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FINES, FEES, COSTS, & INDIGENCE

August 9th marked the two-year anniversary of the tragic events in Ferguson, Missouri. In response to the shooting and subsequent unrest, the U.S. Department of Justice (DOJ) conducted an investigation and issued a 100-page report that detailed policing practices of the Ferguson Police Department and practices in the Ferguson Municipal Court that undermined the court, eroded community trust, and ultimately had devastating consequences for the City of Ferguson and its residents.

Critics subsequently contended that local courts throughout the nation are operating “debtors’ prisons.” 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.

Civil rights attorneys began aggressively filing lawsuits and working to publicize them in the media. In addition to cities and counties in Louisiana, Tennessee, Mississippi, Washington, and Virginia, lawsuits were against three of the largest cities in Texas. As of date, federal courts have dismissed lawsuits against the City of Austin and the City of Amarillo and a motion to dismiss is pending in a suit against the City of El Paso.

The legal issues are complicated. Perhaps that explains why the media has not fully explained them. How much does the public know about Texas law governing the imposition and enforcement of fines and costs? How much do your local and state elected leaders know? When poverty-related issues 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? TMCEC hopes this issue will prepare readers to talk about these issues.

In the two years since 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. 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?

Most of the legal contentions being bantered about are hardly new. They are settled law. Nevertheless, occasionally, it is necessary to revisit such legal issues and to examine them in the light of modern times. Now is such a time. It is not only healthy to engage in such critical inquiry, it is essential when the rule of law is called into question, when the law is not being followed, and when the law has been misrepresented. This is why TMCEC has prepared this special issue.

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“Debtors’ Prisons” and “Ticket Debt:” The Misleading Rhetoric Revolving Around Criminal Penalties in Texas

In his 1906 speech to the American Bar Association, distinguished American legal scholar Roscoe Pound said “dissatisfaction with the administration of law is as old as the law.”¹ In his speech, he enumerated multiple reasons for criticism, several of which still apply 110 years later. Recently, criticism of the incarceration of indigent defendants for Class C misdemeanors has become a controversial topic, and some are publicly questioning its legality. This dissatisfaction with the administration of justice is, in part, caused by what Pound called the “inevitable difference in the rate of progress between law and public opinion.”² The arrow of criticism, seemingly aimed solely at local courts, is misdirected.

Reconciling the Rhetoric with the Law

Judges have legal obligations to follow the law, and the law does not always allow judicial discretion. Judges and local courts are widely criticized for complying with laws they did not create, but dissatisfaction with the law is not an issue the judiciary can solve. This gap between public opinion and the law is a legislative matter. Because the gap is not discernible to the public, the public is often incorrect in its assumptions regarding the law. These assumptions are understandable, however, in light of media accounts of “injustice” that are rooted more in public policy and social impact than in the law—both state and federal. As Pound stated in 1906, sources of dissatisfaction lay in the “environment of our judicial administration,” and a contributing cause to this environment is “public ignorance of the real workings of courts due to ignorant and sensational reports in the press.”³

Judges and local courts are widely criticized for complying with laws they did not create, but dissatisfaction with the law is not an issue the judiciary can solve.

dysphemism

[*dis-fuh-miz-uh m*]

noun

1. the substitution of a harsh, disparaging, or unpleasant expression for a neutral one.

2. an expression so substituted.

Emerging rhetoric has increasingly used terms such as “debtors’ prisons” and “ticket debt,” but those terms are not entirely accurate. Such dysphemisms require no understanding of the law. They are an appeal to emotion. Criminal defendants (convicted or merely accused) are portrayed as powerless victims in the criminal process. They are led to believe that they will receive a ticket, and when they cannot pay, they will be stuck in a system that adds on more fees, revokes their driver’s licenses and vehicle registrations, and arrests them leaving them poor and jobless. Additionally, they will carry the stigma of being a criminal, may lose their housing, and have their children taken away from them. This tactic creates false perceptions of the process and promotes an “Us versus Them” mentality. While this parade of horrors may reflect an absolute worst case scenario if a defendant takes no action to respond to the charge at all, too often the public is not educated as to what steps they can take for resolution and what protection is provided in the law.

In June 2016, TMCEC discussed in its blog an example of misleading “debtors’ prison” rhetoric.⁴ Let’s examine some recent and commonly repeated ideas pushed by the media and some advocacy groups regarding criminal penalties and provide some commentary and supplementary legal information that is often left out of the message.

“Criminal Penalties Resulting from Fine-Only Misdemeanors is Just “Ticket Debt””

Referring to criminal fines as “ticket debt” is incorrect. And while it is true that one could be imprisoned for failing to respond to a citation or to pay a fine after a judgment is entered, this does not constitute imprisonment for debt. It is incarceration as a punishment for violation of laws and for a refusal to submit to the penalty imposed. This distinction is important between criminal fine (a punishment for breaking the law) and debt. Debt is more accurately reserved for civil matters. Nationally, advocacy groups often conflate 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.”⁵ Additionally, it is illegal to be jailed for the inability to pay fines and fees, but defendants may be jailed only if they cannot pay and do not make a good faith effort to discharge fines and fees through an alternate means such as community service or payment installments.⁶

“Citations are Received for Minor Issues and Trigger a Monetary Obligation”

Citations are not just “received.” Citations are issued in lieu of arrest for Class C misdemeanors. Peace officers must have probable cause to believe a crime has been committed before issuing a citation—the same standard that applies before an arrest.⁷ A defendant who maintains his or her innocence can enter a plea of not guilty and request a jury or bench trial. A defendant who does not wish to contest the charge may enter a plea of guilty or no contest or simply pay the fine and court costs. A defendant could even appear and refuse to enter a plea, triggering a duty to enter a plea of not guilty on defendant’s behalf.⁸ Regardless of the defendant’s choice, the defendant must do something. By signing a citation, a defendant promises to appear in court or otherwise respond to the charge and accepts the condition of release by the officer. Ignoring this obligation is the commission of a crime.

Citations are issued in lieu of arrest, booking, and posting of bond. If one does not wish to contest the charge and is not able to pay the fines and costs, he or she should contact the court and investigate the options.

“Those Not Able to Pay Will Surely Face Additional Fees”

Citations are issued in lieu of arrest, booking, and posting of bond. If one does not wish to contest the charge and is not able to pay the fines and costs, he or she should contact the court and investigate the options. This could amount to a request to pay fines and costs over time. If evidence is shown leading a judge to determine that the defendant is indigent, the defendant must be given alternative means to discharge the fine. This alternative means is discharging your fine and costs through community service, or perhaps a reasonable installment plan. Courts are required by state law to charge a \$25 time payment fee if any part of a fine or fee is not paid within 30 days of judgment.⁹

“If a Ticket is Not Paid, Defendants Will Lose Their Drivers’ Licenses and Vehicle Registrations Will Be Revoked.”

This may or may not be true. If the court has contracted to be a part of the Failure to Pay/Failure to Appear program (commonly known as OmniBase), a driver may not be able to renew his or her license.¹⁰ In a court using OmniBase, defendants who neglect to appear or pay within 60 days, have a hold put on their licenses. This would add a statutory \$30 fee to lift a license hold. Similarly, courts may restrict a registration renewal if they participate in the Scofflaw program.¹¹ Scofflaw fees can be up to \$20. Additionally, it should be kept in mind that these are holds on renewals of license and registration. These holds do not invalidate current, valid licenses and registrations. So, unless a license or registration is currently expired, and even if one has neglected to respond to the charge, a license and registration will still be valid unless the defendant continues to neglect the obligation until expiration.

Courts do not issue arrest warrants for the debt. Courts may issue arrest warrants for defendants who have not answered their criminal charges in a timely fashion.

“If Defendants Do Not Pay, the Court Will Issue an Arrest Warrant for the Unpaid Debt”

This is misleading. Courts do not issue arrest warrants for the debt. Courts may issue arrest warrants for defendants who have not answered their criminal charges in a timely fashion. If one has not taken any affirmative steps to handle a citation, he or she could be arrested for any one of several reasons. First, one may be charged with a non-appearance crime. If a defendant signed a citation and later failed to appear, the defendant has violated either the promise to appear or the condition of release. The defendant may be charged with this additional new crime, and a warrant is possible. Second, a defendant could be arrested on a warrant for the initial crime for which he or she did not appear or pay. Third, if one has

entered a guilty plea, but has not paid fines, the defendant could be arrested on a *capias pro fine*.

“Those Unable to Pay Will Suddenly Be Jailed and Will Lose Employment”

Choosing to not address court obligations will have numerous negative consequences. Although one could be jailed if a warrant has been issued, referring to the jailing as “sudden” is inaccurate if one has chosen not to respond to criminal charges. Deciding to not drive illegally may indeed hinder employment. However, most people, even those who have a low socioeconomic status, choose to comply with the law.

“Defendants Who Are Unable to Pay and Continue to Drive Without a License or Registration Are Moving Targets Likely to Be Put in Jail”

Choosing to not only ignore court obligations, but to break more laws will subject defendants to more consequences, compounding their problems. If they are taken to jail for past offenses and there is a judgment, the judge is required to have a commitment hearing. If one has an ability to pay, but has not made a good faith effort to do so, then he or she could be committed to jail until the judgment is satisfied. On the other hand, if one is indigent and has not been given an opportunity to discharge fines and costs with community service, he or she must be released. Indigent persons cannot legally be committed to jail unless they have failed to make a good faith effort to discharge fines and costs, and community service would not be an undue hardship for them.

It should be noted that indigency alone is not an undue hardship under current Texas law.¹² If one is an indigent person and community service would be an undue hardship, the judge may waive the indigent person’s fines and costs.¹³ Judges are not empowered to waive fines and costs for indigency alone.

One does not powerlessly get caught up in a vicious system that is out to get them as an uninformed reader of many media accounts or advocacy literature may presume. Only with persistent inaction do defendants find themselves subject to the compounding perils of continued disregard for criminal obligations. On the other hand, if they make a timely response and a full disclosure of their ability to pay, they may be able to find resolution quickly, discharge any fines and fees without payment, avoid arrest and other charges, and continue to drive. It will take an effort on the part of courts to educate the public about the options available to defendants, but without this effort courts may continue to be faced with a public swayed by uninformed reports in the media.

One does not powerlessly get caught up in a vicious system that is out to get them as an uninformed reader of many media accounts or advocacy literature may presume. Only with persistent inaction do defendants find themselves subject to the compounding perils of continued disregard for criminal obligations.

