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Hot Topics in Criminal Justice 2020: A Pandemic Time Capsule.

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HOT TOPICS IN TEXAS CRIMINAL JUSTICE 2020: A PANDEMIC TIME CAPSULE

RYAN KELLUS TURNER & ELIZABETH ROZACKY*

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INTRODUCTION

Is the American criminal justice system having an existential crisis?¹ What about in Texas?² Social order has always depended on consensus.³ Maintaining social order is challenging particularly in a system whose foundational principles are often at odds with one another.⁴ The Supreme Court reminds us that criminal justice requires balancing individual rights, common welfare of society, and greater governmental interests.⁵ The Court holds that “the right to be let alone [is] the most comprehensive set of rights valued” by civilized people.⁶ The Court also warned that a society based on the rule that each person is “a law unto themselves” will be confronted with “disorder and anarchy.”⁷

1. Cf. Melissa Chan, “‘I Want This Over.’ For Victims and the Accused, Justice is Delayed as COVID-19 Snarls Courts, TIME (Feb. 23, 2021, 10:12 AM) <https://time.com/5939482/covid-19-criminal-cases-backlog/> [https://perma.cc/KN9S-5A92] (describing the massive conflict occurring between the COVID-19 pandemic and the American criminal justice system).

2. See Luis Soberon, *Justice Delayed: Addressing the Criminal Court Backlog in Texas* (Jan. 26, 2022) <https://texas2036.org/posts/justice-delayed-addressing-the-criminal-court-backlog-in-texas/> [https://perma.cc/6SSJ-LZAB] (“The COVID-19 pandemic has affected virtually every facet of state government, and Texas’ criminal courts are no exception.”).

3. Cf. Robin M. Williams, Jr., *Social Order and Social Conflict*, 114 AM. PHIL. SOC’Y 217 (1970) (recognizing that the “absence of conflict does not necessarily imply consensus” but suggesting that the opposite of consensus is “dissent [and] disagreement.”).

4. See *id.* (“If there is high consensus but low interdependence in a collectivity primarily organized to maintain or promote a particular systematic ideology, the collectivity will be highly vulnerable to schism and dissolution if suddenly forced to cope with major changes in its survival-conditions.”).

5. See R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN’S L. REV. 1119, 1131 (2019) (discussing how constitutional scrutiny works—requiring a “balancing of rights, interest, benefits, or harms” to the individual and the “government interest in question.”).

6. See *e.g.*, *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (“To protect, [the right to be let alone], every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”); see also *Katz v. United States*, 389 U.S. 347, 350–51 (1967) (finding similarity in an individual’s general right to privacy, or a person’s right to be let alone by others, and a person’s protection of property or life—all of which are not expressly provided for by the Constitution and is “left largely to the law of the Individual States.”).

7. See *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (warning that liberty of the individual does not grant him the right to make every decision “free from restraint . . . regardless of the injury that may be done to others”).

This balance becomes even more precarious during periods of pronounced disharmony and polarization.⁸ With the rise of social media, people have a new medium to express what they think and to share their different perceptions of the justice system.⁹ Such technological advances, while offering great promise to inform, do not necessarily tell the public the whole truth.¹⁰ Fueled by a new alternative, media ecosystems that leverage confirmation bias, where facts do not necessarily change beliefs, reduce public trust in the government, which is near a historic low.¹¹ Toxic politics, polarization, and tribalism arguably threaten to trap Americans in a spiral of conflict and division.¹² The COVID-19 pandemic stresses the criminal justice system in new ways.¹³

While many legal institutions and components of the criminal justice system were under the microscope before the pandemic, the novel coronavirus revealed new fault lines, enhanced old fissures, and amplified cognitive dissonance in an already divided nation.¹⁴ Since the

8. See generally Ronald Bayer, *The Continuing Tensions Between Individual Rights and Public Health*, 8 EMBO REPORTS 1099 (2007) (examining the difficulty in balancing the liberty of citizen with the preservation of the common good within the context of public health crises).

9. See Lisa A. Kort-Butler & Patrick Habecker, *Framing and Cultivating the Story of Crime: The Effects of Media Use, Victimization, and Social Networks on Attitudes About Crime*, 43 CRIM. JUST. REV. 127, 141 (2018) (describing the dangerous intersection between crime, justice, and social media, as a place where the lines between the real and virtual are blurred).

10. See Lee Rainie et al., *The Future of Free Speech, Trolls, Anonymity, and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017) <https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/> [<https://perma.cc/9QGR-JZVS>] (reflecting on the concerns related to the dissemination of fake news on and by social media platforms).

11. See Ryan Kellus Turner, *Can Withering Public Trust in Government be Traced Back to the JFK Assassination?* THE CONVERSATION (Nov. 21, 2017, 8:56 PM), <https://theconversation.com/can-withering-public-trust-in-government-be-traced-back-to-the-jfk-assassination-87719> [<https://perma.cc/J2NN-LJKY>] (referring to the point of origin that initiated the decline of public trust in the federal government).

12. See STEPHEN HAWKINS ET AL., HIDDEN TRIBES: A STUDY OF AMERICA'S POLARIZED LANDSCAPE 4 (More in Common 2018) (attributing today's American political and social climate of "outrage and taking offense" to "social media and partisan news outlets").

13. Cf. *Poll Finds Americans Highly Stressed by Politics, Pandemic*, HEALTHDAY NEWS (Feb. 2, 2021), <https://consumer.healthday.com/b-2-2-poll-finds-americans-highly-stressed-by-politics-pandemic-2650248828.html> [<https://perma.cc/RW7P-K4JS>] (demonstrating the significant sources of reported social stressed including but not limited to, the future of the United States, the Coronavirus pandemic, and political unrest).

14. See Elliot Aronson & Carol Tavris, *The Role of Cognitive Dissonance in the Pandemic*, THE ATL. (July 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/role-cognitive->

pandemic began, the country is seeing an increasing awareness of inequities in criminal justice.¹⁵ We are all in the same storm, but we are not all in the same boat.¹⁶

I. THE MEANING OF “CRIMINAL JUSTICE”

As current events and controversies spark renewed interest in the criminal justice system, now is a good time to pause and take inventory of what “criminal justice” means and all that it entails—there is a lot to unpack.¹⁷

In the field of law, criminal justice is defined as “[t]he methods by which society deals with those who are accused of having committed crimes.”¹⁸ This definition brings up two key points. First, it notes how a society “deals” with people accused of crimes is unspecified.¹⁹ As society changes, so do its prescribed methods for “dealing” with criminals.²⁰ This mutability leaves a lot to the imagination and is subject

dissonance-pandemic/614074/ [https://perma.cc/E65D-PU47] (“Because of the intense polarization in our country, a great many Americans now see the life-and-death decisions of the coronavirus as political choices rather than medical ones. In the absence of a unifying narrative and competent national leadership, Americans have to choose whom to believe as they make decisions about how to live: the scientists and the public-health experts, whose advice will necessarily change as they learn more about the virus, treatment, and risks?”).

15. See U.S. White House Briefing Room, *Memorandum on Resorting the Department of Justice’s Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable* (May 18, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/18/memorandum-on-restoring-the-department-of-justices-access-to-justice-function-and-reinvigorating-the-white-house-legal-aid-interagency-roundtable/> [https://perma.cc/K8GY-X6X5] (admitting that the coronavirus pandemic “has further exposed and exacerbated inequities in our justice system”).

16. See *Coronavirus and the Criminal Justice System*, FWD.US, <https://www.fwd.us/criminal-justice-and-coronavirus/> [https://perma.cc/MM4V-AFM4] (providing an example of how those in the criminal justice system are disparately impacted by the COVID-19 pandemic and “especially vulnerable” to its effects).

17. See U.S. Dep’t of Just., *What is the Sequence of Events in the Criminal Justice System?*, BUREAU OF JUST. STAT. (June 3, 2021), <https://bjs.ojp.gov/justice-system> [perma.cc/4U6V-N9JB] (unpacking the criminal justice system, including the role citizens play in the many stages of the process).

18. *Criminal Justice*, BLACK’S LAW DICTIONARY (11th ed. 2019).

19. See *id.* (designating criminal justice to be whatever methods a society chooses to deal with the criminally accused—leaving those methods undefined and in the hands of society).

20. Cf. PRESIDENT’S COMM’N ON L. ENF’T AND ADMIN. OF JUST., *The Challenge of Crime in a Free Society* at vi (1967) (proposing seven different approaches and considerations a society could take in attempting to structure and deal with the criminal justice process, making it apparent there are many routes a society can take).

to opinion, making it a prime topic for debate.²¹ Second, those accused of committing crimes include two distinct groups: (1) individuals who are presumed innocent and (2) individuals who are convicted.²² Most criminal justice debates involve the best way to “deal” with crime, treatment of the accused, and consequences for the convicted.²³

A. *The “Criminal Justice System”*

The criminal justice system is comprised of “[t]he numerous public agencies involved in implementing public policy concerning crime.”²⁴ The system typically has three components: law enforcement (police, sheriffs, marshals); the judicial process (judges, prosecutors, defense lawyers); and corrections (prison officials, probation officers, and parole officers).²⁵ There are three observations, first, contemporary thinking about the criminal justice system has been dominated by the “system approach.”²⁶ If you took an introduction to criminal justice course in college, you are likely familiar with it. The system approach is popular among professors and commonly seen by students who study the American criminal justice system.²⁷ This approach depicts the criminal justice system as three overlapping circles within a larger circle (see,

21. *See id.* (“While recent public opinion polls show increasing public sympathy with rehabilitative goals, conflict and uncertainty about the theories behind and the goals of [criminal justice] have impaired broad support for needed experiments and changes.”).

22. *See Estelle v. Williams*, 425 U.S. 501, 518 (1976) (Brennan, J., dissenting) (dissenting with the majority’s opinion to remind the Court that the criminally accused is presumed guilty until he is proven guilty beyond a reasonable doubt).

23. *See Doris Layton Mackenzie, Sentencing and Corrections in the 21st Century: Setting the Stage for the Future* (July 2001) (reflecting on the societal shift into viewing incarceration as a method of crime-control within the community, whereas the four major goals of sentencing—treatment of the accused—include: “retribution, rehabilitation, deterrence, and incapacitation.”).

24. *E.g.*, DAVID W. NEUBAUER & HENRY FRADELLA, *AMERICA’S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 7 (Wadsworth, 11th ed. 2015) (providing a concise definition for a complicated social institution).

25. *See id.* (dividing the complexities of the criminal justice system into three main components).

26. *E.g. id.* (“The system approach to criminal justice dominates contemporary thinking about criminal justice.”)

27. *See Richard J. Terrill, Approaches for Teaching Comparative Criminal Justice to Undergraduates*, 7 CRIM. JUST. REV. 23 (1982) (citing a recent study that revealed higher education approaches to teaching criminal justice has changed focus from a comparative view-comparing the American criminal justice system to those around the world—to an internal focus on the American system itself).

Figure 1: The Overlapping Circle of the Criminal Justice System).²⁸ The system approach conceptualizes the criminal justice system as three interdependent components: police, courts, and corrections.²⁹ Secondly, while the system approach makes it easy to draw the criminal justice system as a one-dimensional Venn Diagram, it is inadequate in many ways—important details and nuances are absent.³⁰ The system approach ignores problems stemming from what is increasingly becoming a popular term: fragmentation.³¹ The system approach fails to represent each component’s internal and external tensions, scale, and scope adequately.³² Third, by drawing focus to the three overlapping inner-circle components of the system (police, courts, and corrections), it is easy to lose sight of the importance of what the larger circle represents: the public.³³ The public features a multitude of different voices and

28. *E.g.* NEUBAUER & FRADELLA, *supra* note 24, at 6 (illustrating the “overlapping circles of the criminal justice system” where the three small circles representing (1) the “courts”; (2) the “police”; and (3) “institutional and community-based” are surrounded by a larger circle, representing the public).

29. *See id.* (describing the criminal justice system as both “interdependent and fragment . . . government institutions with different goals, histories, and operating procedures.”).

30. *Compare id.* at 6-7 (depicting a simplified system of three interdependent and intertwined entities that comprise the criminal justice system), *with id.* at 17-19 (introducing the intricate components, decisions, and roles of each major entity within the criminal justice system).

31. *See* Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1438 (2017) (defining “fragmentation” as the “way in which the constitution divides power between actors and governments”); *see also* Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 188 (2017) (positing that “criminal justice is fragmented” and by viewing criminal justice through a regulatory lens, punishment is overproduced as result of structure, misaligned incentives, and three types of fragmentation: vertical, horizontal, and individual); *see also* Alvin W. Cohn, *Training in the Criminal Justice Nonsystem*, 38 FED. PROBATION 32, 33 (1974) (“‘Fragmented,’ ‘divided,’ ‘splintered,’ and ‘decentralized’ are the adjectives most commonly used to describe the American system of criminal justice.”).

32. *See* NEUBAUER & FRADELLA, *supra* note 24, at 8 (“The police component consists of nearly 18,000 law enforcement agencies, with varying traditions of cooperation and antagonism. Likewise, the corrections component includes more than 1,820 state and federal correctional facilities, to say nothing of the thousands of local jails. But corrections also encompass probation, parole, drug treatment, halfway houses, and the like. The same fragmentation holds true for the courts. In many ways, talking about courts is misleading, because the activities associated with ‘the court’ encompasses a wide variety of actors. Many people who work in the court-house—judges, prosecutors, public defenders, clerks, court reporters, bailiffs—are employed by separate government agencies.”).

33. *See id.* (discussing the tensions between the inner circles of the criminal justice system, but neglecting the public’s role within the system)

differing perspectives.³⁴ It is vital not to lose sight of the larger sphere.³⁵ The criminal justice system exists because of the public.³⁶ The public determines the form, function, operational sustainability, and viability of the justice system's components (police, courts, and corrections).³⁷ The desires, wants, and thoughts of most people (i.e., public opinion) typically drives public policy and—by extension—the law.³⁸ This is where lawyers come into the picture.³⁹

B. "Law" and Its Essential Features

Lawyers are in the business of arguing the law.⁴⁰ Meanwhile, those in legal academia are paid to debate the meaning of "law."⁴¹ Legal scholars have continuously debated what the law is and how to determine what the

34. See Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, CATO INST. (Dec. 7, 2016) <https://www.cato.org/survey-reports/policing-america-understanding-public-attitudes-toward-police-results-national> [<https://perma.cc/J94P-KYS8>] (quantifying the various views and sentiments of different demographics within the United States public and how those different groups vary in their view of law enforcement).

35. See NEUBAUER & FRADELLA, *supra* note 24, at 8 (demonstrating how it is easy to lose sight of the overarching public sphere, resulting in the public's integral voice being left out of the conversation).

36. See *What is the Sequence of Events in the Criminal Justice System?*, *supra* note 17 (asserting that response to crime is performed by an array of institutions and groups in service to the public, suggesting that the criminal justice system ultimately exists to serve the public).

37. See Emily Gold, *The Case for Procedural Justice: Fairness as a Crime Prevention Tool*, COPS (Sept. 2013), https://cops.usdoj.gov/html/dispatch/09-2013/fairness_as_a_crime_prevention_tool.asp [<https://perma.cc/J3FW-M27R>] (revealing the underlying premise of a legitimate and operational criminal justice system: that the system demonstrates its "legitimacy to the public it serves. If the public ceases to view its justice system as legitimate, dire consequences ensue.").

38. See *id.* ("Put[ting it] simply, people are more likely to comply with the law and cooperate with law enforcement efforts when they feel the system and its actors are legitimate.").

39. See generally *What is a Lawyer?*, AM. BAR ASS'N (Sept. 10, 2019), https://www.americanbar.org/groups/public_education/resources/public-information/what-is-a-lawyer/ [<https://perma.cc/T7VT-PXMH>] (defining what a lawyer is and what lawyers' main duties are).

40. See *Civil Litigation in Texas: The Basics in Three Phases*, TEXASLAWHELP.ORG (Feb. 22, 2022), <https://texaslawhelp.org/article/civil-litigation-in-texas-the-basics-in-three-phases> [<https://perma.cc/6GH5-9G26>] ("Contested cases require that both sides argue their position to explain why the law says that a judge should rule in for them.").

41. See Bruce Green, *What Use Are Legal Academics?*, 26 CRIM. JUST. 1 (2011) (describing how legal academics "rationalize and develop the law, . . . point out problems in the law and legal processes, suggest how the law can be improved, and thereby contributing to the sound development of legislation and judicial decisions.").

law is for centuries—without reaching a consensus.⁴² However, there is consensus that law has four essential features.⁴³

1. *It is cohesive.*⁴⁴ Law is a body of rules governing the relationships between all members of society. It promotes predictability in the conduct of human affairs.⁴⁵
2. *It is institutional.*⁴⁶ Public officials enact the law. Rules are not laws unless government institutions recognize them.⁴⁷
3. *It is legitimate.*⁴⁸ Laws must be enacted legitimately.⁴⁹ There are commonly accepted protocols for legislating, applying, and interpreting laws.⁵⁰ “Legitimacy is the right to rule and the recognition by the ruled of that right.”⁵¹
4. *It is Coercive.*⁵² Law is backed by the force of the state, meaning states can impose sanctions.⁵³ There can be no law without the

42. See CONG. RSCH. SERV. REP., STATUTORY INTERPRETATION: THEORIES, TOOLS, AND Trends 1 (2018) (supplying a hypothetical to demonstrate the difficulty lawyers have faced for years in trying to interpret statutes and thus determine what the law means).

43. See generally DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES (Wadsworth, 7th ed. 2016) (discussing the four essential features of the law).

44. See *id.* at 17 (“As used in this book, law is a body of rules enacted by public officials in a legitimate manner and backed by the force of the state. This working definition incorporates features that most scholars agree on.”)

45. *Id.*

46. See *id.* at 3 (describing the relationship between courts and the legislature).

47. See generally *Overview – Rule of Law*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> [<https://perma.cc/3DCT-FZ7U>] (referencing the creation and enforcement of laws by the United States judiciary).

48. See *id.* (stating that in order for the rule of law to be effective and legitimate, the law must be publicly promulgated, equally enforced, adjudicated independently and consistent with principles of human rights).

49. See generally *id.* (emphasizing that protocols must exist in our legal system to enforce complex laws).

50. See *id.* (referencing the Bill of Rights as a mechanism used to install protocols that allow for the application and interpretation of the law).

51. See Jonathan Jackson et al., *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. OF CRIMINOLOGY 1051 (2012) (defining what legitimacy of law is through using a law enforcement lens).

52. See Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1196–97 (May 1, 2008) (emphasizing the necessity for sanctions as a function of enforcement); see also Hans Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 AM. J. JURIS. 71, 71–94 (1976) (noting how sanctions aid in enforcing widely-applicable law).

