

CHANGE IN THE LEGAL PROFESSION AND IN THE TEXAS JUDICIARY, THE THIRD BRANCH

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November 12, 2017

Walter B. Huffman Distinguished Lecture Series
Texas Tech University School of Law
Lanier Auditorium

Thank you very much, Emily, and thank you all for being here today and for your kind invitation for me to join you at this lecture series named for my good friend, Walter Huffman, whom I've known for many years. He and Cathy were nice to host me last night, and we were talking about our past experiences together. So, it's a wonderful privilege for me to be here, as always, on the campus of the law school at Texas Tech, but also at a lecture in his honor.

I'm going to talk to you for a few minutes today about change in the legal profession and in the Texas Judiciary, the third branch. I hope you will take from this that it is not a scary time to be coming to the Bar, but an exciting time. There are changes that are being made in our justice system in Texas, changes that are being proposed, and changes that are being resisted, and so I want to talk to you about all of those for a few minutes.

The law and its processes are a product of, and deeply indebted to, its history. Thousands of times each year, twenty-first century courts employ a legal device at least seven hundred years old: the writ of habeas corpus. Over the centuries, little about the "great writ" has changed. Even the name has remained the same. Habeas Corpus, the two Latin words with which the writ always began¹ and mean "you have the body," literally.² It was a directive to someone: you have the body delivered to a superior for the purpose of examination.³ "*Ad subjiciendum*" were the Latin words for it.⁴ It was a way of determining whether the person who had custody of the other person had

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1. *See generally Habeas Corpus*, BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

2. *See id.*

3. *See id.*

4. *See id.*

proper custody of them.⁵ That, of course, is the same way that it is used today. Blackstone cites the first recorded use of habeas corpus during the reign of King Edward I in 1305, though similar writs to the same effect were issued as early as the twelfth century under the reign of King Henry II.⁶ That is one example.

Another example is mandamus, also dating to at least the fourteenth century, and also called for its Latin word “mandamus,” which means “we command.”⁷ Some states actually these days have gone to a more modern name.⁸ California calls it “mandate,” rather than calling it “mandamus” anymore.⁹ But Texas still calls it “mandamus,” as do almost all of the states.¹⁰ It’s an order from a higher court directing a lower court or other government authority to do its duty.¹¹ Now, petitions for this ancient writ seven to eight hundred years old are 30% of the docket for the Supreme Court of Texas.¹² So, it has common usage even after all of these centuries. Our jurisprudence about when mandamus should issue has evolved. But the basic form of the writ and its basic function have not changed. They are still rooted in its ancient past.

Those are two examples of fundamental concepts in twenty-first century American law that I think are unshakably rooted in the ancient past, but their purpose is to achieve justice. What justice is and how it’s done evolves. So, let me give you two examples of that.

Court pleadings in civil cases under the English common law were extremely formal and technical. You had to use the same words all of the time, and cram your facts into those words. When the law was developing formal proceedings, the justification was requiring parties to shoehorn their claims and defenses into recognizable forms, which allowed liability to be more readily determined. Similar fact patterns should be treated similarly. But in fact, the procedure incentivized parties to resort to legal fictions in order to force their facts to fit within prescribed forms, and then to engage in

5. 3 WILLIAM BLACKSTONE, COMMENTARIES *129–37. *See generally* Jones v. Cunningham, 371 U.S. 236, 238–40 (1963).

6. 3 WILLIAM BLACKSTONE, COMMENTARIES *129–37. *See generally* Webb v. Warden, No. CV000003239, 2003 WL 22480186, at *1 (Conn. Super. Ct. Oct. 8, 2003).

7. *See Mandamus*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

8. *See, e.g.*, Common Cause v. Bd. of Supervisors, 777 P.2d 610, 615 (Cal. 1989) (referring to mandamus as a writ of mandate).

9. *See id.*

10. *See, e.g.*, *In re Coppola*, 535 S.W.3d 506, 510 (Tex. 2017) (granting a petition for writ of mandamus).

