

# **Depenalizing Poverty**

***A Proposal for Improving Harris County  
Bail Policies***

**TFDP**

**TEXAS FAIR DEFENSE PROJECT**

## **ABOUT TFDP**

The Texas Fair Defense Project's mission is to improve the fairness of Texas's criminal courts and ensure that all Texans have access to justice.

TFDP focuses on improving the public defense system and challenging policies that create modern-day debtors' prisons filled with poor people who cannot afford to pay commercial bond fees and post-conviction fines and costs.

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“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” – *U.S. v. Salerno*, 48 U.S. 739, 755 (1987).

The current pretrial process in Harris County is shortchanging defendants and taxpayers. The combination of Harris County’s reliance on bail schedules, bail hearings at which defendants are unrepresented, and the miserly use of personal bonds for pretrial release have led to this point. Thousands of defendants who have not been found guilty of a crime sit in the Harris County Jail for days and weeks because they cannot afford to post financial bail—that is, they cannot afford to post the full cash amount with the court or pay a non-refundable fee in order to have a bondsman post a bail bond on their behalf. As of November 1st of last year, over 58% of the inmates—more than 5,200 individuals—in the Harris County Jail were awaiting trial.<sup>1</sup>

The pretrial detention of individuals who are stuck in jail because they are poor is obviously bad for those individuals and their families. It’s also bad for the taxpayers who foot the bill for this detention. Pretrial detention has short-term and long-term consequences for individuals, ranging from the immediate loss of a job to the potential loss of child custody and a life of decreased employment opportunities. People who are held pending trial also are more likely to be convicted and, if convicted, to receive longer sentences. Finally, detaining people before they are convicted because they cannot afford to post bond costs Harris County millions of dollars each year.

One way to improve Harris County’s pretrial process, and to reduce the number of poor people unnecessarily detained prior to trial, is to provide a defense attorney to defendants at their initial bail hearings. A defense attorney would be able to advocate for a reasonable bail that considers a defendant’s financial position. An increase in the number of defendants whose bail is set at a reasonable amount they can afford would improve the fairness of the entire system. Fewer defendants would remain in jail pending trial because they are poor, rather than because they pose a flight risk or a threat to the community.

## **Bail is Fundamental**

The fact that an individual accused of a crime is considered innocent until proven guilty is the linchpin of the American justice system.<sup>2</sup> Bail exists to protect that presumption of innocence. With the presumption of innocence comes a presumption of liberty—people should not lose their freedom because they have been *accused* of a crime. The system must find that an individual is guilty before the State can punish an individual with prison time or other restrictions on his liberty.

When courts require financial bail, and set that bail in an amount that is unaffordable, the presumption of innocence disappears. Individuals who cannot afford bond face days and weeks of pretrial detention that effectively punishes them for being poor before they have been convicted of any crime.

### ***Bail Cannot be Excessive***

The primary purpose of bail always has been to ensure a defendant's appearance in court.<sup>3</sup> Bail is supposed to be a security that keeps a defendant from leaving town, not a means to keep the defendant locked up. More recently, courts have held that a judge also may consider the safety of the community when setting bail.<sup>4</sup>

Although there is no federal constitutional right to bail,<sup>5</sup> courts repeatedly have held that when bail is set it must be limited to the amount necessary to ensure the defendant's appearance and protect the community, and must not be so high as to be excessive or oppressive.<sup>6</sup> Bail is not intended to be punishment or a barrier to release.

Whether bail is appropriate or excessive depends in part on the economic means of the individual defendant. Federal courts have found that the setting of bail must be an individualized decision for each defendant.<sup>7</sup> The court setting bail should look not only at the nature of the alleged offense, but also to the defendant's economic means and community and family responsibilities, as well as at the potential for flight risk.<sup>8</sup> When it comes to bail, one amount cannot fit all defendants—or even all defendants charged with a particular offense.

### ***Texas Guarantees the Right to Bail for Most People Accused of a Crime***

The Texas Constitution goes even further than federal law to protect the liberty of defendants prior to trial. Texas gives most defendants who have not been accused of capital murder the right to bail.<sup>9</sup>

Texas law also makes clear that judges must conduct an individualized inquiry when setting bail.<sup>10</sup> Texas statute specifically requires the judge setting bail to consider the defendant's ability to post a particular amount of money, in addition to the alleged offense and the surrounding circumstances.<sup>11</sup> Texas law also allows judges to consider additional factors including the defendant's work record, family ties, and length of residency.<sup>12</sup>

### **Harris County's Reliance on Pretrial Detention Harms Defendants and Taxpayers**

Despite the strong presumption in the law toward setting a reasonable bail, pretrial detention has increased across the country in recent decades. Although crime rates have decreased nationally, jail populations have risen, in part because of the growing practice of incarcerating defendants prior to trial.<sup>13</sup>

Due to this shift, the majority of inmates currently detained in jails nationwide are awaiting trial. In 1996, jail populations were split down the middle, with 50% of inmates serving sentences and 50% awaiting trial.<sup>14</sup> However, by 2010, 61% of inmates nationwide were pretrial detainees.<sup>15</sup> There were 456,724 people detained across the country pending trial in 2010, which was more than twice as many as the about 200,000 people detained pending trial in 1990.<sup>16</sup> Consistent with this national trend, nearly 60% of current inmates in Harris County are pretrial detainees.<sup>17</sup>