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1. Roscoe A. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA Reports p. 395 (1906).
 2. *Id.*
 3. *Supra*, n. 1.
 4. See, Mark Goodner, *Debtors’ Prisons and Ticket Debt: The Misleading Rhetoric Revolving Around Criminal Penalties*, Full Court Press (June 14, 2016), <http://blog.tmcce.com/2016/06/debtor-prisons-and-ticket-debt-the-misleading-rhetoric-revolving-around-criminal-penalties/>.
 5. Texas Appleseed, *Debtors’ Prisons*, <https://www.texasappleseed.org/debtors-prisons> (last visited June 16, 2016).
 6. Under *Tate v. Short*, 401 U.S. 395 (1971), 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. Additionally, under *Bearden v. Georgia*, 461 U.S. 660, 664-674 (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.
 7. Article 14.06 of the Code of Criminal Procedure provides officers the ability to generally issue a field release citation in lieu of arresting a defendant and taking them before a magistrate.
 8. Article 45.02, Code of Criminal Procedure.
 9. Section 133.104, Local Government Code.
 10. See, Chapter 706 of the Transportation Code.
 11. Section 702.003, Transportation Code.
 12. Article 45.0491 of the Code of Criminal Procedure states that waiver of fines and costs is a possibility if, after default in payment, a judge determines the defendant to be either indigent or a child and that performing community service would be an undue hardship. Indigence and undue hardship are mentioned separately. In Texas, the Court of Criminal Appeals generally presumes that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible. *State v. Hardy*, 963 S.W.2d 516 (1997). To treat indigence and undue hardship as interchangeable would be to render our *capias pro fine* and commitment hearing statutes meaningless. According to the U.S. Supreme Court, “it is our duty to give effect to every clause and word of a statute, rather than to emasculate an entire section.” *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Additionally, if indigence and undue hardship were the same thing, then waiver would be the only alternative means to payment under *Tate v. Short*.
 13. Article 45.0491, Code of Criminal Procedure.

Comparing Courts: Texas Is Not Ferguson, Missouri

Media buzz aside, current Texas laws are ahead of other states and do not authorize most controversial practices occurring in local courts of other states.

Municipal courts in Texas, like municipal courts in other states, have been subject to a steady barrage of negative press. Yet, amidst all of the media coverage, something critically important is not being reported: state laws substantially differ. Compared to other states, Texas laws aimed at preventing the kinds of abuses that occurred in Ferguson, Missouri adequately address these issues.

State Laws Differ

While most states have municipal courts, such courts are not governed by a single set of laws. Accordingly, 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. Some municipal courts have jurisdiction over fine-only misdemeanors (e.g., Texas¹); others have jurisdiction over misdemeanor offenses punishable by a sentence of jail (e.g., Mississippi² and Missouri³). 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 Missouri law in 2015, municipal courts were predominantly vestiges of municipal government and operated in the shadows of state laws.⁴ This is not the case in Texas.

Accordingly, when assessing courts and their treatment of indigent defendants, the laws of each state must be considered independently.

Texas Is Different

Texas law has already addressed many of the issues raised and implemented effective solutions. One reason Texas may be further ahead than other states on indigence issues in local municipal courts is the fact that the seminal case dealing with these issues, *Tate v. Short*, came out of Texas courts.⁵ 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.⁶

Since 1971, the Texas Legislature has grappled with these and related issues several times, and updated the laws in light of more recent decisions regarding indigence and enforcement of fines. This is why many of the deficiencies the DOJ highlighted in Missouri laws are not present in Texas laws (See chart on page 7 of this issue of *The Recorder*).

When assessing courts and their treatment of indigent defendants, the laws of each state must be considered independently.

Alternative Means: Extensions of Time to Pay

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.”⁷ 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).⁸ Notably, in Texas, a defendant need not be deemed indigent by the court in order to receive a payment plan. With the addition of Article 45.041(b-2) in 2011, however, if a court determines that the defendant is unable to immediately pay the fine and costs, the judge must allow the defendant to pay the fine and costs in designated intervals.⁹

Alternative Means: 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.¹⁰ 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.¹¹ An order to perform community service does not preclude the defendant from choosing to subsequently pay fines and costs.¹² A

defendant is considered to have discharged not less than \$50 of fines or costs for each eight hours of community service performed.¹³ 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.¹⁴

Waiver of Fines for Indigent Defendants

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: (1) the defendant is either indigent or was a child at the time of the offense; and (2) discharging the fine and costs through community service or as otherwise authorized by the Code of Criminal Procedure would impose an undue hardship.¹⁵ 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.¹⁶

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.

	Municipal Courts in Texas	Municipal Courts in Missouri
1.	Jurisdiction is Limited to Misdemeanors Punishable by the Imposition of a Fine ¹⁷	City Ordinance Violations Punishable by Jail Sentences ¹⁸
2.	Two-Year Statute of Limitations ¹⁹	No Statute of Limitations ²⁰
3.	No “Cash Bail” System ²¹	“Cash Bail” for Release ²²
4.	Alternative Means: Installment Payments Authorized, Community Service, Tutoring ²³	Community Service Not Available Until 2015 ²⁴
5.	Fines Enforced with Capias Pro Fine ²⁵ Commitment Orders Required ²⁶	Fines Enforced with Contempt for Failure to Appear or Pay ²⁷
6.	Jury Trial Guaranteed ²⁸	Jury Trial Not Available ²⁹
7.	Trial de Novo, or Appeal for Court of Record ³⁰	Trial de Novo ³¹
8.	Municipal Courts are Statutory and Part of the Texas Judicial System ³²	Municipal Courts are an Arm of the Police Department, Judge is a Judicial Employee ³³
9.	Municipal Judges Must Have Judicial Education ³⁴	State Bar CLE Hours are Sufficient for Judicial Education ³⁵

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.³⁶ 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.³⁷ 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.³⁸ City councils are prohibited from considering the amount of revenue collected by municipal courts for purposes of determining reappointment.³⁹ 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.⁴⁰ 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. 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.⁴¹

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1. Article 4.14, Code of Criminal Procedure.
 2. Miss. Code Ann., Section 21-23-19 (2013).
 3. Mo. Rev. Stat., Subsection 77.590, 79.470 (2015).
 4. See, *The Recorder* (April 2016) at 7.
 5. *Tate v. Short*, 401 U.S. 395 (1971).
 6. Ryan Kellus Turner, *Pay or Lay: Tate v. Short Revisited*, Municipal Court Recorder, March 2003.
 7. *Tate*, 401 U.S. at 671 n. 5.
 8. Article 45.041 of the Code of Criminal Procedure applies to municipal and justice courts. A similar provision, Article 42.15, governs county and district courts.
 9. Article 45.041(b-2), Code of Criminal Procedure; H.B. 27, 82d. Leg., Reg. Sess. (Tex. 2011).
 10. S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015).
 11. Article 45.049, Code of Criminal Procedure.
 12. Article 45.049(a), Code of Criminal Procedure.
 13. Article 45.049 (e), Code of Criminal Procedure.
 14. Article 45.049 (d), Code of Criminal Procedure.
 15. Articles 43.0901 and 45.0491, Code of Criminal Procedure.
 16. Articles 43.0901(2) and 45.0491(2), Code of Criminal Procedure.
 17. Article 4.14(a), Code of Criminal Procedure.
 18. Mo. Rev. Stat., Subsection 478.230, 479.010.
 19. Article 12.02, Code of Criminal Procedure.
 20. Missouri Bench Book, Section 3.9.
 21. Article 17.01, Code of Criminal Procedure.
 22. Mo. Rev. Stat., Section 544.455.
 23. e.g., Articles 45.041 and 45.0492, Code of Criminal Procedure.
 24. Mo. Rev. Stat., Section 479.360.
 25. Article 45.045, Code of Criminal Procedure.
 26. Article 45.046, Code of Criminal Procedure.
 27. Mo. Rev. Stat., Section 479.070.
 28. Article 1.12, Code of Criminal Procedure.
 29. Mo. Rev. Stat., Section 479.140.
 30. Article 45.042, Code of Criminal Procedure.
 31. Mo. Rev. Stat., Section 476.010.
 32. Tex. Const., Art. II, Section 1; Chapter 29, Texas Government Code.
 33. U.S. Department of Justice, *Investigation of the Ferguson Police Department* (2015) at 7.
 34. Rule of Judicial Education 5(a), Court of Criminal Appeals.
 35. Mo. Supreme Court Rule, 18.05(a).
 36. Section 542.402(b), Transportation Code (placing a 30 percent cap on the amount of revenue that may be collected locally in the form of fines).
 37. Section 720.002(a), Transportation Code.
 38. Section 720.002(b), Transportation Code.
 39. The Texas Legislature's repeal of Section 720.002(c) of the Transportation Code 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.
 40. Section 720.002(e), Transportation Code.
 41. 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).

Judges Who Do Not Comply with Safeguards in Texas Laws Protecting Indigent Defendants Are Committing Judicial Misconduct

**Legislation alone cannot solve the problem. The responsibility belongs to local judges.
The solution is community awareness.**

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.¹ 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 Past-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.”²

Failure to Comply with Statutory Safeguards is a Violation of the Code of Judicial Conduct

The Code of Judicial Conduct is clear: ignorance or indifference is no defense. Failure to observe statutory safeguards 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.”³ Canon 3 of the Code of Judicial Conduct requires judges to perform 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.⁴ 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.⁵ 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.⁶

Judicial Accountability

Ultimately, 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.⁷ 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.⁸

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.”

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 commitments to jail.⁹

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.¹⁰ It has happened in Texas.¹¹

Education is Key

Public education of voters and city council members 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. A court is allowed to incidentally generate revenue through the

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. It has happened in Texas.

imposition of fines. In fact, there is a strong argument to be made for the expanded use of fines and other monetary sanctions in the American criminal justice system.¹² 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. The law prohibits this.

Judicial education is equally important. 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,¹³ can assist judges in determining whether a defendant is indigent.

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.

1. *Williams v. Ill.*, 399 U.S. 235, 240-241 (1970).
2. Quote obtained by authors. June 19, 2016. Communication on file.
3. Supreme Court of Texas, *Texas Code of Judicial Conduct*, Canon 2(A) (2002).
4. *Id.*, Canon 3(B)(2).
5. *Id.*, Canon 3(B)(6).
6. *Id.*, Canon 3(B)(8).
7. *Id.*, Canon 3(D)(1).
8. *Id.*
9. 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).
10. 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).
11. 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).
12. 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.
13. 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).

Misunderstanding “Fine-Only” Misdemeanors

Although they have existed since the dawn of the Republic, the last 12 months have been dark days for Class C misdemeanors. Yet, despite too often being mischaracterized and minimized, these “minor offenses” play a major role in maintaining public order and quality of life in Texas.

Class C misdemeanors are criminal offenses for which the sentence entails the imposition of a fine as punishment.¹ Since the 1970s, Texas law has authorized judges to employ “alternative means” to discharge fines and court costs (See, Comparing Courts: Texas Is Not Ferguson, Missouri, page 6 of this issue of *The Recorder*).

Texas Law Governing Class C Misdemeanors Is Distinct

As of 2015, there were 1,299 Class C misdemeanors in state law. Per state law, additional Class C misdemeanors may be created via city ordinances or county regulation. Yet, despite being the most commonly committed type of misdemeanor in Texas, Class C misdemeanors remain the most misunderstood. This misunderstanding has increased in the last two years. Media coverage has, for the most part, overlooked that state laws vary and that Texas law governing Class C misdemeanors is distinct (even when compared with other types of Texas misdemeanors).

Class C Misdemeanors Are Crimes

Also absent is that Class C Misdemeanors are *crimes* (In Texas, they are not civil infractions; they are not administrative violations). As a matter of state’s rights, Texas has chosen to exercise its police powers under the 10th Amendment to criminalize a host of behaviors that are not criminal in other states. Such crimes, even those where the punishment is a fine, *can result in an arrest*. In 2000, the U.S. Supreme Court, in *Atwater v. City of Lago Vista*,² held that the 4th Amendment does not forbid a warrantless arrest for a Class C misdemeanor.

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.

The Important Role of Class C Misdemeanors

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 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 taken a dim view of “small-fry” offenses and “low-level courts.”³

The driving behaviors most likely to result in injury or death are Class C misdemeanors.

