

# The Cost of Injustice: How Texas’s “Bail Reform” Keeps Low-Income People & People of Color Behind Bars

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## *Author’s Note*

The term “Latinx” is used in this piece in keeping with academic convention. “Latinx” is widely used in academic contexts and is more inclusive of nonbinary people in the sense that it is gender neutral, yet it has not been widely accepted in the community. *See* Luisa Torregrosa, *Many Latinos say ‘Latinx’ offends or bothers them. Here’s why.*, NBC NEWS (Dec. 14, 2021), <https://www.nbcnews.com/think/opinion/many-latinos-say-latinx-offends-or-bothers-them-here-s-ncna1285916>. For instance, the League of United Latin American Citizens decided to discontinue use of “Latinx” because it was so disliked by the community. *See* Russell Falcon, *‘Latinx’ dropped from LULAC official usage, deemed ‘very disliked’ by Latinos*, KXAN (Dec. 22, 2021 11:28 AM), <https://www.kxan.com/news/latinx-dropped-from-lulac-official-usage-deemed-very-unliked-by-latinos/>. And the Mexican American Legal Defense and Educational Fund also uses the term “Latino” in official statements. *See* Press Release, Mexican American Legal Defense and Educational Fund, MALDEF Statement On The Biden Administration’s Failure To Address Historical Latino Exclusion In Judicial Nominations (May 25, 2022), <https://www.maldef.org/2022/05/maldef-statement-on-the-biden-administrations-failure-to-address-historical-latino-exclusion-in-judicial-nominations/>. But the term “Hispanic” is also not wholly inclusive since it excludes non-Spanish descended people. *See* Torregrosa, *supra*. While Latinx is used here, this note is included to acknowledge the controversy in terminology and include the perspective of much of the community the terminology describes.

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**I. INTRODUCTION**

In 2010, police stopped sixteen-year-old Kalief Browder as he was walking home from a party with a friend, accusing him of stealing a backpack from a victim.<sup>1</sup> Even though he consented to a search and denied the allegations, he was arrested and brought before Central Booking at the Bronx County Criminal Court.<sup>2</sup> There, the judge set Mr. Browder’s bail at \$3,000 because he had previously pled guilty to a crime.<sup>3</sup> Mr. Browder’s family could not pay the bail amount and he languished, imprisoned on Rikers Island for three years until the charges were ultimately dropped because the prosecution lost contact with the only known witness to the alleged robbery.<sup>4</sup> But the damage was done. After three years of constant detention and almost two years in solitary confinement for twenty-three

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1. Jennifer Gonnerman, *Before the Law: A boy was accused of taking a backpack. The courts took the next three years of his life.*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [https://perma.cc/TLX4-29PM].

2. *Id.*

3. *Id.* (Kalief was accused of taking a delivery vehicle on a joy ride. He insists that he only watched his friends do it, but he didn’t think he had a case and pled guilty).

4. *Id.*

hours a day, Mr. Browder committed suicide after his release.<sup>5</sup> He was twenty-two years old.<sup>6</sup>

Mr. Browder's story is horrifying, but sadly his outcome is not unique. In 2020, Preston Chaney was "accused of stealing lawn equipment and meat from someone's garage."<sup>7</sup> After being held in jail in Harris County for months pending trial, he eventually caught COVID-19 and died.<sup>8</sup> His bail was set at \$100.<sup>9</sup>

Mr. Chaney was just one of the massive number of people held in state and local jails pending trial because they cannot afford to pay cash bail. The cash bail system allows courts to set the amount that an accused person must pay to be released before their trial.<sup>10</sup> The court then holds the money and returns it to the accused when they appear for their court date.<sup>11</sup> Although the Eighth Amendment of the U.S. Constitution provides that excessive bail is unconstitutional,<sup>12</sup> the Excessive Bail Clause has only been interpreted by the U.S. Supreme Court three times and has never been incorporated or found applicable to the states.<sup>13</sup> This lack of judicial guidance has allowed the cash bail system to flourish. In 2017, "more than 450,000 people [were] in jail across the country awaiting trial because they cannot afford bail."<sup>14</sup> The choice for accused people who cannot pay the bail amount is to: (1) pay a bail bondsman 10–15% of the bail amount as a non-refundable fee, after which the bail bondsman will provide the rest of the amount; (2) stay incarcerated;<sup>15</sup> or (3) plead guilty and get a lesser

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5. Michael Schwartz & Michael Winerip, *Kalief Browder, Held at Rikers Island 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html> [https://perma.cc/U5DE-KAXY].

6. *Id.*

7. Jolie McCullough, *Gov. Greg Abbott prioritized changing how bail is set. He isn't addressing people stuck behind bars because they can't afford to pay.*, TEX. TRIB. (Feb. 11, 2021, 5:00 AM), <https://www.texastribune.org/2021/02/11/texas-bail-reform/> [https://perma.cc/L5PQ-CREZ].

8. *Id.*

9. *Id.*

10. Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works> [https://perma.cc/RA4L-ZZXE].

11. *Id.*

12. U.S. CONST. amend. XIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

13. Michael S. Woodruff, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241, 243, 261, 263–64 (2013).

14. Rhonda McMillion, *Boosting Bail Reform: ABA urges Congress to limit use of cash bail*, 103 A.B.A. J. 70, 70–71 (2017), <https://www.jstor.org/stable/26516161> [https://perma.cc/F43S-9M73].

15. Onyekwere, *supra* note 10.

charge or time served for their conviction.<sup>16</sup> For many low-income people, this is a false choice.

While death is a severe consequence of the cash bail system, it can also destroy a low-income accused person's life in other ways. Detention for even a few days can cause an accused person to lose their job, custody of their children, or their progress with substance abuse or mental health treatment.<sup>17</sup> Further, the cash bail system encourages low-income accused people to plead guilty to lower charges and spend less time behind bars rather than risk higher charges and more time incarcerated.<sup>18</sup> Pretrial release is also correlated with better case outcomes as "those who are held pretrial are four times more likely to be sentenced to prison than defendants released prior to trial."<sup>19</sup> Neither does pretrial incarceration prevent recidivism. In fact, the longer a person is held behind bars, the more the likelihood of recidivism increases, even for low- and moderate-risk, accused people.<sup>20</sup> To add insult to injury, the cash bail system disparately impacts people of color. For example, Black and Latino men are frequently assessed higher bail amounts than white men for similar crimes, 35% and

16. See Mustafa Z. Mirza, *Dallas County's Secret Bail Machine*, MARSHALL PROJECT (Sept. 4, 2018, 3:47 PM), <https://www.themarshallproject.org/2018/09/04/dallas-county-s-secret-bail-machine> [<https://perma.cc/DYG3-LNTZ>].

17. TEX. APPLESEED, *AN ANALYSIS OF TEXAS JAIL BOOKINGS: HOW TEXAS COUNTIES COULD SAVE MILLIONS OF DOLLARS BY SAFELY DIVERTING PEOPLE FROM JAIL 1* (2019), <https://www.texasappleseed.org/sites/default/files/An%20Analysis%20of%20Texas%20Jail%20Bookings%20Apr%202019.pdf> [<https://perma.cc/54KS-EQDD>]; see also Ryan Cooper, *How your local jail became hell: An investigation*, THE WEEK (Apr. 2, 2015), <https://theweek.com/articles/540725/how-local-jail-became-hell-investigation> [<https://perma.cc/FZ4B-9ZK7>] (describing the experience of a depressed arrested person who went into withdrawal from depression medication during her confinement and later attempted to commit suicide after her release upon being charged with a felony).

18. See Onyekwere, *supra* note 10 ("Pretrial detainees are also likely to make hurried decisions to plead guilty to a lower charge to spend less time behind bars rather than chancing a higher charge and longer sentence at trial.").

19. *Id.* ("Pretrial detention has dramatically negative effects on the outcome of a defendant's case: those who are held pretrial are four times more likely to be sentenced to prison than defendants released prior to trial.").

20. See CHRISTOPHER T. LOWENKAMP ET AL., ARNOLD VENTURES, *THE HIDDEN COSTS OF PRETRIAL DETENTION* 3 (2013), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0019/1585/ljaf\\_report\\_hidden-costs\\_fnl.ashx.pdf](https://www.ncsc.org/_data/assets/pdf_file/0019/1585/ljaf_report_hidden-costs_fnl.ashx.pdf) [<https://perma.cc/6FNJ-3UCP>].