11. *See generally id.*

12. *See* OFFICE OF COURT ADMIN., ANNUAL STATISTICAL SUPPLEMENT 2 (2017), <http://www.txcourts.gov/media/1439462/sc-activity-2017.pdf> (showing that approximately 15% of the Texas Supreme Court’s 2017 docket consisted of petitions for writs of mandamus); OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY Detail – 3 (2016) [hereinafter ANNUAL STATISTICAL REPORT], <http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf> (indicating approximately 20% of the Texas Supreme Court’s 2016 docket consisted of petitions for writs of mandamus).

pleadings wars, amending pleadings back and forth, making the process very complex, expensive, and slow. You remember Charles Dickens in *Bleak House* invented the case of *Jarndyce v. Jarndyce*.¹³ It was a story about a dispute over an inheritance in the chancery court that lasted until the legal fees ate up all of the estate.¹⁴ That condition of the chancery courts at the time was common knowledge. Charles Dickens could write about it in a novel to a lay audience, and everybody knew what he was talking about. Not only that, even still today, mention *Jarndyce v. Jarndyce*, and we know what that means: unending, expensive litigation that doesn't seem to get anywhere and just costs people money.¹⁵ Those common law formal proceedings prevailed until the Federal Rules of Civil Procedure and were adopted in 1938.¹⁶ With great controversy, great consternation, the federal rules writers changed the rules of procedure to adopt notice pleadings and discovery.¹⁷ So, instead of setting out in your pleadings all of the factual details of your claims, you just gave notice to the other side that this is what you're claiming.¹⁸ The defendant would likewise just give notice of the defenses the defendant was claiming.¹⁹ Then, the parties would go through discovery to try to flesh out what their various claims were.²⁰ That was seen as an enormous change in the law in 1938.²¹ It was very controversial.²² It was debated at length in Texas.²³ When Texas devised its own rules of civil procedure in 1941, just three years after the federal rules, in the very next

13. See generally CHARLES DICKENS, *BLEAK HOUSE* (1853).

14. See generally *id.*

15. See *Stern v. Marshall*, 564 U.S. 462, 468 (2011) (comparing the present case, a complex and lengthy bankruptcy case, to the case in *Bleak House*).

16. See generally FED. R. CIV. P. (1938) (amended 2009).

17. See Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 448 (1936) (explaining how two features of the then-proposed rules were the creation of a straightforward method of pleading the issues of a case and new, useful provisions for discovery); Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1057 (1955) (examining the legal movements that led to the passage of the Rules Enabling Act of 1954, and by extension, the rules of procedure).

18. See Sherman L. Cohn, *The New Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1204 (1966) (stating that the purpose of the rules was to complete the abolishment of form pleading in federal civil practice); Holtzoff, *supra* note 17, at 1059–60 (emphasizing the two philosophies underpinning the rules that a case should proceed to trial based on its merits rather than a litigator's ability to navigate a complex procedural system and that expansive discovery facilitates just decisions by transforming the nature of trial from contests of skill to endeavors to ascertain the truth).

19. See, e.g., James R. Mareiner, *Pleadings and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PA. ST. L. REV. 1257, 1277–78 (2010).

20. See, e.g., John W. Curran, *Afterthoughts of the Institute on Federal Rules of Civil Procedure at Cleveland*, 145 NOTRE DAME L. REV. 103, 103 (1938).

21. See *id.*

22. See, e.g., Charles E. Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 TEX. L. REV. 4, 4 (1941).

23. See *id.*

legislative session in 1943, bills were introduced to undo notice pleadings.²⁴ Those bills failed, and we simply proceeded along the lines that the federal rules proceeded along.²⁵ Now, after eighty years of that practice, we begin to wonder: Was that a good idea after all? Were notice pleadings the right way to go? Should pleadings have to be more detailed like they are in fraud cases? Should discovery be as expansive as it is and as invasive as it is in this electronic age? We're asking all those questions. We're just not sure again. We're coming to a point in our history where looking at these procedures and asking ourselves: Is this the way to go?