53. See *id.*

possibility of sanctions such as confiscation of property, fines, liability for monetary damages, incarceration, and in limited circumstances, capital punishment.⁵⁴

C. What about “Justice?”

It seems perplexing that the meaning of “justice” is remarkably absent from definitions of “criminal justice” and the “law.”⁵⁵ Justice is widely regarded as unifying.⁵⁶ People want justice.⁵⁷ It transcends our nation’s wide spectrum of beliefs and seemingly insurmountable differences.⁵⁸

Of course, it is not that simple because there are many different types of justice.⁵⁹

1. Retributive justice is punitive and focuses on the propriety of punishment.⁶⁰
2. Restorative justice is compensatory and focuses on making amends for loss or wrongdoing.⁶¹
3. Procedural justice focuses on process and the fairness of organizational and institutional systems.⁶²

54. Cf. Jackson et al., *supra* note 51 (expounding on the necessity for sanctions as a function of law enforcement).

55. See *Criminal Justice*, *supra* note 18.

56. See Michelle Maiese & Heidi Burgess, *Types of Justice*, BEYOND INTRACTABILITY (July 2020), https://www.beyondintractability.org/essay/types_of_justice [<https://perma.cc/N239-RFNK>] (“Just institutions tend to instill a sense of stability, well-being, and satisfaction among society members, while perceived injustices can lead to dissatisfaction, rebellion, or revolution.”).

57. See *generally id.* (providing ways in which communities benefit from when justice is properly sought and delivered).

58. See *id.* (suggesting that justice is sought by all regardless of interpersonal differences).

59. See *generally id.* (implying that justice operates differently depending on the type of justice that is sought).

60. See *id.* (defining one of the six types of justice commonly used within the legal system).

61. See *id.* (“[R]estorative justice is concerned with healing victims’ wounds, restoring offenders to law-abiding lives, and repairing harm done to interpersonal relationships and the community.”).

62. See Maiese & Burgess, *supra* note 56 (“Rules must be impartially followed and consistently applied in order to generate an unbiased decision. Those carrying out the procedures should be neutral, and those directly affected by the decisions should have some voice or representation in the decision-making process.”).

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4. Distributive justice focuses on how benefits and burdens are allocated between individuals.⁶³
5. Commutative justice focuses on individuals and interpersonal obligations.⁶⁴
6. Contributive justice focuses on individual duties to society and the common good.⁶⁵

Each type of justice acts like a powerful lens by providing a different perspective and influencing how people make sense of the world around them.⁶⁶ If you are unfamiliar with these different types of justice (or you do not recall any of them being part of your legal education), you are in good company.⁶⁷ It seems odd, particularly to non-attorneys, that justice is not a required subject in law school.⁶⁸ Law professors have argued about whether it is the responsibility of law schools to teach law students about justice.⁶⁹ Even better, so have law students.⁷⁰

63. See Maiese & Burgess, *supra* note 56 (explaining that “distributive justice” can also be referred to as “economic justice” because its main focus is giving all members of society a “fair share” of benefits and resources that are available).

64. See William R. White, *The Natural Law and Commutative Justice*, 2 THE CATHOLIC LAW 3, 34 (1956) (providing an example of commutative justice functions. If you hit and injure your neighbor by recklessly driving down your street and the neighbor suffers a fracture of the leg, you must recompense the neighbor. The question of whether the recompense is “just and fair” will be regulated by the principles of commutative justice).

65. See Cristian Timmermann, *Contributive Justice: An Exploration of a Wider Provision of Meaningful Work*, 31 SOC. JUST. RES. 185, 186 (2018) (“‘Contributive justice’ is a valuable tool when arguing for a fairer provision of meaningful tasks, doing one’s share of tedious tasks, a fairer competition of ideas, and capacity-building.”).

66. See generally Maiese & Burgess, *supra* note 56 (explaining how different types of justice have been applied towards events that occurred in the summer of 2020 following the murder of George Floyd and Breonna Taylor).

67. See generally *id.* (emphasizing the complexity and elusiveness of justice and its many forms as concepts not commonly acknowledged or understood).

68. See Berkman Ctr. for Internet & Soc’y, *Real-Time Rotisserie Responses*, HARVARD L. SCH., <https://cyber.harvard.edu/eon/ei/justice-rot.html> [<https://perma.cc/PZY8-ZSLX>] (“The role of a law school is to enable its graduates to advance the causes of justice. But what constitutes “justice” will differ from student to student.”).

69. See ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMAND OF PROFESSIONALISM* 43-92 (Cambridge Press, 2014) (emphasizing that the ongoing debate over whether justice should be taught in law school stems from the fact that numerous definitions of justice exist and that these definitions vary from student to student).

70. See *Real-Time Rotisserie Responses*, *supra* note 68 (using student responses to show why law schools must provide the necessary tools to their students as future lawyers, so that students can pursue justice in their careers and influence society).

Some academics prefer to sidestep the issue.⁷¹ Their rationale can be summarized as follows: there is no singular legal definition of “justice.”⁷² Too often, “justice” is shorthand for winning, achieving a desired result, or bolstering specific normative values, while ignoring others.⁷³ Justice has become a “catchall term” used by proponents “to support particular political and social goals” in the public arena.⁷⁴ However, this rationale undermines why it is so important for members of the Bar, particularly those who work in government, to take a closer look at the meaning of “justice.”⁷⁵

This brings us back to the big sphere in Figure 1: the public.⁷⁶ Even if “justice” is just a catchall term used by the public to support political and social goals, those desires, wants, and thoughts (i.e., public opinion) can drive public policy and, by extension, the law.⁷⁷

Texas criminal law is rooted in retributive justice.⁷⁸ Nevertheless, it is naïve to think that these roots are immutable.⁷⁹ Views of how the criminal justice system should handle crime have shifted considerably

71. *See id.* (Manuel d’Empaire from Harvard Law School states that “[justice] is a subjective concept that is based upon some moral or principles,” evidencing that legal academics sidestep the issue of whether justice should be taught in law school).

72. *See generally id.* (reiterating that an individual’s conception of justice is deeply rooted in their own personal morals and values).

73. *See* DAVID W. NEUBAUER & STEPHEN MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 18 (Wadsworth, 6th ed. 2013) (emphasizing that the concept of justice is not a product of victory alone, but largely dependent on *who* benefits from the outcome).

74. NEUBAUER & FRADELLA, *supra* note 43, at 18.

75. *See generally id.* (“Our working definition of law deliberately excludes any reference to justice because there is no precise legal or scientific meaning for that term. Rather, justice is a general term used to support particular political and social goals. In the public arena, justice is used in several ways.”)

76. *See generally id.* at 6 (referring back to Figure 1 and explaining that the public is outside the overlapping circles of the police, corrections, and the courts in our criminal justice system).

77. *See generally* Maiese & Burgess, *supra* note 56 (“Issues of justice arise in several different spheres and play a significant role in causing, perpetuating, and addressing conflict.”).

78. *See* KEN COLLIER ET AL., LONE STAR POLITICS: TRADITION AND TRANSFORMATION IN TEXAS 223 (CQ Press, 6th ed. 2019) (expounding that retributive justice is the notion that people deserve to be treated in the same way they treat others. In other words, it is an approach that justifies punishment for wrongdoings).

79. *See generally id.* (arguing that the law is not necessarily something unchanging over time or unable to be changed).

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over the past decade.⁸⁰ For the first time since polling began, most Americans no longer believe the criminal justice system is “not tough enough,” and more people think it is “about right” or even “too tough.”⁸¹

Keep the following in mind as we explore other hot topics. In terms of law, justice is a “virtue of institutions.”⁸² A crime is a wrong against society or the public’s interest, and criminal law protects and vindicates the rights of the people.⁸³ The criminal justice system exists because of efforts to protect the public.⁸⁴ To reiterate, people want justice.⁸⁵

II. THE INTERSECTION OF PUBLIC SAFETY, PUBLIC HEALTH, AND LAW

A. *The Mask Debate*

As the novel coronavirus continues to spread, public officials scramble to craft policies in response to the threat.⁸⁶ Executives at all governmental levels grappled with whether to impose public mask mandates to control the spread of COVID-19.⁸⁷ Controlling the spread

80. See Justin McCarthy, *Americans’ Views Shift on Toughness of Justice System*, GALLUP (Oct. 20, 2016), <https://news.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx> [<https://perma.cc/YCJ3-NTCS>] (stipulating that incarceration rates in the United States have exceedingly increased in the past decade, and as a result, criminal justice reform is continuously sought).

81. See *id.* (reporting that 45% of Americans currently believe that the justice system is “not tough enough,” and which is 20% less than the rate in 2003).

82. See THE OXFORD COMPANION TO AMERICAN LAW (Kermit L. Hall ed., Oxford University Press 2002) (defining justice as not a virtue of individual persons but rather of social institutions).

83. See ANNIKEN U. DAVENPORT, BASIC CRIMINAL LAW: THE CONSTITUTION, PROCEDURE, AND CRIMES 38 (Prentice Hall, 2d ed. 2009) (detailing the relationship between criminal activity and how laws are meant to protect citizens).

84. See generally *id.* (reiterating the importance of our criminal justice system’s role in protecting the public).

85. See Hanan Parvez, *Why Do People Want Justice?*, PSYCHMECHANICS (Nov. 6, 2020), <https://www.psychmechanics.com/why-justice-is-important/> [<https://perma.cc/G6YN-7NPJ>] (“We frequently witness the human desire for justice, punishment, and revenge throughout history and in our day-to-day lives.”).

86. See generally Alex Samuels, *Gov. Greg Abbott Warns if Spread of COVID-19 Doesn’t Slow, “the Next Step Would Have to Be a Lockdown”*, TEX. TRIB. (July 10, 2020, 3:00 PM), <https://www.texastribune.org/2020/07/10/greg-abbott-shutdown-texas-mask-order/> [<https://perma.cc/PJW8-PDQS>] (highlighting how public officials, like state Governors, still struggle with deciding how to handle the ebb and flow of Covid-19 cases as they come and go, and whether to implement mask mandates).

87. See generally *id.* (examining how the executives that chose to not impose public mask mandates were faced with the possibility of implementing a lockdown).

of COVID-19 through mask usage posed broad and deep implications for both physical and economic wellbeing.⁸⁸ According to Dallas Federal Reserve President Robert Kaplan, if everyone wore a mask, the economy would bounce back sooner from the economic ailments and calamity that accompany the pandemic.⁸⁹ Kaplan agreed with a Goldman Sachs forecast, indicating that mask usage can prevent a five percent gross domestic product loss of \$1 trillion and alleviate the necessity of strict shutdowns that have devastating impacts on nonessential businesses.⁹⁰ Despite the high stakes, mask-wearing remains controversial.⁹¹

A June 2020 survey conducted by the Pew Research Center found that about 65% of adults said they regularly wear masks in public, and 15% said they wore masks sometimes.⁹² But for some, the call to wear masks is not convincing.⁹³ People throughout the nation refuse to wear face coverings.⁹⁴ News reports have captured rallies and protests over

88. *See generally id.* (commenting on how COVID-19 had more extreme implications on people's economic wellbeing by closing the doors of bars and tightening restaurant capacity limits).

89. *See* Megan Henney, *Fed's Kaplan Says Wearing Face Masks is Key to US Economic Growth*, FOX BUS. (July 10, 2020), <https://www.foxbusiness.com/economy/feds-kaplan-says-wearing-masks-is-key-to-us-economic-growth> [https://perma.cc/4REX-MF8D] (articulating that the use of mask-wearing would not only substantially mute the transmission of the novel coronavirus, but also lower the unemployment rate and grow the economy faster).

90. *See id.* (restating that Kaplan anticipates the economy to shrink an unprecedented thirty-five percent before the economy gets back on track to only shrinking by five percent for the year).

91. *See generally* Katie Shepherd, *Masks Become a Flash Point for Protests and Fights as Businesses, Beaches and Parks Reopen*, WASH. POST (May 5, 2020, 6:59 AM), <https://www.washingtonpost.com/nation/2020/05/05/masks-protests-coronavirus/> [https://perma.cc/4FWZ-U34Z] (“Although resistance to wearing masks appears to split along ideological lines in many instances, with protests against the measures organized largely by conservative activists and championed by Republican lawmakers, polling has consistently indicated that most Americans support the social distancing precautions in place to prevent the spread of covid-19 and many have been willing to wear masks.”).

92. Ruth Igielnik, *Most Americans Say They Regularly Wore a Mask in Stores in the Past Month; Fewer See Others Doing It*, PEW RSCH. CTR. (June 23, 2020), <https://www.pewresearch.org/fact-tank/2020/06/23/most-americans-say-they-regularly-wore-a-mask-in-stores-in-the-past-month-fewer-see-others-doing-it/> [https://perma.cc/EP2N-M8EV] (citing a study measuring behaviors of the general public in terms of mask wearing during the pandemic).

93. *See generally* Shepherd, *supra* note 91 (noting the resistance to wearing masks in public setting and under governmental mandates, and how such resistance has even lead to violence in certain parts of the United States).

94. *See* Igielnik, *supra* note 92 (reporting that Americans in counties with more reported deaths from the virus are more likely to respond they wore a mask at all or most of the time in

masks.⁹⁵ Some people believe that orders to wear masks violates their freedom and do not want the government telling them what to do.⁹⁶ Others believe the masks do not prevent infections.⁹⁷ Still, to others, mask-wearing has just become another sad chapter in our nation's culture war.⁹⁸ The controversy surrounding mask usage has intensified as the conversation shifted from whether a person *should* wear a mask in certain public places to whether a person *must* wear a mask in public places (i.e., recommendations vs. mandates).⁹⁹

Safety, freedom, and culture have long been a contentious triangle in America.¹⁰⁰ While it may seem unprecedented, the spat over masks is

public places than those who live in a county with a low death rate); *see also id.* (using former Vice President Pence nonuse of a face mask during his visit to the Mayo Clinic as an example of how even government officials refuse or defy mask mandates).

95. *See id.* (warning that escalating tension over face covering precautions has spurred protests, rebellions, fights, and even a fatal shooting in the state of Florida).

96. *See generally* Elisabeth Buchwald, *Why Do so Many Americans Refuse to Wear Face Masks? Politics is Part of It — but Only Part*, MARKETWATCH (June 28, 2020, 2:16 PM), <https://www.marketwatch.com/story/why-do-so-many-americans-refuse-to-wear-face-masks-it-may-have-nothing-to-do-with-politics-2020-06-16> [<https://perma.cc/HG4E-VDK5>] (comparing the “freedom” that people who choose not to wear a mask claim to the freedom of “going out” that is allowed when individuals wear a face covering).

97. *See* Denis G. Rancourt, *Masks Don't Work: A Review of Science Relevant to COVID-19 Social Policy*, RIVER CITIES' READER (June 11, 2020), <https://www.rcreader.com/commentary/masks-dont-work-covid-a-review-of-science-relevant-to-covid-19-social-policy> [<https://perma.cc/293X-2VXT>] (“There have been extensive randomized controlled trial (RCT) studies, and meta-analysis reviews of RCT studies, which all show that masks and respirators do not work to prevent respiratory influenza-like illnesses, or respiratory illnesses believed to be transmitted by droplets and aerosol particles.”).

98. *See* Jerry Davich, *Wearing a Facial Mask in Public — or Not — is Our New Culture War Controversy*, CHI. TRIB. (May 11, 2020, 2:53 PM), <https://www.chicagotribune.com/suburbs/post-tribune/opinion/ct-ptb-davich-wearing-masks-in-public-culture-war-st-0512-20200511-cdxmeaagurgy3duhzhmahpeya-story.html> [<https://perma.cc/9V5A-9QWP>] (“These masks, in any form, have become the new emblem for our stance regarding this public health crisis. It's causing harsh judgments from both sides, multiple arrests in many states for violators and angry debates about what matters more to us: our personal freedoms or our public concerns.”).

99. *See* Buchwald, *supra* note 96 (inferring that the controversy surrounding mask wearing may be a reaction to authority because “[t]here's a certain bravado of being angry and defying requirements to wear a mask.” However, Americans are rarely upset when they see signs that require them to wear shoes or shirts because abiding by those standards is part of our culture).

100. *See generally* Kiona N. Smith, *Protesting During a Pandemic Isn't New: Meet the Anti-Mask League of 1918*, FORBES (Apr. 29, 2020, 6:10 PM), <https://www.forbes.com/sites/kionasmith/2020/04/29/protesting-during-a-pandemic-isnt-new-meet-the-anti-mask-league/#699a831312f9> [<https://perma.cc/Q9TV-5ZGM>] (pointing to the same cycle of debate that constantly plays out in front of a frightened and frustrated public).

hardly novel.¹⁰¹ The same controversies and arguments regarding masks occurred nearly 100 years ago during the 1918 influenza pandemic.¹⁰² People who resented the strict rules perceived the rules as a violation of their civil liberties and were called “mask slackers.”¹⁰³ The wearing of masks became political, a “national symbol of responsibility and patriotism.”¹⁰⁴ Around the country, there were reports of mask-less people attacked in the streets.¹⁰⁵ In San Francisco, protests over mask laws led to the creation of the Anti-Mask League which opposed the use of police powers.¹⁰⁶ “[The League] claimed that masks were useless and demanded the mayor repeal the ordinance requiring them.”¹⁰⁷ San Franciscans wrote the local newspaper “deriding the ordinance saying that ‘the muzzle is a farce and an outrage against our liberties.’”¹⁰⁸ People claimed that the city government should “dedicate itself to

101. See Kori Rumore & Marianne Mather, *How the 1918 Flu Pandemic Mirrors Today's Coronavirus Crisis*, CHI. TRIB. (Apr. 24, 2020, 4:09 PM), <https://www.chicagotribune.com/coronavirus/ct-opinion-flashback-1918-flu-pandemic-timeline-htmlstory.html> [<https://perma.cc/WH5D-53DB>] (discussing the similar 1918 influenza pandemic that “swept across the globe, sickening one-third of the world’s population, or about half a billion people, by the end of its terrifying run.”).

102. See *id.* (remarking on the many similarities between the 1918 flu pandemic that lasted from February of 1918 to April 1920, and the current coronavirus crisis).

103. See Katie Canales, *Photos Show How San Francisco Had to Convince Its ‘Mask Slackers’ to Wear Masks After Many Defied the Law While the 1918 Spanish Flu Pandemic Seized the City*, BUS. INSIDER (June 3, 2020, 2:56 PM), <https://www.businessinsider.com/san-francisco-anti-mask-league-1918-spanish-flu-pandemic-2020-5#resentment-once-again-boiled-in-some-residents-who-were-fatigued-by-yet-another-retightening-of-rules-and-angered-by-what-they-perceived-as-a-violation-of-their-civil-liberties-14> [<https://perma.cc/W9KT-CKA3>] (introducing the term mask slacker based on a Red Cross advertisement placed in the San Francisco Chronicle urging members of the public to wear masks and referring to those who would not wear a mask as a dangerous slacker).

