Lessons From Ferguson: Rededicating Local Courts To Procedural Fairness And The Rule Of Law

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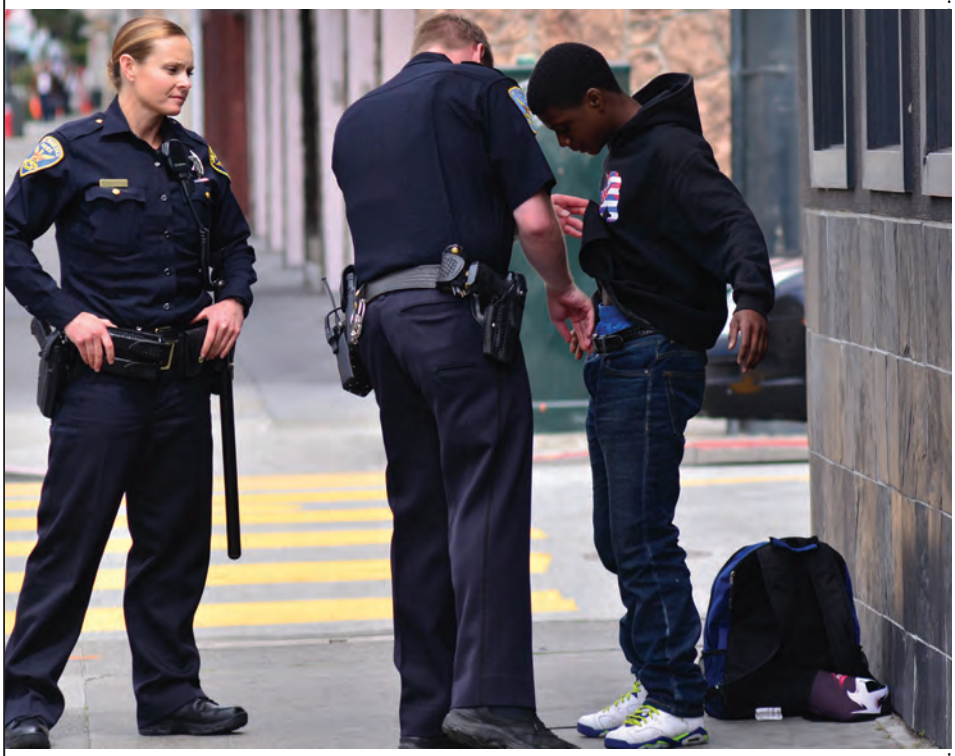

LESSONS FROM FERGUSON
How much do you know about Ferguson, Missouri?

If you are like most Americans, what you know about the subject is limited to what you gleaned from the cable news networks: on August 9, 2014, Officer Darren Wilson shot and killed 18-year-old Ferguson resident Michael Brown. The incident set off a year of protests that placed a community of 20,000 people at the center of a vigorous debate about the relationship between police and African Americans, the militarization of law enforcement, and the use of force doctrine.

In less than two years, what began as a discussion about criminal justice policy evolved into a national dialog on social justice and economic inequality. In response to the shooting, the U.S. Department of Justice (DOJ) conducted an investigation into the policing practices of the Ferguson Police Department (FPD). In March 2015, the DOJ announced that the FPD had engaged in misconduct by discriminating against African Americans and applying racial stereotypes in a "pattern or practice of unlawful conduct."[1]

While the 100-page DOJ report focused primarily on FPD law enforcement shortcomings, it also described how practices in the Ferguson Municipal Court imposed substantial and unnecessary barriers to indigent defendants, eroded community trust, undermined the FPD, and exacted a devastating toll on Ferguson and its residents:

> St. Louis County's municipal courts [including the Ferguson Municipal Court] didn't kill Michael Brown. But they were a major contributor to the outrage and distrust that was on display in Ferguson following Brown's death. Activists now contend that local courts throughout the nation are no different from the Ferguson Municipal Court and are operating "debtors' prisons."[2]

In March 2016, the DOJ issued a letter to state and local courts regarding their legal obligations with respect to the enforcement of fines and fees. That letter put all courts on notice that the "feds are joining the fight" as part of a broader campaign against what Attorney General Loretta Lynch called "the criminalization of poverty."

Missouri municipal courts were sued for unjust jail sentences, referred to by defense counsel as "poverty violations."[3] Civil rights attorneys around the country soon adopted a strategy to force reform in courts that allegedly targeted the poor: aggressively file lawsuits and publicize them in the media (i.e., impact litigation). Civil rights lawyers brought suits in New Orleans; Rutherford County, Tennessee; Biloxi and Jackson, Mississippi; Benton County, Washington; and Alexander City, Alabama.[4] In Texas, federal courts have dismissed lawsuits against the City of Austin and the City of Amarillo and, and as of date, a motion to dismiss is pending in a suit against the City of El Paso.[5]

In September 2016, the National Consumer Law Center in collaboration with the Criminal Justice Policy Program at Harvard Law School published Confronting Criminal Justice Debt: A Guide for Litigation. It is valuable resource for municipal lawyers seeking to better understand various related legal issues (civil and criminal).