The second example is appellate procedure. It was probably affected by trial procedure, but 100 years ago, we thought it was a good idea to have very technical rules in appellate cases.²⁶ Here's an example: we used to have a rule that you had to present your issues on appeal—the things you were complaining about—in detailed points of error.²⁷ A point of error could not be multifarious.²⁸ You had to put each issue in a separate point of error. But neither could they be duplicitous.²⁹ If you put an issue in a point of error and the same issue in a second point of error, that was a problem as well.³⁰ Courts were not required to consider multifarious points of error—even if they could, even if they knew what was being argued, even if two things were at issue. They were not required under our rules even to consider the points of error. Oftentimes, appeals were decided on those technicalities. In my first appeal—Emily was kind enough to say I was lawyer forty-two in a forty-two-person firm back in 1975, in what's now a 900-person firm, which means I'm really old. I get that. When I was working on my first appeal in the Texas Court of Appeals, the bible for appeals was published by the State Bar of Texas, and it said that all points of error should be put in all-caps typeface.³¹ As a result, they were basically unreadable. Then, points of error should also include citations to the record.³² So, as you're reading a point of error—and it might go on for a page or so, all caps, with references to the record here and there—it was very difficult to tell what arguments were being made. That was not just Texas procedure; that was the procedure throughout the country. In 1906, Roscoe Pound wrote in his paper, entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*, that this kind of unproductive focus on fine points of appellate procedure is sheer waste

24. See, e.g., William V. Dorsaneo, III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 739–40, 751–52 (2013).

25. See *id.*

26. See *id.* at 749–52.

27. See *id.* at 749–50.

28. See *id.*

29. See *Holmes v. J. C. Penney Co.*, 382 S.W.2d 472, 473–74 (Tex. 1964).

30. See generally *id.*

31. See generally STATE BAR OF TEX. PROF'L DEV. PROGRAM, TEXAS APPELLATE PRACTICE MANUAL (1974).

32. See *id.* at 58–60.

that a modern system should obviate.³³ That was in 1906.³⁴ Ninety-one years later, a modern system of justice in Texas replaced points of error with a simple system that briefs should state concisely all issues or points present for review.³⁵ The TRAPs—Texas Rules of Appellate Procedure—should not allow “traps” that do not subserve the presentation of the merits of a case.

Those four examples—two showing how deeply rooted our procedure is in the past, and two showing how forces of change in society have forced changes in the law and its processes—are indicative of the situation today. To quote Roscoe Pound again, “Law must be stable . . . [but] it cannot stand still.”³⁶ It must yield to forces that require change in our law and in our processes, but it doesn’t, and it never has.³⁷ In my first example, flaws in the forms of common law pleadings were so commonly obvious that Dickens could poke fun at court procedure and his simplest readers could understand that statutory code pleading had not made things much better. It still took decades for any real change to be made.³⁸ As I said with the changes in appellate procedure, again, it took almost a century for those changes to take hold, and not just in Texas, but throughout the United States. Why is change so hard? Why is it so hard for us lawyers to change things?

First, our beloved legal profession is extremely resistant to change. Preserving common law form pleading was important to the Bar. Lawyers knew that if they crammed their client’s case into a form that had won before, maybe they, too, would win. At least the case would survive dismissals. We are still a form-reliant profession. Why do we continue to follow so many procedures? Because we always have. You’ve heard the joke: “How many lawyers does it take to change a lightbulb?” The answer is “Change? Change? What do you mean Change? Leave it alone!”

Second, arguments both for and against change are often driven by opinion rather than fact. As Texans, we pride ourselves on our own opinions. If we are going to change, then it must be for a better reason than everybody else is doing it, even if they are clearly better off. Let me give you an example. In 1995, not that long ago, Texas decided to make truancy a crime.³⁹ The idea was that if the consequences were stiff enough children would go to school rather than skip.⁴⁰ Supporters must not have had many children. Or they must not have read Carl Sandburg’s poem:

33. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 742–46 (1906).

