

Winter 2012

## Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas

Marcia Johnson

Lockett Anthony Johnson

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### Recommended Citation

Marcia Johnson and Lockett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 Nw. J. L. & Soc. Pol'y. 42 (2012), <http://scholarlycommons.law.northwestern.edu/njls/vol7/iss1/2>

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# **Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas**

**Marcia Johnson\***

**Luckett Anthony Johnson†**

## ABSTRACT

*Starting in the 1970s, the U.S. federal government and many state and local governments adopted “get tough” policies against crime. These new strict policy initiatives produced an explosion of incarceration in prisons throughout the country. They also impacted local jails as well, particularly in the numbers of persons detained pre-trial. This Article explores this phenomenon and its implications for local governments, as well as its unforeseen consequences on communities, particularly communities of color. The Article uses Harris County, Texas to exemplify the systematic problems resulting from the over-jailing of its citizens, particularly persons who are detained pre-trial. We attempt to show that with some changes to local policies and the development of new initiatives, Harris County could substantially reduce its jail population without increasing crime, at a substantial savings to the county in both monetary and human capital.*

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\* Marcia Johnson is a professor at the Thurgood Marshall School of Law.

† Luckett Anthony Johnson is a 2010 graduate of the University of Texas School of Law. The authors acknowledge with great appreciation the assistance they received from Harris County Commissioner El Franco Lee, Danyahel Norris, and Janis Bane, who reviewed and commented on a draft of this Article. Also, they thank: Sidney Braquet; the Office of Harris County Commissioner El Franco Lee; Alan Bernstein; the Harris County Sheriff’s public information officer; Caprice Coper, Director, Harris County Office of Criminal Justice Coordination; Clarissa Stephens, Deputy Director, Harris County Office of Criminal Justice Coordination; Carol Oeller, Director, Harris County Pretrial Services; and Harris County Coalition for Juvenile and Criminal Justice.

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“The United States is simultaneously a leader of the ‘free world’ and of the incarcerated world. We celebrate and export our commitment to free markets, civil rights, and civil liberties, yet we are also a world leader in incarceration and the death penalty.”—*Professor David Cole*<sup>1</sup>

## INTRODUCTION

Over the last forty years, the United States’ increasingly “get tough” response to crime and punishment has resulted in an overwhelming rate of incarceration, now the highest in the world.<sup>2</sup> The criminal justice policies that the United States has adopted

<sup>1</sup> David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 455 (2001).

<sup>2</sup> Roy Walmsley, *World Prison Population List (Seventh Ed.)*, KINGS COLLEGE LONDON: INT’L CTR. FOR PRISON STUDIES 1 (2007), <http://www.kcl.ac.uk/depsta/law/research/icps/downloads/world-prison-pop-seventh.pdf>; see BRUCE WESTERN, LEONARD LOPP & BECKY PETTIT, PUNISHMENT AND INEQUALITY IN AMERICA 52–58 (Russell Sage Found. 2007) (discussing how the war on drugs and the war on crime were two policy initiatives that helped grow the prison population by creating a new set of criminal offenses and procedures); Alfred Blumstein et al., *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 30 (1999) (observing that the drug arrest rate showed sharp growth overall, rapidly increasing during the 1980s, peaking in 1989, hitting a trough from 1991 to 1993, then rising again). However, Blumstein and his co-authors note that because drug offending is measured through arrests and because drug arrest

have produced a tidal wave of imprisonment in this country.<sup>3</sup> Between 1972 and 2008, the number of men, women, and children locked up in the United States has grown by a historically unprecedented 705%.<sup>4</sup> As a result, the United States detains almost a quarter of the prisoners in the entire world.<sup>5</sup> “In fact, if all our prisoners were confined in one city, that city would be the fourth largest in the country.”<sup>6</sup> Ironically, Houston, located in Harris County, Texas, is the fourth largest city in the country.<sup>7</sup>

Within the United States’ borders, Texas stands out at the center of the prison boom.<sup>8</sup> “While Texas ranks fiftieth among states in the amount of money it spends on indigent criminal defense, it ranks first in prison growth, first in for-profit imprisonment, first in supermax lockdown, first in the total number of adults under criminal justice supervision, and a resounding first in executions.”<sup>9</sup> There are five Texas jails that rank among the fifty largest in the nation. Harris County has the nation’s third largest jail; Dallas’s jail is seventh largest; Bexar County’s (San Antonio) is sixteenth; Tarrant County’s (Fort Worth) is twenty-sixth; and Travis County’s (Austin) is thirty-fourth.<sup>10</sup>

If Texas is ground zero, it owes much of its dubious stature to the justice system in Harris County, a county which harbors about 16%<sup>11</sup> of the state’s population and which

policies can be highly discretionary, it is difficult to distinguish how much these trends are attributable to an increase in drug offending and how much is due to changes in drug enforcement and arrest policies. *Id.*  
<sup>3</sup> See D. A. Andrews et al., *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCHOL. PUB. POL’Y & L. 39, 42 (2010); Jason J. Ben, *America’s Need to Explore Alternatives to Incarceration: Can America Purport to Be the “Land of the Free” When It Currently Is the World’s Leading Incarcerator?*, 30 S.U. L. REV. 349, 360–61 n.107 (2003); Franklin E. Zimring, *Sanctions: Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 332 (2005) (reporting that after the “war of drugs” was declared state imprisonment rose dramatically with drug prisoners in state prisons between 1986 and 1991 showing a 289% increase and with the general U.S. prison population expanding at a greater rate between 1992 and 2000 even as the crime rate was falling); Marie Gottschalk, *The Long Reach of the Carceral State: The Politics of Crime, Mass Imprisonment, and Penal Reform in the United States and Abroad*, 34 LAW & SOC. INQUIRY 439, 441 (2009); cf. MARC MAUER, *RACE TO INCARCERATE* (New Press 1999) (arguing that “get tough” policies have been ineffective at reducing crime, and in fact results in the imprisonment of less serious criminals). *But see* Brackett B. Denniston, III, *Getting Tough on Crime: Does It Work?*, 38 BOS. B. J. 9, 25–26 (1994) (discussing the advantages of the “get tough” policies from reducing crime and economic standpoints).

<sup>4</sup> *Prison Count 2010: State Population Declines for the First Time in 38 Years*, PEW CTR. ON THE STATES, 2 (Apr. 2010), [http://www.pewcenteronthestates.org/uploadedFiles/Prison\\_Count\\_2010.pdf?n=880](http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf?n=880).

<sup>5</sup> Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459 (2010); Elizabeth Alexander, *Michigan Breaks the Political Logjam: A New Model for Reducing Prison Populations*, AM. CIV. LIBERTIES UNION, 3 (Nov. 2009), <http://www.aclu.org/files/assets/2009-12-18-MichiganReport.pdf>.

<sup>6</sup> Alexander, *supra* note 5, at 3.

<sup>7</sup> Paul Mackun & Steven Wilson, *Population Distribution and Change: 2000 to 2010*, U.S. CENSUS BUREAU, 11 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

<sup>8</sup> ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE 4* (Metropolitan Books 2010).

<sup>9</sup> *Id.*

<sup>10</sup> Todd D. Minton, *Jail Inmates at Midyear 2010—Statistical Tables*, U.S. DEP’T OF JUSTICE, 10 (Apr. 2011), <http://bjs.gov/content/pub/pdf/jim10st.pdf> (showing Harris County at 109.3% capacity in 2010); see Scott Henson, *Harris County Among Leaders in National Jail Population Decline*, GRITS FOR BREAKFAST (Apr. 22, 2011, 10:22 AM), <http://gritsforbreakfast.blogspot.com/2011/04/harris-county-among-leaders-in-national.html>.

<sup>11</sup> See Mackun & Wilson, *supra* note 7.

produces about 19% of the state's prison population.<sup>12</sup> For the last three years, Harris County jails have been overcrowded.<sup>13</sup> The total Harris County jail capacity is 9434.<sup>14</sup> However, by December 2010, Harris County reported 9973 persons detained in county facilities, 1097 of whom were housed in outsourced facilities.<sup>15</sup>

Harris County has relied on several remedies to its more recent jail overcrowding with limited success.<sup>16</sup> While the county has been addressing the problem since the 1970s and more specifically addressing the problem since about 2005, its first response to the overcrowding has always been to build more jails and jail cells.<sup>17</sup> Increasing the number of facilities never solved the problem as more and more persons were arrested for misdemeanor crimes including minor drug offenses, filling the new facilities.<sup>18</sup> Responding to its more recent overcrowding problem, the county next chose to lease jail space from other jails outside of Harris County.<sup>19</sup> This approach somewhat relieved the overcrowding in Harris County jails, but had other negative consequences.<sup>20</sup>

The obligation of the state and county to act summarily and effectively reaches constitutional proportion, as inhumane conditions, including overcrowded jails, have long

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<sup>12</sup> *Statistical Report Fiscal Year 2010*, TEX. DEP'T CRIM. JUSTICE, 24 (2010),

<http://tdcj.state.tx.us/publications/executive/FY2010StatisticalReportFiscalYear2010.pdf>.

<sup>13</sup> Statistics, Office of Criminal Justice Coordination, *Harris County Comparison of Daily Average Jail Population* (Mar. 7, 2011) (on file with author) [hereinafter *Daily Average Jail Population*] (showing that the total housed by HCSO exceeded capacity from June 2007 to date).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g.*, Brandi Grissom, *Harris County Seeks to Keep Extra Jail Beds*, TEX. TRIB. (Aug. 5, 2010), <http://www.texastribune.org/texas-state-agencies/state-commission-on-jail-standards/harris-county-seeks-permission-for-extra-jail-beds/>.

<sup>17</sup> *See* *Alberti v. Sheriff of Harris Cnty.*, 406 F.Supp. 649, (S.D. Tex. 1975). This case remained under the court's continuing jurisdiction for twenty years. *In re Clements*, 881 F.2d 145 (5th Cir. 1989); *Alberti v. Sheriff of Harris Cnty.*, 937 F.2d 984 (5th Cir. 1991), *aff'd in part, rev'd in part sub nom.*; *Alberti v. Klevenhagen*, 46 F.3d 1347 (5th Cir. 1995).

<sup>18</sup> *See* Roma Khanna, *Harris County Sheriff: New Jail Will Fix County Lockup Woes*, HOUS. CHRON., May 7, 2009, <http://www.chron.com/disp/story.mpl/front/6412792.html> (noting the county's plan to build an 1100-bed jail in Atascocita, Harris County was rejected by voters in 2007); Steve Hawley, *Harris County Commissioners Consider Capital Improvement Program*, HOUS. TOMORROW (Jun. 23, 2009), <http://www.houstontomorrow.org/livability/story/harris-county-commissioners-consider-capital-improvement-program/>.

<sup>19</sup> *See* *Inmates Housed Elsewhere*, TEX. COMM'N ON JAIL STANDARDS (Aug. 1, 2011), <http://www.tcjs.state.tx.us/docs/elsewhere.pdf> (providing that the next closest county in July was McLenna at 163); Pat Hernandez, *Harris County to Send More Inmates to Louisiana to Ease Jail Overcrowding* (88.7 KUHf Houston Public Radio broadcast May 6, 2008), [http://app1.kuhf.org/houston\\_public\\_radio-news-display.php?articles\\_id=29885](http://app1.kuhf.org/houston_public_radio-news-display.php?articles_id=29885) (noting that as of March 1, 2011, Harris County had the greatest number of inmates housed outside its facilities at 1146, and Limestone County had the next closest number with 83 inmates housed elsewhere). By July 1, the number of Harris County inmates housed elsewhere had decreased to 893, but it still outpaced, by far, all other Texas counties. *Id.*

<sup>20</sup> *See* Mike Morris, *Privatizing County Jail on Commissioners' Agenda*, HOUS. CHRON., Apr. 18, 2011, <http://www.chron.com/disp/story.mpl/metropolitan/7527480.html> (discussing how one commissioner, Steve Radack, has recommended the privatization Harris County jails as a way to cut back on costs); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 37–43 (Cambridge Univ. Press 2007) (discussing privatization as part of military prisons and government relinquishment in general).

been recognized as violating inmates' constitutional rights.<sup>21</sup> Harris County could be particularly vulnerable to claims of unconstitutional jail conditions because it is overcrowded and fails to provide adequate health care. In 2009, the United States Department of Justice produced a report following its investigation of the Harris County Jail.<sup>22</sup> The Department of Justice found that the jail failed to "provide detainees with adequate: (1) medical care; (2) mental health care; (3) protection from serious physical harm; and (4) protection from life safety hazards."<sup>23</sup> Complicating the issue, the United States Supreme Court recently upheld a California district court's decision to limit the state's prison population, because it was necessary in order to protect prisoners from constitutionally prohibited "cruel and unusual punishment."<sup>24</sup> The Supreme Court's decision effectively challenges Texas and, in particular, Harris County to implement measures to ensure that prison overcrowding will not continue to violate prisoners' rights.<sup>25</sup>

Harris County could successfully address the issue of overcrowding with changes to its pretrial detention policies. In December 2010, about half of the persons in Harris County jails were pretrial detainees.<sup>26</sup> About 20% of those pretrial detainees were charged with misdemeanor offenses or held for other non-felony reasons.<sup>27</sup> Harris County could experience a significant decrease in jail population if it would reform its arrest and bail policies in order to release from detention pretrial detainees held on nonviolent misdemeanor offenses.

In this Article, we will use Harris County as an illustrative case of the kinds of problems typical of jail populations throughout the country. We take the position that Harris County must reevaluate its systems of incarceration and bail, for the purpose of providing a more humane, less punitive, constitutional system of justice. We will identify policy measures the county might employ to aid in the administration of justice. We also posit that the effect on overcrowding will be clear, as will the overall reduction in cost to

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<sup>21</sup> *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (holding that the Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement"); *see, e.g.*, Wayne N. Welsh & Henry N. Pontell, *Counties in Court: Interorganizational Adaptations to Jail Litigation in California*, 25 L. & SOC'Y REV. 73, 81 (1991); Karen M. Blum, *Local Government Liability Under Section 1983*, 836 PLI/LIT 171, 534 (2010); *see Rhodes v. Chapman*, 452 U.S. 337, 347–50 (1981) (observing that crowded conditions are not unconstitutional unless they rise to the level of cruel and unusual); *Collins v. Ainsworth*, 382 F.3d 529, 540 (5th Cir. 2004) (recognizing that overcrowded conditions for pretrial detainees are not unconstitutional unless they are unduly punitive).

<sup>22</sup> Memorandum from Loretta King, Acting Asst. U.S. Att'y Gen. to Ed Emmett, Harris Cnty., Tex. Judge (June 4, 2009), *available at* [http://www.justice.gov/crt/about/spl/documents/harris\\_county\\_jail\\_findlet\\_060409.pdf](http://www.justice.gov/crt/about/spl/documents/harris_county_jail_findlet_060409.pdf) [hereinafter King Memorandum].

<sup>23</sup> *Id.* at 2–14.

<sup>24</sup> *See Brown v. Plata*, 131 S. Ct. 1910 (2011) (ordering California to reduce its prison population by 37,000 inmates). This was only the latest development in this litigation, which has lasted more than ten years. The plaintiffs claimed that California state prisons failed to provide adequate health care to its prisoners in violation of their Eighth Amendment constitutional rights and the American with Disabilities Act. *Id.* They argued—and the Court agreed—that a remedy for unconstitutional medical and mental health care could not be achieved without reducing prison overcrowding. *Id.*

<sup>25</sup> *See id.* at 1923 (finding that prison overcrowding is the "primary cause of the violation of a federal right").

<sup>26</sup> Office of Criminal Justice Coordination, *supra* note 13.

<sup>27</sup> *Id.*

Harris County. Further, it is our position that Harris County should not continue to use its current bail structure to deny release to qualified persons, while also recognizing that release from jails alone is not sufficient to best serve the community.

In addition to releasing qualified detainees, it is also important to consider, in a more comprehensive way, the best practices for deterring crime and reviving communities. These practices include modifications to conditions to pretrial release, probation and parole, and ticketing in lieu of arrest. They also include more active efforts, such as improving education and mental health care, to help further deter crime and reduce recidivism.

Part I of this Article describes the incidence of over-incarceration and jail overcrowding in the United States generally, and in Texas and Harris County, specifically. In Part II we analyze the constitutional implications of jail overcrowding with emphasis on denying bail to pretrial defendants. In Part III, we look at the Harris County bail/bond system and examine the racial disparity of the county's bail/bond policies on African-Americans, while Part IV explores over-jailing and denying bail/bond to pretrial defendants and their collateral effects on the overall Harris County community. In Part V, we recommend policy reforms that could dramatically impact the numbers of people jailed in Harris County, Texas and significantly reduce the monetary costs of the current system without any appreciable, if any, increase in crime. Finally, we present our conclusions.

## I. OVER-INCARCERATION

### A. Incarceration Rates

The United States maintains the highest rate of incarceration in the world, leading at 753 detainees per 100,000 people.<sup>28</sup> Worldwide, over 9.8 million people are incarcerated, with over 30% of them detained in the United States.<sup>29</sup> The explosion in incarceration occurred only in the last few decades. Since the early 1970s, the incarceration rate has continuously grown at about 6.3% per year.<sup>30</sup> In 1970, 300,000 Americans were behind bars and by 1997 that number had reached 1.6 million.<sup>31</sup> The

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<sup>28</sup> Nicole D. Porter, *The State of Sentencing 2010: Developments in Policy and Practice*, SENTENCING PROJECT, 1 (Feb. 2011), <http://sentencingproject.org/doc/publications/publications/Final%20State%20of%20the%20Sentencing%202010.pdf>; see also John Schmitt et al., *The High Budgetary Cost of Incarceration*, CTR. ECON. POL'Y RES., 3–4 (Jun. 2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>. This report charts the incarceration rates of thirty “rich” countries that are members of the Organization for Economic Cooperation and Development. It shows that from 2008 to 2009 the United States imprisoned more than three times more persons per 100,000 than Poland, which was second at 224 per 100,000. *Id.* It also shows that the United States leads the world in incarceration rate, not only among rich countries but among all countries, leading second place Russia by 20% and more than 25% of third place Rwanda. *Id.*

<sup>29</sup> See Walmsley, *supra* note 2; Marc Mauer, *Comparative International Rates of Incarceration: An Examination of Causes and Trends*, SENTENCING PROJECT, 2 (June 20, 2003), <http://www.sentencingproject.org/pdfs/pub9036.pdf>.