Detaining low- and moderate-risk defendants, even just for a few days, is strongly correlated with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low- and moderate-risk defendants also increases significantly.

When held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours.

19% higher bail on average, respectively.<sup>21</sup> Overall, the cash bail system releases wealthy accused people, while low-income accused people and accused people of color, who are charged for the same crime, remain incarcerated.

Given the deficiencies in the cash bail system, it is unfortunate that it remains a dominant feature of the United States' pretrial system; only seven states and Washington D.C. have enacted bail reform that substantially curtails the use of cash bail.<sup>22</sup> Some of the reasons cited in support of cash bail are that it keeps dangerous people behind bars and ensures that released accused people return for their court dates.<sup>23</sup> However, criminal justice reform advocates have long criticized the system as "criminalizing poverty" and a method of pretrial management that has a disparate impact on people of color—all while failing to ensure public safety.<sup>24</sup> These advocates have long called for bail reform, which would decrease reliance on cash bail in favor of alternative pretrial methods that do not rely on wealth for release.<sup>25</sup> Moreover, evidence from implemented bail reform programs supports that reform focused on risk assessment, no-cash or personal recognizance bonds for misdemeanors and nonviolent offenses, and increased pretrial services has the effect of decreasing the jailed population and minimizing racial and income disparities within the jailed population.<sup>26</sup> New Jersey successfully implemented a reformed bail system in 2017 that has drastically reduced its reliance on cash bail,<sup>27</sup> while in 2020, New York eliminated reliance on cash bail for 90% of arrests.<sup>28</sup> In 2021, Illinois became the first state to eliminate cash bail completely.<sup>29</sup> While the latter two reforms have not been enacted long enough to draw strong conclusions, there is a trend toward

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21. Onyekwere, *supra* note 10.

22. See *The State of Bail Reform*, MARSHALL PROJECT (Oct. 30, 2020), <https://www.themarshallproject.org/2020/10/30/the-state-of-bail-reform> [https://perma.cc/JE9D-93L2] (six states are: Alaska, California, Georgia, New Jersey, New York, and Vermont, Washington D.C. is also noted as eliminating cash bail). See also Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, NAT'L PUB. RADIO (Feb. 22, 2021, 8:36 PM), <https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail> [https://perma.cc/7R3V-X3K7] (Illinois is the seventh state and the first to eliminate cash bail).

23. McCullough, *supra* note 7.

24. TEX. APPLESEED, *BAIL REFORM WILL MAKE TEXAS SAFER* 1–2 (2019), <https://www.texasappleseed.org/sites/default/files/Bail%20Reform%20Makes%20Texas%20Safer.pdf> [https://perma.cc/6R2S-8XHQ].

25. TEX. APPLESEED, *Bail Reform & Pretrial Justice*, <https://www.texasappleseed.org/bail-reform-pretrial-justice> [https://perma.cc/3TE7-ZP7T] (last visited Dec. 2, 2021).

26. See Section II *infra*.

27. See Section II.A *infra*.

28. Taryn A. Merkl, *New York's Upcoming Bail Reform Changes Explained*, BRENNAN CTR. FOR JUST. (Dec. 10, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-upcoming-bail-reform-changes-explained> [https://perma.cc/Z25J-SB37].

29. Corley, *supra* note 22.

reducing reliance on cash bail to manage pretrial detention, and so far the results have been encouraging.

In contrast to these reforms, one of the most populous states in the country recently had an opportunity to reduce its reliance on cash bail, but instead perpetuated it. Texas failed to reform its bail system and use evidence-based alternatives to cash bail, perpetuating a system that disparately impacts low-income people and people of color. As this Note will explore, the reason behind this failure was primarily the majority party's insistence that bail reform meant ensuring people accused or previously convicted of violent crimes stayed behind bars, not implementing meaningful reform that would address income or racial disparities in Texas's bail system.<sup>30</sup> In fact, Texas's version of "bail reform" makes the situation for groups already disparately harmed by the Texas criminal justice system worse.<sup>31</sup> This Note will examine Texas's recent efforts toward bail reform and discuss how features of the bill will disparately impact low-income people and people of color, while failing to keep Texans safer. Section II will explore alternative approaches to bail reform that some states implemented to sharply decrease their reliance on cash bail, while maintaining the integrity of their criminal justice systems. Section III will provide background on Texas's bail reform, a summary of the legislation, an analysis of why Texas's bail reform will perpetuate the disparate impact cash bail has on low-income people and people of color, and policy recommendations Texas could adopt to improve its bail system for low-income accused people and accused people of color.

## **II. ALTERNATIVE APPROACHES TO BAIL REFORM**

Section II will examine what other states have done to decrease their reliance on the cash bail system. First, it provides an analysis of New Jersey's successful effort to decrease reliance on cash bail. Then, it will turn to New York's recent bail reform and see what lessons have been learned from decreasing reliance on cash bail for most offenses.

### **A. New Jersey's Bail Reform**

On January 1, 2017, New Jersey's bail reform bill, The New Jersey Criminal Justice Reform Act (CJR), took effect and functionally stopped

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30. McCullough, *supra* note 7.

31. *Id.*

the state's reliance on cash bail overnight.<sup>32</sup> The Drug Policy Alliance's 2013 Jail Population Analysis prompted a call for reforming the bail system,<sup>33</sup> in which the Alliance reported that 38.5% of New Jersey's jail population was being held because they could not afford cash bail or a bail bondsman's 10% fee.<sup>34</sup> The same report noted that 12% of incarcerated New Jerseyans were held because they could not afford \$2,500 or less in bail—a little over half of them could not afford \$500 in bail.<sup>35</sup> The statistics sparked nonpartisan outrage, with all three branches of New Jersey's government coming together with the Office of the Attorney General, Office of the Public Defender, and civil rights organizations to work on a pretrial system that would decrease the disparities in defendants.<sup>36</sup> The ultimate goal of the bail reform bill was to ensure that the criminal justice system was still able to detain people who would present a danger to the community, while not relying on an income-dependent bail system.

New Jersey's bail reform created a presumption of release for all defendants who are not facing life imprisonment.<sup>37</sup> It also requires a prosecutor to convince a judge that detaining the defendant is the only way to protect the public and ensure the accused's return to court.<sup>38</sup> But defendants at these hearings have access to informed counsel and the opportunity to cross-examine witnesses at the hearing.<sup>39</sup> To determine which defendants would pose a danger to the community, New Jersey judges use a risk assessment tool called the public-safety assessment (PSA), which has been implemented in at least forty jurisdictions nationally.<sup>40</sup> Importantly, while the system uses data from 1.5 million cases in 300 jurisdictions to predict whether a defendant is likely to commit a new crime, it does not rely on race, gender, education, socioeconomic status, or neighborhood information to compute its predictions.<sup>41</sup> Thus, while racial bias in algorithms has been demonstrated to be a latent concern in many

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32. *Pretrial Justice Reform*, AM. CIV. LIBERTIES UNION - N.J., <https://perma.cc/2D4S-BZJA> (last visited Mar. 12, 2022) [hereinafter ACLU-NJ].

33. *Id.*

34. MARIE VANNOSTRAND, DRUG POL'Y ALL., NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION 13 (2013) [https://drugpolicy.org/sites/default/files/New\\_Jersey\\_Jail\\_Population\\_Analysis\\_March\\_2013.pdf](https://drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf) [<https://perma.cc/6EBQ-EYN6>].

