



# INTERIM REPORT *to the 86<sup>th</sup> Texas Legislature*



**HOUSE COMMITTEE ON  
CRIMINAL JURISPRUDENCE**

*January 2019*

HOUSE COMMITTEE ON CRIMINAL JURISPRUDENCE

TEXAS HOUSE OF REPRESENTATIVES

INTERIM REPORT 2018

**Report & Recommendations for the  
86th Texas Legislature**

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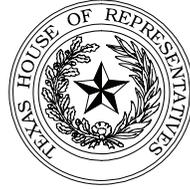
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COMMITTEE ON CRIMINAL JURISPRUDENCE  
TEXAS HOUSE OF REPRESENTATIVES

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JOE MOODY  
Chair



TODD HUNTER  
Vice Chair

January 23, 2019

The Honorable Joe Straus  
Speaker, Texas House of Representatives  
and  
Honorable Members of the Texas House of Representatives  
Texas Capitol, Rm. 2W.13 | Austin, TX 78701

re: Criminal Jurisprudence Interim Report 2018

Dear Mr. Speaker & Members:

The House Committee on Criminal Jurisprudence for the 85th Texas Legislature is proud to submit this interim report for the 86th Texas Legislature's consideration.

Respectfully,

Handwritten signature of Joe Moody in black ink.

JOE MOODY  
Chair

Handwritten signature of Todd Hunter in black ink.

TODD HUNTER  
Vice-Chair

Handwritten signature of Terry Canales in black ink.

TERRY CANALES

Handwritten signature of Barbara Gervin-Hawkins in black ink.

BARBARA GERVIN-HAWKINS

COLE HEFNER

MIKE LANG

TERRY WILSON

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## PREFACE

This is a report by and for people who care about criminal justice. Of course, that should include everyone—justice has been a core component of virtually every moral, religious, and political credo since the dawn of civilization. Our current justice system is both a reflection of who we are and a promise about who we want to be. And if abstract ideals don't interest you, then we're talking about public safety and an astronomical amount of taxpayer money.

So, whatever the reason, it's worth getting right. That's why our approach in this report favors pragmatic, nonpartisan, evidence-based policies.

The interim work of the committee was built on its efforts during the 85th Legislative Session, so we'd like to acknowledge the contributions of session-only committee staff members Emily Bresnahan and Julia Connor, whose work was invaluable. We also appreciate the attention and feedback of the dedicated men and women who've staffed each member of the committee during both session and the interim; we couldn't have tackled these topics without them.

The support structure undergirding the committee and the House itself is also ever-amazing, especially House Committee Coordinator Stacey Nichio and her office, the too-often-unsung heroes at the Texas Legislative Council, and Speaker Straus's policy team (including Shelton Green, who provided fantastic feedback for our committee before his recent move to the Legislative Budget Board).

Lastly, the entire committee extends its sincerest gratitude to the numerous agencies, experts, and (especially) members of the public who shared information and insights with us throughout the interim.

(Oh, by way of warning, the citations in this report will generally follow the *Greenbook* and the *Bluebook*—this is a criminal law committee, so apologies to non-attorney readers.)

## COMMITTEE & CHARGES

House Speaker Joe Straus appointed the following members to the House Committee on Criminal Jurisprudence for the 85th Legislative Session:

Joe Moody—Chair  
Todd Hunter—Vice Chair  
Terry Canales  
Barbara Gervin-Hawkins  
Cole Hefner  
Mike Lang  
Terry Wilson<sup>1</sup>

The House Rules gave the committee the following organization and jurisdiction:

**Section 7. Criminal Jurisprudence**—The committee shall have seven members, with jurisdiction over all matters pertaining to:

- (1) criminal law, prohibitions, standards, and penalties;
- (2) probation and parole;
- (3) criminal procedure in the courts of Texas;
- (4) revision or amendment of the Penal Code; and
- (5) the following state agencies: the Office of State Prosecuting Attorney and the Texas State Council for Interstate Adult Offender Supervision.<sup>2</sup>

The committee was initially given the following interim charges:

1. Evaluate the impact of Hurricane Harvey on the Texas criminal justice system, including its effect on the speed of criminal trials and litigation, criminal courts, district attorneys' ability to prosecute, and attorneys' ability to provide proper defense. Recommend any changes that could improve operational stability of state criminal justice institutions following a natural disaster and changes that would allow for a more effective response.
2. Assess developments in medical science and legal standards related to the imposition of the death penalty on defendants with serious mental illness or intellectual and developmental disabilities. Review statutorily prescribed jury instructions used during capital sentencing.
3. Study current practices for the enforcement of criminal laws against low-level possession of marijuana. Examine the use of alternative punishments and improvements to criminal enforcement mechanisms and community supervision.
4. Examine instances of prosecutorial misconduct and ineffective assistance of defense counsel. Review systemic and structural issues affecting the resolution of criminal cases.
5. Examine the legal framework surrounding sexual assault prosecutions, including statutory definitions, certain age-based offenses, and ongoing developments in evidence collection and processing.
6. Review the Texas state jail system, including its original intent, sentencing guidelines, effectiveness, and recidivism rates. Make recommendations for changes in the state jail system that will improve outcomes. (*Joint charge with the House Committee on Corrections*)

7. Monitor the work of the Office of Court Administration on pre-trial risk assessment tools for the Texas Judiciary, and study the use of risk assessment tools at various stages in the criminal justice process. Monitor litigation on Harris County pretrial bond practices. Monitor the implementation of the legislation passed by the 85th Legislature regarding the imposition of fines, fees, and court costs in criminal courts.
8. Monitor the agencies and programs under the Committee's jurisdiction and oversee the implementation of relevant legislation passed by the 85th Legislature.<sup>3</sup>

Later, two supplemental charges were added:

- \*1. Review the applicable portions of the state's penal laws and make legislative recommendations regarding whether existing protective order laws are sufficient or could be amended to include 'red flag' or mental health protective orders or whether 'red flag' or mental health protective orders should be independently created to allow law enforcement, a family member, a school employee, or a district attorney to file a petition seeking removal of firearms from a potentially dangerous person and providing for mental health treatment for the potentially dangerous person, while preserving the fundamental rights of the Second Amendment and ensuring due process.
- \*2. Examine current statutes designed to protect minors from accessing firearms without proper supervision and make recommendations to ensure responsible and safe firearm storage, including enhancing the penalty to a felony when unauthorized access results in death or bodily injury.<sup>4</sup>

The committee studied these charges at six hearings—five held in Austin, one held in El Paso—on March 26, 2018, April 26, 2018, May 23, 2018, June 25, 2018, August 29, 2018, and August 30, 2018, respectively.

The report and recommendations below are largely based on the testimony and written materials witnesses submitted to the committee at each hearing as well as the independent research and professional experience of committee staff.

## CHARGE 1—HURRICANE HARVEY

Evaluate the impact of Hurricane Harvey on the Texas criminal justice system, including its effect on the speed of criminal trials and litigation, criminal courts, district attorneys' ability to prosecute, and attorneys' ability to provide proper defense. Recommend any changes that could improve operational stability of state criminal justice institutions following a natural disaster and changes that would allow for a more effective response.

### Hearing

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The committee held a hearing on August 30, 2018 in room E2.014 of the Texas Capitol to consider charge one. This is the official witness list generated from electronic witness affirmation forms:

Brown, Susan (11th region)  
Daniel, Chris (Office of Harris County District Clerk)  
Ogg, Kim (Harris County District Attorney's Office)  
Slayton, David (Texas Judicial Council)  
Velasquez, Vanessa (Self)  
Whatley, Janna (Self)

### Background

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2017's Hurricane Harvey was one of the deadliest and costliest storms in United States history, causing 107 deaths and approximately \$125 billion in property damage—most of it in the Houston metropolitan area.<sup>5</sup> The criminal justice system in Harris County suffered both immediate and lingering effects from the storm that led to significant delays, inefficient and sometimes dangerous makeshift solutions, and an overall reduction in capacity.<sup>6</sup>

### Discussion

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#### INFRASTRUCTURE DAMAGE

The damage from Harvey hit the criminal justice system in Harris and other coastal counties in several ways. Beyond the immediate delays, the most obvious lasting impact was

infrastructure damage that left countless buildings—including the courthouses, offices, and detention facilities the justice system operates out of—unusable or inaccessible.

The Harris County Criminal Justice Center, which houses the Houston area’s dozens of criminal courts, was catastrophically damaged and may remain shuttered for repairs until 2020.<sup>7</sup> Criminal courts were forced to operate out of the already full civil courthouse, leading to each courtroom there housing two civil judges and two criminal judges plus the staff and

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Our courthouse was knocked out completely [and] it’s gonna cost a bundle. The human toll is much greater . . . the conditions are miserable. [T]he bottom line . . . about Harvey is, our justice system needs your attention and help.

THE HON. KIM OGG, HARRIS COUNTY DISTRICT ATTORNEY

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equipment for each simultaneously.<sup>8</sup> Others began sharing space with federal or family courts (some in dilapidated, otherwise-condemned buildings),<sup>9</sup> and for jurisdictions besides Harris, court had to be held in other counties altogether for some time.<sup>10</sup>

Every other office related to criminal justice suffered similar displacement, but nothing’s proven more dramatic than the issues facing jails. Prisoner housing has had to be outsourced as far away as Louisiana, creating significant logistical and security challenges when bringing inmates back for court.<sup>11</sup> That’s also meant potential constitutional violations as hundreds of prisoners awaiting trial have been held hundreds of miles away, unable to effectively consult with their attorneys in facilities the Texas Commission on Jail Standards lacks authority over.<sup>12</sup>

Damage to the networks of technology supporting the justice system led to significant problems in the immediate wake of Harvey. A lack of telephone and internet service meant the local administrative judge couldn’t be reached as the disaster escalated, so there was considerable uncertainty about whether courts could close and no uniformity in responses.<sup>13</sup> Spotty service after courts reopened also created security issues when deputies couldn’t be contacted promptly,<sup>14</sup> and the temporary lack of reliable connectivity meant that the “paperless” electronic platforms every level of our system has come to rely on were inaccessible for some time after the storm,<sup>15</sup> although in Harris County, at least, no electronic records were lost.<sup>16</sup>

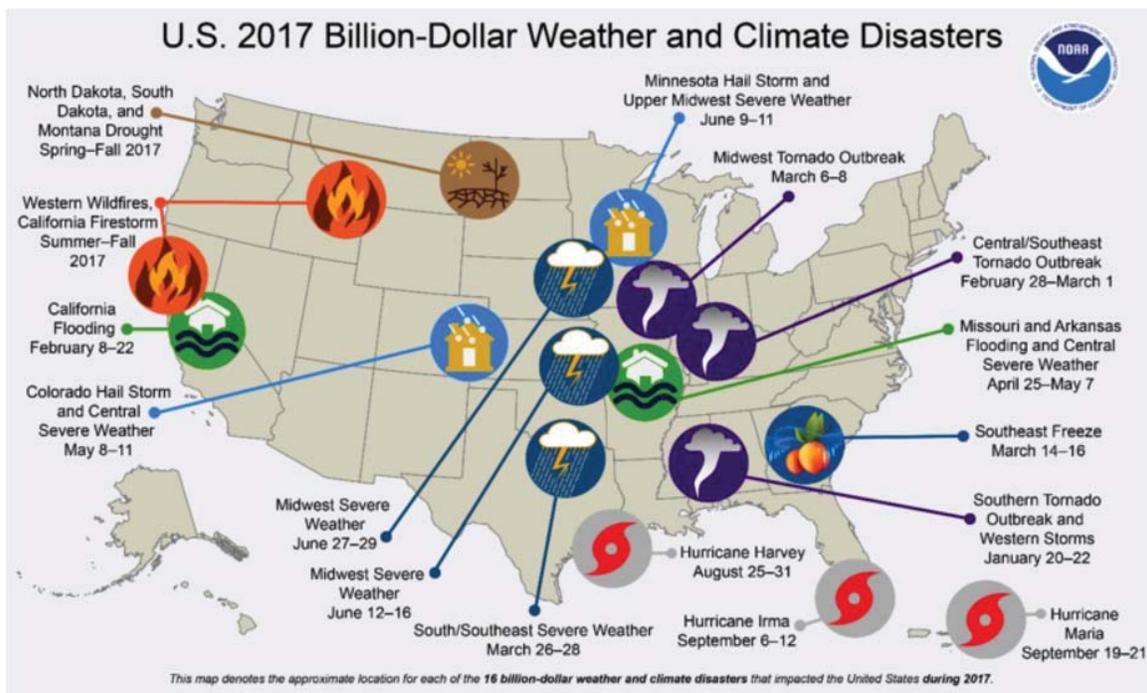
#### MONEY & MANPOWER

Harvey’s toll can also be accounted for in terms of money and manpower. The Harris County District Attorney’s Office has already committed more than \$10 million to office rental costs alone and lost 57,000 hours of prosecutorial time (a \$3.6 million annual value), with more than 10 percent of its workforce quitting over the miserable working conditions that have persisted

due to post-Harvey disarray and displacement.<sup>17</sup> The Criminal Justice Center will cost upwards of \$86 million to renovate,<sup>18</sup> and Harris County is spending about \$600,000 per month to house its inmates in facilities outside the county.<sup>19</sup>

#### STATUTORY LIMITATIONS

All these problems have been exacerbated by the rigidity of some statutes that control court operations. For example, only the Supreme Court of Texas is authorized to issue emergency orders, and then only in a limited fashion and for a limited time.<sup>20</sup> There are also strict limitations on the geographic locations where court may be held, which has put some courts in the position of being unable to legally convene.<sup>21</sup> These restrictions are all the more troubling in light of how frequent significant (if not always Harvey-level) disasters are:<sup>22</sup>



#### MOVING FORWARD

These issues have culminated in tremendous delays in the administration of justice, including several months in the storm's aftermath when no trials could be held throughout the region.<sup>23</sup> Some smaller counties, like Aransas and San Patricio, have caught back up and have little or no case backlog now;<sup>24</sup> Harris County is still far from fully catching up, with case dispositions down despite a decrease in cases being filed.<sup>25</sup>

No law can prevent a natural disaster, of course, and the unsurprising solution to the immediate problem is state funding to aid recovery efforts directly affecting the criminal justice system.<sup>26</sup> Stakeholders also highlighted the need for uniform disaster policies and plans

coordinated between all levels of our criminal justice system to bring some order to inherently chaotic situations.<sup>27</sup> And several witnesses advocated for more flexibility in when, where, and how court may be held, particularly for the benefit of rural communities.<sup>28</sup>

## Recommendations

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The committee makes the following recommendations to the 86th Texas Legislature:

### **Allocate Emergency Funding & Resources**

Any additional relief that can be allocated specifically towards getting the criminal justice system fully operating in areas that are still struggling is a smart investment that'll benefit professionals, practitioners, and the public on many levels. We owe our communities the fair, timely administration of justice and should dig deep to make good on that obligation.

