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Confronting the Burden of Fines and Fees on Fine-Only Offenses in Texas: Recent Reforms and Next Steps

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Key Points

- Criminal defendants who cannot afford to pay for fine-only offenses should be held accountable, but the sanctions should be proportionate and determined on an individualized basis so they are not unduly burdensome.
- Per *Bearden*, courts must establish whether nonpayment of fines or fees was willful before incarcerating an individual. SB 1913 and HB 351 provide justices and judges more tools and flexibility to tailor sentences so that criminal defendants may comply with legal financial obligations without undue hardship.
- Preliminary analysis of SB 1913 and HB 351 shows that Texans are experiencing better outcomes since the changes in law, but more data collection is necessary for complete analysis.
- Additional policy changes are needed to clarify some ambiguous provisions of SB 1913 and HB 351 and further advance the goals of these bills.

Introduction

Texas passed SB 1913 and HB 351 during the 85th Legislature. The substantively similar laws went into effect on September 1, 2017, and allow justices and judges more flexibility to ensure criminal defendants comply with legal financial obligations stemming from fine-only offenses.

The new laws were designed to maintain accountability while allowing Texans to resolve minor infractions without imposing the undue hardships that often accompany the inability to afford fines, fees, and court costs. Moreover, these reforms were premised on the constitutional principles of equal protection and due process, which necessarily require individualized consideration of each case with the goal of imposing the sanction that restricts liberty as little as necessary to ensure accountability and public safety. While policy in this area had previously focused on the perceived imperative of collecting more money for government entities, the purpose of government is not to generate revenue, but to secure the rights of its citizens.

This policy perspective will provide context for SB 1913 and HB 351, outline the key policies embodied in the bills, and provide preliminary analysis. Additionally, this perspective recommends further reforms to clarify certain provisions in these bills and continue Texas' progress in moving away from incarcerating people who cannot afford to pay fines and fees.

Fine-Only Offenses in Texas

Class C misdemeanors are offenses punishable by fine only without the possibility of confinement (Texas Penal Code. Sections 12.03, 12.41). For this reason, they are colloquially known as "fine-only offenses."[1] They include the lowest level criminal offenses (Texas Penal Code. Section 12.03), such as speeding, parking within 15 feet of a fire hydrant, and driving without a valid inspection sticker (OCA 2016a). They also include violations of city ordinances, which can be everything from an overgrown lawn to building code violations.

In Texas, justice courts and municipal courts have concurrent jurisdiction in Class C misdemeanor cases (OCA 2018). There exist hundreds of these local courts across the state, and they handle millions of cases every year. While justice courts and municipal courts each have jurisdiction over other categories of cases, the large majority of their respective caseloads are dedicated to Class C misdemeanors (OCA 2017, iii, 87, 94). More specifically, most of these cases involve state traffic laws (88, 95).

1 The term "fine-only offenses" excludes civil penalties for the purposes of this publication.

continued

Minor traffic violations and other Class C misdemeanors may warrant a sanction, but these offenses are not particularly pernicious to society. For many Texans, a speeding ticket is an inconvenient but affordable penalty. Paying a ticket could mean the temporary loss of luxuries, but it would not be a major financial hardship. For others, however, a speeding ticket could be more difficult to pay and lead to a cascade of consequences, including jail time, driver's license suspension, and an inability to maintain employment in areas where another means of transportation is not available (SB 1913 Bill Analysis, 5-6). The extent to which people are jailed or otherwise penalized because they did not, and in many cases could not, pay the fine for fine-only offenses has been documented and analyzed nationally (COSCA) and statewide (Texas Appleseed and Texas Fair Defense Project).

During the State of the Judiciary address to the 85th Texas Legislature, Chief Justice Nathan L. Hecht of the Supreme Court of Texas highlighted the far-reaching consequences of incarcerating individuals for the inability to pay criminal justice debt:

> *Jailing criminal defendants who cannot pay their fines and court costs—commonly called debtors' prison—keeps them from jobs, hurts their families, makes them dependent on society, and costs the taxpayers money. Most importantly, it is illegal under the United States Constitution. Judges must determine whether a defendant is actually unable, not just unwilling, to pay a fine* (Hecht, 8).