35. *Id.*

36. ACLU-NJ, *supra* note 32.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

systems,<sup>42</sup> the PSA was designed to factor in racial bias. Further, the ACLU is actively monitoring the system for racial bias and, so far, there has not been evidence of racial bias in the PSA to date.<sup>43</sup>

Since its implementation, New Jersey's new bail system has successfully lowered the jailed population, while keeping the recidivism and court appearance rates for released defendants largely stable, compared to the old cash bail system.<sup>44</sup> In 2020, the number of defendants that were held pretrial on a bond of \$2,500 or less had decreased to .2% of the population (fourteen people total).<sup>45</sup> But the new system created benefits apart from just dramatically decreasing reliance on cash bail bonds. In its 2018 report, the New Jersey Judiciary reported that the recidivism rate from released defendants under CJR in 2017 compared favorably with the cash-bail system in 2014, with only a 1% increase between the CJR system and the old cash-bail system.<sup>46</sup> Further, the court appearance rate for defendants remained extremely high under both systems, with an average appearance rate of 92.7% under the cash bail system and 89.4% under CJR.<sup>47</sup> In 2020, the court appearance rate under CJR increased to 90.9%.<sup>48</sup> Therefore, the data suggests that there is not a substantial difference in either the recidivism rate or the non-appearance rate between the CJR system and the cash bail system.

The CJR system also had a substantial impact on the lives of low-risk defendants. Under CJR, low-risk defendants are largely issued complaint-summonses (giving a defendant a court date without incarceration). In 2017, 71% of defendants received complaint-summonses as opposed to 54% of defendants in 2014 under the cash bail system.<sup>49</sup> Thus, under CJR fewer low-risk defendants were spending time in jail than under the cash bail system. Further, under CJR, defendants who are issued complaint-warrants (requiring the defendant's arrest) have a risk assessment

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42. See Julia Angwin et al., *Machine Bias*, PRO PUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/9D33-GWCF>] (detailing the discriminatory potential of algorithms against Black people in the criminal justice system).

43. See ACLU-NJ, *supra* note 32.

44. GLENN A. GRANT, N.J. JUDICIARY, JAN. 1–DEC. 1 2018 REPORT TO THE GOVERNOR AND LEGISLATURE 3, <https://www.politico.com/states/f/?id=00000169-df3a-d48d-a57d-dfff7f270000> [<https://perma.cc/WN6R-4RAX>].

45. Press Release, N. J. Courts, Judiciary Releases 2020 Annual Criminal Justice Reform Report, (Oct. 8, 2021), <https://www.njcourts.gov/pressrel/2021/pr100821a.pdf?c=wbp> [<https://perma.cc/2AVD-LF23>].

46. GRANT, *supra* note 44, at 4–5 (both systems had low recidivism rates, 13.7% for CJR and 12.7% for cash bail).

47. *Id.*

48. Press Release, *supra* note 45.

49. GRANT, *supra* note 44, at 5.



completed on them by Pretrial Services within forty-eight hours of arrest.<sup>50</sup> The only way the prosecutor can detain the defendant after this point is to file a motion for detention.<sup>51</sup> When the prosecutor did not file a motion for detention 81.3% of defendants were released within twenty-four hours and 99.5% were released within forty-eight hours.<sup>52</sup> The quick turnaround on release substantially mitigates the effects of short-term detention on low-income defendants, because the detention is short enough to minimally interfere with work, family, and childcare.

In addition to the broad benefits of the CJR system, its implementation has also helped narrow the racial disparity in the New Jersey jailed population. In 2013, “more than two-thirds” of incarcerated defendants in New Jersey were racial minorities.<sup>53</sup> Under CJR, the total number of defendants decreased by 3,000 Black and 1,300 Latinx defendants in 2018.<sup>54</sup> However, even under CJR, there are a disproportionate number of Black defendants in New Jersey jails. As of 2020, 60% of New Jersey’s state jail incarcerated individuals were Black.<sup>55</sup> It can be inferred from this data that while bail reform is helpful in narrowing the racial disparity in the criminal justice system, reform is necessary at all stages of the criminal justice system to enforce equity for people of color, particularly Black and Latinx accused people.

There are a lot of reasons to admire New Jersey’s approach to bail reform. It has decreased the jailed population, virtually eliminated the state’s reliance on cash bonds, and has helped narrow some racial disparities in the system. None of these benefits have come with significant costs to public safety, but they have come with increased respect for the criminal justice system and the constitutional rights of low-income accused people and accused people of color.

## **B. New York’s Bail Reform**

On January 1, 2020, New York implemented bail reform, which was designed not to require cash bail for release in 90% of arrests, but instead gave judges discretion on whether to impose a cash-bond for release for the other 10% of defendants.<sup>56</sup> However, the measure did not last three months

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 6.

54. *Id.*

55. Press Release, *supra* note 45.

56. Merkl, *supra* note 28.

before the Legislature amended the reform, allowing judges to impose cash bail for more offenses.<sup>57</sup> The Legislature made these changes largely due to pressure from district attorneys, law enforcement, and members of the public who claimed, with minimal evidence, that bail reform was to blame for increased crime.<sup>58</sup> The current version of the law prohibits judges from imposing cash bail on misdemeanor and nonviolent felony defendants, while giving judges discretion on whether to impose cash bail in all other cases.<sup>59</sup>

While there is encouraging data regarding the bail reform bill's success, the data is not yet conclusive since it was entirely collected during the COVID-19 pandemic.<sup>60</sup> Preliminary data suggests that the bail reform legislation has reduced the number of people outside New York City held on bail for misdemeanors or nonviolent felonies by 83.3%.<sup>61</sup> Unfortunately, the preliminary data has also captured an increase in the likelihood of incarceration for Black accused people in particular.<sup>62</sup> It is unclear at this point whether the bail reform itself is responsible for this increase or whether other disparities in the criminal justice system account for the increase. For instance, one interpretation of the data is that because Black people are more likely to be charged with violent crimes than other racial groups,<sup>63</sup> reducing the number of people held on bail who are charged with nonviolent crimes may have increased the proportion of Black incarcerated accused people. More time and data are necessary to truly evaluate New York's bail reform. However, the preliminary data suggests that even when cash bail is partially used, using no-cash bonds for misdemeanors and nonviolent offenses can dramatically reduce pretrial detention and the disparate impact the bail system has on low-income defendants.<sup>64</sup>

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57. Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained> [<https://perma.cc/GW7E-ELSZ>].

58. *Id.*

59. *Id.*

60. JAEOK KIM, QUINN HOOD & ELLIOT CONNORS, VERA INST. JUST., *THE IMPACT OF NEW YORK BAIL REFORM ON STATEWIDE JAIL POPULATIONS: A FIRST LOOK 1–3* (2021), <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf> [<https://perma.cc/92BE-VBUJ>] (indicates that even accounting for the pandemic, bail reform legislation has reduced incarceration rates).

61. *Id.* at ii.

62. *Id.*

63. Stephen Demuth & Darrell Steffensmeir, *The Impact of Gender on Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 238 (2004), <https://www.jstor.org/stable/10.1525/sp.2004.51.2.222> [<https://perma.cc/VJ9L-KVFS>].

64. *But see* Luis Ferré-Sadurní & Grace Ashford, *New York Toughens Bail Law in \$220 Billion Budget Agreement*, N.Y. TIMES (Apr. 7, 2022), <https://www.nytimes.com/2022/04/07/nyregion/new-york-budget-bail-reform.html> [<https://perma.cc/MN8B-HLY5>] (New York's Governor Hochul has now further tightened bail

### III. TEXAS'S 2021 BAIL REFORM

Section III will analyze Texas's bail reform legislation. First, it will examine the state's recent controversies with bail reform in Harris County and statewide. Second, it will discuss the key portions of the final bail reform law. Third, it will analyze why Texas's attempt at reform fails low-income accused people and people of color. Finally, it will propose bail reform alternatives that could and should have been implemented to help cure those disparities.

#### A. Background—The Road To Texas's "Bail Reform"

In 2017, District Court Judge Lee Rosenthal held that Harris County's bail system violated the Due Process and Equal Protection rights of low-income misdemeanor defendants.<sup>65</sup> The court found that bail hearings in Harris County often lasted seconds and did not include an individualized review of a defendant's ability to pay the cash bond.<sup>66</sup> As a result, Harris County violated the rights of indigent defendants when it set bail amounts that were impossible for them to pay, while wealthy defendants were released because they had enough cash on hand.<sup>67</sup> To ameliorate these impacts, Judge Rosenthal issued an injunction, requiring Harris County to release almost all misdemeanor defendants within twenty-four hours of arrest.<sup>68</sup>

Between the district court's injunction and the Fifth Circuit's appellate review of the bail system, Harris County implemented a new risk-assessment system for setting bail and argued that it was ameliorating the effects the district court had found deficient.<sup>69</sup> However, the Fifth Circuit

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restrictions during the state's budgeting process earlier this year. More time is needed to see how this step backward will impact the state's progress with bail reform).