<sup>30</sup> Blumstein et al., *supra* note 2, at 18.

<sup>31</sup> Kathy Gill, *Growth Rate for Jail, Prison Exceeds That for Population Growth*, ABOUT.COM (May 24, 2006), <http://uspolitics.about.com/b/2006/05/24/growth-rate-for-jail-prison-exceeds-that-for-population-growth.htm>.

incarceration rate in 1997 was more than four times the stable rate that had prevailed for the fifty years preceding 1973.<sup>32</sup> Between 1995 and 2005, the total prison population rose by almost 600,000.<sup>33</sup>

According to the United States General Accounting Office (GAO), the increase in inmate populations could be traced to major legislative initiatives intended to get tough on crime, particularly on drug offenders.<sup>34</sup> In fact, the United States had 100,000 more persons behind bars for drug offenses than the European Union had for all offenses even though the European Union's population exceeded the U.S. population by 100 million people.<sup>35</sup> In addition to the increased drug arrests, a number of factors contributed to the high incarceration rates in the United States, including zero tolerance policies, population growth, increases in reported crime, and changes in prosecutorial and judicial decisions to incarcerate persons who previously would not have been incarcerated.<sup>36</sup>

Pretrial detention also increased dramatically after the initiation of "get tough" policies throughout the country.<sup>37</sup> In the ten years between 1996 and 2006, the number of people held pre-trial in jails increased more than 20%.<sup>38</sup> According to data from the State Court Processing Statistics, between 1992 and 2008, fewer people were released pre-trial without bail and fewer were granted bail at all.<sup>39</sup> That national trend is continuing.<sup>40</sup> Pretrial detainees commonly fill jails; for example, they have comprised up to 89% of the jail population in Baltimore, Maryland.<sup>41</sup> In Texas, about 80% of the persons jailed for felony charges and about 64% of the persons jailed for misdemeanors are pretrial

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<sup>32</sup> *Id.*

<sup>33</sup> Kieran Healy, *Incarceration Rates*, CROOKED TIMBER (May 23, 2006), <http://crookedtimber.org/2006/05/23/incarceration-rates/>.

<sup>34</sup> U.S. GEN. ACCOUNTING OFFICE, FEDERAL AND STATE PRISONS: INMATE POPULATIONS, COSTS, AND PROJECTION MODELS (LETTER REPORT, GAO/GGD-97-15) (Nov. 25, 1996), available at <http://www.fas.org/irp/gao/ggd97015.htm>.

<sup>35</sup> Texas Criminal Justice Coalition, Solutions for Sentencing & Incarceration FAQ sheet available at [http://www.criminaljusticecoalition.org/solutions\\_for\\_incarceration/facts#cost](http://www.criminaljusticecoalition.org/solutions_for_incarceration/facts#cost); see also Healy, *supra* note 33. Moreover, the ratio of commitments for drug arrests were lower in the state prison systems during the same period. However, drug admissions showed a marked increase from about two prison admissions per one hundred arrests in 1980 to about ten per one hundred arrests in from 1990 to 1992, a five-fold increase. The rate dropped to eight by 1996. Time served for drug offenses also increased from 1.3 years in 1987 to 2.3 years by 1996. Blumstein, *supra* note 2, at 34. See also PEW CTR. ON THE STATES, *supra* note 4 (noting that the number of state prisoners in the United States has declined, despite a 2061 person increase in the nation's total prison population between December 31, 2008 and January 1, 2010).

<sup>36</sup> Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 725 (1996); India Geronimo, *Deconstructing the Marginalization of "Underclass" Students: Disciplinary Alternative Education*, 42 U. TOL. L. REV. 429, 451 (2011); Terry Gibbs et al., *Race and Class Dimensions of the War on Drugs: A Humanitarian Crisis*, 3 RUTGERS J.L. & URB. POL'Y 62 (2006).

<sup>37</sup> Amanda Petteruti & Nastassia Walsh, *Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies*, JUST. POL'Y INST., 6–8 (Apr. 2008), [http://www.justicepolicy.org/images/upload/08-04\\_REP\\_JailingCommunities\\_AC.pdf](http://www.justicepolicy.org/images/upload/08-04_REP_JailingCommunities_AC.pdf).

<sup>38</sup> *Id.* at 10.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *Policy Statement on Fair and Effective Pretrial Justice Practices*, AM. COUNCIL OF CHIEF DEFENDERS, 7–8 (Jun. 4, 2011), <http://pretrial.org/Featured%20Resources%20Documents/ACCD%20Pretrial%20Release%20Policy%20Statement%20June%202011.pdf>.

<sup>41</sup> *Id.* at 8.



detainees.<sup>42</sup> Jailing pretrial defendants is part of the bigger problem of over-incarceration throughout the prison systems.<sup>43</sup>

One study that reviewed the practice of pretrial release, bails and bonds across the country found that “since 1992, fewer people have been released pretrial without bail, fewer have been granted bail at all, and, of those granted bail, fewer have been able to make the payment.”<sup>44</sup> Failure to grant pretrial release, may be, in part, based on fear that people might commit crimes while they are waiting to be tried.<sup>45</sup> But there are legal, moral, and practical prohibitions to penalizing persons for what they *might* do rather than what they actually have done.<sup>46</sup> This is particularly true when persons are being considered for pretrial release, since they have not been convicted of a crime and they are constitutionally protected by a presumption of innocence.<sup>47</sup>

### *B. Effects at the Local Level*

The unprecedented population growth in prisons and jails alike has burdened state and local governments. For example, in 2007, Texas spent \$3.3 billion on corrections, a rate of over \$19,000 per inmate that year.<sup>48</sup> By contrast, during the same period, Texas spent less than \$8,000 per child for public education.<sup>49</sup> Similarly, the Harris County, Texas budget for 2007 attributed almost 51% of its expenses to the “administration of justice.”<sup>50</sup> Indeed, a conservative analysis reveals that the county spent \$473,844,505—or 36%, of its \$1,286,985,451 total budget—in the administration of *criminal* justice

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<sup>42</sup> *Abbreviated Population Report for 8/1/2011*, TEX. COMMISSION ON JAIL STANDARDS (Aug. 18, 2011), <http://www.tcjs.state.tx.us/docs/abrprpt.pdf>. Harris County figures show that as of August. 1, 2011, 82% of its detainees held on felony charges were pretrial and 38% of its misdemeanor detainees were pretrial. *Id.*

<sup>43</sup> *Id.* at 5.

<sup>44</sup> Petteruti & Walsh, *supra* note 37, at 11.

<sup>45</sup> Robert Fickman, *Message from the President Regarding Jail Overcrowding*, LAW OFFICES OF ROBERT FICKMAN, <http://www.fickmanlaw.com/CM/Articles/Presidential-Message-Jail-Overcrowding.asp> (last visited Jan. 9, 2012) (Fickman is the immediate past president of the Harris County Criminal Lawyers Association).

<sup>46</sup> *Id.* (stating that “[w]hile it may be politically safer for the judge, it is far more dangerous to the fundamental tenants of our system for the judge to keep the presumably innocent locked up for political reasons”).

<sup>47</sup> The United States Constitution does not explicitly declare this right, however, it is widely acknowledged that it is inherent in the Fifth, Sixth, and Fourteenth Amendments to the Constitution. *See, e.g., Miles v. State*, 154 S.W.3d 679, 681 (Tex. App. 14th Dist. 2004) (stating even though the presumption of innocence is guaranteed by a Texas statute, the statute itself arises from a constitutional guarantee, that of a fair and impartial trial); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”).

<sup>48</sup> Jennifer Warren, *One in 100: Behind Bars in America 2008*, PEW CTR. ON THE STATES, 30 (Feb. 2008), [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).

<sup>49</sup> *See Table 7. Total Students, Revenue, Current Expenditures, and Current Expenditures Per Pupil for the 100 Largest Public Elementary and Secondary School Districts in the United States, by School District: Fiscal Year 2007*, NAT’L CTR. FOR EDUC. STAT. (2007), [http://nces.ed.gov/pubs2009/revexpdist07/tables/table\\_07.asp](http://nces.ed.gov/pubs2009/revexpdist07/tables/table_07.asp). In stark contrast, for every dollar Texas spent on higher education, it spent \$0.51 on corrections. *See Warren, supra* note 48.

<sup>50</sup> *See BUDGET LETTER AND SUMMARY, HARRIS COUNTY, TEX., COMMISSIONERS COURT, 7* (Mar. 2, 2007), <http://www.hctx.net/CmpDocuments/74/Budget/FY%202007-08%2001-Budget%20Letter%20&%20Summary.pdf>.

specifically.<sup>51</sup> A large portion of this amount went to jail expenses alone. By the end of 2007, 10,086 persons were incarcerated in Harris County facilities.<sup>52</sup> The minimum cost of such incarceration for that period was \$251,871,900, constituting more than 19% of the Harris County, Texas budget,<sup>53</sup> with untold additional cost to the inmates' families and the overall community.<sup>54</sup>

The costs and challenges of incarceration became so dire in Texas that by 2008, members of the state legislature recognized that they needed to act decisively. The legislature developed an overall legislative strategy to be more humane and fiscally responsible.<sup>55</sup> Among other initiatives, the Texas legislature instituted alternative programs for incarceration that include community-based treatment, diversion programs, and sentencing and probation/parole options.<sup>56</sup> By January 2010, state prisons reported the first decline in population in thirty-eight years, with Texas being one of five states to experience the greatest decline at a drop of 1257 persons.<sup>57</sup>

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<sup>51</sup> Based on the DEPARTMENT BUDGETS: FY 2007–2008, HARRIS COUNTY, TEX. (2007), <http://www.hctx.net/CmpDocuments/74/Budget/FY%202007-08%2002-Departments.pdf>. The budget does not clearly identify numbers on the administration of *criminal* justice. However, we developed an estimate from the available data. To start, our estimates eliminated certain categories of spending altogether. Those were sheriff's civil service, fire marshal, county attorney, the courts of appeals, and probate courts. Additionally, we modified other budgets so that the entire focus would be on criminal matters and are therefore exclusive of civil categories. The constable budget, for purpose of this calculation, was reduced by 50% to reflect only criminal justice activity. The medical examiner budget was reduced by 50% so that any noncriminal work was excluded by the calculations from the data. The district clerk budget was reduced by 75% because there were fifteen criminal courts and fifty-nine district courts. (However, this was likely a liberal reduction in that there were about 100,000 civil cases filed and 120,000 criminal cases filed in that office). The justice of the peace courts reported that of the almost 600,000 cases filed, 86% were criminal so their budget was adjusted from approximately \$19 million to approximately \$16 million. Similar calculations were done to district courts, county courts, and county clerk line items.

<sup>52</sup> Statistics, Harris County Office of Budget Management, Harris County Daily Jail Count by Facility Dec. 1, 2007–Dec. 31, 2007 (on file with author) [hereinafter Harris County Daily Jail Count]. This number includes persons in contracted facilities; the daily average was 10,192 for December 2007. *Id.*

<sup>53</sup> The calculation is based on a minimum daily cost per inmate of \$70 for 9,858 inmates over 365 days. Daily housing costs alone range between \$42 and \$45, but when one-time events like bookings, release, medical screening, inmate classification, and pretrial interviews are amortized, the average cost per day is between \$70 and \$75 at minimum. Telephone Interview with Alan Bernstein, Public Information Officer, Harris County Sheriff's Department, in Houston, Tex. (Mar. 22, 2011). The costs climb appreciably for inmates that require additional attention, particularly mental health care. Harris County Daily Jail Count, *supra* note 52.

<sup>54</sup> These "collateral" effects include impact on the economic security of the jailed person's family, the impact on the children's performance in schools, and health and the stature of the family in the community, to name a few. *See* discussion *infra* Part IV.

<sup>55</sup> John Vratil & John Whitmire, *Cutting the Prison Rate Safely*, WASH. POST (Mar. 20, 2008), [www.washingtonpost.com/wp-dyn/content/article/2008/03/19/AR2008031902854.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/03/19/AR2008031902854.html). The legislative initiatives represent a combined effort of government officials, agencies, criminal justice professionals, liberals, conservatives, and urban legislators who recognized the need for reform. Legislation like the Texas Fair Defense Act (enacted in 2001) and HB 2391 (enacted in 2007) were part of this criminal justice reform movement in Texas. *See* discussion *infra* subpart I.D.

<sup>56</sup> *See* discussion *infra* subpart I.D.

<sup>57</sup> *Prison Count 2010*, *supra* note 4 (reporting that California reduced its prison population by 4257, Michigan by 3260, New York by 1699, Maryland by 1315, and Mississippi by 1233 during the same period).

### C. Overcrowding in Harris County's Jails

The drop in Texas prisoners is also occurring in Harris County, which has realized around a 10% decline in its jails as of January 1, 2011.<sup>58</sup> The jail population is down from more than 11,500 at the end of 2009.<sup>59</sup> It has achieved this drop through the joint efforts of the Harris County Sheriff's Department and local political figures.<sup>60</sup> However, reports continue to show a large number of persons in the county-provided facilities are pretrial detainees.<sup>61</sup> For example, the daily jail average count for October 2010 showed 5908—more than half—of the 10,401 county jail inmates were detained pending trial.<sup>62</sup> About 30% of these persons can expect to serve between 0 and 30 days, about 30% serve between 31 and 90 days, 20% between 91 and 180 days, and 20% remained in jail for more than 180 days in Harris County jails.<sup>63</sup>

Despite the decrease in jail population over the last year, the decades-long policy preferring incarceration to reasonable alternatives has had a long lasting impact on the state and the county. Evidence of that impact is illustrated by the historic growth of Texas prisons. Between 1980 and 2005, Texas realized a 61% increase in population.<sup>64</sup> However, that growth was dwarfed by its 308% increase in prison population during the

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<sup>58</sup> *Incarceration Rate Report—Highest to Lowest*, TEX. COMMISSION ON JAIL STANDARDS (Jan. 1, 2011), <http://www.tcjs.state.tx.us/docs/incar.pdf> (reporting that there were 10,316 persons in Harris County jails on that date).

<sup>59</sup> Brandi Grissom, *Harris County Seeks to Keep Extra Jail Beds*, TEX. TRIB. (Aug. 5, 2010), <http://www.texastribune.org/texas-state-agencies/state-commission-on-jail-standards/harris-county-seeks-permission-for-extra-jail-beds/>.

<sup>60</sup> *Id.* (recounting the efforts of Texas State Senators Rodney Ellis and Mario Gallegos along with Texas State Representatives Carol Alvarado, Ellen Cohen, Garnet Coleman, Al Edwards, Senfronia Thompson, and Sylvester Turner, as well as the cooperation of Harris County Sheriff Adrian Garcia and Harris County District Attorney Patricia R. Lykos).

<sup>61</sup> Daily Average Jail Population, *supra* note 13.

<sup>62</sup> Janis Bane et al., *Harris County Pre-Trial Services: Policies and Practices*, HOUS. MINISTERS AGAINST CRIME (2011), [http://www.criminaljusticecoalition.org/files/userfiles/HMAC\\_Pre-trial\\_Report\\_FINAL.pdf](http://www.criminaljusticecoalition.org/files/userfiles/HMAC_Pre-trial_Report_FINAL.pdf).

<sup>63</sup> JUST. MGMT. INST., HARRIS COUNTY CRIM. JUST. SYS. IMPROVEMENT PROJECT, PHASE 1 REPORT 22 (Oct. 2009) (on file with author). The report also noted that in November 2005, the Harris County Sheriff's Office reported that 21% of all inmates were released within twenty-four hours after arrival at the inmate processing center; 40% were released within forty-eight hours, and 52% within seventy-two hours. *Id.* Those who were not released quickly often remained in jail for "lengthy" periods. *Id.*

<sup>64</sup> *Recent and Projected Growth of the Texas Prison Population*, COUNCIL OF ST. GOV'TS JUST. CENTER, <http://justicecenter.csg.org/downloads/TX3+big+picture+growth.pdf> (last visited Jan. 9, 2012) [hereinafter *Recent and Projected Growth*]. The Council of State Governments Justice Center is a national nonprofit organization that serves policy makers at the local, state, and federal levels from all branches of government. *Background*, COUNCIL OF ST. GOV'TS JUST. CENTER, [http://justicecenter.csg.org/about\\_us/background](http://justicecenter.csg.org/about_us/background) (last visited Jan. 24, 2012). The center's board of directors includes past board chair, the Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals. *Board of Directors*, COUNCIL OF ST. GOV'TS JUST. CENTER, [http://www.justicecenter.csg.org/about\\_us/board](http://www.justicecenter.csg.org/about_us/board) (last visited Jan. 24, 2012). State Representative Jerry Madden, Chair of the Texas House Corrections Committee, also serves on this board. *Id.* Dr. Tony Fabelo, working with designated agency and legislative staff in Texas, coordinates the project in Texas for the Justice Center. *Staff Directory*, COUNCIL OF ST. GOV'TS JUST. CENTER, [http://www.justicecenter.csg.org/about\\_us/staff\\_directory](http://www.justicecenter.csg.org/about_us/staff_directory) (last visited Jan. 24, 2012).

same period.<sup>65</sup> Significantly, at least one Texas study found that no portion of the increase in the Texas prison population could be attributed to an increase in crime.<sup>66</sup>

Harris County's experience has been similar. In 2009, the United States Department of Justice Civil Rights Division published findings following its investigation of the Harris County jail conditions and overcrowding.<sup>67</sup> Among other findings, the report noted that between 2004 and 2009, the Harris County jail population had increased by 50%, far exceeding the county's population growth over the same period.<sup>68</sup>

The Texas Commission on Jail Standards, which sets rules and procedures and provides consultation and technical assistance to county jail facilities,<sup>69</sup> determined several likely reasons for the dramatic increase in Harris County's jail population. They found: (1) that a high number of the persons being held in jails were being detained pre-trial on a single drug possession charge, most commonly for possession of drug paraphernalia and drug residue; (2) that detainees were held for excessively long periods of time awaiting trial, with at least 200 detained longer than the minimum sentence for the crime of which they were accused; (3) that approximately 25% of Harris County inmates suffered from mental illness, making Harris County jails the largest facility in the state that provides mental health services; and (4) that a very high number of persons who qualified for release on a personal recognizance bond were being detained in Harris County jails.<sup>70</sup>

In 2004, Harris County contracted with the Justice Management Institute (JMI) to study the Harris County criminal justice system and to make recommendations for improvement.<sup>71</sup> Their most recent report, which revises their initial 2005 report,<sup>72</sup> was expected to be released in 2011 and makes findings similar to those offered by the Texas commission after its review of the Harris County criminal justice system.<sup>73</sup> JMI submitted several recommendations aimed at reducing the county's jail population. Among other things, the institute recommended that: (1) plea and sentencing practices be

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<sup>65</sup> *Recent and Projected Growth*, *supra* note 64 (reporting that from 1985 to 2005, the correctional population increased from 37,281 to 152,217).