In *Bearden v. Georgia* (1983), the U.S. Supreme Court held that courts may not incarcerate an individual for failure to pay fines or fees without first making an inquiry to determine whether nonpayment was due to a willful refusal (672-673). Importantly, the Court made a distinction between nonpayment due to willfulness and nonpayment due to inability (668). *Bearden* also made clear that courts must comply with the inquiry step of the judicial process to uphold 14th Amendment guarantees (672-673). Per *Bearden*, then, courts must establish a defendant is genuinely able but unwilling to pay before incarcerating a person for failure to pay.

In addition to the precedent established by *Bearden*, Texas law requires justices and judges make a written determination after a hearing (Texas Code of Criminal Procedure. Article 45.046). Unfortunately, one report indicates that some Texas courts have failed to comply with with the law (Texas Appleseed and Texas Fair Defense Project, 34). The problem has not been limited to Texas as, across the country, courts of limited jurisdiction have been found to be out of compliance with *Bearden* in many cases (COSCA, 8).

The failure to uphold constitutional guarantees and state statutes is troublesome. Considering the nature of the typical Class C misdemeanor, jailing defendants for fine-only offenses without any meaningful inquiry is an imprudent use of taxpayers' money. The judiciary should uphold the rule of law, but legislatures should craft policies that allow courts to maintain accountability for defendants in fine-only criminal cases without utilizing costly confinement except as a last resort. Moreover, legislative bodies should refrain from utilizing the judiciary as a means to raise revenue without expending the political capital it takes to impose a tax.

Key Policies in SB 1913 and HB 351

Chief Justice Hecht serves as chair of Texas Judicial Council (TJC), which is tasked with studying the procedures and practices of state courts and improving the administration of justice (Texas Government Code. Sections 71.031, 71.033). TJC examined the assessment and satisfaction of fines, fees, and court costs resulting from fine-only offenses in Texas. In a resolution to the 85th Texas Legislature, the council urged lawmakers to make statutory changes to the judicial processes regarding the imposition and collection of fines and court costs (OCA 2016b). TJC noted that less than 2 percent of cases involving fine-only offenses in justice and municipal courts were fully or partially satisfied through alternatives in FY15, while over 16 percent of the assessments were discharged by jail credit (OCA 2016b). The council determined lower courts were underutilizing the ability to allow criminal defendants to satisfy their debt through alternatives to confinement, despite possessing statutory authority to do so (OCA 2016b). According to TJC, the judiciary was in need of "additional flexibility and tools to ensure that defendants comply with their legal financial obligations without causing an undue hardship on the defendant" (OCA 2016b).

The 85th Texas Legislature responded with SB 1913 and HB 351, which included many of the recommendations embodied in TJC's Resolution. These bills are substantively similar, containing only a few minor but compatible differences. The bills made several changes to the judicial processes in Texas regarding the imposition and collection of fines and court costs for fine-only offenses.

For instance, after a defendant makes a plea in open court, justices and judges must inquire whether the person has the ability to pay the fines or costs in part or in full. If the court determines a defendant is unable to immediately pay, the court must tailor a payment plan, order discharge by community service, and/or waive all or part of fines and costs. The waiver component is a particularly commonsense change, as justices and judges no longer are required

by law to delay waiver until after a defendant defaults on a payment. While justices and judges must assess a defendant's ability to pay during or immediately after imposing a sentence, only a defendant who pleas in open court is legally entitled to consideration for alternatives to confinement. Notably, though, Texas law does not disallow courts from reconsidering fines and costs after sentencing.

A greater range of activities constitute community service under SB 1913 and HB 351, further strengthening the judiciary's ability to tailor appropriate sentences. Previously, performance of community service was limited to governmental entities or nonprofit organizations. Now, justices and judges may order defendants to perform services such as job training, educational classes, and drug treatment. Additionally, the rate per eight hours of community service has increased from a minimum of $50 to $100.

Citations, complaints, and certain notices must now include information regarding alternatives to full payment. If a defendant fails to appear, courts are required to provide notice before issuing an arrest warrant for failure to appear (FTA) regarding the initial court setting. Following this notice, defendants have an opportunity to appear in court before the FTA is issued. If a defendant appears before the court voluntarily and resolves the FTA, or makes a good faith effort to resolve the FTA before it is executed, the court must recall the arrest warrant.