65. *ODonnell v. Harris Cnty.*, 892 F.3d 147, 147 (5th Cir. 2018), *overruled by Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022). The court in *Daves* overruled *ODonnell* holding that a county could not be liable under § 1983 for county and district judge actions regarding bail. *Daves*, 22 F.4th at 540. But because this note is concerned with the effects of the *ODonnell* ordered bail reform and not its precedential value, the *Daves* opinion will not be discussed further here. See also, Jolie McCullough, *What's happening in Harris County now that the Sheriff is issuing bail bonds?*, TEX. TRIB. (Nov. 29, 2017, 12:00 AM), <https://www.texastribune.org/2017/11/29/heres-whats-happening-harris-county-now-sheriff-issues-bail-bonds/> [https://perma.cc/VZ79-2C6R].

66. *ODonnell*, 892 F.3d at 153–55.

67. *Id.* at 157–63.

68. McCullough, *supra* note 65.

69. *Id.*

did not address this change,<sup>70</sup> finding that Harris County's automatic and systemic reliance on cash bail unconstitutionally discriminated against low-income defendants.<sup>71</sup> The court summarized its analysis with the following:

[T]ake two misdemeanor arrestees who are identical in every way . . . except that one is wealthy and one is indigent. . . . [B]oth arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.<sup>72</sup>

Though the Fifth Circuit ordered the district court to revise its injunction to require a bail hearing within forty-eight hours of arrest, rather than the lower court's twenty-four-hour deadline, it largely left the district court's framework in place.<sup>73</sup>

Harris County attempted to comply with the federal courts' orders and suspended cash bail for most misdemeanors, but the success rate of their program was hard to measure in 2017, partially due to the havoc Hurricane Harvey wrought on the Houston area.<sup>74</sup> In the aftermath of the storm, the County had to sort out accused people who failed to appear from accused people who had shown up in the wrong court or otherwise attempted to comply with court orders.<sup>75</sup> However, the County's response to the Fifth Circuit's ruling changed dramatically after the 2018 election, when more bail-reform minded officials were voted into office.<sup>76</sup> Harris County officials were then able to standardize no-cash bonds for the vast majority of misdemeanors, consider ability to pay when imposing cash bail on defendants,<sup>77</sup> and implement pretrial services such as reminding defendants of their court dates and allowing them to reschedule hearings.<sup>78</sup> As a result, independent federal court monitors of the County's reforms noted that the

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70. *Id.*

71. *ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018), *overruled by Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022).

72. *Id.*

73. *Id.*

74. McCullough, *supra* note 65.

75. *Id.*

76. Jolie McCullough, *Harris County got rid of cash bail for many people accused of minor crimes. GOP lawmakers want to walk that back.*, TEX. TRIB. (Mar. 3, 2021, 11:00 AM), <https://www.texastribune.org/2021/03/03/harris-county-bail-texas/> [<https://perma.cc/J8F7-K2SS>].

77. *Id.*

78. Jolie McCullough, *Report: Harris County's bail reforms let more people out of jail before trial without raising risk of reoffending*, TEX. TRIB. (Sept. 3, 2020, 1:00 PM), <https://www.texastribune.org/2020/09/03/harris-county-bail-reform/> [<https://perma.cc/6CA9-L6Q2>].

rearrest rate for misdemeanor defendants released on bond was minimal, and the racial disparities in bond decisions had decreased.<sup>79</sup>

But two unanticipated developments hampered Harris County's new constitutional system: (1) the death of Officer Damon Allen; and (2) the COVID-19 pandemic. What follows is a brief summary of how these issues led to the call for Texas's current bail legislation.

### 1. *The death of officer Damon Allen*

On Thanksgiving Day 2017, a suspect shot and killed Department of Public Safety (DPS) Officer Damon Allen.<sup>80</sup> The suspect was later identified as a man who had previously been incarcerated for assaulting a public servant and who a grand jury had indicted for damaging a police vehicle with his car the previous month.<sup>81</sup> After law enforcement caught the suspect, it was discovered that he had been released on bond at the time of Officer Allen's shooting.<sup>82</sup> Officer Allen was a fifteen-year veteran of DPS and a father of three.<sup>83</sup> As such, critics of reforming the bail system portrayed his death as an example of why bail reform would hurt public safety.<sup>84</sup> Shortly after Officer Allen's death, Governor Abbott called for reform that would have prevented this suspect from being released before his trial.<sup>85</sup> Although Governor Abbott promoted similar bail legislation in the 2019 Texas Legislative Session,<sup>86</sup> it was not until the next factor in the bail reform debate came to light that he made the legislation one of his top priorities: the COVID-19 pandemic.

### 2. *The COVID-19 pandemic*

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79. McCullough, *supra* note 76,

80. Robert Downen & Alyson Ward, *Texas trooper slain on Thanksgiving was father of three, 15-year veteran of force*, HOUS. CHRON. (Nov. 24, 2017, 2:14 PM), <https://www.chron.com/news/houston-texas/article/The-latest-Slain-Texas-trooper-was-15-year-12381203.php> [<https://perma.cc/4B2F-HMBF>].

81. *Id.*

82. McCullough, *supra* note 7.

83. Downen & Ward, *supra* note 80.

84. McCullough, *supra* note 7.

85. *See id.*

86. *Id.* ("Abbott unsuccessfully promoted a bail bill similar to his current proposals two years ago.").

Since early 2020, the COVID-19 pandemic has provided the criminal justice system with a public health reason to reduce our reliance on cash bail: to reduce overcrowding and keep the pandemic from spreading inside prisons.<sup>87</sup> As part of its pandemic response, the Harris County Judge<sup>88</sup> drafted an executive order that would have deputized the county sheriff to determine which elderly or vulnerable nonviolent offenders could be released on a general bond.<sup>89</sup> Meanwhile, state district judges were heeding the county sheriff's calls to remove vulnerable inmates from Texas jails, increasing felony pretrial releases by 4% in a bit over a week.<sup>90</sup> During this time the judiciary's calculus was, as one judge put it, "Judges can sign orders releasing people now, or they can sign dismissals later for the people that will die in jail[.]"<sup>91</sup>

While compassionate release programs were in progress in Harris County and around the country,<sup>92</sup> Governor Abbott issued an Executive Order on March 29, 2020, suspending a county's authority to release prisoners on a personal bond if they had been charged with or previously convicted of an offense "involv[ing] physical violence or the threat of physical violence."<sup>93</sup> As noted in Section I, Mr. Chaney could not afford the \$100 cash bail imposed on him. Because he had a low-level assault on his record, Governor Abbott's order prohibited his release on a personal, no-cash bond, which ultimately led to his death from COVID-19.<sup>94</sup> Although the order remained in place into June 2021, many county-level courts disregarded it as unconstitutional and continued their compassionate release programs.<sup>95</sup> This approach led to an unequal application of justice standards

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87. Gabrielle Banks, *Exclusive: Lina Hidalgo seeking compassionate releases at Harris County Jail due to coronavirus*, HOUS. CHRON. (June 23, 2020, 1:11 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Judge-Lina-Hidalgo-seeking-15159260.php> [<https://perma.cc/H7RJ-C3CU>].

88. In this note "county judge" means the head of a county's commissioner's court, not a judicial position.

89. Banks, *supra* note 87.

90. *Id.*

91. *Id.*

92. *Id.* (noting that New Jersey compassionately released 1,000 inmates and Los Angeles County compassionately released 1,700 inmates citing the pandemic.).

93. Jolie McCullough, *Gov. Greg Abbott has lifted almost all Texas pandemic restrictions. But not the one limiting jail releases.*, TEX. TRIB. (June 10, 2021, 5:00 AM), <https://www.texastribune.org/2021/06/10/texas-bail-pandemic-greg-abbott/> [<https://perma.cc/ZB3Y-8VEX>]; see also, Jolie McCullough & Emma Platoff, *As local officials shrink jail populations due to coronavirus, Abbott blocks release of some inmates who can't pay bail*, TEX. TRIB. (Mar. 29, 2020, 7:00 PM), <https://www.texastribune.org/2020/03/29/texas-governor-bans-release-without-bail-some-inmates-amid-coronavirus/> [<https://perma.cc/S8VY-G7SX>] (supporting the date the Executive order was issued).