For municipal attorneys, Ferguson and the increased use of impact litigation raises the question, "What if this was your hometown—is there something you could do to prevent a similar tragedy?" Fortunately, the DOJ report provides insights that may help other cities throughout the United States avoid a comparable experience.

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

A court is authorized to generate revenue incidentally through the imposition of fines and despite rhetoric to the contrary, there are strong policy arguments for expanded use of fines and other monetary sanctions in the American criminal justice system. Fines offset criminal justice costs and are cheaper to administer than jails and prisons. Offenders are potentially spared the criminalizing effects of incarceration and the long-term stigmatization that reduces income earning potential.

If, however, a court is viewed by government primarily as a source of revenue (as was the case in Ferguson),[6] the integrity of the judicial system is at grave risk. This is particularly true for municipal courts, with which the public interacts (whether as a

party, juror, witness, and so on) more than all other courts combined.[7] In the wake of Ferguson-inspired lawsuits, now is an ideal time to remind local officials and employees that 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 proceedings, it is also a primary reason why local governments are not held legally responsible for the decisions of local judges.[8]

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

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

WRONG ANSWER: Judges assess their own job performance based on revenue generation. Courts are viewed as profit centers and judges viewed as debt collectors in robes. Citations are an IOU. When defendants fail to appear in court, their presumption of innocence ceases to exist. Similarly, once an arrest warrant is issued, the defendant is no longer presumed innocent, despite never having entered a plea. Local government depends on revenue from the court in order to balance its budget. The court is more focused on revenue than public safety or quality of life. In a diagram of the local government structure, the court is under the finance department.

Which did you choose? To quote Indiana Jones and the Last Crusade, "You must choose, but choose wisely." Ferguson, as the nation now knows, "chose poorly." The question now is what kind of choices will your local and state officials make?

There is nothing new about the tension between the express and implicit functions of courts that impose fines as punishment and collect court costs.[9] This is not the first time that imposition of fines at the local government level has been called into question on a national level.[10] What is new, however, is the degree of public attention that is being drawn to "court costs" and other fees and surcharges that accompany fines.

Understandably, for most citizens there is no meaningful distinction between "fines," "court costs," and "fees." Regardless of the

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label, each entails money coming out of a defendant's pocket. Legally, however, it is important that the legislature, the governor, and all members of the judiciary can distinguish "fines" from other legal constructs involving the payment of monies.

The distinctions are becoming increasingly important. In the context of a criminal case:

> *Fines* – are assessed following conviction to punish a defendant for violating a law;
> *Court Costs* – are prescribed by the legislature, determined on a case-by-case basis and varied in relation to the activities involved in the course of the case; and
> *Fees* – are amounts charged for a service by a governmental entity.[11]

With noted exceptions, the media has done little to delve into such distinctions or to increase public awareness of how state-mandated court costs and fees are actually utilized.[12] Nationally, advocacy groups capitalize on this oversight by grouping criminal justice obligations (and the enforcement of lawful criminal court judgments) with private consumer debt (which they contend are enforced through illegal predatory collection practices). Public awareness of these distinctions is increasingly important, particularly amidst claims that municipal courts are turning jails into "debtors' prisons."[13]

To be clear, the public has long supported the imposition of "fines" (a form of retribution and punishment) for common criminal offenses (regardless of a defendant's socio-economic class). What is unclear is whether the public supports, or is even aware, that "court costs" are being used to pay for governmental expenditures which are debatably not related to the criminal justice system, let alone the matter that landed the defendant in court.[14]

LESSON TWO: How the Ferguson Municipal Court Harmed the Community

The DOJ report and letter provide insights that may prevent other American cities from witnessing similar tragedies. In finding that the Ferguson Municipal Court imposed substantial and unnecessary barriers to resolving simple municipal code violations, the DOJ identified various troublesome practices:

1. Procedural deficiencies created a lack of transparency regarding rights and responsibilities;
2. In-court appearances were often needlessly required for code violations;
3. Driver's license suspensions were unnecessarily prolonged by the court, making it difficult to resolve a case and imposing substantial hardship;
4. Even offenses not requiring an in-person court appearance were complicated by additional obstacles; and
5. High fines, coupled with legally inadequate ability-to-pay determinations and insufficient alternatives to immediate payment, imposed a significant burden

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on people living in or near poverty.[15] DOJ also reported that the Ferguson Municipal Court imposed unduly harsh penalties for missed payments or appearances, using arrest warrants to secure payment and exacting onerous bond requirements for release from the Ferguson City Jail.[16]

LESSON THREE: Ferguson-Related Legislative Reforms

Nine months after Michael Brown's death, the Missouri legislature passed S.B. 5 (effective August 28, 2015), which, among other things, authorized payment plans, community service for indigent defendants, capped the amount of revenue that municipalities can collect in traffic cases, prohibited jail sentences for common traffic offenses, and abolished the offense of failure to appear for traffic violations.