### **Mandate Local Pretrial Detention**

Housing pretrial detainees out-of-state impedes their access to counsel and subjects them to facilities Texas standards don't apply to, undermining the numerous jail reforms recently passed by the Texas Legislature. Texas should immediately and categorically end out-of-state transfers of detainees awaiting trial. For similar reasons, the Legislature should also study then impose reasonable restrictions on how far away from the relevant court a prisoner within the state may be housed.

### **Develop a Uniform Criminal Justice Disaster Plan**

Predictability is paramount in our criminal justice system. A blue-ribbon commission of experts and stakeholders should be formed to study and make recommendations on a uniform statewide plan for disaster response. Once developed and adopted, those procedures should be practiced periodically in disaster drills.

### **Expand Emergency Order Powers**

Flexibility and responsiveness should be increased by amending section 22.0035 of the Texas Government Code to allow the Supreme Court to issue emergency orders that continue indefinitely until it terminates them. The presiding judge of each administrative judicial region should also be given the same authority to issue emergency orders within the region subject to review by the Texas Supreme Court.

### **Provide Greater Flexibility to Courts**

Situations in which entire judicial districts are devastated should be accounted for by amending section 24.033 of the Texas Government Code to allow the presiding judge of an

administrative judicial region to designate an alternate location anywhere within the region at which a court may conduct its proceedings (with the approval of the judge of the affected court, naturally). This might even be expanded to include comparable interregional agreements approved by the Supreme Court.

## CHARGE 2—DEATH PENALTY

Assess developments in medical science and legal standards related to the imposition of the death penalty on defendants with serious mental illness or intellectual and developmental disabilities. Review statutorily prescribed jury instructions used during capital sentencing.

### Hearing

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The committee held a hearing on March 26, 2018 in room E2.014 of the Texas Capitol to consider charge two. This is the official witness list generated from electronic witness affirmation forms:

Alcala, Elsa (Self)  
Barba, Michael (Texas Catholic Conference of Bishops)  
Claiborne, Shane (Self)  
Edmonds, Shannon (Texas District and County Attorneys Association (TDCAA))  
Gosslee, Susybelle (League of Women Voters of Texas)  
Hansch, Greg (National Alliance on Mental Illness (NAMI) Texas)  
Houle, Kristin (Texas Coalition to Abolish the Death Penalty)  
Martinez, Ana (The Arc of Texas)  
Marzullo, Amanda (Texas Defender Service)  
Metzinger, Janie (Mental Health America of Greater Dallas)  
Piccola, Kyle (The Arc of Texas)  
Place, Allen (Self; Texas criminal defense lawyers association)  
Wells, Kathleen (Self; Texas Impact)  
Woomer, Eric (Federation of Texas Psychiatry)

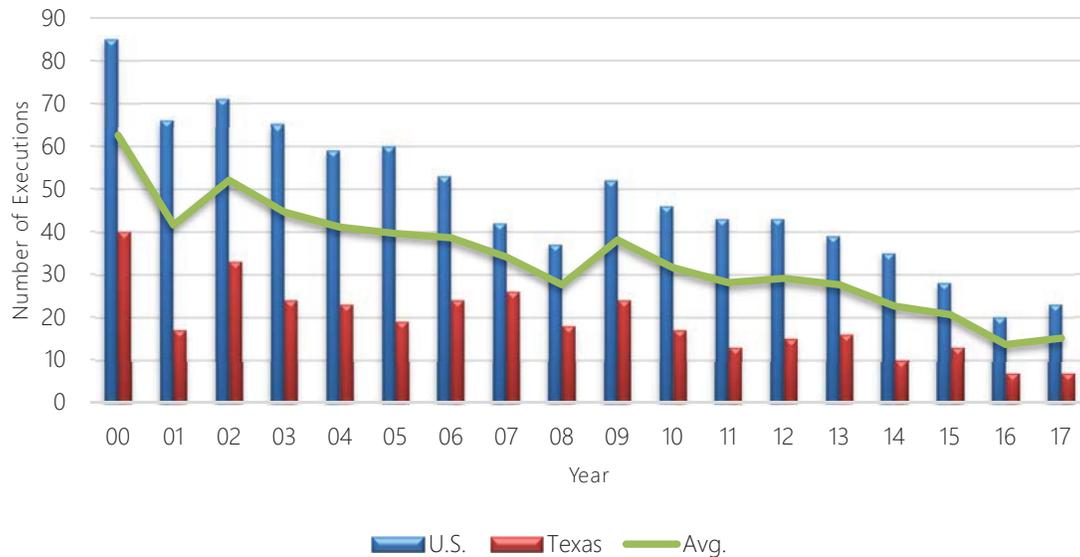
### Background

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The death penalty remains a lasting point of controversy in criminal justice. Texas still leads among all states in its number of executions, but its overall use of capital punishment has declined precipitously over the last couple of decades.<sup>29</sup> Last year, seven executions took place, while another nine were halted after being scheduled, including six stopped by the Court of Criminal Appeals, one by a federal court, and one because “prosecutors were concerned he would confess to the murder for which [another man] was convicted.”<sup>30</sup> Only four new death sentences were handed down.<sup>31</sup>

These trends are in line with overall attitudes in the United States. Support for the death penalty has diminished over the years—albeit with discernable differences between some demographic groups—amid debate over how it’s applied and whether it’s worth the cost.<sup>32</sup> As a result, the use of capital punishment is declining everywhere in the United States.<sup>33</sup>

## EXECUTIONS BY YEAR



Some of the most contentious recent developments have been in a long-running line of cases that began in 2002 with *Atkins v. Virginia*, in which the Supreme Court held that the execution of people with intellectual disabilities violated the Eighth Amendment.<sup>34</sup> Since the Texas Legislature didn’t respond to that decision with statutory guidance, our Court of Criminal Appeals took responsibility during the “legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims.”<sup>35</sup>

Those court-crafted standards proved far from temporary, however, because the Texas Legislature hasn’t addressed the issue since, a fact repeatedly cited by a frustrated court.<sup>36</sup> The Legislature’s inaction has led to considerable problems: “Without a unified procedure, intellectual-disability determinations may vary from county to county, court to court, and case to case.”<sup>37</sup> The situation came to a head in *Moore v. Texas* when the Supreme Court invalidated the “wholly nonclinical” factors developed by the Texas Court of Criminal Appeals and required determinations to be made through up-to-date medical diagnostic techniques,<sup>38</sup> once again leaving the courts to devise standards where the Legislature has failed to do so.<sup>39</sup>

Recent years have also seen significant discussion about the instructions given to death penalty juries. A jury is guided through several issues focused on culpability and future dangerousness

and is instructed that it “may not answer the issue ‘yes’ unless it agrees unanimously and may not answer the issue ‘no’ unless 10 or more jurors agree.”<sup>40</sup> In reality, though, a sentence of life imprisonment is automatic if even one juror fails to agree on each issue—a fact the court and attorneys “may not inform a juror or a prospective juror of” during the trial.<sup>41</sup>

## Discussion

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### THE DEATH PENALTY GENERALLY

Witnesses at the committee hearing included judges, attorneys, mental health professionals, interested voters, and clergy members. Not one of them said the death penalty was being administered appropriately, and many supported outright abolition. The discussion was particularly focused on how unevenly the penalty is administered even within Texas, with just a few counties handing down the majority of all death sentences<sup>42</sup> and how a punishment theoretically reserved for the “worst of the worst” was being applied capriciously.<sup>43</sup> Others pointed out that the death penalty has neither a deterrent nor a restorative effect<sup>44</sup> and argued that non-lethal means are enough to protect our communities.<sup>45</sup>

Yet the principal issue for most those witnesses was the moral cost to our society in meeting a killing with a killing.<sup>46</sup> As Pastor Shane Claiborne told the committee, “The death penalty isn’t about whether a person deserves to die, but whether we deserve to kill.”<sup>47</sup>

### S M I & I D D

Notwithstanding the foundational concerns many witnesses raised, implementation issues remain, particularly in how our capital punishment system deals with defendants who have serious mental illness (“SMI”) and intellectual and developmental disabilities (“IDD”). The recurring theme in the case law from *Atkins* to *Moore* is that standards and procedures should be legislatively set instead of cobbled together out of necessity by our courts.

Whatever approach is decided on, witnesses cautioned the committee to avoid stigmatizing those with SMI or IDD. Ninety-five percent of violent crimes are perpetrated by offenders who don’t suffer from mental illness,<sup>48</sup> and those who do are actually at a higher risk of being victims of crime and being wrongfully convicted.<sup>49</sup> Offenders with SMI and IDD (including those on death row) also face unique barriers at every step within our criminal justice system, from arrest, charging, and trial decisions<sup>50</sup> to care during and after incarceration.<sup>51</sup>

Part of the difficulty is that accurate diagnosis can be tough even among professionals, let alone in the courts.<sup>52</sup> There’s also both a medical and practical distinction between SMI and IDD that hasn’t been clearly resolved under the law,<sup>53</sup> so policies and procedures are bound to

fail when painting both with one brush. (This suggests that specialty courts for those with SMI or IDD—in which death penalty issues would, hopefully, play only a very small and uncommon role—would be a valuable addition to our system.<sup>54</sup>)

In pragmatic terms, the intersection of capital punishment and these populations comes down to how decisions are made, who makes them, and when.<sup>55</sup> The first is the most significant challenge; the Supreme Court has once again said what shouldn't be done but failed to provide guidelines for preferred procedures, beginning a new daisy-chain of deferred decision-making that stretches through the Texas Legislature into our state courts.<sup>56</sup> Nonetheless, that litigation is still probably the best starting point for a legislative solution to stop the cycle.

After *Moore* was remanded to the Court of Criminal Appeals earlier this year, the court developed an approach that's a step in the right direction because it attempts to utilize contemporary medical standards in the form of the fifth edition of the *Diagnostic and Statistical Manual* ("DSM-5").<sup>57</sup> However,

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The number one area that needs attention and has needed attention for over a decade is intellectual disability. [The court has had to] repeatedly tell the Legislature, "please write a law that we can apply," because without a law, the court is having to create the law that will be applied in these determinations.

JUDGE ELSA ALCALA, TEXAS COURT OF CRIMINAL APPEALS

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Judge Alcala wrote a dissenting opinion that sharply criticized the court's interpretation and application of the DSM-5's criteria.<sup>58</sup> And even assuming those problems are addressed, any firm standards pronounced by the Legislature are a snapshot of current medical science that may quickly become obsolete as it advances.<sup>59</sup>

As far as who makes these decisions, there's no uniformity right now—some jurisdictions leave it to the judge, others to the jury<sup>60</sup>—which is an issue the Legislature should explicitly address to create consistency across the state. Of course, the most important decisionmaker is the prosecution, since it decides whether to pursue the death penalty in the first place;<sup>61</sup> the clearer any legislated standards, the more likely prosecutors will exercise the discretion to forego capital punishment where appropriate. Notably, there are several other systemic "tripwires" that can stop a death penalty case that shouldn't move forward, such as a finding of incompetency or insanity,<sup>62</sup> although these can't be independently relied on.<sup>63</sup>

Finally, the "when" is similarly inconsistent: some Texas courts make decisions about SMI and IDD in death penalty cases as a pretrial matter, while others take it up during trial.<sup>64</sup> There are strong policy arguments for making it a front-end determination, which would mirror similar processes already in place for competency and insanity, save money by limiting the state's investment in cases that might not otherwise need to be tried to a jury, and be fairer to

defendants by divorcing the determination of their cognitive abilities from consideration of the necessarily heinous crime itself.<sup>65</sup> At the same time, these procedures must be limited in scope to avoid pretrial proceedings that are tantamount to a full-blown trial.<sup>66</sup>

While the Texas Legislature must act promptly to address this issue, it shouldn't do so haphazardly. Moving forward, the best approach is to thoughtfully engage with a relatively small group of judges, prosecutors, defense attorneys, and medical professionals to craft a workable procedure that meets constitutional guidelines and will endure as science develops.<sup>67</sup>

#### JURY INSTRUCTIONS

Several uncertainties exist within existing jury instructions in capital cases, such as whether “prison” is part of “society” in determining future dangerousness<sup>68</sup> and whether mental illness is an aggravating or mitigating factor.<sup>69</sup> The clearest issue, though, is the misleading language suggesting that 10 jurors must agree to return an answer of “no” to any special issue, which doesn't accurately reflect the effect of an individual juror's decision.<sup>70</sup> The problem isn't hypothetical—real jurors have reported being misled by the instructions into imposing the death penalty when their consciences called for a different result.<sup>71</sup> Although there are many options for resolving these issues, a death sentence should always be evaluated at the highest level of scrutiny,<sup>72</sup> so the alternatives shouldn't be a license for legislative inaction.