The national increase in pretrial detention has accompanied an also significant increase in the use of financial bail.<sup>18</sup> Harris County courts in particular have dramatically increased their reliance on financial bail and decreased their use of personal bonds—that is, the release of an individual, without requiring payment of financial bail, upon the individual's promise to return to court.<sup>19</sup> The *Houston Chronicle* reported that Harris County released nearly 9,000 people on personal bonds in 1994—including more than 1,800 inmates facing lower-level felony charges such as drug possession.<sup>20</sup> In 2012, however, Harris County released only 4,273 defendants on personal bond, 453 of whom had a felony charge.<sup>21</sup>

The increased reliance on pretrial detention is bad for the people forced to stay in jail because they can't afford bail, as well as for their families. But pretrial detention also is expensive for taxpayers, especially when detained individuals pose little flight risk or threat to community safety. Pretrial supervision can accomplish the purpose of bail—ensuring defendants appear in court and do not commit new crimes—without the human costs of pretrial detention. An increase in the use of personal bonds coupled with pretrial supervision is one way to decrease pretrial detention.

## ***Pretrial Detention Hurts Defendants and their Families***

For many people, pretrial detention eliminates the small safety net they had prior to their arrest. Those people who were previously making it, but just barely, can quickly find themselves in poverty.<sup>22</sup> Pretrial detention immediately jeopardizes employment. People who remain detained for even just a few days may lose their jobs, their homes, and their vehicles.<sup>23</sup> The loss of a few days' income often makes the difference between the ability to pay rent and possible eviction.

However, pretrial detention is more than an economic burden for the individual. Detention affects individuals' physical and mental health. The mere experience of jail can traumatize individuals with mental health problems.<sup>24</sup> Additionally, inmates often have to wait to be examined by a jail doctor before they can receive necessary medications, even if they entered jail with a prescription.<sup>25</sup>

Detained individuals with mental health problems have long been a concern in Harris County.<sup>26</sup> Nearly a quarter of the inmates in the Harris County Jail have a history of mental illness<sup>27</sup>, or require psychotropic medication.<sup>28</sup> In fact, the Harris County Jail is routinely identified as "the largest mental health facility in the state."<sup>29</sup> Though Harris County has worked hard<sup>30</sup> to decrease the number of people who end up arrested and detained solely because of their mental illness, the rate of mental illness among detainees remains high.<sup>31</sup>

Pretrial detention not only affects the individual, but can cause ripple effects for a detainee's family. Families often lose the defendant's income, which may be the family's primary or sole income. Family members also may lose their housing while a breadwinner is in jail. Detainees' children may be forced to move in with other family members or be placed in foster care, all before the defendant has been convicted of any offense.<sup>32</sup>

In addition to the immediate consequences of pretrial detention, any kind of detention, whether pretrial or post-adjudication, has a lasting effect on people's lives long after the detention ends. People who have been detained have trouble finding employment for years after they are released. They work on average fewer hours and make lower wages for as many as fifteen years after their release from detention.<sup>33</sup> The children of adults with criminal justice involvement also have higher rates of delinquency and are at a higher risk of dropping out of school.<sup>34</sup> Further, these children are more likely to become involved with the criminal justice system themselves.<sup>35</sup>

Finally, any number of days of pretrial detention has been linked to increased recidivism. The link is especially high for those individuals who have been identified

as low- or moderate-risk by a pretrial services agency<sup>36</sup>—meaning they have been identified as not likely to miss court appearances or to engage in criminal activity if released on bond.<sup>37</sup> These people generally are charged with relatively minor offenses and are not hardened criminals before they spend days or months in pretrial detention. If these people cannot afford bond, they often remain in jail regardless of their risk level. However, after spending even just a few days in pretrial detention, these individuals are more likely to engage in new criminal activity.<sup>38</sup>

### ***Defendants Who Are Released Pending Trial Have Better Case Outcomes***

Pretrial detention also dramatically affects the results of a defendant's criminal case. The period between arraignment and trial is recognized as the "most critical" phase of an individual's case for ensuring a thorough investigation of the facts and testing the State's evidence.<sup>39</sup> People who are able to post bond and gain pretrial release soon after their arrest are able to build stronger relationships with their attorneys, assist with the defense investigation, and identify potential witnesses.<sup>40</sup> Individuals who are released prior to trial also are more likely to obtain a dismissal or deferred adjudication.<sup>41</sup>

In contrast, individuals who remain in jail while charges are pending are more likely to be incarcerated following a conviction. A recent study found that those defendants who remained detained for the entire pretrial period were more than four times more likely to be sentenced to jail and three times more likely to be sentenced to prison than those defendants who achieved pretrial release.<sup>42</sup> This study used a multivariate model that controlled for factors including risk level, demographics, and offense type.<sup>43</sup> The discrepancy in outcomes was even more pronounced for those defendants that had been identified by a pretrial services agency as low-risk.<sup>44</sup> Additionally, defendants who never obtain pretrial release generally receive longer sentences upon conviction than those defendants released at some point before trial.<sup>45</sup>