The Ferguson Commission Report entitled "*Forward through Ferguson: A Path toward Racial Equity*" was issued on September 14, 2015. The 197-page report includes four sets of "calls to action" to guide legislation and community action in improving racial equality in the region.[17] The Ferguson Commission calls for the elimination of incarceration for all minor offenses, for such offenses to be decriminalized, and fines for such offenses to be collected in the same manner as civil debts. While the report does not define "minor offenses," anecdotally it includes traffic offenses (*e.g.*, Driving While License Suspended, Expired License Plates, No Insurance, and Speeding). To avoid assessing a fine or fee a person cannot afford, the Commission suggests that municipal courts should be required to determine a defendant's ability to pay at the defendant's first court appearance and all subsequent hearings.

GOING FORWARD: ASSESSING NEEDS AND PERILS

The events in Ferguson, the shooting of Tamir Rice in Cleveland, the suicide of Sandra Bland in Waller County, Texas, and the subsequent series of violent police and community interactions around the nation seemingly put us at a flashpoint in American legal history. Advocates for reforming America's criminal justice system, such as the American Civil Liberties Union (ACLU), deserve the lion's share of credit for increasing public awareness of the plight of the indigent in American courts.

Real change, including in the criminal justice system, seldom occurs from the top down and it never occurs when people merely observe and remain idle. It occurs from the bottom up—when people stand up and speak out against injustice. Two examples of how real change came about involve cases that began at the local level and were argued all the way to the U.S. Supreme Court. These two decisions remain of paramount importance to the civil liberties of indigent defendants and are at the heart of the debate involving local courts:

- *Tate v. Short* (1971) - The Equal Protection Clause of the 14th Amendment prohibits states from imposing a fine as a sentence and automatically converting it to a jail term solely because the defendant is indigent and cannot pay the fine in full.[18]
- *Bearden v. Georgia* (1983) - A sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was responsible for the failure or that alternative forms of punishment were inadequate to meet the State's interest in punishment and deterrence.[19]

These two decisions can be construed to stand for the propositions that (1) the 14th Amendment requires that defendants accused of fine-only offenses be provided "alternative means" of discharging the judgment to avoid incarceration; and (2) converting a fine and/or court costs into a term of confinement without a judicial inquiry into the reasons for nonpayment and whether nonpayment was willful violates notions of fundamental fairness. In essence, a defendant who is indigent may only be committed to jail after being afforded an alternative means of discharging fines and costs.

A. Assessing Needs

Before leaping to action, lawmakers would be wise to understand the problems facing courts and defendants. Some of those challenges, and some potential solutions, include the following:

1. A Call to Judicial Action

Judges are not immune to the human tendency to form opinions based on their own experiences. As Dr. Steven Covey explains in the "5th Habit" of his book, The 7 Habits of Highly Effective People, people can look at the same thing from completely different perspectives because they understand "autobiographically." In order to effectively handle Ferguson-related issues, it is important for the judiciary to understand what organizations like the ACLU are claiming is happening in municipal courts in America. The ACLU's written statement before the U.S. Commission on Civil Rights hearing on Municipal Policing and Courts is particularly illuminating (March 18, 2016).[20] What is reported to have occurred in courts in Ohio, Georgia, Mississippi, and Washington is very disturbing.

The key to preventing this kind of misconduct is increased awareness and vigilance. Leadership on these issues is needed at all levels of the judiciary and at all levels of government. Change will not occur if local judges merely observe and remain idle.[21]

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

Similarly, national organizations like the Conference of Chief Justices and the Conference of State Court Administrators (COSCA) created a national task force on fines, fees, and bail practices. In September 2016, COSCA published a policy paper detailing specific policies and practices that courts can adopt to minimize the negative impact of legal financial obligations while ensuring accountability for individuals who violate the law.

2. The Role of Education

Education of voters is the best way to ensure that bad judges are neither elected nor appointed to the office. Education of judges and municipal officials is equally important. As previously explained, there is nothing wrong with local governments retaining

fines, but such revenue must be viewed as an incidental byproduct of justice. Courts should not be viewed by local or state governments as profit centers. Legislation is not required in order for judges to share best practices, such as the use of "safe harbor" and other techniques aimed at reducing the number of people arrested. Judges can be taught to use technology such as the living wage calculator[22] to assist them in determining whether a defendant is indigent.

