

# Risk, Not Resources

## Improving the Pretrial Release Process in Texas

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Texas' resource-based bail system keeps low-risk individuals unnecessarily detained before trial and allows risky defendants to buy their freedom with limited oversight. This practice undermines public safety, disproportionately harms low-income defendants, and costs counties millions of dollars every year. By adopting pretrial reform in line with national standards, Texas can reduce its jail population while making communities safer.

### Introduction

Texas county jails currently detain 40,300 inmates who are awaiting trial, representing over 62% of the entire jail population of the state.<sup>1</sup> This sizable pretrial population is a result of the state's reliance on a "resource-based" bail system that consists largely of money bonds. The decision about who is released and who is detained before trial is determined primarily by a person's financial resources rather than his or her risk to public safety or likelihood to return to court. Indeed, the National Association of Counties has found that 60% of the confined population presents a low risk of pretrial misconduct.<sup>2</sup> If the Texas jail population is representative of this national trend, then approximately 24,180 low-risk defendants are in Texas jails awaiting trial on any given day.

This practice of incarcerating low-risk individuals is not only harmful to people confined in the jails, but is expensive for counties and has negative implications for public safety. It also disproportionately affects low-income defendants. This brief reviews the current pretrial process in Texas and the problems with a release process based on the defendant's resources, explores the benefits of a risk-based pretrial release system, highlights other jurisdictions around the U.S. that rely on risk assessments to determine who remains in jail while awaiting trial, and makes recommendations for the consideration of state lawmakers and local officials.

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**Texas Code of Criminal Procedure, Section 38.03**

*All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.*

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### **The Current Pretrial Process in Texas**

After a person is arrested, he or she is brought before a magistrate and is given bail.<sup>3</sup> Based on the constitutional protection of individual rights, Texas must provide bail except in the case of arrest for a capital offense or if the defendant meets certain other criteria involving prior charges.<sup>4</sup> According to the Texas Code of Criminal Procedure, “[b]ail is the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a Bail Bond or a Personal Bond.”<sup>5</sup> A bail bond is a sum of money that a defendant deposits with the court to secure his or her release and to ensure that the defendant returns to all of his or her court dates. Bail can be paid either in cash or through a commercial bail bondsman.<sup>6</sup> A Personal Bond, on the other hand, is when the judge releases the defendant without that person having to pay any money up front, although the defendant could still be charged the full amount of their bail if he or she misses court and the bond is forfeited.<sup>7</sup> Under current Texas law, some defendants released on Personal Bonds are charged a Personal Bond Fee of \$20 or 3% of the value of the bond, whichever is higher.<sup>8</sup>

If someone does not receive a Personal Bond and cannot afford his or her bail bond, that person will remain in jail until trial. While the statewide average pretrial detention period is 21 days, one study in Harris County showed that felony defendants unable to afford bail were detained pretrial for an average of 68 days.<sup>9</sup>

Under the law, there are only two justifications to detain someone pretrial: (1) to ensure that the defendant returns to court; and (2) to protect the community from a dangerous person. The U.S. Supreme Court and standards set by the American Bar Association (ABA) state that if a person is a low risk to public safety and unlikely to miss court, that person should be released without financial conditions.<sup>10 11</sup>

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**Texas Code of Criminal Procedure, Section 17.1**

*Bail is the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond.*

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### **The Use of Bond Schedules**

The current resource-based bail system disproportionately affects low-income individuals who are incapable of buying their freedom through bail, even with seemingly low money bonds. Some Texas counties still rely heavily on bond schedules that prescribe bail amounts based solely on the charge for which a person has been arrested, even though this approach to bond-setting has been successfully challenged in several federal courts since 2015.<sup>12 13 14</sup> In the case of Dallas County, the lowest recommended amount on the bail schedule is \$1,500.<sup>15</sup> Due to poverty and an almost universal lack of legal representation during bail hearings, many defendants who cannot afford their financial bond plead guilty as a way of being released sooner rather than awaiting trial, regardless of the strength of the government’s case against them.<sup>16</sup> Guilty pleas may result in long-term financial costs and other collateral consequences of conviction for poor defendants, including consequences for employment, public assistance, education, housing, and gun ownership.<sup>17</sup>