Glaringly absent from most media accounts is any acknowledgment of the harms and dangers of the crimes pigeonholed as “minor offenses.” Which of the following is a “minor offense:” A teenager driving under the influence of alcohol;⁴ Failing to restrain a child while operating a motor vehicle;⁵ Speeding through a school zone;⁶ Selling cigarettes to children;⁷ Distributing abusable synthetic substances;⁸ Public intoxication;⁹ Assault;¹⁰

Disorderly conduct;¹¹ or, Theft of under \$100?¹² Each of these offenses can have a lasting and important impact on both the individual and public safety.

Class C Misdemeanors and Traffic Safety

Littering is a Class C misdemeanor in Texas.¹³ 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.¹⁴

Texas has not had a day without a traffic fatality in more than 15 years, during which time more than 50,000 people have been killed.

On those highways and streets, on average, a person is killed every two and a half hours, and injured every two minutes.¹⁵ The driving behaviors most likely to result in injury or death are Class C misdemeanors.¹⁶ Texas has not had a day without a traffic fatality in more than 15 years, during which time more than 50,000 people have been killed.¹⁷ Last year, in Austin, there were 102 people killed, a record number of traffic fatalities. Thirty-four percent of the fatalities involved a person who was not authorized to operate an automobile.¹⁸ 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 aggravated murder.¹⁹ 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.” As put by one of the digital curators of *Salud America!*, “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.”²⁰

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.

1. Sections 12.23, 12.41, Penal Code.
2. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2000).
3. Kendall Taggart and 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>.
4. Section 106.041, Alcoholic Beverage Code.
5. Section 545.412, Transportation Code.
6. Section 545.351, Transportation Code.
7. Section 161.082, Health & Safety Code.
8. Section 484.002, Health & Safety Code.
9. Section 49.02, Penal Code.
10. Section 22.01 (a)(3), Penal Code.
11. Section 42.01 (a), Penal Code.
12. Section 31.03 (e)(1), Penal Code.
13. Chapter 365, Health & Safety Code.
14. Mark Lisher, *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>.
15. 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>.
16. Notably, to avoid the equal protection issue regarding fines and indigent defendants 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. “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 v. Short*, 401 U.S. 395, 401 (1971).
17. 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/>.
18. 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-scratching-their-heads/>; 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-vision-zero-program/>. “Police say more than half of the victims were in a vehicle, nearly 30 percent of the dead were pedestrians. Impairment from drugs or alcohol were a factor in 60 percent of the incidents, for drivers and pedestrians.” *Id.*
19. Leonard Evan, *A New Traffic Safety Vision for the United States*, 93 *Am. J. Pub. Health* 1384, at 1384-1386 (September, 2003); National Coalition for Safer Roads, *Key Issues*, <http://ncrsafety.org/key-issues/> (accessed August 16, 2016); FBI.gov, *Expanded Homicide Data Table 8*, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_8_murder_victims_by_weapon_2010-2014.xls (accessed August 16, 2016).
20. 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/>.

Distinguishing “Fines” from “Court Costs”

Legally, they are not the same. It is important that the public and state and local officials understand the difference.

Regardless of the label applied, both fines and court costs entail money to be paid by a defendant. However, there are important differences between them. In the context of a criminal case, fines are amounts assessed to punish an individual or organization for violating a law following conviction by a judge.¹ Court costs are amounts prescribed by the Legislature, determined on a case-by-case basis, and varying in relation to the activities involved in the course of the case (and may include fees, miscellaneous charges, and surcharges).²

Fines (are not Court Costs)

Fines make sense (not just money). Throughout history, dating back to the Roman Empire, societies around the world have supported the imposition of fines for common criminal offenses. Fines have historically been considered among the least severe of criminal consequences. There are several arguments for the extensive use of fines and other monetary sanctions in the American criminal justice system: (1) Fines are cheaper to administer than jail and prisons; (2) Fines have the potential to achieve optimal deterrence compared to incarceration; (3) Fines offset criminal justice costs; and (4) Offenders are potentially spared the longer-term criminalizing effects of sentences entailing incarceration.³

Fines in Texas

Fines, incarceration, and the death penalty are the typical three types of punishment in the Texas criminal justice system. Fines are the most common form of punishment for violations of criminal laws. Ironically, despite the frequency of their use and their application throughout history, the underpinnings of fines are rarely independently examined outside the context of other legal issues.

Class C misdemeanors (“fine-only” offenses) are typically thought of as being punishable by a fine of up to \$500. However, this “fine-only” misnomer is only true of misdemeanors defined in the Penal Code.⁴ It inaccurately reflects the range of fines for municipal ordinance violations for which the fine range can potentially be as high as \$4,000.⁵ Furthermore, it inaccurately reflects the

Mayer v. City of Chicago, 404 U.S. 189 (1971) - An indigent defendant accused of fine-only disorderly conduct is entitled to a free transcript or comparable alternative regardless of ability to pay applicable court costs. Limiting free transcripts to felonies was an unreasoned distinction prohibited by the 14th Amendment. The fact that the offenses were fine only did not lessen the invidious discrimination against an indigent defendant.

Weir v. State, 278 S.W.3d 364 (Tex. Crim. App. 2009) - The statutory assessment of court costs against a convicted defendant is not an additional penalty for the crime committed, but a non-punitive recoupment of the costs of judicial resources expended in connection with the trial of the case.

Mayer v. State, 309 S.W.3d 552 (Tex. Crim. App. 2010) - No trial objection is required to preserve an appellate claim of legally insufficient evidence as it pertains to the imposition of a particular court cost.

Armstrong v. State, 340 S.W.3d 759 (Tex. Crim. App. 2011) - The amount and assessment of criminal court costs is a matter of criminal law (not civil law) and is subject matter that may be raised on direct appeal.

Johnson v. State, 423 S.W.3d 385 (Tex. Crim. App. 2014) - Defendants are legally entitled to an itemized bill of costs. A bill of costs does not need to be presented to the trial court before costs can be imposed upon conviction.⁶

Peraza v. State, 467 S.W.3d 508 (Tex. Crim. App. 2015) - 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.

potential maximum fine for offenses defined elsewhere in state law. The Penal Code provides that all state law violations defined outside of the Penal Code are to be prosecuted as a Class C misdemeanor as long as they are punishable by a fine only.⁷ Thus, for such non-Penal Code criminal offenses, the maximum fine amount is determined by the Legislature.⁸

Court Costs (are not Fines)

While society has long supported the imposition of “fines” as punishment for common criminal offenses, 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.

In the United States, terminology and definitions vary from state to state when it comes to terms used to describe court-related revenues.⁹ 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.¹⁰ 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).¹¹ 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 court costs and fees are actually utilized in Texas.¹² These distinctions, however, are increasingly of public importance, particularly amidst claims that local courts in Texas are turning jails into “debtors’ prisons” and where criminal court costs have dramatically increased 1,060 percent since 1965.¹³

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1. Carl Reynolds and Jerry Hall, *Courts are Not Revenue Centers*, Conference of State Court Administrators (2011) at 2.
 2. *Id.*
 3. Martin H. Pritikin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 U. Colo. L. Rev. 343, 350 (2010).
 4. Section 12.23, Penal Code.
 5. Article 4.14(a)(2), Code of Criminal Procedure; Section 29.003(a)(1), Government Code.
 6. H.B. 287 (2015) amended Article 103.001 of the Code of Criminal Procedure to require that a bill of costs be physically provided to a criminal defendant in either a county or district courts, but makes no such requirement for municipal and justice courts.
 7. Section 12.41(3), Penal Code.
 8. The Legislature in 1997 clarified that “fine only” means that courts may impose sanctions not consisting of confinement in jail or imprisonment and that imposition of a sanction or denial, suspension, or revocation of a privilege does not affect the original jurisdiction of the local trial courts in Texas. Articles 4.11 and 4.14, Code of Criminal Procedure; Section 29.003, Government Code. To be clear, prohibition of confinement in jail or imprisonment is distinct from commitment to jail when the defendant defaults of the judgment, which is authorized by Article 45.046 of the Code of Criminal Procedure.
 9. *Id.*
 10. While judges typically have discretion in imposing fines within a statutory range of punishment, it 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) (Section 681.011, Transportation Code) 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) (Section 601.191, Transportation Code). City councils can also proscribe via ordinances a fixed fine amount or create mandatory minimum fines.
 11. Article 45.041(b)(1) of the Code of Criminal Procedure 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).
 12. 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).
 13. The percent increase is represented in Dan Feldstein’s ‘Loser fees’ taking place of new taxes, *Houston Chronicle*, March 5, 2006.

Making Meaningful Use of the Fine Range

Consideration of a defendant's ability to pay is a matter of judicial discretion.

Does the Constitution require that fines be custom tailored to avoid disproportionate burdens on low-income defendants? No. While there are positive aspects of custom tailored fines, the Constitution does not require a fine to be custom tailored to avoid disproportionate burdens on low-income defendants. In *San Antonio Independent School District v. Rodriguez* (1973), the U.S. Supreme Court, citing *Tate v. Short*, 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.”¹

Other than in cases involving capital punishment, the 8th Amendment does not mandate individualized sentencing. The 8th Amendment, as distinguished from the Due Process Clause, imposes no apparent limitation on the discretion of the sentencing entity, be it judge or jury, including any requirement that punishment be informed by the particular circumstances of the offense and/or the offender.² Some judges assess the amount of the fine based on circumstances of the case such as the type of crime, frequency, and flagrancy, reserving consideration of ability to pay until deciding the method of discharging the fine. Some judges consider ability to pay at sentencing. Both are constitutionally permissible and within the bounds of judicial discretion.

Day Fines: Fines Based on a Defendant's Earnings

One proposed alternative to reduce incarceration of individuals who are unable to pay legal financial obligations is basing fines on a defendant's earnings.³ During the late 1980s and early 1990s, American courts were introduced to “day fines” through a series of pilot programs directed by the Vera Institute. Day fines are an alternative to the traditional fixed fine in the United States and are based on an offender's financial means. Typically, the day fine is calculated using a unit scale, where certain crimes are assigned a specific number or range of units.⁴ Each unit is then valued in a manner tailored to the particular offender, taking into account his or her financial means through the consideration of net daily income, adjusted downward for factors like subsistence needs and familial responsibilities.⁵ To reach the total fine amount, the number of units is multiplied by the personalized unit value.⁶ The purpose of the day fine is to punish offenders proportionately, balancing the offenders' financial means with the crimes committed, and in theory representing a single day of incarceration without salary. Day fines have been analyzed and applied in a multitude of scenarios: some studies apply them to minor offenses already punishable by fixed fines, some try to use day fines as an intermediate sanction to replace probation or imprisonment, while others use day fines in combination with other sanctions. Notably, day fines are no longer being tested in the United States and are only of novel issue because of the recent growing interest in and concerns about alleged “debtors’ prisons” and criminal justice reform, generally.

The 8th Amendment, as distinguished from the Due Process Clause, imposes no apparent limitation on the discretion of the sentencing entity, be it judge or jury, including any requirement that punishment be informed by the particular circumstances of the offense and/or the offender.