3. Collaboration on Public Policy—An Example

Last year, the Center for Public Interest Law at the University of Texas facilitated two stakeholder conversations on collections, fines, and fees. A wide range of key stakeholders, including members of the judiciary, state and regional government representatives, civil rights advocates, and public policy experts were invited. The goal of the conversations was to identify shared priorities with an eye toward the 85th Texas Legislature in 2017.

Consensus is possible. The stakeholder conversation revealed that among differing opinions there is ample room for agreement on matters of public policy. Four particularly promising initiatives are presented here:

a. Better Tools for Determining Indigence

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

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

Currently, under Texas law, alternative means consists of installment payments, community service, and for children, tutoring in lieu of community service.[23] Within the bounds of the Code of Judicial Conduct, judges should be given more leeway as to what else might constitute "alternative means." By conceptualizing a broader meaning of "community service," the Legislature could authorize mentoring, job training, and other means that benefit the defendant and society.

Just as it is wrong for judges to make sweeping generalizations about indigent defendants, it is wrong for critics to make similarly sweeping generalizations about the law, courts, and judges. State laws differ. As a consequence, so do municipal courts. This is important and often overlooked by the national media.

c. Broaden the Use of "Show Cause" Hearings

To comply with one of the requirements of *Bearden*, Chapter 45 of the Texas Code of Criminal Procedure already requires courts to give defendants an opportunity to explain themselves at a "show cause" hearing. This is intended to avoid the prospect of possible arrest for failure to submit proof of completion of a driving safety course, or failure to submit proof of compliance with the terms of deferred disposition.[24] It is an oversight in Texas that there is no similar statutory requirement that defendants be afforded an opportunity to "show cause" prior to the issuance of a capias pro fine. Similarly, defendants, particularly if they are indigent, after the imposition of judgment should statutorily be provided an opportunity to request a hearing before the court where their financial circumstances can be considered. Defendants should have the ability to access courts regardless of financial condition and the posting of a bond or other form of security should not be required.

d. Time Payment of Fees

Installment payments are a type of "alternative means" contemplated in *Tate v. Short*.[25] Indigent defendants should not necessarily have to pay more in court costs, as is currently required by Texas law,[26] simply because they cannot pay the total balance of all fines, costs, and restitution within 30 days.

B. Perils to Progress

Despite the success of stakeholder conversations in identifying promising public policy reforms, efforts to change laws in Texas and elsewhere may be endangered for two reasons:

1. The Danger of Sweeping Generalizations. Municipal courts have increasingly been subject to a steady barrage of mostly negative media coverage. Advocacy groups tend to welcome such public clamor because it has the potential to influence public opinion and pave the way for changes in public policy. However, it is possible, particularly in Texas, that sensational and inaccurate headlines coupled with sweeping generalizations could derail reform efforts.

Consider the following headline from *BuzzFeed* in October 2015:

> "THEIR CRIME: BEING POOR. THEIR SENTENCE: JAIL. People in Texas get thrown in jail just because they can't afford their traffic tickets."[27]

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

In an age where it pays to play to people's biases, digital ink costs nothing and clickbait has proven to be profitable. Content aimed at generating advertising revenue comes at the expense of accuracy. This appears particularly true when it comes to headline writing. In the age of Facebook and Twitter, success is measured by the number of reads, shares, likes, and re-tweets and makes it easy to lose sight of what has traditionally been considered the attributes of good journalism.[28]

Just as it is wrong for judges to make sweeping generalizations about indigent defendants, it is wrong for critics to make similary sweeping generalizations about the law, courts, and judges. State laws differ. As a consequence, so do municipal courts. This is important and often overlooked by the national media. Although most states have municipal courts, these courts are not governed by a single set of laws. Thus, it is improper to attribute the statutorily authorized acts of one municipal court in one state to all municipal courts in

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the United States.

Municipal court jurisdiction in America varies widely. While some municipal courts have jurisdiction over fine-only misdemeanors (*e.g.*, Texas[29]), others have jurisdiction over misdemeanor offenses punishable by a sentence of jail (*e.g.*, Mississippi[30] and Missouri[31]). Municipal courts in states like Texas are part of the state judiciary; state law governs most facets of their existence. In states like Missouri, prior to what happened in Ferguson and changes to state law in 2015, municipal courts were predominantly vestiges of municipal government and operated in the shadows of state laws.[32] Accordingly, when assessing courts and their treatment of indigent defendants, the laws of each state must be considered independently.