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A capias pro fine is an arrest warrant for failure to satisfy the judgment, which is essentially a failure to pay fines or costs. The defendant now has an opportunity for a hearing before the court issues a capias pro fine. Courts must provide notice of the hearing. If the defendant fails to appear at the hearing, the court may then issue the capias pro fine. However, if the defendant voluntarily appears before the court and successfully resolves the debt prior the execution of the capias pro fine, the warrant must be recalled. Alternatively, even if the defendant attends the hearing after receiving notice, the court may still determine the warrant should be issued. In all these scenarios, the court must make an inquiry as to the defendant's ability to pay.

The minimum jail credit has increased from $50 to $100 for defendants incarcerated due to a failure to pay fines and costs.

Preliminary Analysis

SB 1913 and HB 351 became effective on September 1, 2017, and thus the full effect of these bills remains to be seen. The data reports used for our preliminary analysis were run on the Court Activity Reporting and Directory System operated by the Texas Office of Court Administration (OCA). The data reports include court activity from justice and municipal courts. Data was measured in six-month intervals. We analyzed data both before SB 1913 and HB 351 took effect, ranging from September 1, 2013, to August 31, 2017, and after SB 1913 and HB 351 took effect, ranging from September 1, 2017, to February 28, 2019.

The average percent of courts reporting data to OCA prior to the implementation of SB 1913 and HB 351 was 96 percent. Post-implementation data has an average reporting rate of 93 percent. The following indicators help policymakers evaluate the reforms embodied in SB 1913 and HB 351.

The issuance of arrest warrants related to Class C misdemeanors, including FTAs, was substantially lower in the six months ending February 28, 2019, than it was in the six months just prior to the implementation of SB 1913 and HB 351. The number of warrants issued is important in assessing the impact of the provision allowing adjustment of the fine at the outset of the case since the hypothesis is that this will enable more individuals to fulfill their obligations without reaching the point of a warrant being issued. During the interval immediately prior to implementation—March 1, 2017, to August 31, 2017—justice and municipal courts issued 901,915 Class C warrants. The most recently measured interval—September 1, 2018, to February 28, 2019—reported an issuance of 730,171 Class C warrants. This drop indicates the changes embodied in SB 1913 and HB 351 regarding notice requirements and FTAs may have yielded positive outcomes. By placing information concerning potential alternatives to payment on citations and complaints, Texans who otherwise may choose to avoid a hearing because they know they cannot afford to pay may choose to attend and interact with the court. Moreover, it is likely the newly implemented opportunity for defendants to appear before the court prior to the issuance of an FTA contributes to the drop in the overall issuance of Class C warrants. Notably, the most recently measured interval reported a lower issuance of Class C warrants compared to the data collected prior to SB 1913 and HB 351 becoming effective, which dates back as far as 2013.

Between September 1, 2018, and February 28, 2019, justice and municipal courts issued 276,510 warrants for failure to pay. Just prior to the changes in law—between March 1, 2017, and August, 31, 2017—this number was 329,503. A decrease of this caliber is encouraging, indicating, once again, that notice requirements and opportunities to appear are encouraging compliance.

Unlike the notice requirement and statutory changes to procedure, justices and judges maintain the discretion to offer community service as an alternative to payment. While it is critical to provide options and flexibility as alternatives to nonpayment, it is incumbent upon the judiciary to utilize the tools. One tool is community service, which can be used in lieu of part or all of the fine. During the interval just prior to the implementation of SB 1913 and HB 351 (March 1, 2017, to August 31, 2017), the number of cases fully satisfied by community service was 37,008. Justices and judges chose to utilize community service comparatively less during the most recently measured interval (September 1, 2018, to February 28, 2019). Data shows 35,477 cases were fully satisfied through community service during this time period. The number of cases partially satisfied by community service from March 1, 2017 to August 31, 2017 was 7,141. This number rose to 10,953 during the most recently measured interval (September 1, 2018 to February 28, 2019). Further data collection is necessary to draw correlations or analyze the effects of the community service provisions embodied in SB 1913 and HB 351.

