 2016).

[13] Robert Stein, *City Sued Over Municipal Fines Policy*, Amarillo Globe-News (January 15, 2016, 10:51 PM), http://amarillo.com/news/crime-and-courts/2016-01-15/city-sued-over-municipal-fines-policy.

[14] Kendall Taggart and Alex Campbell, Buzzfeed News, *El Paso Sued Over Jailing For Unpaid Tickets*, El Paso Times (April 20, 2016, 4:04 PM), http://www.elpasotimes.com/story/news/2016/04/20/el-paso-sued-over-jailing-unpaid-tickets/83277736/.

[15] There was a Ferguson, Texas, once. It was in northwest Jasper County. It was established in 1928 but no longer existed by 1949. Texas State Historical Association, *Handbook of Texas Online, Ferguson, Texas*, https://tshaonline.org/handbook/online/articles/hvf15 (last visited June 20, 2016).

[16] Martin H. Pritikin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 U. Colo. L. Rev. 343, 350 (2010). Fines are cheaper to administer than jail and prisons. Fines have the potential to achieve optimal deterrence compared to incarceration. Fines offset criminal justice costs. Offenders are potentially spared the longer term criminalizing effects of sentences entailing incarceration. Offenders experience faster adaptation when fined versus jailed, and do not experience the long-term stigmatization that reduces income earning potential.

[17] The DOJ reported the city used aggressive policing techniques to increase revenues, and adopted a system of high fines and pressure to write more traffic citations without any consideration of public safety needs. Internal emails and memos, coupled with an examination of city practices and procedures show that the concern of city policy-makers and law enforcement was with the generation of revenue. Dep't of Justice, *Supra*, at 9-10.

[18] More people (*e.g.*, defendants, witnesses, and jurors) come into contact with municipal courts than all other Texas courts combined. Because these experiences are frequently the only contact citizens have with the courts, the public's impression of the entire Texas judicial system is largely dependent upon their experience in municipal court. Ryan Kellus Turner and W. Clay Abbott, *Municipal Judges Book, 5th Ed.* (Texas Municipal Courts Education Center 2014) at 1-3.

[19] *Id.* at 1-31.

[20] A local judge acting in his or her judicial capacity is not considered a local government official whose actions are attributable to the local government. *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 227 (5th Cir. 2009) citing *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995). As municipal courts are part of the state judicial system, claims against a municipal judge in the judge's official capacity are not claims against a city but rather claims against the State of Texas. *DeLeon v. City of Haltom City*, 2003 U.S. Dist. LEXIS 9879, 10-11 (N.D. Tex. June 10, 2003), citing *Ex parte Quintanilla*, 207 S.W.2d 377 (Tex. Crim. App. 1947). However, when judges are not acting independently, but rather effectuating official policies or customs of cities that violate constitutional rights, municipalities face potential liability. Cities can be sued and subjected to monetary damages and injunctive relief under federal civil rights law only if its official policy or custom caused plaintiff to be deprived of a federally protected right. *Board of County Commissioners v. Brown*, 520 U.S. 397, 403 (1997).

[21] Such courts are integral parts of community policing. One of the most important components to restoring order and reducing crime is belief that begins at the community level. In their groundbreaking book, *Fixing Broken Windows*, Kelling and Coles illustrate that in order to prevent "more serious," less common crimes, the criminal justice system must locally address the more frequent, "less serious" crimes that collectively create a community environment conducive to all types of disorder and lawlessness. George L. Kelling & Catherine M. Coles, *Fixing Broken Windows*, New York, Simon & Shuster (1996). "Broken Windows" theory also has its critics who associate it with zero tolerance enforcement, which tends to produce oppressive environments and adversarial relationships between the police and civilians. C.R. Sridhar, *Broken Windows and Zero Tolerance: Policing Urban Crimes*, 41 Econ. And Pol. Wkly. 19, at 1841 (2006); Gary Stewart, Note, *Black Codes and Broken Windows: The*

Legacy of Racial Hegemony in Anti-Gang Civil Injunctions, 107 Yale L.J. 2249 (1998). More recently, however, one of the co-authors of the influential approach to law enforcement argues that it has been misunderstood by its critics and misused by law enforcement. George Kelling, *Don't Blame My 'Broken Windows' Theory for Poor Policing*, Politico (August 11, 2015), http://www.politico.com/magazine/story/2015/08/broken-windows-theory-poor-policing-ferguson-kelling-121268.

[22] *Indiana Jones and the Last Crusade* (Paramount Pictures, 1989).

[23] *Id.*

[24] Turner and Abbott, *supra*, at 1-31. The express function of such courts is to preserve public safety, protect quality of life, and deter further criminal behavior. The implicit function is revenue generation. In Texas, municipal courts generated more than $681 million in 2013. The tension between the express function and implicit function (which when viewed in the proper perspective is an incidental benefit) has long been a source of conflict between municipal courts and city councils. *Id.* at 1-32.

[25] Consider also *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), where a conviction in another mayor's court, even with the possibility of a trial de novo, was invalidated, even though the fines assessed went to the town's general fund, because the mayor faced a "possible temptation" created by his "executive responsibilities for village finances."

[26] The percent increase is represented in Dan Feldstein's, "'Loser fees' taking place of new taxes," Houston Chronicle, March 5, 2006.

[27] Carl Reynolds and Jerry Hall, Conference of State Court Administrators, *2011-2012 Policy Paper: Courts are Not Revenue Centers* 2 (2011).

[28] *Id.*

[29] *Id.* at 1.