The most straightforward remedy would simply be to remove the misleading component of the instructions. That would be in keeping with other instructions in criminal cases, where the jury is simply told that it must be unanimous in finding a special issue true and that a reasonable doubt requires a “no” answer.<sup>73</sup> A partial solution would be to allow attorneys and judges to discuss the implications of a juror's vote on each question.<sup>74</sup> These solutions aren't mutually exclusive, of course, and could both be pursued.

Lastly, a tangential but important issue connected to both mental health and jury instructions is a gap in our writ laws. Currently, a petitioner gets a new trial after showing that new scientific evidence that was unavailable at the time of trial would more likely than not have resulted in acquittal instead of conviction if it had been presented.<sup>75</sup> This kind of relief is unavailable to those who show that it wouldn't have changed their conviction but would likely have resulted in a lesser sentence, including life instead of death.<sup>76</sup> Capital punishment trials in particular are often entirely about punishment (not guilt), and medical and behavioral science are always evolving, so this oversight has the potential to work true injustice if it isn't rectified.

The committee makes the following recommendations to the 86th Texas Legislature:

**Craft Standards & Procedures for SMI & IDD Determinations**

The Legislature should set clear, medically informed criteria for claims of SMI or IDD in the face of the death penalty in consultation with judges, prosecutors, defense attorneys, and mental health professionals. Those standards should be designed to evolve alongside medical science and should be mindful of the distinctions between SMI and IDD—one size may not fit all in addressing these issues. The most recent decision by the Court of Criminal Appeals in *Ex parte Moore* is a starting point, but the approach crafted there should be further refined.

**Authorize Specialty Courts for SMI & IDD**

Issues surrounding SMI and IDD, both with respect to the death penalty and within the criminal justice system generally, may be best addressed by courts with specialized training and staffing in those issues. The Legislature should expand the underdeveloped, underutilized mental health specialty courts described by Chapter 125 of the Government Code to create parity with other types of specialty courts and mandate their creation in large counties.

**Remove Misleading Jury Instructions**

Chapter 37 of the Code of Criminal Procedure should be amended to entirely remove language implying that a lone juror can't affect the verdict by answering "no" to the special issues presented during death penalty deliberations. The statute's prohibition on the court, prosecution, and defense discussing the implications of a juror's vote with the jury should likewise be eliminated.

**Develop Clearer Jury Instructions**

Changes to jury instructions that may bring greater clarity to the special issues described in Chapter 37 of the Code of Criminal Procedure should be explored. The goal should be a set of instructions without ambiguity that provides juries with the maximum possible practical guidance in resolving the issues fairly and intelligently.

**Allow "New Science" Writs for Punishment Issues**

Article 11.073 of the Code of Criminal Procedure should be amended to allow for relief when new science more likely than not would've lessened the punishment a petitioner received.

## CHARGE 3—MARIJUANA ENFORCEMENT

Study current practices for the enforcement of criminal laws against low-level possession of marijuana. Examine the use of alternative punishments and improvements to criminal enforcement mechanisms and community supervision.

### Hearing

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The committee held a hearing on April 26, 2018 in the chambers of El Paso City Hall to consider charge three. This is the official witness list generated from electronic witness affirmation forms:

Cox, William (El Paso County)  
Darnell, Jim (Self)  
Demorris, Colt (Self; El Paso NORML)  
Melendez, Leila (Workforce Solutions Borderplex)  
Morales Aina, Magdalena (El Paso County CSCD)  
Patrick, Arnold (Probation Advisory Committee, Texas Probation Association)  
Shapleigh, Ballard (Jaime Esparza, 34th District Attorney)  
Vandenbosch, Jennifer (Jaime Esparza, 34th Judicial District Attorney)

### Background

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Marijuana's legal status has been a flashpoint of debate throughout the country in recent years. While it remains illegal at the federal level,<sup>77</sup> there's been a great deal of movement at the state level to reduce or eliminate penalties. Twenty-two states and the District of Columbia have made simple possession a fine-only offense or decriminalized it altogether,<sup>78</sup> and ten of those have now legalized possession of small amounts of marijuana for recreational use.<sup>79</sup> Medical marijuana laws have also exploded: "31 states, the District of Columbia, Guam, and Puerto Rico now allow for comprehensive public medical marijuana and cannabis programs [while] 15 states allow use of 'low THC, high cannabidiol (CBD)' products for medical reasons in limited situations."<sup>80</sup>

Texas falls into the latter, very limited category when it comes to medical marijuana,<sup>81</sup> but state law otherwise criminalizes possession, with up to two ounces falling into the class B misdemeanor range.<sup>82</sup> Class B misdemeanors are arrestable offenses punishable by up to six months in jail and up to a \$2,000 fine or both,<sup>83</sup> which can be probated or deferred (in other words, the offender can be placed on supervised probation) for a maximum of two years.<sup>84</sup>

For comparison's sake, that's the same range of punishment used for driving while intoxicated<sup>85</sup> and most crimes involving theft of or damage to property totaling \$100 or more but less than \$750.<sup>86</sup> There are stark racial disparities in enforcement: nationally, black people are 3.73 times more likely to be arrested (and ten times more likely to be incarcerated) for possessing marijuana than whites.<sup>87</sup> Black Texans specifically are 2.33 times more likely to be arrested for marijuana than their white counterparts, but there are tremendous geographic fluctuations, with a rate as high as 34.1 times more likely in some counties.<sup>88</sup>

In previous sessions, this committee has approved bipartisan marijuana-related bills ranging from civil penalties<sup>89</sup> to complete decriminalization.<sup>90</sup> Similarly, marijuana reform is part of the official platforms of both major political parties, with the Texas Democratic Party supporting both medical and recreational legalization<sup>91</sup> and the Texas Republican Party favoring medical marijuana but preferring decriminalization and a civil penalty for recreational use.<sup>92</sup> Governor Greg Abbott has similarly expressed openness to making marijuana possession a fine-only offense.<sup>93</sup> These positions seem to be in line with shifting public opinion; across the political spectrum, polling data indicates that the overwhelming majority of Texans support efforts to reduce penalties for marijuana possession.<sup>94</sup>

## Discussion

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### COSTS & CONSEQUENCES

There are significant costs to enforcing our existing marijuana laws. In a direct sense, marijuana enforcement accounted for about 64,900 arrests in Texas (a staggering 12% of all such arrests in the United States) in 2016, the most recent year for which data is available; 98% of those arrests were for simple possession.<sup>95</sup> The cost to the state is difficult to determine precisely, although incarceration expenses alone have been pegged at \$234 million per year in Texas,<sup>96</sup> and Chairman Moody's office has estimated complete enforcement costs (including manhours at every stage of the criminal justice system) to total around \$734 million every year. Witnesses expressed disappointment with what they saw as a wasteful diversion of resources away from the investigation and prosecution of more serious crimes.<sup>97</sup> Today's judges and juries have generally held the same view, making it difficult to even try a simple possession of marijuana case when resources can instead be shifted to crimes like driving while intoxicated.<sup>98</sup>

There are also significant collateral consequences for those offenders tagged with a marijuana conviction,<sup>99</sup> including a six-month driver's license suspension,<sup>100</sup> immigration issues for residents in the citizenship process or foreign nationals here on student visas, and impediments to employment, housing, educational, and occupational licensing opportunities.<sup>101</sup> The extent

of involvement with the criminal justice system, particularly the length of incarceration (even in the form of pretrial detention), is also positively correlated with recidivism for low-level offenses.<sup>102</sup> In other words, there's a reverse deterrent effect, so the current enforcement regime is making the problem worse, not better.

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In most cases, anything on a record is a deal-breaker [for government contracts], which is a hindrance and a barrier for our small businesses to grow. . . . The talent is actually there, but because of [workers having backgrounds with] low-level offenses, that completely eliminates a huge pool of talent.

LEILA MELENDEZ, WORKFORCE SOLUTIONS BORDERPLEX

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Criminal records for marijuana possession are particularly troublesome on the employment front. Those trying to enter or reenter the workforce with any sort of criminal record are often met with rejection after rejection despite adequate qualifications.<sup>103</sup> That isn't always an employer preference; many

businesses are interested in hiring skilled employees with minor criminal histories but can't do so because employing those people precludes the business from bidding on many government contracts.<sup>104</sup>

#### ENFORCEMENT ALTERNATIVES

These issues have led to an overwhelming trend in prosecution towards dismissal of marijuana possession charges, often conditioned on the offender completing counseling or community service.<sup>105</sup> In recent years, these approaches have been formalized in diversion programs throughout the state, all of which operate differently.<sup>106</sup> El Paso's recently created "First Chance Program" is one example.

The program involves pre-arrest diversion (so no criminal record is created) and applies to first-offenders who would otherwise be arrested for any of several simple possession charges.<sup>107</sup> Those accepted into the program are required to pay a \$100 fee and perform eight hours of community service in exchange for prosecutors foregoing criminal charges.<sup>108</sup> A total of 192 people were referred to the program during its first three months, and of those, 37 failed to report and four more failed to complete the requirements after reporting.<sup>109</sup> While traditional criminal charges will be pursued against those individuals,<sup>110</sup> the successful diversion of the vast majority of that cohort represents both a far better outcome for those individuals and a substantial cost savings for the state.<sup>111</sup>

A wealth of research demonstrates that diversion programs like this, which are calibrated towards risk and responsive to the individuals involved, produce far better real-world results than the "lock 'em up" ethos that long dominated criminal justice policy.<sup>112</sup> However, the fact

that they operate as a patchwork of programs that vary between counties is problematic—depending on where in the state an offense is committed, a Texan might be facing not only different penalties, but a different system altogether.<sup>113</sup> Criminal justice reforms should instead create one approach that’s functional and predictable everywhere.<sup>114</sup>

The alternative of making possession of marijuana a class C misdemeanor isn’t as palatable because it removes virtually none of the collateral consequences. An offender can still be arrested for a class C misdemeanor,<sup>115</sup> and even if it’s resolved through a citation, simply “paying the ticket” creates a permanent criminal record, triggering the same driver’s license suspension<sup>116</sup> and potential consequences for employment, housing, immigration and naturalization,<sup>117</sup> and occupational licensing. Also, when a person is convicted of a class C misdemeanor, that precludes expunction of any other charge stemming from the same arrest,<sup>118</sup> so a person can be acquitted by a jury of greater charges or never formally charged in the first place if the prosecution declines the case, but the marijuana ticket would still keep the arrest on the person’s record forever. All of this is compounded by the fact that class C offenders aren’t eligible for appointed counsel to explain these complexities to them.<sup>119</sup>

| POSSIBLE CONSEQUENCE <sup>120</sup> | CLASS B    | CLASS C               | CIVIL PENALTY |
|-------------------------------------|------------|-----------------------|---------------|
| Fine Amount                         | ≤ \$2,000  | ≤ \$500               | ≤ \$250       |
| Jail Time                           | ≤ 180 days | None (besides arrest) | None          |
| Arrest                              | ✓          | ✓                     |               |
| Permanent Record Created            | ✓          | ✓                     |               |
| Driver’s License Suspension         | ✓          | ✓                     |               |
| Employment Loss                     | ✓          | ✓                     |               |
| Financial Aid Denial                | ✓          | ✓                     |               |
| Military or Federal Service Barred  | ✓          | ✓                     |               |
| Housing Rejection                   | ✓          | ✓                     |               |
| Professional License Loss           | ✓          | ✓                     |               |
| Naturalization Denial               | ✓          | ✓                     |               |
| Work Visa Revoked                   | ✓          | ✓                     |               |
| Attorney Appointed to Assist        | ✓          |                       |               |

#### RESULTS OF REFORM

Several studies in the United States and abroad have shown that marijuana decriminalization doesn’t lead to increased use among teens, and that in some cases, it’s caused a decrease in usage.<sup>121</sup> (In fact, states that have legalized have initially experienced slightly higher rates of teen usage that’s then swiftly fallen to levels lower than pre-legalization.<sup>122</sup>) Crime rates have similarly been unaffected (although arrest rates and racial disparities in enforcement have, naturally, fallen),<sup>123</sup> nor has there been an increase in traffic accidents or marijuana-impaired

driving.<sup>124</sup> The main effects of decriminalization seems to simply be fewer tax dollars spent and better outcomes for both the justice system and the offenders involved.<sup>125</sup>

## Recommendations

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The committee makes the following recommendations to the 86th Texas Legislature:

### **Pass Civil Penalty Legislation**

Decriminalizing personal use possession of marijuana and instituting a civil penalty instead is the right approach for Texas, one that enjoys broad consensus between both political parties. A civil penalty would free up hundreds of millions of dollars in state revenue every year that could be better spent on priorities like education and infrastructure and allow law enforcement to devote more time to crimes that endanger public safety and private property. It would also treat offenders in a fairer way more closely in line with evolving societal standards, preserving their opportunities while still providing an appropriate penalty.