These findings are consistent with studies that have focused on case outcomes in individual Texas counties. A review of data in Wichita County indicated that defendants who were released on bond were 30% more likely to have all of their charges dismissed than defendants who remained detained.<sup>46</sup> This study compared statistically identical defendants controlling for variables including offense level, criminal history, mental health status, and demographics.<sup>47</sup> In that study, defendants who were released prior to trial were less likely to be found guilty and, if they were convicted, served 54% fewer days in jail than defendants who were detained.<sup>48</sup> They also were more than three times as likely to receive deferred adjudication.<sup>49</sup>

A review of cases in Harris County indicates similar trends. Defendants who are released pending trial are more likely to have the charges against them dismissed and to receive deferred adjudication.<sup>50</sup> If they are convicted, defendants who were free on bail prior to conviction tend to get shorter sentences than defendants who are detained prior to trial.<sup>51</sup>

### ***Pretrial Detention Costs Harris County Taxpayers Money***

The daily costs to detain defendants in a county as large as Harris County quickly add up. The Harris County Office of Budget Management estimates that the average daily detention cost per person in the Harris County Jail is \$45.<sup>52</sup> That number quickly rises if a defendant has any physical or mental health concerns. For example, it costs more than \$200 per day to detain a defendant who needs infirmary care and at least \$285 to hold defendants who need special mental health housing within the jail.<sup>53</sup> As of November 1st of last year, there were 5,207 pretrial detainees in the Harris County Jail.<sup>54</sup> Of that group, 1,023 people were charged with misdemeanors (charges such as driving with an invalid license, driving while intoxicated, and theft of property worth less than \$1,500) or state jail felonies (charges such as credit card abuse and possession small amounts of illegal drugs).<sup>55</sup> To detain those 1,023 people cost Harris County at least \$46,035 each day.

Total detention costs make up a significant portion of the Harris County general budget. In the Fiscal Year 2011-2012, Harris County spent \$190,447,000 on detention.<sup>56</sup> These costs represent just over 16% of Harris County's total General Fund that year.<sup>57</sup> Pretrial detention costs Harris County tens of millions of dollars each year. Harris County could save millions of those dollars by eliminating the pretrial detention of people facing minor charges such as theft under \$1,500 and possession of small amounts of drugs.

### **Pretrial Supervision Can Achieve the Same Goals as Financial Bail and Prevent Individuals from Being Detained Solely Because They're Poor**

Nationally, the majority of defendants who are held prior to trial did not obtain pretrial release because they were not given a personal bond, and they couldn't afford to post financial bail or they couldn't identify a commercial bondsman who would agree to post a bail bond for them.<sup>58</sup> More than 80% of arrestees nationally had a total monthly income of less than \$2,000 in the month immediately before their arrest.<sup>59</sup> At least one study has indicated that many of the pretrial detainees in Harris County are there because they could not afford to post the financial bail set by the court.<sup>60</sup> That study also found that many pretrial detainees in Harris County remained in jail despite posing "no significant risk of nonappearance or danger to victims or the community."<sup>61</sup>



People who cannot afford financial bail could be appropriate candidates for a personal bond with pretrial supervision. Pretrial supervision can accomplish the same goals that bail is supposed to achieve—appearance in court and safety for the community. Individuals receiving supervision are much more likely to appear in court than those who do not receive supervision.<sup>62</sup> Pretrial supervision for longer periods of time also has been linked to a decrease in new criminal activity.<sup>63</sup>

A common argument in favor of financial bail is the misguided assertion that people who do not have to post money to get out of jail are more likely to skip out on court appearances.<sup>64</sup> However, a recent study found that pretrial supervision significantly decreased the likelihood that defendants would fail to make a court appearance.<sup>65</sup> This was especially true for defendants designated high-risk by the pretrial screening process.<sup>66</sup> In 2012, defendants who were on personal bond and under pretrial supervision in Harris County made 94.2% of their collective court appearances.<sup>67</sup> This appearance rate is comparable to the appearance rates reported for defendants released on surety bond and may, in fact, be higher.<sup>68</sup>

### **The Current Pretrial System in Harris County**

The current pretrial system in Harris County is designed to efficiently charge and process defendants. It likely works well for defendants with means who can afford financial bail. But defendants without the money to post bond can get stuck in detention indefinitely without reasonable bail.

#### ***Setting Bail in Harris County—Bail Schedules***

The pretrial release system in Harris County currently relies on standardized bail schedules adopted by the criminal court judges—one schedule for felonies and one for misdemeanors. These bail schedules set specific bail amounts for different charges—for example, bail for all first degree felonies is set at \$20,000, while bail for a third degree felony is \$5,000.<sup>69</sup> The bail schedule also includes bail increases for defendants with particular criminal histories. The bail schedules do not account for an individual's financial ability to post bail or for the circumstances of the alleged offense, both of which are mandatory statutory considerations in Texas.<sup>70</sup>

Bail schedules do not allow for an individualized determination of bail, as is required by state and federal law. Instead, bail schedules encourage a standardized process, rather than a process driven by the circumstances of an individual defendant and case. The bail schedule in Harris County explicitly states that the "initial bail amount shall be determined by application of the bail schedule."<sup>71</sup> The schedule goes on to say that the prosecutor can request that the judge set a higher bond.<sup>72</sup> Harris