[30] *Id.*

[31] While judges typically have discretion in imposing fines within a statutory range of punishment, this discretion is not guaranteed. Legislative bodies can prescribe a fixed fine amount and create mandatory minimum fines (even when the offense has a fine range). Examples in Texas include unauthorized use of disabled parking violation (minimum fine of $500) (Tex. Trans. Code, § 681.011) and operating a motor vehicle without financial responsibility (minimum fine of $175 unless a court determines that a defendant has not previously been convicted of the offense and is economically unable to pay $175) (Tex. Trans. Code § 601.191). City councils can also prescribe via ordinances a fixed fine amount or create mandatory minimum fines.

[32] Tex. Code of Crim. Proc., art. 45.041(b)(1) allows a justice or municipal judge to order payment structured as a lump sum, or in installments. However, the statute does not allow the justice or judge to require the fine be paid before the costs are satisfied. This allocation rule dates back to Attorney General Opinion Nos. O-755 (1939) and O-469 (1939). As these opinions articulate the rule, where only a part of a fine and costs are collected, the money should go first pro-rata to the state court costs until the full amount is satisfied, and the balance, if any, to the fine. Attorney General Opinion No. GA-147 (2004).

[33] Eric Dexheimer, *Hard-Up Defendants Pay as State Siphons Court Fees for Unrelated Uses*, Austin American Statesman (March 3, 2012); Eric Dexheimer, *Even Court Officials Find Fees Hard To Untangle*, Austin American Statesman (March 3, 2012); and Dan Feldstein, *"Loser Fees" Taking Place of New Taxes*, Houston Chronicle (March 5, 2006).

[34] Texas Appleseed, *Debtors' Prisons*, https://www.texasappleseed.org/debtors-prisons (last visited June 16, 2016).

[35] Consider for example, Tex. Gov't Code, § 133.102 (a.k.a., the Consolidated Court Cost statute). The statute provides funds for: (1) abused children's counseling; (2) crime stoppers assistance; (3) breath alcohol testing; (4) Bill Blackwood Law Enforcement Management Institute; (5) law enforcement officers standards and education; (6) comprehensive rehabilitation; (7) operator's and chauffeur's licenses; (8) criminal justice planning; (9) an account in the state treasury to be used only for the establishment and operation of the Center for the Study and Prevention of Juvenile Crime and Delinquency at Prairie View A&M University; (10) compensation to victims of crime fund; (11) emergency radio infrastructure account; (12) judicial and court personnel training fund; (13) an account in the state treasury to be used for the establishment and operation of the Correctional Management Institute of Texas and Criminal Justice Center Account; and (14) fair defense account. While lawyers have argued that such court costs are actually taxes, and requiring courts to collect them violates separation of powers, in *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015), the Court of Criminal Appeals rejected this argument. The Court held that a court cost need not arise out of the defendant's particular prosecution in order to be legitimate. Furthermore, as long as the statutory assessment is reasonably related to the costs of administering the criminal justice system, it is not a tax in violation of separation of powers.

[36] George Santayana, *The Life of Reason* 284 (Charles Scribner's Sons, 1905).

[37] U.S. Dep't of Justice, *Supra*, at 43.

[38] Court procedures are not published reliably, and the information available on the court's procedures is "ambiguous, [is] not written down, and [not] transparent or even available to the public on the court's website or elsewhere." Citations by officers often do not include the offense alleged, or are not sufficiently detailed or complete to give notice to the defendant of the offense alleged. Appearance requirements are not well-defined, and "...there are certain offenses for which [Court Staff] will sometimes require a court appearance and other times not, depending on their own assessment of whether an appearance should be required in a given case. That information, however, is not reliably communicated to the person who has been given the citation." Id. at 45-46.

[39] The Ferguson Municipal Court required defendants to appear in court even when it was not required by state law. *Id.* at 48-50.

[40] *Id.* at 50-51.

[41] *Id.* at 51-52.

[42] *Id.* at 52-54.

[43] *Id.* at 54-55.

[44] Missouri, unlike Texas, does not have a statutory capias pro fine (which under Texas law contains procedural safeguards for indigent defendants). Municipal courts in Missouri use warrants in tandem with contempt. "The warrants the court issues are not put in place for public safety purposes," but in order to coerce payment of fines. Warrants issued are not prioritized, and may take weeks or months to be detectable to officers in the field. Although the underlying offenses would not result in incarceration, arrest and detention often result from the warrant. The decision to arrest is "highly discretionary," but FPD Officers do frequently arrest individuals for outstanding municipal warrants. "[During] the roughly six-month period from April to September, 2014, 256 people were booked into the Ferguson City Jail after being arrested at least in part for an outstanding warrant—96% of whom were African American. Of these individuals, 28 were held for longer than two days, and 27 of these 28 people were black... Of the 460 individuals arrested during traffic stops [between October 2012 and October 2014] solely for outstanding warrants, 443 individuals—or 96%—were African American."[44] *Id.* at 55-58.

[45] *Id.* at 58-62.

[46] Jennifer S. Mann, *Muni Court Reform Law Takes Effect Friday; many Warrants, Fines Are Being Cancelled Early*, St. Louis Post-Dispatch (August 23, 2015), http://www.stltoday.com/news/local/crime-and-courts/muni-court-reform-law-takes-effect-friday-many-warrants-fines/article_a790197b-b58b-548a-9616-934a36649358.html.

[47] Craven, et. al., *Supra* note 5.

[48] The Ferguson Commission, *Forward Through Ferguson: A Path Toward Racial Equality* 30 (2015).

[49] *Id.* at 31.

[50] *Id.* at 92.

[51] *Tate v. Short*, 401 U.S. 395, 397-401 (1971).

[52] *Bearden v. Georgia*, 461 U.S. 660, 664-674 (1983). While *Bearden* does pertain to fines and fees, its application to offenses punishable by the imposition of a fine is less straightforward than one may imagine. It should come as no surprise that there is still debate about *Bearden*, as commentators have observed that states do not necessarily agree on its application. *See generally*, Wagner, Ann K. *The Conflict over Bearden v Georgia in State Courts: Plea-Bargaining Probation Terms and the Specter of Debtors' Prison*, 2010 U. Chi. Legal F. 383 (2010).