Issues and Shortcomings of a Day Fine System

Part of the reason that day fines are not already used in the United States (as opposed to Great Britain) is the fact that our country is founded on common law, where punishment is suited to the crime rather than the criminal— “departure from these socially entrenched norms is not easy.”⁷

Procedural issues abound with the day fine system. One major obstacle to the day fine system is access to financial information by the courts. If the defendant will not provide the information, how does the court get it? While a defendant desiring a low fine may be willing to disclose financial information, a defendant facing a large fine due to income level may not. There are potential 5th Amendment and privacy concerns involved with forcing individuals to provide information that would incriminate them in a punitive sense.⁸ The IRS is not permitted to turn over tax information.⁹ Federal and state laws prohibit disclosure by financial institutions without consent of the offender.¹⁰ If income is self-reported, this calls into question reliability and trustworthiness, jeopardizing the “just” and “equitable” purpose of day fines.¹¹

Another risk of the day fine system is its effect on crime.¹² If the punishment value decreases based on income, poorer individuals have a heightened incentive to commit the crime—they may experience a net monetary gain overall, or the crime may become more “worth it” from a non-monetary perspective if it is within their ability to pay a fine with ease.¹³ Raising the maximum fine amount only serves to punish high income offenders to a greater extent, leaving low income offenders at an advantage only by comparison; day fines’ only punitive value in this scenario would be in imposing extra punishment on offenders who are more well-off.

A day fine system may be too costly. Costs include collection and enforcement systems, training for judges and other court personnel on how to calculate day fines (calculating the day fine is itself an obstacle¹⁴), and staff employment and time commitment required to track payments and follow up with those who default.¹⁵

Contrast this with the current system of only making this type of inquiry for indigent defendants instead of all defendants. The current system also gives the judge discretion to make the type of inquiry that best suits individuals and the court in each respective community, without having to resort to a strict calculation that applies across the state. Day fines do not necessarily improve compliance rates. The courts may still have to resort to jail, community service, and civil procedures to effectuate some sort of sanction.¹⁶

Meaningful Use of the Fine Range

While day fines are not likely to grace the pages of Texas law books, courts are encouraged to make meaningful use of the fine range. Fine schedules have utility but also have inherent limitations. Similar to writing prospective fine amounts on arrest warrants prior to a judgment, fine schedules can be misconstrued to mean that there is no fine range or 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.¹⁷ A trial court denies a defendant due process when it arbitrarily refuses to consider the entire range of punishment or imposes a predetermined punishment.¹⁸ What factors the judge uses in considering the entire fine range and the weight given to such factors is purely a matter of judicial discretion, guided by the Canons of Judicial Conduct.

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1. 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.
 2. The Court of Criminal Appeals has stated “aside from a few specific instances where the range of punishment depends upon the determination of discrete facts, ‘[d]eciding what punishment to assess is a normative process, not intrinsically factbound.’ Indeed, we have described the sentencer’s discretion to impose any punishment within the prescribed range to be essentially ‘unfettered.’ Subject only to a very limited, ‘exceedingly rare,’ and somewhat amorphous Eighth Amendment gross-disproportionality review, a punishment that falls within the legislatively prescribed range, and that is based upon the sentencer’s informed normative judgment, is unassailable on appeal.” *Ex parte Chavez*, 213 S.W.3d 320, 323-324 n.20 (Tex. Crim. App. 2006) citing *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991).
 3. Neil L. Sobol, *Article: Charging the Poor: Criminal Justice Debt & Modern Day Debtors’ Prisons*, 75 Md. L. Rev. 486, 524-532.
 4. See, Bureau of Justice Assistance, *How to Use Structured Fines (Day Fines) as an Intermediate Sanction*, p. 16 (1996).
 5. *Id.*
 6. *Id.*
 7. Lance R. Hignite & Mark Kellar, *Day Fines*, *The Encyclopedia of Criminology and Criminal Justice* (Jay S. Albanese, 2014) at 1-2.
 8. Gary M. Friedman, *The West German Day Fine System: A Possibility for the United States?*, 50. U. Chi. L. Rev. 281, 299-300 (1983).
 9. *Id.*
 10. Edwin W. Zedlewski, *Alternatives to Custodial Supervision: The Day Fine*, p. 8 (National Institute of Justice, Washington, D.C. 2010).
 11. *Id.* at 9.
 12. Friedman at 302.
 13. *Id.*
 14. Zedlewski, pp. 3, 6-7.
 15. Friedman at 302.
 16. Zedlewski, p. 8.
 17. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006). See also, *Jefferson v. State*, 803 S.W.2d 470, 471-472 (Tex. App.--Dallas 1991, pet. ref’d) (reversal of trial court where the trial court told the defendant upon deferring his sentence that, if he violated his probation, the maximum sentence would be imposed, the court finding a denial of due process of law because the trial court’s action effectively excluded evidence relevant to punishment, it precluded consideration of the full range of punishment prescribed by law, and it deprived Jefferson of a fair and impartial tribunal at the punishment hearing.)
 18. *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)).

Defining Indigence

The challenge is not just formulation, it is application. While judges need more “tools,” the Legislature has wisely avoided a “one-size-fits-all” approach.

Judges need tools to determine whether a defendant is able to pay the fine and costs assessed in a case. In Class C misdemeanor cases, this determination is relevant at the time of judgment,¹ upon a default in the discharge of the judgment,² and before commitment to jail.³ How is a judge to know if a defendant is indigent?

Indigence Undefined

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. Perhaps there are good reasons for that. Whether or not a particular defendant is able to pay the fine and costs is a complex determination involving numerous factors that widely vary depending on where a defendant lives, especially in a state as large and diverse as Texas.

Whether or not a particular defendant is able to pay the fine and costs is a complex determination involving numerous factors that widely vary depending on where a defendant lives, especially in a state as large and diverse as Texas.

The U.S. Supreme Court has made no attempt to define indigence, leaving that duty to state legislatures. Texas statutes like Articles 45.041, 45.046, and 45.049 provide judicial discretion in determining whether a defendant is indigent, without defining indigence. This allows a judge to consider all relevant facts when applying the law in each specific case, whereas a statutory definition of indigence, especially one with a formulaic approach, may prove unrealistic and either too exclusive (burdening defendants who do not meet the definition, but are unable to pay) or too inclusive (burdening courts of varying volume with consumption of time and resources). It would be an attempt to standardize what is arguably not subject to precise measurement—an exact point on an economic scale where all defendants in Texas are unable to pay their fine and costs.

Tools for Determining Ability to Pay

Whether or not such a point can be determined, judges need tools to apply the law within their own communities, be it Houston or Gun Barrel City. The Federal Poverty Guidelines, published each year in the Federal Register by the Department of Health and Human Services, are an inadequate tool for several reasons. The poverty thresholds were developed in 1963-64 by Mollie Orshansky, an economist working for the Social Security Administration.⁴ As Orshansky later indicated, her purpose was not to introduce a new general measure of poverty, but instead to develop a measure to assess the relative risks of low economic status among different demographic groups of families with children.⁵ They were based solely on the cost of food in plans prepared by the Department of Agriculture.⁶ This is because no generally accepted standards existed of the minimum needed for all that is essential for a family to live “at a designated level of well-being” (such as housing, medical care, clothing, child care, and transportation).⁷ Updated only for inflation each year, the guidelines assume that one-third of household income is spent on food,⁸ not taking into account changes in household budgets over the last 50 years.⁹ The guidelines do not account for specific family composition or geographic location within the United States, let alone within a particular state.¹⁰

The federal poverty guidelines do not account for specific family composition or geographic location within the United States, let alone within a particular state.

Self-Sufficiency Standard

Other tools exist that account for a wider range of household budget items and geographic location. The Self-Sufficiency Standard, created by the Center for Women’s Welfare, is a budget-based measure of the cost of living and a self-proclaimed alternative to the federal poverty measure.¹¹ It takes into account family composition, ages of children, and geographic differences in costs to define the amount of income necessary to meet basic needs at a minimally adequate level. However, data is not available for every state. While some states have data for multiple years and data as recent as 2015, Texas only has data for the year 1996.¹²

Living Wage Calculator

The Living Wage Calculator, developed by Dr. Amy K. Glasmeier at the Massachusetts Institute of Technology in 2004, estimates the living wage needed to support families (12 different compositions) based on geographically specific expenditure data related to a family's likely minimum costs for food, child care, health insurance, housing, transportation, and other basic necessities.¹³ Data for Texas is available by county. To use the calculator, a judge would need the composition of the family (number of adults and number of children) and income information for all working adults in the family.

It is up to the judge to decide what to consider in determining whether a defendant is able to pay the fine and costs and how to weigh each fact.

Judicial Discretion

Judicial discretion means choosing the right tool in each case. It is up to the judge to decide what to consider in determining whether a defendant is able to pay the fine and costs and how to weigh each fact. The chosen level of complexity of that process directly affects the burden on the defendant to show that he or she is indigent and the burden on the court to efficiently dispose of cases. As mentioned, if using the Living Wage Calculator, defendants would have to provide their income and the size of their family or household. Compare this to requiring a defendant to list all assets, credit rating, retirement, and government assistance. How big a financial picture does the judge need to see? Should a judge delve into personal financial choices or take on the role of financial advisor? How strictly does a judge construe the word "unable" regarding the ability to pay? These questions are answered using the discretion of the judge.

1. Article 45.041(b-2), Code of Criminal Procedure.
2. Articles 45.049 and 45.0491, Code of Criminal Procedure.
3. Article 45.046, Code of Criminal Procedure. Note that it is not relevant to appointment of counsel because a Class C misdemeanor case, though an adversarial judicial proceeding, is not one that "may result in punishment by confinement;" the sentence is limited to the payment of the fine and costs to the state. See, Articles 1.051(c) and 45.041(a), Code of Criminal Procedure.
4. Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, Social Security Bulletin, Vol. 5, No. 4 (1992).
5. *Id.*
6. *Id.* at 4.
7. *Id.*
8. *Id.* at 5.
9. John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel*, 70 Wash. & Lee L. Rev. 1173, 1205 (2013).
10. *Id.*
11. Center for Women's Welfare, University of Washington, The Self-Sufficiency Standard, <http://www.selfsufficiencystandard.org/> (accessed August 10, 2016).
12. <http://selfsufficiencystandard.org/texas>.
13. Living Wage Calculator, <http://livingwage.mit.edu/pages/about> (accessed August 10, 2016).

Living Wage Calculation for Henderson County, Texas

The living wage shown is the hourly rate that an **individual** must earn to support their family, if they are the sole provider and are working full-time (2080 hours per year). All values are **per adult in a family** unless otherwise noted. The state minimum wage is the same for all individuals, regardless of how many dependents they may have. The poverty rate is typically quoted as gross annual income. We have converted it to an hourly wage for the sake of comparison.

For further detail, please reference the [technical documentation here](#).