Jail credit refers to when someone convicted of a fine-only offense receives credit against the fine based on the number of nights spent in jail. SB 1913 and HB 351 increased the credit amount per night from $50 to $100. The number of cases satisfied by jail credit between March 1, 2017, and August 31, 2017, was 293,375. This number has decreased substantially since SB 1913 and HB 351 became effective. From September 1, 2018, to February 28, 2019, the number of cases satisfied by jail credit dropped to 224,523, perhaps indicating justices and judges are utilizing alternative sentencing, such as payment plans, so that defendants may comply with court-order obligations. While this indicator is promising, the number of cases fully or partially satisfied by community service is substantially smaller compared to the number of cases satisfied by jail credit. As mentioned in a prior section, TJC made note of this disparity in a resolution to the 85th Texas Legislature (OCA 2016b).

The number of cases waived due to indigence increased between the two six-month intervals examined. Though, like the number of cases satisfied by community service, the number of cases waived due to indigence is substantially low in relation to the number of cases satisfied by jail credit. From March 1, 2017, to August 31, 2017—the interval just prior to the new laws taking effect—the number of cases waived due to indigence was 19,283. During the most recently measured interval (September 1, 2018, to February 28, 2019), the number rose to 26,651. This increase is likely attributable to the changes in SB 1913 and HB 351 that allow justices and judges to waive all or part of a fine or costs prior to default on payments, which was previously required by Texas law.

There are methodological reasons why this paper compares data from the six months prior to the 2017 legislation taking effect to the most recent six months for which data is available. One of the main reforms in the 2017 bills was to allow, but not require, courts to adjust fines at the outset of the case if it was clear the person was too poor to pay it in full, even with a payment plan. Community service could be used in place of some or all of the total amount. Many cases in which a warrant is issued or someone is jailed for failure to pay originated months or years ago. Given that, cases in which adjustment at the outset was not allowed at the time would make up a greater percentage of total cases immediately after the bill went into effect than in the more recent period. Also, some guidance judges received on how to implement the new law was provided months after it took effect and perhaps applied in some cases even later. For example, the OCA Bench Card was published online in February 2018 as indicated by the properties of the document (OCA 2018a). This could create some delay in the impact.

For this analysis, we chose data from the six months prior to the bill going into effect to compare to data from the most recent six months it is available because to extract data prior the most recent six months would increase the role of intervening factors such as population, demographics, the composition of the judiciary, and more.

Options for Building on SB 1913 and HB 351

Additional time and data are needed to fully evaluate the impact of SB 1913 and HB 351. However, the preliminary analysis indicates some effects that reflect the legislative intent to use alternatives to jail when people cannot pay the financial obligations associated with fine-only offenses. Nonetheless, in a significant number of cases, courts are continuing to jail individuals. Thus there still may be opportunities for improving current law.

Consider alternatives to fines and fees in all cases

The changes in law from the 85th Texas Legislature required justices and judges to consider alternatives for defendants who could not afford fines and fees. This requirement, however, applies only to defendants who are sentenced in open court. The majority of cases are not resolved this way (OCA

2017, 148). Outcomes should be independent of the method by which the case is resolved and instead based on whether a person is unable to pay.

Improve the ability to use community service in lieu of fines and costs without undue hardship

Current law requires that community service in lieu of some or all of the fine have to be performed in the county where the case originated. Lawmakers can modify this to give judges the ability to allow community service to be performed in the defendant's county of residence. This would make it more accessible for individuals, especially those with disabilities or limited transportation options, while not diminishing the quality and quantity of service that would be required. Additionally, given that courts may order up to 16 hours of community service a week, policymakers should continue to examine how to balance the value of community service in promoting accountability and benefiting the community without imposing an undue hardship on individuals.

Preclude arrest in court for defendants who voluntarily appear to resolve fine-only citations

Most courts wisely do not arrest defendants who appear in court in response to a warrant for an unpaid fine on a fine-only offense, but current law allows for this. This undermines the goal of encouraging people to come to court rather than evade the law. Precluding arrest in these situations would remove this disincentive to come forward and avoid the law enforcement costs of enforcing a warrant.