[53] "The Court also required that a court consider whether alternate sanctions (such as a restructured payment schedule or community service) could meet the state's interest in punishment and deterrence before resorting to incarceration... *Bearden* established a powerful (albeit somewhat vague) standard that protects debtors whose inability to pay isn't willful, by requiring court to hold ability-to-pay hearings." *Note: State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 Harv. L. Rev. 1024, at n. 22 and 1026 (2016).

[54] Habit 5. Steven Covey, The Seven Habits of Highly Effective People (Free Press 1989).

[55] Nusrat Choudhury, American Civil Liberties Union, *Written Statement of the American Civil Liberties Union Before the United States Commission on Civil Rights* (2016).

[56] *Williams v. Ill.*, 399 U.S. 235, 240-241 (1970).

[57] Quote obtained by authors. June 19, 2016. Communication on file.

[58] Supreme Court of Texas, *Texas Code of Judicial Conduct*, Canon 2(A) (2002).

[59] *Id.*, Canon 3(B)(2).

[60] *Id.*, Canon 3(B)(6).

[61] *Id.*, Canon 3(B)(8).

[62] *Id.*, Canon 3(D)(1).

[63] *Id.*

[64] Examples: A judge: (1) refused to provide the defendant with an opportunity to plead "not guilty" and request a jury trial; (2) adjudicated the defendant guilty and assessed a fine in the defendant's absence without notice and without setting a court date; (3) threatened the defendant with arrest if he did not pay the fine when the defendant appeared in court. State Commission on Judicial Conduct, *Private Reprimand and Order of Judicial Education* (December 10, 2010). A judge failed to comply with the law in issuing a capias pro fine and committing a defendant to jail where previously: (1) there was no written deferred disposition order; (2) no final judgment was entered; (3) there was no show cause hearing; and (4) there was no indigency hearing to determine whether the defendant had the financial ability to pay the fine and court costs. State Commission on Judicial Conduct, *Private Admonition and Order of Additional Education* (November 22, 2011).

[65] In a letter to officials requesting that his own salary be raised be raised from $40,000 to $60,000 per year, Grady County State Court Judge William Bass, Sr. stated that he worked hard "to maximize" the county revenue through his extra efforts, raising $350,000 in fines per year, according to court documents. Judge Bass received a 60-day unpaid suspension, a formal reprimand from Georgia's Judicial Qualifications Commission, and agreed not to seek reelection. In March, 2015, as terms of a proposed settlement agreement for the class-action lawsuit against Grady County and Judge Bass, certain defendants were eligible to receive $100 in damages and a refund of court costs, up to $700. Ga. Commission on Judicial Qualifications, Docket No. 2012-31, *In re: Inquiry Concerning Judge J. William bass, Sr. (2012)*; R. Robin McDonald, *Grady County is Asked to Repay Thousands in Illegal Court Fees*, Southern Center for Human Rights (August 9, 2013); Karen Murphy, *Former State Court Judge Speaks Out on Settlement*, Thomasville Times-Enterprise (April 6, 2015).

[66] Judge Jack Byno of Haltom City was accused of committing people to jail if, at the time of their conviction, they could not pay all fines and costs. "Pay or Lay" is the name given for the practice prohibited by *Tate v. Short*. "The Commission and a private citizen initiated complaints against the judge, based on several newspaper articles and television news reports containing various allegations, including that the judge exhibited a poor judicial demeanor and failed to follow the law in proceedings in his court. Although the judge denied the allegations of misconduct, he opted to resign from office rather than spending time and money on further disciplinary proceedings. No Findings of Fact or Conclusions of Law were made in connection with the complaints, but the parties agreed that the allegations of judicial misconduct, if found to be true, could result in further disciplinary action. The parties agreed that the judge's resignation was not an admission of guilt, fault or liability. The Commission agreed that it would not pursue further disciplinary proceedings against the judge in connection with said complaints, and the judge agreed to be disqualified from future judicial service; sitting or serving as a judge in the State of Texas in the future; standing for election or appointment to judicial office in the State of Texas; or performing or exercising any judicial duties or functions of a judicial officer in the state." State Commission on Judicial Conduct, *2004 Annual Report* 29-30 (Voluntary Agreement of Jack Byno, Former Municipal Judge, to Resign from Judicial Office in Lieu of Disciplinary Action (12/5/03).

[67] Bourree Lam, *The Living Wage Gap: State by State*, The Atlantic (Sept. 15, 2015); Mass. Inst. Of Tech., *Living Wage Calculator*, http://livingwage.mit.edu/ (last visited June 20, 2016).

[68] "In terms of fine-only offenses, there is no statutorily prescribed means test. The Code of Criminal Procedure neither requires a judge to make an inquiry as to the defendant's ability to pay the fine and court costs before sentencing, nor does it contain guidelines for conducting an indigence hearing. While federal poverty guidelines, published each year in the *Federal Register* by the Department of Health and Human Services (HHS), may be of some utility, these guidelines are a simplification of the poverty thresholds and are used to determine financial eligibility for certain federal programs. As HHS urges caution in using such guidelines in legislative or administrative situations where precision is important, similar caution is urged among judges." Turner and Abbott, *supra*, 5-12.

[69] Tex. Code of Crim. Proc., art. 45.041.

[70] Tex. Code of Crim. Proc., art. 45.049.

[71] Tex. Code of Crim. Proc., art. 45.0492.

[72] Tex. Code of Crim. Proc., art. 45.0511(i)-(k).

[73] Tex. Code of Crim. Proc., art. 45.051(c-1)-(d).

[74] *Tate v. Short*, 401 U.S. 395, 400 n.5 (1971).