### **Be Mindful of Collateral Consequences**

Any effort short of civil penalties, such as reducing marijuana possession to a fine-only offense, should be mindful of collateral consequences and be engineered to avoid them. For example, a reduction to a class C misdemeanor should include a prohibition on arrest, mandatory deferred adjudication in most scenarios, a fix for expunction issues, and either appointment of counsel or substantial statutory warnings to assist those accused.

### **Include Job & Health Components in Penalty Systems**

Any system—criminal, civil, or diversionary—should be geared towards promoting employment and public health in addition to any penalty. That should include referral for a spectrum of treatment, employment, and other assistance as appropriate, but always optionally at the discretion of the offender so that intervention doesn't become as onerous as punishment and resources are spent appropriately.

### **Create Partnerships with Workforce Programs for Job Placements**

The Legislature should coordinate with workforce programs to increase employment options for those burdened with minor criminal history blemishes, including marijuana possession. Those programs would greatly benefit from the elimination or conditional waiver (for employees hired through certain workforce programs) of criminal background requirements related to low-level convictions in government contracting and occupational licensing.

## CHARGE 4—ATTORNEYS & SYSTEMIC ISSUES

Examine instances of prosecutorial misconduct and ineffective assistance of defense counsel. Review systemic and structural issues affecting the resolution of criminal cases.

### Hearing

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The committee held a hearing on May 23, 2018 in room E2.014 of the Texas Capitol to consider charge four. This is the official witness list generated from electronic witness affirmation forms:

Acevedo, Linda (State Bar of Texas)  
Burkhart, Geoffrey (Texas Indigent Defense Commission)  
Edmonds, Shannon (TDCAA (Texas District and County Attorneys Association))  
Ford, Ashley (Texas Council for Developmental Disabilities)  
Morris, Gerry (Texas Criminal Defense Lawyers Association)  
Piccola, Kyle (The Arc of Texas)  
Soule, Stacey (State Prosecuting Attorney)  
Ware, Mike (Self)  
Registering, but not testifying:  
Heimlich, Ed (Self; INFORMED CITIZENS)

### Background

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The Michael Morton case shined a powerful light on both prosecutorial misconduct and systemic problems in Texas criminal justice. Michael Morton was sentenced to life in prison for a murder he didn't commit, and his exoneration after a quarter-century in prison placed the lion's share of the blame on egregious misconduct by the prosecutor.<sup>126</sup> Ultimately, the case resulted in sea-change to the process of discovery (how evidence is shared between the prosecution and defense) to safeguard against the same kind of malfeasance in the future.<sup>127</sup>

Examples like Morton's case represent gross violations, but more often, miscarriages of justice are the result of failures in the broader system well-meaning prosecutors must rely on or even simple mistakes (especially when a single prosecutor becomes the clearinghouse for all evidence in a case<sup>128</sup>). Legislation has largely focused on fixing these kinds of issues, with key examples being the Michael Morton Act itself and the creation of the Timothy Cole Exoneration Review Commission, the recommendations of which were recently adopted.<sup>129</sup>

Ineffective assistance of counsel by some defense attorneys has also led to wrongful convictions and undermined confidence in the justice system. “Ineffective assistance” is a bit of a misnomer; legally, it refers to representation so poor it fell below an objective standard of reasonable professional assistance and in all reasonable probability changed the outcome of a case for the worse.<sup>130</sup> In other words, ineffective assistance means having an attorney so bad it’s like not having one at all (or worse), as in the infamous “sleeping lawyer” case.<sup>131</sup>

The commonsense understanding of what effective representation means is far greater, of course, and criminal defense falls short of that mark far more frequently. Even at the highest levels that demand the most stringent qualifications, such as death penalty appeals, Texas studies have found widespread “defense understaffing, inadequate attorney screening and monitoring, poor representation, [and] excessive caseloads.”<sup>132</sup> Across the board, the criminal defense bar has also long been plagued by underfunding and unmanageable caseloads that have sharply curtailed investigation, negotiation, and preparation.<sup>133</sup>

## Discussion

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### PROSECUTORIAL MISCONDUCT

Despite high-profile examples like Michael Morton’s case, documented instances of serious prosecutorial misconduct are relatively rare, with only four violations involving the withholding of exculpatory evidence (known as *Brady* material<sup>134</sup>) identified by appellate courts within the past year.<sup>135</sup> *Brady* violations do remain the most common complaint,<sup>136</sup> however, and include situations where evidence was inadvertently withheld, such as when a prosecutor was unaware of information police possessed.<sup>137</sup> Structural improvements to the Texas discovery process like the Michael Morton Act have been a major victory for procedural fairness, although courts are still wrestling with certain technical issues.<sup>138</sup> At a lower level, it’s virtually impossible to determine the frequency and extent of petty misconduct, although logically it’s likely far more common than serious ethical breaches.

For their part, Texas prosecutors have done a laudable job of implementing new discovery systems, increasing ethics training (including on subtle issues like cognitive bias), and promoting accountability within their profession.<sup>139</sup> However, all these efforts have been locally funded—state requirements haven’t come with state resources—which has hampered progress somewhat and challenged existing resources.<sup>140</sup>

Beyond procedure, Texas has seen important improvements through forensic science reform spearheaded by the Texas Forensic Science Commission, which has aggressively combatted

“junk science” and helped ensure that only valid, reliable scientific evidence makes its way into our courtrooms.<sup>141</sup> Increasingly rigorous statutory requirements, like individual licensure for forensic analysts, have also improved the science used in criminal cases.<sup>142</sup> Troublingly, the federal government has inexplicably begun a move in the opposite direction by disbanding the Justice Department’s Forensic Science Commission and suspending ongoing reviews of FBI testimony related to a number of forensic techniques.<sup>143</sup> Texas shouldn’t follow suit.

When misconduct is evident, there’s wide disagreement about whether and to what extent prosecutors are truly held accountable.<sup>144</sup> It’s probably true that instances of major misconduct are exaggerated in this age of social media;<sup>145</sup> the trend in grievances against prosecutors filed with the State Bar of Texas has been that the vast majority are

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Both [prosecutorial misconduct and ineffective assistance are] topics where there’s often more heat than light. [C]laims don’t always hold up to scrutiny. [What’s] on social media . . . is rarely independently scrutinized or reviewed to [much] extent. . . . It’s very important that if you want to legislate . . . you need to make sure it’s based on data [and] the actual evidence.

SHANNON EDMONDS, TDCOA

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rooted in anger over the outcome of a case, not legitimate issues with how it was prosecuted.<sup>146</sup> Since the same trend might otherwise spill into our civil courts without similar screening, there’s a compelling argument for preserving prosecutorial civil immunity.<sup>147</sup>

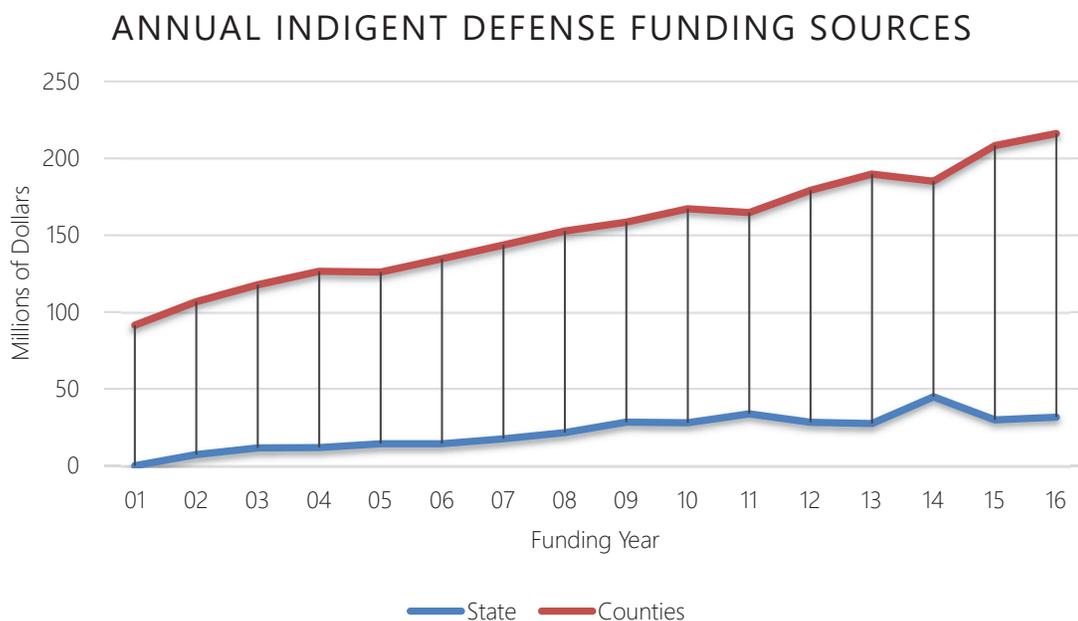
Yet the proportionality in the most serious Texas cases is undeniably eyebrow-raising: Ken Anderson, whose indefensible actions put Michael Morton behind bars for 25 years, was ultimately sentenced to just ten days in jail for contempt of court.<sup>148</sup> In a similar case, prosecutor Charles Sebesta was simply disbarred for withholding evidence and knowingly using false testimony to secure a death sentence against Anthony Graves, who was exonerated after 18 years in prison and several close calls with execution.<sup>149</sup> “I think he should’ve been brought before a court of law,” an exasperated Graves said in response to news of the punishment, “to answer to charges of attempted murder.”<sup>150</sup>

#### I N E F F E C T I V E   A S S I S T A N C E

In 2002, the Texas Fair Defense Act<sup>151</sup> kicked off an ongoing project to modernize and improve indigent defense in Texas.<sup>152</sup> It’s led to many successes, including greater oversight, promotion of best practices, increased funding, informal caseload limits, and above all, public reporting about how our system is working.<sup>153</sup> Problems persist, however, with the state still shifting the bulk of the indigent defense burden onto local governments and at least four different appointment systems (plus some hybrid models) creating substantial differences in

indigent defense between Texas counties.<sup>154</sup> Tellingly, the Texas Indigent Defense Commission has never found a Texas county in compliance with the Fair Defense Act on first review.<sup>155</sup>

Again, a lack of funding is the catalyst for a snowball effect that creates other challenges, like an outright lack of appointed counsel in counties struggling to afford it<sup>156</sup> and increased caseloads where clients are piled onto public defenders or where low rates paid to private appointed counsel necessitate volume businesses.<sup>157</sup> This is a systemic issue that puts Texas out of compliance with American Bar Association standards, which require (among other things) parity between prosecution and defense resources,<sup>158</sup> and saddles local governments with a wildly disproportionate burden.<sup>159</sup>



The upshot is hundreds of sustained ineffective assistance claims every year, many for basic mistakes like failing to preserve a client’s appellate rights or providing incorrect advice about the consequences of a plea agreement, but also for issues in trial preparation and performance.<sup>160</sup> These deficiencies can mean wrongful conviction on the one hand and difficulty re-prosecuting the guilty on the other, with a significant waste of judicial resources along the way in either scenario.<sup>161</sup> Numerous grievances are also filed against those who may not be constitutionally but merely practically ineffective, although discipline is usually reserved for complete neglect or failure to communicate.<sup>162</sup> And even the most deficient performance is often resolved through private reprimand, leaving appointing courts and potential clients unaware of an attorney’s questionable track record.<sup>163</sup>

## FURTHER STUDY NEEDED

Much of what's known about prosecutorial misconduct and ineffective assistance of counsel is anecdotal, but the issues extend from pretrial through appeal and habeas proceedings.<sup>164</sup> No independent study has been done within Texas; one designed to examine reported court opinions involving “attorney issues” that then worked backwards into the factual underpinnings leading up to that point could be valuable.<sup>165</sup> Particular attention should be paid to common factors in substantiated prosecutorial misconduct or ineffective assistance so that solutions can be developed, and examining any consequences imposed on the attorneys by the State Bar or appropriate government entity could provide guidance on accountability issues.<sup>166</sup>

## Recommendations

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The committee makes the following recommendations to the 86th Texas Legislature:

### **Create a Criminal Penalty for Certain Prosecutorial Misconduct**

No one should be above the law. Rogue prosecutors should face felony penalties for the worst kinds of abuses, such as intentionally or knowingly withholding exculpatory evidence or using material perjured testimony. Procedurally, there should be a requirement that any allegation of a violation be referred to a state-level or otherwise disconnected law enforcement agency and prosecuting authority. And since this kind of misconduct is often discovered years afterwards, any statute of limitations should run from the time of that discovery.

### **Preserve Prosecutorial Immunity from Civil Suit**

There's no front-end screening as far as when a civil suit can be filed, so waiving prosecutorial immunity would subject prosecutors to harassment, embarrassment, and legal fees even when allegations are totally baseless. The Legislature should maintain prosecutorial immunity from civil suit; a criminal penalty and the attorney discipline system are enough to appropriately punish misconduct, and compensation systems for wrongful imprisonment exist that do as much (and as little) as money can do to help those we've failed in the ultimate way.