104. Smith, *supra* note 100 (discussing how slowing the spread of influenza became a political and patriotic effort, especially during the final months of World War I).

105. See *id.* (suggesting that even though people were attacking those that did not wear masks did not necessarily mean that people liked wearing a mask either).

106. See Nicholas Gilmore, *The Mask Slackers of the 1918 Influenza Pandemic*, SATURDAY EVENING POST, (May 6, 2020), <https://www.saturdayeveningpost.com/2020/05/the-mask-slackers-of-the-1918-influenza/> [<https://perma.cc/PNP4-WMNJ>] (“Although San Francisco saw one of the worst U.S. outbreaks of the pandemic, these dissidents opposed orders from the city’s Board of Health not because of the economic implications, but because they saw it as their right to walk the city mask[-]less. Besides, they didn’t think the things were working anyway.”).

107. *Id.*

108. See *id.* (providing examples of how dissidents of local mask mandates, even prior to the COVID-19 pandemic voiced their alleged grievances).

cleaning up the city instead of implementing ‘autocratic rules,’” which could have resulted in arrest and a fine of five dollars.¹⁰⁹

1. *Buckle Up: Other Familiar Controversies Regarding Liberty and Death*

The controversy over masks is similar to other public debates over police powers.¹¹⁰ For example, laws implementing bans on indoor smoking are in effect worldwide to protect people from second-hand smoke, based on scientific evidence showing tobacco smoking is harmful to smokers and those inhaling second-hand smoke.¹¹¹ Critics claim that such laws are misguided, violating both personal liberty and the rights of property owners.¹¹² Like smoking laws, traffic laws have also sparked debates over police powers.¹¹³ Since the days of the early automobile to the present, people cite personal freedom and individual responsibility as reasons for opposition to various traffic safety laws.¹¹⁴ States like

109. *See id.* (emphasizing how prominent the discontent of the few may be, even though nine-out-of-ten people in San Francisco at the time supported mask wearing).

110. *See generally* Tara McKelvey, *Coronavirus: Why Are Americans so Angry About Masks?*, BBC NEWS (July 20, 2020), <https://www.bbc.com/news/world-us-canada-53477121> [<https://perma.cc/VHR6-VJUJ>] (comparing the resistance Americans made to requirements to wear seat belts and not smoke in restaurants. Initially, Americans restricted those guidelines but now follow those same safety guidelines).

111. *See generally* U.S. DEP’T OF HEALTH AND HUM. SERV., *THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL* 11 (2006) (concluding secondhand smoke causes an increased risk of different diseases, including heart disease, cancer, and emphysema. Therefore, the Surgeon General determined “[e]liminating smoking in indoor spaces fully protects nonsmokers from exposure to secondhand smoke. Separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate exposures of nonsmokers to secondhand smoke.”).

112. *See generally* Elizabeth A. Smith & Ruth E. Malone, *‘We Will Speak as the Smoker’: The Tobacco Industry’s Smokers’ Rights Groups*, 17 EUR. J. OF PUB. HEALTH 306, 306–13 (2007) (suggesting the claim that clean indoor air acts violate the right to smoke conflates the concept of rights and legality. While smoking is legal, it is not a right).

113. *See generally* *The History of Speed Limits in America: A Nation Speeding Up*, AM. SAFETY COUNCIL, <https://blog.americansafetycouncil.com/the-history-of-speed-limits-in-america/#:~:text=Connecticut%20was%20the%20first%20state,limit%20law%20back%20in%201901> [<https://perma.cc/P9LC-3JNV>] (referring to states such as Montana and Nevada that have historically opposed restrictive speed limit laws in recognition of freedom).

114. *See* Dave Roos, *When New Seat Belt Laws Drew Fire as a Violation of Personal Freedom: The 1980s Battle over Safety Belt Law Reflected Widespread Ambivalence over the Role and Value of Government Regulation*, HISTORY (Aug. 31, 2020),

Montana and Nevada have historically opposed restrictive speed limit laws.¹¹⁵ In 2011, Texas Governor Rick Perry vetoed a bill outlawing texting while driving because it was a “government effort to micromanage the behavior of adults.”¹¹⁶

However, the closest modern parallels to the current face-mask debate can be seen in the not-too-distant hullabaloo over seatbelts.¹¹⁷ In terms of public vitriol, many people are unaware of or have forgotten the protracted twenty-year battle over seatbelt laws in America.¹¹⁸ Before 1964, seatbelts were optional equipment; since then, the United States has required all new passenger cars to have some form of a seatbelt.¹¹⁹ In 1968, 63% of car owners had automobiles with seatbelts but only 35% reported using them all or most of the time.¹²⁰ A whopping 51 million dollars was spent to convince the American people to voluntarily wear seatbelts.¹²¹ An editorial in 1970 stated: “No one is going to tell Americans what to do as for the 56,000 of us who died on the highways

<https://www.history.com/news/seat-belt-laws-resistance> [perma.cc/46B3-3WMJ] (“When David Hollister introduced a seat belt bill in Michigan in the early 1980s that levied a fine for not buckling up, the state representative received hate mail comparing him to Hitler. At the time, only 14 percent of Americans regularly wore seat belts, even though the federal government required lap and shoulder belts in all new cars starting in 1968.”).

115. See *The History of Speed Limits in America: A Nation Speeding Up*, *supra* note 113 (reporting how Congress handed legislative authority back to individual states in 1995 regarding speed limit laws).

116. See Brandi Grissom & Thanh Tan, *Perry Issues Vetoes, Nixes Texting-and-Driving Ban*, TEX. TRIB. (June 17, 2011, 5:00 PM), <https://www.texastribune.org/2011/06/17/perry-issues-vetoes-nixes-texting-and-driving-ban/#:~:text=In%20all%2C%20he%20has%20vetoed,have%20banned%20texting%20while%20driving> [perma.cc/CAV4-AUX8] (discussing current Texas law that prohibits drivers under eighteen years of age from texting and talking while driving).

117. See generally Scottie Andrew, *The Debate over Masks Today Is a Lot Like the Decade-Long Fight to Mandate Seat Belts*, CNN (Aug. 5, 2020, 9:42 AM) <https://www.cnn.com/2020/08/05/us/seat-belts-masks-coronavirus-wellness-trnd/index.html> [https://perma.cc/B3FN-VCXF] (comparing the debate over the use of seatbelts in the past to the tactics that anti-mask advocates use to defend their position today).

118. See *id.* (analogizing the historical debate surrounding the use of seatbelts to rationale currently used by anti-maskers).

119. See *id.* (“Interest surged again in the 1960s, with the passage of the National Traffic and Motor Vehicle Safety Act, which required carmakers to install seat belts among other safety equipment.”).

120. See *Seatbelts*, ITHACA J. 6 (1970) (explaining that majority of persons with an automobile and seatbelts refused to use them regularly).

121. See *id.* (discussing how even with multimillion dollars in campaigning the notion of seatbelt use still did not appeal to American drivers).

last year, they are beyond telling anything.”¹²² Another exasperated writer stated that the fifteen-year effort to get people to save themselves was discouraging and that the only way to get folks to buckle up was to make the nonuse of seatbelts illegal.¹²³

Seatbelts help save lives.¹²⁴ Since 1975, The National Safety Council estimates seatbelts have helped saved 374,276 lives, which is roughly 15,000 lives a year.¹²⁵ Seatbelt laws help because they affect behavior and social norms.¹²⁶ Beginning with New York in 1984, states across the nation began mandating seatbelt use.¹²⁷ “Before those laws, around 14% of people wore their seatbelts. Within a decade, that number was up to 60%, and today it is around 90%—a cultural change along with automobile safety regulations, drastically reduced traffic deaths.”¹²⁸ New Hampshire, also known as the “Live Free or Die” state, has a seatbelt usage rate that is 20% below the national average.¹²⁹

122. *Id.*

123. See Leo Aikman, *We Know Cause of Accidents but Refuse to Take the Cure*, ATLANTA CONST., Apr. 5, 1970, at 19A (“If saving [a] life isn’t motivation enough for using [seatbelts], then what is?”).

124. See *id.* (“The evidence that they save lives is positive. Belts have become standard equipment.”).

125. See generally Automotive Fleet Staff, *New Hampshire Moves Closer to Seatbelt Law for Drivers*, AUTO. FLEET (Feb. 27, 2020), <https://www.automotive-fleet.com/352082/new-hampshire-moves-closer-to-seatbelt-law-for-drivers> [<https://perma.cc/384D-EEKG>] (praising the effectiveness of seatbelts in saving the lives of auto drivers and passengers).

126. See *Policy Impact: Seat Belts*, CTR. FOR DISEASE CONTROL AND PREVENTION <https://www.cdc.gov/transportationsafety/seatbeltbrief/index.html> [<https://perma.cc/UN6E-MHUU>] (“Seat belt use is on the rise. Laws, education, and technology have increased seat belt use from 11% in 1981 to nearly 85% in 2010, saving hundreds of thousands of lives.”).

127. See Nell Henderson, *N.Y. Is First State To Get Seat Belt Law*, WASH. POST (July 13, 1984), <https://www.washingtonpost.com/archive/business/1984/07/13/ny-is-first-state-to-get-seat-belt-law/b86fd522-bb32-4286-980a-caefdb3edfa5/> [<https://perma.cc/9GNU-5R5T>] (“New York yesterday became the first state to require motorists to wear seat belts, as the Reagan administration and auto safety advocates debated over whether other states should follow.”).

128. Ben Henry, *You Asked, We Answered: Why Doesn’t Everyone Wear Seat Belts in N.H.?* N.H. PUB. RADIO (Nov. 13, 2017, 3:16 PM), <https://www.nhpr.org/post/you-asked-we-answered-why-doesnt-everyone-wear-seat-belts-nh#stream/0> [<https://perma.cc/3F6F-YTDH>] (accentuating the dramatic increase in seatbelt usage that occurred over time with drivers and passengers).

129. *Id.* (“While the state requires that drivers and passengers under 18 wear seat belts, a law for adults never made it through the legislature. As a result of never having had one of these laws, fewer people wear their seat belt in New Hampshire than in any other state. The national average is 90 percent. In New Hampshire, it’s just 70 percent.”).

When Texas passed its seatbelt law in 1985 critics described it as “Big Brother at his worst.”¹³⁰ When the constitutionality of the Texas seatbelt law was challenged, the appellant complained that it infringed upon his constitutional right “to be free from bodily restraint.”¹³¹ The First Court of Appeals rejected this argument and found that the seatbelt law was not just about the person needing to buckle up.¹³² Rather, seatbelt-wearing served the state’s interest in public safety and welfare by enhancing a driver’s ability to maintain control of his vehicle and by reducing injuries not only to himself but also to others.¹³³ The Court of Criminal Appeals denied the petition for discretionary review with one member of the Court, Judge Marvin O. Teague, warning of the slippery slope towards an Orwellian society, where the law protects a person from themselves.¹³⁴ Interestingly, Judge Teague’s dissent relies heavily on *Jacobson v. Massachusetts*, a 1905 U.S. Supreme Court decision affirming the use of police powers to mandate compulsory vaccination for smallpox.¹³⁵ The *Jacobson* rationale is the reason why police powers can be used to mandate and compel wearing masks during COVID-19.¹³⁶

2. A Novel Source of Controversy: Chapter 418, Government Code

Despite similarities to prior public health and public safety controversies, the novel coronavirus has also generated novel

130. SHREVEPORT TIMES, Oct. 13, 1988, at 12A.

131. *See Richards v. State*, 743 S.W.2d 747, 748 (Tex. App.—Houston [1st Dist.] 1987, pet. ref’d) (explaining freedom from bodily restraint arises from the Constitution’s protection of liberty).

132. *Id.* (“In considering the constitutionality of the Texas mandatory seat belt law, it is not the function of the courts to decide whether the law is desirable or necessary. The issue is ‘not what the legislature should do but what the legislature can do.’”).

133. *Id.* (stating the state’s legitimate interest in enacting seatbelt legislation).

134. *See id.* at 726 (“By implicitly approving the holding by the court of appeals that the seat belt law is constitutional, has this Court not taken one giant step upon ‘the slippery slope of paternalism, treading blithely on individual liberty?’”).

135. *See generally Jacobson, supra* note 7, at 25-26 (noting that vaccination non-compliance resulted in a criminal fine of five dollars with nonpayment resulting in commitment to jail).

136. *See* Joan Biskupic, *The 115-year-old Supreme Court Opinion that Could Determine Rights During a Pandemic*, CNN (Apr. 10, 2020, 2:58 PM), <https://www.cnn.com/2020/04/10/politics/pandemic-coronavirus-jacobson-supreme-court-abortion-rights/index.html> [<https://perma.cc/JUA9-JWJZ>] (“Jacobson instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency”).

controversies over Texas law.¹³⁷ Title IV of the Government Code details the statutory authorities of the Executive Branch.¹³⁸ The code contains Subtitle B which is about law enforcement and public protection.¹³⁹ Within Subtitle B is Chapter 418, Emergency Management.¹⁴⁰

In the future, when lawyers look back on the mask debate and other controversies surrounding COVID-19 in Texas law, many inquiries will lead to Chapter 418.¹⁴¹ The short title of Chapter 418 is the Texas Disaster Act of 1975.¹⁴² Although Chapter 418 has been on the books for forty-five years, many lawyers were likely unaware of its existence until 2020.¹⁴³ When dealing with disasters, the governor is not required to enforce its provisions.¹⁴⁴ Consequently, there is no broad, general understanding of the Act's provisions.¹⁴⁵ Since the beginning of the COVID-19 pandemic, many lawyers are discovering Chapter 418 and its implications on the criminal justice system.¹⁴⁶

137. *Cf. id.* (discussing the century-long dispute as to whether the power of the government includes the ability to compel an individual's actions regarding their health).

138. *See* TEX. GOV'T CODE ANN., tit. 4 (examining issues such as executive officers; law enforcement and publication; state military forces and veterans; history, culture, and education; other administrative agencies and programs; commerce and industrial development; corrections; and health and human services).

139. *See id.* (addressing concerns dealing with law enforcement and public protection).

140. *See generally* TEX. GOV'T CODE ANN. § 418.001 (noting that Chapter 418 is also known as the Texas Disaster Act of 1975).

141. *See generally id.* (outlining and emphasizing the purpose of Chapter 18 and how it helps protect the safety of the public).

142. *See id.* (giving the county judge the power to declare a local disaster within the county under certain circumstances).

143. *See* Brad Johnson, *An Overview of the Texas Disaster Act, the Source of the State's Coronavirus Response*, THE TEXAN (Aug. 31, 2020), <https://thetexan.news/an-overview-of-the-texas-disaster-act-the-source-of-the-states-coronavirus-response/> [<https://perma.cc/U2B2-KRQ3>] (noting that up until 2020, these disaster laws had rarely been used in statewide issues, but rather had been isolated to specific areas such as severe weather issues).

144. *See* TEX. GOV'T CODE ANN. § 481.025 (providing instances when the office is the agency that administers programs).

145. *Cf.* Texas Municipal League Staff, *Local Government Emergency Management*, TEX. MUN. LEAGUE, (Mar. 16, 2020), <https://www.tml.org/DocumentCenter/View/1562/Local-Government-Emergency-Management> [<https://perma.cc/3ZXZ-BQN6>] (demonstrating how lawyers give legal opinions even where some areas of the law are not always crystal clear).

146. *See generally* Johnson, *supra* note 143 (assuming that the abundant use of the Texas Disaster Act caused many lawyers to learn the different implications this law may have on citizens).

Section 418.012 authorizes the governor to “issue executive orders” that “have the force and effect of law.”¹⁴⁷ Section 418.016(a) states that, “The governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.”¹⁴⁸ Section 418.173 provides penalties for violating an emergency management plan.¹⁴⁹ Emergency management plans “may prescribe a punishment for the offense but may not prescribe a fine that exceeds \$1,000 or confinement in jail for a term that exceeds 180 days.”¹⁵⁰

Together, these sections display a concentration of authority in the Texas Executive Branch.¹⁵¹ This is a drastic departure from the traditional demands of separation of powers and its system of checks and balances.¹⁵² Governor Abbott used these powers, citing Chapter 418 in coronavirus-related executive orders (including GA-29 requiring public masking).¹⁵³ On the surface, public mask mandates are a fleeting issue tied to the duration of the pandemic.¹⁵⁴ However, the current debate mirrors the controversy surrounding Chapter 418 and looming

147. TEX. GOV'T CODE ANN. § 418.012 (drawing attention to the wide scope and purview of the governor's powers during a local disaster).

148. TEX. GOV'T CODE ANN. § 418.016(a).

149. *See* TEX. GOV'T CODE ANN. § 418.173(a) (“A state, local, or interjurisdictional emergency management plan may provide that failure to comply with the plan or with a rule, order, or ordinance adopted under the plan is an offense.”).

150. TEX. GOV'T CODE ANN. § 418.173(b).

151. *See* TEX. GOV'T CODE ANN. §§ 418.012, 418.016, 418.073 (highlighting specific sections within the government code that emphasize the concentration of emergency power in the Texas executive branch).

152. *See Government Emergency Powers*, TEX. PUB. POL'Y FOUND. (Sept. 24, 2020), <https://www.texaspolicy.com/legemrgpower/> [<https://perma.cc/XR8Y-WZXP>] (“Although circumstances may warrant the use of emergency powers, this authority is not unlimited nor are government officials allowed to create their own extrajudicial concepts”).

153. *See* The Governor of the State of Tex., *Executive Order GA 38*, 46 Tex. Reg. 4913 (2021) (regarding the regulations in place for Texans during the COVID-19 pandemic and the reopening of public settings).

154. *See* Jamie Ducharme, *Should We Keep Wearing Masks Even After the Pandemic Ends?*, TIME (Apr. 2, 2021, 10:42 AM), <https://time.com/5952051/masks-after-pandemic-ends/> [<https://perma.cc/DTQ7-7UH6>] (summarizing different opinions on whether the mask mandate will make a difference in post-COVID America).

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constitutional concerns about the delegation of legislative authority to the executive branch during disaster declarations.¹⁵⁵

3. *Police Practices, Law Enforcement, and Accountability*

The pandemic underscores how seemingly “minor offenses” are essential to avoiding major problems.¹⁵⁶ However, for public health and safety laws to be effective, they must be enforced.¹⁵⁷ There can be no law without enforcement, and there can be no enforcement without law.¹⁵⁸

Prior to COVID-19, there were already questions and criticism about the police and enforcement of such laws.¹⁵⁹ Different reasons exist for what seems to be diminishing efforts to enforce traffic laws and their possible effects on public safety.¹⁶⁰ In 2019, Randy Petersen, a former police officer who is now a senior researcher with the Texas Public Policy Foundation, called into question the motives underlying traffic enforcement.¹⁶¹ In July 2020, Berkeley, California, became the first city in the nation to revoke the authority of its police department to enforce traffic laws.¹⁶²

155. See *In re Hotze*, 627 S.W.3d 642, 646 (Tex. 2020) (referring to the power of the Texas Constitution and the seriousness of constitutional laws).