Hourly Wages	1 Adult	1 Adult 1 Child	1 Adult 2 Children	1 Adult 3 Children	2 Adults (One Working) (One Working)	2 Adults (One Working) 1 Child	2 Adults (One Working) 2 Children	2 Adults (One Working) 3 Children	2 Adults	2 Adults 1 Child	2 Adults 2 Children	2 Adults 3 Children
Living Wage	\$9.82	\$20.17	\$23.75	\$28.97	\$16.10	\$19.59	\$21.91	\$24.28	\$8.05	\$11.21	\$13.09	\$15.00
Poverty Wage	\$5.00	\$7.00	\$10.00	\$11.00	\$7.00	\$10.00	\$11.00	\$13.00	\$3.00	\$5.00	\$5.00	\$6.00
Minimum Wage	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25

<http://livingwage.mit.edu/>

An Incomplete Picture: State Data and Indigence

**While some data is better than none,
state and local governments are urged to exercise caution.**

OCA Data Available	Data Unavailable
Number of Cases Filed	Number of Defendants and Number Determined to be Indigent
	Number of Failure to Appear (FTA) and Violate Promise to Appear (VPTA); Number Dismissed
Number of Cases Disposed	Number of Indigence Determinations
	Number of Cases Satisfied with Jail Time Prior to Court Appearance or Trial
	Number of Cases per Defendant per Year
Number of Cases Satisfied with Jail Time	Whether Defendant Was Held on Higher Charges; Number of Days Served
	Fines Satisfied by Jail Credit Consecutively vs. Concurrently; Number of Days Served; Dollar Amounts Credited
	Number of Capias Pro Fine (CPF) Cases which End in Arrest and Jail Time
Number of Cases with Community Service Restitution (CSR)	Dollar Amount Satisfied with Community Service
Total Dollar Amount Paid	Number of Cases with Extensions and Amount Paid; Length of Time Between Judgment and Final Payment

The Office of Court Administration (OCA) collects various data on court operations. Although this data certainly has utility, it paints an incomplete picture when it comes to assessing indigence issues in criminal courts. OCA does not purport to paint a complete picture with the data collected, cautioning at the outset of the *Annual Report* that its “statistics do not attempt to portray everything courts or judges do, or how much time is spent on court-related activities not represented” in the data collected.¹ Extrapolating information on the treatment of indigent defendants under the law from incomplete data can serve to create inaccurate perceptions of court processes, and create problems where none may exist. The following analysis will address specific data currently collected, and why that data should not be used exclusively to assess the treatment of indigent defendants in Texas courts.

Number of Cases Filed

Although the total number of cases filed is useful, it is not sufficient in isolation to assess the need for criminal justice reform. One complaint leveled at municipal courts across the nation is “piling on” fines and costs for defendants who fail to appear (FTA or VPTA).² Because FTA is a separate criminal offense,³ a fine, warrant fee, and court costs accompany it. Contrast this with mere non-appearance that does not result in a charge of FTA, but results in a warrant and the accompanying warrant fee. Current data does not delineate between the two scenarios. To add confusion, “FTA” is used by some to describe both scenarios. Do indigent defendants tend to have more cases-per-person than non-indigent defendants, as has been alleged?⁴ No data exists to answer that question.

Without knowing the number of cases *per defendant*, and how many of those cases are related to a defendant’s failure to appear (distinguishing those cases with a FTA charge and without), it is difficult to say with any certainty whether these complaints are applicable to Texas courts. Basing these accusations on the simple number of cases filed gives an inaccurate assessment.

Number of Cases Disposed

The number of cases disposed is a metric applicable to determining the overall volume of cases and their movement through the caseflow process in criminal courts. However, this does not paint any picture of the treatment of indigent defendants in these courts. Judges may make indigence determinations at magistration, at the time of judgment, and upon default in discharging the judgment. Prior to committing a defendant to jail for defaulting in the discharge of the judgment, judges must make a written determination at a hearing that the defendant (1) is not indigent and has failed to make a good faith effort to discharge the fine and costs, or (2) is

indigent and has failed to make a good faith effort to discharge the fines and costs through community service and could have done so without experiencing any undue hardship. How many indigence determinations occur each year in Texas courts? How many disposed cases resulted in a determination that the defendant could not pay? There is no data to answer those questions.

Number of Cases Satisfied with Jail Time

One complaint levied against municipal courts is that, when a defendant owes \$5,000 in fines, that defendant will likely serve 100 days in jail (at the minimum statutorily prescribed rate of \$50 per day).⁷ However, this presumes that the fines will be satisfied consecutively, and at the statutory minimum rate per day for fine-only offenses.⁸ Anecdotal evidence suggests that judges often convert fines to jail time to be discharged concurrently. Judges might also give jail credit to defendants being held in jail on higher charges, either before or after the defendant served time in jail on those non-Class C misdemeanor charges. How often does this occur? There is no data on how many days defendants given jail credit served in jail or how many dollars were satisfied with jail time. There is no data on the number of cases disposed of with jail credit prior to a court appearance or trial.

Use of the *capias pro fine*⁹ in fine-only cases is often the subject of criticism.¹⁰ In cases where the judgment is satisfied with jail time credit, how often were *capiases pro fine* issued? In cases where a *capias pro fine* was issued, how often did it result in commitment to jail? How often did it result in release? How often was the defendant given other options to discharge the judgment? If released, how often was jail time credit given for any time served on the *capias pro fine*? How much credit? There is no data.

Total Dollar Amount Paid

Extensions to pay and payment plans are examples of “alternative means.” The U.S. Supreme Court has ruled that alternative means must be made available by courts for indigent defendants.¹¹ Courts are still accused of applying a “pay or lay” policy¹² even though that practice was ruled illegal in 1971.¹³ Anecdotal evidence suggests that many courts offer payment plans and extensions as standard practice to any defendant, whether indigent or not. How often? That is hard to say without data.

Merely knowing the reported number of cases satisfied and the dollar amount paid does not demonstrate whether, why, or how various alternative means are being used by courts. Without knowing the number of cases with extensions given or the length of time between judgment and final payment, it is impossible to answer those questions.

More Data Needed

The key to making an informed assessment of court processes is more data. The data available through OCA is useful for assessing many subjects, but is insufficient for the specific purpose of levying complaints against a criminal court’s treatment of indigent defendants. Courts are encouraged to collect their own relevant data beyond that which is required by OCA in order to get a full picture of how they are handling cases involving indigent defendants.

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1. Office of Court Administration, *Cautionary Statement*, Annual Report for the Texas Judiciary, Fiscal Year 2010, p. 21.
 2. American Civil Liberties Union, *Modern Day Debtors’ Prisons: The Ways Court-Imposed Debts Punish People for Being Poor*, p. 9 (2014).
 3. Generally, the offenses based upon a defendant’s failure to appear are Failure to Appear, defined in Section 38.10, Penal Code, and Violation of Promise to Appear, defined in Section 543.009, Transportation Code.
 4. See, e.g., American Civil Liberties Union, *In for a Penny*; VERA Institute, *Incarceration’s Front Door*; Texas Criminal Justice Coalition, *Wrong Way for Texas*.
 5. Taggart and Cambell, *In Texas, It’s A Crime to be Poor*, BuzzFeed (Oct. 7, 2015, 4:21 PM) <https://www.buzzfeed.com/kendalltaggart/in-texas-its-a-crime-to-be-poor>.
 6. Article 45.046, Code of Criminal Procedure.
 7. Article 45.045, Code of Criminal Procedure.
 8. See, e.g., U.S. Dep’t of Justice, *Investigation of the Ferguson Police Department* at 9 (2015); Class Action Complaint, *Gonzales v. City of Austin*, 1:15-cv-00956-SS, Section 64, et. seq. (October 27, 2015).
 9. *Tate v. Short*, 401 U.S. 395 (1971).
 10. See, e.g., Department of Justice, *Supra*, note 1, at 3; Second Amended Complaint – Class Action, *McKee et. al. v. City of Amarillo*, 2:16-cv-00009-J (2015); Class Action Complaint, *Gonzales et. al. v. City of Austin*, 15-cv-00956-SS (2015).
 11. *Tate*, 401 U.S. at 399.
 12. U.S. Dep’t of Justice, *Investigation of the Ferguson Police Department* (2015).
 13. *Id.* at 1.

In the Shadow of *Bearden*, Guidance from Case Law, and the Texas Code of Criminal Procedure, the Case for “Show Cause” Hearings Prior to Issuing a *Capias Pro Fine*

Twenty-six years ago the U.S. Supreme Court in *Bearden v. Georgia* warned that analysis of such legal issues “cannot be resolved by resort to easy slogans or pigeonhole analysis.”¹ This remains true today.

Part One of this article focuses on *Bearden* and related case law.

Part Two addresses what Texas has done to comply with *Bearden* and why show cause hearings in municipal and justice courts are an important step to ensuring the kind of fundamental fairness required by *Bearden*.

Part One: The Trilogy

What role does *Bearden* play in consideration of indigence matters?

Bearden is best understood as part of a trilogy of Supreme Court decisions having to do with fines, costs, indigence, and incarceration. The holding in *Bearden* is predicated upon two prior decisions.

Williams v. Illinois (1970) is about whether a defendant sentenced to a term of incarceration and a fine had to spend additional time behind bars to discharge fines and costs. The Court held it violates the Equal Protection Clause of the 14th Amendment.

Tate v. Short (1971) is about whether an indigent defendant convicted and sentenced to pay a fine and costs can have the fine and costs automatically converted to jail time simply because the defendant cannot immediately pay the fine *in full*. The Court, relying on *Williams*, held it similarly violates the Equal Protection Clause. Notably, *Tate* effectively mandated states to devise and courts to allow such defendants “alternative means” to discharge fines and costs. (See, page 28 of this issue of *The Recorder*.)

Bearden v. Georgia (1983) is about whether a sentencing court can revoke a defendant’s probation for failure to pay a fine and make restitution, absent evidence and findings that the defendant was responsible for the failure or that alternative forms of punishment were inadequate to meet the State’s interest in punishment and deterrence. The Court, relying on *Williams* and *Tate*, held it violates fundamental fairness required by the 14th Amendment.

Despite being inextricably linked to *Williams* and *Tate* by the 14th Amendment, it is important to note that *Bearden* was not decided on equal protection grounds. The Court’s pivot to “fundamental fairness” is significant and should not be overlooked. Shortly after *Tate*, but prior to *Bearden*, the Court in *San Antonio Independent School District v. Rodriguez* (1973) held that the poor are not a suspect class² for purposes of equal protection analysis.³

While all three decisions advanced the rights of indigent defendants, none of the decisions promoted inverse discrimination or precluded “imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant’s reasonable efforts to satisfy the fines by those means.”⁴ In reiterating the holdings of *Williams* and *Tate*, the Court in *Bearden* “recognized limits on the principle of protecting indigents in the criminal justice system.”⁵

Despite *Bearden*: Indigent Status Does Not Categorically Preclude the Possibility of Jail

Citing *Williams* and *Tate*, *Bearden* held that when the state determines that a fine or restitution are an adequate penalty for a crime, it may not imprison a defendant *solely* because the defendant lacked the resources to pay it. If, however, the probationer (1) has *willfully* refused to pay the fine or restitution when he has the ability to pay or (2) has failed to make sufficient *bona fide* efforts to seek employment or borrow money, the state is justified in using imprisonment as a sanction to enforce collection.⁶

What Does “Willfully” Mean?

Bearden does not define “willfully.” Black’s Law Dictionary defines “willful” as meaning voluntary and intentional. In *Bearden*, “the Supreme Court didn’t tell courts how to determine what it means to ‘willfully’ not pay. So it is left to judges to make the sometimes difficult calculations.”⁷

What Does “Bona Fide” Mean?

Bearden does not define “bona fide.” However, Black’s Law Dictionary defines it as meaning made in good faith; without fraud or deceit. Sincere; genuine. The opposite of bona fide is fake. Thus, when a person makes a bona fide effort, they are making a true, sincere, good faith effort to do something.