### **Increase Criminal Justice Resources, Particularly for Indigent Defense**

State funding throughout the system should be increased so that prosecutors can effectively meet the obligations the Texas Legislature has imposed on them and caseloads can be reduced for appointed counsel. However, if choosing between the two, indigent defense should be prioritized because it's both a bulwark against prosecutorial misconduct and a vindication of constitutional rights that has historically created a massive burden on local governments.

**Publicize Findings of Ineffective Assistance of Counsel**

Section 81.072(b)(11)(B) of the Texas Government Code should be amended to preclude private reprimands for rules violations related to ineffective assistance of counsel claims.

**Create a Presumption of Ineffective Assistance at Certain Caseload Levels**

The Legislature can and should force a reduction in caseloads across the state by creating a rebuttable presumption that any case resolved while an attorney is carrying an excessive caseload was marred by ineffective assistance of counsel. That threshold should be set in consultation with the Texas Indigent Defense Commission.

**Study Prosecutorial Misconduct & Ineffective Assistance of Counsel**

Hard data and in-depth analysis are needed to make informed decisions on these issues, so an independent study should be commissioned to review documented findings of prosecutorial misconduct and ineffective assistance of counsel then identify common threads leading to those outcomes as well as if and how the offending attorney was eventually sanctioned.

## CHARGE 5—SEXUAL ASSAULT

Examine the legal framework surrounding sexual assault prosecutions, including statutory definitions, certain age-based offenses, and ongoing developments in evidence collection and processing.

### Hearing

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The committee held a hearing on May 23, 2018 in room E2.014 of the Texas Capitol to consider charge five. This is the official witness list generated from electronic witness affirmation forms:

Amilhat, Alice (DPS)  
Derrick, Amy (Dallas County District Attorney)  
Ford, Ashley (Texas Council for Developmental Disabilities)  
Gair, Aja (SAFE)  
Kaiser, Chris (Texas Association Against Sexual Assault)  
McCleskey, Gene (Attorney General)  
Morris, Gerry (Texas Criminal Defense Lawyers Association)  
Piccola, Kyle (The Arc of Texas)

### Background

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Perspectives on what constitutes sexual misconduct and how allegations should be addressed are shifting rapidly, with adverbs like the #MeToo movement poised to affect our laws in coming sessions.<sup>167</sup> The seeds of such change have already been seen in proposed legislation that would alter the definition of “consent” to reflect “affirmative consent,” for example.<sup>168</sup> Most recent legislation, however, has been aimed at filling gaps in the law, like the push to raise the penalty for fondling or groping an adult.<sup>169</sup>

Perhaps the highest profile problem in combatting sexual assault has been forensic testing of evidence kits. Past attempts to increase the rate and speed of testing have met with limited success,<sup>170</sup> and the situation has become so dire that legislative efforts have turned to what amounts to crowdfunding for further testing.<sup>171</sup> However, there are signs of hope: Texas is the only state to have enacted all six pillars of testing suggested by End The Backlog (the Joyful Heart Foundation’s evidence kit testing backlog reduction program) and the state has leveraged multiple funding methods into a precipitous drop in untested kits.<sup>172</sup>

Nonetheless, sexual assault remains a staggering problem in Texas. About one-third of all Texans have experienced some form of sexual assault in their lifetimes—413,000 in the past year<sup>173</sup>—with roughly two-thirds of Texans identifying it as a problem for the state.<sup>174</sup> This results in an estimated negative economic impact of \$8 billion every year in this state,<sup>175</sup> but more importantly, there are heartbreaking human costs that can't be easily quantified:<sup>176</sup>



## Discussion

### GAPS IN LAW

True legal gaps that prevent appropriate accountability are priority problems in our system. The woefully inadequate laws against adult groping and fondling are one example—that conduct is currently (at best) a class C misdemeanor akin to a traffic ticket that can't result in arrest unless the offense is committed in the presence of a peace officer.<sup>177</sup> (The same conduct committed against a 16-year-old would be a second-degree felony.<sup>178</sup>) Another common situation inadequately covered by current laws is also problematic: when a person is highly

impaired but still conscious, there's only a lack of consent if the attacker directly caused the impairment without the victim's knowledge.<sup>179</sup> That creates a loophole for situations in which a victim becomes extremely intoxicated of their own accord or is drugged by a third-party besides the offender.

The difficulty in legal change is accounting for the real world's shades of gray, such as how to deal with situations involving only minimal impairment or those where both parties are very drunk; our laws should be aligned with real-world human behavior to avoid criminalizing activity we might disapprove of but which shouldn't be felonious.<sup>180</sup> The same concerns animate the recent push for an "affirmative consent" or "yes means yes" definition in sexual assault laws (which may also implicate the constitutional issue of burden-shifting).<sup>181</sup> While promoting the ideal of active, enthusiastic consent rightly expresses contemporary expectations, we should beware inadvertent over-criminalization or even creating additional gaps in the law through poor drafting (as we might see in situations where a disconnect exists between words and actions<sup>182</sup>). While the Legislature should move forward on these issues, it should tread carefully.

#### UNDERSERVICE & UNDERTRAINING

Only about 9% of all sexual assault victims report the abuse.<sup>183</sup> For vulnerable populations like racial minorities, the LGBTQ community, and the undocumented, reporting and prosecution statistics are even lower.<sup>184</sup> Much of that's due to a perception within those groups that their reports won't be taken seriously or could even result in harm to them.<sup>185</sup> This problem is especially pronounced among those struggling with homelessness, since they often have negative interactions with law enforcement and contend with instability that makes participating in investigation and prosecution extremely challenging.<sup>186</sup> Likewise, people with intellectual and developmental disabilities ("IDD") experience "one of the highest rates of sexual assault of any group in America, and it's hardly talked about at all."<sup>187</sup>

In each case, training that improves communication with and increases sensitivity to the needs of these communities is essential in reversing these trends.<sup>188</sup> Specialized education is especially important for judges, prosecutors, defense attorneys, and law enforcement officers who deal with victims and offenders who have IDD,<sup>189</sup> and some clarification is also needed on the proper roles of guardians and service providers in the context of these cases.<sup>190</sup> Creating specialty courts designed to meet the challenges associated with IDD would be especially helpful.<sup>191</sup> Those same courts might also serve those with serious mental illness—a different group with different needs, but one that needs just as much specialized attention.

Regardless of population, though, improvements in the overall effectiveness of criminal responses and faster processing of evidence are cornerstones of increasing public confidence and reporting rates.<sup>192</sup> On a hopeful note, the statewide electronic tracking system for sex offense evidence<sup>193</sup> (if effectively and thoughtfully rolled out) will be an important milestone. Our Office of the Attorney General has also done a commendable job of realizing the ideal that a victim should never be charged for examination through its reimbursement program and is creating improved protocols for collection and testing through research partnerships.<sup>194</sup>

#### EVIDENCE TESTING

Texas has made tremendous strides in evidence kit testing in recent years. An estimated backlog of 18,955 kits only a few years ago has been turned into a mere 2,185 now.<sup>195</sup> Much of that's been accomplished through extraordinary measures, however, and more comprehensive testing hasn't meant faster results or more thorough auditing.<sup>196</sup> The

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The mother of a survivor in her twenties asked how long it would take to get the results of her evidence kit. It fell to [us] to tell her, basically, that we have no way of knowing, but it's likely in the range of 12–18 months. [T]he feeling in the room just sunk. . . . No one in the room could make the situation better or even explain what the situation was.

AJA GAIR, THE SAFE ALLIANCE

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importance of remaining current on testing and improving our speed and efficiency can't be overstated; universal testing (even in cases where identity is uncontested) solves cold cases, identifies serial offenders, exonerates the innocent, and sends the message that survivors matter and their cases will be pursued seriously and fully.<sup>197</sup>

The most daunting obstacle in doing so is properly funding the laboratories and technicians responsible for forensic testing, and the current inadequacy is responsible for the largest bottleneck in our system.<sup>198</sup> Texas has too few testing facilities, and within them, a capacity limited by insufficient personnel who require an extensive investment in training but have a rate of turnover disproportionate to that (a problem seen with DNA testing generally, not just in sexual assault cases).<sup>199</sup>

#### EVIDENTIARY ISSUES

Evidentiary issues in the courtroom have proven almost as hot a topic as evidentiary issues in the laboratory. Recent legislative sessions have seen an expansion in the admissibility of “extraneous offenses”—crimes and bad acts other than the one on trial—in child sexual assault cases.<sup>200</sup> That legal shift has begun to erode the long-held standard that a defendant can't be tried by proof of being a criminal generally (known as “conformity evidence”).<sup>201</sup> These statutes don't apply to sexual assault cases involving adult victims, and although the

Rules of Evidence do allow extraneous offense evidence for certain non-conformity purposes (like proving “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident”<sup>202</sup>), many judges aren’t aware of the substantial case law surrounding those exceptions and exclude evidence improperly.<sup>203</sup>

Creating a simple, explicit statutory authorization for extraneous offense evidence in adult sexual assault cases would buoy the prosecution’s case when dealing with “well-chosen” victims who may have inherent credibility issues, such as undocumented immigrants and people living with mental illness.<sup>204</sup> On the other hand, opening an unfettered door to conformity evidence would further weaken our tradition of trying a particular crime instead of a person’s general background and reputation, and it may increase the danger of wrongful convictions in Texas.<sup>205</sup>

Child sexual assaults also have their own unique evidentiary issue in controversy: how forensic interview recordings are shared with defense attorneys. Forensic interviews are a core component of most investigations into child sexual assault and are usually performed at local child advocacy centers;<sup>206</sup> these interviews are virtually always video-recorded.<sup>207</sup> However, copies of these recordings can be withheld from the defense,<sup>208</sup> and many jurisdictions restrict defense attorneys solely to viewing the recordings by appointment in the prosecutor’s office.<sup>209</sup>

Defense attorneys have questioned the rationale for the statute and argued that this law prevents adequate trial preparation.<sup>210</sup> Beyond that, fundamental fairness (especially in the post-Morton world) seems to dictate that evidence be provided in a format that allows effective, efficient review.<sup>211</sup> Opposite that are legitimate worries about privacy, harassment, and potentially providing certain defendants with what might serve as illicit erotic material to them, but these can be addressed through a court granting a protective order or through statutory confidentiality requirements.<sup>212</sup>

## Recommendations

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The committee makes the following recommendations to the 86th Texas Legislature:

### **Increase the Penalties for Adult Groping & Fondling**

Adults who are intentionally or knowingly groped or fondled without consent deserve justice and safety, so a new offense should be created to appropriately punish that conduct as at least a class A misdemeanor.

### **Clarify Consent & Incapacity**

Our law should recognize that an incapacitated person—someone truly incapable of appraising the situation—can't consent to sex regardless of how they became incapacitated.

### **Explore the Implications of Affirmative Consent**

Affirmative consent reflects evolving social values and encourages the behavior Texans expect. However, before pursuing any legal change promoting it, we should be sure that won't radically alter the evidence required for a conviction, shift the burden onto the accused, sweep up innocent behavior, or inadvertently create new gaps in the law that endanger victims.

### **Promote Training & Communication**

Improvements to criminal justice training around and communication with vulnerable populations should be incentivized or even mandated to protect the victims who need it most.

### **Authorize Specialty Courts for SMI & IDD**

Issues surrounding SMI and IDD, both with respect to sexual assault and within the criminal justice system generally, may be best addressed by courts with specialized training and staffing in those issues. The Legislature should expand the underdeveloped, underutilized mental health specialty courts described by Chapter 125 of the Government Code to create parity with other types of specialty courts and mandate their creation in large counties.

### **Properly Fund Laboratories**

Maintaining the progress we've made on reducing the evidence kit testing backlog and speeding future testing means making an investment in our laboratories and analysts.

### **Formalize Rule 404(b) & the Case Law Surrounding It**

Our laws shouldn't permit the blanket introduction of conformity evidence in adult sexual assault cases; the risk of unfairness and outright wrongful convictions is too great. However, the Legislature should explore ways to statutorily formalize the principles found in Texas Rule of Evidence 404(b) and the wealth of case law surrounding it to promote appropriate, uniform judicial treatment of extraneous offense evidence.

### **Provide Defense Attorneys with Copies of Forensic Interview Recordings**

Article 39.15(a)(3) of the Code of Criminal Procedure should be repealed for the sake of fairness and efficiency, and defense attorneys should be provided with copies of forensic interview recordings. However, the privacy and dignity of child victims should be protected by allowing courts to issue protective orders or by statutorily precluding defendants themselves from viewing the videos.

## CHARGE 6—STATE JAILS

Review the Texas state jail system, including its original intent, sentencing guidelines, effectiveness, and recidivism rates. Make recommendations for changes in the state jail system that will improve outcomes. (*Joint charge with the House Committee on Corrections*).