34. *Id.*

35. See TEX. R. APP. P. 77.

36. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (Harold Dexter Hazeltine ed., 1967).

37. See generally *id.*

38. See generally DICKENS, *supra* note 13.

39. See TEX. EDUC. CODE ANN. § 25.0915 (West 2017).

40. See *id.*

Why did the children put beans in their ears when the one thing we told the children they must not do [is] put beans in their ears?

. . . .

Why did the children pour molasses on the cat when the one thing we told the children they must not do [is] pour molasses on the cat?⁴¹

(I hope I'm not putting bad ideas in your heads. Some of you are looking at your beans.)

Not surprisingly, looking back at the past, criminalizing truancy did not have much of an impact.⁴² Teenagers already hampered by a lack of education were burdened by criminal records.⁴³ It took us twenty years to decriminalize truancy after every other state had done it, except Wyoming.⁴⁴ Truancy is still a serious problem, and decriminalizing it is not the solution; it still abounds. But the shift leaves one problem to address—trying to get kids to go to school—instead of two, trying to get them in school and out from under criminal records.

Third, change is hampered by a legitimate wariness that matters not be made worse. Change that is prompted by frustration and haste instead of planning can hurt more than help. If it ain't broke, don't fix it. By the same token, the perfect must not be allowed to be the enemy of the good. Reformers must be careful but not timid.

Fourth, change is resisted when it is not well-understood or well-explained. Few would resist change if convinced they would be better off. When there is confusion or doubt, the devil you know can seem better than the devil you don't know.

Finally, and worst of all, change is opposed by those who benefit from the existing system, even when it is detrimental to others.

The Texas justice system is undergoing profound changes, considering some and resisting others. In this lecture I want to put those in four categories. First is technology, second is court procedure, third is access to justice, and fourth is institutional structure.

41. CARL SANDBURG, *THE PEOPLE, YES* 82 (Harcourt, Brace & Co. 1936).

42. See Steven E. Gilmore, *Education and Its Discontents: The Decriminalization of Truancy and the School-to-Prison Pipeline in Texas*, 18 *THE SCHOLAR* 229, 234–35 (2016) (noting the disproportionate effects of Texas truancy laws).

43. *Id.* at 234–35.

44. Act Jun. 18, 2015, 84th Leg., R.S., ch. 935, 2015 Tex. Sess. Law. Serv. 935 (West); see also Tony Gutierrez, *Texas Decriminalizing Students' Truancy*, USA TODAY (June 20, 2015, 6:16 PM), <https://www.usatoday.com/story/news/nation/2015/06/20/texas-truancy-absent-students-criminalized/29047285/> (discussing the decriminalization of academic truancy in Texas).

Texas has 254 counties.⁴⁵ Brewster County, which is east of El Paso, is bigger than Connecticut.⁴⁶ Brewster County has 9,000 inhabitants.⁴⁷ I kid my colleague, the Chief Justice of Connecticut, that we have a county bigger than her state. If New Haven had the same density population as Brewster County, it would have a population of twelve.⁴⁸ We have counties in Texas that do not have ready access to the Internet at all and certainly not in government offices for courts that ride circuit.⁴⁹

We have over 3,000 judges in Texas.⁵⁰ Texas and Oklahoma are the only two states with two high courts: one for civil cases and one for criminal cases.⁵¹ We have eighty judges on our fourteen courts of appeals which are regional, scattered throughout the state.⁵² We have 468 district judges, another 243 statutory county judges including probate judges, and 254 constitutional county courts.⁵³ We have 802 justices of the peace and 1,326 municipal court judges.⁵⁴ We have more than 2,100 judges that handle misdemeanors, traffic offenses, and other small offenses.⁵⁵ They handle more than seven million cases a year, including more than six million minor offenses.⁵⁶ The fees and fines that are collected by those courts are over one

45. See, e.g., *Center for Health Statistics Texas County Numbers and Public Health Regions*, TEX. DEP'T ST. HEALTH SERVS., https://www.dshs.texas.gov/chs/info/info_txco.shtm (last visited Mar. 29, 2018).