94. McCullough, *supra* note 93.

95. *Id.*

from county to county, however,<sup>96</sup> and conservative politicians used the relatively high national murder rate during the pandemic as evidence that releasing more accused people pretrial caused a spike in crime.<sup>97</sup> The reason for the increased murder rate is unknown, but criminal justice experts theorize that the pandemic, recent changes in policing tactics, and subsequent changes in the public's perception of law enforcement after the anti-police-brutality protests likely accounted for the increase.<sup>98</sup> Houston alone experienced 400 homicides in 2020.<sup>99</sup> Though federal court ordered independent monitors have confirmed that Harris County's revised bail policies are unlikely to be responsible for the increased number of homicides,<sup>100</sup> this has not stopped conservative politicians from using the statistic to decry the County's recent bail reform.<sup>101</sup>

As a result, Governor Abbott designated "bail reform" legislation—meaning legislation that would prevent persons charged with violent crimes from release on personal or no-cash bonds—an emergency item in the first Legislative Session after the pandemic began.<sup>102</sup> The first attempt at bail reform legislation, House Bill 20, failed when Democrats from the Texas House broke quorum to kill anti-voter legislation.<sup>103</sup> Governor Abbott retaliated by vetoing funding for the Legislative branch to punish lawmakers for breaking quorum,<sup>104</sup> then called a special legislative session

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96. *Id.*

97. Rob Arthur & Jeff Asher, *What Drove the Historically Large Murder Spike in 2020?*, THE INTERCEPT (Feb. 21, 2021, 6:00 AM), <https://theintercept.com/2021/02/21/2020-murder-homicide-rate-causes/> [<https://perma.cc/2NRK-BMCX>] (stating the national murder rate increased by 21% nationally during 2020); *see also* McCullough, *supra* note 7 (supporting the contention that conservative politicians are pointing to the murder rate as a result of releasing suspects on no-cash bonds).

98. Arthur & Asher, *supra* note 97.

99. McCullough, *supra* note 76.

100. *Id.*; *see also* BRANDON L. GARRETT ET AL., INDEP. MONITOR FOR *ODONNELL V. HARRIS CNTY. DECREE, MONITORING PRETRIAL REFORM IN HARRIS COUNTY* 1–8 (2020), <https://storage.courtlistener.com/recap/gov.uscourts.txsd.1360805/gov.uscourts.txsd.1360805.722.1.pdf> [<https://perma.cc/V59Y-RVAD>] (recounting the success of Harris County's bail reform system in spite of the complications caused by the COVID-19 pandemic).

101. McCullough, *supra* note 7 (supporting the contention that conservative politicians are pointing to the murder rate as a result of releasing suspects on no-cash bonds).

102. Press Release, Greg Abbott, Governor, State of Texas, Governor Abbott Statement on Passage of Bail Reform Legislation (Aug. 31, 2021), <https://gov.texas.gov/news/post/governor-abbott-statement-on-passage-of-bail-reform-legislation> [<https://perma.cc/G2LN-ZSPV>] ("Public safety is at risk because of our current bail system that recklessly allows dangerous criminals back onto our streets, which is why I made bail reform an emergency item during the 87<sup>th</sup> Legislative Session.").

103. Jolie McCullough, *GOP priority bail bill dies in Texas House after Democrats walk out on voting bill*, TEX. TRIB. (May 31, 2021), <https://www.texastribune.org/2021/05/30/texas-bail-legislature/> [<https://perma.cc/ZL8U-KHVV>].

104. Cassandra Pollock, *Gov. Greg Abbott vetoes funding for Texas Legislature and its staff as punishment for Democrats' walkout on elections bill*, TEX. TRIB. (June 18, 2021, 6:00 PM),

in which both bail reform and election integrity legislation were priorities.<sup>105</sup> Texas Democrats then fled to Washington D.C. to prevent another anti-voter bill from reaching the Governor's desk,<sup>106</sup> and it was not until the second-called special session that the final "bail reform" bill was passed.<sup>107</sup> Against the protests of criminal justice experts and bail reform advocates, Senate Bill 6 (aka "The Damon Allen Act") was finally signed into law.<sup>108</sup>

## B. The Damon Allen Act Explained

The Damon Allen Act (Act) requires the Office of Court Administration for the Texas Judicial system to develop a public safety report system to evaluate a defendant's bail amount according to the updated rules.<sup>109</sup> The bill added rules for setting bail,<sup>110</sup> which previously had only five requirements.<sup>111</sup> Now the person who is setting bail must

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<https://www.texastribune.org/2021/06/18/greg-abbott-veto-legislature-democrats/>  
[<https://perma.cc/XCH4-PNGP>].

The governor's move targeting lawmaker pay comes after House Democrats walked out in the final days of the regular legislative session, breaking quorum, to block passage of Senate Bill 7, Abbott's priority elections bill that would have overhauled voting rights in the state. The move also killed bail legislation that Abbott had earmarked as a priority.

*Id.*

105. OFF. OF TEX. GOVERNOR, Proclamation by the Governor of the State of Texas, (July 7, 2021), [https://gov.texas.gov/uploads/files/press/PROC\\_first\\_called\\_session\\_87th\\_legislature\\_IMAGE\\_07-07-21.pdf](https://gov.texas.gov/uploads/files/press/PROC_first_called_session_87th_legislature_IMAGE_07-07-21.pdf) [<https://perma.cc/CJU3-WQH6>].

106. Alexa Ura & Cassandra Pollock, *Texas House Democrats flee the state in a move that could block voting restrictions bill, bring Legislature to a halt*, TEX. TRIB. (July 12, 2021, 8:00 PM), <https://www.texastribune.org/2021/07/12/texas-democrats-voting-bill-quorum/> [<https://perma.cc/ZUE3-58SB>].

107. *See* S.J. of Tex., 87th Leg., 2d. C.S. 268 (2021) (confirming SB 6 was signed by the Governor on September 17, 2021, during the second-called session).

108. S.B. 6 House Comm. on Const. Rts. & Remedies, Witness List, Tex. S.B. 6, 87th Leg., 2d. C.S. (Aug. 21, 2021) (twenty-nine witnesses testified against SB 6 in the House Committee including The Bail Project and ACLU, while only eight witnesses testified in favor of SB 6. No witnesses were recorded in the Senate); *see also*, Damon Allen Act, 87th Leg., 2d C.S., ch. 11, 2021 Tex. Gen. Laws 526.

109. Tex. Crim. Proc. Code Ann. § 17.021.

110. *Id.* § 17.15.

111. *Id.* Before S.B. 6:

The amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion by the Constitution and by the following rules:

(1) The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.



consider: whether the offense committed involved violence or violence against a peace officer; “the future safety of a victim of the alleged offense, law enforcement, and the community”; the defendant’s criminal history including any instances of “family violence, other pending criminal charges, and any instances in which the defendant failed to appear in court following release on bail”; and the defendant’s citizenship status.<sup>112</sup> The information in the report produced by the public safety report system, as well as any supplemental information collected by DPS, must be used to evaluate the defendant’s eligibility for bail and to set the defendant’s bail amount.<sup>113</sup> Further, the bill requires the Office of Court Administration to develop a training program for magistrates charged with setting bail amounts, that magistrates must then complete.<sup>114</sup>

The bill also prohibits courts from releasing defendants who are charged with committing an “offense involving violence,” or who after being released on bail or community supervision for an “offense involving violence” are charged with committing a felony, or any assault, deadly conduct, terroristic threat, or disorderly conduct involving a firearm after being released on bail or community supervision for such an offense.<sup>115</sup> It defines an “offense involving violence” as including murder, assault if it is chargeable as a felony or involves family violence, kidnapping, human trafficking, sexual abuse or assault, taking or attempting to take a weapon from a peace officer, repeatedly violating a bond order restraining family violence, and promoting or compelling prostitution.<sup>116</sup> However, it allows a magistrate, sheriff, or officer to skip consideration of a defendant’s criminal history if they are charged with a Class C misdemeanor or “fine-only offense” or if they were only issued with a citation.<sup>117</sup> It also requires magistrates to hold bond hearings “without undue delay” or within forty-

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(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.*

112. *Id.*

113. *Id.* §§ 17.15, 17.021–17.022.