<sup>66</sup> *Id.*

<sup>67</sup> King Memorandum, *supra* note 22; see Agenda, Texas Commission on Jail Standards Meeting (Aug. 5, 2010), available at <http://static.texastribune.org/media/documents/DOC008.PDF>.

<sup>68</sup> King Memorandum, *supra* note 22. Harris County's jail overcrowding is not a new phenomenon. In 1972, inmates filed suit against Harris County charging severe overcrowding. See text accompanying *supra* note 17. The litigation lasted two decades and ended with the construction of four new jail facilities by 2002, significantly increasing jail capacity. JUST. MGMT. INST., *supra* note 63, at 8. However, by 2005, the county was again facing overcapacity. Steve McVicker & Bill Murphy, *Report Condemns County Jail Conditions*, HOUS. CHRON., July 16, 2005, at A1 (reporting that 1300 inmates in the downtown Harris County jail were sleeping on mattresses on the floor and that jails in forty other Texas counties were in violation of state standards).

<sup>69</sup> TEX. COMMISSION ON JAIL STANDARDS, <http://www.tcjs.state.tx.us/> (last visited Jan. 9, 2012).

<sup>70</sup> Agenda, *supra* note 67, at 27.

<sup>71</sup> JUST. MGMT. INST., *supra* note 63. This report, which revises the JMI's 2005 report on Harris County jails, was favorably received by the Texas Commission on Jail Standards. Memorandum from Justice Mgmt. Inst. to Ed Emmett, Harris County Judge 5, 31 (June 18, 2009) (on file with author). The Justice Management Institute researches emerging judicial issues and provides consulting services.

<sup>72</sup> Barry Mahoney et al., *Pretrial Release and Detention in Harris County: Assessment and Recommendations*, JUST. MGMT. INST. (June 2005), <http://www.pretrial.org/Docs/Documents/reportfinalharriscountypretrial2.pdf>.

<sup>73</sup> JUST. MGMT. INST., *supra* note 63.

altered so that drug offenders would receive treatment rather than imprisonment; (2) prosecutorial processes be revised so that fewer persons would be charged with felonies for possession of small amounts of illegal drugs; (3) arrest policies and practices be revised to make greater use of pre-arrest diversion and pretrial intervention; and (4) bond policies and procedures be revised.<sup>74</sup>

By 2010, the Harris County jails had passed an unscheduled inspection by the Texas Commission on Jail Standards.<sup>75</sup> But the problem is far from over. In January 2011, Harris County Sheriff Adrian Garcia detailed part of the remaining challenge in a letter to the *Houston Chronicle*, the county's largest newspaper:<sup>76</sup>

Although we have made great progress in service to these citizens, we are still unable to change the fundamental fact that has forced local law enforcement into the role of de facto mental health professionals: People simply cannot get the treatment and services they need to lead stable, healthy lives.

Texas ranks 49th in the nation in per capita spending on mental health services. Only 25 percent of children and 18 percent of adults with severe mental illness and in need of services from the public mental health system in Harris County are able to receive them. Now, Texas lawmakers are looking to cut funding to the already overburdened public mental health system by \$134 million for 2012–13.<sup>77</sup>

....

... [M]any individuals with untreated mental illness who lack access to care end up cycling through the criminal justice system at a cost that is significantly higher to taxpayers than that of providing ongoing, community-based treatment and services.

A prime example of cost shifting has occurred within the Harris County Jail, now the largest mental health facility in Texas. The Harris County Jail treats more individuals with mental health issues on a daily basis than our state's 10 psychiatric hospitals combined. This is especially worrisome given that the United States Department of Justice reports that it costs 60 percent more to incarcerate inmates with serious mental illnesses than it costs to house typical inmates.<sup>78</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> Press Release, Office of Sheriff Adrian Garcia, State's Largest County Jail Passes Inspection (Apr. 27, 2010), available at <http://www.adriangarcia.com/2010/04/27/states-largest-county-jail-passes-inspection/>

<sup>76</sup> Adrian Garcia & Charles McClelland, Editorial, *Harris County Sheriff and Houston Police Chief Speak Out*, HOUS. CHRON. (Jan. 2, 2011), <http://www.chron.com/disp/story.mpl/editorial/outlook/7362044.html>; see also Brandi Grissom, *Sheriffs Worry Over Proposed Mental Health Cuts*, TEX. TRIB. (Dec. 16, 2010), <http://www.texastribune.org/texas-state-agencies/department-of-state-health-services/sheriffs-worry-over-proposed-mental-health-cuts/> (reporting that sheriffs across Texas are increasingly frustrated and worried about ever-decreasing amount of bed space at state mental hospitals).

<sup>77</sup> Garcia & McClelland, *supra* note 76.

<sup>78</sup> *Id.*

Yet in June 2011, the 82nd Texas State Legislature passed and Governor Perry signed the state's new biennium budget.<sup>79</sup> Texas's department of state health services suffered a 2% reduction in adult mental health services from the prior biennium.<sup>80</sup>

#### *D. Harris County's Response to Overcrowding*

In 2001, the 77th Texas Legislature adopted the Fair Defense Act (FDA) to overhaul the state's indigent defense system.<sup>81</sup> Following the passage of FDA, Harris County began implementing a number of the Justice Management Institute's 2005 recommendations for addressing overcrowded jails.<sup>82</sup> The primary focus of the Fair Defense Act, as well as the institute's work, was to improve the system of indigent defense in Texas, particularly as it related to the quality of assistance of counsel.<sup>83</sup> By improving the quality of legal assistance provided to indigent defendants, it was believed that, among other things, jail overcrowding would be reduced.<sup>84</sup> In 2010, more than nine years after the passage of the Fair Defense Act, Harris County established a public defender office, but only on a trial basis.<sup>85</sup> One of the primary purposes for establishing

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<sup>79</sup> See *Texas State Budget*, SUNSHINE REV., [http://sunshinereview.org/index.php/Texas\\_state\\_budget](http://sunshinereview.org/index.php/Texas_state_budget) (last visited Jan. 9, 2012); see also *Texas's 82nd Legislative Session*, OFFICE OF THE GOVERNOR, <http://www.governor.state.tx.us/news/bills/> (last visited Jan. 9, 2012). The battle over the Texas budget was a contentious one with Texas facing a \$27 billion budget deficit. Overall, the 2012–13 budget cut \$4–6 billion for Texas schools, cut more than \$4 billion in Medicaid, while retaining more than \$7 billion in tax breaks including the natural gas tax loophole and the early filer tax break for retailers. See Wick Allison, *The Welfare Queens of Texas*, D MAG., Mar. 23, 2011, [http://www.dmagazine.com/Home/D\\_Magazine/2011/April/Wick\\_Allison\\_on\\_the\\_Welfare\\_Queens\\_of\\_Texas.aspx](http://www.dmagazine.com/Home/D_Magazine/2011/April/Wick_Allison_on_the_Welfare_Queens_of_Texas.aspx).

<sup>80</sup> *Harris County Healthcare Alliance Report on Legislation of Interest: 82nd Texas Legislative Session*, DOCTORS FOR CHANGE, <http://www.doctorsforchange.org/documents/82ndLegislatureSummary.pdf> (last visited Jan. 9, 2012).

<sup>81</sup> Texas Fair Defense Act, TEX. GOV'T CODE ANN. § 71 (West 2001). The Texas Fair Defense Act became law two years after Texas State Senator Rodney Ellis first proposed it in 1999. Then Governor George W. Bush vetoed the act, but Ellis persevered. See Jeremy Warren, *List of Accomplishments for 76th Legislative Session*, THE ST. OF TEX. (June 18, 1999), <http://www.senate.state.tx.us/75r/senate/members/dist13/pr99/p061899a.htm>. Senator Ellis proposed the bill again in the 77th legislature as SB 7, which was enacted in 2001. See Kellie Dworaczyk, *SB 7 Update: How Counties Provide Indigent Defense*, HOUSE RES. ORG. (Oct. 16, 2002), <http://www.courts.state.tx.us/tfid/pdf/HRO%2010-16-02%20report%20on%20SB7.pdf>.

<sup>82</sup> Mahoney et al., *supra* note 72; see also Douglas Colbert, *Thirty-five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 1–2 (1998) (writing that “lawyers’ early intervention would significantly reduce court congestion and overcrowded jails, thus lowering the public expense for maintaining an unnecessarily large pretrial jail population”).

<sup>83</sup> See Catherine Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 600, 623 (2001). Burnett et al. suggest that the Fair Defense Act was designed in part to ensure effective assistance of counsel for indigent defendants. They also state that nearly half of the judges surveyed reported that their peers appointed counsel because they had a reputation for moving cases without regard to the quality of the defense provided. See also Rodney Ellis et al., *Gideon's Promise: The Texas Story*, CHAMPION, Apr. 2003, at 61.

<sup>84</sup> See Burnett et al., *supra* note 83.

<sup>85</sup> See Chris Moran, *Harris County OKs Hybrid Public Defender Office*, HOUS. CHRON., Apr. 28, 2010, <http://www.chron.com/dispatch/story.mpl/metropolitan/6978673> (reporting that the Harris County Commissioners Court voted to start a public defender office on an experimental basis).

the office was to “relieve [the county’s] jail overcrowding by shortening the time inmates wait for trials.”<sup>86</sup>

In 2007, the Texas legislature passed House Bill 2391 (HB 2391) to provide local policing agencies an additional way to reduce jail overcrowding.<sup>87</sup> This law gave police officers discretion to arrest a suspect—the current practice—or to write citations, which are much like traffic tickets, to individuals suspected of various minor crimes, including criminal mischief, graffiti, theft by check, theft of service, bringing contraband into a correctional facility, driving with an invalid license, and possession of less than four ounces of marijuana.<sup>88</sup> Though it may seem a “soft on crime” measure, the bill earned overwhelming approval of the legislature—only two negative votes in both houses—in part because of support from the Sheriffs’ Association of Texas.<sup>89</sup>

Prior to HB 2391’s passage, the Sheriffs’ Association, together with the Combined Law Enforcement Association of Texas, issued a report that posited that the measure would save local taxpayers \$60 per offender per night on jailing offenders before they post bond.<sup>90</sup> The police associations also advocated for passage of the bill because it would result in more officers on the street who would have otherwise spent hours booking each suspect into county jail.<sup>91</sup> In the years since HB 2391’s passage, communities across the state have seen its positive effects. Texas counties have taken advantage of this law and have seen reduced incarceration costs and jail populations as a result.<sup>92</sup> However, in spite of the measure’s success in implementing counties and its strong support among state policy makers, the City of Houston and Harris County have

<sup>86</sup> *Id.* (quoting Precinct 1 Commissioner El Franco Lee). Commissioner Lee has served as chair of the Harris County Criminal Justice Coordinating Council since 2009. *See Harris County’s Public Defender’s Office*, HARRIS COUNTY PRECINCT ONE, [http://www.co.harris.tx.us/comm\\_lee/public\\_defender.htm](http://www.co.harris.tx.us/comm_lee/public_defender.htm) (last visited Jan. 9, 2012).

<sup>87</sup> TEX. CODE CRIM. PROC. ANN. art. 14.06 (West 2011).

<sup>88</sup> *Id.* (stating that for mischief, graffiti, or theft crimes, the statute only applies if there is less than \$500 of property damage or theft).

<sup>89</sup> H.B. 2391, 80th Leg., Reg. Sess. (Tex. 2007). The vote carried in the House 132 Yeas, 0 Nay, 2 Present. H.J. No. 80-64, at 2582 (Tex. 2007), *available at* <http://www.journals.house.state.tx.us/hjrnl/80r/pdf/80RDAY64FINAL.PDF#page=12>. The Senate voted 29 Yeas and 1 Nay. S. J. No. 80-65, at 2283 (Tex 2007), *available at* <http://www.journals.senate.state.tx.us/sjrnl/80r/pdf/80RSJ05-18-F.PDF#page=15>).

<sup>90</sup> *See* Marc Levin, Center for Effective Justice, *Ten Tall Tales About Texas Criminal Justice Reforms*, POL’Y PERSP., 2 (Mar. 2008), <http://www.texaspolicy.com/pdf/2008-03-PP07-10tales-ml.pdf>. The Center for Effective Justice at the Texas Public Policy Foundation is a conservative organization that lobbied for HB 2391. Levin said “the idea was to free up more county jail space and law officers’ time for violent offenders and sex offenders; . . . [w]e looked at how to save counties money. We always came back to the same answer: Take the low-level offenders out of the county jail.” Bud Kennedy, *A Thrifty Move: Lightening Up a Bit on Those Who Light Up*, FORT WORTH STAR-TELEGRAM, June 22, 2007, *available at* <http://www.texaspolicy.com/pdf/2007-06-22-FWST-ML.pdf>.

<sup>91</sup> Levin, *supra* note 90 (“In short, this bill recognized that since local taxpayers bear the mounting cost of county jails, local governments should have the tools to prioritize their limited county jail capacity to focus on those offenders who pose the *greatest* danger.”); *see also* H. RES. ORG., *Bill Analysis*, <http://www.hro.house.state.tx.us/PDF/ba80R/HB2391.PDF> (last visited Jan. 21, 2012).

<sup>92</sup> *See* Ana Yanez-Correa, *Costly Confinement & Sensible Solutions: Jail Overcrowding in Texas*, TEX. CRIM. JUST. COALITION PUB. POL’Y CENTER, 12, n.51 (2010), [http://www.criminaljusticecoalition.org/files/userfiles/Jail\\_Overcrowding\\_Report\\_FOR\\_WEB.pdf](http://www.criminaljusticecoalition.org/files/userfiles/Jail_Overcrowding_Report_FOR_WEB.pdf).

not fully adopted it, instead continuing to arrest and jail offenders for these minor offenses.<sup>93</sup>

Harris County Sheriff Adrian Garcia and Harris County District Attorney Patricia Lykos agreed to issue citations in lieu of arrest as provided by the law on a trial basis and only for certain detainees.<sup>94</sup> The City of Houston police, the police agency that makes by far the most arrests in Harris County, has so far refused to implement its discretion that was granted with HB 2391, creating a significant hurdle to reducing overcrowded county jails.<sup>95</sup> The city's failure to implement the law may constitute an abuse of its discretion in light of the law's substantial benefits contrasted against its minor detriments.

If the City of Houston and Harris County would implement HB 2391, there could be a significant impact on jail overcrowding. In April 2011, about 22% of the misdemeanor cases in Harris County were citation-eligible, about 60% of which were attributable to Houston.<sup>96</sup> Additionally, in the Texas counties where the policy has been implemented, law enforcement has reported savings in incarceration costs, an enhancement of its ability to fight crime allowing it to refocus limited resources and personnel in more effective ways, increased public safety, and reduction in the number of victims.<sup>97</sup>

Moreover, if Houston would adopt the policy of ticketing minor offenses covered by the bill in lieu of arresting and jailing the suspected offenders, it should realize a similar impact on the jail population and savings to the public. There is also evidence that there would not be a rise in crime. For example, Harris County pretrial services findings demonstrate that 65.2% of persons released on a bond pending trial required no further incarceration.<sup>98</sup> Additionally, about 35% of detainees were assessed as posing a low or low-moderate risk for pretrial misconduct.<sup>99</sup> Evidence also shows that less than 4% of persons released on personal recognizance and less than 5% of those released after

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<sup>93</sup> See *Red White and Blue: Safety vs. Budgets* (PBS television broadcast May 13, 2011), available at <http://www.houstonpbs.org/shows/localproductions/rwb/safety-vs-budgets-1.html> (including an interview with Houston Police Chief Charles McClelland where the chief suggests that he would need to get the approval of the district attorney before he could implement the policy). However, in an article in the *Texas Tribune*, the county suggested that their implementation of the citations law would be ineffective without the participation of the Houston Police Department. Grissom, *supra* note 16.

<sup>94</sup> TEX. CODE CRIM. PROC. ANN. art. 14.06 (West 2011); see also *Overcrowding Solutions Sought as Harris County Jail's Budget Tightens* (KHOU11 television broadcast Mar. 10, 2010), available at <http://www.khou.com/news/local/-Overcrowding-solutions-sought-at-Harris-County-Jail-as-budget-tightens-87189187.html>; PLANNING TEAM REPORT, HARRIS COUNTY FELONY MENTAL HEALTH COURT (Oct. 2009), <http://www.justex.net/JustexDocuments/0/Mental%20Health/mhctc.pdf> (stating that in 2009, Harris County approved the creation of a felony mental health court). In 2010, Harris County authorized the creation of a Harris County public defender's office. Moran, *supra* note 85.

<sup>95</sup> See also 2010 ANNUAL REPORT, HARRIS COUNTY PRETRIAL SERVICES, 8 (2011), <http://www.hctx.net/CmpDocuments/59/Annual%20Reports/2010Annual%20Report.pdf> (showing that in calendar year 2010, Houston police were responsible for 54.2% of all misdemeanor and 65.8% of all felony arrests in the county). See generally *Overcrowding Solutions Sought*, *supra* note 94.