Slowly, Texas has started to shift towards risk-based systems that affect pretrial release. In some counties, defendants are being interviewed and categorized based on their likelihood to be re-arrested or miss a court date during the pretrial period, taking into account their “ties to the community,” which include current employment, housing, and family information.<sup>18</sup> The ABA has developed standards for criteria that are effective predictors of pretrial risk (see next page).<sup>19</sup> Risk levels have different names depending on which tool is used, but defendants are generally classified as being Low, Moderate, or High Risk.<sup>20</sup> Out of 254 Texas counties, 46 are using some form of risk assessment. However only two counties, Travis and Harris, have validated their risk assessments to ensure that they accurately predict court appearance and re-arrest rates for their local populations.<sup>21</sup>

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ABA STANDARDS FOR RISK ASSESSMENT INSTRUMENTS

**(1) Defendant's Character**

Family and Community ties, employment status and history, past history including criminal history of drug abuse, any facts that warrant concern if the defendant will break the law if released without restrictions;

**(2) Nature and Circumstances of the Offense**

Context of the offense, whether the defendant was on parole, probation, pending trial at the time of the arrest or current offense;

**(3) Availability of Community Supervision and Support**

Access to family members or individuals in the community that will assist the defendant in attending court;

**(4) Eligibility for Conditional Release Options**

Factors that make the defendant eligible for drug, mental health, or other treatment and diversion supervision release options.

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**The Cost to Texas Communities**

Incarcerating people who are low-risk pretrial is costly. The Texas Commission on Jail Standards estimates that the average daily cost of housing one person in jail is \$59.00.<sup>22</sup> Based on an estimated 24,180 low-risk defendants awaiting trial in Texas jails per day, counties across the state are collectively paying approximately \$1,426,620 *every day* to incarcerate thousands of low-risk people.

The costs of pretrial detention extend beyond the pretrial period. Research shows that those who are detained pretrial receive harsher and lengthier sentences than otherwise identical defendants who were released on bond.<sup>23</sup> This compounds the negative effects the current bail system has on the poor who cannot afford their pretrial release, and affects the state budget through the cost of housing these prisoners once they are sentenced to a prison or state jail.

## Public Safety Implications

Unnecessary pretrial detention makes Texas communities less safe. A study by the Laura and John Arnold Foundation (LJAF) shows that pretrial incarceration of low-risk individuals longer than one day is linked with increased likelihood to commit future crimes, both during the pretrial period and after the case is over.<sup>24</sup> Time in jail can lead to decreased community stability such as loss of job, housing, and weakening of family support.<sup>25</sup> The same factors that contributed to making a person low-risk when (s)he was first arrested can quickly erode during the pretrial detention phase, increasing the risk to the community when that person is eventually released. Furthermore, research shows that after controlling for risk level, people released on non-financial bonds are no more likely to miss court or commit new crimes than people released on financial bonds.<sup>26</sup> When a risk assessment is performed before the initial bail-setting, the main difference is that defendants with financial bonds take longer on average to get released than those with non-financial bonds.<sup>27</sup> <sup>28</sup> For low-risk defendants, this delay can lead to an increased likelihood of re-arrest in the future.

## Resource-based vs. Risk-based Bail Systems

Resource-based bail systems produce two systematic flaws:

1. Low-risk individuals who are poor may not be capable of paying seemingly low money bonds, causing them to remain in jail even though they are unlikely to miss court or commit new crimes during the pretrial period. This is not only expensive for counties, but can have disastrous effects for low-income arrestees and their families.<sup>29</sup>
2. High-risk individuals with significant financial backing are capable of making bail and buying their release, regardless of their danger to society. This undermines the public safety of the community with respect to people who pose a high risk of violence and also have access to resources.