County's reliance on bail schedules appears to have eliminated any consideration of a defendant's individual circumstances, other than criminal history, when setting bail. This is quite likely unconstitutional, as it eliminates what is supposed to be the individualized basis of a bail determination. In fact, at least one state supreme court has found bail schedules to be illegal.<sup>73</sup>

### ***Setting Bail in Harris County—the Process***

Harris County's direct filing system has made the front-end of the criminal justice process move very quickly. Soon after an arrest, defendants are transported to a sub-station where they wait to find out if they will be charged.<sup>74</sup> The arresting officer can quickly get a response from the district attorney on call and any pertinent charges are immediately filed.<sup>75</sup> The district attorney also can assign a bail amount at that time that corresponds with the bond schedule.<sup>76</sup> Defendants with means often post bail immediately and are released.<sup>77</sup>

Those defendants who cannot immediately post bond are transported to the county jail and then detained pending an appearance in front of a magistrate for the Article 15.17 hearing, which Harris County calls the probable cause hearing.<sup>78</sup> Pretrial Services interviews those detained defendants and produces an individual risk assessment in the form of a Defendant Report.<sup>79</sup> This risk assessment is based on an in-depth interview as well as confirmation with outside sources, and evaluates the likelihood that a defendant will appear for upcoming court dates or pose a safety risk to the community if released on bond.<sup>80</sup> Pretrial Services provides the Defendant Report to the magistrate conducting the probable cause hearing.<sup>81</sup>

In Harris County, defendants generally appear before the magistrate, in person or by video conference, within 12 hours.<sup>82</sup> One of the purposes of this hearing is to set the defendant's bail.<sup>83</sup> At this hearing, a magistrate, the defendant, and a prosecuting attorney are present.<sup>84</sup> No defense attorney is present. Defendants have an opportunity to speak at the hearing, and often defendants will try to advocate for themselves, but they rarely know how to do so effectively. The prosecutor has the opportunity to argue for a higher bail than called for in the bail schedule.<sup>85</sup> The Defendant Report prepared by Pretrial Services usually is available to the magistrate.<sup>86</sup> However, the magistrate typically sets bail in the amount that is specified in the bail schedule.<sup>87</sup>

### ***Pretrial Release on a Personal Bond is Rare in Harris County***

Personal bonds are unusual in Harris County. In 2012, only 5% of defendants in the county (4,513 individuals) were released on personal bond.<sup>88</sup> By comparison, in Fiscal Year 2009, Travis County released 18,275 defendants on a personal bond.<sup>89</sup>

That number constituted nearly 30% of the 61,365 people arrested in Travis County during that year.<sup>90</sup>

The failure to release people on personal bond is not due to a low number of recommendations for personal bonds from Pretrial Services. Rather it is due to the decisions of the magistrates who are relying on bail schedules, rather than considering defendants' individual situations when setting bail. Additionally, magistrates have demonstrated that they generally do not consider release on personal bond to be a viable option even for those defendants that have been identified as candidates for a personal bond by Pretrial Services. The director of Harris County Pretrial Services told the Houston Chronicle that her office screened about 80,000 defendants in 2011 and recommended release on a personal bond for 25% of felony defendants and 40% of misdemeanor defendants.<sup>91</sup> Magistrates granted significantly fewer personal bonds than were recommended. In 2011, only 5.2% of defendants received personal bonds.<sup>92</sup>

### **Providing Defendants with Defense Attorneys at Bail Hearings Would Promote Fairness in the Harris County Pretrial System**

Harris County currently detains a number of defendants prior to trial without setting a bail that considers their financial situation. The current bail hearing process relies on bail schedules, which means that magistrates are routinely failing to conduct an individualized inquiry, as required by federal and Texas laws, before setting a defendant's bail.

Further, defendants are forced to face a prosecutor without their own counsel. Defendants often do not know what to expect during the 15.17 hearing and they do not know how to advocate for a reasonable bail. When defendants do speak up, they regularly run the risk of incriminating themselves in front of the prosecutor.

As of November 1st of last year, more than 5,000 people were sitting in the Harris County Jail awaiting trial and had not been convicted of any crime. The Supreme Court averred in *U.S. v. Salerno*, "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."<sup>93</sup> In Harris County, pretrial detention should be "the carefully limited exception," rather than the norm it has become. Providing attorneys to defendants at the initial probable cause and bail hearing would limit pretrial detention and improve the fairness of the Harris County pretrial system.

## ***Defense Attorneys at Bail Hearings Would Lead to More Defendants Securing Pretrial Release***

Harris County could dramatically improve the fairness of its system while decreasing pretrial detention costs by providing representation to defendants at their 15.17 hearings. A defense attorney would be able to advocate on behalf of the defendant for a more appropriate bail. The attorney would be able to help each defendant articulate to the magistrate evidence relevant to the factors for consideration when setting bail. A defendant is unlikely to have any idea what these factors are without an attorney there to help.

With the attorney there to advise the defendant, defendants would be far less likely to incriminate themselves in front of the prosecutor. The attorney would be able to warn the defendant about this risk ahead of time, as well as during the hearing. This would make the hearing more fair for defendants, as well as less dangerous, whereas currently a defendant must face both the magistrate and a prosecutor on his own.