156. See Texas Municipal League Staff, *supra* note 145 (citing to an example of a situation where people must put public health and safety first to avoid causing health hazards to others).

157. See Jackson et al., *supra* note 51 (referring to a study which demonstrates the effect of moral compliance when police enforce laws).

158. See *id.* (enforcing laws ensures individuals will follow the rules because they accept that it is the right thing to do).

159. See Robert Avila et al., *One Decade Down: Possible Explanations for the Decrease of Traffic Citations in Texas*, 27 THE RECORDER 1, 3 (2018) (tracking a reduction in Texas traffic citations from about 9 million in 2006 to 5.5 million in 2017. Multiple theories may explain this: changes in law enforcement, law enforcement agents rerouted to the border, and loss of resources and funding).

160. See *id.* (establishing reasons for the decrease in citations for Class C fine-only misdemeanors may be a result of protecting public perceptions of officers and reactive policing).

161. See generally Randy Peterson, *Let's Reconsider Traffic Enforcement*, TEX. PUB. POL'Y FOUND. (Jan. 17, 2019), <https://www.texaspolicy.com/lets-reconsider-traffic-enforcement/> [[https://perma.cc/N\(%P-Y5WJ\)](https://perma.cc/N(%P-Y5WJ))] (labeling traffic enforcement a means of gaining tax revenue rather than making the roads safer).

162. See Rachel Sandler, *Berkeley Will Become 1st U.S. City to Remove Police from Traffic Stops*, FORBES (July 15, 2020, 8:22 PM), <https://www.forbes.com/sites/rachelsandler/2020/07/14/berkeley-may-become-1st-us-city-to-remove-police-from-traffic-stops/#6ebf1b5b70fa> [<https://perma.cc/2YCD-DBDJ>] (“Though

Controversy over mask rules led a number of sheriffs and police departments to refuse to enforce mask orders altogether.¹⁶³ Whether orders are contradictory or deficient is one thing—the outright refusal to uphold the law by law enforcement has been called a threat to the legitimacy of law.¹⁶⁴ In one Texas county, a sheriff said, “[GA-29] includes specific language prohibiting law enforcement from detaining, arresting, or confining to jail as a means to enforce the order” and that the order “strips law enforcement of the necessary tools to enforce compliance with the law.”¹⁶⁵ In another county, a sheriff said deputies would not be required to wear face masks on duty because it could put them at a disadvantage during a physical confrontation, and he wants deputies to be able to communicate their intentions when interacting with citizens.¹⁶⁶

Criminal law ultimately entails the possibility of arrest.¹⁶⁷ However, that does not mean that the decision to arrest is solely within the purview

Berkeley would be the first U.S. city to adopt such a proposal, criminologists have been debating the idea for years, and the majority of police officers in the U.K, Iceland and Norway already conduct most police duties unarmed.”).

163. See Sophie Lewis, *Growing Number of Texas Sheriffs Refuse to Enforce Governor's Mask Requirement*, CBS NEWS, (July 8, 2020, 7:03 AM), <https://www.cbsnews.com/news/texas-coronavirus-face-masks-sheriffs-refuse-enforce-governor-abbott-order/> [<https://perma.cc/TQ2S-F4R8>] (“Police officials in at least nine counties — including Denton, Houston, Montgomery, Gillespie, Upshur, Kerr, Gregg, Nacogdoches and Panola — said they will not impose the [mask requirement] with verbal or written citations.”).

164. See Zaira Perez, *Denton County Sheriff Tracy Murphree Says Abbott's Mask Order Is Contradictory*, DENTON REC.-CHRON. (July 6, 2020), https://dentonrc.com/news/denton_county/sheriffs_office/denton-county-sheriff-tracy-murphree-says-abbotts-mask-order-is-contradictory/article_d04c0185-8fca-5bc2-86dd-ffe2c9102ef7.html [<https://perma.cc/7P8P-QAHV>] (deciding not to follow the executive order, Denton County Texas Sheriff, Tracey Murphree, is arguably setting a precedent for establishing the legitimacy of the law).

165. Valeria Olivares, *Nearly 80 Texas Counties Have Opted Out of Gov. Greg Abbott's Mask Order. Others Refuse to Enforce It.*, TEX. TRIB. (July 19, 2020, 6:00 PM), <https://www.texastribune.org/2020/07/09/texas-mask-order-enforcement/> [<https://perma.cc/CKA8-C3XJ>].

166. See *id.* (summarizing an interview with a different law enforcement office regarding their reasoning for not following implemented mask mandates).

167. See generally NAT'L INST. OF JUST., *Five Things About Deterrence*, U.S. DEP'T. OF JUST. (May 2016) (summarizing generally from research on deterrence as a means to stop criminals. “[R]esearch shows clearly that the chance of being caught is a vastly more effective deterrent than even draconian punishment,” and “[t]he police deter crime when they do things that strengthen a criminal's perception of the certainty of being caught.”).

of law enforcement or that it must be the first recourse.¹⁶⁸ Texas law already limits the authority of peace officers to make on-view arrests for certain Class C misdemeanors (speeding, open container, and “texting while driving” violations).¹⁶⁹ Other government actors, including health inspectors, code enforcement officers, and animal control personnel, enforce laws through summonses and citations and are not authorized to make on-view arrests.¹⁷⁰ That does not mean that arrests cannot occur, it just means that the decision to arrest a person is made subsequently by a judge after determining probable cause.¹⁷¹

The debate about police officer authority to make arrest for Class C Misdemeanors is not new.¹⁷² This issue has been contentious in Texas since 2001, when it went to the U.S. Supreme Court.¹⁷³ It was contentious when Governor Rick Perry twice vetoed bills curtailing police authority to make arrests for Class C misdemeanor traffic offenses.¹⁷⁴ The issue raised its contentious head once again in the 2019 Legislature.¹⁷⁵ However, what is new is a growing public concern about

168. *See generally id.* (detering crime can include strategies like hot spotting or law enforcement agents merely showing handcuffs and radio).

169. *See* TEX. TRANSP. CODE ANN. § 543.009 (driving offenses such as speeding, the use of a wireless communication device, or violation of open container laws while driving can result in arrest by law enforcement); *see also* TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (permitting the arrest of an individual committing an offense in view of peace officer).

170. *E.g., Code Enforcement Process*, CITY OF SAN ANTONIO, <https://www.sanantonio.gov/ces/Services> [<https://perma.cc/8THD-LYW5>] (explaining the municipal process for handling code violations leading up to adjudicative processes).

171. *E.g., id.* (failing to resolve a code violation could lead to the City’s adjudicative process, including going to court where arrests are possible).

172. *See* *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (answering the issue of whether the Fourth Amendment forbids arrests for minor criminal offenses, including a seatbelt violation).

173. *See id.* (finding that “[m]otorist’s Fourth Amendment right to be free from unreasonable seizure was not violated when she was arrested, handcuffed, and detained in jail for one hour for failing to wear her seat belt and failing to fasten her children in seat belts[.]”).

174. *See* Tex. S.B. 1597, 78th Leg., R.S. (2003) (limiting when an officer can arrest based on section 543.003 of the Texas Transportation Code); *see generally* Tex. S.B. 730, 77th Leg., R.S. (2001) (concerning motorcycle safety).

175. *See* Arya Sundaram, *A Measure to Limit Arrests for Non-Jailable Offenses Passed the House After a Great Struggle. It Still Died.*, TEX. TRIB. (May 26, 2019, 12:00 AM), <https://www.texastribune.org/2019/05/26/texas-class-c-arrests-legislation-dead/> [<https://perma.cc/9AS8-6SME>] (spotlighting Senator Moody’s Senate Bill 815 which “would let judges dismiss low-level crimes if police officers didn’t explain why they arrested someone for an offense that is punishable only by a fine, such as a traffic ticket”).

police practices and the use of force.¹⁷⁶ On June 4, 2020, the American Public Health Association declared police violence a public health crisis in the United States.¹⁷⁷ The public perceives law enforcement officers as having a special license to brutalize without accountability.¹⁷⁸ If sustained and unaltered, such perception poses a dire threat not only to public health but also to the law itself.¹⁷⁹

176. See Am. Pub. Health. Ass'n., *APHA Calls Out Police Violence As a Public Health Crisis: A Statement from APHA Executive Director Georges C. Benjamin, MD*, APHA NEWS RELEASES (June 4, 2020), <https://www.apha.org/news-and-media/news-releases/apha-news-releases/2020/apha-calls-out-police-violence> [<https://perma.cc/HX75-F8EQ>] (denouncing the violent practices used by law enforcement because they create a public health problem).

177. See *id.* (“The American Public Health Association denounces the use of violent methods by law enforcement against peaceful protesters. The current protests are the result of the American people rightfully demanding an end to the racial profiling by some police officers and a system of structured racism resulting in disproportionate harm to the health of individuals and communities of color.”).

178. Cf. *What if I am Stopped by Police?*, ACLU MINN., <https://www.aclu-mn.org/en/know-your-rights/what-if-im-stopped-police> [<https://perma.cc/RL5Q-8PMM>] (advising the public that police have the burden of de-escalation in traffic stops, “[h]owever, you cannot assume officers will behave in a way that protects your safety or that they will respect your rights even after you assert them.”).

179. Cf. *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. 1 (July 9, 2020), <https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/> [<https://perma.cc/GYJ9-CWJB>] (“Two-thirds of Americans (66%) say that civilians need to have the power to sue police officers to hold them accountable for misconduct and excessive use of force, even if that makes the officers’ jobs more difficult.”).

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B. Looking Behind the Mask: The Intersection of Public Safety, Public Health, and Law

COVID-19 is like a carnival ride from a nightmare.¹⁸⁰ It is slow.¹⁸¹ It is scary.¹⁸² And no one knows how long it is going to last.¹⁸³ The pandemic permeates even the most mundane aspects of life, from regular work, school, and recreation routines to where we travel and how we dress.¹⁸⁴ COVID-19 has also cast a new light on the complex interplay between public safety, public health, and criminal law.¹⁸⁵

1. Public Safety

Public safety is ostensibly about keeping people safe.¹⁸⁶ As the figure containing Maslow's Hierarchy of Needs depicts below, safety needs are

180. See *How to Handle the Emotional Rollercoaster of Coronavirus Stress*, CLEVELAND CLINIC: HEALTH ESSENTIALS (Aug. 25, 2021), <https://health.clevelandclinic.org/emotional-rollercoaster-coronavirus-pandemic/> [<https://perma.cc/CR4N-96WE>] (“The COVID-19 pandemic is a constant whirlwind of evolving information, flattened curves and worrying spikes, mask policies and virus variants.”).

181. Cf. *id.* (asserting there is high likelihood there will be a long-term battle against COVID).

182. See *id.* (identifying how individuals experienced have increased stress and anxiety during the pandemic).

183. See Jessica Roy, *Will this Pandemic Ever End? Here's What Happened with the Last Ones*, L.A. TIMES (Dec. 23, 2021, 5:00 AM), <https://www.latimes.com/science/story/2021-12-23/will-the-pandemic-ever-end-heres-what-happened-with-the-last-ones> [<https://perma.cc/84CS-DPNC>] (pointing out how the COVID Delta variant created a new wave of infections, hospitalizations and deaths).

184. See generally Patrick Van Kessel et al., *In Their Own Words, Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), <https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-covid-19-pandemic/> [<https://perma.cc/LBG8-H3VY>] (providing statistics and dates on the effect the pandemic has had on Americans).

185. See Brian A. Jackson et al., *How the Criminal Justice System's COVID-19 Response Has Provided Valuable Lessons for Broader Reform*, RAND CORP. (2021), https://www.rand.org/pubs/research_briefs/RBA108-6.html [<https://perma.cc/CF2F-PRZ8>] (explaining how past efforts by the system to prepare for pandemic threats were not fully successful and how the pandemic made the inextricable relationship between public safety goals of criminal justice and public health undeniable).

186. See *What is Public Safety?*, REIMAGINING PUB. SAFETY (Mar. 24, 2021, 1:31 PM), <https://www.austintexas.gov/blog/what-public-safety> [<https://perma.cc/5ULT-BRQL>] (“Legal scholars define public safety as ‘the protection of the general public.’”).

among the most basic human needs.¹⁸⁷ Safety is “the condition of being safe from undergoing or causing hurt, injury, or loss;” and the condition of being protected from or unlikely to cause danger, risk, or injury.¹⁸⁸

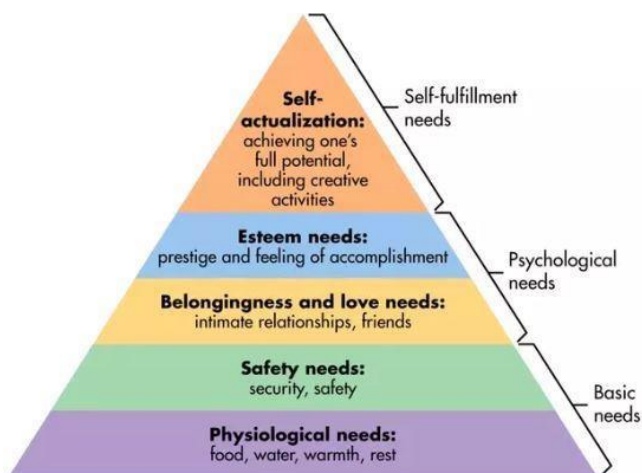


Figure 1: Maslow's Hierarchy of Needs (McLeod 2020)

Some believe that personal safety is distinct from public safety.¹⁸⁹ Yet both public and personal safety raise similar questions.¹⁹⁰ Safety from what? Safety from whom? Is it safety for personal interests and individual liberties or safety for public interests and the collective good of society?¹⁹¹ COVID-19 has reignited old debates about public safety

187. See Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLY PSYCH. (Dec. 29, 2020), <https://www.simplypsychology.org/maslow.html> [<https://perma.cc/RX6U-3N6F>] (showing that safety needs are only second to the most fundamental needs, which are physiological needs).

188. *Safety*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/safety> [<https://perma.cc/9J9N-5DZ8>] (defining safety by using the first definition of the word in the dictionary); *Safety*, LEXICO, <https://www.lexico.com/en/definition/safety> [<https://perma.cc/83HD-WZMR>] (providing an alternative but similar definition of the word safety).

189. See Spencer Coursen, *Safety vs. Security: Understanding the Difference May Soon Save Lives*, LINKEDIN (Aug. 31, 2014), <https://www.linkedin.com/pulse/20140831152519-11537006-understanding-the-difference-may-soon-save-lives-safety-vs-security> [<https://perma.cc/D2HW-EN5Y>] (stating that a significant challenge officials encounter is overcoming the assumption that personal and public safety can be achieved at the same time, by doing the same thing).

190. See generally *id.* (discussing what is needed to consider being “safe”).

191. See generally *id.* (questioning what exactly requires protection for the creation of safety).

and the mechanisms we use to balance personal liberties against the collective good of society.¹⁹² Public safety is inextricably associated with police powers.¹⁹³ “The 10th Amendment of the U.S. Constitution has provided that the powers not delegated to the Federal Government are reserved to the states.”¹⁹⁴ These powers include police power, which encompasses the authority of each state (derivatively, a city or town) to regulate behavior and enforce order within its territory for the betterment of the health, safety, morals, and general welfare of its inhabitants.¹⁹⁵

Before the pandemic, discussions about public health and criminal justice involved health challenges of people cycling through courts, jails, and prisons.¹⁹⁶ Since the advent of COVID-19, more discussions have been about the interrelationship of people, their decisions, and how those decisions affect public health and safety.¹⁹⁷ More and more people across the nation realize how something as seemingly small and insignificant as wearing a mask can help reduce the transmission of the virus and help save lives.¹⁹⁸ National focus seems to be coalescing on how our choices

192. See Jackson et al., *supra* note 185 (“Long before the pandemic, there were concerns among both experts and the public about the consequences of the number of people channeled into the justice system in the United States.”).

193. See Ilya Shapiro, *State Police Powers and the Constitution*, CATO INST. (Sept. 15, 2020), <https://www.cato.org/pandemics-policy/state-police-powers-constitution> [<https://perma.cc/EH9B-CXL2>] (explaining that state and local officials govern public health and safety).

194. Ryan K. Turner & Benjamin Gibbs, *Lessons from Ferguson: What Every Government Lawyer in Texas Needs to Know*, STATE BAR OF TEX. 28TH ANN. ADVANCED GOV’T. L. COURSE 13 (July 2016).

195. See Jacobson, *supra* note 7, at 39 (upholding the authority of states to enforce compulsory vaccination laws. The Court’s decision articulated the view that individual liberty is not absolute and is subject to the police power of the state).

196. See *The Intersection of public Health and Criminal Justice: Interview with David Cloud*, (2017), <https://craft2.vera.org/research/the-intersection-of-public-health-and-criminal-justice> [<https://perma.cc/RB6N-7T79>] (unpacking the public health implications of mass incarceration and why it is necessary for the criminal justice system and health care system to converge).

197. See generally Shapiro, *supra* note 193 (discussing how generally constitutional pandemic regulations can tread on the rights of individuals and whether or not the government can justify the restriction of basic liberties).

198. See Jeremy Howard et al., *Face Masks Against COVID-19: An Evidence Review*, PREPRINTS (Apr. 12, 2020), <https://www.preprints.org/manuscript/202004.0203/v1> [<https://perma.cc/D5ZX-TS5P>] (elaborating that most of the evidence suggests that mask wearing is most effective at reducing the spread of the virus when compliance is high).

are interconnected and how individual decisions affect public health and safety.¹⁹⁹

It is an abrupt change and in stark contrast to the advocacy-led media narrative in recent years, which trivialized, downplayed, and ignored the significance of public health and safety laws (i.e., fire safety regulations, sanitation issues, traffic offenses).²⁰⁰ Rather than acknowledging the importance of such laws and while highlighting how to address inequities, critics ignored the legitimate need for such laws and their enforcement and instead stoked “public outrage rooted in sweeping generalizations about the dysphemism of ‘debtor’ prisons.”²⁰¹ People are dying daily and are injured hourly because of so-called “small fry,” “victimless,” or “minor” crimes, and the annual economic impact in Texas is staggering.²⁰² That is why states and local governments must have a legitimate interest and a rational basis to exercise police powers.²⁰³ In Texas, Class C misdemeanors are criminal offenses punishable by imposing a fine, permeating public health and safety laws.²⁰⁴ Class C Misdemeanors play an understated yet significant role in providing consequences and ensuring compliance with the most fundamental notions of social order.²⁰⁵

199. *See generally* SOCIETY’S CHOICES: SOCIAL AND ETHICAL DECISION MAKING IN BIOMEDICINE at vi (Ruth E. Bulger et. al. 1995) (exploring that although our individual choice may benefit other people, we may be hesitate to act upon or endorse them).