Evidence of these inherent shortcomings are recurrent throughout Texas. The jailing of poor, low-risk defendants is so prevalent in Harris County that the Washington, DC-based nonprofit Equal Justice Under Law joined local Texas firms to file a class action lawsuit declaring the county's bail practices unconstitutional.<sup>30</sup> The plaintiffs in that suit include a woman who was detained on a \$2,500 bond for Driving While License Invalid (DWLI), a man unable to pay bail for a misdemeanor shoplifting charge, and a pregnant mother of two who was in jail for five days because she could not afford the \$5,000 bond for DWLI – her first arrest ever.<sup>31</sup> The lawsuit alleges that

money bail is routinely assigned to defendants without considering their ability to pay, resulting in poor defendants being needlessly detained pretrial.<sup>32</sup> This problem exists in counties across Texas. In 2010, a National Public Radio series on bail showcased three defendants in the Lubbock Jail who had each been detained for months because they were unable to afford bond of \$500 or less for nonviolent property crimes.<sup>33</sup>

Sandra Bland's death in the Waller County Jail shows the tragic potential consequences of low-risk defendants being held in jail due to their inability to pay low bail amounts – in her case, only \$515.<sup>34</sup> But she is not alone. In May of 2016, Symone Marshall died in the Walker County Jail while unable to afford her \$5,000 money bond for two weeks on felony drug possession and related misdemeanor charges.<sup>34</sup> Patrick Joseph Brown was being held on a \$3,000 money bond for a misdemeanor theft charge when he was killed by inmates in the Harris County Jail in April of 2016; one of the killers had already paid his money bond on an unrelated case and was awaiting release at the time of the incident.<sup>36</sup> The Texas Jail Project reported through the Houston Chronicle that 12 pretrial detainees died in county jails in Texas between September 22, 2015 and January 6, 2016; over half of those deaths were from suicide.<sup>37</sup>

At the same time, high-risk individuals and Texas' resource-based bail system combine to undermine public safety. For example, in February of 2015, Harris County resident Dante Thomas allegedly murdered his great-aunt and attempted to murder his cousin while he was out on bond for the murder of his girlfriend only two months earlier.<sup>38 39</sup> He posted his \$50,000 bond, set according to the Harris County bail schedule, before Harris County Pretrial Services was able to interview him and assess his risk.<sup>40</sup> In another case, real estate heir Robert Durst, implicated in three killings, famously posted a \$300,000 bond in Galveston on a murder charge in Texas only to flee to Pennsylvania, where he was living in disguise until he was apprehended.<sup>41</sup>

Counties and states can maintain public safety and reduce additional societal costs by operating a pretrial system that utilizes risk assessment tools to inform bail decisions. Former Travis County District Judge Charles Baird has pointed out that a risk-based system "...allows people who are presumptively innocent to get out and not just to continue to work, to provide for themselves and their families, and to help their lawyers to prepare a case, but it also saves the county millions a year."<sup>42</sup>

A key element of operating an effective risk-based system is access to pretrial supervision for moderate- and high-risk defendants who do not fall into the lowest risk category but still need not be detained pretrial. Supervision is typically provided by a

Pretrial Services Agency operated by the county. Conditions of supervision should be targeted to the specific needs of the defendant and can be as minimal as phone check-ins and court date reminders, or as comprehensive as electronic monitoring via GPS, drug testing, maintaining mental health treatment in the community, installing an Ignition Interlock Device on the defendant’s personal vehicle, or reporting regularly to a pretrial supervision officer.<sup>43</sup> Evidence-based practices require that conditions of supervision be as minimal as possible to reasonably ensure compliance during the pretrial period – putting too many conditions on low-risk defendants has been shown in multiple studies to be counter-productive.<sup>44 45</sup> Moreover, it is important that the costs of providing supervision not be placed upon the presumptively innocent defendant.<sup>46</sup> Poor people will be just as unable to pay supervision costs as they are unable to pay money bond. If complying with conditions of supervision requires having money, it will not resolve the unnecessary pretrial detention of poor, low-risk people currently caused by financial bail.