[75] Tex. Loc. Gov't Code, § 133.103.

[76] Eva Hershaw, *Lawmakers Call for End to Controversial Driver Responsibility Program*, Texas Tribune (April 30, 2015), https://www.texastribune.org/2015/04/30/lawmakers-call-end-controversial-driver-responsibi/.

[77] Kendall Taggart, Alex Campbell, *Judge Blasts Texas For Using Courts to Make Money off Poor*, BuzzFeed (April 19, 2016, 10:44 AM), https://www.buzzfeed.com/kendalltaggart/texas-judge-blasts-state-for-profiting-from-poorest-defendan.

[78] In the face of such public clamor, Texas judges are bound by Canon 3(B)(2) ("A judge should be faithful to the law and shall maintain professional competence in it.") A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

[79] Kendall Taggart, Alex Campbell, *In Texas It's a Crime to be Poor*, Buzzfeed (October 7, 2015, 4:21 PM), https://www.buzzfeed.com/kendalltaggart/in-texas-its-a-crime-to-be-poor.

[80] *See generally* Ryan Kellus Turner, "Citations (Part I): Tickets are for Concerts and Sporting Events," *The Recorder* Vol. 16, No. 2 (March 2007); Ryan Kellus Turner, "Citations (Part II): Tickets are for Concerts and Sporting Events," *The Recorder* Vol. 16, No. 2 (May 2007).

[81] Summer Anne Burton, *50 Sure Signs that Texas is Actually Utopia*, BuzzFeed (February 6, 2013, 2:19 PM), https://www.buzzfeed.com/summeranne/50-sure-signs-that-texas-is-actually-utopia.

[82] Ben Frampton, *Clickbait: The Changing Face of Online Journalism*, BBC News (September 14, 2015), http://www.bbc.com/news/uk-wales-34213693.

[83] The Washington Post published an article by Judge Edward Spillane on April 8, 2016. Judge Spillane is the Presiding Judge of the College Station Municipal Courts and President of the Texas Municipal Courts Association. In the wake of the BuzzFeed article (*Supra*, at note 79) and other articles about municipal courts in Texas, Judge Spillane wrote about the duty of judges in criminal cases to provide indigent defendants alternative means of discharging fines and costs. He criticized judges who turn a blind eye to matters of indigence and gave examples of what he does in his court to ensure that people are not committed to jail just because they are poor. Although his editorial made it clear that defendants in his court are arrested if they do not avail themselves of alternative means, the Washington Post on-line headline read: "Why I refuse to send people to jail for failure to pay fines." The Washington Post did not respond to a request to clarify that the headline were not actually Judge Spillane's words. According to Judge Spillane, more than 200,000 people clicked on the headline within the first 30 minutes it was online. *See* Ed Spillane, *Why I Refuse to Send People to Jail for Failure to Pay Fines*, Washington Post (April 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/04/08/why-i-refuse-to-send-people-to-jail-for-failure-to-pay-fines/.

[84] Jeffrey Dvorkin, *Why Click-Bait Will Be the Death of Journalism*, PBS Newshour (April 27, 2017, 6:11 PM), http://www.pbs.org/newshour/making-sense/what-you-dont-know-about-click-bait-journalism-could-kill-you/.

[85] *See generally* Mark Goodner, *Debtors Prisons and Ticket Debt: The Misleading Rhetoric Revolving Around Criminal Penalties*, Full Court Press (June 14, 2016), http://blog.tmcec.com/2016/06/debtor-prisons-and-ticket-

debt-the-misleading-rhetoric-revolving-around-criminal-penalties/.

[86] Tex. Code of Crim. Proc., art. 4.14, Code of Criminal Procedure.

[87] Miss. Code Ann., § 21-23-19 (2013).

[88] Mo. Rev. Stat., §§ 77.590, 79.470 (2015).

[89] Dep't of Justice, *Supra*, at 7.

[90] *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). (holding that, absent a knowing and intelligent waiver, *no person may be imprisoned* for *any offense* ... unless he was represented by counsel at his trial) (emphasis added).

[91] *Scott v. Illinois*, 440 U.S. 367 (1979). Affirming, *Argersinger* drew a bright line between incarceration (as part of a sentence) and the mere threat of incarceration (separate from a sentence). As the Court explained in *Scott*, "[t]he central premise of *Argersinger* -- that actual imprisonment is a penalty *different in kind from fines or the mere threat of imprisonment* -- is eminently sound and warrants adoption of *actual imprisonment* as the line defining the constitutional right to appointment of counsel." *Id.*, at 373. Emphasis added.

[92] The right to counsel does not necessarily mean the right to court appointed counsel. It also means the opportunity to procure the advice and assistance of counsel *See, generally,* Ryan Kellus Turner, "The Oversimplification of the Assistance of Counsel in the Adjudication of Class C Misdemeanors in Texas," *The Recorder* (January 2009).

[93] *United States v. Jennings*, 323 F.3d 263, 276 n.5 (4th Cir. 2003) citing *Alabama v. Shelton*, 535 U.S. 654, 658, (2002) quoting *Argersinger* at 40.

[94] Since the DOJ letter, some have contended that the failure to appoint counsel in Class C misdemeanors runs afoul of federal case law, particularly when defendants are subsequently committed to jail on capiases pro fine. These contentions misrepresent federal case law. They also contradict civil libertarians who have criticized Texas for not expanding the right to counsel for indigents charged with fine-only misdemeanors, but who, nonetheless, acknowledge that Texas law meets the requirement of the U.S. Constitution as set forth in *Scott*. *See*, B. Mitchell Simpson, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?* 5 Roger Williams U. L. Rev. 417, 434, n. 127 (2000). The author, in offering a critique of *Scott v. Illinois*, 440 U.S. 367 (1979), explains that Texas is among the states that have not expanded the right to counsel for indigents charged with misdemeanors beyond what is required by the U.S. Constitution in the standards announced in *Scott*. Simpson at 433-434. According to Simpson, the problems with *Scott* are "inherent in its reliance on the sentence imposed as the touchstone for the right of counsel for indigents." *Id.* at 438.