200. *See id.* (nothing how the influence of media, abuse of the ‘audio sound byte’ and other tactics have influenced the public’s perception on public health and safety).

201. *See* Turner & Gibbs *supra* note 194 (re-emphasizing that Texas law does not authorize certain practices used in other state courts to address public outrage).

202. *See id.* (using littering as an example of how Texas taxpayers have spent \$969.9 million to pick litter up off of Texas highways since 1986).

203. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (reiterating the rational basis test which requires “that legislation [which could also cover other official action] is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

204. *See generally* TEX. PENAL CODE ANN. § 12.23 (indicating that fines for Class C misdemeanors shall not exceed \$500).

205. *See* Tex. Mun. Courts Educ. Ctr., 2016 Legislative Update, 26 THE RECORDER J. TX. MUN. CT. 1 AT 11 (Oct. 2016) (using certain driving behaviors that are classified as Class C Misdemeanors to exemplify why compliance with fundamental notions of social order is important to the safety of society).

2. *Public Health*

The definition of police powers contemplates the protection of “public health” and “public safety,” but are the terms distinct?²⁰⁶ Public health is “[t]he science and art of preventing disease, prolonging life and improving quality of life through organized efforts and informed choices of society, organizations, public and private, communities and individuals.”²⁰⁷ The enforcement of laws and regulations that protect health and ensure safety are considered, by the Institute of Medicine, one of the essential elements “that must be in place to create and sustain a healthy community.”²⁰⁸ The Center for Disease Control conducts a survey identifying the top ten most important public health issues in the United States.²⁰⁹ They include:²¹⁰

- Alcohol-related harms*;
- Food safety*;
- Healthcare-associated infections (i.e., antibiotic-resistant bacteria);
- Heart disease and stroke;
- HIV;
- Motor vehicle injury*;
- Nutrition, physical activity, and obesity;
- Prescription drug overdose*;
- Teen pregnancy;
- Tobacco use*.

206. See *Dillon’s Rule, Home Rule, and Preemption*, PUB. HEALTH L. CTR AT MITCHELL HAMLINE SCH. OF L. 2-3 (2020) (describing the nature of police powers as it relates to local governmental powers).

207. Joav Merrick, *Public Health in a Global Context*, 1 FRONTIERS IN PUB. HEALTH 1, 2 (2013) (using the founder of Yale’s Department of Public Health, Charles-Edward Amory Winslow’s definition of public health).

208. See *id.* (addressing ten essential elements the Institute of Medicine deems essential in sustaining a healthy community, including enforcement of laws and regulations).

209. See *generally Prevention Status Reports for Georgia*, CTR. FOR DISEASE CONTROL AND PREVENTION (2016) <https://www.cdc.gov/psr/overview.html> [<https://perma.cc/X595-WEBU>] (“The Prevention Status Reports (PSRs) highlight – for all 50 states and the District of Columbia – the status of public health policies and practices designed to address the following important public health problems and concerns[.]”).

210. See *generally id.* (listing the sectors in which the CDC’s *Prevention Status Report* collects data and information from to better inform their public health policy practice and design).

Only five of these public health issues (indicated with asterisks) are considered public safety issues.²¹¹ So why do some public health concerns become legal issues that justify using police powers? Ultimately, it has to do with social control.²¹² Informal social controls run the gamut through varying levels of shaming to social ostracism.²¹³ While informal social controls often bring about compliance, they have limitations.²¹⁴ “As societies become more complex, informal social controls become less effective.”²¹⁵ “With increasing numbers of people comes a decrease in the power of major social institutions to control human behavior.”²¹⁶ “More conflicts arise among members and between groups, and a more formal, rationally thought-out method of social control is necessary.”²¹⁷ Once the effectiveness of informal social control diminishes, the formal social control of law steps in.²¹⁸

3. *Civil vs. Criminal Law*

Civil and criminal law exist to control behavior and to protect the interests of society and individuals.²¹⁹ Both types of law control particularized conduct and permit the government to assess penalties.²²⁰ Civil penalties usually consist of payment to wronged parties.²²¹ Criminal penalties, however, involve incarceration and/or a fine and are

211. *See generally id.* (delineating what the Center for Disease Control considers to be public safety issues from other general public health concerns).

212. *See generally* SUSAN TITUS REID, CRIMINAL LAW 2 (7th ed. 2007) (reviewing the connection between state police powers and social control).

213. *Id.*

214. *See generally* SUE T. REID, CRIMINAL LAW (Roxbury 7th ed. 2007) (exploring misdemeanors, felonies, federal and state statutes and cases, and constitutional principles relating to criminal law).

215. *Id.*

216. *Id.*

217. *Id.*

218. *See generally id.* (discussing the ways informal and formal social norms create the governing law).

219. *See Civil Law vs. Criminal Law*, LAWSHELF EDUCATIONAL MEDIA (2022), <https://lawshelf.com/coursewarecontentview/civil-law-vs-criminal-law> [<https://perma.cc/D8RF-KJ45>] (explaining how criminal law involves punishing and rehabilitating offenders by the government, while civil law involves a private party paying for the harm, loss, or injury of another private party).

220. *See id.* (comparing civil and criminal law punishments and burdens of proofs).

221. *See id.* (stating that payment usually involves compensation to the injured party which can include disposition of property).

used to maintain social solidarity and protect the public.²²² Additionally, the differences between civil and criminal adjudication have constitutional implications.²²³ Practicing professor at Stanford Law School, Alec Schrierenbeck, explains, “classification of an offense as one or the other leads to consequences ranging from the applicable burden of proof—reasonable doubt in the criminal context and preponderance of the evidence in the typical civil case—to the availability of procedural protections that exist only in the criminal realm.”²²⁴

There is also a difference between the enforcement of civil penalties (e.g., civil fines and civil sanctions) and criminal fines.²²⁵ Data shows there is a massive gap between penalties imposed “on the books” and penalties actually collected.²²⁶ The study notes “existing scholarship has not seriously addressed what happens after the state orders offenders to pay these sanctions.”²²⁷ “Instead, the administrative enforcement literature has essentially ignored to what extent offenders actually pay the penalties imposed against them.”²²⁸ If civil fines are not effectively enforced against corporations and white-collar criminals who have money, why should they be used for public health violations against people who may or may not have money?²²⁹ Remember, coercion is an essential feature of the law.²³⁰ Although monetary remedies sought in civil proceedings may have a punitive motivation, generally only criminal

222. See *id.* (identifying the main forms of punishment under the criminal law and the purpose behind it).

223. *Id.*

224. Alec Schrierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1890–1891 (2018).

225. See 28 U.S.C. § 2461 (2019) (describing the mode of recovery for a civil fine and criminal charge).

226. See Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. POL’Y REV. 453, 454 (2011) (discussing the enforcement of financial penalties and lack of collection).

227. *Id.*

228. *Id.*

229. See Matt Zbrog, *Follow the Money: Why Financial Crimes Often Go Unpunished*, FORENSICS COLLEGES (Nov. 6, 2019), <https://www.forensicscolleges.com/blog/follow-the-money/unpunished-financial-crimes> [<https://perma.cc/VRJ2-TQGQ>] (explaining that after the mortgage crisis in 2008, those who were committing fraudulent practices did not pay fines nor were they jailed).

230. See Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 728 (2005) (“Only a threat that is perceived to be credible has the power to coerce.”).

finer are considered retributive.²³¹ To maintain the credibility of threats, “punishments must actually be imposed on those who commit crimes.”²³²

This may explain why civil fines are not typically used in Texas and why statutory law governing them is scant.²³³ In contrast, Texas authorities widely use criminal fines and the statutory laws governing them are substantial.²³⁴ In 2017, the legislature passed “Smart on Crime” legislation with bipartisan support, which governed the imposition of criminal fines.²³⁵ The legislation struck a balance between “increasing procedural protections for low income and indigent criminal defendants and giving judges more leeway in delineating between fines and state mandated court costs and in the way each is respectively discharged.”²³⁶

“For the most part, this balance is achieved without compromising the ability of criminal courts (after affording due process) to enforce their lawful judgments against all defendants.”²³⁷

231. See *id.* at 734-35 (explaining that a threat subject to criminal sanctions or monetary remedies diminishes its credibility).

232. Don E. Scheid, *Constructing a Theory of Punishment, Desert, and the Distribution of Punishments*, 10 CANADIAN J.L. & JURIS. 441, 466 (1997).

233. See Sally Beauvais et al., *Gov. Greg Abbott is Limiting Enforcement of Covid-19 Orders, but Many Cities Already took a Lax Approach*, TEXAS TRIBUNE (May 14, 2020), <https://www.texastribune.org/2020/05/14/texas-coronavirus-enforcement/> [<https://perma.cc/E6ZD-5MMV>] (explaining Texas law enforcement has stated that these penalties are not enforceable).

234. See Maura Ewing, *Why Texas Courts Will Stop ‘Nickel-and-Diming’ the Poor*, ATLANTIC (July 24, 2017), <https://www.theatlantic.com/politics/archive/2017/07/texas-court-fines/534363/> [<https://perma.cc/C8SJ-AU6L>] (explaining the Texas legislature passes on fees to criminal defendants because they are unpopular).

235. See Ed Chung, *Smart on Crime: An Alternative to the Tough vs. Soft Debate*, CTR. FOR AM. PROGRESS (May 12, 2017), <https://www.americanprogress.org/issues/criminal-justice/news/2017/05/12/432238/smart-crime-alternative-tough-vs-soft-debate/#:~:text=Smart%20on%20Crime%20is%20shorthand,against%20disparities%20at%20every%20level> [<https://perma.cc/PM7M-J9NR>] (“Smart on Crime is shorthand for a set of criminal justice principles that supports a comprehensive approach to criminal justice reform. It emphasizes the use of evidence and data to inform policies, encourages alternatives to arrests and incarceration, and protects against disparities at every level. Instead of a one-size-fits-all strategy centered on ramping up enforcement to deal with public safety issues, Smart on Crime policies aim to drive down incarceration rates in the United States—which remain the highest of any country—and favor a comprehensive approach to criminal justice that incorporates public health, education, and other related sectors.”).

236. Tex. Mun. Courts Educ. Ctr., *Procedural Law*, 26 RECORDER J. TX. MUN. CT. 44, 45 (Aug. 2017).

237. *Id.*

However, the effectiveness of a law (civil or criminal) as a formed social control is contingent upon sufficient social cohesiveness.²³⁸ In a nation seemingly divided among so many fault lines regarding the public safety and health, COVID-19 has presented new issues to the fortitude of the law.²³⁹

III. MENTAL HEALTH: THE JUDICIARY, SANDRA BLAND, AND FULLY OPTIMIZING OPPORTUNITIES FOR DIVERSIONS IN TEXAS LAW

Surveys show that COVID-19 affects Americans' mental health.²⁴⁰ Nearly half of Americans said that the coronavirus pandemic harmed their mental health.²⁴¹ The cumulative mental stresses of the pandemic were referred to "quarantine fatigue."²⁴² Quarantine fatigue encompasses both the stress of the pandemic's economic hardships and the "profound burden of extreme physical and social distancing."²⁴³ Dr. Marcus identified that these stresses "can severely damage psychological wellbeing, especially for people who were already depressed or anxious before the crisis started."²⁴⁴

What makes the pandemic's mental toll more frightening is that it is occurring during an ongoing mental health crisis in the country's criminal

238. See Sharyn L. Roach Anleu, *The Role of Civil Sanctions in Social Control: A Socio-Legal Examination*, 9 CRIME PREVENTION STUD. 21, 24 (1998) (explaining that social control enforces society's interests).

239. See David N. Sundwall, *Much More Has Been Done Right Than Wrong*, 110 AM. J. PUB. HEALTH 613 (2020) ("Finding the right balance requires all of us to work closely together to achieve the common good; public health officials and politicians must listen to each other.").

240. See Nirmita Panchal et al., *The Implications of COVID-19 for Mental Health and Substance Use*, KFF (Feb. 10, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/> [<https://perma.cc/4S3C-GW22>] (providing surveys on the implications that Covid-19 has on mental health, particularly issues of anxiety and depression).

241. See *id.* (highlighting over 50% of young adults have reported symptoms of anxiety of depressive disorder from the pandemic).

242. See Julia Marcus, *Quarantine Fatigue is Real: Instead of an All-or-Nothing Approach to Risk Prevention, Americans Need a Manual on How to Have a Life in a Pandemic*, ATLANTIC (May 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/quarantine-fatigue-real-and-shaming-people-wont-help/611482/> [<https://perma.cc/PDL9-XMLG>] (emphasizing that isolation can severely impair someone's well-being).

243. *Id.*

244. *Id.*

justice system.²⁴⁵ There seems to be an emerging consensus that jails are not the place to treat mental illness.²⁴⁶ Yet, according to the National Alliance on Mental Illness (NAMI), jails are America's largest mental health facilities.²⁴⁷ NAMI reports that every year authorities imprison more than 2 million people with serious mental illness.²⁴⁸ Half of these people receive no treatment while in jail.²⁴⁹ Because this approach is "cruel, inhumane, expensive, and unproductive," NAMI advocates that people "step up" and "step toward a better future where no one is punished for being ill and people with serious mental illness get treatment, not jail."²⁵⁰

In January 2018, something unprecedented occurred.²⁵¹ The Supreme Court of Texas and the Court of Criminal Appeals, for the first time, convened court to focus the attention of the highest judicial officials in the State on the mental health crisis in Texas and the role of the judiciary.²⁵² As a result of this historic union, the Judicial Commission on Mental Health (JCMH) was created.²⁵³ In May 2018, the JCMH had

245. See Kristie R. Blevins & Irina R. Soderstrom, *The Mental Health Crisis Grows On: A Descriptive Analysis of DOC Systems in America*, 54 J. OF OFFENDER REHAB. 142, 142 (2015) (highlighting 56% of state prisoners have a mental illness).

246. See *id.* (explaining that drug and alcohol treatment is not offered in every state).

247. See Mary Gilberti, *It's Outrageous: Jails and Prisons Are No Place to Treat Mental Illness; Just Ask Paton Blough*, HUFFPOST (May 21, 2015), https://www.huffpost.com/entry/its-outrageous-jails-and-prisons-are-no-place-to-treat-mental-illness_b_7334026 [<https://perma.cc/A6QH-KL9E>] (emphasizing 80% of people incarcerated with a mental illness do not get treatment once they arrive at jail facilities).

248. See *id.* (highlighting those with a mental illness and who are imprisoned suffer harsh and abusive treatment in jails).

249. See *id.* (emphasizing reform requires the need for understanding treatment for mental illnesses).

250. *Id.*

251. See Harriet O'Neill, *Texas Courts Step Up on Mental Health*, FORT WORTH STAR TELEGRAM (May 15, 2018), <https://www.star-telegram.com/opinion/article211186029> [<https://perma.cc/3GEY-WKC3>] (focusing on the significance of the January meeting between the Supreme Court of Texas and the Court of Criminal Appeals, as it was the first time State courts met with a focus on mental health).

252. See *id.* ("People from across the state appeared before Texas' high courts to testify on how the judicial branch can play a key role in transforming the way we treat people with mental health needs.").

253. See *id.* (highlighting the meeting's groundbreaking result of an official Commission on Mental Health and the resounding interest to serve the Commission).

its first meeting.²⁵⁴ Since then, JCMH commissioners and dozens of mental health advocates and professionals have come together as a new problem-solving model for the Texas court system.²⁵⁵ In explaining this massive undertaking, former Texas Supreme Court Justice and JCMH Commissioner, Harriet O’Neill, explained, “[t]hose who come into the court system suffering from unmet needs deserve jurists trained to identify and address the problem.”²⁵⁶

In October 2019, the Supreme Court of Texas and the Texas Court of Criminal Appeals issued an order establishing the Legislative Research Committee of the Judicial Commission on Mental Health.²⁵⁷ The Legislative Research Committee was charged with examining ways to improve the laws governing competency restoration, community services, and diversions.²⁵⁸

Most discussions regarding how to identify and divert people with mental illness from greater involvement in the criminal justice system predominantly focus on felonies and misdemeanors where the sentence entails incarceration.²⁵⁹ However, there is an increased realization that

254. *See id.* (detailing the development and first meeting of the Commission in May of 2018).

255. *See* Order Appointing Members to the Judicial Commission on Mental Health, Supreme Court Misc. Docket No. 20-9149 & Court of Criminal Appeals Misc. Docket No. 20-015 (Dec. 21, 2020) (listing dozens of members with expertise ranging from behavioral health science to juvenile corrections); *see also, id.* (explaining the purpose and challenges faced by the commission and why the members are so diverse in their areas of practice and expertise).

256. *See* O’Neill, *supra* note 251 (“Those who come into the court system suffering from unmet needs deserve jurists trained to identify and address the problem.”).

257. *See generally* Order Establishing Legislative Research Committee of the Judicial Commission on Mental Health, Supreme Court Misc. Docket No. 19-9095 & Court of Criminal Appeals Misc. Docket No. 19-010 (Oct. 1, 2019), <https://www.txcourts.gov/media/1444914/misc-docket-19-010-and-19-9095.pdf> (listing the members of the Committee along with their area of practice and expertise).

258. *See id.* (“The Judicial Commission on Mental Health was created by the Supreme Court of Texas and the Texas Court of Criminal Appeals [] on February 13, 2018, to develop, implement, and coordinate policy initiatives designed to improve the courts’ interaction with—and the administration of justice for children, adults, and families with mental health needs.”).

259. *See generally* Substance Abuse and Mental Health Services Administration (SAMHSA), *Municipal Courts: An Effective Tool for Diverting People with Mental and Substance Use Disorders from the Criminal Justice System*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, 1-2 (2015) (“While each intercept presents opportunities for diversion, Intercept 2 may hold the most unexplored potential. . . . However, for a variety of reasons discussed below, this intercept is often overlooked. The purpose of this document is to turn community attention to the possibilities that Intercept 2, especially when the first appearance is at a municipal court, presents for diversion.”).