An efficient presentation of the relevant facts by a trained advocate will put the magistrate in a better position to make a truly individualized determination about bail. The attorney also would be able to answer any questions the magistrate may have about the potential for a defendant's success if granted a personal bond with pretrial supervision. Such advocacy should make magistrates more willing to consider personal bonds and more reasonable financial bail.

A defense attorney at the bail hearing is necessary to ensure the magistrate sets bail in an appropriate amount at the very beginning of a defendant's prosecution. While it is rare for a magistrate to set bond lower than the bail schedule, it is even rarer still for a judge to lower a defendant's bond once the case has been transferred to the assigned court. In 2012, Harris County magistrates set bail in an amount lower than that called for in the bail schedule in 3,431 cases out of the 74,293 probable cause hearings that year, which is just fewer than 5% of cases.<sup>94</sup> When this initial bail amount was reviewed by the assigned court, the courts lowered bond in only 40 cases.<sup>95</sup>

Communities that have introduced defense attorneys at the initial bail hearing have seen an increase in defendants securing pretrial release. Baltimore introduced defense attorneys at bail hearings for some defendants in 1998 through the Baltimore City Lawyers at Bail Project ("LAB") and conducted a randomized study of the outcomes.<sup>96</sup> Defendants with attorneys at their bail hearing were more than twice as likely to be released on their own recognizance than were defendants without attorneys.<sup>97</sup> Additionally, the average bail for defendants with attorneys was

\$500 less than the average bail set for defendants without representation at the bail hearing.<sup>98</sup> The attorney in charge of the Baltimore study concluded that “a lawyer’s advocacy is the critical difference for determining whether defendants will be released or will spend substantial time in pretrial incarceration.”<sup>99</sup>

When defendants are represented by an attorney at the initial bail hearing, those defendants will be more likely to be able to obtain pretrial release either because any financial bail will be more likely to be reasonable and within their specific financial means, or because they will be more likely to obtain release on personal bond. Pretrial release will improve defendants’ immediate economic situation, as well as that of their families. Defendants will be able to meet with their attorneys and investigate their cases while they’re released pending trial, which will lead to more fair outcomes in their cases. These fair outcomes will include fewer coercive guilty pleas. Defendants who remain detained often agree to guilty pleas in exchange for time-served sentences.<sup>100</sup> Pleas entered under these circumstances are inherently coercive as the defendants who cannot afford bail have no other way to gain release. Often the time-served punishment is longer than the defendant would have served even if convicted.<sup>101</sup> With defendants who could be safely released pretrial actually out of jail, the incentive to plead just to get out of jail is gone.

## **Conclusion**

A defense attorney at bail hearings would help even the playing field in the Harris County pretrial process and ultimately lead to more fair case outcomes. The attorney would be able to advocate for the defendant, rather than leaving him to face the prosecutor alone.

Further, the attorney would be able to help the magistrate make a fair and reasonable bail determination, whether for a personal bond or reasonable financial bail. More defendants who pose neither a flight risk nor a safety risk would be released prior to trial, which would improve their individual situations, as well as improve the outcome of their criminal case. These defendants would be less likely to face prison time just because they are too poor to be able to afford the bond set forth in the bond schedule.

Any decrease in the number of people held pending trial also would save Harris County taxpayers the thousands of dollars that the jail currently spends each day detaining individuals because they cannot afford bond.

## Endnotes

<sup>1</sup> TEX. COMM'N ON JAIL STANDARDS, ABBREVIATED POPULATION REPORT FOR 11/1/2013 [hereinafter ABBREVIATED POPULATION REPORT].

<sup>2</sup> *Coffin v. U.S.*, 156 U.S. 432, 453 (1895).

<sup>3</sup> *Ex Parte Rodriguez*, 595 S.W.2d 549, 550 (Tex. Crim. App. 1980); *Ex Parte Vasquez*, 558 S.W.2d 477, 479 (Tex. Crim. App. 1977).

<sup>4</sup> *U.S. v. Salerno*, 481 U.S. 739 (1987).

<sup>5</sup> *See, e.g., U.S. v. Stanford*, 722 F. Supp. 2d 803, 813 (S.D. Tex. 2010) (citing *U.S. v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988)).

<sup>6</sup> *Ex Parte Ivey*, 594 S.W.2d 98, 99 (Tex. Crim. App. 1980); *Ex Parte Vasquez*, 558 S.W.2d at 479; U.S. CONST. amend. VIII.

<sup>7</sup> *Stack v. Boyle*, 342 U.S. 1 (1951).

<sup>8</sup> *See, e.g., Bandy v. United States*, 364 U.S. 477, 477 (1960).

<sup>9</sup> TEX. CONST. art. I, § 11. The Texas Constitution also provides that a court can deny bail when (a) a defendant is accused of a felony with a history of particular felony convictions; (b) a defendant is on bail pending trial for an offense involving family violence and bail is subsequently revoked for a violation of the conditions of release; or (c) a defendant violates an order for emergency protection issued by a judge in a family violence matter. TEX. CONST. art. I, § 11(a)-(c).

<sup>10</sup> TEX. CODE CRIM. PROC. art. 17.15; *Ex Parte Pemberton*, 577 S.W.2d 266, 267 (Tex. Crim. App. 1979); *Ex Parte Rubac*, 611 S.W.2d 848, 849 (Tex. Crim. App. 1981).