State Implementation and Uncertainty Surrounding *Bearden*

The essence of the modern debate surrounding

Bearden is that, for better or worse, the Supreme Court did not superimpose procedural steps that all state trial courts must follow. Because the laws of each state vary, there is no uniformity in how *Bearden* has been implemented. While some states have amended their laws to reflect the holding in *Bearden*, others states have not. Regardless whether a state has attempted to codify *Bearden*, each state and its judges are bound to comply with its holding.

The problem is that in absence of *Bearden* procedures in state law, the U.S. Supreme Court decision provides minimal guidance. This, in turn, increases the potential probability of debates surrounding whether a court is meeting its legal obligation under the U.S. Constitution in light of *Bearden*. Since it was decided in 1983, state courts throughout the United States have had to deal with the uncertainties surrounding *Bearden*.⁸ More than 30 years later, *Bearden* continues to be a source of conflict in state courts.⁹

Regardless whether a state has attempted to codify *Bearden*, each state and its judges are bound to comply with its holding.

Steps Leading Up to Commitment on a Capias Pro Fine

Article 45.046 of the Code of Criminal Procedure



*Prior to ordering a defendant confined to jail (commitment order), Article 45.046 of the Code of Criminal Procedure requires a hearing and a written determination that the defendant either (1) is not indigent and has failed to make a good faith effort to discharge the fine and costs; or (2) the defendant is indigent and (a) has failed to make a good faith effort to discharge the fines and costs under Article 45.049 (community service) and (b) could have discharged the fines and costs under Article 45.049 without experiencing any undue hardship.

Part Two: *Bearden* in Texas

While *Bearden* involved fines and fees, its holding is less straightforward than the holding in *Tate*. Implementing and complying with the U.S. Supreme Court decision in *Tate v. Short* (1971)¹⁰ was relatively easy for Texas. *Tate* began in the Houston Municipal Court and was about the Texas Code of Criminal Procedure

and its requirement that if the defendant could not pay the fine and costs in full, the fine and costs were automatically converted to a period of incarceration.¹¹ *Bearden* involved Georgia's First Offender Program, a felony offense, probation revocation, and a sentence of two years in prison.¹² *Bearden* did not involve a sentence consisting solely of a fine and costs, a *capias pro fine*, or statutes similar to Texas law.

The Court of Criminal Appeals has stated that separate and distinct from the Code of Criminal Procedure, "*Bearden* prescribes a mandatory judicial directive."

There may be limitations in extrapolating the holding in *Bearden*.¹³ Nuanced and specific issues in Chapter 45 of the Code of Criminal Procedure, governing municipal and justice court proceedings, have not been considered by the Texas Court of Criminal Appeals or the U.S. Supreme Court. Nevertheless, opinions from the U.S. 5th Circuit Court of Appeals and the Texarkana Court of Appeals make it evident that municipal

judges and justices of the peace are bound by the holding in *Bearden*.¹⁴ Instructively, the Court of Criminal Appeals has stated that separate and distinct from the Code of Criminal Procedure, "*Bearden* prescribes a mandatory judicial directive."¹⁵

The Code of Criminal Procedure

It is worth reiterating that state legislatures are under no obligation to codify case law. Texas has amended some provisions in the Code of Criminal Procedure to ensure indigent criminal defendants the protections provided by *Tate* and *Bearden*, but not in others.

The Commitment Hearing

Texas law does not specify when indigence must be determined (See, page 17 of this issue of *The Recorder*). *Bearden* is a narrow decision and does not require a sentencing court to determine a defendant's ability to pay at sentencing.¹⁶ In accordance with *Tate*, however, such a determination must be made *prior* to committing a defendant to jail for failure to pay fines and costs.

To be clear, when a judgment and sentence have been entered against a defendant and the defendant defaults in the discharge of the judgment, Texas law does *not* authorize a judge to order arrest and commitment in jail for non-payment of fines and costs absent a prompt hearing and written determinations.

A *capias pro fine* (Latin for "that you take for the fine") is a post-judgment writ issued by the convicting trial court after judgment and sentence for unpaid fines and costs ordering any peace officer of Texas to arrest the convicted person and bring them before the court immediately or place the defendant in jail until the next business day if the defendant cannot be immediately brought before the court.¹⁷

Article 45.045(a) requires that individuals arrested on a *capias pro fine* be brought immediately before the issuing court or placed in jail until the business day following the arrest. Article 45.046(c) allows commitment hearings to be conducted by means of an electronic broadcast system (*e.g.*, Internet videoconferencing).¹⁸

To be clear, when a judgment and sentence have been entered against a defendant and the defendant defaults in the discharge of the judgment, Texas law does not authorize a judge to order arrest and commitment in jail for non-payment of fines and costs absent a prompt hearing and written determinations.

A *capias pro fine* is *not* a commitment order. Preference is given to the defendant being brought immediately before the court. Anecdotal evidence suggests that this rarely happens. For practical and security reasons, judges

often go to where the defendant is jailed (assuming, of course, that they have been notified that the defendant is in custody). Because judges commonly associate trips to jail as part of their magistrate duties, it is important for judges to understand that a commitment order is *not* a magistrate function, but rather a duty of a judge. It is similarly imperative that law enforcement, court, and jail staff understand: Effective communication is required. Time is of the essence. When a court issues a *capias pro fine*, and the defendant is arrested, what happens next determines whether a judge is in compliance with Texas law and what the Court of Criminal Appeals described as the “mandatory judicial directive” of *Bearden*.¹⁹

Article 45.046(a) authorizes a court to order a defendant to be confined when a judgment and sentence have been entered against a defendant and the defendant defaults in the discharge of the judgment if the court makes a written determination at a hearing that the defendant is either:

- (1) not indigent and has failed to make a good faith effort to discharge the fines and costs; or
- (2) indigent and has failed to make a good faith effort to discharge the fines and costs by performing community service and could have performed such community service without experiencing any undue hardship.

Prior to commitment, the judge must affirmatively find that the defendant failed to make a good faith effort to discharge the judgment. Article 45.046 encapsulates the *Bearden* line of cases which “endeavors to shield criminal justice debtors making a good faith effort while leaving nonpayment unprotected.”²⁰

Probation Revocation

As *Bearden* is a probation revocation case, its influence is evident in some of the “probationary statutes” contained in the Code of Criminal Procedure. In county and district court proceedings, the Texas Legislature has partially codified *Bearden*’s “ability to pay” determination in the context of revoking community supervision for failure to pay fees and costs (but not fines).²¹ The statute, Article 42.12, Section 21(c), is inapplicable to municipal and justice courts.

In municipal and justice courts, when a defendant fails to submit proof of completion of a driving safety course,²² or fails to submit proof of compliance with the terms of deferred disposition,²³ judges are required to give defendants a show-cause hearing before imposing a sentence or enforcing its judgment. This begs an obvious question.

Is it an oversight in Texas law that there is no statutory requirement that criminal defendants be given a show-cause hearing prior to the issuance of a *capias pro fine* for failure to discharge a fine or costs?

Perhaps it is not. Not if a proper commitment hearing and written determinations are made per Article 45.046. Nevertheless, under current law the commitment hearing occurs after arrest and typically at the jail.

“Show-Cause” Hearings Prior to Issuing a Capias Pro Fine in Texas

Requiring show-cause hearings before issuance of a *capias pro fine* is an additional safeguard that has the potential to prevent indigent defendants from being arrested solely over matters of money. Although they are not currently mandated by the Code of Criminal Procedure, some believe they are an essential part of complying with *Bearden*. There are obvious benefits to mandating show-cause hearings prior to issuing a *capias pro fine*. In terms of *Bearden*, ordering a show-cause hearing potentially allows consideration of a defendant’s ability to pay and allows judges an opportunity to consider the circumstances surrounding failure to discharge the judgment through alternative means. (This, of course, assumes the defendant appears: See, *Safe Harbor Policies: Why Arrest Is Not Always the Best* on page 26 of this issue of *The Recorder*). When used this way, show cause hearings have the potential to help courts, law enforcement, and jails save time and money.

In Texas, the commitment hearing required by the Code of Criminal Procedure is the primary *Bearden* safeguard. Show-Cause hearings before the issuance of a *capias pro fine*, even if mandated by the Legislature, would be a preliminary safeguard (not a substitute).

Conclusion

Questions about *Bearden* abound. Like *Bearden*, the answers and legal issues do not lend themselves to easy slogans or pigeonhole analysis. In Texas, the commitment hearing required by the Code of Criminal Procedure is the *primary Bearden* safeguard. Show-cause hearings before the issuance of a *capias pro fine*, even if mandated by the Legislature, would be a preliminary safeguard (not a substitute).

1. *Bearden v. Georgia*, 461 U.S. 660, 666-667 (1983).
2. A “suspect class” is a group identified or defined in a suspect classification, a statutory classification based on race, national origin, or alienage. If a state law impinges on a fundamental right or operates to the disadvantage of a suspect class, the law passes constitutional muster only if it survives strict scrutiny under equal-protection analysis. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4 (1973). See also, Black’s Law Dictionary.
3. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973) “[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.”
4. *Tate v. Short*, 401 U.S. 395, 400-01 (1971).
5. *Bearden*, 461 U.S. at 664-65.
6. *Id.* at 668. Emphasis added.
7. Critics claim this omission undercuts the holding in *Bearden* <http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons>.
8. “[T]he Court creates a good deal of uncertainty for trial courts attempting to implement the decision. First, although the decision generally prohibits imprisonment of probationers who are unable, despite good faith efforts, to pay their monetary conditions, it provides trial courts with no guidance in determining what evidence and circumstances are sufficient to establish an inability to pay. Furthermore, although the decision contemplates situations where imprisonment of some probationers who are unable to pay will be necessary to protect the state's interests, it provides trial courts with no guidance concerning the nature and quantity of evidence necessary to establish that no alternatives will adequately protect the state's interests. Trial courts will have to address these uncertainties as they implement the decision.” NOTE: EQUAL PROTECTION AND REVOCATION OF AN INDIGENT'S PROBATION FOR FAILURE TO MEET MONETARY CONDITIONS: BEARDEN V. GEORGIA., 1985 Wis. L. Rev. 121, 152
9. 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).
10. 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.
11. 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. *Ex parte Tate*, 445 S.W.2d 210 (Tex. Crim. App. 1969). 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. *Tate*, 401 U.S. at 399 (1971).
12. In 1981, Danny Bearden pled guilty to burglary and theft. The trial court rather than entering a judgment of guilt sentenced Bearden to probation on the condition that he pay a fine and restitution per an installment payment plan. Bearden subsequently lost his job and despite repeated efforts was unable to find other work. Shortly before the balance became due, he notified the probation office that his payment was going to be late. In response, the prosecution filed a motion to revoke Bearden’s probation; the trial court, despite a trial record clearly indicating that Bearden had been unable to find employment and had no assets or income, entered a conviction and sentenced to Bearden to two years in prison.
13. “The limits of *Bearden* are unclear. Although the broad language of Justice O'Connor's opinion suggests otherwise, *Bearden* may apply solely to situations in which probation is revoked for failure to pay a fine.” ARTICLE: RATIONALITY VERSUS PROPORTIONALITY: RECONSIDERING THE CONSTITUTIONAL LIMITS ON CRIMINAL SANCTIONS, 51 Tenn. L. Rev. 623, 651.
14. *Garcia v. City of Abilene*, 890 F.2d 773 (5th Cir. 1989); *Ex parte Burks*, 2014 Tex. App. LEXIS 4507 (Unpublished Op).
15. *Gipson v. State*, 3983 S.W.3d 152, 157 (Tex. Crim. App. 2012).
16. Wagner, *Supra*, n. 9 at 385.
17. Article 43.015(2), Code of Criminal Procedure.
18. Bill Summary S.B. 414, *The Recorder* (August 2009) at 7.
19. *Supra*, note 14.
20. *Note: State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 Harvard L. Rev. 1024 (February 10, 2016).
21. *Gipson v. State*, 428 S.W.3d 107, 108 (Tex.Crim. App. 2014).
22. Article 45.0511(i)-(k), Code of Criminal Procedure.
23. Article 45.051(c-1)-(d), Code of Criminal Procedure.