[95] Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1596 (2015).

[96] *See, e.g.*, Michele Estrain Gilman, *The Poverty Defense*, 47 U. Rich. L. Rev. 495, 547-47 (2013).

[97] *Bearden*, 461 U.S. at 666-667.

[98] *Tate*, 401 U.S. at 399 (1971).

[99] 399 U.S. 235, 244(1970).

[100] *Tate*, 401 U.S. at 400-01 (1971) (emphasis added).

[101] *Bearden*, 461 U.S. at 664-65 (1983).

[102] *Note: State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 Harvard L. Rev. 1024 (February 10, 2016).

[103] Neil L. Sobol, *Article: Charging the Poor: Criminal Justice Debt & Modern Day Debtors' Prisons*, 75 Md. L. Rev. 486, 524.

[104] *Id.* at 524-532. Additionally, Sobol proposes his own hybrid approach. *Id.* at 532-540.

[105] *Bearden*, 461 U.S. at 674.

[106] 411 U.S. 1, 21-22 (1973) Neither *Williams* nor *Tate* touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. "In *San Antonio School District v. Rodriguez*, the Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (3d ed. 2006) at 786.

[107] *See, e.g., Harris v. McRae*, 448 U.S. 297, 323 (1980).

[108] *Tate*, 401 U.S. at 671 n. 5. It is also important to note that "[t]he State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones." Id. at 671.

[109] Circumstances vary and the application and assessment of alternative means should be assessed on a case by case basis. *Id.*

[110] 392 U.S. 514 (1968). The Supreme Court rejected the principal that "[criminal] penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 533.

[111] 26 Am. J. Crim. L. 401 (1999).

[112] Michele Estrin Gilman, *The Poverty Defense*, 47 U. Rich. L. Rev. 495 (January 2013). While Professor Gillman acknowledges that "debtors' prisons" have been abolished, the reality is that courts are increasingly jailing poor people who cannot pay their debts. She believes that a poverty defense has the potential to correct this trend. Specifically, Gillman proposes expanding the poverty defense to three categories of crime: (1) Non-Violent Crimes - "A poverty defense to non-violent crimes avoids the public safety quandary. Starting with these crimes, a poverty defense may help to sharpen our assessment of individual and societal culpability and thereby produce more accurate judicial decisions, more generous crime prevention strategies, and more effective interventions. The poverty defense could eliminate the inequity that arises in a system that punishes the wrongdoing of the poor with incarceration, while imposing lenient fines and regulatory controls on more affluent wrongdoers." *Id.* at 548-549; (2) Victimless Crimes - "'Victimless' crimes 'are committed almost exclusively by the poor, including the crimes related to homelessness, drug

use, truancy, and turnstile jumping." *Id.* at 549; and (3) "Crimes of poverty" – "[C]rimes that people engage in for economic survival such as public benefits fraud, low-level drug dealing, panhandling, prostitution and minor thefts. The defense might also cover crimes poor people commit in order to survive in a dangerous community such as unlawful possession of a weapon." *Id.* Gillman also acknowledges the arguments against a poverty defense. Professor Stephen J. Morse has long maintained that such a defense has no place in the criminal justice system. First, growing up poor does not reduce individual responsibility for criminal acts; as moral agents all people are equally responsible for the decisions. Second, a poverty defense is patronizing and demeaning to poor people. Third, if society allowed people to act according to their own subjective moral code it would abandon the rule of law and undermine public safety. Fourth, criminal law is retributive and incompatible with advancing social welfare goals (i.e., criminal justice is not social justice). *Id.* 505-506.

[113] Robin S. Rosenberg, *There's No Defense for Affluenza*, Slate.com (December 17, 2013, 3:27 PM) http://www.slate.com/articles/health_and_science/medical_examiner/2013/12/ethan_couch_affluenza_defense_critique_of_the_psychology_of_no_consequences.html.

[114] 399 U.S. at 241.

[115] Meaning, "let the buyer beware," the principle that the buyer alone is responsible for checking the quality and suitability of goods, and that purchasers buy at their own risk. *Caveat Emptor*, Black's Law Dictionary (9th ed. 2011).

[116] American Civil Liberties Union, *In For A Penny: The Rise of America's New Debtor's Prisons* 5 (2010)

[117] *Id.* at 29.

[118] *Id.* at 29.

[119] *Id.* at 43.

[120] *Id.* at 55.

[121] *Id.* at 65.

[122] Choudhry, Supra, note 55 at 2. In addition to the aforementioned states, it identified Colorado, Maine, Mississippi, and New Hampshire.

[123] Jeff Balke, *Why New Organizations Are Trying on Upworthy Headlines: The Answer May Surprise You*, Houston Press (January 29, 2014, 11:00 AM) http://www.houstonpress.com/news/why-new-organizations-are-trying-on-upworthy-headlines-the-answer-may-surprise-you-6754862.

[124] Other correct answers include Peter Sanchez-Navarro Jr., the Houston Legal Foundation, Roy Lucas, Stanley Bass, the NAACP, the United States Supreme Court and the Texas Legislature. To be fair, however, without the American Civil Liberties Union and Norman Dorsen's advocacy on behalf of Preston Tate, there likely would be no *Tate v. Short* and the Texas Legislature may not have been compelled to change applicable law in Chapter 45 of the Code of Criminal Procedure. The ACLU's legal case files in *Tate* are preserved as part of the collection of Princeton University.

[125] *Ex parte Tate*, 445 S.W.2d 210 (Tex. Crim. App. 1969).

