



Key Components of Legislation to Enhance Public Safety and Fairness in Texas' Pretrial Justice System

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During the 86th legislative session, the Texas legislature has the opportunity to create a pretrial justice system that both maximizes public safety and court appearance rates, while ensuring the system complies with legal requirements recently outlined by the courts. By relying on existing research and data, as well as evidence from Texas counties and other jurisdictions about what works, the legislature could improve the safety of communities across Texas while maintaining court appearance rates. Moreover, by examining legal precedent and recent federal court rulings in litigation challenging the pretrial systems in Harris and Dallas counties, the legislature could protect Texas counties from future litigation and safeguard them from having to operate under federal court injunctions. As the legislature considers improvements to Texas' pretrial justice system, the following are key components of any system that is both constitutionally sound as well as evidence-based.

(1) Reduce Overall Jail Bookings

In order to dramatically reduce the burden on magistrate judges making pretrial release decisions and to alleviate jail overcrowding, expand cite and release for misdemeanor offenses and end arrests for fine-only misdemeanors.

The Texas legislature has already wisely determined that law enforcement can safely charge people accused of certain Class B and A misdemeanors through citations that order them to appear in court at a later date.ⁱ People charged with citation rather than arrest still must appear in court for trial, and their potential punishment for the offense is no different than if they had been arrested. However, with a citation in lieu of arrest, they are able to avoid being booked into jail prior to any criminal conviction, maintaining their employment and continuing to care for their families while awaiting trial.

Requiring each Texas law enforcement agency to develop a cite-and-release policy that presumes an officer will use a citation in lieu of arrest for eligible offenses in accordance with the existing statute, except under certain defined circumstances when the officer believes that arrest is necessary, would lead to a dramatic reduction in jail bookings for nonviolent misdemeanor offenses across Texas. In turn, counties would not have to spend time and resources conducting individualized risk assessments and magistrations of these individuals, leaving more time for consideration of the people charged with more serious offenses.ⁱⁱ In short, expanded citation in lieu of arrest would make the other pretrial reforms discussed below more likely to be successful. Expanded citation in lieu of arrest would also promote public safety by keeping officers on patrol in the community for a larger percentage of their shift, rather than at the jail processing arrests and bookings, and would allow sheriffs to avoid overcrowded jails filled with non-dangerous individuals.ⁱⁱⁱ

Similarly, thousands of Texans charged with Class C misdemeanors alone—which are not intended to be punished by jail at all but rather by fine alone—are booked into jail upon arrest, when law enforcement officers choose not to use a citation.^{iv} By prohibiting most Class C misdemeanor arrests, even more pressure on jails and magistrate judges would be alleviated, freeing up law enforcement and court resources to focus on individuals charged with more serious offenses.

(2) Make Risk-Based Release Decisions

Require prompt individualized hearings regarding pretrial release within 48 hours of booking and with defense counsel present, making individualized decisions based on risk.

In Texas' current system, the ability to pay the bond amount, rather than risk, generally determines pretrial release, and any pretrial reform legislation should shift the state from this money-based pretrial justice system to a risk-based system.^v Evidence from other jurisdictions demonstrates that in order to maximize public safety and court appearance, judges should make individualized decisions about release, including any conditions necessary in order to reasonably ensure public safety and court appearance, based on an individual's risk of committing a new crime if released and risk of flight.^{vi} Money bond, on the other hand, undermines the goal of community safety and leads to people being detained for no other reason than their inability to pay, while allowing the dangerous but wealthier individuals to buy their freedom.^{vii}

Moving to a risk-based pretrial justice system will require that judges setting bond consider the unique risk and circumstances of each individual booked into jail. The United States Court of Appeals for the Fifth Circuit recently held in the litigation challenging Harris County's bail system that such an individualized case-by-case evaluation is constitutionally necessary for Harris County, or any Texas county for that matter, to protect an individual's due process and equal protection rights when setting bail.^{viii} During this individualized inquiry the judge should consider the crime an individual is charged with, their risk of committing another crime and of flight if released, and if considering imposing a financial bond, the judge must also consider the individual's ability to pay that bond.^{ix}

Defendants are constitutionally entitled to notice of the hearing that will determine their eligibility for pretrial release and what will be at issue at that hearing; an opportunity to be heard and submit evidence at a hearing within 48 hours of arrest; and a reasoned decision by an impartial decisionmaker.^x Defendants should also have the right to counsel at these initial magistrations to ensure that their rights are protected and to advocate for the appropriate bond and conditions of release. Counsel at magistrations has been demonstrated to produce fairer outcomes and to lead to fewer people unnecessarily detained pretrial.^{xi}

(3) Use Risk Assessment Tools Wisely

Ensure risk assessment tools are validated and reduce rather than worsen racial disparities.