<sup>11</sup> TEX. CODE CRIM. PROC. Art. 17.15.

<sup>12</sup> The court also can consider the following factors in determining bail: (1) the accused's work record; (2) the accused's family and community ties; (3) the accused's length of residency; (4) the accused's prior criminal record, if any; (5) the accused's conformity with the conditions of any previous bond; (6) the existence of outstanding bonds, if any; and (7) aggravating circumstances alleged to have been involved in the offense the accused is charged with committing. *Ex Parte Rubac*, 611 S.W.2d at 849-50; *see also Ex parte Scott*, 122 S.W.3d 866, 869 (Tex. App.—Fort Worth 2003).

<sup>13</sup> PRETRIAL JUSTICE INST., RATIONAL AND TRANSPARENT BAIL DECISION-MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 1 (2012) [hereinafter BAIL DECISION-MAKING]; Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE REV. 1297, 1311 (2012) [hereinafter *Justice in the Shadowlands*].

<sup>14</sup> BAIL DECISION-MAKING at 1.

<sup>15</sup> TODD MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MID YEAR 2010: STATISTICAL TABLES (2011).

<sup>16</sup> TODD MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MID YEAR 2010: STATISTICAL TABLES (2011); BAIL DECISION-MAKING at 1.

<sup>17</sup> ABBREVIATED POPULATION REPORT.

<sup>18</sup> BAIL DECISION-MAKING at 1.

<sup>19</sup> *See Mike Tolson, Use of no-cash bonds drops in Montgomery, Harris counties*, HOUS. CHRON. (April 6, 2008) [hereinafter *Use of no-cash bonds drops*].

<sup>20</sup> *Use of no-cash bonds drops*.

<sup>21</sup> PRETRIAL SERVICES HARRIS COUNTY, TEXAS 2012 ANNUAL REPORT 15 [hereinafter PRETRIAL SERVICES 2012 ANNUAL REPORT].

<sup>22</sup> JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 19 (2011) [hereinafter SYSTEM OVERLOAD].

- <sup>23</sup> SYSTEM OVERLOAD at 18; ANA YÁÑEZ-CORREA & MOLLY TOTMAN, TEX. CRIM. JUSTICE COAL., COSTLY CONFINEMENT & SENSIBLE SOLUTIONS: JAIL OVERCROWDING IN TEXAS 9 (2010).
- <sup>24</sup> NAT'L ASSOC. OF CNTYS LEGISLATIVE DEP'T, DIVERTING THE MENTALLY ILL FROM JAIL (2005).
- <sup>25</sup> See, e.g., Steve McVicker, *Six years, 101 deaths in Harris County jails*, HOUS. CHRON. (Feb. 18, 2007) [hereinafter *Six years, 101 deaths*].
- <sup>26</sup> See, e.g., Emily DePrang, *In Harris County, New Efforts to Treat Mental Illness In and Out of Jail*, TEX. OBS. (Sept. 26, 2013) [hereinafter *New Efforts to Treat Mental Illness In and Out of Jail*]; Alex Sanz, *Steps being taken to help Harris County mental health inmates*, KHOU.COM (Nov. 22, 2009) [hereinafter *Steps being taken to help Harris County mental health inmates*].
- <sup>27</sup> *Steps being taken to help Harris County mental health inmates*.
- <sup>28</sup> DR. TONY FABELO, CARL REYNOLDS, & JESSICA TYLER, COUNCIL OF STATE GOVERNMENTS, JUSTICE CENTER, HARRIS COUNTY DEFENDER: PRELIMINARY REPORT ON OPERATIONS AND OUTCOMES 21 (2012).
- <sup>29</sup> HARRIS COUNTY DEFENDER: PRELIMINARY REPORT at 21.
- <sup>30</sup> For example, in 2013, the Harris County Sheriff's Office doubled the staffing for its Crisis Intervention Response Team. This team includes specially trained Mental Health Deputies and licensed clinicians from the Mental Health and Mental Retardation Authority. See John Donnelly, *Harris County doubles efforts to deal with mentally ill*, FOX 26 (Sept. 27, 2013); Press Release, Houston Police Department, Houston, Harris County, MHMRA Announce Joint Crisis Intervention Response Team (Oct. 27, 2011), available at <http://www.houstontx.gov/police/nr/2011/oct/nr102711-1.htm>. Also in 2013, the National Commission on Correctional Health Care awarded the Harris County Jail as Program of the Year. *Harris County Jail Mental Health Security Units win national award*, yourhoustonnews.com (Sept. 30, 2103).
- <sup>31</sup> See *New Efforts to Treat Mental Illness In and Out of Jail*.
- <sup>32</sup> Sharon Dolovich, *Foreword: Incarceration American Style*, 3 HARV. L. & POL'Y REV. 237, 245 (2009) [hereinafter *Foreword: Incarceration American Style*]; SYSTEM OVERLOAD at 18.
- <sup>33</sup> AMANDA PETTERUTI & NATASSIA WALSH, JUSTICE POLICY INST., JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES 17 (2008) [hereinafter *JAILING COMMUNITIES*].
- <sup>34</sup> HELEN GAEBLER, WILLIAM WAYNE JUSTICE CTR. FOR PUB. INTEREST LAW, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICE AND RECOMMENDATIONS FOR REFORM IN TEXAS (2013).
- <sup>35</sup> HELEN GAEBLER, WILLIAM WAYNE JUSTICE CTR. FOR PUB. INTEREST LAW, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICE AND RECOMMENDATIONS FOR REFORM IN TEXAS (2013).
- <sup>36</sup> CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, THE LAURA & JOHN ARNOLD FOUNDATION, THE HIDDEN COSTS OF PRETRIAL DETENTION 11 (2013) [hereinafter *HIDDEN COSTS*].
- <sup>37</sup> *HIDDEN COSTS* at 11.
- <sup>38</sup> *HIDDEN COSTS* at 11.
- <sup>39</sup> *Powell v. Alabama*, 287 U.S. 45, 57 (1932); see also Douglas Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1727 (May 2002) [hereinafter *Do Attorneys Really Matter?*].
- <sup>40</sup> JAMES K. STEWART, DEP'T OF JUSTICE, EARLY REPRESENTATION BY DEFENSE COUNSEL FIELD REPORT (1985); *Do Attorneys Really Matter?* at 1720.
- <sup>41</sup> See, e.g., DOTTIE CARMICHAEL & MINER P. MARCHBANKS III, WICHITA COUNTY PUBLIC DEFENDER OFFICE: AN EVALUATION OF CASE PROCESSING, CLIENT OUTCOMES, AND COSTS 54 (2012) [hereinafter *WICHITA COUNTY PUBLIC DEFENDER OFFICE*].
- <sup>42</sup> CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, THE LAURA AND JOHN ARNOLD FOUNDATION, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 3 (2013) [hereinafter *INVESTIGATING THE IMPACT OF PRETRIAL DETENTION*].
- <sup>43</sup> *INVESTIGATING THE IMPACT OF PRETRIAL DETENTION* at 3.
- <sup>44</sup> *INVESTIGATING THE IMPACT OF PRETRIAL DETENTION* at 3.
- <sup>45</sup> *INVESTIGATING THE IMPACT OF PRETRIAL DETENTION* at 3.
- <sup>46</sup> *WICHITA COUNTY PUBLIC DEFENDER OFFICE* at 54.
- <sup>47</sup> *WICHITA COUNTY PUBLIC DEFENDER OFFICE* at 53-54.