### **Risk-based Bail Systems Across the U.S.**

There are examples of effective risk-based systems across the country. Four states-- Wisconsin, Illinois, Kentucky and Oregon--have eliminated for-profit bail and implemented validated risk assessments as a component of their pretrial services. Kentucky passed legislation in 2013 to create a presumption of release for low and moderate risk defendants and requiring judges to justify in writing any decision to set financial bond on such a defendant.<sup>47</sup> As the risk level of the defendant increases, courts require more supervision conditions like GPS monitoring and drug testing.<sup>48</sup>

A 2013 assessment of Kentucky Pretrial Services after statewide pretrial reform shows that 70% of defendants were released while their cases are pending, including half of all high-risk defendants, without any decrease in public safety or re-appearance rates from previous levels.<sup>49</sup> Of those who were released, 90% made all their court appearances, and 92% completed the pretrial period without a new arrest.<sup>50</sup> Kentucky Pretrial Services estimated that its work led to a net cost avoidance of almost \$103 million in 2012 alone.<sup>51</sup>

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#### **Spotlight: Kentucky Pretrial Services**

*70% of defendants released pretrial*

*90% make all their court appearances*

*92% arrest-free through pretrial period*

*\$103,000,000 annual cost avoidance*

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## Recommendations

Many of the issues addressed in this brief require action on the part of both the Texas Legislature and individual counties. The following recommendations will help shift Texas to a risk-based pretrial release process that can better protect public safety and avoid the expensive, unnecessary, and harmful practice of incarcerating low-risk, poor defendants in county jails while they await their trials.

### Implement Risk Assessment Tools Across Texas

All courts should perform a pretrial risk assessment on arrestees within 24 hours of arrest. The **Texas Legislature should require all 254 counties to implement a risk assessment tool at initial bail hearings**, which would assist judges in determining which individuals are low-risk and should be released pretrial. Texas Code of Criminal Procedure Article 17.15 “Rules for Fixing Amount of Bail” should be revised to require consideration of risk of flight and re-arrest as determined by a validated risk assessment instrument. Any risk assessment tool should apply the standards set by the American Bar Association and the National Association of Pretrial Service Agencies.<sup>52 53</sup>

This policy recommendation builds on recent related initiatives in Texas that increase the use of evidence-based practices by expanding reliance on risk assessments. In 2013, for example, the Texas Legislature passed Senate Bill 213, which required the Department of Criminal Justice to implement a standardized risk assessment for people who have been sentenced to either prison or community supervision. Before someone is placed on probation or parole, TRAS is used to identify high-risk people who will need additional monitoring and to identify offenders who are at a low risk of reoffending to avoid placing unnecessary conditions on them.<sup>54</sup> TRAS is also used to inform treatment plans for people entering prison from probation.<sup>55</sup>

Given the diversity of counties within Texas, each county should determine what method and form of risk assessment, consistent with the protections of the Constitution, can be best applied given the county’s procedures and capabilities. Small, rural counties, for example, may choose to build a simple risk assessment form into the booking process at the Sheriff’s office as a low-cost measure. Larger counties might choose to perform risk assessments through a Pretrial Services office, as many counties have already done. Texas should consider creation of a statewide electronic tool for risk assessment and whether this could be integrated into the statewide electronic Department of Public Safety (DPS) background check procedure at booking.