[126] *Tate*, 401 U.S. at 399 (1971)

[127] Ryan Kellus Turner, *Pay or Lay: Tate v. Short Revisited*, Municipal Court Recorder, March 2003.

[128] *Ex parte Tate*, 471 S.W.2d 404, 406 (Tex. Crim. App. 1971). The Court of Criminal Appeals, like the Supreme Court, acknowledged that the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.

[129] Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, National Public Radio, All Things Considered (May 19, 2014, 4:02 PM) http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor.

[130] Tex. Code of Crim. Proc., art. 45.046 (a)(2).

[131] "Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible Eighth Amendment considerations. If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable." *Tate* at 401.

[132] *Pay or Lay*, *supra*, note 127.

[133] Commentary from H.B. 3060 states "this amendment codifies part of the U.S. Supreme Court decision of Tate v. Short, 401 U.S. 395 (1971). Specifically, a court may not commit an indigent defendant to jail on a capias pro fine without first providing the defendant an alternative means of discharging the judgment. As written, courts may currently, in violation of Tate, commit a defendant to jail under (a)(1) without considering whether the defendant is indigent. Further codifying Tate, this amendment provides that an indigent defendant after being given the opportunity to discharge the judgment, via community service or according to a payment plan, may nonetheless be committed to jail. After the bill was introduced, it was amended by the sponsor to include three safeguards to ensure that indigent defendants are not wrongfully incarcerated. First, the judge committing the defendant to jail following arrest on a capias pro fine is required to have a hearing. Second, the determination resulting in incarceration is required to be in writing. Third, in the event that the defendant is indigent, not only must the judge find that the defendant failed to make a good faith effort to discharge the fine and costs by means of community service, but that the defendant could have performed such community service without experiencing undue hardship." Tex. Mun. Cts. Educ. Ctr., *HB 3060*, The Recorder 51 (August 2007).

[134] *Tate*, 401 U.S. at 671 n. 5.

[135] Tex. Code of Crim. Proc., art 45.041 applies to municipal and justice courts. A similar provision, Tex. Code of Crim. Proc., art. 42.15 governs county and district courts.

[136] Tex. Code of Crim. Proc., art. 45.041(b-2). H.B. 27, 82d. Leg., Reg. Sess. (Tex. 2011).

[137] S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015)

[138] Tex. Code of Crim. Proc., art. 45.049.

[139] Tex. Code of Crim. Proc., art. 45.049(a)

[140] Tex. Code of Crim. Proc., art. 45.049 (e)

[141] Tex. Code of Crim. Proc., art. 45.049 (d)

[142] Tex. Code of Crim. Proc., arts 43.0901 and 45.0491.

[143] Tex. Code of Crim. Proc., arts. 43.0901(2) and 45.0491(2)

[144] Centre for Justice and Reconciliation, *Community Service*, http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/community-service/ (last visited June 27, 2016).

[145] "Indeed, given the general flexibility of tailoring fines to the resources of a defendant, or even permitting the defendant to do specified work to satisfy the fine, a sentencing court can often establish a reduced fine or alternative public service in lieu of a fine that adequately serves the State's goals of punishment and deterrence, given the defendant's diminished financial resources." *Bearden* at 672 (citations omitted).

[146] Tex. Trans. Code, § 542.402(b) (placing a 30 percent cap on the amount of revenue that may be collected locally in the form of fines).

[147] Tex. Trans. Code, § 720.002(a).

[148] Tex. Trans. Code, § 720.002(b).

[149] The Texas Legislature's repeal of Tex. Trans. Code, § 720.002(c) in 2009 clarified that the prohibition of traffic quotas is, in fact, intended to prohibit municipalities from considering the amount of revenue collected by municipal courts when evaluating the performance of municipal judges for purposes of determining reappointment. Turner and Abbott, *Supra*, at 1-32.

[150] Tex. Trans. Code, § 720.002(e).

[151] *See generally*, Craig Adair, *The Driver Responsibility Program: A Texas-Sized Failure*, Tex. Crim. Just. Coalition, (2013); Kendall Taggart and Alex Campbell, *Judge Blasts Texas For Using courts to Make Money Off Poor*, BuzzFeed (April 19, 2016, 10:44 AM) https://www.buzzfeed.com/kendalltaggart/texas-judge-blasts-state-for-profiting-from-poorest-defendan.

[152] Those in which a fine is defined by the defendant's daily earnings, rather than a fixed dollar amount. *See e.g.*, Suzanne Daley, *Speeding in Finland Can Cost a Fortune, If You Already Have One*, New York Times (April 25, 2015).

[153] *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006).

[154] *Id.; See McClenan v. State*, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983) (Overruled in part on other grounds by *De Leon v. Aguilar*, 127 S.W.3d 1, 6 (Tex. Crim. App. 2004)).

[155] Vikrant Reddy, *Overcriminalization in the States*, Tex. Pub. Pol'y Found. (November 2013). http://www.texaspolicy.com/press_release/detail/overcriminalization-in-the-states

[156] Of many examples, here is one of the most memorable: "These low-level courts, which Jennifer Laurin, the University of Texas law professor, calls 'the darkest corners of the criminal justice system,' can be a world unto themselves. They handle only class C misdemeanors, such as common traffic violations and other petty offenses, for which the most serious official sentence is a fine. Because the offenses, and the official penalties, are so small-fry, judges are not required to provide lawyers to those who can't afford them." Taggert and Campbell, *In Texas, It's a Crime to be Poor*, *Supra*, note 79.

[157] All Things Considered, *Justice Sotomayor Delivers Blistering Dissent in Utah Search Case*, National Public Radio (June 20, 2016, 4:30 PM) http://www.npr.org/2016/06/20/482832733/justice-sotomayor-delivers-blistering-dissent-in-utah-search-case.