- <sup>48</sup> WICHITA COUNTY PUBLIC DEFENDER OFFICE at 54.
- <sup>49</sup> WICHITA COUNTY PUBLIC DEFENDER OFFICE at 54.
- <sup>50</sup> See Mark Hochglaube, Presentation at the Rusty Duncan Criminal Law Course, *Bond for the Indigent: What?* (2013) [hereinafter *Bond for the Indigent*] (on file with author). The data for this presentation came from the research conducted by the Counsel of State Governments Justice Center while preparing its 2013 report, *Improving Indigent Defense: Evaluation of the Harris County Public Defender*.
- <sup>51</sup> *Bond for the Indigent*.
- <sup>52</sup> See FACTS ABOUT THE HCSO, available at <http://www.harriscountytso.org/documents/PressKits/HCSO%20Fact%20Sheet.pdf>. This figure does not include one-time and overhead costs.
- <sup>53</sup> HARRIS CNTY. OFFICE OF BUDGET MGMT., ESTIMATED HARRIS COUNTY JAIL DETENTION COSTS (2009).
- <sup>54</sup> ABBREVIATED POPULATION REPORT.
- <sup>55</sup> ABBREVIATED POPULATION REPORT.
- <sup>56</sup> HARRIS COUNTY BUDGET MGMT. DEPT., BUDGET PRESENTATION TO HARRIS COUNTY COMMISSIONER'S COURT (February 26, 2013), available at <http://www.harriscountyttx.gov/agenda/2013/2013-02-26%20Vol.%203-FY%202013-14%20Budget%20Letter,%20Policy%20Issues%20&%20Budget%20Allocation.pdf> [hereinafter BUDGET PRESENTATION TO HARRIS COUNTY COMMISSIONER'S COURT]
- <sup>57</sup> BUDGET PRESENTATION TO HARRIS COUNTY COMMISSIONER'S COURT.
- <sup>58</sup> JAILING COMMUNITIES at 11-12.
- <sup>59</sup> DORIS JAMES, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES 2002 9 (2004).
- <sup>60</sup> BARRY MAHONEY & WALT SMITH, JUSTICE MANAGEMENT INST., PRETRIAL RELEASE AND DETENTION IN HARRIS COUNTY: ASSESSMENT AND RECOMMENDATIONS 23 (2005) [hereinafter PRETRIAL RELEASE AND DETENTION IN HARRIS COUNTY].
- <sup>61</sup> PRETRIAL RELEASE AND DETENTION IN HARRIS COUNTY at 24.
- <sup>62</sup> CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, THE LAURA & JOHN ARNOLD FOUNDATION, EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES 3 (2013) [hereinafter EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES].
- <sup>63</sup> EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES at 4.
- <sup>64</sup> See, e.g., James Pinkerton, *Judges Leery of no-cost personal bonds*, HOUS. CHRON. Sept. 9, 2012 [hereinafter *Judges Leery of no-cost personal bonds*.]
- <sup>65</sup> EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES at 3.
- <sup>66</sup> EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES at 3.
- <sup>67</sup> PRETRIAL SERVICES 2012 ANNUAL REPORT 20.
- <sup>68</sup> While the *Houston Chronicle* reported that defendants released on surety bonds have a failure-to-appear rate of about 5%, other studies have released much higher failure-to-appear rates for defendants on surety bond. Lise Olsen, *Bail bonds are big business, but not all pay up*, HOUS. CHRON. (Feb. 22, 2010). Travis County Pretrial Services reported that in 2010, defendants released on personal bond had a 13% failure-to-appear rate while defendants released on surety bond had a 20% failure-to-appear rate. Jordan Smith, *Your Word is Your Bond: Travis County moves toward broader pretrial release of the accused*, AUS. CHRON. (Oct. 12, 2012). Based on data from 1990-2004, the Bureau of Justice Statistics reported a national 18% failure-to-appear rate for defendants released on surety bond. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (2007).
- <sup>69</sup> HARRIS CNTY. DIST. COURTS, DISTRICT COURT BAIL SCHEDULE, amended December 6, 2006, effective January 1, 2007.
- <sup>70</sup> TEX. CODE CRIM. PROC. art. 17.15.
- <sup>71</sup> MISDEMEANOR BAIL SCHEDULE FOR THE HARRIS COUNTY CRIMINAL COURTS AT LAW as amended September 6, 2012.
- <sup>72</sup> MISDEMEANOR BAIL SCHEDULE FOR THE HARRIS COUNTY CRIMINAL COURTS AT LAW as amended September 6, 2012.