114. Tex. Crim. Proc. Code Ann. § 17.024.

115. *Id.* § 17.03(b–2).

116. *Id.* § 17.03(b–3)(2).

117. *Id.* § 17.028(m); *see also Id.* § 17.20(c).

eight hours of the accused's arrest,<sup>118</sup> codifying the Fifth Circuit's ruling in *ODonnell*.<sup>119</sup>

### C. The Effects Of Texas's Bail Reform And Lost Opportunities

The Damon Allen Act does have some good features, such as codifying the Fifth Circuit's forty-eight-hour bond hearing requirement from *ODonnell* and requiring training for magistrates who set bail amounts for defendants.<sup>120</sup> However, requiring the judiciary to consider criminal history and citizenship status when setting bail amounts has drawn sharp criticism from advocates, who argue that both of these provisions will disproportionately impact accused low-income people and people of color.<sup>121</sup>

Mandating consideration of an accused person's criminal history will disproportionately impact low-income accused people and accused people of color. People of color are already disproportionately incarcerated in Texas jails. According to a 2015 report by the Vera Institute, although Black Texans comprise only 13% of Texas's population, they accounted for 27% of the population in Texas jails and 33% of the population in Texas prisons.<sup>122</sup> In 2019, the percentage of Black defendants incarcerated in Texas was 32.6%.<sup>123</sup> This disparate incarceration rate is prevalent in the United States; however, the lasting impact of "War on Drugs" policies has further created a disproportionate impact on people of color when criminal history is used as a factor in bail decisions.<sup>124</sup> Over 80% of drug arrests in 2016 were for drug possession only.<sup>125</sup> Although drug use remains similar

118. *Id.* § 17.028(a).

119. *ODonnell v. Harris Cnty.*, 892 F.3d 147, 160 (5th Cir. 2018), *overruled by* *Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022).

120. Jolie McCullough, *Texas lawmakers pass rewrite of state's bail system aimed at keeping more people behind bars who can't post cash*, TEX. TRIB. (Aug. 31, 2021), <https://www.texastribune.org/2021/08/27/texas-bail-legislature/> [<https://perma.cc/9SFT-F3NA>]; see also, *ODonnell*, 892 F.3d at 160 ("We conclude that the federal due process right entitles detainees to a hearing within 48 hours.").

121. McCullough, *supra* note 120.

122. VERA INST. JUST., INCARCERATION TREND TEXAS 1 (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf> [<https://perma.cc/6LAL-RFWH>].

123. TEX. DEPT. OF CRIM. JUST., 2019 STAT. REP. 8 (Aug. 31, 2019), [https://www.tdcj.texas.gov/documents/Statistical\\_Report\\_FY2019.pdf](https://www.tdcj.texas.gov/documents/Statistical_Report_FY2019.pdf) [<https://perma.cc/FZ88-63SU>].

124. DRUG POL'Y ALL., *The Drug War, Mass Incarceration and Race* (Jan. 2018), [https://drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race\\_01\\_18\\_0.pdf](https://drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf) [<https://perma.cc/UR6U-JZ2Q>].

125. *Id.*

across racial demographics in the United States, people of color are more likely to be convicted of drug offenses than white people.<sup>126</sup> For example, while 13% of Americans are Black, 29% of people arrested for drug violations are Black.<sup>127</sup> Moreover, 40% of people incarcerated in state or federal prisons for drug offenses in the United States are Black.<sup>128</sup> Similarly, 18% of the United States' population is Latinx, but 38% of people incarcerated for drug offenses are Latinx.<sup>129</sup> Despite comparable drug use among white people, the increased likelihood that people of color will be stopped, searched, and arrested has led to their disproportionate representation among the incarcerated.<sup>130</sup> Furthermore, drug possession is at least a Class B misdemeanor in Texas.<sup>131</sup> While it is an improvement that a sheriff may release a Class C misdemeanor-charged defendant without looking at the defendant's criminal record or setting a bond—pretty much any drug offense will make someone ineligible for this leniency.<sup>132</sup> Therefore, the fact that a Black or Latinx individual in Texas is more likely than a white individual to be stopped, searched, arrested, and charged for a misdemeanor makes them more likely to be ineligible for a discretionary, sheriff-issued, personal bond under the Texas bail reform bill.<sup>133</sup> Additionally, Black people are more likely to be charged and convicted of violent crimes than their white counterparts.<sup>134</sup> Thus, a Black Texan is more likely than a white Texan to be ineligible for release on personal bond, because even a previous offense involving violence on your record means you are ineligible for a no-cash bond, just like Mr. Chaney.

To compound this problem, Black and Latinx male defendants are frequently set higher bail amounts than white male defendants for similar crimes.<sup>135</sup> The disparate bail amounts can help explain why Black and Latinx defendants are less likely to obtain pretrial release, mostly because of inability to afford a bail bond.<sup>136</sup> The disparate impacts throughout the criminal justice system make it more likely that people of color will get a criminal offense on their record that counts against them during the bail

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. DRUG POL'Y ALL., *supra* note 124.

131. *See generally*, Tex. Health & Safety Code Ann. § 481 (only three drug-related offenses qualify as Class C misdemeanors, and marijuana possession is a Class B misdemeanor).

132. Tex. Crim. Proc. Code Ann. §§ 17.028(m), 17.20(c).

133. DRUG POL'Y ALL., *supra* note 124; *see also supra* Section III(B).

134. Demuth & Steffensmeir, *supra* note 63, at 230–31.

135. *See* Onyekwere, *supra* note 10 (“Bail practices are frequently discriminatory, with Black and Latino men assessed higher bail amounts than white men for similar crimes by 35 and 19 percent on average, respectively.”).

136. Demuth & Steffensmeir, *supra* note 63, at 238.

setting process, causing them to incur a cash bond, which they are then less likely to be able to pay. Moreover, these policies are not even necessarily keeping the most dangerous defendants behind bars. For while the Act prohibits releasing a defendant charged or previously convicted of an offense involving violence from getting a personal bond, it does not prohibit a judge from setting a cash bond. Thus, once again, poor defendants sit in jail, while rich defendants are released for the same, presumptively dangerous, conduct.

These statistics demonstrate that, whether the incarcerated are guilty or not, this legislation will penalize charged defendants with existing criminal histories—whether or not they are guilty of the charged offense—in the future for their criminal records, and the burden of this penalty will disproportionately fall on Black and Latinx Texans. When this data is combined with the fact Black and Latinx Texans are “more than twice as likely to live below the poverty line as White and Asian Texans,”<sup>137</sup> it really drives home the point that the cash bail system perpetuates a pretrial detention scheme that disparately impacts low-income people and people of color.

Reducing reliance on cash bail also impacts the reduction of racial disparities in the pretrial process. For example, Harris County demonstrated in its reformed bail system that once no-cash bonds became the norm for most misdemeanors, the racial disparity in their incarceration rate narrowed considerably.<sup>138</sup> As one advocate from the Texas Organizing Project said in a statement, the Act was based on “right-wing hysteria that violates Texans’ rights, not public safety,” and that its implementation will “lead to more overcrowding in jails and further criminalize poverty in our state, meaning more Texans—a disproportionate amount being Black and Latinx—will stay stuck in jail solely because they cannot afford bail.”<sup>139</sup>

The citizenship provision raises additional opportunities for bias against accused people of color. Texas Senator Lucio pointed out when the Senate debated the Act that requiring consideration of an accused person’s

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137. *Poverty in Texas: 4.1 Million Texans Live in Poverty*, CTR. FOR PUB. POL’Y PRIORITIES (Mar. 2019), [https://everytexan.org/images/2019\\_Poverty\\_in\\_Texas.pdf](https://everytexan.org/images/2019_Poverty_in_Texas.pdf) [<https://perma.cc/6VYC-4A4M>] (19% of Black Texans and 21% of Latinx Texans live below the poverty line, as compared to 9% of white Texans and 10% of Asian Texans).