“Safe Harbor” Policies: Why Arrest Is Not Always the Best

In an effort to address some of the main reasons defendants do not come to court to take care of their cases, some courts have implemented “safe harbor” policies, walk-in dockets, and hardship dockets aimed at reducing the number of people arrested.

No-Arrest Policies

Some defendants do not come to court for fear of being arrested. Presiding Judge Ed Spillane, College Station Municipal Court, knows this firsthand. “Almost everyone I see in jail tells me that they are in the jail due to fear of coming to court. They fear an approaching police officer at the door ready to arrest them because they either do not have the money to pay a fine or they failed to appear on a charge. I do see defendants in jail for other charges but a very large percentage are defendants who just failed to come to court.” Failing to go to court and take care of a case results in the culmination of that very fear.

Some municipal courts, therefore, have a no-arrest or “safe harbor” policy for defendants who come to the court with active warrants. Such a policy is good for defendants, courts, and cities. Judge Spillane says a policy allowing a defendant to not be arrested at the misdemeanor court issuing the warrant would solve numerous problems. “One, it would help free our jails of defendants who owe fines for misdemeanor cases. Two, it would encourage defendants to come to court and take advantage of what the court provides: a chance to make a plea, have a trial, receive community service if indigent, or even a waiver of the fines and fees should community service be an undue hardship. Three, it would make it clear that jail is not the first punishment for fine-only cases.”

Note that the amnesty described here is only for Class C misdemeanors, not any other level of crimes. A defendant in municipal court who also has active warrants in other courts would not fall under this “safe harbor.”

Walk-In Dockets

Another reason why defendants do not come to court is scheduling conflicts. Some municipal courts in Texas make the judge available during specified hours (a walk-in docket) for any defendant with a pending case to appear without prior scheduling. The judge can hold uncontested hearings (like indigence or show-cause), dispose of uncontested cases, set cases for contested hearings, recall warrants, and hear uncontested motions to modify, for example, payment plans and extensions to pay. The Austin Municipal Court has a walk-in court Monday through Thursday from 8:30 a.m. – 11:00 a.m. and 1:30 p.m. – 4:00 p.m. This has been the practice in that court for 20 years. Presiding Judge Sherry Statman says they hope to start an evening walk-in docket and possibly hold walk-in court at other locations. One goal of this special docket is “to work with defendants to help them avoid situations where they might be at risk for arrest,” says Judge Statman. At this docket, defendants can see a judge to request payment plans and those who are indigent may request community service. Defendants can also request extensions on community service or payment plans, request that jail credit be applied to their cases, hand in late paperwork, show hardship or other inability to complete community service, and bring other issues before the court. “Recognizing the diversity of our City, Spanish translators are available in person at this docket and other language interpreters can be contacted via phone,” says Judge Statman.

A court considering use of a walk-in docket should also consider instituting the above mentioned no-arrest policy at the courthouse for defendants with active warrants. Defendants who voluntarily come in to the Austin Municipal Court, for example, will not be arrested. This is important in order to avoid the appearance that the docket is used as bait to lure in recalcitrant defendants.

Hardship Dockets

Judge Statman has created a new docket that may be unique to any Texas court. “If a defendant is in custody at the central booking facility, facing possible commitment for failure to complete previously assigned community service, and indicates in the commitment proceeding that his or her failure was due to a hardship, a judge may

immediately release that defendant to appear at a weekly hardship docket. At this docket, defendants may provide any documentation they might have and discuss their situation so that a judge can determine if waiving part or all of the fees and fines is appropriate per Article 45.0491 of the Texas Code of Criminal Procedure,” says Judge Statman.

Considerations and caution are of course important if implementing any of these procedures. Best practices must always operate within the confines of the law.

Warrant Amnesty Periods

In addition to special dockets, another potential solution is “warrant amnesties,” conducted by the College Station Municipal Court, along with other courts. For example, during the amnesty period, Judge Spillane waives the \$50 warrant fee for any defendant who comes to court to take care of his or her case. Judge Spillane says, “I’m always amazed how many defendants come to court just hearing the word ‘amnesty.’ We often clear 500 cases each amnesty period,” says Judge Spillane, “Every judge signing a warrant really wants defendants to come to court and take advantage of what our criminal justice system should provide, a chance to have your case heard by a judge or jury and a fair and efficient opportunity to close that case.”

“Why not encourage defendants to come to court and not be in jail by having a practice that coming to court removes any pending warrant out of that court for misdemeanor charges on fine-only cases?,” says Judge Spillane. “Defendants in fine-only cases are under warrant primarily for failing to come to court and/or not paying a fine. In both cases, rewarding defendants who come to court by taking them out of warrant is a winning solution for the court and for the defendant. Society and law and order always benefit from defendants coming to court and not being in jail. The fine can only be disbursed through a payment plan or alternative means like community service when the defendant comes to court and arranges such a plan.” “No matter how many wonderful programs we have at court as alternatives to fines and fees for indigent defendants, we cannot offer them should defendants avoid coming to court out of fear of an active warrant. Jail does not solve these problems.”

Does Your Court Have a Solution to Share?

TMCEC is collecting information about how courts are improving accessibility, transparency, trust, and compliance to meet the needs and expectations of all who come in contact with municipal courts. Please share your solutions by emailing tmcec@tmcec.com. Also, below you can fill out a survey on “safe harbor,” walk-in dockets, and hardship dockets. This information will be available on the TMCEC website so that other judges and court personnel can set up an opportunity to visit your court to see how you have set up these options. Click [here](https://goo.gl/forms/ZephDmrujGxCqaeJ2) to complete the survey [https://goo.gl/forms/ZephDmrujGxCqaeJ2].

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1. Canon 2(A), Code of Judicial Conduct (A judge... should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.).
 2. All prosecutions in municipal court must be conducted by the city attorney or by a deputy city attorney. Article 45.201, Code of Criminal Procedure. Not having a prosecuting attorney present will limit the kinds of hearings which may be held. Dismissals (other than compliance dismissals (See, TMCEC Compliance Dismissal chart: http://www.tmcec.com/files/7814/3939/6436/Compliance_Dismissals.pdf)) would require the prosecution to move for dismissal. Article 32.02, Code of Criminal Procedure. A judge should not hear any evidence or testimony, sworn or otherwise, in a case that has not been adjudicated. Canon 6(C)(2), Code of Judicial Conduct. Sentencing hearings may be ex parte (TMCEC Bench Book, *Sentencing*, page 189 (2015)), but trials require

an attorney for the state to be present. In addition to the judge, courts need to factor in the costs of scheduling a clerk, prosecutor, and bailiff at the walk-in docket. For cities without in-house prosecutors, this could entail a review of any agreements with attorneys. Courts should also be aware of related staffing issues such as overtime and other potential human resources issues for court personnel. Judges and clerks at such dockets must take care that no plea is taken from a person who was a juvenile at the time the offense was alleged, unless that person’s parent is present. Article 45.0215, Code of Criminal Procedure. A judge should exercise caution, and verify that any underage defendant is accompanied by either a parent or a legal guardian, or that the case be reset to give notice.

In Light of *Tate*: What “Alternative Means” Means

It does not mean waiver of fines and costs.

There are, currently, three alternative means defined under Texas law: installment payments, community service, and tutoring. Although judges have broad discretion within these statutes, no other alternative means are currently defined by the Legislature.

In *Tate v. Short*, the U.S. Supreme Court suggested that other alternatives to immediate cash payments exist and may be specified by legislative enactment or judicial authority.¹ In *Bearden v. Georgia*, the court ruled that if a defendant willingly refuses to comply with these alternative measures, the court is justified in using imprisonment to enforce collection.² This line of cases spurred legislation requiring the use of acceptable alternative means. But, what are “acceptable alternative means?”

Because the answer is based upon legislative enactment and judicial authority, it will differ from state to state. Texas has defined alternative means as installment payments,³ community service,⁴ and, for children, tutoring in lieu of community service.⁵ These statutes give judges discretion in the application of the alternative means defined, but do not explicitly allow other alternative means of payment.

Installment Payments

Installment payments are a type of “alternative means” explicitly contemplated in *Tate v. Short*.⁶ Under current Texas law, if any amount of fine or costs assessed for a misdemeanor are not paid within 30 days, the defendant is assessed a time payment fee of \$25 on the 31st day.⁷ The amount assessed may be ordered paid immediately, at “some later date,” or in installments in designated intervals.⁸ Under this statute, judges have broad latitude in the amount of time a defendant may be allowed for payment of a fine, and in the amount and frequency of payment plans given, although the assessment of the one-time \$25 fee is mandatory if any amount is paid after the 31st day after the date that judgment is entered.⁹

Community Service

Converting fines to community service is explicitly provided for under Texas law. Article 45.049 of the Code of Criminal Procedure allows the court to require a defendant who fails to pay as previously ordered, or who the court determines is unable to pay, to discharge the fine and costs assessed in the form of community service.¹⁰ The judge has broad latitude as to the number of hours of community service which will be required, as long as not less than \$50 is discharged for each eight hours of community service performed.¹¹ A defendant may discharge an obligation to perform community service under Article 45.049 by paying at any time the fine and costs assessed.¹²

Texas has defined alternative means as installment payments, community service, and, for children, tutoring in lieu of community service. These statutes give judges discretion in the application of the alternative means defined, but do not explicitly allow other alternative means of payment.

The statute requires the judge to order the defendant to perform community service work “only for a governmental entity or a nonprofit organization that provides services to the general public that enhance social welfare and the general well-being of the community.”¹³ Although some advocates for change call for substitution of mentoring, job training, or other means to benefit the defendant and society in place of community service work, the current wording of the statute seems to preclude such an expansion of the system. Such an expansion would require legislative action, either to expand Article 45.049, or to authorize such a program separately.

Tutoring

Article 45.0492 is an example of legislative expansion of the concept of “community service.” Under this article, the court may require juveniles assessed fines or costs for certain offenses either to perform community service, or to “[attend] a tutoring program that is satisfactory to the court.”¹⁴ This applies only to Class C misdemeanors committed by juveniles in buildings or on the grounds of primary or secondary schools, at which the juvenile is enrolled.

Waiving Fines and Costs

Judges may not waive fines and costs as an alternative means of payment.¹⁵ Only after a defendant has defaulted in payment, if the judge determines that the defendant is either indigent or a child, and that community service would impose an undue hardship, may the judge waive payment of a fine or costs imposed.¹⁶

Policy Considerations

Currently, under Texas law, alternative means consists of installment payments, community service, and for children, tutoring in lieu of community service. Within the bounds of the Code of Judicial Conduct, judges could 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 a defendant resides 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.

By conceptualizing a broader meaning of “community service,” the Legislature could authorize mentoring, job training, and other means that benefit the defendant and society.