46. *Compare Texas Counties Land Area*, TEXASCOUNTIES.NET, <http://www.texascounties.net/statistics/landarea.htm> (last visited Mar. 29, 2018) (citing Brewster County at 6,183.7 square miles), *with Connecticut*, CITY-DATA.COM, <http://www.city-data.com/states/Connecticut-Location-size-and-extent.html> (last visited Mar. 29, 2018) (noting Connecticut's size as 5,018 square miles).

47. See *Texas Counties: 2016 Population Estimates from the U.S. Census Bureau*, COUNTY INFO. PROGRAM, TEX. ASS'N OF COUNTIES, <http://www.txcip.org/tac/census/morecountyinfo.php?MORE=1044> (last visited Mar. 29, 2018).

48. See *Brewster County Profile*, COUNTY INFO. PROGRAM, TEX. ASS'N OF COUNTIES, <http://www.txcip.org/tac/census/profile.php?FIPS=48043> (last visited Mar. 29, 2018); see also *Quick Facts: New Haven City, Connecticut*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/newhaven-cityconnecticut/age295216> (last updated July 1, 2016).

49. See, e.g., Nick Saint, *The 10 U.S. Counties Stuck in the Dial-Up Dark Ages*, BUS. INSIDER (July 27, 2010, 7:28 AM), <http://www.businessinsider.com/us-counties-broadband-access-2010-7> (explaining that Ector County seat, Odessa still lacks ready access to broadband Internet); Chris Zubak-Skees & Ben Wieder, *Where Broadband Access is Unequal*, CTR. FOR PUB. INTEGRITY (May 12, 2016, 5:00 AM), <https://www.publicintegrity.org/2016/05/12/19585/where-broadband-access-unequal> (illustrating that, for several counties in Texas, including Hudspeth, Culbertson, Leon, Runnels, and Coleman, up to 100% of residents are without access to broadband Internet, ranging from those below the poverty line, up to those making \$80,000 annually).

50. See Nathan L. Hecht, Chief Justice, Supreme Court of Tex., *Address to the 85th Texas Legislature: The State of the Judiciary in Texas* (Feb. 1, 2017) (transcript available at <http://www.txcourts.gov/media/1437289/soj-2017.pdf>).

51. See, e.g., Ben L. Mesches, *Bifurcated Appellate Review: The Texas Story of Two High Courts*, 53 JUDGES' J. 30, 30 (Fall 2014).

52. *About Texas Courts*, TEX. JUDICIAL BRANCH, <http://www.txcourts.gov/about-texas-courts/courts-of-appeals/> (last visited Mar. 29, 2018).

53. *Court Structure of Texas*, TEX. JUDICIAL BRANCH (Jan. 1, 2018), <http://www.txcourts.gov/media/1439552/court-structure-chart-jan-2018.pdf>.

54. *Id.*

55. *Id.*

56. See, e.g., ANNUAL STATISTICAL REPORT, *supra* note 12, at Detail – 47 (2016).

billion dollars a year.⁵⁷ A third goes to the state and two-thirds stay with local governments.⁵⁸ These courts are sometimes, and very badly, thought of by local governments as revenue generators. How many cases did you process and how many fines did you take in? In the issues we're facing today, we deal with a very complex, very large, very diverse judicial system in our state.

On technology: Historically, courts and the legal profession have been slow to embrace technology. We are Luddites. In 1974, when I was clerking for Judge Roger Robb on the D.C. Circuit, we got a Xerox machine. It was great. The only thing was they'd been invented twenty years earlier, and everybody else had one, including the law school I had just graduated from. We got a Xerox machine at the D.C. Circuit, but the United States Supreme Court, I was told, still didn't have one. When you wrote a memo to another justice on the Supreme Court of Texas, email wasn't even a part of Al Gore's vision for the Internet; it was nothing. Email had not even been thought of. The United States Supreme Court was still using a printing press. Sometimes the Supreme Court of Texas used one of those old lithograph machines that you turned the crank on just to generate twenty or thirty copies of a memo to send around the Court.