<sup>96</sup> Statistics retrieved from Case Master Files, Harris County Justice Information Mgmt. Systems (May 2011) (on file with author). See also Chris Moran, *Harris County Jail Open to All Comers Again*, HOUS. CHRON. (April 20, 2010), <http://www.chron.com/news/houston-texas/article/Harris-County-Jail-open-to-all-comers-again-1697368.php>; Moran, *supra* note 85.

<sup>97</sup> *Incarceration Rate Report*, *supra* note 58.

<sup>98</sup> Bane et al., *supra* note 62, at 3.

<sup>99</sup> *Id.* at 2.



making bail (financial bond) commit crimes while released.<sup>100</sup> Furthermore, Harris County records show that the failure to appear rates for persons released on their own recognizance is less than 6% and for those released after posting bail, less than 4%.<sup>101</sup> While any number may be too high for a civilized society, it is important to note that 69% of the crimes committed while on release are only misdemeanor offenses.<sup>102</sup>

According to the Harris County Office of Criminal Justice Coordination, in February 2011, Harris County jails housed more than 800 persons charged with pretrial misdemeanors and more than 600 for pretrial offenses categorized as “other.”<sup>103</sup> They detained more than 1200 persons for Class C misdemeanors only.<sup>104</sup> The per-person per-day cost of detaining them ranges from a low of \$70 up to \$280 per day.<sup>105</sup> Reductions in the numbers of incarcerated persons would result in significant taxpayer savings estimated to be between \$4.6 and \$19.2 million per year.<sup>106</sup> Moreover, significant ancillary costs to the taxpayer and the community at large, including economic loss from losing work, would be saved.<sup>107</sup> In addition to economic reasons for changing policy, there are constitutional bases supporting change.

## II. CONSTITUTIONAL ISSUES

Texas, like many other states, addresses bail in its constitution. The Texas constitution provides that “[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.”<sup>108</sup> The Texas bail laws are very similar to federal bail statutes and meet the mandates of the United States Constitution.<sup>109</sup>

<sup>100</sup> 2010 ANNUAL REPORT, *supra* note 95, at 20; Petteruti & Walsh, *supra* note 37.

<sup>101</sup> 2010 ANNUAL REPORT, *supra* note 95, at 19.

<sup>102</sup> *Id.* at 20. Referencing Chart D1, divide 142 new misdemeanors by 206 new misdemeanors and felonies.

<sup>103</sup> Daily Average Jail Population, *supra* note 13.

<sup>104</sup> *Id.*

<sup>105</sup> Daily housing costs alone range between \$42 and \$45, but when one-time events like bookings, release, medical screening, inmate classification, and pretrial interviews are amortized, the average cost per day is minimally \$70 to \$75. Bernstein Interview, *supra* note 53. The costs climb significantly higher for inmates that require additional attention, particularly mental health care. Harris County Daily Jail Count, *supra* note 52.

<sup>106</sup> See PowerPoint, Dr. Johnnie Williams, *Citation Eligible Savings* (Aug. 2011) (on file with authors) (prepared for the Harris County Coalition for Criminal and Juvenile Justice).

<sup>107</sup> See Petteruti & Walsh, *supra* note 37, at 3–4.

<sup>108</sup> TEX. CONST. art. I, §§ 11–19.

<sup>109</sup> TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2011). Texas provides for fixing the amount of bail using five basic considerations:

1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
2. The power to require bail is not to be so used as to make it an instrument of oppression.
3. The nature of the offense and the circumstances under which it was committed are to be considered.
4. The ability to make bail is to be regarded, and proof may be taken upon this point.
5. The future safety of a victim of the alleged offense and the community shall be considered.

*Id.*

### A. Bail Reform

The Eighth Amendment provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>110</sup> U.S. courts have long held that the primary purpose for bail is to ensure the defendant's appearance at trial.<sup>111</sup> On the other hand, courts, in interpreting the Eighth Amendment, have held that it does not confer a right to bail, but only mandates that if bail is granted that it is not to be excessive.<sup>112</sup> While determinations whether to grant bail and the assessment of bail are discretionary, unconstitutional discriminatory practices are not permitted.<sup>113</sup>

The controversy surrounding bail is not new and there have been many attempts to address the bail issue through legislation and judicial decisions. The Bail Reform Act specifically applies to federal defendants. Texas law reflects the substance of the Bail Reform Act and state court opinions interpreting Texas law have been very similar to that of federal court opinions.<sup>114</sup> To contextualize bail in Texas, it is instructive to examine federal bail policies.

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<sup>110</sup> U.S. CONST. amend. VIII.

<sup>111</sup> Ariana Lindermayer, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 *FORDHAM L. REV.* 267, 273 (2009).

<sup>112</sup> See, e.g., *United States v. Stanford*, 722 F. Supp. 2d 803, 813 (S.D. Tex. 2010) (citing *United States v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988); *United States v. Acevedo-Ramos*, 755 F.2d 203, 206 (1st Cir. 1985)).

<sup>113</sup> See *United States ex rel. Diller v. Greco*, 426 F. Supp 375, 378–79 (S.D.N.Y. 1977).

<sup>114</sup> See *Queen v. State*, 842 S.W.2d 708, 711–12 (Tex. App. 1st 1992) (holding that the trial court could not refuse to revoke an appellate bond because the defendant committed a misdemeanor while on bond even on a finding by the court that she was “very concerned about public safety,” explaining that Article I, § 11 of the Texas constitution provides all prisoners *a right to bail* pending trial, and further holding that a denial of bail is authorized only when one of the exceptions embodied in article I, § 11a applies.) (emphasis added). Also note, TEX. CONST. art. I, § 11a, which states:

Any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefore, (2) accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted, (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony, or (4) accused of a violent or sexual offense committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, after a hearing, and upon evidence substantially showing the guilt of the accused of the offense in (1) or (3) above, of the offense committed while on bail in (2) above, or of the offense in (4) above committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, may be denied bail pending trial, by a district judge in this State, if said order denying bail pending trial is issued within seven calendar days subsequent to the time of incarceration of the accused; provided, however, that if the accused is not accorded a trial upon the accusation under (1) or (3) above, the accusation and indictment used under (2) above, or the accusation or indictment used under (4) above within sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder, and said appeal shall be given preference by the Court of Criminal Appeals.

Congress passed The Bail Reform Act of 1966, which required federal courts to release any defendant charged with a non-capital crime on his or her recognizance or an unsecured appearance bond, unless the court determined that the defendant would fail to appear for trial under minimal supervision.<sup>115</sup> This legislation appeared to address one of the central problems with denying bail: the increased likelihood that defendants plead guilty, even when they are not, in order to resolve their cases quickly so they can get out of jail. Defendants who remain in pretrial custody are not only statistically more likely to plead guilty than defendants who are released pending trial; they are also handicapped in assisting their attorneys in locating witnesses and evidence, thus lowering their chances of acquittal.<sup>116</sup> The progressive provisions of the 1966 Act, which were designed to encourage greater numbers of pretrial releases, eventually gave way to increasing concerns about dangerousness.<sup>117</sup>

Congress passed the Bail Reform Act of 1984 primarily to address safety concerns in the 1966 Act that it replaced. The Bail Reform Act of 1984 (BRA) provided that the judicial officer *shall* order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . *unless* the judicial officer determines that such release will not reasonably assure the appearance of the person as required or *will* endanger the safety of any other person or the community.<sup>118</sup> The 1984 Act expanded the scope of discretion that the court had in determining whether a person would receive bail. However, the discretion was not boundless. According to the BRA, the judicial officer would be required to attach the denial of bond to requiring appearance or to safety.<sup>119</sup>

To memorialize the reasons for a court's decision to deny bail, the BRA provides that the judicial officer may seek a detention hearing in a case that involves "a serious risk that such person will flee" or "a serious risk that such person will obstruct . . . justice" or attempt to intimidate witnesses or jurors.<sup>120</sup> The Act also permits the government to move for a detention hearing based on the nature of the offense charged, specifically in cases involving a crime of violence or specified act of terrorism, a capital offense, a drug offense carrying a maximum sentence of ten years or more, any felony, if the person is a qualifying repeat offender, or an offense that is not otherwise a

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*See also Ex parte* Beard, 92 S.W.3d 566, 568 (Tex. App. 2002) (holding that a defendant is entitled to reasonable bail, meaning that the amount of bail is not excessive where there was no exception under article I, § 11 of the Texas constitution).

<sup>115</sup> Michael R. Handler, Comment, *A Law of Passion, Not of Principle, Nor Even Purpose: A Call to Repeal or Revise the Adam Walsh Act Amendments to the Bail Reform Act of 1984*, 101 J. CRIM. L. & CRIMINOLOGY 279, 284 (2011).

<sup>116</sup> Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 124–25 (2005).

<sup>117</sup> Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1455–56 (2009).

<sup>118</sup> Bail Reform Act of 1984, 18 U.S.C.A. § 3142(b) (West 2011).

<sup>119</sup> *Id.*; *see also* United States v. Barnett, 986 F. Supp. 385, 393 (W.D. La. 1997).

<sup>120</sup> Douglas J. Klein, *The Pretrial Detention "Crisis": The Cause and the Cure*, 52 WASH. U. J. URB. & CONTEMP. L. 281, 284 (1997).

crime of violence but involved a minor victim or the use of a firearm or a “deadly weapon.”<sup>121</sup>

The BRA also allows for preventive detention for the sake of the community’s safety.<sup>122</sup> But an assessment of dangerousness is prone, in any case, to erroneous prediction and abuse in that it relates to factors that have yet to be proven.<sup>123</sup> Punishment should be based on conviction.<sup>124</sup> A person deserves punishment for a past offense, but should not be punished for perceived dangerousness or for a future offense.<sup>125</sup> Otherwise, pretrial detention would serve to punish a person for a crime for which he or she has not been found guilty, as well as for a crime not yet committed, which would certainly be cruel and unusual.<sup>126</sup>

### B. *United States v. Salerno*

The constitutionality of the BRA’s expanded scope of judicial discretion was challenged to the Supreme Court, in the landmark *United States v. Salerno* decision.<sup>127</sup> In *Salerno*, two men charged with multiple RICO violations challenged their pretrial detention under the BRA and the Constitution.<sup>128</sup> The BRA allowed a federal court to detain an indicted person without bail before trial if it found that no release conditions would protect the safety of the community.<sup>129</sup> *Salerno* presented two constitutional issues to the Court. First, the Court addressed whether denying defendants bail on dangerousness violated the Eighth Amendment’s right to bail. The second issue was whether pretrial detention violated the Due Process Clause of the Fifth Amendment, particularly in the face of the basic juridical tenet that a defendant is innocent until proved guilty.<sup>130</sup> The defendants’ burden would be great as Chief Justice Rehnquist acknowledged when he stated that a facial challenge to a legislative act is the most

<sup>121</sup> Matthew S. Miner, *Hearing the Danger of an Armed Felon—Allowing for a Detention Hearing Under the Bail Reform Act for Those Who Unlawfully Possess Firearms*, 37 U. MICH. J.L. REFORM 705, 710–11 (2004).

<sup>122</sup> Bail Reform Act of 1984, 18 U.S.C.A. §§ 3141–3156 (West 2011) replaced the Bail Reform Act of 1964, which did not allow judges in non-capital cases to consider the danger a defendant posed to the community. Section 3142(e) of the 1984 Act states that if after a hearing, the court finds that it cannot set conditions of release sufficient to reasonably assure the safety of any other individual or the community, the court should deny the defendant bail or any other form of pretrial release.

<sup>123</sup> Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 910 (2009).

<sup>124</sup> *Id.* at 915.

<sup>125</sup> *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (establishing the standard for determining the constitutionality of confinement conditions for pretrial detainees, stating that under the Due Process Clause a pretrial detainee cannot be deprived of his liberty without due process of law so that he may not be punished because a finding of guilt must be a prerequisite to punishment).

<sup>126</sup> It is a basic tenet of justice that an innocent person should not be punished. *See, e.g., Cool v. United States*, 409 U.S. 100, 105 (1972) (ruling that the presumption of innocence is constitutionally rooted); *see also Schlup v. Delo*, 513 U.S. 298, 324–25 (1995).

<sup>127</sup> *United States v. Salerno*, 481 U.S. 739 (1987).

<sup>128</sup> *Id.*

<sup>129</sup> Nihal S. Patel, Comment, *Weighty Considerations: Facial Challenges and the Right to Vote*, 104 NW. U. L. REV. 741, 750 (2010).

<sup>130</sup> *Salerno*, 481 U.S. at 747–52, 756.

difficult challenge to mount successfully, because the challenger must establish that no set of circumstances exists under which the act would be valid.<sup>131</sup>

### 1. Right to Bail

As to the first issue, the Court found that “the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.”<sup>132</sup> The Court held that the BRA met the constitutional requirements of the Eighth Amendment, stating “when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, the Eighth Amendment does not require release on bail.”<sup>133</sup> The Court stated further that “the right to bail . . . in the Eighth Amendment is not absolute” and rejected “the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests [besides safeguarding the judicial process] through regulation of pretrial release.”<sup>134</sup> Moreover, the Rehnquist majority concluded that “[t]he only arguable substantive limitation of the Bail Clause [was] that the Government's proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.”<sup>135</sup> The Supreme Court’s decision overturned the Second Circuit’s declaration that the BRA was unconstitutional, thereby supporting a court’s authority to detain a person pre-trial without bail in the interest of preserving community safety.<sup>136</sup>

One of the effects of *Salerno* was to provide federal and state courts, like those in Texas, that have followed its direction, such discretion in issuing bail which could be easily abused and applied in an impermissible discriminatory manner even if unintentional. *Salerno* gave life to the use of a long list of factors to aid a court in determining how to use its discretion to decide whether to grant bail. For example, courts could base their decision on defendants' personal attributes, such as their “character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, [and] history relating to drug or alcohol abuse,” along with their “history and characteristics” generally.<sup>137</sup> This list can lead to discriminatory practices, based on finances and race, among other prohibited forms of discrimination. Texas law similarly reflects these factors in determining the sufficiency of bail.<sup>138</sup>

<sup>131</sup> Jill Hamers, *Reeling in the Outlier: Gonzales v. Carhart and the End of Facial Challenges to Abortion Statutes*, 89 B.U. L. REV. 1069, 1075 (2009).

<sup>132</sup> Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85, 130 (2011).

<sup>133</sup> *Salerno*, 481 U.S. at 755.

<sup>134</sup> *Id.*

<sup>135</sup> Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 146 (2009) (quoting *Salerno*, 481 U.S. at 754).

<sup>136</sup> *Salerno*, U.S. 481 at 740; 18 U.S.C.A. § 3142 (2008) (describing the conditions of release, prescribing the process for challenging qualification for release under federal law); *see also* TEX. CODE CRIM. PROC. ANN. art.17.15 (West 2011) (regarding fixing bail in Texas).

<sup>137</sup> Wiseman, *supra* note 135, at 142.

<sup>138</sup> *See, e.g.,* Montalvo v. State, 315 S.W.3d 588, 593 (Tex. App. 1st 2010) (holding “the primary purpose for setting bail is to secure the presence of the defendant in court at his trial . . . courts should also consider the defendant’s work record, family ties, residency, criminal record, conformity with previous conditions and aggravating factors involved in the offense.”).

Texas courts have generally held that there is no precise standard for reviewing a court's assessment of bail. Instead, a court's determination of the amount of bail must rest on certain guidelines promulgated by the laws of Texas.<sup>139</sup> Factors that a court must consider in setting bail are:

- (1) that the amount of bail be sufficiently high to give reasonable assurance that a criminal defendant will appear at trial and comply with all court orders and conditions of the bond;
- (2) that the amount of bail not be used as an instrument of oppression;
- (3) the nature of the offense and the circumstances of its commission;
- (4) the ability to make bail;
- (5) the future safety of a victim of the alleged offense and the community.<sup>140</sup>

Texas judges are also permitted to consider: (1) the length of the sentence; (2) the nature of the offense; (3) the defendant's work record, family ties, and length of residency; (4) a prior criminal record; (5) conformity with previous bond conditions; (6) other outstanding bonds; and (7) aggravating factors involved in the offense.<sup>141</sup> While the Texas statute does not prioritize the factors that a court should consider, at least one judicial decision has indicated that the two primary factors that a trial court must consider in setting bail are the length of sentence and the nature of offense.<sup>142</sup> This seems contrary to the state constitution, which states that securing the defendant's appearance at subsequent hearings and trial should be the most important factor in determining bail.<sup>143</sup>

## 2. Due Process

The *Salerno* Court also considered defendants' claim that their pretrial detention violated the Due Process Clauses of the Fifth and Fourteenth Amendments. Generally, the Constitution prohibits all "punishment" of pretrial detainees—individuals that are held by the government, but not found guilty of any crime.<sup>144</sup> Freedom from imprisonment and government custody is at the "heart of the liberty that [due process] protects."<sup>145</sup> Specifically, due process prohibits the government from taking a person's liberty or property without meeting certain procedural and substantive prerequisites.

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<sup>139</sup> TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2011); see also *Ex parte Bell*, 784 S.W.2d 577, 578–79 (Tex. App. 1st 1990).

<sup>140</sup> *Golden v. State*, 288 S.W.3d 516, 518 (Tex. App. 1st 2009) (*reh'g overruled* Apr. 3, 2009; *reh'g overruled* May 18, 2009; *petition for discr. rev. ref'd* Aug. 19, 2009).

<sup>141</sup> *Ex parte Anunobi*, 278 S.W.3d 425, 427 (Tex. App. 2008); *Ex parte Cuevas*, 130 S.W.3d 148, 151 (Tex. App. 2003)

<sup>142</sup> *Hughes v. State*, 843 S.W.2d 236, 237 (Tex. App. 14th 1992).

<sup>143</sup> *Queen v. State*, 842 S.W.2d 708, 709 (Tex. App. 1st 1992) (holding that trial court had no authority to deny defendant constitutionally mandated pretrial bail except in extraordinary circumstances).

<sup>144</sup> David C. Gorlin, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 417 (2009).

<sup>145</sup> Brandon L. Phillips, *Questioning the Supremacy of the Supreme Court: Hernandez-Carrera v. Carlson and the Tenth Circuit's Justification for Indefinite Detention Under the Brand X Framework*, 96 IOWA L. REV. 1099, 1107 (2011).