### Hearing

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The committee held a joint hearing with House Committee on Corrections on August 29, 2018 in room E1.030 of the Texas Capitol to consider charge six. This is the official witness list generated from electronic witness affirmation forms:

Collier, Bryan (Texas Department of Criminal Justice)  
Creuzot, John (Self)  
Dillon, Gregory (Brazoria County CSCD/ Texas Probation Association)  
Edmonds, Shannon (TDCAA (Texas District and County Attorneys Association))  
Forbes, Tricia (Crime Survivors for Safety and Justice)  
Gillian, David (Legislative Budget Board)  
Levin, Marc (Texas Public Policy Foundation, Texas Smart on Crime)  
Marek, Roxane (Texas Probation Association)  
May, Teresa (Texas Probation Association and Harris County CSCD)  
Molina, Laurie (Legislative Budget Board)  
Place, Allen (Self)  
Simpson, Matt (ACLU of Texas)  
Smith, Douglas (Texas Criminal Justice Coalition)  
Thomas, Brock (Harris County)  
Tucker, Terra (Alliance for Safety and Justice)  
Wagner, BJ (Meadows Mental Health Policy Institute)  
Registering, but not testifying:  
Wolfe, Michael (Texas Probation Association and Taylor CSCD)

### Background

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The state jail felony offense category and the facilities designed to hold those convicted of those offenses were created in 1993 to focus on “low-level property and drug offenses” with an eye towards diversion and treatment at a cost-savings to the state.<sup>213</sup> The idea was to reduce prison populations and recidivism by tying treatment tracks to both probation and

incarceration.<sup>214</sup> And unlike prison, those who did end up doing time would be housed locally so they could utilize family support and community assistance.<sup>215</sup>

In many ways, state jail felonies are a hybrid offense level that stands apart from both misdemeanors and traditional felonies. Offenders face a range of punishment between 180 days and two years of incarceration in a state jail facility, with fines capped at a maximum of \$10,000.<sup>216</sup> This is complicated by the fact that state jails don't offer parole, so sentences are "flat" or "day-for-day" except for the diligent participation program, which allows inmates to earn up to 20% off the time they serve.<sup>217</sup> That's further muddied by the statutory option of allowing defendants to serve state jail time in local county jails,<sup>218</sup> which maintain their own varying systems of "good time" credit. These offenses also have their own enhancement scheme, so a state jail felony history usually has no direct effect on the punishment of either misdemeanors or more serious felonies.<sup>219</sup>

The average sentence time in today's state jails is just over one year, but much of that time is served in county jails through pretrial detention and delays in post-sentence transfers.<sup>220</sup> The offenders serving those sentences are housed in 17 facilities spread throughout Texas, which collectively incarcerate 73,520 people—88.5% of them for personal use drug possession and minor property crimes such as shoplifting with two prior convictions.<sup>221</sup>

## Discussion

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### SYSTEMIC PROBLEMS

State jails have come to incarcerate people who pose little threat to society at great cost and in ways that don't increase public safety but do make re-offense more likely.<sup>222</sup> The treatment and programming concepts state jails were originally designed around a quarter-century ago were never funded or developed, so state jails now offer nearly nothing in the way of rehabilitative services.<sup>223</sup> In fact, the way these jails have developed actually makes jail stays too short for appropriate in-custody care, and there are no aftercare systems in place,<sup>224</sup> leaving programs that do exist—vocational training, substance abuse treatment, and life skills training for mothers and young offenders—underutilized and ineffective.<sup>225</sup>

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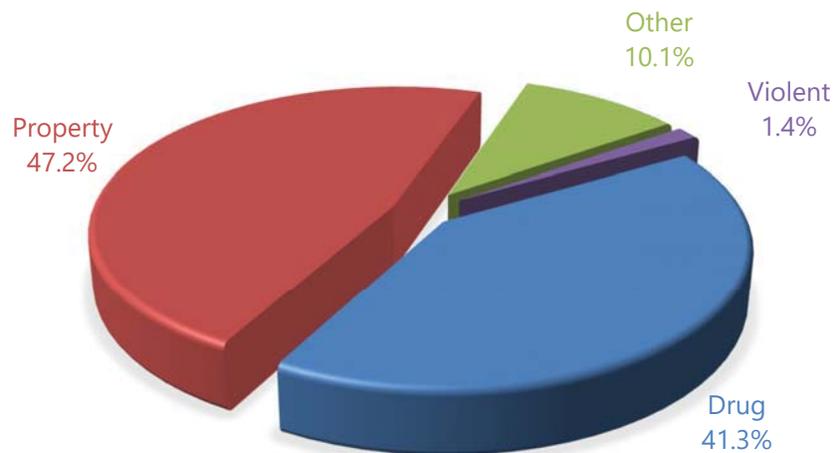
The [state jail] system itself has some limitations. [Time in] is long enough for persons to lose their jobs, lose their housing, and to leave with . . . significant barriers . . . to reentry, but it's not long enough to truly complete [even the] limited programming available. People are just processing in and processing out.

DOUG SMITH, TCJC & RIGHT ON CRIME

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The alternative of probation is also discouraged, especially since the potential for placement in an inpatient treatment, intermediate sanction facility, or substance abuse felony punishment facility means that an offender on probation might be locked up for at least as long as someone who simply accepts a state jail sentence, except that the offender will still be on probation afterwards.<sup>226</sup> Even when such confinement isn't on the table, relatively short sentences with a clear, clean ending are usually preferred given the (often accurate) perception that probation is difficult, costly, and a barrier to responsibilities like work and childcare.<sup>227</sup> The end result is state jails that merely warehouse inmates who unproductively serve out their time until being released, with no new resources, into the same conditions that led them to jail in the first place<sup>228</sup>—most often, drug addiction and poverty.<sup>229</sup>

## STATE JAIL POPULATION BY OFFENSE



Predictably, the offender groups that overwhelmingly populate state jails are among the most likely to recidivate.<sup>230</sup> A detailed study tracking a 2013 cohort showed that nearly one-third of the group were reincarcerated within only three years of their release from state jail,<sup>231</sup> and other available data shows similar results.<sup>232</sup> Qualitative interviews with wardens, directors, guards, staff members, and even inmates have likewise revealed almost universal agreement that the facilities serve no rehabilitative function and lack treatment options.<sup>233</sup>

Bluntly but factually, Texas's state jail system is such a complete failure that it's come to literally produce the opposite of its intended result in every measurable way. Perhaps the only success state jails have had is reducing prison populations back in the outmoded days of the "tough on crime" push 25 years ago.<sup>234</sup> Every other component of our criminal justice system has

made big strides since then, though, while state jails remain a relic of the past. As stakeholders saw in Ohio when it eliminated its intermediate jail system, each state jail closed would present an opportunity to handle the same offenses in wiser ways and return money to both state and local government coffers.<sup>235</sup>

#### STATE JAIL ALTERNATIVES

Even if realized, the concept of state jails as treatment facilities is flawed because the same resources are better spent on pretrial services, probation programming, and aftercare.<sup>236</sup> Efforts that have proven effective for the populations overwhelmingly involved in state jails are community investments, particularly drug remediation services and 24-hour sobering centers, as well as diversions once a person does become involved with the criminal justice system, including parental continuity programs that allow family contact and release for childcare, vocational reentry programs that improve job opportunities, and specialized dockets with aftercare components.<sup>237</sup> One side-issue that remains to be addressed, however, are the criminal background requirements found in occupational licensing, which can create barriers to employability.<sup>238</sup> Legislative tweaks like that shouldn't be the end of state-level involvement, though; the positive reforms implemented at the local level in some communities should serve as a blueprint the state can replicate for effective justice across Texas.<sup>239</sup>

There are several examples to follow. Community engagement projects designed to address substance abuse, mental illness, and other risk factors before someone is in handcuffs, like the RIGHT program in Dallas, have been extremely successful.<sup>240</sup> Interventions at the earliest point of system contact instead of once a person is already incarcerated have yielded much lower re-arrest rates while improving public safety by freeing up patrol officers to respond to more serious matters.<sup>241</sup>

Once people do become involved in the court system for low-level offenses, the chief goal must be reintegration.<sup>242</sup> Harris County has become a leader in meeting that challenge through its Reintegration Impact Court, which is designed to “target low-level, nonviolent felony cases to increase the use of treatment programs and address deep disparities in the criminal justice system” by expanding diversion programs, reducing pretrial detention, and leveraging community partnerships.<sup>243</sup> The county has also recently made a concrete commitment to improving economic justice and addressing racial disparities in enforcement.<sup>244</sup> Results have been promising: the court has safely reduced the number of people sent to jail as well as the racially disproportionate makeup of the jail population while expanding pretrial intervention and other diversion opportunities for offenders.<sup>245</sup> The docket uses an assessment-driven approach and has three recovery coaches in the courtroom every day to quickly link offenders

with services based on their needs, which may even lead to dismissal of charges if the court is satisfied that those services address the criminal behavior appropriately.<sup>246</sup>

More broadly, Harris County now also employs risk-needs assessments and a treatment model geared specifically towards those most likely to recidivate, one that targets criminogenic needs and considers criminal history, family relationships, education and employment background, and substance abuse issues.<sup>247</sup> This approach is rooted in research showing that no matter how well a single factor like substance abuse is treated, recidivism remains likely if the spectrum of problems behind most low-level criminal behavior remains unaddressed.<sup>248</sup> Harris County's overall paradigm shift has already led to outcomes positive enough to warrant statewide and even national attention, and it continues to build on these victories.<sup>249</sup>

#### C O S T S   O F   C H A N G E

None of this is free, of course, and even large counties need more resources.<sup>250</sup> But rural counties are often especially funding-limited and face infrastructure challenges like deficits in both available in-house treatment providers and outpatient services, which makes it difficult to implement some best practices.<sup>251</sup> There are also often basic logistical concerns, including for offenders, who may reside in a geographically expansive area with very limited public transportation options.<sup>252</sup> These problems are all the more prominent in state jail cases because so many call for substance abuse treatment, which is notoriously intensive and costly.<sup>253</sup>

Changes in our system may also have negative effects on local economies even as the state saves millions,<sup>254</sup> so reinvestment is crucial. Indeed, if Texas fails to properly fund solutions to our state jail crisis and simply mandates approaches like diversion, those efforts are likely to fall flat anyway.<sup>255</sup> That lack of follow-through is precisely what undermined today's state jails, and there was no surprise there—the problems we're now experiencing were all predicted by experts soon after state jails were created as it became clear that resources wouldn't meet rhetoric.<sup>256</sup> Any reforms pursued now are a second chance to avoid the unsupported, underdeveloped good intentions that brought us here and instead craft effective solutions to low-level crime that trade short-term investment for long-term savings and security.

#### R e c o m m e n d a t i o n s

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The committee makes the following recommendations to the 86th Texas Legislature:

##### **Abolish State Jails . . .**

State Jails (both the category for offenses and the facilities that deal with them) are fundamentally flawed in terms of effectiveness, fairness, and cost. The Legislature should shift

state jail offenses into existing categories—in particular, making most substance abuse and low-level property crimes class A misdemeanors—then winddown or repurpose our state jail facilities, reinvesting the money saved into community resources, diversion programs, specialty courts, probation services, and aftercare. The result would be a more just system with lower recidivism, greater public safety, and long-term savings for Texas taxpayers.

#### **. . . or Reform Them from the Ground Up**

If the Legislature chooses to continue the state jail category and our state jail facilities, they should be overhauled in every respect. State jails were designed to be an intermediate sanction with a focus on rehabilitation and reintegration, and that should be the standard if we're going to continue with them. A massive investment and strong new guidelines would have to be made to realize that vision.

#### **Invest in Alternative Systems**

For low-level offenses, diversion, treatment, probation, and aftercare all lead to better outcomes than simple incarceration. Regardless of whether state jails remain open, the state should build these capacities through additional funding at the local level, which will eventually be offset by fewer Texans being locked up.

#### **Note Urban-Rural Distinctions**

What works in large urban counties may not work in more sparsely populated rural areas. In both program development and resources investment, the Legislature should take care to address the actual needs of each community. This will be doubly important if state jails begin to close in communities where the local economy is closely tied to the jail; these areas will need strategic reinvestment that can both build capacity for state jail alternatives and revitalize the economy with new jobs and better infrastructure.

#### **Promote Best Practices**

Although no single approach to low-level crime will work statewide, best practices like risk-needs assessments, diversion programs, and other smart-on-crime efforts should be promoted. Similarly, statutory incentives to plea to modest lengths of incarceration instead of pursuing probation or treatment options, like those created by section 12.44 of the Texas Penal Code, should be reconsidered and tweaked to help end cycles of recidivism.

## CHARGE 7—PRETRIAL RELEASE & FEES

Monitor the work of the Office of Court Administration on pre-trial risk assessment tools for the Texas Judiciary, and study the use of risk assessment tools at various stages in the criminal justice process. Monitor litigation on Harris County pretrial bond practices. Monitor the implementation of the legislation passed by the 85th Legislature regarding the imposition of fines, fees, and court costs in criminal courts.