Our Court did not use email until about fifteen years ago, about ten years after the legal profession widely used it. We had good reasons. We didn't think it was appropriate in our court—where we are all on the same floor, where we all office right down the hall from one another—to send off a nasty email, when you could just walk down the hall and tell a colleague what you thought face-to-face. Emails are very troublesome because you put things in emails without thinking about how they're going to be read when they're received. Or maybe you do think about it, in which case, it just causes more problems than it solves. There was no way to do the business of a big twenty-first century state high court if we didn't use email.

So, we're doing better. Here are my remarks, on my iPad. I was reading briefs this morning on my iPad. I don't have to carry around boxes of paper anymore. Most of my colleagues do their work electronically. Court filings in all civil cases in Texas must be electronic.⁵⁹ When we ordered mandatory e-filing in December of 2012,⁶⁰ the reaction of some in the Bar was, "Well, you've wrecked the practice. This is terrible. I don't know how to work a computer. I'm used to the other way. It's going to be five o'clock some afternoon, the computer is going to be unplugged, I'm not going to know what it's doing, I'm not going to get something filed, and I'm going to lose my client's case." Six months later, most lawyers love it, and e-filing is great.

57. *Id.* at Court-Level – 36.

58. *Id.* at Detail – 49.

59. *Id.* at Detail – 2.

60. *See generally* SUPREME COURT OF TEXAS, ORDER REQUIRING ELECTRONIC FILING IN CERTAIN COURTS 1 (2012), http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdoCKET/12/12920600.pdf.

Many like it for all the reasons they didn't like it at first. Lawyers are procrastinators; they put off the brief, and it's due tomorrow. Not to worry; you can still push the button two minutes before the brief is due. Even two minutes before midnight, long after all of the messenger services have gone home, and the clerk's office is closed, by gum, you did it, you got it filed. So, the initial resistance is all but gone, and there's broad acceptance.⁶¹

The next step is electronic access, because once the documents are filed electronically, can we get to them electronically? That seems like a no-brainer: certainly yes for judges. Rather than having clerks running for files around the offices, if judges can just push a button and get access to that information, wouldn't that be much better? The lawyers in the case, too, should be able to have the same access themselves. What about the lawyers in cases that aren't theirs? Well, probably so. They're doing research and need to know what's happening in other cases. What about the local media? That's harder because people sometimes say things in court pleadings that are privileged. Generally, you can't be liable for what you say in a court pleading, with very few exceptions. You can say anything, and in family cases lots of people do. Do we want that to be picked up by the local media, or by the New York Times, or by a hacker who's just interested in exploiting these records for himself?

These are the kinds of problems we must now wrestle with in order to determine what access to these electronic records is appropriate. Electronic access to court records raises very fundamental and deeply held issues in the legal profession. On the one hand, we believe deeply in public justice. We're not going to have Star Chamber proceedings. If you want to go in camera and tell the judge something that the other side can't hear, you better have a very good reason to do it. We don't like sidebar. We don't like ex parte conferences. Everything should be done together, and the public should be allowed to come in the courtroom when it's happening. We're Americans, it's just fundamental to our system of justice. On the other hand, we're a very private people. We have the Fourth Amendment.⁶² It says the government, even when it suspects you of a crime, cannot come and look through your stuff without some reasonable basis for doing so.⁶³ You can't have unreasonable search and seizure.⁶⁴ We've left that word "unreasonable" ambiguous all these years because as time passes what's unreasonable changes. Is it an unreasonable search and seizure for a police officer to sit outside your home with cameras aimed at it that can tell what's happening inside? Is being able to sit next to you and electronically detect what's on your iPhone an unreasonable search and seizure? Is it an unreasonable search

61. *See generally id.* (discussing the benefits of electronic filing, such as reduced documents storage costs and instant access to pleadings).