Validated risk assessment tools can provide helpful information to a judge when making an individualized determination about release and the conditions of release that are appropriate in a particular case. At the same time, no person should be detained solely based on a risk assessment score, and an individual should have access to information about the tool being used to assess them and a meaningful opportunity to challenge the accuracy of the results in their particular case.^{xii}

Furthermore, if risk assessments are used, counties should be required to select a *validated* tool, meaning that it has been proven to accurately predict risk of new criminal activity and failure to appear. Counties should also select a tool that has been shown to reduce racial disparities and does not include factors that are simply proxy for race and/or income (*e.g.*, zip code, home ownership, etc.). Certain tools have been shown to reduce racial disparities^{xiii}, while other risk assessments have been shown to make disparities worse, by using factors that disproportionately lead to people of color being flagged as high risk, even when they have the same criminal history and are accused of the same crimes as white individuals.^{xiv} Finally, training must be provided for any person who will be administering the risk assessment tool, as well as training provided for judges in how to appropriately interpret and use the results.

(4) Increase Use of Personal Bonds

Release the majority of people on personal bond unless the judge makes written findings about why other conditions of release or types of bond are appropriate, and ensure that no person is detained solely due to their inability to pay bail.

Given the infrequency with which personal bonds are used in Texas, thousands of low-risk, nonviolent people remain in jail for no other reason than their inability to pay bail, violating not only constitutional principles but also causing individuals to suffer the collateral consequences of unnecessary jail stays, like lost employment and the inability to care for their children. However, the majority of people could be safely released pretrial on personal bond, either without conditions (aside from court date reminders) or with the least restrictive conditions necessary to ensure court appearance and public safety. Experiences in other states that have moved away from money bail have demonstrated this. For example, Kentucky releases about two-thirds of individuals on non-financial bond, yet has maintained public safety and court appearance rates.^{xv}

To reliably increase the use of personal bond across counties while still maintaining judicial discretion, the legislature should establish in state law a rebuttable presumption that a person charged with a crime is entitled to release on personal bond until trial. A judge would have the option to release a person on personal bond without any conditions or to impose the least restrictive conditions necessary to ensure court appearance and public safety. If no presumption of release on personal bond is written

into the law, there is nothing to ensure that more low-risk people will actually be released pretrial even if risk assessments are implemented in all Texas counties.

If the magistrate judge determines, given the crime charged and other relevant factors, that no conditions of release on personal bond could reasonably ensure public safety or court appearance, the magistrate could order that a person be detained, or order a monetary bond instead of a personal bond, and make written findings explaining the decision.

Ideally, pretrial release and detention decisions would be based completely on risk, and money bond would be eliminated in Texas. If money bail continues to exist, its role should be dramatically reduced, with it being imposed only in cases where a judge finds that release on personal bond with or without conditions cannot reasonably ensure public safety or court appearance. Further, no individual should be held in jail for no other reason than their inability to pay the bond amount. To protect against such a constitutional violation, a person should be entitled to an adversarial hearing to reconsider their bond if they have a money bond amount set yet have remained detained for a period of time—a procedure required by the U.S. District Court for the Northern District of Texas as part of its preliminary injunction in litigation challenging the Dallas bail system.^{xvi} The defendant should again have the right to counsel, as well as access to all information being used in the pretrial release determination and an opportunity to present evidence and cross-examine witnesses, and the judge should be required to make written findings if they decline to lower the bond amount or provide alternative means for release.

(5) Require Transparency

Require transparency in the pretrial process by requiring that bail hearings be open to the public and by collecting and publishing data regarding risk assessment scores, pretrial release decisions and related metrics.

While criminal proceedings are constitutionally required to be open to the public, Texas counties routinely prohibit public access to bail hearings.^{xvii} In order to ensure that magistrate judges abide by the law, any legislation should clarify that these proceedings must be open to public viewing. Safety and logistics have been cited by counties as a reason for keeping these hearings closed.^{xviii} To accommodate for such concerns, broadcast over closed circuit television in a site near the hearing would be acceptable. Recordings of such proceedings should be made and maintained for a period of at least one year.