### Hearing

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The committee held a hearing on August 30, 2018 in room E2.014 of the Texas Capitol to consider charge seven. This is the official witness list generated from electronic witness affirmation forms:

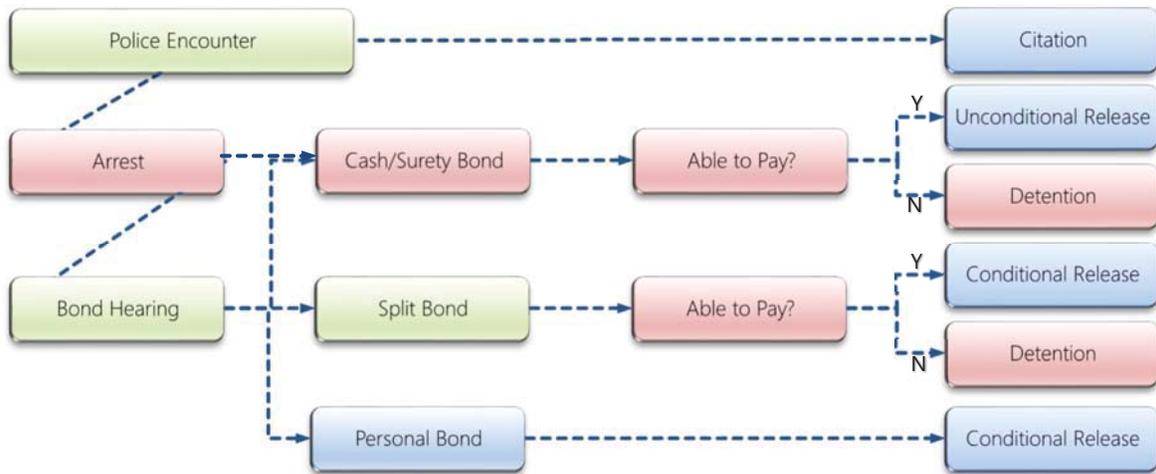
Banks, Kelvin (Harris County Pretrial Services)  
Clayton, Jeffrey (American Bail Coalition)  
Gerrick, Emily (Texas Fair Defense Project)  
Good, Ken W. (Professional Bondsmen of Texas)  
Haugen, Michael (Texas Public Policy Foundation)  
Hecht, Nathan (Supreme Court of Texas)  
Keller, Sharon (Ct of Criminal Appeals)  
Mergler, Mary (Texas Appleseed)  
Ogg, Kim (Harris County District Attorney's Office)  
Place, Allen (Self; Texas Criminal Defense Lawyers Association)  
Slayton, David (Texas Judicial Council)

### Background

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Prior to conviction, a person accused of a crime has a constitutional right to release from jail on bond in all but a very narrow set of cases.<sup>257</sup> The most well-known type of bond is the traditional cash or surety bond, where money is posted either by the accused or a bail bondsman (who charges the accused a percentage of the bond as a fee) as collateral on a promise to appear.<sup>258</sup> Alternatively, except in certain aggravated cases, Texas courts may set “personal bonds,” which require no payment unless the accused fails to appear in court or violates any number of conditions that might be imposed (the “catch” with personal bonds), such as pretrial reporting, drug testing, and restrictions related to public or victim safety.<sup>259</sup>

## TEXAS PRETRIAL RELEASE PROCESS



Legally, courts are supposed to set bond high enough to ensure a defendant’s appearance and proportionate to both the nature of the offense and the public safety danger implicated, but bond isn’t designed to be a punishment itself, and courts are supposed to consider the defendant’s ability to pay.<sup>260</sup> Decisions on bond are required to be individualized and rapid.<sup>261</sup> In many Texas jurisdictions, though, bond is set by either the arresting peace officer or a magistrate without a hearing based on a pre-set schedule tied solely to the offense charged; a lack of timely, individualized hearings for those who can’t make those initial bonds means the wealthy walk and the poor stay in jail—except for the many who plead guilty solely to secure their release<sup>262</sup>—regardless of the relevant circumstances or risk to the public.<sup>263</sup>

This has led to a spate of ongoing and initially successful lawsuits mounting due process and equal protection challenges to the way Texas counties set bond, forcing an urgent discussion about bail reform.<sup>264</sup> Governor Abbott has also recently spoken in support of bail reform after a state trooper was killed by an offender out on an obviously inadequate cash or surety bond.<sup>265</sup>

A conceptually similar concern over the proper role of fines and fees in our justice system has also generated serious discussion. Historically, many poor Texans have been jailed for minor infractions (including “status offenses” like driving without a valid license) because they couldn’t afford the tickets or related costs, creating what critics have called outright debtors’ prisons.<sup>266</sup> These problems have become rampant nationwide, not just in Texas.<sup>267</sup> Where Texas has stood apart is significant legislation during the 85th Session designed to stop these practices by creating sentencing alternatives like community service for those who can’t pay,

greater notice before warrants can be issued over failure to appear or pay, and more substantial inquiries in a defendant's ability to pay, among other reforms.<sup>268</sup>

## Discussion

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### BAIL REFORM GENERALLY

As the United States Supreme Court has observed, “[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>269</sup> Yet at the time of that pronouncement, the rate of pretrial detention was about 24% of all defendants; that figure now hovers around 72%, making detention the norm and liberty the exception.<sup>270</sup> The spirit of the bond system itself is grounded in presumptive release pending trial in most cases,<sup>271</sup> and available data shows that not doing so with low-risk, low-level offenders actually increases the likelihood of re-offense,<sup>272</sup> inverting one of the principal purposes of bond. Yet 75% of people held in county jails today are pretrial detainees who haven't been convicted of an offense, which costs taxpayers at least \$1 billion every year.<sup>273</sup>

Not accounted for in that group are those with sufficient means to post bond, who are then able to obtain release regardless of the threat they pose, which marks a failure for both fairness and public safety.<sup>274</sup> This is particularly problematic because while bondsmen have generally done a good job of getting their clients to court,<sup>275</sup> there's little incentive for them to keep their clients out of trouble since Texas courts are statutorily required to discharge a bondsman from liability if their client is arrested and incarcerated for a new offense.<sup>276</sup>

Any reforms will have to address several areas to be successful. Chief of them is speed, which has been a central issue for federal courts in recent litigation.<sup>277</sup> Making bail decisions quickly reduces costs, protects the rights of the accused, and increases public safety, since “even serving 72 hours in jail is enough time to lose your job and become an increased risk.”<sup>278</sup> Court orders in Texas bond litigation have balanced those factors against logistical realities and required that those still detained after 48 hours be given individualized bond hearings.<sup>279</sup>

However, a system must be in place to gather information and provide it to judges so that those early bond decisions are fully informed, which has been a deficiency in the “early presentment” requirements instituted in Harris County.<sup>280</sup> Indeed, a recent statewide survey of judges who set bail revealed frustration with a lack of relevant information about the specifics of the allegations, prior criminal history, and the defendant's background and living situation as well as reliable tools for decision-making.<sup>281</sup> Most judges are simply setting bail based on “intuition” and “gut feelings,” with results those same judges admit they aren't

confident in.<sup>282</sup> This problem probably contributed to the death of State Trooper Damon Allen, whose killer was out on a \$15,000 bond based solely on the charge he was facing; that bond was later raised to \$400,000 when relevant information was gathered, but he had already been released by that point.<sup>283</sup> Inflexible bail schedules or the mechanical application of risk assessment results are equally ineffective—judges need all the information they can get to make a thoughtful, individualized decision on each bond.<sup>284</sup>

#### R I S K   A S S E S S M E N T   T O O L S

Risk assessment tools consider a person’s criminal history and a wide array of criminogenic needs to predict risk of flight or re-offense.<sup>285</sup> The most effective are validated risk assessment tools—ones that have “been shown through research to reliably predict defendants’ chance of bail failure.”<sup>286</sup> These can provide vital data to inform an appropriate bond decision, but while a number of Texas counties use risk assessment mechanisms, only six Texas counties currently use a validated tool, with different ones used among that group.<sup>287</sup> There’s some debate about how effective risk-based systems have been in other jurisdictions. Consider Kentucky, which requires judges to consider (but not follow) validated risk assessment recommendations on bonds: some reports have indicated improved public safety and appearance rates comparable to traditional bond,<sup>288</sup> while others have suggested a modest increase in failures to appear and re-arrests.<sup>289</sup>

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The judges don’t have the information they need. A risk assessment is not information; it’s a scoring of the information. . . . The judges don’t need the score . . . they need to know the facts and circumstances [when setting bail].

JEFFREY CLAYTON, AMERICAN BAIL COALITION

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Evaluation of Texas jurisdictions, though, has underscored the power of these tools. A 2017 study involving several recent years of data compared Travis County (which couples risk assessments with pretrial supervision) with Tarrant County (which uses cash or

surety bonds almost exclusively).<sup>290</sup> Researchers found that the tools accurately predicted the chance of bond failure, led to fewer high-risk defendants being released and fewer low-risk defendants being detained, reduced both overall costs and danger to public safety, and were fairer to the accused.<sup>291</sup> The study also suggested that, for those jurisdictions without the resources to replicate Travis County’s interview-based risk assessments, a well-designed statistical algorithm would’ve produced similar results.<sup>292</sup>

Ultimately, a risk assessment tool should be just one factor in the set of information judges use to make bond decisions. These tools also shouldn’t be embraced simply because they purport to be evidence-based; proper implementation means a mixture of open-mindedness

and skepticism that continually evaluates how systems are working in the real world and adjusts practices accordingly.<sup>293</sup> It should also foster consistency and avoid unfunded mandates, so a tool or tools should be developed and disseminated at the state level,<sup>294</sup> and resources (especially for pretrial supervision, which is essential for an effective release system that ultimately defrays investment costs<sup>295</sup>) should flow to local governments for implementation.

#### C O N C E R N S & C R I T I C I S M

A variety of concerns have been raised about the move towards bail reform and the increasing utilization of risk-based release. A common thread is public safety and victims' rights.<sup>296</sup> As discussed above, we know that safety is improved through systems that combine risk-based release with pretrial monitoring.<sup>297</sup> Beyond that, victims' rights arguments tied to accountability misunderstand the purpose of bond, which isn't punishment—by definition, those on bond haven't been convicted of a crime.<sup>298</sup>

Of course, both the community and crime victims deserve to have the accused show up for their day in court. The federally ordered release of many Harris County detainees as part of the recent litigation there led to reported failure to appear rates in excess of 40%.<sup>299</sup> There's reason for skepticism over those numbers,<sup>300</sup> and much of the non-appearance co-occurred with the chaos and infrastructure damage following Hurricane Harvey,<sup>301</sup> but those outcomes are still disastrous. Yet critically, the bonds mandated by the federal court were unsecured (also known as “personal recognizance”) bonds premised solely on a promise to appear, with no monetary liability, conditions, or monitoring.<sup>302</sup> These are rarely used in Texas because our personal bonds make the bailee civilly liable for the bond amount if forfeited and may include safety-related conditions, valuable interventions for issues like mental health,<sup>303</sup> and pretrial supervision, so the comparison is apples and oranges.<sup>304</sup> What it does underscore is the danger of pure personal recognizance bonds, which Texas should be wary of expanding the use of.

The call for expanded preventative detention is tied to both issues. Proponents argue that some defendants who aren't covered by current constitutional provisions for “no bond” holds shouldn't be released at all, either because of public safety concerns or flight risk,<sup>305</sup> while others claim that preventative detention hasn't been shown to improve safety or security.<sup>306</sup> In either case, in the real world, one of the features of cash or surety bonds is that judges often “set[] bond at a level that will be presumptively out of reach to a defendant . . . as a proxy to preventatively detain” them.<sup>307</sup> As bail reform (hopefully) reduces that practice, we risk undoing much of that progress<sup>308</sup> unless, as the principles behind bond itself suggest, any preventative detention is rare and limited to the most exceptional circumstances.<sup>309</sup>

Another important point of criticism is racial disparity in pretrial release, which plagues both traditional cash or surety systems and risk-based models—the former because of implicit bias, the latter because criminal history, socioeconomic stability, and other risk factors incorporate racial inequities.<sup>310</sup> Nonetheless, objective measures still offer less opportunity for prejudice than subjective human intuition, and many risk assessment tools do attempt to control for racial bias.<sup>311</sup> In practice, risk-based systems seem to be performing a more evenhanded job in Texas.<sup>312</sup> Whatever the approach, our system must be proactive in stamping out the racial divides that have historically dominated criminal justice outcomes, which means open-eyed programs aimed directly at the issue<sup>313</sup> and the resources to fund them.<sup>314</sup>

Finally, an array of overall criticisms of bail reform comes from the existing bail industry. The core argument of surety bond advocates is that risk-based systems have produced worse results than we’re currently seeing at a greater cost,<sup>315</sup> but although their points are well-taken with respect to some risk-based systems, the discussion above shows that those arguments are at odds with the relevant data in Texas. However, they’ve rightly amplified the problems of making risk-based systems prescriptive, which would handcuff judges the same way federal sentencing guidelines have,<sup>316</sup> leading to potential increases in detention and entrenching existing racial disproportionality.<sup>317</sup> They’ve also pointed to criticism that risk-based systems using tools or algorithms may “reanimate and give new life to old data and outcomes from a bail system that’s presently under reform,”<sup>318</sup> ironically turning the downsides of the money bond system into integral components of purported change.

These positions are unsurprising and can’t necessarily be faulted—bail bonds are a business, so the industry has historically mounted strong opposition when its bottom line has been threatened.<sup>319</sup> Movement to a more effective and equitable system, however, doesn’t need to spell the end of private bonds. There’s no reason that public-private partnerships can’t make use of the existing network of bondsmen who’ve provided a valuable service the government has, until recently, been reluctant to accept responsibility for. In fact, “split bonds” that include both pretrial monitoring and other conditions as part of a personal bond but also have a cash or surety component are common in some jurisdictions,<sup>320</sup> and the government certainly has the authority to contract with members of the industry as it pursues reform.