Allow for defendant to appear in court via phone or video at the judge's discretion

Many people receive speeding tickets and other citations in counties far from where they live. In some cases, the person receiving the citation may have stolen the identity of the person being charged. There should be a method to resolve cases, especially those that are clearly invalid, without a defendant being required to drive hundreds of miles. Legislation could empower judges in fine-only citation cases to take advantage of modern technology through a video hearing or to do so by phone.

Conclusion

Preliminary analysis of the data reveals that Texans have experienced better outcomes since SB 1913 and HB 351 were implemented, although further data collection is necessary to draw firm correlations. While certain indicators are promising, complete analysis of SB 1913 and HB 351 is untenable at this moment.

SB 1913 and HB 351 provided justices and judges more tools and flexibility to tailor sentences for criminal cases regarding fine-only offenses, but it is important to remember that justices and judges still maintain significant discretion in determining whether a person has the ability to pay fines or costs. Criminal defendants who cannot afford to pay the legal financial obligations stemming from fine-only offenses should be held accountable, but this must be done in an individualized manner to ensure the least deprivation of liberty necessary. This avoids further destabilizing people's lives and taking a toll on taxpayers who bear the costs of our county jails. Moving forward, policymakers should continue judicial education to ensure consistent implementation of SB 1913 and HB 351 across Texas and consider additional policy changes to help better balance accountability with fairness and due process.

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Haley Holik is an attorney on staff with Texas Public Policy Foundation. She holds a B.A. in communications from Moody Bible Institute and earned her J.D. from Regent University School of Law. She served as a clerk for the American Center for Law and Justice during law school, as well as a legislative intern for Rep. Randy Forbes. Holik participated in the Civil Practice Clinic at Regent as a student-practitioner, advocating on behalf of clients in need of civil legal services. As a staff member of *Regent University Law Review*, her note concerning compelled speech and First Amendment violations was chosen for publication.

Marc A. Levin is the vice president of criminal justice at the Texas Public Policy Foundation and Right on Crime.

An attorney and accomplished author on legal and public policy issues, Marc began the Foundation's criminal justice program in 2005. This work contributed to nationally praised policy changes that have been followed by dramatic declines in crime and incarceration in Texas. Building on this success, in 2010, Levin developed the concept for the Right on Crime initiative, a Foundation project in partnership with Prison Fellowship and the American Conservative Union Foundation. Right on Crime has become the national clearinghouse for conservative criminal justice reforms and has contributed to the adoption of policies in dozens of states that fight crime, support victims, and protect taxpayers.

In 2014, Levin was named one of the *Politico 50* in the magazine's annual "list of thinkers, doers, and dreamers who really matter in this age of gridlock and dysfunction."

Marc has testified on criminal justice policy on four occasions before Congress and has testified before legislatures in states including Texas, Nevada, Kansas, Wisconsin, and California. He also has met personally with leaders such as U.S. Presidents, Speakers of the House, and the Justice Commtitee of the United Kingdom Parliament to share his ideas on criminal justice reform. In 2007, he was honored in a resolution unanimously passed by the Texas House of Representatives that stated, "Mr. Levin's intellect is unparalleled and his research is impeccable."

Since 2005, Marc has published dozens of policy papers on topics such as sentencing, probation, parole, reentry, and overcriminalization which are available on the TPPF website. Levin's articles on law and public policy have been featured in publications such as the *Wall Street Journal, USA Today, Texas Review of Law & Politics, National Law Journal, New York Daily News, Jerusalem Post, Toronto Star, Atlanta Journal-Constitution, Philadelphia Inquirer, San Francisco Chronicle, Washington Times, Los Angeles Daily Journal, Charlotte Observer, Dallas Morning News, Houston Chronicle, Austin American-Statesman, San Antonio Express-News* and *Reason Magazine*.

In 1999, Marc graduated with honors from the University of Texas with a B.A. in Plan II Honors and Government. In 2002, Marc received his J.D. with honors from the University of Texas School of Law. Marc was a Charles G. Koch summer fellow in 1996. He served as a law clerk to Judge Will Garwood on the U.S. Court of Appeals for the Fifth Circuit and staff attorney at the Texas Supreme Court.

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