138. See BRANDON L. GARRETT ET AL., INDEP. MONITOR FOR *ODONNELL V. HARRIS CNTY. DECREE*, MONITORING PRETRIAL REFORM IN HARRIS COUNTY 38–39 (2021), <https://static.texastribune.org/media/files/f66da81cc40c6bf4bbec22e822314f44/second-odonnell-report.pdf> [<https://perma.cc/EQL7-QAUW>].

139. Jolie McCullough, *Texas bill to require cash bail for those accused of violent crimes becomes law*, TEX. TRIB. (Sept. 13, 2021, 9:00 AM), <https://www.texastribune.org/2021/09/03/texas-bail-legislation-abbott/> [<https://perma.cc/C3QV-SQYK>].

citizenship status can encourage magistrates to engage in racial profiling.<sup>140</sup> In his attempt to strike down the citizenship provision, he noted “[n]othing in a person’s citizenship status makes them more likely to be a flight risk.”<sup>141</sup> But proponents of the citizenship requirement disagree. The bill’s author, Senator Huffman, contended that noncitizens may have fewer community ties, or immigration holds on their record, which could increase their risk of not attending court hearings.<sup>142</sup>

Though the Act’s proponents assume that an undocumented immigrant is inherently a flight risk, the Ninth Circuit pointedly rejected this conclusion.<sup>143</sup> In *Lopez-Valenzuela v. Arpaio*, the court considered whether an Arizona constitutional amendment (Proposition 100)—denying undocumented immigrants charged with any listed “serious felony offenses” eligibility for bail if the state could establish probable cause that the accused’s status was “undocumented” at their hearing—violated the Due Process Clause of the Fourteenth Amendment.<sup>144</sup> As part of its analysis that Proposition 100 was unconstitutional, the court weighed whether the amendment was “adopted to address a particularly acute problem[.]” and it found that the record “contains no findings, studies, statistics or other evidence . . . showing that undocumented immigrants as a group pose either an unmanageable flight risk or a significantly greater flight risk than lawful residents.”<sup>145</sup> Therefore, it found that the state was not addressing an acute problem with Proposition 100 because there was no empirical evidence supporting the assumption that undocumented immigrants are a greater flight risk than citizens are.<sup>146</sup> Thus, when there is no clear evidence that noncitizens pose a greater flight risk, there is little reason to impose a citizenship prong into the bail setting analysis. Further, it is possible that forcing judges to consider citizenship status could result in racial profiling

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140. Jolie McCullough, *Texas Senate approves bail bill that would keep more people in jail if they can't post cash bonds*, TEX. TRIB. (Apr. 14, 2021, 6:00 PM) <https://www.texastribune.org/2021/04/14/texas-bail-legislature/> [https://perma.cc/XV92-HX93] (Note: at this point the bail reform legislation was under the bill number S.B. 21.)

141. *Id.*

142. *Id.*

143. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 783–84, 791–92, (9th Cir. 2014), (en banc), cert. denied, 575 U.S. 1044 (2015).

144. *Id.* at 775.

145. *Id.* at 783.

146. See *id.* at 783–784 n.6 (the court noted that the trial court had relied on the statements of County Attorney Andrew Thomas who was later found to be an incredible source because “[h]e was disbarred in 2012 for using his office to destroy political enemies, filing malicious and unfounded criminal charges, committing perjury and engaging in a host of other crimes . . . .” It also noted that the defense on appeal “tellingly” did not mention Thomas’s statements).

in a state where approximately 73% of the undocumented immigrant population is Latinx.<sup>147</sup>

Moreover, the prohibition on personal or no-cash bonds for accused people charged with “offenses involv[ing] violence” will harm low-income defendants while allowing wealthy defendants charged with the same offense to leave custody.<sup>148</sup> While no-cash bonds do not require a defendant to pay a bond amount up front, they can impose other requirements such as GPS tracking or drug testing that cash-only bonds may not impose.<sup>149</sup> The system the Texas Legislature designed to keep violent offenders behind bars will, therefore, keep low-income defendants charged with violent crimes incarcerated, but will do nothing to prevent wealthy defendants charged with the same offenses from obtaining release. As a result, wealthier defendants will likely avoid the cycle of hardship the incarcerated face—just as the court in *O'Donnell* feared.<sup>150</sup> Thus, though the Texas Legislature was ostensibly concerned with public safety, all it managed to do was systematize keeping poor defendants in a cycle of incarceration and give their wealthier counterparts a “get out of jail for a fee” card.

#### D. Policy Recommendations To Improve Texas’s Bail Reform

This section will discuss policy reforms that would improve Texas’s bail reform law for low-income accused people and accused people of color. First, Texas should increase pretrial services for accused people to increase the rate of appearance for released accused people without requiring confinement. Second, Texas should use no-cash bonds for misdemeanors and nonviolent offenses unless the risk is too great. Finally, Texas should require the judiciary to complete a comprehensive, individualized review for each accused person and allow them to rebut

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147. *U.S. unauthorized immigrant population estimates by state, 2016*, PEW RSCH. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/> [<https://perma.cc/X35Y-DLDD>] (stating that as of 2016 73% of unauthorized immigrants in Texas were from Mexico). The Pew Research Center notes that this report is based on augmented U.S. Census Bureau data there may be some underreporting of the number of undocumented immigrants in Texas, due to fear of reprisal. Similar hesitancy was apparent when the citizenship question for the 2020 U.S. Census was proposed. *See e.g.*, Sara Murray & Gregory Wallace, *What’s behind the citizenship question on the 2020 census*, CNN POLITICS (June 24, 2019, 9:12 AM), <https://www.cnn.com/2019/06/24/politics/citizenship-census-2020/index.html> [<https://perma.cc/YXB8-TWNQ>].

148. McCullough, *supra* note 93.

149. *Id.*

150. *O'Donnell v. Harris Cnty.*, 892 F.3d 147, 163 (5th Cir. 2018), *overruled by* *Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022).

presumptions related to their criminal history, financial inability to pay, and citizenship status.

### *1. Increase pretrial services*

Cash bail is seemingly a method of ensuring that accused people appear for their court dates. However, a report commissioned by the Department of Justice investigating the reasons why accused people fail to appear for court dates found that the reasons for failing to appear for a court date for most accused people were scheduling conflicts, work conflicts, transportation problems, forgetting the date, and childcare conflicts.<sup>151</sup> Most of the issues identified are more likely to be solved by simply allowing accused people to reschedule court hearings to accommodate scheduling, work, transportation, and childcare conflicts. Moreover, adding a program to remind accused people of their court dates would be another low-cost alternative to cash bail that would increase the appearance rate without imposing a wealth-based system of pretrial release on accused people.<sup>152</sup> Furthermore, we have seen evidence that this approach helps appearance rates for no-cash bond released accused people. One of the reforms Harris County implemented to comply with federal court mandates was a system that reminded accused people of their court dates and allowed them the opportunity to reschedule a certain number of times without penalty.<sup>153</sup> The County found that in 56% of observed cases in 2020, when rescheduling rates were high, appearance rates were correspondingly high: only 6.9% of accused people failed to appear in observed cases.<sup>154</sup> The reasons for nonappearance listed often concerned “medical issues, quarantine, [and] miscommunication between defense attorneys and clients, and other such explanations.”<sup>155</sup> Even though the appearance rate will not beat the 100% appearance guarantee of an accused person who has no opportunity for pretrial release, overall, the rate of nonappearance in Harris County was quite low when the rescheduling system was available. Given the discussed

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151. BRIAN H. BORNSTEIN, ALAN J. TOMKINS & ELIZABETH M. NEELEY, NAT’L CRIM. JUST. REFERENCE CTR., REDUCING COURTS’ FAILURE TO APPEAR RATE: A PROCEDURAL JUSTICE APPROACH 24–25 (2011), <https://www.ojp.gov/pdffiles1/nij/grants/234370.pdf> [<https://perma.cc/U869-J2D2>] (while this study was funded by the U.S. Department of Justice it was not published by the department).

152. See TEX. APPLESEED, *supra* note 17, at 6 (noting the cost of holding misdemeanor defendants in Texas “So misdemeanor jail stays are conservatively costing just these 10 [Texas] counties \$51 million dollars [sic] annually.”).