Likewise, when discussing *Argersinger v. Hamlin* (1971),[33] *Scott v. Illinois* (1979),[34] and other Supreme Court decisions relating to the right to counsel, it is important to distinguish between different types of misdemeanor sentences and not make sweeping generalizations. Defendants in Texas accused of Class C misdemeanors (offenses punishable by fine only) have the right to counsel. However, a sentence consisting only of the imposition of fine and costs is not a deprivation of liberty. Commitment to jail for 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.

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

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

High-flung rhetoric and divisive dysphemisms are nothing new. More than two decades ago in *Bearden*, the Court warned that the issues "cannot be resolved by resort to easy slogans or pigeonhole analysis."[35] In the context of the "criminalization of poverty" and other hyperbole, the danger of such sweeping generalizations is that critical consumers of information are left with the responsibility of separating facts from opinions and distinguishing isolated incidents from normal practices. This can have unintended consequences. When key decision-makers become fatigued, deceived, and divided along ideological lines, effective reforms are less likely.

2. The Danger of Inverse Discrimination

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

The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.[36]

Citing *Williams v. Illinois* (1970),[37] the Court, in qualifying its mandate that alternative means be provided to indigent defendants, acknowledged the existence of a valid state interest in enforcing payment of fines. The Court also emphasized that its holding did not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor was the *Tate* decision to be understood "as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means."[38] 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."[39]

Following Ferguson and the DOJ report, such limits may be put to the test in state legislatures and in local governments. What constitutes "alternative means" may be getting turned on its head. In the emerging canon of modern "debtors' prison" literature, seldom do writers acknowledge: "The *Bearden* line of cases thus endeavors to shield criminal justice debtors making a good faith effort to pay, while leaving willful nonpayment unprotected."[40]

Rather, as Professor Neil Sobol at Texas A&M School of Law explains, "given the return of debtors' prisons as well as the historical concerns that led to calls for their abolition, it is time to implement more effective alternatives to reduce the incarceration of individuals who are unable to pay legal financial obligations."[41]

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

a. abolishing monetary sanctions;
b. basing fines on defendants' earnings; and
c. developing "a more effective system for enforcing existing laws designed to prevent incarceration of indigents."[42]

These proposed alternatives are susceptible to several criticisms:

First, "alternative means" does not mean eliminating punitive consequences for criminal behavior on the basis of socioeconomics. That is tantamount to inverse discrimination. Under *Bearden*, "alternative means" are "alternative punishments."[43]

Second, while custom-tailored fines are preferable, the Constitution does not require a fine be custom-tailored to avoid disproportionate burdens on low-income defendants. In *San Antonio Independent School District v. Rodriguez* (1973), the Court, citing *Williams* and *Tate*, stated that it had "not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate."[44] In *San Antonio ISD*, the Supreme Court "expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive

rational basis review."[45] This holding has been extended in cases decided after *Williams* and *Tate*.[46]

Third, in the context of court-ordered fines and court costs, "alternative means" can entail either a non-monetary substitute or, as the Court stated in *Tate*, "a procedure for paying fines in installments."[47] "Alternative means" do not, however, prevent the lawful incarceration of indigents.

This is not the first time the status of a defendant has been the rallying cry of reformers, nor is it the first time municipal courts in Texas have been caught in the maelstrom. *Powell v. Texas*,[48] holding that Texas law criminalizing public intoxication did not constitute cruel and unusual punishment, began in the Austin Municipal Court and was decided by the Supreme Court in 1968. This is also not the first time people have argued that society loses its moral justification for punishing poor criminal defendants when it refuses to remedy the conditions of inequity and that poverty should be a defense to non-violent crimes, victimless crimes, and "crimes of poverty."[49]

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

III. A DIFFERENT "FERGUSON EFFECT"

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

Unquestionably, justice must be seasoned with mercy. Criminal justice, however, is not social justice. This is not to say that restorative justice cannot play a role, but criminal law is retributive and does not necessarily advance social welfare.

- A proposed law in Philadelphia would permit police to issue civil citations instead of criminal summonses for certain low-level offenses. The legislation "would decriminalize certain violations such as disorderly conduct, refusing to disperse, and public drunkenness."[50]
- In New York City, the police will no longer arrest people for minor infractions such as drinking alcohol in public, urinating in public, or littering in Manhattan. The District Attorney's Office will no longer prosecute most "quality of life" violations.[51]
- The Mayor and City Council of New York are working on a plan to purge "needless warrants" for "small crimes."[52]

Most of these kinds of reform seem aimed at "Broken Windows" policing, and are not without controversy. Against criticism that "Broken Windows" is discriminatory and being used to target minorities, one of the authors of the theory, George L. Keeling, maintains that it is misunderstood by critics, has been misused by some in law enforcement, and continues to be needed. Keeling asserts that quality of life crimes are not victimless; they harm whole neighborhoods, and in New York City, the Broken Window approach has saved lives – most of them minority – cut the jail population, and reknit the social fabric.[53]

The consequence of switching-up police power tactics is not entirely understood. San Francisco, a city known for a tradition of official empathy for the downtrodden, is now divided over whether to respond with more muscular law enforcement or stick to its forgiving attitudes. One member of the local government says, "We are not going to criminalize people for being poor," while another says that San Francisco at times is a "consequence-free" zone.[54] The debate in San Francisco seems all too familiar.