Procedural due process involves the ways that a government may enforce its policies.<sup>146</sup> Substantive due process embraces fundamental personal liberty under the United States Constitution.<sup>147</sup> Substantive due process claims often include facts that present questions of arbitrary or capricious conduct, governmental conduct premised upon trivial reasons, bad faith or improper motive as well as governmental conduct so extreme that it shocks the conscience.<sup>148</sup> When pretrial detention is used as punishment for a crime not yet proved, it conceivably shocks the prudent conscience.

However, *Salerno* rejected the argument that pretrial detention facially constitutes impermissible punishment before trial.<sup>149</sup> The Court further rejected the claim that pretrial detention violated substantive due process.<sup>150</sup> The Court explained, “the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.”<sup>151</sup>

Justice Marshall strongly dissented in *Salerno*, opining that a defendant could not be incarcerated before being convicted, because, in the absence of a conviction, he was innocent.<sup>152</sup> He posited that it was irrelevant that the government provided clear and convincing proof that the defendant would be dangerous in the immediate future.<sup>153</sup>

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<sup>146</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring a court to consider “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

<sup>147</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3092–94 (2010).

<sup>148</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998).

<sup>149</sup> In *Salerno*, the court concluded that while pretrial detention is impermissible if the action is punitive, it is permissible if it is regulatory. Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on “whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].” 481 U.S. 739, 747 (1987) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)); see also Michael L. Corrado, *The Abolition of Punishment*, 35 SUFFOLK U. L. REV. 257, 268–69 (2001).

<sup>150</sup> *Salerno*, 481 U.S. at 739; Handler, *supra* note 115, at 285.

<sup>151</sup> *Salerno*, 481 U.S. at 746.

<sup>152</sup> *Id.* at 753–54; see also *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (stating that the presumption of innocence would lose meaning if the right to bail before trial is not preserved); *In re Extradition of Nacif-Borge*, 829 F.Supp. 1210, 1214 (D. Nev. 1993) (noting that the presumption of innocence “guarantees that defendants pending trial are entitled to a concomitant presumption in favor of bail in this country”); *Augustus v. Roemer*, 771 F.Supp. 1458, 1464 (E.D. La. 1991) (noting that the presumption of innocence represents “a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community”); *People v. Pena*, 609 N.Y.S.2d 827 (1994) (stating that the presumption of innocence is a fundamental safeguard); *Stern v. State*, 827 P.2d 442, 448 (Alaska Ct. App. 1992) (stating that the presumption of innocence should not be relaxed by having the accused appear before the jury with the “badges” of custody); Eric Sandberg-Zakian, *Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons Under the International Emergency Economic Powers Act*, 48 HARV. J. LEGIS. 95, 125 (2011); William Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 338 n.43 (1995) (citing *Hunt v. Roth*, 648 F.2d 1148, 1162 (8th Cir. 1981)) (noting that “[r]elease upon reasonable conditions of bail thus serves to preserve the presumption of innocence by preventing infliction of punishment before trial”).

<sup>153</sup> *Salerno*, 481 U.S. at 761–63.

Justice Marshall characterized post-*Salerno* pretrial detention as “consistent with the usages of tyranny and the excesses of . . . the police state.”<sup>154</sup>

When it comes to bail, the presumption of innocence should prevail over any analysis that favors guilt, including the likelihood that the person will do harm to the community.<sup>155</sup> To do otherwise either presumes guilt or seeks to deny a person release because of what the court believes he or she may do in the future. Justice Marshall’s analysis comports with the Eighth Amendment’s admonition that excessive bail shall not be employed. Assuming that the Eighth Amendment infers a preference for bail (numerous cases have held that it does not confer a *right* to bail), one should believe with prudence that there are three questions before the court, in exercising its discretion to deny bail: (1) whether there are circumstances that would defeat the preference for bail; (2) whether those circumstances are constitutionally permissible; and (3) how much bail should be assessed.<sup>156</sup>

The constitutional analysis is different depending on whether the case involves a convicted prisoner or a pretrial detainee. The constitutional rights of convicted prisoners are protected by the Eighth Amendment while the constitutional rights of pretrial detainees are protected under the Fourteenth Amendment’s due process requirement.<sup>157</sup> The applicable standard to determine whether the pretrial detainee’s constitutional rights are violated is whether the act or condition constitutes punishment.<sup>158</sup> Because pretrial detainees have not been convicted of the crime for which they are charged, they have a due process right to not be punished for that crime.<sup>159</sup> Thus, courts must view the confinement of a pretrial detainee to determine whether the condition complained of is imposed for the purpose of punishment.<sup>160</sup>

Courts may find a *punitive purpose* upon the direct proof of an expressed intent by detention facility officers to punish the pretrial detainee for the crime with which the detainee has been charged but not yet convicted.<sup>161</sup> In addition, the courts may *infer* a punitive purpose if the challenged condition or restriction is not reasonably related to a legitimate governmental objective.<sup>162</sup>

The Fifth Circuit Court of Appeals held that a person who is arrested for a second crime cannot be punished for the commission of the second crime until he is found guilty of the commission of the second crime.<sup>163</sup> The court, in distinguishing pretrial detainees

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<sup>154</sup> *Id.* at 755.

<sup>155</sup> Generally, the notion that the person charged with a crime must be treated as innocent until proven guilty and the significance for release is that innocent people should not be detained. As such, pretrial detention can be defined as the detention of the innocent. *See generally* Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1, 16 n.63 (2010).

<sup>156</sup> Larry Laudan & Ronald J. Allen, *Deadly Dilemmas II: Bail and Crime*, 85 CHI.-KENT L. REV. 23, 28 (2010) (distinguishing the academic position that the presumption of innocence is demanded from the moment of arrest from Supreme Court analyses that stress the inapplicability of the presumption to events that occur before trial).

<sup>157</sup> *Olabisootsho v. City of Hous.*, 185 F.3d 521, 525 (5th Cir. 1999).

<sup>158</sup> *Kitai-Sangero*, *supra* note 123, at 916.

<sup>159</sup> *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

<sup>160</sup> *Id.* at 538.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 539, 561 (stating that “reasonably related” means that the restriction is (1) rationally related to a legitimate governmental purpose, and (2) not excessive in relation to that purpose).

<sup>163</sup> *Hamilton v. Lyons*, 74 F.3d 99, 105 (5th Cir. 1966).



who committed an additional crime while on parole from the pretrial detainees who have been previously convicted of a crime but fully served their sentences, or fully paid their fines, found that the standard established in *Bell v. Wolfish* was applicable in the latter instance.<sup>164</sup> The *Bell* standard prohibits punishing a person for perceived dangerousness or for a future offense.

Texas law traces these standards. In Texas, neither the magistrate nor the court, has unfettered discretion to grant or assess bail.<sup>165</sup> Restricting a citizen's liberty must be made by a neutral and detached magistrate and bail should *not* be used as an instrument of oppression.<sup>166</sup> Like their federal equivalents, Texas courts have rejected trial courts' denial of bail even in the face of concern about the possible effect of pretrial release on public safety, when a supportable alternative was available.<sup>167</sup>

### III. THE HARRIS COUNTY BAIL/BOND SYSTEM

There is statistical reason to believe that Harris County's bail system is unconstitutional.<sup>168</sup> The broad breadth of discretion that judges have makes it easier for them to improperly consider race even in an otherwise race-neutral bail system. For example, a judge in Harris County may determine that a defendant is dangerous simply based on his or her stereotype of what a dangerous offender is, which in some cases might mean simply that the defendant is African-American and male.<sup>169</sup> The specific policies in place in Harris County only complicate the problem.

Harris County courts use a predetermined bail schedule that establishes bond amounts according to a defendant's offense level.<sup>170</sup> Other factors are seldom used, save for those that support incremental increases in the bail amount, such as an increase for each conviction in a defendant's history regardless of how long ago the prior offense had occurred.<sup>171</sup> Neither the predetermined bail schedule nor the fact that the court generally considers factors for the purpose of increasing bail amounts appears to bear any rational

<sup>164</sup> *Id.* at 105 n.6 (referring to *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

<sup>165</sup> TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2011).

<sup>166</sup> *Ex parte Garcia*, 547 S.W.2d 271, 275 (Tex. Crim. App. 1977); *see also Brown v. State*, 11 S.W.3d 501, 503–04 (Tex. App. 14th 2000) (stating that bail should be set high enough to give reasonable assurance that the defendant will appear at trial, but should not operate as an instrument of oppression). Though *Brown* was a drugs case, the application of the standard is not restricted to large amounts of drugs. *See, e.g., Ex parte Proffitt*, 2002 WL 287776 (Tex. App. Feb. 28, 2002) (murder); *Ex parte Jackson*, 2011 WL 166933 (Tex. App. Jan. 13, 2011) (forgery, fraud, organized crime); *Ex parte Brown* 959 S.W.2d 369, 370 (Tex. App. 1998) (murder); *Ex parte Smith*, 2006 WL 1511480 (Tex. App. May 31, 2006) (aggravated sexual assault); *Ex parte Hunt*, 138 S.W.3d 503, 504 (Tex. App. 2004) (capital murder); *Ex parte Scott*, 122 S.W.3d 866, 868 (Tex. App. 2003) (aggravated kidnapping); *Gonzalez v. State*, 996 S.W.2d 350, 351 (Tex. App. 1999) (aggravated robbery); *Ex parte Vasquez*, 558 S.W. 2d 477, 480 (Tex. Crim. App. 1977).

<sup>167</sup> *Queen v. State*, 842 S.W.2d 708, 712 (Tex. App. 1st 1992).

<sup>168</sup> *Bane et al., supra* note 62, at 3.

<sup>169</sup> Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 262 n.62 (2009) (citing Cassia Spohn & David Holleran, *The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders*, 38 CRIMINOLOGY 281 (2000)) (“documenting study that found that race, gender, age, and employment status interact to produce harsher sentences for offenders who are black or Hispanic, male, young, and/or unemployed”).

<sup>170</sup> *Bane et al., supra* note 62.

<sup>171</sup> *Id.* at 1–2.

relation to a legitimate government objective. In fact, basing bail on the detainee's prior conviction directly contravenes the Fifth Circuit Court, which stated that pretrial detainees who have been previously convicted of a crime but fully served their sentences or fully paid their fines are entitled to be treated as detainees who have no prior conviction.<sup>172</sup> Additionally, offenders of different races seem to face different bail standards.<sup>173</sup>

While courts have held that punishment of pretrial detainees is unconstitutional, they have permitted confinement to further a non-punitive governmental goal.<sup>174</sup> It is likely that the system of bail promulgated by the state of Texas and within the Harris County justice systems meets these constitutional mandates and guides regardless of the statistically disparate impact on racial groups. The United States Supreme Court has long held that purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment.<sup>175</sup> Absent such purpose, differential impact of facially neutral laws is subject only to the test of rationality.<sup>176</sup>

In *McCleskey* the United States Supreme Court stated that because discretion is essential to the criminal justice process, a court must demand exceptionally clear proof before it may infer that discretion has been abused.<sup>177</sup> Moreover, *McCleskey* held that statistics alone will not support a cause of action for disparate treatment.<sup>178</sup> In rejecting a regression study that indicated that African-American defendants charged with killing whites were more likely to receive the death penalty than white defendants charged with killing African-Americans,<sup>179</sup> the Court found that while the regression study was valid statistically, one could only conclude that a discrepancy existed that *appeared* to correlate to race.<sup>180</sup>

Yet in his dissent in *McCleskey*, Justice Blackmun argued that cases based on disparate impact should be sparingly employed. He also went on to say, "it is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life."<sup>181</sup> If statistical analyses provide a clear picture of racial imbalance in assessing bail, the court should hear these voices and shift the burden onto the state to show that the impact was not the result of discriminatory intent. This approach provides a fairer approach to analyzing the statistically disparate effect of bail policies in Harris County on racial minorities.

<sup>172</sup> Hamilton v. Lyons, 74 F.3d 99, 105–06 (5th Cir. 1966).

<sup>173</sup> Bane et al., *supra* note 62, at 2.

<sup>174</sup> Antonelli v. Sheahan, 81 F.3d 1422, 1428 (7th Cir. 1996).

<sup>175</sup> Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982).

<sup>176</sup> Washington v. Davis, 426 U.S. 229, 247–48 (1976).

<sup>177</sup> McCleskey v. Kemp, 481 U.S. 279, 297 (1987).

<sup>178</sup> *Id.* Conversely, in the employment discrimination context, courts do consider disparate impact without the prerequisite of showing discriminatory intent. The Civil Rights Act of 1964 prohibits employment practices that adversely impact a protected class without the need to prove intent. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2010); Griggs v Duke Power Co., 401 U.S. 424, 431–32 (1971) (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . absence of discriminatory intent does not redeem employment procedures . . .").

<sup>179</sup> *Id.* at 291 n.7.

<sup>180</sup> *Id.* at 312.

<sup>181</sup> *Id.* at 342–43.

*A. Race in Harris County Jails*

“Men occasionally stumble over the truth, but most of them pick themselves up and hurry off as if nothing ever happened.”—*Sir Winston Churchill*<sup>182</sup>

Notwithstanding the Supreme Court’s rejection of the position that statistical data showing racial correlation was sufficient to prove disparate impact and its dismissal of the value of statistics to support a defendant’s claim for racial bias, Harris County *should* reconsider its policies in light of the significant overrepresentation of African-Americans in its jails. A variety of surprising facts support such review.

First, statistics show that while only 18.9% of the population,<sup>183</sup> African-Americans represent almost 50% of the persons detained in Harris County jails.<sup>184</sup> The racial and ethnic make-up of the county is 40.8% Hispanic or Latino, 33% non-Hispanic white, and 18.9% non-Hispanic African-Americans.<sup>185</sup> Yet the Harris County jail population is 49.2% African-American, 48.84% white (which includes Hispanics), and 1.24% “other.”<sup>186</sup> There is a severe overrepresentation of African-Americans in the county jails, which suggests a need for more study to determine whether there is a constitutionally impermissible basis for these numbers.<sup>187</sup>

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<sup>182</sup> GLENN VAN EKEREN, *WORDS FOR ALL OCCASIONS* 213 (1988).

<sup>183</sup> See *Harris County, Texas QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48201.html> (last visited Jan. 9, 2012).

<sup>184</sup> Statistics from Harris Cnty. Att’y’s Off. on Jail Population (Apr. 2011) (on file with authors) [hereinafter Harris Cnty. Att’y’s Off. Statistics]. The county reports that it keeps race numbers by black and white with Hispanic counted as white.

<sup>185</sup> Press Release, U.S. Census Bureau, U.S. Census Bureau Delivers Texas’s 2010 Census Population Totals, Including First Look at Race and Hispanic Origin Data for Legislative Redistricting (Feb. 17, 2011), available at <http://2010.census.gov/news/releases/operations/cb11-cn37.html> (linking to tables reporting that Harris County also has 0.7% American Indians and Alaska Natives, 6.1% Asians, 0.1% Native Hawaiian and Other Pacific Islanders, and 0.2% Non-Hispanics reporting some other race).

<sup>186</sup> Harris Cnty. Att’y’s Off. Statistics, *supra* note 184.

<sup>187</sup> Shawn Bushway & Jonah Gelbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* 1 (Feb 14, 2011) (unpublished manuscript), available at <http://www.econ.yale.edu/seminars/labor/lap11/gelbach-110218.pdf> (stating that “[b]lack defendants are assigned systematically greater bail levels than whites accused of similar offenses and, partly as a result, have systematically lower probabilities of pre-trial release”). Bushway and Gelbach’s findings also “suggest that judges set bail as if they value blacks’ lost freedom from a typical pre-trial jail stay by thousands of dollars less than they value whites’ lost freedom.” *Id.*; see also *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 754 (5th Cir. 1989) (allowing a case to proceed under Title VI through a disparate impact analysis); *NAACP v. Med. Ctr., Inc.*, 657 F.2d 1322, 1324 (3d Cir. 1981) (“disparate impacts of a neutral policy may be adequate to establish discrimination under Title VI . . .”); *GI Forum v. Tex. Educ. Agency*, 87 F.Supp.2d 667, 677–79 (W.D. Tex. 2000) (applying a burden shifting disparate impact analysis); Derek Black, *Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge*, 43 CONN. L. REV 503, 511–15, 539 (2010) (discussing the differences in racial intent and effect and citing few cases where disparate impact was actionable under the Civil Rights Act). The Court in *Alexander v. Sandoval* held no cause of action for disparate impact existed, nor ever had. 532 U.S. 275, 282–83 (2001). Prior to *Sandoval*, however, lower courts found that *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 592–94 (1983), had recognized a cause of action for disparate impact. See, e.g., *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70 (1992); *Alexander v. Choate*, 469 U.S. 287, 292–96 (1985); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Roberts v. Colo. Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993).

Also, there is evidence that if the courts follow the recommendations made by Harris County pretrial services, the racial disparity in the jail population would be substantially narrowed.<sup>188</sup> Additionally, data show that African-Americans are less likely to be released on their own recognizance or on bail than whites or Hispanics.<sup>189</sup> In 2011, a Houston-based community activist group commissioned a report about the effect of Harris County criminal justice policies on African-Americans, particularly as it related to pretrial release.<sup>190</sup> That report found that African-Americans make up the highest percent of misdemeanor arrests, yet bear the lowest pretrial release rate for misdemeanor offenses.<sup>191</sup> Records show that while white defendants were released on bond about 70% of the time for misdemeanor offenses and 44% for felonies, and Hispanics were released about 52% of the time for misdemeanors and 31% of the time for felonies, African-Americans were released only 45% of the time for misdemeanors and 30% for felonies.<sup>192</sup> The study reports that these racial inequities in bail/bond decisions in Harris County are symptomatic of substantial bias against African-Americans in bail setting throughout the United States.<sup>193</sup>

The Harris County experience has some national precedent. A 1994 study concluded that there exists substantial bias against African-Americans in setting bail.<sup>194</sup> The Ayres and Waldfogel study also found that while African-American bond rate regressions alone did not provide credible evidence that courts engage in disparate racial treatment, a market test did provide evidence that bail setters used criteria which disproportionately burden minority males.<sup>195</sup> A 2011 study similarly concluded that courts consider race in setting bail and suggests that “judges set bail as if they value blacks’ lost freedom as thousands of dollars less valuable than whites’ freedom.”<sup>196</sup>

<sup>188</sup> Bane et al., *supra* 62, at 4.