“optimal diversion strategies” are being overlooked at initial detention and in cases before municipal courts (and other courts of limited jurisdiction) involving relatively minor, yet common crimes, are punished with fines (see, Sequential Intercept Model; Intercept 2).²⁶⁰

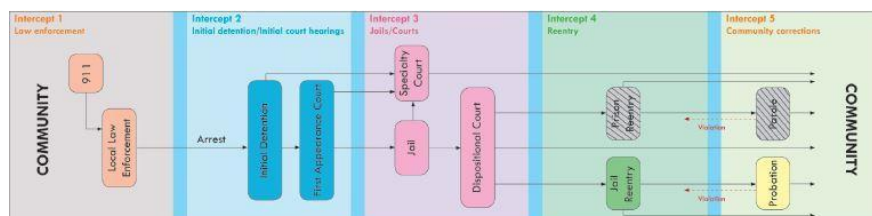


Figure 2: Sequential Intercept Model (SAMHSA 2015)

According to the U.S. Department of Health and Human Services and the Substance Abuse and Mental Health Services Administration, municipal courts, and other courts of limited jurisdiction, have untapped potential to fill a current “gap in diversion strategies” and “to minimize the criminal justice system involvement and reduce unnecessary incarceration of people with mental illness and co-occurring substance use disorders as well as facilitate engagement or re-engagement in mental health and substance use disorder services.”²⁶¹ In Texas, Intercept 2 occurs predominantly at hearings before the 1,531 municipal judges, with hearings and court appearances on Class C misdemeanor charges.²⁶² Texas municipal judges and justices of the peace in their dual capacities as magistrates are uniquely positioned to intervene at this stage.²⁶³

260. *See id.* (portraying the Sequential Intercept Model and Intercept 2).

261. *See generally id.*

262. *See id.* (“This is because it is at Intercept 2 (initial detention and first court appearance) that the vast majority of individuals who come into contact with the criminal justice system appear. Many of these individuals have a mental illness and co-occurring substance use disorders; these are the individuals whom communities often try to divert.”).

263. *See generally id.* (highlighting that the municipal courts are placed at the forefront and therefore have the opportunity to be an integral part in these diversion efforts).

A. *Restoration of the Sandra Bland Act and Class C Misdemeanors*

More than five years have now passed since Sandra Bland died; however, in terms of mental health, the facts surrounding her death remain pertinent.²⁶⁴

“On Thursday, July 10, 2015, Sandra Bland had just accepted a job offer from Prairie View A&M University when she was pulled over for a [Class C misdemeanor] traffic offense and subsequently arrested after an altercation with the officer.²⁶⁵ At the jail, Sandy told a guard she felt “very depressed,” had felt depressed during the past year, and tried to commit suicide in 2014 after her pregnancy loss.²⁶⁶ She was not hospitalized, seen by a mental health professional, nor put on suicide watch.²⁶⁷ On Saturday, Sandy’s bond was set to \$515, yet she did not have the financial resources nor support to post bond.²⁶⁸ She spent Sunday sobbing and repeatedly saying that she could not deal with being locked up.²⁶⁹ On Monday, she refused breakfast at 6:30 a.m.²⁷⁰ Later that day, she used an emergency intercom twice to beg for assistance in

264. See Adeel Hassan, *The Sandra Bland Video: What We Know*, N.Y. TIMES (May 7, 2019) <https://www.nytimes.com/2019/05/07/us/sandra-bland-brian-encinia.html> [<https://perma.cc/BHW6-HJ77>] (emphasizing the lasting impact the death of Sandra Bland has had on mental health awareness and de-escalation training for police officers and first responders).

265. See *id.* (detailing the circumstances which led up to the traffic stop of Sandra Bland).

266. See Amy Calvin & Phil Hesel, *Sandra Bland Told Jailers She Was Depressed, Attempted Suicide Before: Jail Records*, NBC NEWS (July 23, 2015), <https://www.nbcnews.com/news/us-news/sandra-bland-said-she-was-depressed-attempted-suicide-jail-records-n396886> [<https://perma.cc/595G-WAK4>] (explaining the mental health crisis Sandra Bland was facing during her arrest and night in jail).

267. See *id.* (discussing the discrepancy in intake forms for Sandra Bland and noting that she was found in her cell the next morning unresponsive. None of the police forms mention placing her on suicide watch or any other preventative measures for individuals in mental health crisis).

268. See Sharon Grigsby, *Another Outrage in Sandra Bland: She Couldn’t Find \$500 Bail*, DALL. MORNING NEWS (Jul. 27, 2015) <https://www.dallasnews.com/opinion/2015/07/27/another-outrage-in-sandra-bland-injustice-she-couldn-t-find-500-bail/> [<https://perma.cc/T355-AJUM>] (conveying the demoralizing obstacles that Sandra Bland encountered as she called her friends and family to post bail).

269. See *id.* (“She was very aggravated,” Needham said. “She seemed to be in pain. I told her I would work on getting her out,” said her sister, close to tears.)

270. *The Case of Sandra Bland as an Example Police Brutality in Texas*, REDDEN LAW PLLC, <https://www.reddenlawtexas.com/the-case-of-sandra-bland-as-an-example-of-police-brutality-in-texas/> [<https://perma.cc/RJG3-TPFB>] (making the case to acknowledge police brutality and to recognize Sandra Bland’s tragic death as an example).

making a telephone call, but her requests went unanswered.²⁷¹ At 9:00 a.m. on Monday, July 13, 2015, Sandra Bland was found hanging in her jail cell in Waller County, Texas.²⁷²

The events leading up to Sandra Bland's tragic death sparked statewide and national outrage.²⁷³ In the Texas Legislature, the House Committee on County Affairs held hearings and studied the circumstances and policies that led to her death.²⁷⁴ In its findings, the Committee stated that "policies of diverting people who are in crisis and running afoul of the law either due to their mental health or substance abuse would be better served being diverted into treatment, rather than cycled through the jail system and released with the same problems that caused them to get arrested previously."²⁷⁵

In 2017, the Sandra Bland Act amended Article 16.22 of the Code of Criminal Procedure by requiring the sheriff to provide written or electronic notice to the magistrate of anyone within their custody with signs of a mental illness or intellectual disability within twelve hours.²⁷⁶ "This language focused on creating greater identification, diversion, and services for *all* people with mental illness, intellectual disabilities, or substance abuse issues."²⁷⁷

However, another bill amended Article 16.22 during the same legislative session.²⁷⁸ S.B. 1326 amendment required municipal jailers to notify a magistrate if there is reasonable cause to suspect a defendant

271. *See id.* (detailing the known events which led to the discovery of Sandra Bland unresponsive in her cell).

272. *See* Hassan, *supra* note 264 (stating the time and circumstances under which Sandra Bland was found in her cell).

273. *See id.* (highlighting the impact of social media to raise awareness and show support for Sandra Bland).

274. *See* H.B. 2702, 85th Leg., (Tex. 2017) (discussing the racial disparities within the Texas criminal justice system and enacting the Sandra Bland Act in response).

275. H.B. 2702, 85th Leg., (Tex. 2017).

276. *See* Tex. Mun. Courts Educ. Ctr., *Magistrate Duties and Mental Health*, 26 RECORDER J. TX. MUN. CT. 33, 42 (Aug. 2017) (providing an update and written report of the bills proposed to the Texas Supreme Court and the Court of Criminal Appeals).

277. Tex. Mun. Courts Educ. Ctr., *Class C Misdemeanors, Competency, and Continuity of Care*, 29 RECORDER J. TX. MUN. CT. 1, 3 (Aug. 2020).

278. *See* *Magistrate Duties and Mental Health*, *supra* note 276 (introducing another amendment to the duties of the arresting officers and magistrates).

has mental illness or intellectual disability.²⁷⁹ However, it limited the obligation to defendants in custody for offenses punishable as a “Class B misdemeanor or any higher category of offense.”²⁸⁰ Though the two amendments of Article 16.22 differed, for two years the two versions coexisted on the books and were given effect.²⁸¹ All was well. However, the harmony did not last.

The Texas Legislative Council is required by law to execute a permanent statutory revision program for the systematic and continuous study of the statutes.²⁸² These revisions aim to make statutes “more accessible, understandable, and usable, and may *not* alter the sense, meaning, or effect of the statute.”²⁸³ In 2019, the Texas Legislature passed H.B. 4170 in its continued efforts to expand the statutory revision program.²⁸⁴ However, the cleanup bill ran afoul to Article 16.22.²⁸⁵ Article 16.22 amendment referenced only defendants in custody for offenses punishable as a “Class B misdemeanor or any higher category of offense.”²⁸⁶ “This was a substantive change because it rewrote and undermined the Sandra Bland Act’s more inclusive scope for identifying and diverting *all* people with mental illness, intellectual disabilities, or substance abuse issues.”²⁸⁷ This expansive view is evident in Article 16.23, where law enforcement agencies are generally required to make a good faith effort to divert people suffering a mental health crisis or suffering from the effects of substance abuse to a property treatment center if the offense the person is accused of is a non-violent

279. *See id.* (indicating the bill now requires municipal jailers to notify the magistrate when mental health issues are suspected).

280. *See id.* at 39-40 (Aug. 2017) (limiting S.B. 1326 to crimes punishable by as a Class B misdemeanor or higher category offense).

281. *See generally* TEX. GOV’T CODE § 311.025(b) (explaining how to enforce two amendments enacted at the same time).

282. *See* TEX. GOV’T CODE § 323.007(a) (establishing the statutory provision program of state statutes).

283. TEX. GOV’T CODE § 323.007(a)–(b).

284. *See* H.B. 4170, 86th Leg., (Tex. 2019) (explaining the need for the Act).

285. *See Class C Misdemeanors, Competency, and Continuity of Care, supra* note 277 (exploring the substantial changes made by H.B. 1470 to Article 16.22 of the Sandra Bland Act).

286. *Id.*

287. *Id.* at 4.

misdemeanor.²⁸⁸ “In this way, H.B. 4170 created substantive changes outside the purview of a simple ‘cleanup.’”²⁸⁹

There is good reason to consider Class C misdemeanors when addressing mental health issues because the municipal courts can act as a great venue for diversion.²⁹⁰ Research shows that people with mental illness and co-occurring substance abuse disorders are arrested for relatively minor offenses such as public intoxication and other “nuisance” offenses at higher rates than other people.²⁹¹ People with mental illness and co-occurring substance abuse disorders are more likely to be arrested multiple times for such offenses because of exacerbating factors such as homelessness and unemployment.²⁹² “Mental illness or intellectual disability is not selective or less present depending on offense level, and the potentially dire consequences to the person in custody are the same regardless the level of charge.”²⁹³ “If the Texas judiciary is to succeed at early identification of defendants suspected of having mental illness or intellectual disability and diversion of such people from jail, then the authority of a magistrate to order an inquiry into a person’s mental health history should not hinge on preliminary charging decisions made by law enforcement at the time of arrest.”²⁹⁴ “That is why it is important that people arrested on Class C misdemeanors have access to the same procedural safeguards in Article 16.22 as all other people taken to jail on misdemeanor charges.”²⁹⁵

Restoring procedural safeguards for Class C misdemeanors has been brought to the attention of the Judicial Commission on Mental Health and members of the Texas Judicial Council.²⁹⁶ “Judicial organizations, mental health advocates, and criminal justice reformers are poised to ask

288. See TEX. CODE CRIM. PROC. §16.23.

289. *Class C Misdemeanors, Competency, and Continuity of Care*, *supra* note 277, at 4.

290. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., *supra* note 259, at 3 (suggesting municipal courts as a venue for diversion of people because of the high volume of cases, high prevalence of mental and substance use disorders among those appearing before the court, and the risk of increased jail time).

291. See *id.* (illustrating how those who suffer from mental health issues are more likely to be arrested than those who do not suffer from mental health issues).

292. See *id.* at 3 (reporting the factors that exacerbate the risk for multiple arrests).

293. *Class C Misdemeanors, Competency, and Continuity of Care*, *supra* note 277, at 5.

294. *Id.*

295. *Id.*

296. See *id.* (presenting procedural safeguards for Class C misdemeanors as an issue for the commission’s consideration).

the Legislature to address the potentially unintended consequences of the 2019 cleanup legislation.”²⁹⁷ “That revision had a substantive effect that works against providing the same means of just treatment to all persons who are in jail.”²⁹⁸ The limited application of Article 16.22 to those arrested under Class B misdemeanors or above should be repealed to ensure equal treatment and access to justice.²⁹⁹ The cause for the arrest is irrelevant, the important factor is whether a “magistrate has credible information that may establish reasonable cause to believe that the person has a mental illness or is a person with an intellectual disability.”³⁰⁰

B. In the Courtroom: Defendants with Mental Illness and Developmental Disabilities Accused of Class C Misdemeanors

In Texas, most instances of a defendant appearing before “judges in criminal cases involve Class C misdemeanors.”³⁰¹ What are judges in such cases supposed to do when there is a reason to suspect that the defendant appearing before them does not have either a factual or rational understanding of the proceedings? What procedural protections exist in Texas law for people with mental illness or developmental disabilities?

One “might assume the answer already exists in Texas statutory law.”³⁰² Currently, however, the Code of Criminal Procedure provides no guidance to the bench or the bar when it comes to Class C misdemeanors.³⁰³ Chapter 46B of the Code of Criminal Procedure, which is typically applicable to other types of criminal cases, is inapplicable here.³⁰⁴

297. *Id.*

298. *Id.*

299. *See id.* (repealing limited application of statute would expand access to justice and equal treatment to individuals charged with lower misdemeanor offenses).

300. *Id.*

301. *Id.*

302. *Id.*

303. *See id.* (explaining that the Code of Criminal Procedure provides no guidance on how to comply with constitutional prohibitions and requirements related to competency in cases involving Class C misdemeanors).

304. *See id.* (highlighting that although the Code of Criminal Procedure contains an entire chapter governing competency, article 46B.002 limits its applicability to defendants charged with a felony or a misdemeanor punishable by confinement. While people can be committed to jail for a Class C misdemeanor, the *punishment* for a Class C misdemeanor only entails the imposition of a fine).

In contrast, the constitutional case law seems to provide clear guidance.³⁰⁵ The conviction of a legally incompetent defendant violates due process.³⁰⁶ A criminal defendant may not be subjected to trial if the defendant lacks the capacity to understand the proceedings against him or her; is denied consultation with counsel and is deprived of assistance when preparing a defense.³⁰⁷ Furthermore, a trial court's failure to make sufficient inquiry into a defendant's competency can violate due process.³⁰⁸

"The deficiency of the Code of Criminal Procedure to reflect due process protections for defendants charged with Class C misdemeanors is regrettable."³⁰⁹ "It is a flaw that has caught an untold number of defendants with mental illness in a repeating cycle of Class C misdemeanor violations, fines, warrants, and jail (and where currently magistrates have no authority to order screening under Article 16.22)."³¹⁰ Furthermore, unlike trial judges in felony cases, judges with jurisdiction over Class C misdemeanor cases (e.g., municipal judges, justice of the peace, and county judges) have no statutory authority to put on the brakes.³¹¹

Professors George Dix and John Schmolesky explain the conundrum in Texas law:

What if a defendant in a Class C misdemeanor case appears to be incompetent within the meaning of the *federal due process requirement* and Chapter 46B? Does [Chapter 46B] constitute a legislative command to ignore the defendant's impairment and proceed? Most likely, the

305. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."); *see also Sanders v. Allen*, 100 F.2d 717, 270 (D.C. Cir. 1938) (explaining that convicting any person lacking competency is a violation of certain immutable principles of justice).

306. *See Bishop v. United States*, 350 U.S. 961 (1956) (reviewing cases in which a person's mental condition was considered by courts to determine whether the individual had the capacity to understand their judicial proceedings).

307. *See Drope*, *supra* note 305, at 171 (explaining that a mental disorder at the time of trial may negate whether they are subject to trial).

308. *See id.* at 174-75 (discussing that in light of certain circumstances, a court's failure to inquire into an individual's competence to stand trial is to deny the individual a fair trial).

309. *Class C Misdemeanors, Competency, and Continuity of Care*, *supra* note 277.

310. *Id.*

311. *Id.*

legislators intended that misdemeanor courts rely on *constitutional restraints*. If a defendant is incompetent the proceedings must simply stop. The public interest in restoring such defendants to competency is so minimal that sound policy suggests that the State simply be required to forego further proceedings. Unfortunately, the legislature did not make this (or any other intent) clear in the revision.³¹²

These issues were studied by the Legislative Research Committee of the JCMH during the spring and early summer of 2020.³¹³ The Committee recognized defendants suspected of being unfit to proceed due to potential competency issues pose unique challenges to municipal, justice, and county courts.³¹⁴ However, the Committee also noted the high volume of Class C misdemeanor cases in Texas and the high degree of legal nuance present in competency cases.³¹⁵ The logistical and cost issues associated with trying to make Chapter 46B of the Code of Criminal Procedure applicable to these courts were deemed insurmountable.³¹⁶ Accordingly, it was not recommended that Chapter 46B should expand to include municipal and justice courts.³¹⁷

Instead, the Committee recommended two legislative changes that provide guidance to the bench and bar without courts having to make a formal determination regarding competency.³¹⁸ One proposal reiterates U.S. Supreme Court case law and tells municipal judges and justices of the peace what the Code of Criminal Procedure already tells county and district judges in Article 26.13(b): a plea should not be accepted unless it appears that the defendant is mentally competent, and the plea is free and voluntary.³¹⁹ A separate proposal provides procedures and safeguards for dismissing complaints when a municipal judge or justice of the peace

312. George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice and Procedure* § 31:3 (3d ed. 2011).

313. *Class C Misdemeanors, Competency, and Continuity of Care*, *supra* note 277.

314. *Id.*

315. *See id.* (stressing the intricacies and importance of legal competency cases, the constitutional implications involved, and indicating the majority of these face-to-face appearances in Texas are Class C misdemeanor cases).

316. *See id.* (concluding that Chapter 46B of the Code of Criminal Procedure is inapplicable and would be costly and result in defendants having lengthy bouts with the criminal justice system).

317. *See id.* (concluding that because of the inapplicability and the costs associated another mechanism of protection must be established for these courts).

318. *See id.* at 5–7 (proposing two legislative changes to address these issues).

319. *Id.* at 6.

believes that a defendant (including a defendant with a mental illness or developmental disability) lacks the capacity to either understand the proceedings or to assist in the defendant's own defense and is unfit to proceed.³²⁰

IV. BAIL REFORM: PRE-TRIAL DETENTION AND PERSONAL BONDS IN TEXAS

The criminal justice system has long endeavored to strike an equitable balance between the competing interests of individual liberty and ensuring a defendant's appearance in court.³²¹

In Texas, these competing interests were recently subject to a rare, if not unprecedented, test because of the Coronavirus pandemic.³²² On March 29, 2020—relying on his statutory emergency powers—Governor Abbott issued an executive order suspending the judiciary's authority to release defendants on personal bond charged, convicted, or with a history of offenses involving physical violence or threats of physical violence.³²³ Governor Abbott issued the executive order because COVID-19 outbreaks in jails sparked several counties to consider broad-scale release of jailed individuals.³²⁴ In response, on April 8, 2020, sixteen Harris County judges sued the Governor and the Attorney General.³²⁵ The lawsuit claimed the executive order improperly interfered with their judicial authority to make individualized bail decisions.³²⁶ On April 10, 2020, a temporary restraining order was issued.³²⁷ The Governor and

320. *Id.*

321. See Ryan Kellus Turner & Henry W. Knight, *Making It Personal in the Age of Bail Reform: The Misunderstanding, Utility, and Limits of Personal Bonds in Texas*, 20 TEX. TECH. ADMIN. L. J. 67, 71–72 (2019) (discussing the factor balance courts should consider in setting bail, including victim and public safety and the defendant's rights and liberties).