62. U.S. CONST. amend. IV.

63. *See id.*

64. *See id.*

and seizure if you're planning a theft? If you're planning terror? We have very difficult questions we're going to have to struggle with. The wide use of electronic filing of court documents raises those questions.

A second area of profound change is court procedure. Two things on the criminal side. As I say, in Texas, more than 2,100 municipal and JP judges take in more than a billion dollars a year in fines and fees.⁶⁵ The extent of the imposition and collection of fines and fees in small criminal cases came to light in the federal investigation in Ferguson, Missouri.⁶⁶ The Department of Justice (DOJ) went to Ferguson to see if the officer's shooting of Michael Brown warranted filing federal charges.⁶⁷ The DOJ concluded it did not.⁶⁸ The officer did not commit a chargeable offense under federal law in those circumstances.⁶⁹ But in the course of the investigation, the DOJ found out something else, as we also have: that thousands of courts were collecting millions of dollars in fines and fees throughout the state and, worse, were jailing people who could not pay the fine.⁷⁰

Is the operation of this system even legal? Does the Constitution allow jailing a person who cannot pay a fine because of indigency? United States Supreme Court cases indicate no.⁷¹ Are there practical alternatives? What are you going to do, turn the guy loose? People can't violate the law and escape punishment merely because they're poor. Community service is a commonly used alternative to a fine, but it is expensive and someone has to run it. What about just waiving the fine? The problems in Ferguson have prompted all of the states to look at these issues themselves. Last session, the Texas Legislature passed Senate Bill 1913 restricting the collection of fines and fees by justice courts and municipal courts.⁷² In fiscal year 2016, in the 6.8 million cases that 2,100 justices handled, in 100,000 cases the fee was waived or community service was imposed, but in 640,000 cases, 16% of the cases, the defendant was jailed at a cost to taxpayers of some \$60 a day.⁷³ We have to think whether this is really serving the ends of the criminal justice system. Yes, we want criminal defendants not to endanger the public safety,

65. See, e.g., ANNUAL STATISTICAL REPORT, *supra* note 12, at Detail – 49 (2016).

66. See generally DEP'T OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 86 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

67. See *id.*

68. See *id.*

69. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 102 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

70. See *id.* at 3–4.

71. See *id.* at 16–17 (discussing the unconstitutionality of the Ferguson Police Department's detention and arrests of persons without requisite probable cause).

72. S.B. 1913, 85th Leg., Reg. Sess. (Tex. 2017).

73. See TEX. JUDICIAL COUNCIL, CRIMINAL JUSTICE COMMITTEE REPORT & RECOMMENDATIONS: PRETRIAL DECISION-MAKING PRACTICES 3 (2016), <http://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf>.

and we want them not to reoffend, but we employ punishment that hurts society and taxpayers more than the wrongdoers. Senate Bill 1913 will help.⁷⁴ At least one Justice of the Peace negotiates fines rather than waiving them. Preliminary statistics indicate that collection of fines and fees may increase while jailing decreases with more flexibility in imposing fines. It's a practice we must continue to explore.

We also asked the legislature to change the bail system. The bill did not pass, but it will be back. A story in the Dallas Morning News told of a grandmother who shoplifted \$105 worth of clothes for her grandchildren.⁷⁵ Because she'd shoplifted for her grandchildren before, bail was set at \$150,000.⁷⁶ She hadn't seen \$150,000 in her whole life. She was jailed for two months, which cost Dallas County taxpayers \$3,300.⁷⁷ Was that good? Was it good for her? Was it good for her family? Did it help the store, or the criminal justice system, or the taxpayers? Was she a flight risk? No, she'd lived in the community a long time. Was she a risk to society? No, she was a grandmother. So, what good came of it? None. We must begin to look at alternatives to jail for low-risk defendants. I'm not talking about murderers, terrorists, rapists, or people who commit violent crimes. I'm talking about low-risk defendants. We now have tools that can help us identify defendants who pose a high-risk of violence, recidivism, or flight from just a few demographic factors that are easy to ascertain: age, prior offenses, relation to the community, property ownership, and others. Very simple factors have been shown to predict with greater than 90% accuracy if someone is going to reoffend if they're turned loose, whether they're likely to be violent, and whether they will show up for their court appearance. Many states are looking at bail reform.⁷⁸ The federal courts started it more than fifty years ago.⁷⁹ It will be a big issue in Texas going forward.