<sup>189</sup> *Id.* at 3.

<sup>190</sup> *Id.* The Ministers Against Crime is a Houston-based association that consists of ethnically and denominationally diverse clergy who serve as police-community liaisons and are called upon to assist in crisis or civil unrest situations. They advocate measures that ensure a more just criminal justice system. *See, e.g., Volunteer Initiatives Program—Ministers Against Crime*, HOUS. POLICE DEP’T, [http://www.houstontx.gov/police/vip/vip\\_mac.htm](http://www.houstontx.gov/police/vip/vip_mac.htm) (last visited Jan. 9, 2012).

<sup>191</sup> Bane et al., *supra* 62, at 3.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (citing Bushway & Gelbach, *supra* note 187).

<sup>194</sup> *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 1010 (1994).

<sup>195</sup> *Id.* at 1039. Ayres and Waldfogel note:

Specifically, the statistically significant tendency of bond dealers to charge lower bond rates to minority males shows (1) that courts increase bail for some characteristic unrelated to defendant flight propensity; and (2) that minority male defendants are most likely to have this characteristic. These inferences provide the two core elements of a traditional disparate impact case: a showing that a criterion has a disparate impact and a showing that that criterion does not further legitimate goals of the decision maker.

*Id.* Additionally, warning that their study could not definitively show racial discrimination, the authors conclude that minority defendants did not have a higher propensity to flee, so that judges who wished to equalize the probabilities of flight would not have to set higher bail amounts for minority men than for white men. *Id.* at 1046.

<sup>196</sup> Bushway & Gelbach, *supra* note 187, at 1. The researchers constructed a model of judges’ optimal bail setting that allowed them to test for racial discrimination in bail levels. The study looked at the value a judge placed on blacks’ freedom versus whites’ freedom by looking at the marginal expected social costs

One wonders if these facts would stand if they applied to another demographic. Various scholars have opined that the severity of criminal justice policies of criminalization, detention, and withholding the right to counsel are permitted principally because the burdens of these policies do not fall equally on the majority, but instead fall disproportionately on African-Americans.<sup>197</sup> At least one theorist has suggested that the reason the reform of the bail system has been slow is because the burdens of these policies fall disproportionately on disempowered minority groups.<sup>198</sup>

It is clear that the courts may need to take action where other institutions have not. In situations such as these, the statistical truth requires that the courts listen not only to the “majoritarian chorus” but also to the voices of the burdened. Courts should act where other institutions have not.

### *B. Geographic Profiling and Its Effect on Arrests in African-American Communities*

The dire and disparate status of African-Americans in the Harris County justice system is the result of many overlapping conditions and reinforcing institutional processes. The pattern has appeared in different communities throughout the United States in recent decades.

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that the defendant would impose on society if he was released pending trial contrasted to the cost if he was detained. *Id.*

<sup>197</sup> See Cole, *supra* note 1, at 466; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 97 (2001); Loïc Wacquant, *Deadly Symbiosis: Rethinking Race and Imprisonment in Twenty-First-Century America*, BOS. REV., Apr.-May 2002, <http://bostonreview.net/BR27.2/wacquant.html> (discussing the United States's social pathology of subordinating African-Americans through an unrelenting pattern of slavery, black codes, Jim Crow laws, urban ghettos, and incarceration).

<sup>198</sup> See Cole, *supra* note 1, at 466. Here Cole challenges the reader to engage in a thought experiment as follows:

Reverse the figures for a moment and imagine that at current trends, one in four *white* male babies born today could expect to be sentenced to a year or more of prison during his lifetime [the expectancy rate for black male babies]. Or that for every one white man who graduated college each year, one hundred were arrested. Imagine, too, that these figures could be *fully* explained by higher offending rates among white men. It is simply inconceivable that such a world would have the same politics of crime as we have. It is virtually certain that the situation instead would be treated as a major social crisis demanding substantial reforms.

*Id.*

A report by the Earl Carl Institute for Legal and Social Policy reveals significant racial disparities for African-American Houstonians in areas that include education, wealth, housing, criminal justice, and the judiciary. For example, it reports a Harris County judiciary that is overwhelmingly non-African-American, with African-Americans representing 12.5% of the justice courts, 0% of the probate courts, 7% of the county criminal courts, 0% of the county civil courts, 0% of the juvenile district courts, 0% of the family district courts, 18% of the district criminal courts, 8% of the district civil courts, about 6% of the county appellate courts, and 18% of the federal district courts in Houston. *State of Black Houston Now*, THE EARL CARL INST. FOR LEGAL & SOC. POL'Y, 54–59 (2012), <http://www.earlcarl.org/Uploads/pdf/Publications/SOBHN%20Master%20Final.pdf>. Also, in Houston in 2006 African-American infant mortality rates were almost twice that of Whites. *Id.* at 39. Furthermore, only 11% of the businesses in Houston were owned by African-Americans in 2009. *Id.* at 15. Additionally, African-American households had incomes that were more than \$15,000 below that of white families between 2006 and 2008. *Id.* at 13.

To start, residential housing in the United States remains overwhelmingly segregated.<sup>199</sup> Most Americans live in segregated neighborhoods and communities.<sup>200</sup> “The extreme racial and socioeconomic segregation of housing in the United States means that the odds of incarceration add up in some places to reach stunning levels.”<sup>201</sup> This is especially true in Texas, where reports show that at least 50% of former prisoners return to neighborhoods that account for only 15% of the city’s adult population.<sup>202</sup> Those neighborhoods are overwhelmingly African-American and are fertile areas for police arrests.<sup>203</sup>

Exacerbating the crime problem in these neighborhoods is the prevalence of underperforming high schools, many with the highest dropout rates in the city.<sup>204</sup> These neighborhoods are also home to a disproportionate number of disconnected youth, who are generally described as sixteen- to nineteen-year-old, unemployed, school dropouts.<sup>205</sup> This may affect crime in the neighborhood in both the short and long term. African-American men under the age of forty who have not finished high school are disproportionately subject to incarceration.<sup>206</sup>

Thus, place has a significant influence on arrest and conviction rates.<sup>207</sup> Jail admissions tend to increase within precincts with higher rates of poverty and racial

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<sup>199</sup> I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 43 (2009).

<sup>200</sup> *Id.*

<sup>201</sup> Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 103 (2008).

<sup>202</sup> Tony Fabelo, *Justice Reinvestment: A Framework to Improve Effectiveness of Justice Policies in Texas*, COUNCIL OF STATE GOV’TS JUSTICE CTR., 34 (2007), [http://www.criminaljusticecoalition.org/files/userfiles/solutions4sentencing/Reports\\_Manuals/Dr.\\_Fabelo\\_Justice\\_Reinvestment.pdf](http://www.criminaljusticecoalition.org/files/userfiles/solutions4sentencing/Reports_Manuals/Dr._Fabelo_Justice_Reinvestment.pdf).

<sup>203</sup> The neighborhoods are identified as Acres Homes (86% African-American), Trinity-Houston Gardens (81% African-American), East Little York-Homestead (83% African-American), El Dorado-Oates Prairie (12% African-American; 65% Hispanic), Kashmere Area (85% African-American), Greater Fifth Ward (63% African-American), OST-South Union (84% African-American), South Park (81% African-American), South Acres-Crestmont Park (95% African-American) and Sunnyside (93% African-American). See *City of Houston Super Neighborhood Demographics*, CITY OF HOUS. PLANNING DEV. DEP’T (Jan. 9, 2002), [http://www.houstontx.gov/planning/SN/docs\\_pdfs/SN\\_demographics.pdf](http://www.houstontx.gov/planning/SN/docs_pdfs/SN_demographics.pdf) (compiling data from the 2000 U.S. Census).

<sup>204</sup> Fabelo, *supra* note 202, at 37.

<sup>205</sup> *Id.* at 38.

<sup>206</sup> Clear, *supra* note 201, at 102–03 (stating “[m]en are almost 15 times more likely to end up in prison than are women, blacks are almost seven times more likely to go there than are whites, and people who fail to finish high school are three times more likely to spend time behind prison bars than are high school graduates. Prison is also for younger adults: 69 percent of the confined are under age 40. . . . These four layers of concentration—race, age, gender, and human capital—come together to produce the fifth and crucial sphere of concentrated incarceration: place.”).

<sup>207</sup> Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 261–62 (2009) (citing a study by Katherine Beckett, Defender Ass’n’s Racial Disparity Project, *Race and Drug Law Enforcement in Seattle* (2004), <http://www.soc.washington.edu/users/kbeckett/Enforcement.pdf>). As Fellner recounts, the Beckett study showed:

Although the majority of those who shared, sold, or transferred serious drugs in Seattle are white (indeed seventy percent of the general Seattle population is white), almost two-thirds (64.2%) of drug arrestees are black. The racially disproportionate drug arrests result from the police department’s emphasis on the outdoor drug market in the racially diverse downtown area of the city, its lack of attention to other outdoor markets that are

segregation, and lower rates of human capital.<sup>208</sup> The effect of such geographic concentration of arrest and incarceration is to cycle criminality rather than reduce it.<sup>209</sup> The longer-term effect is generational:

As the risks of going to jail or prison grow over time for persons living in these targeted areas, their prospects for marriage or earning a living and family-sustaining wage diminish as the incarceration rates around them rise, closing off social exits into productive social roles. Over time, incarceration creates more incarceration in a spiraling dynamic.<sup>210</sup>

Arrests are focused on largely poor African-American and Hispanic communities, perhaps, in part because these areas produce the least resistance to unfair criminal justice policies and practices.<sup>211</sup> One scholar has stated that within a rights-based perspective, until a subjugated group [referring to African-Americans] feels a sense of moral outrage, the group will almost certainly fail to resist the injustice that is oppressing it.<sup>212</sup> The Sentencing Project's *Uneven Justice* report confirms the exponential increase in racial disparity that exacerbated in recent years.<sup>213</sup> It reports that an examination of the ratio of

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predominantly white, and its emphasis on crack. Three-quarters of the drug arrests were crack-related even though only an estimated one-third of the city's drug transactions involved crack. Whites constitute the majority of those who deliver methamphetamine, ecstasy, powder cocaine, and heroin in Seattle; blacks are the majority of those who deliver crack. Not surprisingly then, seventy-nine percent of those arrested on crack charges were black. The researchers could not find a 'racially neutral' explanation for the police prioritization of the downtown drug markets and crack. The focus on crack offenders, for example, did not appear to be a function of the frequency of crack transactions compared to other drugs, public safety or public health concerns, crime rates, or citizen complaints. The researchers ultimately concluded that the Seattle Police Department's drug law enforcement efforts reflect implicit racial bias: the unconscious impact of race on official perceptions of who and what constitutes Seattle's drug problem . . . .

The racial dynamics reflected in Seattle's current drug law enforcement priorities are long-standing and can be found across the country.

Fellner, *supra* note 207, at 261–62. Another scholar has noted:

Studies have also demonstrated disparate drug enforcement patterns. Police efforts directed at combating drug use have focused 'almost exclusively on low-level dealers in minority neighborhoods.' Data suggests that drug dealing and purchasing by Blacks is more likely to occur outdoors, in public places and between strangers, whereas drug dealing by Whites generally occurs in private areas and among acquaintances. This difference has resulted in heightened policing in communities of color and inner-city policing strategies that selectively target Black suspects. Consequently, arrest rates for drug-related offenses are disproportionate to the actual rates of drug use among races.

Catherine London, *Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations*, 29 LAW & INEQ. 211, 218 (2011).

<sup>208</sup> Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1585 (2003).

<sup>209</sup> See generally *id.*

<sup>210</sup> *Id.* at 1589.

<sup>211</sup> Fellner, *supra* note 207 (reviewing the decades long disparity in drug arrests based on race).

<sup>212</sup> See Otis B. Grant, *Rational Choice or Wrongful Discrimination? The Law and Economics of Jury Nullification*, 14 GEO. MASON U. C.R. L.J. 145, 178 (2004).

<sup>213</sup> Gary Ford, *The New Jim Crow: Male and Female, South and North, from Cradle to Grave, Perception and Reality: Racial Disparity and Bias in America's Criminal Justice System*, 11 RUTGERS RACE & L. REV.

black-to-white incarceration rates by state illustrates not only the heightened use of imprisonment for African-Americans, but also regional differences in how incarceration policies produce disparities.<sup>214</sup> Statistics in the sentencing report are accompanied by a discussion of the link between incarceration rates of African-Americans and “policing and prosecution initiatives that emphasize policing in communities of color.”<sup>215</sup>

Another scholar suggests that the difference in treatment due to race and geography is dramatic.<sup>216</sup> She writes about New York City’s adoption of a policy to “reclaim the streets” by systematically and aggressively enforcing laws against graffiti, panhandling, public drinking, unlicensed vending, public urination, and other low level offenses.<sup>217</sup> She finds distinctly more aggressive policing in communities of color where zero tolerance policies require arrests than in wealthy and suburban communities where arrests for minor offenses are rare. African-Americans in New York City, as in Harris County, constitute a significant percent of persons convicted for drug offenses.<sup>218</sup> She further finds that it is the arrest itself that creates substantial barriers to successful integration into the larger community.<sup>219</sup> “The human as well as social, economic and political toll is as incalculable as it is unjust.”<sup>220</sup> The same is true in Harris County.

#### IV. MARGINALIZING THE COMMUNITY

##### *A. The Effect on the Family*

Harris County policies favoring detention are costly to taxpayers generally, but they weigh substantially more heavily on the directly affected communities and families of African-Americans and Hispanics. Imprisonment separates criminals from their communities with the intent of creating safer, stronger communities, more capable of enforcing their own social codes.<sup>221</sup> Instead, at least one author writes:

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323, 333 (2010) (citing Marc Mauer & Ryan S. King, The Sentencing Project, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (July 2007),

[http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf).

<sup>214</sup> Mauer & King, *supra* note 213, at 10.

<sup>215</sup> Ford, *supra* note 213, at 334.

<sup>216</sup> See K. Babe Howell, *From Page to Practice and Back Again: Broken Windows Policing and the Real Costs to Law-Abiding New Yorkers of Color*, 34 N.Y.U. REV. L. & SOC. CHANGE 439, 442 (2010); see also Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL’Y 419, 426 (2007) (discussing zero tolerance as a strategy employed in Baltimore, Maryland, which results in a disproportionate number of arrests of African-Americans and the poor); JUSTICE MGMT. INST., *supra* note 63, at 8.

<sup>217</sup> Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 470 (2000).

<sup>218</sup> *Texas Prisons Notes*, DRUG POLICY FORUM OF TEX., <http://www.dpft.org/tpnotes.htm> (last visited Oct. 2, 2011) (citing *Houston Chronicle* editorials stating that in 2003, “Harris County data showed that 62 percent of those convicted for less than 1 gram of drugs were black out of a local population that is only 18 percent black”).

<sup>219</sup> Howell, *supra* note 216, at 443 (explaining that the costs collateral to over-incarceration are borne disparately by the poor and minorities).

<sup>220</sup> *Decades of Disparity*, HUM. RTS. WATCH (Mar. 2, 2009), <http://www.hrw.org/en/node/81105/section/2>.

<sup>221</sup> TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (Oxford University Press, 2007).



[w]ith its isolation of people from poor places, incarceration does more damage than good, including increases in crime. In this way, incarceration has become part of its own dynamic. Imprisonment has grown to the point that it now produces the very social problem on which it feeds. It is the perfect storm.<sup>222</sup>

Studies show that incarceration has a significantly deleterious impact on families and children.<sup>223</sup> It affects marriage prospects, parenting capacity, family functioning and sexual behavior.<sup>224</sup> Families are the central mechanism of informal social controls and the family is the single most important institution to the well-being of children and the prospects for healthy social relations in adulthood.<sup>225</sup> The Justice Management Institute found that families are deeply affected by the placement of a family member in jail.<sup>226</sup> The institute reported that family members of people in jail might experience a great deal of stress, financial strain, social stigma, increased risk of illness, and other emotional burdens.<sup>227</sup> Children and other family members of a person in jail also experienced declining health after the person was jailed.<sup>228</sup> According to a study by the American Council of Chief Defenders, the consequences of detention are similar regardless of the time that the person spends in jail. That study found that pretrial detention has harsh consequences including the loss of jobs, homes and family ties.<sup>229</sup>

### *B. The Economic Impact on the Community*

On average, a healthy detainee in Harris County costs between \$70 and \$75 per day, when administrative costs for booking and release are factored in.<sup>230</sup> A strained county budget in 2009 was burdened with an expense of \$17 million to house inmates in other jails.<sup>231</sup> The financial burden on the community in the cost of jails and housing detainees is staggering, but represents only part of the costs borne by the community by over-jailing its citizens.

Overall, serving time reduces the hourly wage for men by approximately 11%, annual employment by nine weeks, and annual earnings by 40%.<sup>232</sup> The typical former inmate, by age forty-eight, will have earned \$179,000 less than if he had never been incarcerated.<sup>233</sup> Before being incarcerated, more than two-thirds of male inmates had jobs and more than half were the primary source of financial support for their children.<sup>234</sup> One survey found that 63% of the people surveyed had owned or rented a home prior to

<sup>222</sup> *Id.* at 3.

<sup>223</sup> *Id.* at 94.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 95.

<sup>226</sup> JUSTICE MGMT. INST., *supra* note 63, at 17.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Policy Statement*, *supra* note 40 (finding that all other factors being equal, individuals who are detained prior to trial ultimately experience more severe outcomes).

<sup>230</sup> *See* Bane et al., *supra* note 62, at 4.