322. See *In re Abbott*, 601 S.W.3d 802, 806 (Tex. 2020) (overviewing background of the case and the effect the coronavirus had in testing bail issues in Texas).

323. See *id.* (providing background information on Governor Abbott's executive order).

324. See *id.* (“GA-13 was issued in response to the concern that ‘several counties are now reportedly considering the broad-scale release of arrested or jailed individuals as a result of COVID-19 . . .’”).

325. See *id.* (responding to Governor Abbott's executive order with a suit alleging it exceeded his statutory emergency powers).

326. See *id.* (“According to the petition, the judges sued in their ‘official capacity’ because they ‘have been directly harmed by [the] issuance of this Order and impeded from exercising their judicial authority pursuant to the Texas Constitution.’”).

327. See *id.* (“Late on April 10, the trial court issued a TRO . . .”).

Attorney General sought mandamus relief.³²⁸ On April 23, the Supreme Court of Texas granted relief and found that the judges had no standing to seek invalidation of the executive order.³²⁹

Subject to few limitations, Texas strongly favors the individual's right to bail.³³⁰ Laws governing bail vary greatly amongst the states.³³¹ In Texas, the right to bail is rooted in its constitution, aligning the state with the forty other "right-to-bail" states.³³² However, in recent years bail has attracted increasing scrutiny, particularly in the context of pre-trial bail.³³³

A. "Money Bail"

In particular, criminal justice reform advocates claim that "money bail"—practices requiring defendants to pay money to procure release via either a bail bond (where money is paid to a surety) or cash bond (where

328. *See id.* ("On April 11, the Governor and Attorney General filed a petition for writ of mandamus and motion to stay directly in this Court.")

329. *See id.* (holding the "alleged threat of criminal prosecution in this case does not give the judges standing to seek the invalidation of GA-13.")

330. *See* Tex. Const. art. I, § 11 (explaining as a general rule, bail for cases involving misdemeanors may not be denied. Since 2005, however, the Texas Legislature, with the support of voters, has amended the Texas Constitution to carve out exceptions to the general right to bail. Per amendments to Texas Constitution, Article I, Section 11, the right to bail may be denied by a magistrate: (1) when the accused is arrested for a capital offense and the State presents proof evident that conviction and death sentence will result from trial; (2) when the accused is arrested for violating a condition of bond relating to family violence; (3) when the accused is arrested for violating a magistrate's order of emergency protection or a protective order; or (4) when the accused is arrested for certain sexual offenses involving a child); *see also* Tex. Crim. Proc. Code Ann. art. 17.153 (listing statutory reasons for why an individual may ineligible for bail, may have bail revoked, or limited. The list is relatively short and specific, thus supporting the idea that Texas strongly supports a right to bail).

331. *See* TIMOTHY R. SCHNACKE, NATIONAL INSTITUTE OF CORRECTIONS, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 15 (2014) (providing laws that govern bail throughout various states).

332. *See* Ariana Lindermayer, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 284–85 (2009) (highlighting "right-to-bail" states' adoption of stronger protections than guaranteed by federal law by providing a constitutional right to bail in noncapital cases).

333. *See, e.g.,* Mike Ward, *Bail Bondsmen: Reform Bill Will Drive Us Out of Business*, HOUS. CHRON. (Apr. 5, 2017, 5:12 PM), <https://www.houstonchronicle.com/news/houston-texas/texas/article/Bail-bondsmen-Reform-bill-will-drive-us-out-of-11050902.php> [<https://perma.cc/9QFZ-WCHQ>] (providing an example of the contentious debates and scrutiny recently surrounding bail issues in Texas).

money is deposited with the government)—disproportionately hurts low-income defendants who, while presumed innocent, cannot afford to pay their bond.³³⁴ In 2017, the Chief Justice of the Supreme Court of Texas and the Presiding Judge of the Court of Criminal Appeals told the Senate Committee on Criminal Justice as much, describing a system in need of reform.³³⁵ The high court judges testified that three-quarters of people in Texas jails are awaiting trial.³³⁶ Such pre-trial detention is racially disparate and expensive.³³⁷ Local tax payers pay one billion dollars per year for a system keeping low-risk defendants in jail, and simultaneously allows high-risk defendants out on bail.³³⁸

Efforts to abolish “money bail” in other states have resulted in unintended consequences.³³⁹ In California, bail reform was designed to increase the use of personal bonds.³⁴⁰ However, bail reform could also

334. *See id.* (addressing one example of a Texas County “keep[ing] thousands of indigent defendants in a chronically overcrowded jail because they cannot afford to make bail.”).

335. *See id.* (“Texas Supreme Court Chief Justice Nathan Hecht and Court of Criminal Appeals Presiding Judge Sharon Keller, in a rare joint appearance, both endorsed the legislation. They said it is a much-needed overhaul of an antiquated system that keeps too many Texans in jail and gives violent offenders who have the money the ability to get out of jail when they should not . . . [Court of Criminal Appeals Presiding Judge] said that while just 32 percent of inmates in local jails were awaiting trial just a few years ago, the number is now closer to 75 percent.”).

336. *See id.* (“Keller said that while just 32 percent of inmates in local jails were awaiting trial just a few years ago, the number is now closer to 75 percent.”).

337. *See id.* (informing about the true expense of pre-trial detention and the racial disparity seen in individuals who remain detained due to economic barriers).

338. *See id.* (noting the cost to taxpayers for pre-trial detention as well as the evidence showing that high-risk defendants are posting bail in higher numbers than low-risk defendants).

339. *See* Jeremy B. White, *California Ended Cash Bail. Why Are So Many Reformers Unhappy About It*, POLITICO (Aug. 29, 2018), <https://www.politico.com/magazine/story/2018/08/29/california-abolish-cash-bail-reformers-unhappy-219618> [<https://perma.cc/9BJD-KYZ3>] (discussing how on August 14, 2018, California Governor Jerry Brown signed into law Senate Bill 10, which replaces “the old system of money-based freedom with a new one of risk assessments and preventive detention.” Many who successfully championed the initiative to abolish “money bail” opposed its final passage into law because it gives “local judges the sweeping authority to keep people incarcerated before they’re convicted of anything.” The unintended result being rather than reaching the goal of fewer people in jail before trial, detention in California will increase).

340. *See id.* (recognizing that removing the cash bail system entirely would require pre-trial risk assessment and release on personal bonds rather than cash bonds, making the system more objective).

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lead to or entail the increased use of preventative detention.³⁴¹ Something similar could happen in Texas.³⁴² Texas could cease to be a “right to bail” state altogether if it eliminates “money bail.”³⁴³

Considering these developments (and the specter of potential litigation) local governments in Texas are considering whether to use a risk-assessment measurement tool in making bail determinations and whether to increase the use of personal bonds.³⁴⁴

B. Personal Bonds

As defined in Texas law, a personal bond is a written undertaking entered into by the defendant without a surety or cash deposit, which obligates the defendant to pay both a specific amount and a reasonable fee for locating and arresting the defendant if they fail to appear.³⁴⁵

In 1965, personal bonds were passed into law as a response to beliefs that it was irrational to require an accused either to remain in jail at the expense of taxpayers or to pay a professional bail bondsman when there was only a remote possibility of flight.³⁴⁶ Yet, more than fifty years later,

341. See Turner & Knight, *supra* note 326, at 81-82 (detailing how the increased use of personal bonds and risk assessment prior to release could result in higher numbers of individuals being referred to preventative detention).

342. See *id.* (noting the similarities of personal bonds and preventative detention in Texas).

343. See *id.* (examining the possible long-term consequences for Texas if it becomes a state without “money bail”).

344. See Florian Martin, *New Risk Assessment Tool Meant to Make Harris County Bail Rulings More Fair*, HOUSTON PUB. MEDIA (July 31, 2017, 5:46 PM), <https://www.houstonpublicmedia.org/articles/news/2017/07/31/228089/new-risk-assessment-tool-meant-to-make-harris-county-bail-rulings-more-fair/> [<https://perma.cc/7AQA-43SE>] (detailing the implementation of a new risk assessment tool that Texas judges are considering relying on for decisions on personal bonds); see also Nathan Fennell, *Not Resources: Improving the Pretrial Release Process in Texas*, MEREDITH PRESCOTT & LYNDON B. JOHNSON SCH. PUB. AFFAIRS, *RISK*, (Jun. 2016) (outlining the positive aspects of personal bonds and the reasoning behind the contemplation of using risk based assessment more in the Texas criminal justice system); see generally John Buntin, *The Fight to Fix America’s Broken Bail System*, GOVERNING THE FUTURE OF STATES AND LOCALITIES (Sept. 26, 2017), <http://www.governing.com/topics/public-justice-safety/gov-bail-reform-texas-new-jersey.html> [<https://perma.cc/LDN3-ZC26>] (noting that within the United States pushback has begun on the cash bail system and that lawmakers are seeking reform that would encourage personal bonds).

345. See TEX. CODE CRIM. PROC. ANN. §17.03(a) (defining the limitations of personal bonds in Texas); see also TEX. CODE CRIM. PROC. ANN. §17.04(3) (reiterating the creation of personal bonds and the associated fees).

346. See generally *id.* (reciting background information on the passage of statutes surrounding personal bonds).

personal bonds generally remain underutilized throughout Texas.³⁴⁷ Could increasing the use of personal bonds help “level the playing field” and alleviate some of the problems and harms associated with “money bail” in Texas?³⁴⁸

1. *Utility and Misunderstanding*

The utility of personal bonds in Texas are undermined by popular misunderstandings.³⁴⁹ For example, securing release by personal bond is not synonymous with releasing a person on their own recognizance.³⁵⁰ Personal bonds entail a risk of financial loss, a fact which gets lost when personal bonds are mischaracterized as personal recognizance bonds or “PR bonds.”³⁵¹ Like bail bonds, personal bonds are subject to bond forfeiture.³⁵² Contrary to popular belief, personal bonds have utility in both urban and rural parts of Texas.³⁵³ Additionally, personal bonds are not just a “big city” thing.³⁵⁴ While most personal bond offices exist in

347. See Turner & Knight, *supra* note 326 (determining that even with the dawn of personal bonds, they are still an underutilized resource in Texas).

348. See *id.* at 79 (advocating for the benefits of personal bonds and the need for equity to become the norm in the Texas criminal justice system).

349. See *id.* at 74 (outlining the common misconception in Texas regarding bail bonds and personal bonds and how those misconceptions negatively impact the use of personal bonds).

350. See *id.* (explaining how a release on personal recognizance is not the same as a personal bond release. Those on personal bond release still have more to lose, like a cash bond, in terms of financial matters).

351. See *id.* (explaining the similarities between cash bonds and personal bonds in regards to the money that is placed as a guarantee that the individual will show up for their court hearing. Both bonds are similar in that, if the defendant does not show up for their hearing that money is forfeited).

352. See *id.* at 75-76 (emphasizing that both personal bonds and cash bonds are subject to forfeiture under certain conditions; however, the personal bonds are more aligned with reducing pretrial detention numbers, whereas the cash bonds are more for profit).

353. See *id.* at 77 (pointing to the fact that the authority and use for personal bonds is not confined to one area of Texas, their use is authorized by both magistrates and judges in urban and rural parts of the state); See generally DOTIE CARMICHAEL ET AL., LIBERTY AND JUSTICE: PRETRIAL PRACTICES IN TEXAS XVI (2017), http://www.txcourts.gov/media/1437499/170308_bond-study-report.pdf [<https://perma.cc/XR2N-GF2W>] (reporting on the overall use of personal bonds in Texas to include the use of them in rural counties. This study includes firm data on why personal bonds should be implemented more in all areas of Texas).

354. See Turner & Knight, *supra* note 32; see also CARMICHAEL ET AL., *supra* note 353 (stating that both rural and urban locales in Texas have the right to implement personal bonds and are doing so especially in rural areas).

urban areas, a local government is not required to have a personal bond office to utilize personal bonds.³⁵⁵

Personal bonds may often be a viable alternative to a bail bond.³⁵⁶ However, determining whether a personal bond is appropriate is not just a matter of statutory law, it often requires magistrates and judges to carefully consider the facts and circumstances of each individual case.³⁵⁷

2. *Limitations*

Despite their potential utility, personal bonds also have statutory requirements and limitations.³⁵⁸ First, not all offenses are eligible.³⁵⁹ Second, not all individuals are eligible as limitations only extend to defendants with mental illness or intellectual disabilities.³⁶⁰ Additionally, increasing personal bond usage can result in additional financial obligations, creating a substantially greater risk of financial harm for low-income defendants.³⁶¹ While the increased use of personal bonds may remedy some of the criticisms of people calling for bail reform, personal bonds are no panacea.³⁶²

355. See Turner & Knight, *supra* note 326 (outlining the presence of personal bond risk assessment offices in mainly urban areas of Texas and pointing to the fact that a local government is not required to have this type of office to utilize personal bonds).

356. See *id.* at 72 (reiterating the numerous situations in which personal bonds may be used in lieu of a cash bail bond).

357. See *id.* at 75 (emphasizing that beyond statutory guidelines, judges and magistrates have the right to observe and consider the totality of the circumstances of the defendant in order to reach a decision on issuing a personal bond, a cash bail, or no bail at all).

358. See *id.* at 78 (listing the statutory requirements and limitations for personal bonds in general).

359. See TEX. CODE CRIM. PROC. ANN. §17.03(a) (stating that there are statutory limitations and restrictions for personal bonds).

360. See Turner & Knight, *supra* note 326, at 80–81 (highlighting that judges “must” release mentally ill defendants, but only in circumstances that are limited to the type of crime alleged, a mental health examination, a written assessment confirming the mental illness, and several other steps).

361. See *id.* at 81 (explaining low-income defendants have an increased zone of risk).

362. See *id.* (reflecting on potential solutions while weighing that against critiques of the bond system).

V. CONSENSUS IN CRIMINAL JUSTICE REFORM AND THE DEBATE SURROUNDING “DEFUND THE POLICE”

Does the American criminal justice reform truly have consensus?³⁶³ Professor Benjamin Levin argues that “the purported consensus is much more limited than it initially appears.³⁶⁴ Despite shared reformist vocabulary, the consensus rests on distinct critiques that identify different flaws and justify distinct policy solutions.³⁶⁵ The underlying disagreements transcend traditional left/right political divides and speak to deeper disputes about the state and the role of criminal law in society.”³⁶⁶

To reform a system, Professor Levin states we need to know what is wrong with it, and what “reform” means.³⁶⁷ Levin’s point is that the meaning of words matter.³⁶⁸

Consider the tug-of-war over the phrase “defund the police.”³⁶⁹ Many groups within the criminal justice reform community claim it as part of their platforms.³⁷⁰ However, there remains disagreement about what the

363. See, e.g., Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 318 (2018) (indicating criminal justice reformists use common vocabulary but truly emphasize varying points of view and solutions to the problems prevalent in the criminal justice system).

364. *Id.*

365. *Id.*

366. *Id.*

367. See *id.* (arguing that reform cannot just be a buzzword. There must be action dedicated to understanding the underlying ailments that make a system operate ineffectively and furthermore, we must precisely define our remedies).

368. See generally *id.* (“...we need to know what is wrong with it, and what ‘reform’ means.”).

369. Cf. Julie Norman, *Why ‘Defund the Police’ Could Backfire*, THE HILL (June 9, 2020, 1:00 PM), <https://thehill.com/opinion/criminal-justice/501839-defund-the-police-could-backfire-on-the-very-reforms-they-seek-to> [<https://perma.cc/AZ4G-WPHA>] (“For most activists, defunding the police does not necessarily mean doing away with police departments...”).

370. See generally, *id.* (underlining the provocative nature of the phrase while stating that most advocates do not want to outright defund the police).

phrase means.³⁷¹ This dissention highlights disagreements in the criminal justice reform movement.³⁷²

“Defund” means “to stop providing the money or as much money to pay for something.”³⁷³

A. *Police Reform (is not Police Abolition)*

Some proponents of criminal justice reform use “defund the police” to advocate for police reform.³⁷⁴ Proponents of this movement urge that monies currently being directed to police departments be reallocated to mental health, substance abuse treatment, and social services.³⁷⁵ Police reformers support exploring new ways to prevent violence and promote public safety in addition to police (but without the stigma of brutalization and violence generally associated with law enforcement).³⁷⁶ To this group, defunding the police is the ultimate, aspirational goal.³⁷⁷ However, it is only one component of reform that recognizes on a more limited role for police.³⁷⁸

371. *See id.* (“There are some who maintain that, given that past procedural reforms have not ended police violence, reforms are not enough, and a more radical ‘abolish the police’ objective is necessary. But most people who use the ‘defund the police’ phrase support more nuanced approaches of re-distributing funding for public safety by increasing investment in other crucial social services.”).

372. *See, e.g., id.* (pointing out the variations in ideology regarding police reform. Not everyone agrees on the best way to achieve change, and the criminal justice reform movement is no exception).

373. *Definition of Defund*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/defund> [<https://perma.cc/Y63R-5A39>].

374. *See, e.g., id.* (“As protests for police reforms and racial equality continue across the United States and around the world, ‘defund the police’ is gaining traction as a call to reimagine policing.”).

375. *See id.* (asserting other professionals would be first responders in certain situations instead of police officers).

376. *Cf. id.* (summarizing the goals of police reform as aiming to eliminate the brutalization and harm to black and brown bodies from police brutality).

377. *Cf. id.* (speaking to the group of activists that feel the multiple failed attempts at police reform leave one logical solution: do away with the system of policing entirely).

378. *See* Meghan G. McDowell & Luis A. Fernandez, *‘Disband, Disempower, and Disarm’: Amplifying the Theory and Practice of Police Abolition*, 26 *CRITICAL CRIMINOLOGY* 1, 1 (July 20, 2018) (“Critical criminologists have challenged the utility of efforts to reform the criminal justice system for decades, including strong calls to abolish the prison system. More recently, the rebellions...have made racialized police violence and police reform issues of national concern.”).

B. Police Abolition (is not Police Reform)

To other groups, “defunding the police” is not necessarily about reforming, transforming, or reimagining the police.³⁷⁹ Rather, the movement—rooted in Critical Race Theory³⁸⁰—is about abolishing the police.³⁸¹ Police abolitionists do not subscribe to the ideas that policing is broken and in need of reforms.³⁸² They advocate replacing police with other systems of public safety.³⁸³ While some believe that abolition is the way to transform the police into a public good that people of all communities can enjoy,³⁸⁴ most abolitionists believe that policing is inherently flawed and cannot be reformed.³⁸⁵ The tenets of the police

379. See Norman, *supra* note 369 (“In most cases, defunding the police might look more like cutting expanding budgets, such as Los Angeles Mayor Eric Garcetti deciding to slash up to \$150 million from the LAPD’s \$1.86 billion budget.”).