### Presumption of Release

Texas should not only require all courts to perform risk assessments, it should encourage judges to apply risk-based principles to release/detention decisions. **The Texas Legislature should therefore create a statutory presumption of release with the least-restrictive conditions necessary to ensure public safety and court appearance.**<sup>56</sup> This means that low-risk defendants accused of minor charges would be presumptively released on Personal Bonds with no additional conditions, while many moderate- or high-risk defendants could be released on a Personal Bond with certain (least-restrictive) conditions of supervision. The right to bail provided in Sections 11 and 13 of the Texas Bill of Rights should be clarified to make this explicit. Texas should follow the lead of other states, including Kentucky, in implementing an explicit presumption of non-financial release for certain risk scores and categories of offenses, requiring judges to justify in writing any decision to deviate from that presumptive release.

### Expand Pretrial Supervision Services

While low-risk arrestees can be safely released to the community with little or no supervision during the pretrial period, studies show that individually-tailored supervision strategies can improve pretrial performance for moderate- and high- risk arrestees.<sup>57</sup> Pretrial supervision for these defendants could include regular check-ins with a supervision officer, drug tests, electronic monitoring, curfews, or other conditions. **The Texas Legislature should incentivize counties to develop systems of pretrial supervision for moderate- and high-risk arrestees so that they can be released without financial conditions without jeopardizing public safety or presenting a risk of failure to return to court.** Counties can fund these pretrial supervision systems with the money saved by reducing the numbers of individuals detained pretrial. Pretrial supervision should not require user-fees, which may prevent low-income arrestees from being able to take advantage of those services. The state should consider appropriating funds to help defray the cost to counties of setting up a pretrial supervision program with a Justice Reinvestment condition requiring that savings from reduced pretrial incarceration be diverted to funding future pretrial supervision services.

## Replace Personal Bonds with True Non-Financial Release

“Non-financial release” should mean non-financial release – defendants should not have to pay a fee to be released on a personal bond, or to have supervision during the pretrial period. Financial bonds, whether secured (paid up-front) or unsecured (promised to pay if the defendant misses court) have been proven to be no more effective at ensuring court appearance than a non-financial release on the promise to return.<sup>58</sup> **The Texas Legislature should amend Code of Criminal Procedure Article 17.04 to redefine a Personal Bond as a purely non-financial form of release, and should eliminate all fees associated with Personal Bonds, including those specified in Article 17.42.** This change will help put Texas in line with national best practices on non-financial release, but will require additional changes to the bail statute to eliminate reference to monetary conditions of Personal Bonds, including such references in Texas Code of Criminal Procedure Articles 16.20, 17.03, 17.04, 17.08, 17.15, 17.42, 4.10, and 22.02

## Eliminate Bail Schedules That Rely Only On the Arresting Charge

For those counties that continue to rely on bond schedules, the risk level of a defendant can be built into the schedule to better represent a defendant’s individualized circumstances. **Bond schedules that rely only on the arresting charge should be abolished immediately.** The Legislature should consider amending Texas Code of Criminal Procedure Article 17.15 “Rules for Fixing Amount of Bail” to expressly forbid use of a charge-based bond schedule.

The U.S. Department of Justice has said:

*It is the position of the United States that, as courts have long recognized, any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment’s Equal Protection Clause, but also constitutes bad public policy.<sup>59</sup>*

## Allow Preventative Detention for High-Risk, Dangerous Defendants

Risk-based decision-making is limited by the current right to bail in the Texas Constitution, which is primarily charge-based and does not allow judges to consider other elements of risk.<sup>60</sup> In many cases, even if the court is able to identify someone as high-risk, the judge is legally required to provide that person with bail. This means that some defendants can purchase their release no matter how dangerous they are. Cases like that of Dante Thomas and Robert Durst, discussed above, serve as a reminder of the

potentially deadly deficiencies of a money-based system of pretrial release. **Texas should streamline its right to bail provision in Section 11-11c of the Texas Bill of Rights and allow for preventative detention of the most dangerous, highest-risk defendants accused of serious felony charges,** coupled with strict time limits for prosecution in order to prevent defendants from being detained without bail for excessive periods. Preventative detention should only be used when there is absolutely no condition or set of conditions of release that could reasonably ensure the safety of the community and the likelihood of appearance in court.