<sup>231</sup> *Id.*

<sup>232</sup> Bruce Western & Becky Pettit, *Collateral Costs: Incarceration's Effect on Economic Mobility*, THE PEW CHARITABLE TRUSTS, 4 (2010), [http://www.economicmobility.org/assets/pdfs/EMP\\_Incarceration.pdf](http://www.economicmobility.org/assets/pdfs/EMP_Incarceration.pdf).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 3.

incarceration, but only 29% owned or rented a home after release.<sup>235</sup> The studies generally report on the effect of incarceration both in jails and in state prisons and show that it is incarceration, above and beyond arrest and conviction that accounts for negative economic impact.<sup>236</sup> The evidence shows that the effect of incarceration on earnings is very much the same whether the person was incarcerated in jail or prison, although no specific term of imprisonment was examined.<sup>237</sup> Jails historically house people for shorter periods of time than state prisons.<sup>238</sup> Nevertheless, the Justice Policy Institute found that “jail disrupts the employment and economic outcomes of a person who has been admitted.”<sup>239</sup> The institute cited a 2005 study of people leaving New York jails that showed only a third being employed within fifteen months of release from jail.<sup>240</sup>

Education and parental income are strong indicators of children’s future economic mobility. Family income is 22% lower after a father is incarcerated, as compared to the family income one year before incarceration. Even in the year after the father is released, family income remains 15% lower than it was the year before incarceration.<sup>241</sup> The gap in earnings between former inmates and those never incarcerated persists for the rest of the inmates’ lives.<sup>242</sup>

Moreover, communities that experience higher rates of incarceration tend to become immune to the stigma of incarceration, and this often results in an acceptance and expectation of incarceration.<sup>243</sup> The mass incarceration of African-American men poses a distinctive harm to African-American communities, damaging social networks, distorting social norms, and destroying social citizenship.<sup>244</sup> Furthermore, statistics indicate that high concentrations of incarcerated community members increase crime and further destabilize the communities.<sup>245</sup>

### *C. Poor Health as a Consequence of Over-Jailing*

Incarceration may also produce detrimental health effects among inmates and their home communities. The majority of people in jails live with mental illness and many others are substance abusers.<sup>246</sup> Lack of treatment from an overburdened jail system also means that people who go untreated are likely to have difficulty following rules and may have their sentences lengthened as a result.<sup>247</sup> Mental illness coupled with long jail stays

<sup>235</sup> Petteruti & Walsh, *supra* note 37, at 18.

<sup>236</sup> See generally Western & Pettit, *supra* note 232, at 10.

<sup>237</sup> See Petteruti & Walsh, *supra* note 37, at 17.

<sup>238</sup> *Id.* at 18.

<sup>239</sup> *Id.* at 17 (“Jails, like prisons, are damaging to a person’s employment and economic outlook . . . . Jails not only interrupt the employment track of a person, but they also prevent him or her from gaining skills or experience that would otherwise have been gained while working in the community.”)

<sup>240</sup> Nicholas Freudenberg et al., *Coming Home from Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities*, 95 AM. J. PUB. HEALTH 1725, 1732 (2005).

<sup>241</sup> Western & Pettit, *supra* note 232, at 5.

<sup>242</sup> *Id.* at 12 (noting that the gaps persisted even though the reported losses did not include earnings forfeited during incarceration).

<sup>243</sup> CLEAR, *supra* note 221, at 147.

<sup>244</sup> Lyles-Chockley, *supra* note 169, at 263.

<sup>245</sup> *Id.* at 264.

<sup>246</sup> Petteruti & Walsh, *supra* note 37, at 15.

<sup>247</sup> *Id.* at 16.

also increase the likelihood that someone with a mental illness will be victimized by another prisoner or the jail staff.<sup>248</sup>

Between January 2001 and August 2009, more than one hundred detainees died while in Houston and Harris County jails.<sup>249</sup> At the time of their deaths, more than 70% were people who were incarcerated pre-trial.<sup>250</sup> Records and interviews show that almost one-third of the deaths involved unsanitary conditions, questions of inadequate responses from guards and staff, a failure by jail officials to provide inmates with essential medical and psychiatric care and medications, or allegations of physical abuse by guards.<sup>251</sup> While significant improvements to the Harris County jail in-custody death statistics were cited in the 2010 Texas Commission on Jail Standards report, in January 2011, another man who was in custody at the Harris County jail reportedly died after an altercation with a jail staff member.<sup>252</sup>

Detention may also pose health risks to inmate communities. The Justice Policy Institute reports that the proximity of a jail to the community, the frequent comings and goings of people and prisoners in the jail, and the closeness of the inhabitants make it possible for disease to be easily transmitted.<sup>253</sup> Furthermore, the institute reports higher concentrations of serious infections and sexually transmitted diseases in jail environments, including HIV/AIDS, tuberculosis, and staph infections.<sup>254</sup> Detaining persons accused of minor infractions places the community at large at greater health risk; risk that can be substantially reduced by using citations and increasing pretrial releases.

## V. RECOMMENDATIONS FOR REFORM

Discussions about bail reform have dotted the criminal justice landscape for many years. The problems associated with loss of human dignity as a result of detention, jail overcrowding, and limited funds have reenergized these debates, particularly as it relates to misdemeanor, nonviolent offenses and pretrial detention. The problems also appear to be national in scope, but can be dramatically illustrated by the conditions in Harris County, Texas, where almost half of the jail population is African-American, and a large number of those being detained pre-trial are held for misdemeanors—some ticketable and

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<sup>248</sup> *Id.*

<sup>249</sup> Gary Hunter, *Texas Prisoners Still Dying in Houston Jails, Among Other Problems*, PRISON LEGAL NEWS, [https://www.prisonlegalnews.org/%28S%282pp4lxz4h1iay455lbr5if55%29%29/21777\\_displayArticle.aspx](https://www.prisonlegalnews.org/%28S%282pp4lxz4h1iay455lbr5if55%29%29/21777_displayArticle.aspx) (last visited Sept. 19, 2011).

<sup>250</sup> Steve McVicker, *Six Years, 101 Deaths in Harris County Jails*, HOUS. CHRON. (Feb. 18, 2007, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Six-years-101-deaths-in-Harris-County-jails-1545025.php>.

<sup>251</sup> *Id.* (reporting that while Texas requires all law enforcement agencies to file a custodial death report with the attorney general's office any time an in-custody death occurs, that office is merely a repository of the information and the Texas Commission on Jail Standards keeps no records of figures on in-custody deaths); see also King Memorandum, *supra* note 22, at 3 (finding that the Harris County jail placed "detainees at an unacceptable risk of death or injury.").

<sup>252</sup> Peggy O'Hare, *Harris County Jail Death Has Family Seeking Answers*, HOUS. CHRON. (Jan. 31, 2011, 6:30 AM), <http://www.chron.com/news/houston-texas/article/Harris-County-jail-death-has-family-seeking-1686411.php>.

<sup>253</sup> Petteruti & Walsh, *supra* note 37, at 15.

<sup>254</sup> *Id.*

nonviolent offenses. There are a number of reforms that could positively address these problems.

### A. Judicial

1. *Change arrest policies for certain misdemeanor offenses.* As a general policy, a defendant who is arrested for a crime described in HB 2391—i.e., a Class A or B marijuana possession, Class B criminal mischief, Class B graffiti, Class B theft, or Class B theft of service or driving while license is invalid—should receive a ticket or citation if he or she is eligible for a ticket or citation.<sup>255</sup> If arrested, the defendant should be released on a nonfinancial personal recognizance bond.<sup>256</sup> As with other ticketable offenses, policy makers should allow for exceptional circumstances where tickets or citations would not be warranted. For example, by comparison, while drivers stopped for speeding generally receive a ticket, that is not always the case. An officer can exercise discretion and arrest the offender if the speed is considered in willful or wanton disregard for the safety of persons or property.<sup>257</sup> Similarly, most persons suspected of committing HB 2391 crimes should receive a ticket except in certain determined circumstances.

2. *Strengthen indigent defense.* Harris County established a public defender office in late 2010 that began operating in February 2011.<sup>258</sup> The public defender system is referred to as a hybrid system in that it works in addition to the private court-appointed defense bar.<sup>259</sup> Under this system, judges appoint a local attorney to represent the defendant as a “lawyer for the day” or “lawyer for the week” contract lawyer with the court, or through the newly created public defender office, or some combination thereof.<sup>260</sup> With the help of public defenders and private attorneys, defendants can and should be represented by an attorney at their first court appearance.

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<sup>255</sup> H.B. 2391, 80th Leg., Reg. Sess. (Tex. 2007) (amending TEX. CODE CRIM. PROC. ANN. art. 14.06 by adding subsection (c)).

<sup>256</sup> E-mail from Carol Oeller, Dir., Harris Cnty. Pretrial Services, to Marcia Johnson, Prof. of Law, Thurgood Marshall School of Law (Apr. 6, 2011) (on file with authors) (discussing Harris County’s consideration of the experiences of agencies throughout the country). Among the information Harris County gathered was for Travis County, Texas. *Id.* The program there has shown a steady increase in 2391 citations since it began. *Id.* The county’s largest source of arrests, Austin, participates in the citation program. *Id.* Harris County also learned that in Conroe in Montgomery County, Texas, citation and summons options are used at the discretion of the arresting officer. *Id.* Dallas police issued citations about two years ago but have not continued with the program since then for unspecified reasons. *Id.* New York City uses desk appearance tickets (DAT), which are like citation releases from the precinct rather than from the field. *Id.* Its 2009 annual report indicates that about 25% of misdemeanor cases were released through DAT. *Id.* Washington, D.C. has a similar system. About 50% of the persons screened were released through DAT and about 70% of the defendants who were not given DAT were released on some form of nonfinancial bond. *Id.*

<sup>257</sup> TEX. TRANSP. CODE ANN. § 545.401 (West 2011).

<sup>258</sup> See Molly Ryan, *Harris County Public Defender’s Office Continues to Expand*, COMMUNITY IMPACT NEWSPAPER (July 28, 2011), <http://impactnews.com/northwest-houston/335-recent-news/13957-harris-county-public-defenders-office-continues-to-expand>.

<sup>259</sup> Moran, *supra* note 85.

<sup>260</sup> The Harris County Public Defender’s Office began operating after the commissioners court hired the chief defender in November 2010. Its first divisions were the mental health and appellate divisions followed by its felony division. The juvenile division and other divisions are expected to open in 2012. See HARRIS COUNTY PRECINCT ONE, *supra* note 86.

Courts have long emphasized the importance of counsel in ensuring that defendants receive a fair trial.<sup>261</sup> The United States Supreme Court in *Powell v. Alabama* stated that “the prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant . . . must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.”<sup>262</sup> However, not all defendants in Harris County benefit from such time and counsel.

In its 2009 report, the Justice Management Institute found that “effective representation of accused persons does not begin as soon as [it is] feasible in Harris County.”<sup>263</sup> The detainee who has retained his or her own attorney may have representation at or before the initial appearance before the assigned court; however, no defendant will have an attorney present at the probable cause hearing that is conducted by a magistrate.<sup>264</sup> Furthermore, the defendant is not appointed counsel until his or her first appearance in that court. But, as the institute report explains:

by then, critically important decisions about bail and pretrial release have already been made—at least by the magistrate at the probable cause [hearing], which is typically held within twelve hours of the accused person’s arrest. So even though the defendant is not represented at the probable cause hearing, the assistant district attorney is present and may speak and make bond recommendations.<sup>265</sup>

The report also found that most defendants who are detained beyond the probable cause and bond hearings are not appointed an attorney until their first appearance date.<sup>266</sup> Many defendants, especially those with no prior criminal history, will then accept the prosecutor’s plea as an opportunity to resolve the case. “The opportunity for meaningful communication between counsel and the defendant at this stage is obviously severely limited.”<sup>267</sup>

In accordance with the United States Supreme Court decision in *Powell v. Alabama*, Harris County should provide defendants with counsel at the earliest possible stage after arrest and before appearance in court. This could be beneficial to the administration of justice by “enabling . . . defense counsel to learn [more] about the case and the defendant’s circumstances at an early stage, more effective defense advocacy at the outset of the criminal proceedings (including advocacy concerning bail and potential conditions of release), and increased likelihood of an early non-trial disposition of the case.”<sup>268</sup> Additionally, courts should require the record to reflect that the attorney has had

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<sup>261</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 31–32 (1972).

<sup>262</sup> Robert C. Boruchowitz, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAWYERS, 36 (Apr. 2009), [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) (citing *Powell v. Alabama*, 287 U.S. 45, 59 (1932)).

<sup>263</sup> JUSTICE MGMT. INST., *supra* note 63, at 62.

<sup>264</sup> *Id.* at 25.

<sup>265</sup> *Id.* at 62.

<sup>266</sup> *Id.* at 22.

<sup>267</sup> *Id.* at 23–24.

<sup>268</sup> *Id.*

sufficient time to be fully informed of the circumstances and has had sufficient time to fully inform the client before a guilty plea is accepted.

3. *Grant a greater number of nonfinancial personal recognizance bonds.* There are basically two types of pretrial release: financial and nonfinancial.<sup>269</sup> Financial release, better known as “bail,” requires that money be provided to the court or bail bondsman in exchange for release.<sup>270</sup> This is also known as the “surety bond.” The surety bond is by far the most common type of bond used in Harris County. While about 50% of the persons arrested in Harris County obtain release on bond, more than 80% of these releases are on surety bond.<sup>271</sup>

Nonfinancial release does not require money in exchange for release from jail and is based on the defendant’s own recognizance, citation release, conditional release, or emergency release.<sup>272</sup> As Harris County relies more on surety bonds, it relies less on nonfinancial release bonds despite recommendations by the county’s pretrial services division to do otherwise.<sup>273</sup>

Harris County pretrial services conducts a risk assessment report for defendants to aid the court in determining whether a defendant should be placed on bail and the amount of the bail.<sup>274</sup> In making assessments, pretrial services staff consider factors that include the defendant’s background, criminal history, employment history, family controls, family support, and gang membership, among others.<sup>275</sup> While state law permits these factors to be considered in determining bond/bail, some state court cases have not allowed the magistrate to employ these factors in setting bail/bond, even though doing so could result in the earlier release of pretrial detainees.<sup>276</sup> Thus, many otherwise deserving defendants may not be able to leave detention, because of their failure to secure payment for a bond.

4. *Remove Harris County pretrial services from direct judicial oversight.* Various professionals that have reviewed the Harris County system have recommended that the pretrial services division serve independently from judges.<sup>277</sup> Additionally, judges that reject the bail recommendations of pretrial services should be required to document their reasons on the record. There would have been a noticeable increase in pretrial releases if

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<sup>269</sup> Petteruti & Walsh, note 37, at 11.

<sup>270</sup> *Id.*

<sup>271</sup> JUSTICE MGMT. INST., *supra* note 63, at 17.

<sup>272</sup> Petteruti & Walsh, *supra* note 37, at 11.

<sup>273</sup> By one estimate, while the pretrial services recommends about 30% of the detainees be released on personal bonds, Harris County courts only release about 7.5%. *See* Bane et al., *supra* note 62, at 2. There are numerous explanations for the difference in the number of persons that pretrial services recommends for release and the number the courts actually approve for release, among which is the courts’ reliance on police reports and charging instruments to determine whether there is a public safety risk. When pretrial services completes a risk assessment, it considers a range of factors on a case-by-case basis, but the courts tend to place great weight on public safety. Additionally, other factors, like the type of charge (misdemeanor or felony), docket management, and the defendant’s economic status are likely to be more important to a judge’s review than to pretrial services’ review. Telephone interview with Carol Oeller, Dir., Harris Cnty. Pretrial Services (Oct. 1, 2011).

<sup>274</sup> JUSTICE MGMT. INST., *supra* note 63, at 14.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* Detainees appear before the magistrate within twelve hours of arrest.

<sup>277</sup> *Id.*, at 59; *see also* Bane et al., *supra* note 62, at 5.

Harris County courts had followed pretrial services' recommendations.<sup>278</sup> Harris County's pretrial release rates would then be more in line with those of other jurisdictions in the state.<sup>279</sup>

Reliance on Harris County pretrial services might also substantially reduce the use of race as a factor in determining whether a personal bond should be granted. Judges in Harris County do not expressly use race as a factor in determining bail. However, evidence shows a racially disparate impact of the policies employed by judges. Harris County pretrial services data for the period from October 2010 through December 2010 shows that defendants of different races are released on bond at very different rates. See Table 1.

*Table 1: Harris County Pretrial Release Rates, October 2010 to December 2010*<sup>280</sup>

<i>Race</i>	<i>Misdemeanor Release on Bond</i>	<i>Felony Release on Bond</i>
Other	78.7%	57.7%
White	70.3%	44.4%
Hispanic	51.6%	31.4%
African-American	45.4%	29.9%

Moreover, despite the fact that African-Americans had the lowest release rates, they had the highest arrest rate during the same period.<sup>281</sup> More than 37% of the misdemeanor arrests and 48% of the felony arrests were African-American compared to about 29% and about 22% for whites and about 32% and 29% for Hispanics, respectively.<sup>282</sup> While it is almost impossible to legislate bias out of the process, there are ways to reduce its impact. One way would be to place a greater reliance on pretrial services' recommendations for bail, since the numbers appear to be significantly less disparate by doing so. This would also support maintaining a pretrial services department independent of the courts' and judges' influence. When a judge determines, at his or her discretion, to grant or assess bond that differs from the recommendation made in the pretrial services report, the record should be required to show the basis for the court's action.

<sup>278</sup> Barry Mahoney & Walt Smith, *Pretrial Release and Detention in Harris County: Assessment and Recommendations*, JUSTICE MGMT. INST., 28 (June 2005), <http://www.pretrial.org/Docs/Documents/site%20submissions/reportfinalharriscountypretrial2.pdf>.

<sup>279</sup> Harris County courts' release rates are significantly lower in Harris County than in other Texas counties. For example, in 2009 in Travis County (Austin), 59.5% of defendants were granted release on personal bond compared to about 5.5% in Harris County. See *Pretrial Services*, TRAVIS COUNTY, [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) (last visited Jan. 9, 2012); 2010 ANNUAL REPORT, *supra* note 95, at 5 (showing personal bonds as a percent of total arrests from 2006 to 2010). In Bexar County (San Antonio), the personal release rate is about 30%, according to Mike Lozito, Chief of Bexar County Pretrial Services, Telephone conference with Mike Lozito, Chief of Bexar Cnty. Pretrial Services (Oct. 2011).

<sup>280</sup> Bane et al., *supra* note 62, at 3. The pretrial services department could not provide racial profiles of persons granted personal bonds, cash bonds, or surety bonds.