[158] Tex. Alcoholic Bev. Code, § 106.041

[159] Tex. Trans. Code. § 545.412

[160] Tex. Trans. Code § 545.351

[161] Tex. Health & Safety Code § 161.082

[162] Tex. Health & Safety Code § 484.002

[163] Tex. Pen. Code, § 49.02

[164] Tex. Pen. Code § 22.01 (a)(3)

[165] Tex. Pen. Code § 42.01 (a)

[166] Tex. Pen. Code § 31.03 (e)(1)

[167] Tex. Health & Safety Code, Ch. 365.

[168] Mark Lisheron, *Is Don't Mess With Texas Worth It?*, watchdog.org (February 29, 2016) http://watchdog.org/258146/dont-mess-with/. In 2014, it cost Texas taxpayers $47 million dollars to clean litter off Texas highways. Dora Miller, *Litter on the Highway Costing the State Millions*, KTXS (December 16, 2014, 8:16 PM) http://m.ktxs.com/news/litter-on-the-highway-costing-the-state-millions/30261258.

[169] Texas Department of Transportation, *Texas Motor Vehicle Traffic Crash Highlights Calendar Year 2014* (2014) http://ftp.dot.state.tx.us/pub/txdot/trf/crash-statistics/2014/01.pdf.

[170] Angie Schmidt, *Texas DOT Isn't Learning from its Horrific Fatalities Calendar* StreetBlog USA (January 8, 2016) http://usa.streetsblog.org/2016/01/08/texas-dot-isnt-learning-from-its-horrific-road-fatalities-calendar/.

[171] Nicole Chavez, Katie Hall, and Philip Jankowski, *Record Number of Traffic Deaths Has Officials Scratching Their Heads*, Austin American-Statesman (January 8, 2016, 3:01 PM) http://www.mystatesman.com/news/news/traffic/record-number-of-traffic-deaths-has-officials-scra/npzTT/; Philip Jankowski, *After Deadly Traffic Year, Austin to Join National Vision Zero Program*, Austin American-Statesman (January 26, 2016 12:03 PM), http://www.statesman.com/news/news/local/after-deadly-traffic-year-austin-to-join-national-/nqCgq/

[172] Leonard Evan, *A New Traffic Safety Vision for the United States* 93 Am. J. Pub. Health 1384, at 1384-1386 (September, 2003).

[173] Amanda Merck, *Traffic Safety is a Public Health Issue*, Salud America (March 30, 2016) http://www.communitycommons.org/groups/salud-america/changes/traffic-safety-is-a-public-health-issue/.

[174] The term "Ferguson effect" has been used to describe the situation in which police are likely to use less vigorous enforcement in situations that might lead to backlash, although other mechanisms are suggested. The concept has been criticized by some academics and politicians, including President Obama. Initial reports and studies suggested that there is no credible evidence of such an effect. More recently, a June 2016 DOJ study conducted by Richard Rosenfeld found an unprecedented 16.8 percent increase in homicide in America's largest 56 cities. He said "the only explanation that get the timing right is a version of the Ferguson effect" and that it is his leading hypothesis." Lois Beckett, *Is the 'Ferguson Effect' Real? Researcher Has Second Thoughts*, The Guardian (Friday, May 13, 2016, 4:23 PM) https://www.theguardian.com/us-news/2016/may/13/ferguson-effect-real-researcher-richard-rosenfield-second-thoughts

[175] Joseph Ax, *Philadelphia, Eying Democratic Convention, to Decriminalize Minor Offenses*, Philadelphia Inquirerer (June 8, 2016, 9:39 AM) http://www.philly.com/philly/news/politics/dnc/20160607_Reuters_L1N18Z1VA_Philadelphia__eying_Democratic_convention__to_decriminalize_minor_offenses.html

[176] Dareh Gregorian, *Littering, Public Urination and Other Minor Offenses in Manhattan Will Lead to Summons and Not Arrest*, New York Daily News (March 1, 2016, 8:44 PM) http://www.nydailynews.com/new-york/nyc-crime/minor-offenses-manhattan-no-longer-result-arrests-article-1.2549474.

[177] Jennifer Fermino, *Mayor de Blasio, City Council Working on Plan to Purge NYPD Warrants for Small Crimes*, New York Daily News (February 12, 2016, 11:48 PM) http://www.nydailynews.com/news/politics/mayor-council-purge-old-warrants-small-crimes-article-1.2530407.

[178] Douglas Smith, *Written Testimony before the House Committee on County Affairs* 2, Texas Criminal Justice Coalition, July 30, 2015. One of the main criticisms is levied against "revenue-based policing." However, this explanation is an oversimplification, as the costs of incarceration often far outstrip the amount of revenue collected. This suggests more complex motives at work. *See, e.g.*, Andrea Marsh and Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 Yale L. & Pol'y Rev. 93 (2015). The obvious motive is the compelling government interest in maintaining law and order.

[179] In light of the U.S. Supreme Court's decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) and the veto of S.B. 730, 77th Leg., Reg. Sess. (Tex. 2001) and S.B. 1597, 78th Leg., Reg. Sess. (Tex. 2003) that would have prohibited full custodial arrests for fine-only traffic offenses, Texas remains a state where peace officers have relatively unencumbered discretion to make full custodial arrests. In fact, with the exception of most speeding and open container violations, a Texas peace officer may arrest an offender without a warrant for any offense committed in his or her presence or within his or her view. Tex. Code of Crim. Proc., art. 14.01(b); Tex. Trans. Code, § 543.004.