<sup>73</sup> Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?* 26 CRIM. JUST. 12 (2011); see also *Pelekai v. White*, 861 P.2d 1205 (HI 1993); Attorney General Opinion 2000 OK AG 61 (stating that predetermined bail schedules are unconstitutional under Oklahoma and U.S. Constitutions).

<sup>74</sup> BARRY MAHONEY & ELAINE NUGENT-BORAKOVE, THE JUSTICE MGMT. INST., HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT: PHASE 1 REPORT (2009) [hereinafter HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT].

<sup>75</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 19..

<sup>76</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 16, 19.

<sup>77</sup> These defendants post whatever bail is set according to the bail schedule for their charge.

<sup>78</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 20.

<sup>79</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 14-15.

<sup>80</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 14-15.

<sup>81</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 14-15.

<sup>82</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 20.

<sup>83</sup> TEX. CODE CRIM. PROC. art. 15.17.

<sup>84</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 20.

<sup>85</sup> See HARRIS CNTY. DIST. COURTS, DISTRICT COURT BAIL SCHEDULE, amended December 6, 2006, effective January 1, 2007.

<sup>86</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 14-16.

<sup>87</sup> HARRIS COUNTY CRIMINAL JUSTICE SYSTEM IMPROVEMENT PROJECT at 20.

<sup>88</sup> PRETRIAL SERVICES 2012 ANNUAL REPORT. This number includes defendants for whom a magistrate initially set a personal bond, as well as defendants who subsequently obtained release on a personal bond.

<sup>89</sup> FY 2009 Central Booking Unity Statistics on Pretrial Services Page *available at* [http://www.co.travis.tx.us/pretrial\\_services/new\\_pages/pretrial\\_overview.asp](http://www.co.travis.tx.us/pretrial_services/new_pages/pretrial_overview.asp)

<sup>90</sup> Travis County System Justice Profile 2 (2011) *available at* [http://www.co.travis.tx.us/criminal\\_justice/Research\\_planning/pdfs/justice\\_system\\_profile\\_fy\\_2010.pdf](http://www.co.travis.tx.us/criminal_justice/Research_planning/pdfs/justice_system_profile_fy_2010.pdf).

<sup>91</sup> *Judges Leery of no-cost personal bonds.*

<sup>92</sup> *Judges Leery of no-cost personal bonds.*

<sup>93</sup> 481 U.S. 739, 755 (1987).

<sup>94</sup> PRETRIAL SERVICES 2012 ANNUAL REPORT at 13.

<sup>95</sup> PRETRIAL SERVICES 2012 ANNUAL REPORT at 13.

<sup>96</sup> *Do Attorneys Really Matter?*

<sup>97</sup> *Do Attorneys Really Matter?* at 1720.

<sup>98</sup> *Do Attorneys Really Matter?* at 1753-1754. The average bond was \$2,441 for represented defendants and \$3,012 for defendants that were not represented by an attorney.

<sup>99</sup> *Do Attorneys Really Matter?* at 1763.

<sup>100</sup> Stephano Bibas, *Plea Bargaining Outside the Shadow of Trial*, 177 HARV. L. REV. 2463, 2491-3; Jack King and Ivan J. Dominguez, *Release with Least-Restrictive Conditions Favored over Financial Bail*, 11 THE CHAMPION (2012) [hereinafter RELEASE WITH LEAST-RESTRICTIVE CONDITIONS].

<sup>101</sup> RELEASE WITH LEAST-RESTRICTIVE CONDITIONS; CONFERENCE OF STATE COURT ADM'RS, 2012-2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE 5 (2012).