### **Improve Access to Indigent Defense Counsel at Magistration**

Current law requires that judges appoint counsel within three business days in smaller counties and within one business day in larger counties.<sup>61</sup> Because magistration must occur within 24 hours of arrest for misdemeanors and 48 hours of arrest for felonies, many indigent defendants are not entitled to be appointed counsel until after their bail has already been set.<sup>62</sup> In order to create an effective pretrial justice system, the **Texas Legislature should amend the Texas Code of Criminal Procedure, Sect. 1.051 (c), to provide for appointment of counsel at the initial bail-setting hearing at the request of the defendant.** Providing defense counsel at bail-setting hearings has been found to be the biggest determinant of whether someone will remain in jail for a long period of time pretrial on non-violent charges.<sup>63</sup> Having an attorney present at the initial bail-setting hearing leads to a higher likelihood of defendants receiving Personal Bonds and a lower average value of monetary bail when financial conditions are set.<sup>64</sup> Access to counsel at initial bail hearings also assists the quality of defense representation, where attorneys can consult with defendants shortly after their arrest and collect key evidence that may be time-sensitive, such as third-party video surveillance recordings that are routinely deleted.

*Nathan Fennell and Meridith Prescott are Masters of Public Affairs candidates at the LBJ School of Public Affairs. Nathan is pursuing a summer internship with the Texas Fair Defense Project. This brief was produced under the supervision of Professor Michele Deitch at the LBJ School of Public Affairs for the Policy Research Project course "Increasing Transparency and Accountability in the Criminal Justice System."*

## RECOMMENDATIONS

- Implement Risk Assessment Tools Across Texas
- Presumption of Release
- Expand Pretrial Supervision Services
- Replace Personal Bonds with True Non-Financial Release
- Eliminate Charge-Based Bail Schedules
- Allow Preventative Detention for Defendants at Highest Risk of Pretrial Violence
- Improve Access to Indigent Defense Counsel at Magistration

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- <sup>3</sup> Tex. Code Crim. Proc. Ann. Art. 17.01.
- <sup>4</sup> Tex. Const. Bill of Rights, Art. 11.
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- <sup>7</sup> Ibid Art. 17.03
- <sup>8</sup> Ibid Art. 17.42
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- <sup>11</sup> United States v. Salerno, 481 U.S. 739 (1987), III. “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”
- <sup>12</sup> Jones v. City of Clanton, 2:15-cv-34-MHT at \*2 (M.D. Ala. Sep. 15, 2015) - “The use of a secured bail schedule to detain a person after arrest, without a hearing on the merits that meets the requirements of the Fourteenth Amendment regarding the person’s indigence and the sufficiency of the bail setting, is unconstitutional as applied to the indigent.”
- <sup>13</sup> Walker v. City of Calhoun, 4:15-cv-00170-HLM at p. 49 ( N.D. Ga. Sep. 08. 2015) - “Any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause.”
- <sup>14</sup> Varden v. City of Clanton, 2:2015-cv-00034 at p. 8 (Ala. Sep. 14, 2015) - “...the use of a secured bail schedule to detain a person after arrest, without an individualized hearing regarding the person’s indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment.”
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<sup>27</sup> Ibid.

<sup>28</sup> Note: many Texas jurisdictions claim that financial release is faster than waiting for a personal bond. While some Texas defendants are able to pay their money bail and be released quickly, especially if that bail is set according to a bond schedule, a high-functioning bail system must assess risk before allowing a defendant to post a financial bond so that dangerous defendants can be detained without bond. In jurisdictions where risk is assessed before a bail decision is made, non-financial releases use fewer jail bed days, on average, than those released on financial bonds. *Supra* note 26.

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