Additionally, in order to monitor the implementation of any pretrial reform legislation, it is essential that courts maintain data regarding risk assessment scores, pretrial release and bond decisions, and rates of new criminal activity and failure to appear. This data must also be made publicly available, providing transparency to the public. The legislature as well as counties should use this data to measure the success of the legislation and make any modification necessary to the system to maximize public safety and court appearance.

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ⁱ Texas Code of Criminal Procedure art. 14.06(c) & (d).

ⁱⁱ See International Ass'n of Chiefs of Police, *Citation in Lieu of Arrest* at 18, Apr. 2016, available at <https://www.theiacp.org/projects/citation-in-lieu-of-arrest> (research supports the notion that citation in lieu of arrest reduces jail overcrowding) (hereinafter IACP Citation in Lieu of Arrest); Rachel A. Harmon, *Why Arrest?*, 115 Mich. R. Rev. 307, 319-20 (2016), available at <https://repository.law.umich.edu/mlr/vol115/iss3/1/> (arrests place demands on already overburdened courts and lead to at least one or two days of jail detention costs).

ⁱⁱⁱ IACP Citation in Lieu of Arrest at 18 (IACP research showed that officers spent 24.2 minutes on citations on average versus 85.8 minutes processing an arrest); Harmon at 319 (other estimates show that law enforcement arrests average at least several hours of an officer's time).

^{iv} Texas Appleseed and Texas Fair Defense Project, *Pay or Stay: The High Cost of Jailing Texans for Fines & Fees*, available at https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf.

^v There is no singular "system" in Texas as each county operates its own pretrial system. While a handful of Texas counties have moved towards risk-based release in varying degrees, the vast majority continue to rely primarily on money bond.

^{vi} Harvard Law School Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform* at 21, Oct. 2016, available at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>.

^{vii} Public Policy Research Institute at Texas A&M University, *Liberty & Justice* at 27 (researchers found there was 20% more new criminal activity by people released on bond in Tarrant County's money-based pretrial system compared to Travis County's risk-based system, including 12 percent more new violent crimes committed by people released on bond in Tarrant County compared to Travis County), available at http://www.txcourts.gov/media/1437499/170308_bond-study-report.pdf.

^{viii} *O'Donnell v Harris Co*, No. 17-20333, Opinion at 21 (5th Cir. Feb. 14, 2018) ("The fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: the County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances. Thus, the equitable remedy necessary to cure the constitutional infirmities arising under both clauses is the same: the County must implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances, taking into account the various factors required by Texas state law (only one of which is ability to pay). These procedures are: notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker.")

^{ix} Texas Code of Criminal Procedure 17.15 provides other factors a judge should consider when setting bail.

^x *Id.*

^{xi} The Constitution Project National Right to Counsel Committee, *Don't I Need a Lawyer?: Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing*, Mar. 2015, available at https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf.

^{xii} *Moving Beyond Money* at 24 (discussing safeguards necessary to ensure constitutional compliance when using risk assessment tools in the pretrial context).

^{xiii} In Conversation with Members of Laura and John Arnold Foundation's Pretrial and Research Teams, available at <http://www.arnoldfoundation.org/initiative/criminal-justice/pretrial-justice/in-conversation-with-members-of-ljafs-pretrial-and-research-teams/> (Yakima County, Washington saw a reduction in racial disparities in its pretrial release rates after implementing the LJAF risk assessment tool).

^{xiv} See Pretrial Justice Institute, *Pretrial Risk Assessment Can Produce Race-Neutral Results*, 2017, available to download at university.pretrial.org.

^{xv} Pretrial Services, Administrative Office of the Courts, Kentucky Court of Justice, *Pretrial Reform in Kentucky* (2013).

^{xvi} *Daves v. Dallas Co.*, No. 3:18-cv-00154-N at 4 (N.D. Tex. Sep. 20, 2018).

^{xvii} See, e.g., Mustafa Mirza, *In Dallas Co, bail is set in secret – and often in seconds*, Texas Tribune, Sep. 5, 2018, available at <https://www.texastribune.org/2018/09/05/Dallas-County-Bail-Machine/>; San Antonio Express-News Editorial Board, *Bail hearings must be open to the public*, San Antonio Express-News Sep. 21, 2018, available at <https://www.mysanantonio.com/opinion/editorials/article/Bail-hearings-must-be-open-to-the-public-13247278.php>.

^{xviii} *Id.* (Dallas County cited "logistics and security concerns" as reasons they would not open the hearings).