153. See GARRETT ET AL., *supra* note 138, at 18–20.

154. See *id.* at 19 (percentage calculated from the 436 out of 780 observed cases statistic).

155. *Id.* (percentage calculated from fifty-four out of 780 observed cases statistic).

harms of pretrial detention, a 6.9% chance of nonappearance, with many of those instances citing understandable reasons, is worth allowing release for the majority of nonviolent accused people on no-cash bonds. The state should concentrate on increasing pretrial services such as reminders and rescheduling. If Texas had adopted Harris County's pretrial services system rather than steamrolling it and relying on cash-bail bonds for many accused people, it could save millions of dollars per year while narrowing income and racial disparities in the pretrial system.<sup>156</sup> When Harris County implemented its reformed pretrial system, racial disparities and the jailed population decreased.<sup>157</sup> If experience is any guide, implementing a similar reminder and rescheduling system would help extend that outcome to the rest of the state.

2. *No-cash bonds for misdemeanors and nonviolent offenses based on risk*

As Harris County and New Jersey demonstrated with their versions of bail reform, increasing the use of no-cash bonds (with or without conditions) does not meaningfully increase the incidence of recidivism or failure to appear.<sup>158</sup> As the New York bail reform illustrated, it actually decreases the number of people in jail significantly and dramatically decreases the number of people who remain detained because they cannot afford to pay for their release.<sup>159</sup> Not only do these reforms decrease the jailed population, costing taxpayers less money,<sup>160</sup> but they can also narrow the racial disparities in the pretrial detention process.<sup>161</sup> As both New Jersey

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156. TEX. APPLESEED, *supra* note 17, at 5.

157. McCullough, *supra* note 76.

158. GRANT, *supra* note 44, at 3–5 (noting the stability of nonappearance and recidivism rates in New Jersey); *see also* Press Release, *supra* note 45 (noting the continued improvement of the nonappearance and recidivism rates in New Jersey in 2020); *see also* LOWENKAMP ET AL., *supra* note 20, at 3 (reporting that holding people in detention for even a few days increases recidivism compared with detention for twenty-four hours or less even for low- or moderate-risk defendants); *see also* McCullough, *supra* note 76 (noting that rearrest rates and appearance rates remained similar between Harris County's cash bail and bail reform systems).

159. KIM, HOOD & CONNORS, *supra* note 60, at 4 (indicates that even accounting for the pandemic, bail reform legislation has reduced incarceration rates).

160. TEX. APPLESEED, *supra* note 17, at 5 (noting that misdemeanor jail bookings were responsible for over 850,000 jail bed days in ten Texas counties at an estimated \$60 per day, per defendant, this cost amounts to \$51 million in taxpayer funds annually).

161. GARRETT ET AL., *supra* note 138; *see also* McCullough, *supra* note 103 (noting the decrease in racial disparities in Harris County's bail system after court-ordered reform was implemented); *see also* GRANT, *supra* note 44, at 3–6, (noting the decrease in racial disparities in New Jersey's bail reform system over the cash bail system); *but see* KIM, HOOD & CONNORS,



and Harris County demonstrated, using no-cash bonds for release with misdemeanor and low-to-moderate risk accused people decreased the number of people incarcerated, the number of people who remained incarcerated for inability to pay a cash bond, and the number of people of color who were disproportionately kept behind bars.<sup>162</sup> Further, as New Jersey's system demonstrated, there are methods of assessing risk that narrow disparate impacts on low-income people and people of color, while simultaneously helping to keep the riskiest accused people behind bars.<sup>163</sup> While this Note did not examine another bail system that explicitly required consideration of the accused person's citizenship when setting bail, the Ninth Circuit cited the lack of empirical evidence that undocumented immigrant status constitutes an inherent flight risk to find Arizona's presumptive flight risk proposition unconstitutional.<sup>164</sup> Texas should have implemented a system similar or identical to New Jersey's PSA, allowing judges to assess the riskiness of an accused person based on research and proven outcomes.<sup>165</sup> This is preferable to leaving an accused person's fate to judges whose biases may influence outcomes when they are required to consider criminal history and citizenship status in their bail decisions.

### 3. *Individualized review*

Access to counsel and an adversarial hearing that includes opportunities for rebuttal and cross-examination increases the likelihood that release decisions are the result of a fair hearing, rather than the sole reliance on the State's evidence.<sup>166</sup> Though Texas's bail setting factors include consideration of the accused's ability to pay,<sup>167</sup> Harris County's previous cash bail system demonstrated how well those rules pay off without a true mandate.<sup>168</sup> Therefore, Texas would benefit from requiring a full adversarial hearing where the prosecutor must demonstrate that no other means will keep the accused from potentially harming another

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*supra* note 60, at 8–9 (finding an initial increase in racial disparity after implementing the New York bail reform).

162. See GRANT, *supra* note 44, 3–6 (noting the decrease in racial disparities in New Jersey's bail reform over the cash bail system); see also McCullough, *supra* note 76 (noting the decrease in racial disparities in Harris County's court-ordered bail reform system).

163. ACLU-NJ, *supra* note 32.

164. Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 783 (9th Cir. 2014), (en banc), *cert. denied*, 575 U.S. 1044 (2015).

165. ACLU-NJ, *supra* note 32.

166. *Id.*

167. Tex. Crim. Proc. Code Ann. § 17.15.

168. O'Donnell v. Harris Cnty., 892 F.3d 147, 153–55 (5th Cir. 2018), *overruled by* Daves v. Dallas Cnty., 22 F.4th 522 (5th Cir. 2022).

person.<sup>169</sup> This policy will increase accused-person representation and allow the accused person to provide context for their criminal history, including extenuating circumstances such as accepting a plea bargain out of necessity or missing a court date due to a childcare conflict.

Moreover, citizenship status should not factor into bail bond decisions, because there is no empirical data supporting that noncitizens are less likely to appear for court hearings than their domestic counterparts.<sup>170</sup> Overall, an adversarial hearing process similar to New Jersey's, combined with the other reforms in this Section, would decrease the harmful effects the Damon Allen Act will have on low-income people and people of color. Allowing accused people to provide context for their prior convictions or failures to appear can give the court the necessary insight to determine whether a person is really a risk, or whether a no-cash bond with or without conditions would be sufficient to ensure their appearance.

#### IV. CONCLUSION

Texas is one of the most populous states in the nation, and increasingly its residents are people of color.<sup>171</sup> When the bail system disparately impacts people of color, who are already disparately impacted at all stages of the criminal justice system,<sup>172</sup> it starts a self-perpetuating cycle where more low-income people and more people of color incur criminal records and remain incarcerated for their inability to pay a cash bond, which then does them no favors if they come into contact with the criminal justice system again. As demonstrated in the comparison between alternative state and county programs, and Texas's ultimate bill, Texas's bail reform was a lost opportunity. The evidence that cash bail disparately impacts low-income people and people of color is not news.<sup>173</sup> Instead of implementing evidence-backed systems for curing some of these disparities, Texas focused on ensuring low-income accused people with

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169. See ACLU-NJ, *supra* note 32 (supporting that this is the standard prosecutors must argue during hearings to detain defendants under New Jersey's bail reform system).

170. See *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 783 (9th Cir. 2014), (en banc), *cert. denied*, 575 U.S. 1044 (2015).

171. Alexa Ura et al., *People of color make up 95% of Texas' population growth, and cities and suburbs are booming, 2020 census shows*, TEX. TRIB. (Aug. 12, 2021), <https://www.texastribune.org/2021/08/12/texas-2020-census/> [<https://perma.cc/Q8HL-4PDZ>].

172. DRUG POL'Y ALL., *supra* note 124.

173. Alexa van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History Of Bail Reform And A Prescription For What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 709 (2018) (acknowledging the long history of monetary bail's disproportionate impact on poor people and people of color).

violent offenses on their records stayed in prison while providing an opportunity for wealthier accused people to pay for release. It is unjust and does not keep Texas communities safer. Further, Texas's refusal to implement automatic release on no-cash bonds for nonviolent offenders and most misdemeanants ensures that the system will disparately keep people of color incarcerated. Release for most defendants does not have to come at the price of public safety. Instead, it can help enhance it. Perhaps Texas will realize its error and implement the policy reforms necessary to heal our broken bail system. But until it does, low-income accused people and accused people of color will pay the price for Texas's failed bail reform.