Conclusion

Since 1791, the 10th Amendment has articulated that powers not expressly delegated to the Federal Government are reserved to the states.[55] These powers include the states' authority to regulate behavior and enforce order within their boundaries for the betterment of the health, safety, morals, and general welfare of their inhabitants.[56]

Regardless of whether these powers are exercised under the auspices of criminal or civil law, the 14th Amendment prohibits states and local governments from "enforcing the law" while violating the most important individual safeguards contained in the Bill of Rights.

In the wake of the events in Ferguson, it is not just notions of equal protection and due process that are in question; it is the fundamental use of police powers. Our society regularly endeavors to strike a sound balance between individual and societal interests. The question is how we can better serve the interests 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? The lessons from Ferguson are an opportunity for municipalities—judges, lawmakers, and local government attorneys—throughout the nation to rededicate local courts to both procedural fairness and upholding the rule of law. It is not a binary choice.

Notes

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2. *Id.*
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4. Joseph Shapiro, *Lawsuits Target "Debtors' Prisons" Across the Country*, NPR MORNING EDITION (OCTOBER 21, 2015), http://www.npr.org /2015/ 10/21/ 450546542/ lawsuits-target- debtors-prisons-across-the-country; Rick Anderson, *Debtors Prison a Thing of the Past? Some Places in America Still Lock Up the Poor*, LA TIMES (June 8, 2016), http://www.latimes.com/nation/la-na-debtors-prison- 20160607-snap-story.html.
5. *Harris v. City of Austin*, No. A-15-CA-956-SS, 2016 U.S. Dist. LEXIS 33694, at *1 (W.D. Tex. 2016); Robert Stein, *City Sued Over Municipal Fines Policy*, AMARILLO GLOBE-NEWS (January 15, 2016), http://amarillo.com/news/crime-and-courts/2016-01-15/city- sued-over-municipal-fines-policy; Kendall Taggart and Alex Campbell, BUZZFEED NEWS, *El Paso Sued Over Jailing For Unpaid Tickets*, EL PASO TIMES (April 20, 2016), http://www.elpasotimes.com/story/news/2016/04/20/el-paso- sued-over-jailing-unpaid-tickets/83277736/.
6. Dep't of Justice, *supra*, at 9-10.
7. RYAN KELLUS TURNER AND W. CLAY ABBOTT, MUNICIPAL JUDGES BOOK (Texas Municipal Courts Education Center 5th ed. 2014) at 1-3.
8. 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*, 565 F.3d 214, 227 (5th Cir. 2009) citing *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995). However, when judges are not acting independently, but effectuate official policies or customs that violate constitutional rights, municipalities face liability including monetary damages and injunctive relief. *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997).
9. Turner and Abbott, *supra*, at 1-31. The express function of such courts is to preserve public safety, protect quality of life, and deter further criminal behavior. The implicit function is revenue generation. In Texas, municipal courts generated more than $681 million in 2013. The tension between the express function and implicit function (which when viewed in the proper perspective is an incidental benefit) has long been a source of conflict between municipal courts and city councils. *Id.* at 1-32.
10. Consider *Ward v.Village of Monroeville*, 409 U.S. 57, 60 (1972), where a conviction was invalidated because the mayor faced a "possible temptation" created by his "executive responsibilities for village finances."
11. Carl Reynolds and Jerry Hall, Conference of State Court Administrators, *2011-2012 Policy Paper: Courts are Not Revenue Centers* 2 (2011).
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); and Dan Feldstein, *"Loser Fees" Taking Place of New Taxes*, HOUSTON CHRONICLE (March 5, 2006).
13. Texas Appleseed, *Debtors' Prisons*, https://www.texasappleseed.org/debtors-prisons (last visited June 16, 2016).
14. In Texas, for example, court costs may be applied to no fewer than 14 different cost centers, many of which have nothing to do with the actual costs of operating a court. While lawyers have argued that such costs are actually taxes, the collection of which violates separation of powers, in *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App. 2015), the court held that as long as the statutory assessment reasonably relates to the costs of administering the criminal justice system, it is not a tax in violation of separation of powers.
15. U.S. Dep't of Justice, *supra*, at 43-55.
16. *Id.* at 55-58.
17. The Ferguson Commission, *Forward Through Ferguson: A Path Toward Racial Equality* 30 (2015).
18. *Tate v. Short*, 401 U.S. 395, 397-401 (1971).