<sup>281</sup> *Id.* at 3.

<sup>282</sup> *Id.*

### B. Administrative

*Expose more government offices and agencies to sunshine.*<sup>283</sup> Data on arrests, detention, convictions, and everything in between should be kept in a way that is easily accessible to the public and that is calculated to make all parts of the criminal justice system transparent and accountable to the public.<sup>284</sup> Transparency has the effect of exposing policies and practices that often disparately impact the poor, communities of color, and other marginalized groups.<sup>285</sup>

The JMI reported that the Harris County system needed to reform its technology systems in order to improve the capture and use of data.<sup>286</sup> The report also suggested the county reduce its reliance on paper records.<sup>287</sup> Additionally, the kind of data that the county provides should be expanded to include information such as the race and ethnicity of persons in the Harris County jails, particularly pretrial detainees with similar data for bail and bond amounts, personal bond records, and accurate jail population reports.<sup>288</sup> The data collection and management systems should also be integrated so that they can be accessed by the various county departments as well as by the general public. Improved collection, management and accessibility to enhanced data could impact the quality of decisions made by judges and legislators who rely on accurate, complete data to make informed administrative and budget decisions. It could help attorneys make informed decisions in representing clients and could provide useful information to law enforcement and researchers.<sup>289</sup>

### C. Community

*1. Keep watch.* Community stakeholders could play an influential role in developing and maintaining a criminal justice system that best serves its needs. One of the things it can do is establish a court-watch community organization that monitors the

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<sup>283</sup> Sarah Geraghty et al., *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455 (2011) (“First, no good comes from permitting government officials to perform their duties in secret. Second, officials who have become accustomed to operating without accountability are loath to relinquish the power that comes from conducting their business without public scrutiny. Third, when public officials resist efforts to shine a light on their activities, there is often something to hide. Fourth, public scrutiny is often a prerequisite for changing harmful, entrenched practices.”)

<sup>284</sup> *Id.* at 456.

<sup>285</sup> *Id.* at 458.

<sup>286</sup> See JUSTICE MGMT. INST., *supra* note 63, at 77–78.

<sup>287</sup> *Id.* (“Although the JIMS system was conceived as a vehicle for ongoing storage, retrieval, and exchange of information about cases and persons, it has not been updated and the programming software is old and outdated. Many of the justice system entities have developed stand-alone systems of their own that do not readily exchange information with others or with JIMS. The result is a great deal of duplicative data entry, continued utilization of long-outdated manual record-keeping systems, development of ‘silo’ approaches to obtaining and holding information, frustration on the part of practitioners, slower case processing, and avoidable costs to taxpayers.”)

<sup>288</sup> Harris County has begun working on improving its data collection and production activities and in an email from one official responsible for such activities, the county is almost complete with new programming, is working on changes in the way entries are made in the data by clerks, booking deputies, etc. in order to analyze populations properly. E-mail from Caprice Cosper, Dir., Harris Cnty. Office of Criminal Justice Coordination, to Ron Lewis, Attorney, Marshall & Lewis LLP (Apr. 26, 2011, 5:25 PM).

<sup>289</sup> JUSTICE MGMT. INST., *supra* note 63, at 77–79.



actions of judges, prosecutors, and defense counsel to ensure just processes and results. There are several watchdog organizations in Harris County, but only one that appears to focus on criminal justice watch: a new organization called the Harris County Coalition for Criminal and Juvenile Justice Reform.<sup>290</sup> The Coalition plans to monitor the criminal justice systems in Harris County, particularly, as it impacts poor communities and communities of color. The Coalition was successful in instituting a public defender office in Harris County and could be a significant force in criminal justice reform in Harris County. It has also worked closely with the Texas Criminal Justice Coalition, which advocates for a more effective and fair statewide system of criminal justice.<sup>291</sup> With continued support, resources, and interest, the county coalition could provide the kind of organized and effective community-based oversight of the Harris County justice system that has been lacking in recent years.

2. *Support released detainees.* Community stakeholders can also work to develop strong support programs for individuals released from jail to help limit recidivism and enhance quality of life. Persons who are eligible for pretrial release, but remain in jail, may benefit from skills training, counseling and outreach programs during the period that trial is pending. While these programs would be designed to prevent recidivism and, by extension, enhance public safety, such initiatives could include a mix of existing and new programs that are developed as part of a comprehensive strategy to alleviate jail overcrowding while vitalizing the community overall.

JMI reported that Harris County judges are often concerned about a released defendant's conduct while a case is pending resolution, and in recent years many judges have placed additional conditions on the release of defendants on surety bail.<sup>292</sup> Some of the conditions of release include: checking in with the pretrial services agency by telephone at least every two weeks; calling-in to the agency the day before court to confirm the court date; requiring in-person check-in at the agency's office in the courthouse on the court date; notifying the agency of any change in address, telephone number, or employment; no travel out of the Harris County area; and no contact with a complaining witness.<sup>293</sup> Other conditions include providing urine samples for drug testing (by far the most common additional condition for defendants on any type of bond), submitting to requirements for home confinement and electronic monitoring, and abiding by curfew requirements.<sup>294</sup>

These conditions are geared toward ensuring the defendant appears at all court hearings, but they focus little on helping the defendant stay out of trouble in the future. Conditions that would be a part of a comprehensive plan (including community-based programs that are designed to enhance the community) could be beneficial to the

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<sup>290</sup> This group is currently an association of various community-based organizations including the Ministers Against Crime, the William A. Lawson Institute for Peace and Prosperity, LULAC, NAACP-Houston, the Earl Carl Institute for Legal and Social Policy, the Greater Houston Partnership, as well as some community activists. It was established in February 2011 and grew out of the effort of the collaboration in bringing a public defender to Harris County. The authors are founding members of this organization.

<sup>291</sup> See generally TEXAS CRIMINAL JUSTICE COALITION, <http://www.criminaljusticecoalition.org/> (last visited Jan. 9, 2012). Other Texas-based organizations include Justice for All and Citizens United for Rehabilitation of Errants (CURE).

<sup>292</sup> JUSTICE MGMT. INST., *supra* note 63, at 20.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

administration of justice and to the community at large. Harris County already provides some services in areas that include substance abuse counseling, anger management counseling, domestic violence counseling, and mental health treatment.<sup>295</sup> This is good, but while 23% of defendants specifically requested employment referrals, less than 10% of defendants were ordered to participate in a program.<sup>296</sup> Similarly, for education, less than half of the defendants requesting such referrals were ordered such assistance.<sup>297</sup>

## CONCLUSION

The United States has been caught within the throes of a tough on crime mentality for decades. As a result, it now imprisons more of its citizens than any other nation. In addition, it keeps millions more under alternate forms of criminal justice supervision.

Texas has long been viewed as the worst of what the justice system has to offer, with Harris County being a stark example of what a criminal justice system should not be. However, recently, Texas has begun to acknowledge the fact that mass incarceration of its people, excessive sentences, and racially motivated prosecution has not benefited the state or its citizens. In an effort to revise the system, the state has taken several steps, including passing HB 2391, instituting drug courts and other alternate tribunals, halting the building of new prisons, and innovating in community-based treatment, diversion programs, sentencing, and probation/parole options.

Harris County has also begun to make changes and appears interested in making more. It has established a public defender office for the first time ever. It has created alternative courts, notably drug and mental health courts. Its district attorney and county sheriff have agreed to consider instituting HB 2391 on a trial basis to provide citations in lieu of arrests for certain offenses.<sup>298</sup> They have also agreed to consider implementing a three-for-one time served policy to reduce overcrowding.<sup>299</sup> But much more is needed in order to ensure a more balanced and just criminal justice system that considers the needs of the entire community, its safety, and its requirements for long-term prosperity.

While legislation will not necessarily change a person's views, it does have an effect on the manifestation of those views, such that jurists that may impermissibly consider race in the arrests, prosecution, and sentencing of individuals are reminded that their power is not boundless and that they will be held accountable. Toward this end, community influence plays an important role in the development of a culture of justice. Consequently, the community must be forceful in ensuring that its system of justice is fair.

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<sup>293</sup> 2010 ANNUAL REPORT, *supra* note 95, at 18.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* (showing that while 7% requested education referrals, less than 4% were ordered to participate in a program.)

<sup>298</sup> Grissom, *supra* note 16.

<sup>299</sup> Brandi Grissom, *Many Choosing Jail Time Over Probation*, TEX. TRIB. (Sept. 28, 2010), <http://www.texastribune.org/texas-dept-criminal-justice/court-of-criminal-appeals/many-choosing-jail-time-over-probation/>. This system allows detainees to earn credit for good behavior and participation in certain programs as a way to reduce from their sentences, the actual time they would be required to serve. Three-for-one gives three days credits for each day for certain activities, including good behavior, work, participation in programs, and performing good deeds in jail. *Id.*

Particularly in the area of pretrial release, individuals should not be unduly detained especially in the face of their having not been tried or determined to be guilty. Where public safety is at risk, liberty may be withheld, but the standards for determining when public or individual safety is actually in jeopardy should be clearly defined on a case by case basis and supported with evidence made on the record. Harris County reports that less than 4% of persons released on personal recognizance and less than 5% of those released after making a financial bond commit crimes while released.<sup>300</sup> According to pretrial services records, less than 6% fail to appear after being released on their own recognizance, and less than 4% fail to appear after posting a financial bond.<sup>301</sup> Harris County reports that 69% of the crimes committed while on release are misdemeanors.<sup>302</sup>

Addressing pretrial detention in Harris County in a prudent, multifaceted way will undoubtedly lead to reduced incarceration. Bail reform, particularly as it relates to increasing nonfinancial release and greater reliance on an independent pretrial services division, can play a significant role in improving the criminal justice system in Harris County. Admittedly, bail reform is only one step toward moving Harris County and the state of Texas away from over-incarceration. Another step, addressed only briefly in this Article, is the recognition that merely releasing pretrial detainees back into community may not adequately address the long-term goals of community safety and overall vitality. Stakeholders must also address rehabilitation and evidence-based vehicles for reducing recidivism. While it may seem obvious that locking up more people would lower crime rates, history has not shown that to be the case.<sup>303</sup>

In 2010, a little more than 60% of Harris County misdemeanor offenders and 76% of Harris County felony offenders had at least one prior conviction.<sup>304</sup> Texas stakeholders must recognize the importance of education, job skills, and basic services needed in order to address high recidivism rates, with the effect of reducing arrests and overcrowded jails. Wide support for the state's education system, including the state's prison education system, the Windham School District, could help as studies show a significant correlation between education and reducing recidivism.<sup>305</sup>

Increasingly, officials from across the political spectrum are reconsidering that the current system of incarceration and lack of quality reentry services.<sup>306</sup> In the end,

<sup>300</sup> 2010 ANNUAL REPORT, *supra* note 95, at 20.

<sup>301</sup> *Id.* at 19.

<sup>302</sup> *Id.* at 20.

<sup>303</sup> Pinard, *supra* note 5, at 4. In fact during the period from 1991 to 1998, three states with large prison populations showed decidedly different results. Texas experienced a 144% increase in incarceration with a 35% drop in crime rates, and California had a 44% rise in incarceration rate with a 36% drop in crime rates. By contrast, New York saw its incarceration rate increase by only 24%, yet experienced a 43% drop in crime rates. *Id.*

<sup>304</sup> 2010 ANNUAL REPORT, *supra* note 95, at 12.

<sup>305</sup> Marcia Johnson et al., *Proposal to Reduce Recidivism Rates in Texas—2010 Update*, 1 ECI INTERDISC. J. FOR LEGAL & SOC. POL'Y. 70 (2011) (citing Open Soc'y Inst., Criminal Justice Initiative, *Research Brief Occasional Paper Series No. 2, Education as Crime Prevention 5* (Sept. 1997), available at [http://www.soros.org/initiatives/usprograms/focus/justice/articles\\_publications/publications/edbrif\\_19970901](http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/edbrif_19970901)).

<sup>306</sup> Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST, Jan. 7, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html>. Other conservatives who support prison reform include Ed Meese, Asa Hutchinson, and David Keene. See Newt Gingrich & Pat Nolan, *Right Looking to Lead Fight for Prison Reform*, J. GAZETTE (Fort Wayne, Ind.) (Jan. 12, 2011),

improvements will require a comprehensive approach to criminal justice reform to favorably address overcrowded jails, race-based detention, and community revival in Harris County, Texas. A significant first step is reforming the bail and pretrial release systems.

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<http://www.journalgazette.net/article/20110112/EDIT05/301129962/1147/EDIT07>; Paul Strand, *Conservative Coalition Seeks Criminal Justice Reform*, CHRISTIAN BROADCASTING NETWORK (Dec. 16, 2010), <https://www.cbn.com/cbnnews/politics/2010/December/Conservative-Trio-Wants-Criminal-Justice-Reform/>; *see also* Press Release, Off. of the Gov., State of La., Governor Jindal Announces New Re-Entry Program for State Inmates in Parish Prisons to Reduce Recidivism Rate and Make Communities Safer, (Mar. 18, 2009), *available at* <http://gov.louisiana.gov/index.cfm?articleID=1073&md=newsroom&tmp=detail> (“Without education, job skills, and other basic services, offenders are likely to repeat the same steps that brought them to jail in the first place . . . This is a problem that needs to be addressed head-on. We cannot say we are doing everything we can to keep our communities and our families safe if we are not addressing the high rate at which offenders are becoming repeat criminals.”).

## APPENDIX

*Harris County Criminal Courts at Law; Rule 9. Setting and Modifying Bail*<sup>307</sup>

## Schedule of Bail Amounts

Pursuant to the agreed final judgment and order of the federal court in *Roberson v. Richardson* (No. H-84-2974), Southern District of Texas [1987]), the Harris County Criminal Court at Law Judges promulgate this initial bail schedule. The district attorney shall affix an initial bail amount at the time a complaint is filed in a county criminal court at law. The initial bail amount shall be determined by either presenting relevant information in the possession of the district attorney to a county criminal court at law judge, or Harris County Hearing Officer, or by applying the initial bail schedule. The district clerk shall record the bail amount set by the judicial officer or applied by the district attorney from the initial bail schedule in the case file. This shall be the exclusive means of setting the initial amount of bail, unless otherwise directed by the Judges of the Harris County Criminal Courts at Law.

## Misdemeanor Bail Schedule

## Class: B, Standard Offense

1st Offense	\$500
2nd Offense conviction	\$500, plus \$500 for each prior misdemeanor conviction
	plus \$1,000 for each prior felony conviction
	Not to exceed \$5,000

## Class: A, Standard Offense

1st Offense	\$1,000
2nd Offense conviction	\$1,000, plus \$500 for each prior misdemeanor conviction
	\$1,000 plus \$1,000 for each prior felony conviction
	not to exceed \$5,000

## Class: Family Violence or Threat of Violence

1st Offense	\$1,500
2nd Offense	Plus \$2,000 for each prior conviction for a violent offense or threat of violence

## Class: DWI

First Offense	\$500
Subsequent Offense	\$2,500 plus \$1,000 for each prior conviction not to exceed \$5,000

<sup>307</sup>*Rule 9. Setting and Modifying Bail*, HARRIS COUNTY CRIMINAL COURTS (Sept. 19, 2011), available at <http://www.ccl.hctx.net/attorneys/BailSchedule.pdf>.

Class: Any offense committed while on bond, community supervision, intervention, or parole.	\$5,000
Any motion to adjudicate or revoke community supervision.	\$5,000

The initial bail amount shall be determined by application of the bail schedule.

In any case where the district attorney desires a bond higher than that on the bail schedule, the district attorney shall make a request to a judge of the county criminal court at law or a criminal law hearing officer. The order, when signed by the judge or hearing officer shall be provided to the district clerk along with the complaint and information for filing.

The district clerk shall apply the amount of bond from the bail schedule except in cases where the district attorney has provided the clerk with an order setting bail signed by a judge a county criminal court at law or a criminal law hearing officer, in which case the clerk will apply the amount of bail provided for in the order setting bail.

If the clerk does not receive an order setting bail or if the amount of bail exceeds the amount provided for in the bail schedule, the clerk shall make an entry in the bail field as provided by Rule 2D, and bail will then be set by a judicial officer.

District Court Bail Schedule<sup>308</sup>

<i>Offense</i>	<i>Bail</i>
All capital felonies .....	No Bond
All murders not particularly specified below .....	\$50,000.00
All first degree felonies not particularly specified below .....	\$20,000.00
All second degree felonies not particularly specified below .....	\$10,000.00
All felony DWI's not particularly specified below .....	\$10,000.00
All third degree felonies not particularly specified below .....	\$5,000.00
All fourth degree (State Jail) felonies not particularly specified below .....	\$2,000.00
 <i>Repeat Offenders</i>	
Habitual .....	No Bond
First degree felony with previous conviction .....	\$30,000.00

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<sup>308</sup> *District Court Bail Schedule*, HARRIS COUNTY DISTRICT COURTS (Sept. 19, 2011), available at [www.justex.net/BailBondSchedule.aspx](http://www.justex.net/BailBondSchedule.aspx).

Second degree felony with previous conviction .....\$20,000.00

Felony DWI with previous felony DWI conviction ..... Double bond amount for each previous felony DWI conviction.

Third degree felony with previous conviction .....\$10,000.00

Fourth degree (State Jail) felony with previous conviction .....\$ 5,000.00

Fourth degree (State Jail) felony with more than one previous conviction .....\$15,000.00

*Defendant on Bail for any Felony Charge with:*

First degree felony ..... No Bond

Second degree felony ..... No Bond

Third degree felony ..... No Bond

Fourth degree (State Jail) felony ..... No Bond

*Particular Situations*

Multiple Counts ..... Separate standard bail for each offense in the transaction

Person on felony probation for any grade of felony ..... No Bond

Any 3g offense or where deadly weapon alleged .....\$30,000.00

Person with deportation history or undocumented presence in U.S. ....\$35,000.00

Motion to Revoke Probation ..... No Bond

Motion to Adjudicate Guilt ..... At the Judge’s Discretion

Large quantities of controlled substance ..... Double the value of the controlled  
large quantities of stolen property ..... substance or property.