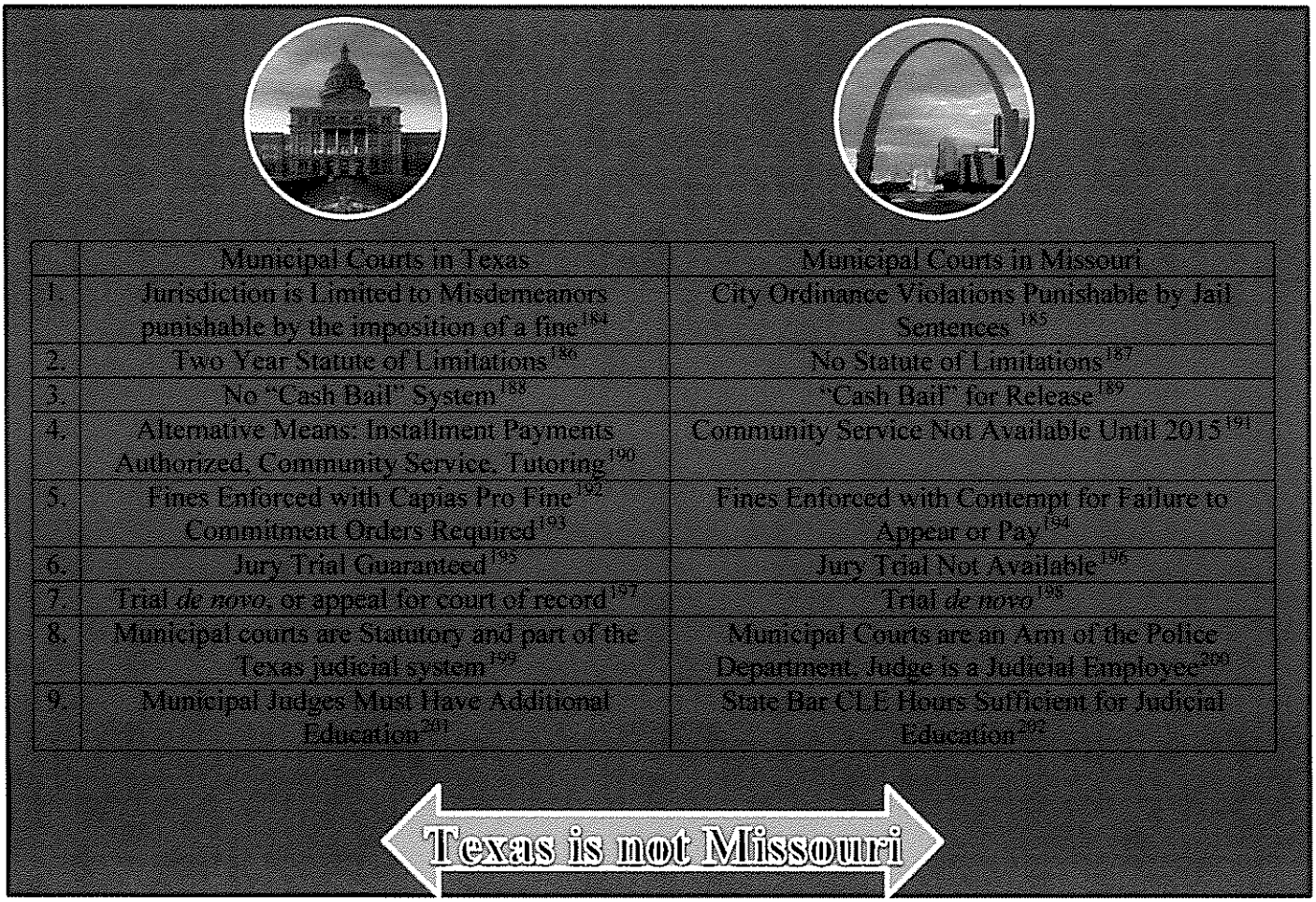
[180] George L. Kelling, William J. Bratton, *Why We Need Broken Windows Policing*, City Journal, Winter 2015

[181] Thomas Fuller, *San Francisco Torn as Some See 'Street Behavior' Worsen*, New York Times (April 24, 2016) http://mobile.nytimes.com/2016/04/25/us/san-francisco-torn-as-some-see-street-behavior-worsen.html?referer=

[182] U.S. Const., amend. X.

[183] Since 1948, it has been well-settled law in Texas that driving an automobile on public roads is not a constitutionally-protected right, but a privilege. *Taylor v. State*, 151 Tex. Crim. 568, 569, 209 S.W.2d 191, 191 (1948); *Naff v. State*, 946 S.W.2d 529, 531 (Tex. App.—Fort Worth 1997); *Ex parte Arnold*, 916 S.W.2d 640, 642 (Tex. App.—Austin 1996). This privilege is subject to reasonable regulation under the State's police power in the interest of the welfare and safety of the general public. *Naff*, 946 S.W.2d at 533.

APPENDIX A



[184] Tex. Code of Crim. Proc., art. 4.14(a)

[185] Mo. Rev. Stat., §§ 478.230, 479.010

[186] Tex. Code of Crim. Proc., art. 12.02

[187] Missouri Bench Book, § 3.9

[188] Tex. Code of Crim. Proc., art. 17.01

[189] Mo. Rev. Stat., 544.455

[190] *e.g.* Tex. Code of Crim. Proc., arts 45.041, 45.0492.

[191] Mo. Rev. Stat., 479.360

[192] Tex. Code of Crim. Proc., art 45.045

[193] Tex. Code of Crim. Proc., art 45.046

[194] Mo. Rev. Stat., 479.070

[195] Tex. Code of Crim. Proc., art 1.12

[196] Mo. Rev. Stat., 479.140

[197] Tex. Code of Crim. Proc., art 45.042

[198] Mo. Rev. Stat., 476.010

[199] Tex. Const., Art. II, § 1; Ch. 29, Tex. Gov't Code

[200] Dep't of Justice, *supra*, at 7

[201] Tex. Crim. App., Rule of Jud. Ed. 5(a)

[202] Mo. Supreme Court Rule, 18.05(a)