19. *Bearden v. Georgia*, 461 U.S. 660, 664-674 (1983). While *Bearden* does pertain to fines and fees, its application to offenses punishable by the imposition of a fine is less straightforward than one may imagine. It should come as no surprise that there is still debate about *Bearden*, as commentators have observed that states do not necessarily agree on its application.
20. Nusrat Choudhury, American Civil Liberties Union, *Written Statement of the American Civil Liberties Union Before the United States Commission on Civil Rights* (2016).
21. Ed Spillane, *Judges Can Fix the System: Here is How*, JUDICATURE (Winter 2016) at 52.
22. 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/ (June 20, 2016).
23. Tex. Code Crim. Proc., art. 45.041, art. 45.049, and art. 45.0492.
24. Tex. Code Crim. Proc., art. 45.0511(i)-(k) and art. 45.051(c-1)-(d).
25. *Tate v. Short*, 401 U.S. 395, 400 n.5 (1971).
26. Tex. Loc. Gov't Code, § 133.103.
27. Kendall Taggart, Alex Campbell, *In Texas It's a Crime to be Poor*, BUZZFEED (October 7, 2015), https://www.buzzfeed.com/kendalltaggart/in-texas-its-a-crime-to-be-poor.
28. *See* Jeffrey Dvorkin, *Why Click-Bait Will Be the Death of Journalism*, PBS Newshour (April 27, 2017), http://www.pbs.org/newshour/making-sense/what-you-dont- know-about-click-bait-journalism-could-kill-you/.
29. *See* Tex. Code Crim. Proc., art. 4.14.
30. Miss. Code Ann., § 21-23-19 (2013).
31. Mo. Rev. Stat., §§ 77.590, 79.470 (2015).
32. *See* Dep't of Justice, *supra* note 7.
33. *See* 407 U.S. 25, 37 (1972). (holding that, absent a knowing and intelligent waiver, *no person may be imprisoned* for *any offense* ... unless he was represented by counsel at his trial) (emphasis added).
34. *See* 440 U.S. 367 (1979). Affirming, *Argersinger* drew a bright line between incarceration (as part of a sentence) and the mere threat of incarceration (separate from a sentence). As the Court explained in *Scott*, "[t]he central premise of *Argersinger* – that actual imprisonment is a penalty *different in kind from fines or the mere threat of imprisonment* – is eminently sound and warrants adoption of *actual imprisonment* as the line defining the constitutional right to appointment of counsel." *Id.*, at 373. Emphasis added.
35. 461 U.S. at 666-667.
36. *See* Tate, 401 U.S. at 399 (1971).
37. 399 U.S. 235, 244 (1970).
38. Tate, 401 U.S. at 400-01 (1971) (emphasis added).
39. Bearden, 461 U.S. at 664-65 (1983).
40. *Note: State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, at n. 22 and 1026 (2016).
41. Neil L. Sobol, *Article: Charging the Poor: Criminal Justice Debt & Modern Day Debtors' Prisons*, 75 MD. L. Rev. 486, 524.
42. *Id.* at 524-532. Additionally, Sobol proposes his own hybrid approach. *Id.* at 532-540.
43. Bearden, 461 U.S. at 674.
44. 411 U.S. 1, 21-22 (1973).
45. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed. 2006) at 786.

46. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980).
47. 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.
48. *See* 392 U.S. 514 (1968). The Supreme Court rejected the principal that "[criminal] penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 533.
49. Michele Estrin Gilman, *The Poverty Defense*, 47 U. Rich. L. Rev. 495 (January 2013).
50. Joseph Ax, *Philadelphia, Eying Democratic Convention, to Decriminalize Minor Offenses*, Philadelphia Inquirer (June 8, 2016) http://www.philly.com/philly/news/politics/dnc/20160607_Reuters_L1N18Z1VA_Philadelphia eying Democratic_convention to_decriminalize_minor_offenses.html.
51. Dareh Gregorian, *Littering, Public Urination and Other Minor Offenses in Manhattan Will Lead to Summons and Not Arrest*, New York Daily News (March 1, 2016) http://www.nydailynews.com/new-york/nyc-crime/minor- offenses-manhattan-no-longer-result-arrests-article- 1.2549474.
52. Jennifer Fermino, *Mayor de Blasio, City Council Working on Plan to Purge NYPD Warrants for Small Crimes*, N.Y. Daily News (February 12, 2016) http://www.nydailynews.com/news/politics/mayor-council- purge-old-warrants-small-crimes-article-1.2530407.
53. George L. Kelling & William J. Bratton, *Why We Need Broken Windows Policing*, City J., Winter 2015
54. Thomas Fuller, *San Francisco Torn as Some See 'Street Behavior' Worsen*, N.Y. Times (April 24, 2016) http://mobile.nytimes.com/2016/04/25/us/san-francisco-torn- as-some-see-street-behavior-worsen.html?referer=.
55. *See* U.S. Const., amend. X.
56. Since 1948, it has been well-settled law in Texas that driving an automobile on public roads is not a constitutionally-protected right, but a privilege. Taylor v. State, 151 Tex. Crim. 568, 569, 209 S.W.2d 191, 191 (1948); Naff v. State, 946 S.W.2d 529, 531 (Tex. App.—Fort Worth 1997); *Ex parte* Arnold, 916 S.W.2d 640, 642 (Tex. App.—Austin 1996). This privilege is subject to reasonable regulation under the State's police power in the interest of the welfare and safety of the general public. *Naff*, 946 S.W.2d at 533. ML