380. *Critical Race Theory*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining Critical Race Theory as “a reform movement within the legal profession, particularly within academia, whose adherent believe that the legal system has disempowered racial minorities.” The term first appeared in 1989. Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashioned it had their own subjective perspectives that, once enshrined in law have disadvantaged minorities and even perpetuated racism).

381. See generally Norman, *supra* note 369 (arguing that due to the targeted nature of police brutality, proponents of abolishment of the police stem from critical race theory); see also *id.* (“A reform movement within the legal professions, particularly within academia, whose adherents believe that the legal system has disempowered racial minorities...”).

382. See Maya Dukmasova, *Police Abolitionists Find Fuel in the Protests*, CHI. READER (June 1, 2020), <https://www.chicagoreader.com/chicago/george-floyd-protests-police-abolition/Content?oid=80349691> [<https://perma.cc/6NDA-QEJ2>] (representing that communities can be maintained without armed enforcement of the law).

383. See *id.* (“Instead, abolitionists propose—and indeed demonstrate through their work—that community order can be maintained without the intervention of an armed representative of the government and that justice can be accomplished without punishment.”).

384. See Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), <http://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> [<https://perma.cc/4RSS-93UG>] (agreeing that transforming policing requires abolishing what currently exists to transform policing’s fundamental nature in to a public good).

385. See Derecka Purnell, *What Does Police Abolition Mean?*, BOS. REV., (Aug. 23, 2017), <http://bostonreview.net/law-justice/derecka-purnell-what-does-police-abolition-mean> [<https://perma.cc/7QGV-RSMR>] (“Law enforcement arbitrarily enforces laws according to demographics and maintains order according to each officer’s subjective notion of peace. Transformation will not save it.”).

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abolition movement are simple: disband, disempower, and disarm the police.³⁸⁶

C. Revealing Differences: The Death of George Floyd

George Floyd, a 46-year-old black man was killed during an arrest on May 25, 2020.³⁸⁷ Amidst protests across America, a national poll—conducted after Minneapolis police officer, Derek Chauvin, was arrested for killing George Floyd—showed a strong majority of Americans supported police reform regardless of political ideology.³⁸⁸ However, the same poll indicates sixty-five percent of those responding opposed reductions to police funding.³⁸⁹

In the weeks following George Floyd’s death, “defund the police” continued to catch traction in media circles.³⁹⁰ At the same time, an increasing number of people began to ask what defunding the police

386. See McDowell & Fernandez *supra* note 378 (acknowledging an emerging practice calling for abolition through disbanding, disempowering, and disarming law enforcement institutions).

387. See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (January 24, 2022), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/D8BS-5YF2>] (“On May 25, Minneapolis police officers arrested George Floyd, a 46-year-old black man, after a convenience store employee called 911 and told the police that Mr. Floyd had bought cigarettes with a counterfeit \$20 bill. Seventeen minutes after the first squad car arrived at the scene, Mr. Floyd was unconscious and pinned beneath three police officers, showing no signs of life.”).

388. See Linley Sanders, *What Police Reform Does America Support?*, YOUGOVAMERICA (June 1, 2020, 8:45 AM), <https://today.yougov.com/topics/politics/articles-reports/2020/06/01/police-reform-america-poll> [<https://perma.cc/L7LX-GXFH>] (revealing strong bipartisan support exists for training police officers to de-escalate situations instead of using force and outfitting all police officers with body cameras).

389. See *id.* (explaining the of the people participating in the poll only sixteen percent of Democrats and fifteen percent of Republicans supported cutting police force funding).

390. See Julie Hollar, *Media Acknowledge Drive to Defund Polce—but Seek to Blunt Its Radical Edge*, FAIR (June 11, 2020), <https://fair.org/home/media-acknowledge-drive-to-defund-police-but-seek-to-blunt-its-radical-edge/> [<https://perma.cc/2DAR-UAHE>] (discussing the phenomenon following George Floyd’s death that in the past media is reluctant to provide coverage to protests; however, in just a few weeks had covered the idea of defunding the police not less than 300 times).

actually meant.³⁹¹ This culminated in a series of op-ed pieces which revealed a lack of consensus in the criminal justice reform movement.³⁹²

One June 7, 2020, police reform authority and Co-Director of the Innovative Policing Program at Georgetown University Law School,

Professor Christy Lopez, wrote a piece for the *Washington Post* titled “Defund the police? Here’s what that really means.”³⁹³ In the article she states that “[s]ince Floyd’s death, a long simmering movement for police abolition has become part of the national conversation, recast slightly as a call to ‘defund the police.’”³⁹⁴ She acknowledges that, “for casual

observers the new direction may seem a bit disorienting—or even alarming.”³⁹⁵ Lopez cajoled, “Be not afraid. ‘Defunding the police’ is not as scary (or even as radical) as it sounds and engaging on this topic is necessary if we are going to achieve the kind of public safety we need.”³⁹⁶

Five days later, on June 12, 2020, police abolition advocate, Mariame Kaba, wrote an article in the *New York Times*.³⁹⁷ “Yes, We Mean

391. See Josiah Bates, *How Are Activists Managing Dissension Within the ‘Defund the Police’ Movement?*, TIME (Feb. 23, 2021, 3:45 PM), <https://time.com/5936408/defund-the-police-definition-movement/> [<https://perma.cc/86BK-YZ7N>] (“There are now varying (and even contradictory) takes on what the term “defund” actually means—and in what ways it should be used to foster change. Some activists use it to describe their goal of wholly disbanding police forces, others take its definition to mean the reallocation, to varying extents, of a police department’s budget. Others still believe the term can be used to describe both goals, or use it simply as a broader call for accountability.”).

392. *Id.* (finding the term “defund” was becoming divisive and a flash-point for trigger a larger culture war).

393. See Christy E. Lopez, *Opinion: Defund the Police? Here’s What that Really Means*, WASH. POST (June 7, 2020), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means/> [<https://perma.cc/2ALH-U26E>] (referring to an op-ed article written by Professor Lopez providing her understanding of what “defund the police” means).

394. See *id.* (“Since George Floyd’s death, a long-simmering movement for police abolition has become part of the national conversation, recast slightly as a call to ‘defund the police.’”).

395. See *id.* (“For activists, this conversation is long overdue. But for casual observers, this new direction may seem a bit disorienting — or even alarming.”).

396. See *id.* (“Be not afraid. ‘Defunding the police’ is not as scary (or even as radical) as it sounds, and engaging on this topic is necessary if we are going to achieve the kind of public safety we need.”).

397. See Mariame Kaba, *Yes, We Mean Literally Abolish the Police: Because Reform Won’t Happen*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html?referringSource=articleShare> [<https://perma.cc/FFE4-7N3S>] (delivering an alternative discourse on what “defund the police” means to some abolitionists who believe it is impossible to reform the police and that police violence can only be reduced by reducing contact with the police).

Literally Abolish the Police . . . Because reform won't happen."³⁹⁸ Mariame Kaba's piece was, in part, a response to the echo chamber of writers seeking to assuage public concern by emphasizing that "defund" does not mean "getting rid of the police altogether."³⁹⁹

Lopez would later say that she was trying to capture the "commonality of all the different articulations" of what people were talking about when it comes to police abolition or defunding the police.⁴⁰⁰ However, police abolitionists are not interested in commonalities.⁴⁰¹ They call on supporters to actively resist "attempts at co-optation, incorporation, and/or reconciliation" by police reformers.⁴⁰² Other police reformers, including Campaign Zero, apologized to police abolitionists and communities demanding "radical transformative change" for unintentionally distracting "from efforts of other organizers invested in paradigmatic shifts that are newly possible in this moment" and stated that "the end goal for all of us should be absolute liberation from policing."⁴⁰³

398. *See id.* ("Yes, We Mean Literally Abolish the Police . . . Because reform won't happen.").

399. *See generally* Andrew Ferguson, 'Defund the Police' Does Not Mean Defund the Police. Unless it Does, ATLANTIC (June 14, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/what-does-defund-police-really-mean/612904/> [<https://perma.cc/F36G-Q5MC>] (discussing the confusion surrounding exactly what is meant when people use the term "defund the police").

400. *See* Christy Lopez, *Christy Lopez on Proposals for Police Abolition and Defunding the Police*, C-SPAN: WASH. J. (June 13, 2020), <https://www.c-span.org/video/?472947-3/washington-journal-christy-lopez-discusses-proposals-police-abolition-defunding-police> [<https://perma.cc/WHP4-W44N>] ("What I was trying to capture was the commonality of all the different articulations of what people are talking about when it comes to police abolition or defunding the police.").

401. *See* McDowell & Fernandez, *supra* note 378, at 373 ("In this spirit, we amplify abolitionist praxis that (1) aims directly at the police as an institution, (2) seeks to dismantle the racial capitalist order, (3) adopts uncompromising positions that resist liberal attempts at co-optation, incorporation, and/or reconciliation, and (4) creates alternative democratic spaces that directly challenge the legitimacy of the police.").

402. *See id.* (emphasizing one of the practices of contemporary police abolitionists includes resisting attempts by others to compromise their beliefs that nothing short of abolition will deliver the necessary change).

403. *See* Christopher Wilson, *Group Behind Moderate Police Reform Proposal Issues Apology for Distracting from Defunding and Abolition Movements*, YAHOO NEWS (June 10, 2020), <https://news.yahoo.com/police-reform-8cantwait-project-zero-cofounder-apology-143505275.html> [<https://perma.cc/9V5A-9QWP>] ("A similar statement was posted to the group's website: 'While we are proud of the impact we were able to make, we at Campaign Zero

Andrew Ferguson, with *The Atlantic* summed it all up as follows: “Unfortunately, the case [Lopez] makes still sounds pretty radical, at least to a layman whose ears are tuned to words as they are normally used. So, fear not: ‘Defund the police’ does not mean defunding the police, except when it does, whether next week or in the next decade.”⁴⁰⁴

Could “defund the police” backfire?⁴⁰⁵ Dr. Julie Norman, a lecturer at University College London explains, “By conflating reforming the police with defunding the police, activists risk missing an opportunity to win public support and investment in much needed reforms.”⁴⁰⁶ As David Leonhardt of the *New York Times* explains, “The challenge for advocates is that many people equate ‘defunding’ with a major reduction in policing—and they don’t like that idea.”⁴⁰⁷ Reducing police budgets is . . . the only high-profile reform idea that is not popular[.]”⁴⁰⁸

acknowledge that, even with the best of intentions, the #8CANTWAIT campaign unintentionally detracted from efforts of fellow organizers invested in paradigmatic shifts that are newly possible in this moment. For this we apologize wholeheartedly, and without reservation.”).

404. Ferguson, *supra* note 404 (arguing that the average person experiences trepidation from the idea of defunding the police because the average person understands that words matter; whether defund the police means decreasing the funding given to police or actually means not providing police with any funds, the average person struggles with the concept).

405. *See* Norman, *supra* note 369 (suggesting slogans like “defund (or abolish) the police,” could backfire on the reforms activists want to achieve).

406. *See id.* (making the point that words matter, Dr. Norman warns activists that public support for much needed reform can be lost when slogans used give the wrong impression).

407. *See* David Leonhardt, *The ‘Defund’ Conundrum*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/briefing/defund-police-george-floyd-coronavirus-your-tuesday-briefing.html> [<https://perma.cc/4JFB-LGJX>] (offering that progressives tend to miss the mark when marketing for reforms that are otherwise popular with voters by using catch-phrases spotlighting unpopular ideas).

408. *See id.* (explaining how the term “defund the police” confuses many people who believe it means eliminating police from our cities—a concept which a majority of society do not support).

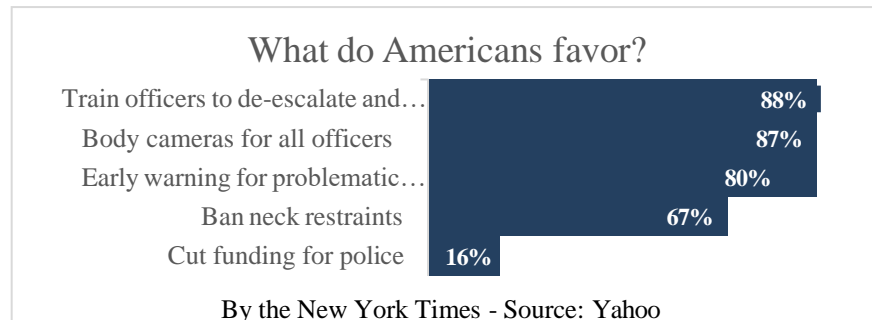


Figure 3: The ‘Defund’ Conundrum (Leonhardt 2020)

Differences between police reformers and police abolitionists support Professor Levin’s argument that consensus in criminal justice reform is not what it seems.⁴⁰⁹ What is publicly perceived as consensus superficially conceals deep-seated disagreement about the role of criminal law in society.⁴¹⁰ It is important to neither gloss over these disagreements nor discount the reasons why they exist.⁴¹¹ The public should be aware that while some people want criminal justice reform, others want criminal justice abolition.⁴¹²

409. See Levin, *supra* note 363 (arguing that consensus in police reforms is more elusive than people want to believe and if we fail to recognize this, we will not be able to achieve reform); see also Lopez, *supra* note 393 (claiming “defund the police” really means reallocating funds not abolishing the police altogether); but see Kaba, *supra* note 397 (asserting “defund the police” means that because police do not serve the role society believes they do, police departments should be defunded).

410. See Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster*, 126 HARV. L. REV. 1299, 1299 (2013) (lamenting that for all the agreement among scholars, just below the surface resides disagreement not only on solutions, but also the fundamentals of what truly needs to be reformed).

411. See Levin, *supra* note 363 (discussing that while consensus represents hope for change, there is value in understanding the frame each disparate angle brings to the conversation because each represents part of the problem that must be solved to cement the needed change).

412. See Lopez, *supra* note 393 (representing the view that “defund the police” doesn’t really mean abolishing the police altogether); but see Kaba, *supra* note 397 (providing the view that some who use the slogan “defund the police” mean exactly that).

CONCLUSION

“Too often we judge other groups by their worst examples, while judging ourselves by our best intentions.⁴¹³ And this has strained our bonds of understanding and common purpose.”⁴¹⁴

The criminal justice system is more than police, courts, and corrections; it is about the public and how much power the people are willing to give the government.⁴¹⁵ Many debates about criminal justice involve the law and all lawyers have an interest in upholding the law.⁴¹⁶ The cornerstones of the law are that it is cohesive, it is institutional, it is legitimate, and it is coercive. These features are present in the debate about bail reform. Discussions about public safety and public health include discussions about mental health.⁴¹⁷ If Texas is to succeed in fully optimizing opportunities for diversion, it should restore the Sandra Bland Act and create law that allows judges, particularly in courts with the highest volume of people, to grant bonds and release based on each particular case. Disbanding, disempowering, and disarming the police is not about criminal justice reform; it is about criminal justice abolition.⁴¹⁸ “#DefundThePolice,” may be effective for gaining attention on Twitter

413. See Julissa Higgins, *Read George W. Bush's Speech at the Dallas Shooting Memorial Service*, TIME (July 12, 2016), <https://time.com/4403510/george-w-bush-speech-dallas-shooting-memorial-service/> [<https://perma.cc/2GHL-RF58>] (speaking at the funeral of five policemen killed in the line of duty by a gunman).

414. See *id.* (dealing with the after effect of anger against the police for the brutality shown to people of color, which resulted in a man taking the lives of as many police officers as possible before he was ultimately killed).

415. See *Ask an Expert: Why Is Criminal Justice Important?*, NAT'L UNIV., <https://www.nu.edu/resources/ask-an-expert-why-is-criminal-justice-important/> [<https://perma.cc/V8BP-UDN5>] (explaining the criminal justice system represents a part of the government with far reaching impact dictated by the people through voting and legislation).

416. See *Initial Question: Is it the Responsibility of Law School to Teach Law Students About Justice?*, BERKMAN CTR. FOR INTERNET & SOC'Y AT HARV. L. SCH., <https://cyber.harvard.edu/eon/ei/justice-rot.html#:~:text=But%20what%20constitutes%20%22justice%22%20will,not%20try%20to%20define%20justice> [<https://perma.cc/PZY8-ZSLX>] (answering whether law schools have a responsibility to teach about justice and saying lawyers not only need to learn about justice, but they are also the “key” to holding the system accountable).

417. See Giliberti, *supra* note 247 (decrying the travesty in our society that many people with mental health problems end up in jails where they suffer more harm); see also Panchal, *supra* note 240 (indicating the COVID-19 pandemic only added to the challenges already faced by those with existing mental health issues).

418. See McDowell & Fernandez, *supra* note 378 (taking the position that attempting to take power away from police is not about reform, but rather abolition).

but it is not a public policy statement. Good discussion and debates about criminal justice involve nuance.⁴¹⁹ Bad discussions involve false dilemmas and recriminations.⁴²⁰

The pandemic and the debates it has reanimated reminds us how interconnected we are and how divided we tend to be when it comes to what the Supreme Court called the “manifold restraints to which every person is necessarily subject for the common good.”⁴²¹ Accordingly, all people must be held accountable. The government must also be held to account for how it uses its powers. There is no exception for the executive branch and its agents in law enforcement. Now more than ever, everyone must insist that the actions of government comply with the Constitution.

419. Cf. Cate Camara, *The Nuance of the Word ‘Nuance’*, STAN. DAILY (June 13, 2017, 2:25 AM), <https://stanforddaily.com/2017/06/13/the-nuance-of-the-word-nuance/#:~:text=Nuance%20allows%20for%20a%20greater,those%20subtleties%20can%20really%20matter.&text=A%20student%20in%20my%20PWR,we%20need%20to%20understand%20more> [<https://perma.cc/8KKL-XCKW>] (demonstrating that the word “nuance” provides the basis of understanding topics seemingly simple on their surface, but are complex after deep thought and consideration).

420. See generally Aaron Huertas, *A Field Guide to Bad Faith Arguments*, MEDIUM (Sept. 23, 2018) <https://medium.com/s/story/a-field-guide-to-bad-faith-arguments-7-terrible-arguments-in-your-mentions-ee4f194afbc9> [<https://perma.cc/C29V-5RVU>] (listing the different argumentative tactics people use when they disagree with someone instead of trying to understand the other side).

421. See Jacobson, *supra* note 7, at 26 (deciding that for society to function in a civilized manner, individual rule is not an option when the health and safety of other people are jeopardized; sometimes the government must restraint the liberty of individuals to protect the masses).