On the civil justice side, surveys across the country, in Texas and elsewhere, reveal that the civil docket is divided into three basic segments. One segment is very small cases, such as credit card collections, evictions, suits on a debt, and the like small cases that, even though important, do not need a lot of judicial attention. They mostly need management, someone to move them towards a resolution. Often they can be mediated, and when a ruling is necessary, it does not require a lot of judicial time. They will engage in no discovery to speak of. The third segment, on the other end of the

74. See S.B. 1913, 85th Leg., Reg. Sess. (Tex. 2017).

75. See Cary Aspinwall, *Why Dallas County Can Set \$150,000 Bail for a \$105 Shoplifting Charge—and How Taxpayers Lose*, DALLASNEWS (Dec. 29, 2016), <https://www.dallasnews.com/news/social-justice-1/2016/12/29/dallas-county-demands-150000-bail-105-shoplifting-charge-taxpayers-lose>.

76. *Id.*

77. *Id.*

78. See, e.g., Nick Wing, *Report Grades Bail Systems across the U.S., and Only One State Gets an A*, HUFFINGTON POST (Nov. 1, 2017, 12:01 AM), https://www.huffingtonpost.com/entry/state-bail-system-grades_us_59f78f90e4b0aec1467a2708.

79. See, e.g., *Stack v. Boyle*, 342 U.S. 1 (1951).

spectrum, is the big cases. Class actions, multi-party cases, suits between major companies. All of these cases need all the rules of procedure. They will need much judicial supervision. The middle segment is for car wrecks, insurance claims, ordinary contract disputes, and such. Technology now allows us to triage cases on the front end to determine which group fits. A new case is not simply sent to the judge automatically for her to sort out; it goes to court managers who can more quickly, and most importantly, more economically move it to resolution. Texas is exploring the use of such a triage system in various counties and will continue to do so.

I'll speak just a minute about the last two things: access to justice and institutional structure. We continue to worry that the poor do not have full access to justice in the criminal and civil courts in the state and country. It's a huge challenge on the civil side. Maybe one in five Texans who need basic civil legal services, who earn less than 125% of the poverty level—about \$15,000 a year—can get a lawyer.⁸⁰ Many people with modest means can't afford a lawyer as well. That remains a challenge especially as people more and more try to represent themselves. There are real problems with criminal indigent defense. One thing that impedes access to justice is the expense of a legal education. All who are working to improve access to justice are mindful that after the student debt incurred getting an undergraduate degree and the debt from law school, it is very difficult to contemplate working at \$50 to \$100 an hour for a long time and paying all of that back. There's a lot of pressure on the profession and lawyers individually to charge higher rates, and that makes it hard on middle income people to afford a lawyer.

We still elect judges in Texas. I don't think we're going to change that. People believe that popular election of judges helps hold judges accountable. But the truth of the matter is, even if voters know their judges in Lubbock County, it's impossible in Dallas, Bexar, Harris and maybe even Travis County because there are so many judges on the ballot. Partisan judicial elections are less troublesome when the politics of the county or district are stable. But when politics are unsettled, judges must worry about those realities when deciding to take the bench and whether to stay. That's hard to justify.

General Huffman asked me last night, "What's the answer?" And we're out of time.

80. See Office of the Assistant Sec'y for Planning and Evaluation, *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://aspe.hhs.gov/poverty-guidelines> (last visited Apr. 4, 2018).