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or message conveyed on those sites. The limitations imposed by the statute are based not upon speech contained in or posted on a site, but instead focus on whether functions of a particular Website are available for use by a minor. (368 N.C. 380, at 386)

Because it concluded that the law was content-neutral, the court applied intermediate scrutiny. It found that the statute was "carefully crafted" by prohibiting registered sex offenders from accessing websites where they could gather information about minors, while still allowing them to use websites "exclusively devoted to speech," including instant messaging services and chat rooms and websites where users must be at least 18 years old to maintain a profile. In this respect, North Carolina had sought to distinguish its statute from similar statutes in Indiana and Louisiana that did not allow registered sex offenders to use chat rooms and messaging services and were subsequently struck down.

The dissent took issue with the majority's characterization of the law as one regulating conduct and not speech and it also indicated that under *Reed* there was a "strong argument" that the statute was "content-based because it prohibits registered sex offenders from accessing some websites, but not others, based on the content that appears on the sites . . ."

The issue before the Supreme Court, as characterized in the petition for certiorari, is whether, under the court's First Amendment precedents, a law that makes it a felony for any person on the state's registry of former sex offenders to "access" a wide array of websites – including Facebook, YouTube, and NY Times.com – that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts, is permissible, both on its face and as applied to petitioner, who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

Although this case involves a state statute, it is directly applicable to local governments as it is a case involving the First Amendment / speech issues, and the North Carolina Supreme Court discussed *Reed* in its decision. IMLA therefore views this as a case that warrants participation as an amicus and will be joining the SLLC brief in this case. And as with *Expressions*, IMLA's arguments will depend on what the petitioner and other *amici* argue. This case has the potential to broaden the application to *Reed* into laws that regulate conduct and not just speech. That being said, it seems likely that the Court will determine that this regulation limits speech and does not pertain just to conduct. Assuming that is the case, IMLA hopes to be able to persuade the Court to push more laws and regulations into the realm of intermediate scrutiny under *Reed* by arguing that this is a content-neutral regulation.

See State v. Packingham, 368 N.C. 380, 777 S.E. 2d 738 (2015).

Lower Court First Amendment / *Reed* Cases

In addition to the foregoing Supreme Court cases, IMLA has also been involved in a number of cases in the lower federal and state courts involving important *Reed* issues. IMLA believes the *Reed* decision is of such importance to our members, that we filed an amicus brief in a federal district court case (which is extremely unusual as IMLA almost exclusively files briefs at the appellate levels). Because this case could easily become persuasive authority in a post-*Reed* world, IMLA believes our members deserve a voice in helping to shape the outcome of these cases.

Thomas v. Schroer, a case out of the Western District of Tennessee, involves the constitutionality of the core provisions of the Tennessee Highway Beautification Act (which is modeled on the Federal Highway Beautification Act), including local authority to regulate billboards. The issues in this case include: 1) whether the distinction between offsite signs and onsite signs is content-based; and 2) whether government signs are government speech.

Shortly after the *Reed* decision came down, the district court judge granted the plaintiff's preliminary injunction, concluding that the plaintiff was likely to succeed on the merits regarding its argument that the provision of the law distinguishing between on premise and off-premise signs was a content-based distinction.

The law in this area after *Reed* is still in its infancy, and IMLA wants to ensure that local governments' interests are represented in these cases. Because IMLA believes this case could pose a threat to billboard regulation across the country as it could be used as persuasive authority elsewhere, IMLA participated as an amicus in this case at the district court level.

See Thomas v. Schroer, No. 2:13-cv-02987 (W.D. Tenn. Sept. 13, 2016).

IMLA's legal advocacy program is just one of the benefits of IMLA membership. To learn more about the legal advocacy program, contact Amanda Kellar at akellar@imla.org. ML