From a policy standpoint, “alternative means” does not mean eliminating punitive consequences for criminal behavior on the basis of socioeconomic status. 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.”¹⁷

Citing *Williams v. Illinois* (1970),¹⁸ the U.S. Supreme 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.”¹⁹ 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.”²⁰

Under *Bearden*, “alternative means” are “alternative punishments.”²¹ 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.”²² Alternative means do not, however, mean preventing the lawful incarceration of indigent defendants.

1. *Tate v. Short*, 401 U.S. 395, 399-401 (1971).
2. *Bearden v. Georgia*, 461 U.S. 660, 668 (1983).
3. Article 45.041, Code of Criminal Procedure.
4. Article 45.049, Code of Criminal Procedure.
5. Article 45.0492, Code of Criminal Procedure.
6. *Tate*, 401 U.S. at 400 n. 5.
7. Section 133.103, Local Government Code.
8. Article 45.041(b), Code of Criminal Procedure.
9. Section 133.103, Local Government Code.
10. Article 45.049(a), Code of Criminal Procedure.
11. Article 45.049(e), Code of Criminal Procedure.
12. Article 45.049(a), Code of Criminal Procedure.
13. Article 45.049(c), Code of Criminal Procedure.
14. Article 45.0492(b), Code of Criminal Procedure.
15. Article 45.0491, Code of Criminal Procedure.
16. *Id.*

17. *Tate*, 401 U.S. at 399 (1971).
18. *Williams v. Illinois*, 399 U.S. 235, 244 (1970).
19. *Tate*, 401 U.S. at 400-01 (1971).
20. *Bearden*, 461 U.S. at 664-65 (1983).
21. *Bearden*, 461 U.S. at 674.
22. *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.

Setting the Record Straight: Class C Misdemeanors, the Right to Counsel, and Commitment to Jail

Neither federal case law nor the DOJ “Dear Colleague” Letter supports the argument that the U.S. Constitution forbids commitment of indigent persons in the absence of appointed counsel.

A defendant accused of a Class C misdemeanor, like any other defendant accused of a criminal matter in Texas, has the right to be represented by counsel in an adversarial judicial proceeding.¹ In Texas, the constitutional right to counsel is implemented through the Code of Criminal Procedure (primarily Articles 1.051 and 26.04). The right to be represented by counsel includes the right to consult with counsel in private, sufficiently in advance of a proceeding to allow adequate preparation for the proceeding.² This right to representation, however, does not necessarily entitle a defendant to court-appointed counsel.

Class C Misdemeanors are Generally Excluded from Texas Appointment of Counsel Statutes

For purposes of Articles 1.051, 26.04, and 26.05 of the Code of Criminal Procedure, “indigent” means a person who is not financially able to employ counsel.³ However, such indigent defendants are generally only entitled to a court-appointed attorney in an adversarial judicial proceeding that may result in punishment by confinement.⁴ This excludes Class C misdemeanors in which the sentence is limited to the payment of the fine and costs to the state.⁵ This means that a defendant accused of a Class C misdemeanor has the right to be represented by counsel, but is not entitled to *court-appointed* counsel. Note that Article 26.04 of the Code of Criminal Procedure “authorize[s] *only* the judges of the county courts, statutory county courts, and district courts trying criminal cases” (or their designees) to appoint counsel for indigent defendants who are arrested, charged, or appealing a conviction of misdemeanors punishable by confinement (*i.e.*, Class A or Class B misdemeanors) or a felony.⁶

This means that a defendant accused of a Class C misdemeanor has the right to be represented by counsel, but is not entitled to court-appointed counsel.

Class C misdemeanor cases do not warrant the appointment of counsel under either federal or Texas case law. The U.S. Supreme Court, in *Scott v. Illinois*, drew a bright line between incarceration (as part of a sentence) and the mere threat of incarceration (separate from a sentence), holding that the 6th and 14th Amendments require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State had afforded him the right to appointed counsel.⁷ Citing *Scott v. Illinois*, Texas appellate courts have been consistent and clear: When the sentence in a criminal case consists only of monetary punishment, be it a Class C misdemeanor,⁸ or even a misdemeanor punishable by confinement, a defendant is not entitled under the U.S. Constitution or Texas law to court-appointed counsel.⁹ The Court of Criminal Appeals has similarly held “that when only a fine is actually assessed in a misdemeanor case, the judgment is not void even though the defendant was indigent, was not represented by counsel, and was convicted under a statute which included imprisonment as a possible punishment.”

Statutory Exception: Interest of Justice Appointments

Texas law, however, does not absolutely preclude appointments of counsel in Class C misdemeanor cases and provides that any court may appoint counsel if it concludes “the interest of justice” requires representation.¹¹ The law is silent regarding the procedure or funding for such appointments and what “the interest of justice” means. A defendant’s indigent status does not appear to be determinative. Texas legal scholars have opined that interest of justice appointments should be determined largely on the basis of whether the case presents defensive possibilities that only an attorney could adequately present to the court.¹² While the Court of Criminal Appeals has not addressed interest of justice appointments in the context of Class C misdemeanors, federal case law suggests that “special circumstances” in

When the sentence in a criminal case consists only of monetary punishment, be it a Class C misdemeanor,⁸ or even a misdemeanor punishable by confinement, a defendant is not entitled under the U.S. Constitution or Texas law to court-appointed counsel.

which failure to appoint counsel results in a trial lacking “fundamental fairness” violate due process and could trigger such an appointment.¹³

Waiver of Right to Counsel Requirements are Inapplicable to Class C Misdemeanors

The right to counsel in Class C misdemeanor cases also operates differently than in cases involving sentences of incarceration regarding waiver of the right to counsel. Article 1.051(f) of the Code of Criminal Procedure permits the right to counsel to be waived “voluntarily and intelligently” in writing. That subsection goes on to say that a waiver is invalid if obtained in violation of subsections (f-1) or (f-2), which only apply to adversary judicial proceedings that may result in punishment by confinement. Case law is instructive as to whether Article 1.051(f) mandates such a waiver in Class C misdemeanor cases. The language of Article 1.051 comes from the U.S. Supreme Court case, *Argersinger v. Hamlin*, which held that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.”¹⁴ The Court was clear, however, that its holding was limited to misdemeanors where defendants were sentenced to a term of incarceration.¹⁵ Under *Argersinger*, in misdemeanors “that end up in the actual deprivation of a person’s liberty, the accused will receive the benefit of ‘the guiding hand of counsel’ so necessary when one’s liberty is in jeopardy.”¹⁶ More recent Supreme Court case law states that “only trials that end up in the actual deprivation of a person’s liberty require that the accused receive ‘the guiding hand of counsel.’ A court that ends up fining a defendant has not placed that liberty in jeopardy.”¹⁷ Of course, though not required, nothing precludes a judge from ascertaining whether a defendant has intelligently and knowingly waived the right to counsel or from making sure a defendant understands the right to counsel and the disadvantage of proceeding pro se.

Court-Appointed Counsel in the Context of Commitment to Jail for a Class C Misdemeanor

In Texas, some advocates for indigent defendants contend that case law and the DOJ’s “Dear Colleague” letter make it clear that the U.S. Constitution forbids commitment of indigent persons to jail in the absence of the appointment of counsel. The opposite is true. The DOJ letter states that “Courts must provide meaningful notice and, in *appropriate cases*, counsel when enforcing fines and fees.”¹⁸ As previously explained, however, case law makes it clear that Class C misdemeanors are not *appropriate cases*. 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. Contentions to the contrary misrepresent federal case law. Such arguments also contradict civil libertarians who have long 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 v. Illinois*.¹⁹

1. Article 1.051(a), Code of Criminal Procedure.
2. Article 1.051(a), Code of Criminal Procedure.
3. Article 1.051(b), Code of Criminal Procedure. This definition only applies to the specifically mentioned statutory provisions and is defined nowhere else. See, Defining Indigence on page 17 of this issue of *The Recorder*.
4. Article 1.051(c), Code of Criminal Procedure. The only exceptions are interest of justice appointments (discussed below).
5. Article 45.041(a), Code of Criminal Procedure.
6. Article 26.04, Code of Criminal Procedure. Emphasis added.
7. *Scott v. Illinois*, 440 U.S. 367 (1979).
8. *Bush v. State*, 80 S.W.3d 199, 199 (Tex. App.—Waco 2002, no pet.).
9. *Fortner v. State*, 764 S.W.2d 934, 934-35 (Tex. App.—Fort Worth 1989, no pet.).
10. *Empy v. State*, 571 S.W.2d 526, 528 (Tex. Crim. App. 1978). Capitalization of “Only” in original text for emphasis. In 1987, the Legislature amended Article 26.04. It retained the phrase “punishable by imprisonment,” but clarified that the right to court appointed counsel was guaranteed to defendants accused of Class A and Class B misdemeanors regardless of the punishment imposed in their cases.
11. Article 1.051(c), Code of Criminal Procedure.
12. George B. Dix and John M. Schmolesky, 42 Criminal Practice and Procedure, Sec. 29.32 (Texas Practice 3d ed. Thompson Reuters/West 2011).
13. Ryan Kellus Turner, “The Oversimplification of the Assistance of Counsel in the Adjudication of Class C Misdemeanors,” *The Recorder* (January 2009).
14. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The Court reversed the Florida Supreme Court which had relied on the U.S. Court for the Southern District of Florida practice of appointing counsel only where imprisonment for the offense was greater than six months.
15. *Id.* at 40.
16. *Id.*
17. *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.
18. DOJ Dear Colleague Letter of March 14, 2016 (emphasis added), available at <https://www.justice.gov/crt/file/832461/download>.
19. 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.

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TMCEC MISSION STATEMENT

To provide high quality judicial education, technical assistance, and the necessary resource materials to assist municipal court judges, court support personnel, and prosecutors in obtaining and maintaining professional competence.

ABOUT TMCEC

The Texas Municipal Courts Education Center (TMCEC) was formed in 1984 by the Texas Municipal Courts Association (TMCA) to provide extensive, continuing professional education and training programs for municipal judges and court personnel. TMCEC is financed by a grant from the Court of Criminal Appeals out of funds appropriated by the Legislature to the Judicial and Court Personnel Training Fund.

In 2006, TMCEC was incorporated as 501(c)(3) non-profit corporation exclusively for charitable, literary, and educational purposes of providing: (1) judicial education, technical assistance, and the necessary resource material to assist municipal judges, court support personnel, and city attorneys in obtaining and maintaining professional competence in the fair and impartial administration of criminal justice; and (2) information to the public about the Texas judicial system and laws relating to public safety and quality of life in Texas communities.

TMCEC conducts courses in various locations throughout the state to facilitate compliance by municipal judges with the Court of Criminal Appeals' order mandating continuing education on an annual basis. Courses are offered for judges, clerks, court administrators, bailiffs, warrant officers, juvenile case managers, and prosecutors. At this time, annual attendance at judicial education programs is not mandatory for court clerks, but is highly recommended.

Sponsoring more than 40 events annually, and providing professional and law-related education to more than 5,000 people, TMCEC is one of the largest organizations of its kind in the United States of America. TMCEC has an outstanding cadre of faculty members that consists of judges, attorneys, and other professionals from throughout the nation. TMCEC takes pride in the quality and content of its conferences and work product. It has earned the praise of judges, attorneys, policy makers, and court professionals throughout the Lone Star State.