#### F I N E S & F E E S R E F O R M

Despite initial controversy, recent fines and fees reforms have been a runaway success. In the year since S.B. 1913 and H.B. 351 were implemented, failures to appear and warrants alike have been drastically declining.<sup>321</sup> Jail time being served has plummeted while community service being performed has risen accordingly, and perhaps most surprisingly, while financial burdens

on defendants have gone down due to waivers of costs and reductions in fines, the actual revenue being collected has increased by roughly 13%—now that fines and fees are more realistic, defendants are paying them at higher rates.<sup>322</sup> All of this represents a fairer Texas as well as greater collaboration between courts and communities, increasing public confidence in the criminal justice system.<sup>323</sup>

A few identifiable gaps do remain in these laws. When and how ability-to-pay determinations are made and whether alternative sentences are used varies greatly from court-to-court, particularly because alternative sentences aren't required unless a plea is taken in open court.<sup>324</sup> Community service is also

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Jailing the poor merely because they're poor is not only a constitutional issue and a moral issue, it's a senseless burden on taxpayers, who must pay for the jail, pay for the collateral damage to defendants' lives, work, and families, and still never collect the fine.

CHIEF JUSTICE NATHAN HECHT, TEXAS SUPREME COURT

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inconsistent and occasionally unreasonable, with some judges demanding hundreds of hours of service to discharge modest costs.<sup>325</sup> Only some courts will adjust obligations after sentencing based on changed circumstances like loss of employment,<sup>326</sup> and none of these options apply to fees for deferred dispositions, depriving poor defendants of the same opportunities available to their wealthier contemporaries.<sup>327</sup> Finally, outside of the newly implemented legislation, the Driver Responsibility Program and scofflaw provisions like the Texas Department of Public Safety's Failure to Appear/Pay Program still impose unreasonable fees on hundreds of thousands of Texans and prevent them from renewing their driver's licenses.<sup>328</sup>

## Recommendations

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The committee makes the following recommendations to the 86th Texas Legislature:

### **Make Pretrial Release the Standard**

The essence of our bond system is that a person accused is presumed innocent and should therefore be presumptively entitled to pretrial release. Pretrial restrictions on liberty should be the minimum necessary to ensure a defendant's appearance and protect the community; we should return to pretrial detention being "the carefully limited exception" in our system. This is especially true for misdemeanors and non-violent felonies, where pretrial detention should be uncommon and largely replaced by release on pretrial supervision for those who can't post a cash or surety bond. This can be furthered by creating a statutory presumption for release

in these circumstances that can only be deviated from for good cause shown and documented by the court.

#### **Don't Expand "No Bond" Preventative Detention**

Considering the principles above, "no bond" preventative detention should be reserved for only the most extraordinary circumstances, and we should comprehensively consider what kinds of situations qualify for that before any expansion is proposed.

#### **Use Risk Assessments, But Only as One Tool . . .**

The concept of risk assessment itself suggests a person's liberty should be restricted before they've been convicted of a crime, which is antithetical to our values. On the other hand, real world experience tells us that those accused of crimes don't always appear to answer for them and sometimes pose a danger to society in the meantime—that's why the bond system exists in the first place—and risk assessment tools have proven superior to the existing methods at accounting for that. We should consider broadening the use of risk assessment tools as one component of a judge's individualized bond decision.

#### **. . . in a Very Full Toolbox**

Judges setting bonds need much more than risk assessment results: they need to be given all relevant information in a timely manner, including the facts alleged and the defendant's criminal history, so that they can make an informed bond decision. All forms of bond and all reasonable conditions should remain available to judges, and training on bond issues should be expanded to promote the wise use of discretion. Risk assessments should never mandate decisions or be applied mechanically.

#### **Create a Statewide Validated Risk Assessment Tool If They're Used**

If risk assessments are going to be used, the state should develop a standard tool or set of tools and help local governments with implementation instead of passing on the burden. Besides being fiscally responsible, this will also help ensure uniformity and best practices.

#### **Control for Historical Discrimination**

Many common "risk factors" simply reflect the injustices of the past, so if things like criminal history and employment are considered in a risk-based system or by actuarial tools, those processes must be designed to control for our history of racial and socioeconomic disparity to avoid perpetuating it. Texas shouldn't move forward with widespread risk considerations until we're sure we won't be institutionalizing discrimination under the guise of objectivity.

### **Fund & Support Pretrial Supervision**

The success seen in counties that use risk-based systems is rooted in pretrial supervision with appropriate conditions and interventions. Without a capable support system in place, radically increasing pretrial release will increase failures to appear and decrease public safety. We must ensure that funding is in place and best practices are used.

### **Require Rapid Bond Decisions**

In conjunction with putting the information and resources described above in place for decision-making, our system must require that decision to be made rapidly. The Legislature should follow the federal courts that have weighed in and statutorily require a bond hearing within 48 hours of arrest for anyone still being detained at that point.

### **Develop Partnerships with the Bail Bonds Industry**

Existing bail bonds companies represent a significant infrastructure that's already been developed. The Legislature and local governments should look for ways to work with them rather than completely usurping their role.

### **Tweak Fines & Fees Reforms**

This session's fines and fees reforms should be tweaked for certainty and uniformity. Procedures of all types and overall case dispositions should be consistent between courts, especially in how and when indigency is determined. Our statutes should also specify that alternative sentences for those who can't pay are mandatory regardless of whether the decision is made in open court, and that option should always be communicated to defendants. There should be a cap on the number of community service hours a court can impose to satisfy a given fine or fee, and defendants should be allowed to complete those hours in their county of residence. The same alternatives for discharging fines should also apply to ancillary costs like deferred disposition fees so that wealth doesn't determine access to justice.

### **Continue to Examine Driver's License-related Sanctions**

Although any specific recommendation on the Driver Responsibility Program, the Failure to Appear/Pay Program, and the variety of other incidental fees and scofflaw provisions related to driver's licenses is beyond the scope of our interim charge, the committee believes the effects of these policies are similar to the issues S.B. 1913 and H.B. 351 addressed and should be examined for reform or repeal in the same spirit.

## CHARGE 8—OVERSIGHT

Monitor the agencies and programs under the Committee’s jurisdiction and oversee the implementation of relevant legislation passed by the 85th Legislature.

### Hearing

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The committee held a hearing on April 26, 2018 in the chambers of El Paso City Hall to consider charge eight. This is the official witness list generated from electronic witness affirmation forms:

Anchondo, Robert (County Criminal Court No.2)  
Barill, Angelica Juarez (El Paso Veterans Treatment Court)  
Bishop, Joel (El Paso County Government)  
Cox, William (El Paso County)  
Darnell Jr., James “Jeep” (Self)  
Daugherty, Kristi (Emergence Health Network)  
Davis, Chrystal (Emergence Health Network)  
Duke, Ray (District Attorney)  
Ellsesser, Stephen (Emergence Health Network)  
Moody, William (34th Dist. Court & El Paso Veterans Court)  
Morales Aina, Magdalena (El Paso County CSCD)  
Patrick, Arnold (Probation Advisory Committee, Texas Probation Association)  
Place, Allen (Texas Criminal Defense Lawyers Association)  
Serna, Silvia (El Paso Veterans Treatment Court Program)  
Spencer, Joe (Self)  
Trejo, Alma (Council of Judges)

### Background

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The committee’s oversight function (particularly in the “relevant legislation” charge) authorizes it to inquire into almost any matter related to criminal justice. This interim, the committee opted to simply ask judges, practitioners of all types, and professionals who work within and alongside the criminal justice system to provide information on developments they considered important and further changes they felt were warranted. The most prominent issues that arose were related to specialty courts, community supervision, and mental health, although several miscellaneous topics were broached.

SPECIALTY COURTS

Specialty courts are partially grant-funded courts confirmed by the Criminal Justice Division of the Texas Governor’s Office<sup>329</sup> that are focused on “stern intervention, intensive supervision, focused treatment, and rehabilitation” for identifiable categories of offenders with special needs, such as those struggling with addiction or mental health issues.<sup>330</sup> Grant funding comes from both the Texas Governor’s Office and the Texas Department of Criminal Justice (which funds county probation departments), although state payments account for only about \$16.5 million in funding across the state<sup>331</sup>—just 2% of total state money provided for the judiciary<sup>332</sup> and a miniscule part of financing when considering local funds as well. As a result, a lack of resources has proven to be the greatest single challenge for specialty courts.<sup>333</sup>

Disparities in funding between courts are problematic as well, particularly for specialty courts that aren’t legislatively mandated. For example, the Veterans Treatment Court in El Paso—home to the United States Army’s massive post Fort Bliss—isn’t mandated and would

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It could be a substance abuse issue, it could be an alcohol issue, it could be a traumatic event that’s leading up to [those]. We’re getting smarter on crime. . . . We’ve proven that specialty courts not only work, but they’re a . . . saver of money and of resources.

JUDGE ROBERT ANCHONDO, EL PASO DWI/DRUG COURT

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be jeopardized if grant funding ceased, reducing treatment options for a significant military population.<sup>334</sup> Differences between programs and approaches authorized for each specialty court can also create difficulties. Some are pre-adjudication, for instance, making them far more attractive to defendants and allowing those courts to help more people.<sup>335</sup> Additional funding, legislatively establishing courts for critical populations, and ensuring equality of options between programs would help alleviate these concerns.

Statutory ambiguity in some places and rigidity in others has also created obstacles for specialty courts. The innovative, treatment-focused solutions and tools that specialty courts employ often lack express authorization, creating uncertainty about the power of courts to implement some solutions. Ignition interlocks are a good illustration: many statutes require or authorize them but are silent about whether alternative devices like portable alcohol monitors may be used instead and about who has the authority to monitor the device in any case.<sup>336</sup>

Other laws haven’t had the effect the Texas Legislature intended and may be at odds with best practices, such as driver’s license surcharges (an ostensible deterrent that hasn’t done so in practice) and license suspension credits that incentivize refusal instead of cooperation with

law enforcement requests for breath or blood samples.<sup>337</sup> The byzantine and sometimes contradictory statutes on driver's license suspensions and occupational driver's licenses are also a stumbling block.<sup>338</sup> But the biggest legislative omission is probably the lack of centralized information management, which has limited data collection and sharing between specialty courts; a statewide system would permit better understanding of results and lead to more consistent and successful approaches among courts.<sup>339</sup>

#### COMMUNITY SUPERVISION

Probation departments have traditionally used a cookie-cutter approach that prescribed generic conditions without reference to the unique needs of individual probationers.<sup>340</sup> That's largely started to give way to evidence-based practices rooted in cultural competency that incorporate validated assessments to determine individual levels of intervention.<sup>341</sup> Assessments of risk and criminogenic needs as well as cognitive-behavioral curricula have been clinically proven to reduce recidivism,<sup>342</sup> and there's overwhelming evidence supporting the use of a risk-needs responsivity model that involves plans for supervision, treatment, and

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Historically, we used to have a criminal justice system that had a one-size-fits-all approach [that treated] people who are justice-involved as offenders and not as people. [Now,] we actually assess individuals—their level of need, their level of intervention—so we . . . tailor it to the needs of the individual [because] the onus is on us to understand how to better serve the clients the courts entrust to us.

MAGDALENA MORALES AINA, EL PASO COUNTY CSCD

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continuity of care after probation ends.<sup>343</sup> These practices have led to markedly improved results where earnestly implemented,<sup>344</sup> and many probation departments are now focused on tailoring the level of care and supervision to the individual and “leaving the probationer alone” (to the extent possible) otherwise.<sup>345</sup>

The intake and planning process at the beginning of probation is a critical juncture; data collection through validated instruments should be used to design supervisory and treatment plans as well as modify those plans appropriately as probation progresses.<sup>346</sup> With that in mind, the Texas Legislature has tried to improve that process by mandating assessments prior to sentencing.<sup>347</sup> Unfortunately, good intentions haven't meshed with the real-world demands of our court system—most courts are simply waiving those assessments in favor of performing them immediately after an individual is placed on probation and modifying probation terms as necessary.<sup>348</sup> Doing otherwise requires a separate hearing and slows case dispositions by weeks while providing almost no benefit over a prompt post-sentencing assessment.<sup>349</sup> Nonetheless, an increasing number of

courts are struggling to implement pre-sentencing assessments because of the legislative mandate, creating a strain on resources.<sup>350</sup>

#### M E N T A L   H E A L T H

Mental health issues are regrettably but inextricably intertwined with criminal justice. More than one in three Texas inmates have a history of mental illness,<sup>351</sup> and county jails also receive a tremendous population with mental health issues; the Harris County Jail alone treats more psychiatric patients than all state-run hospitals combined.<sup>352</sup> Put simply, “[j]ails and prisons in the United States have become the places where people with mental illness go.”<sup>353</sup> The problems with this have been dramatically highlighted in cases like the death of Sandra Bland owing to inadequate training, screening, and monitoring,<sup>354</sup> which has spurred a powerful legislative push towards improvement.

Sandra Bland’s namesake legislation made numerous changes to the way the criminal justice system interacts with and collects information about those dealing with mental health issues, including requiring a good-faith effort to divert those in mental health crisis to treatment instead of jail.<sup>355</sup> In El Paso, that prompted the creation of a crisis intervention team by the El Paso Police Department in close cooperation with the local mental health authority, which holds out the promise of significantly more effective, efficient, and humane interactions between law enforcement and people with mental illness.<sup>356</sup>

Similarly, this session’s requirement that “16.22” screenings for mental illness and intellectual disability be conducted within 12 (instead of the former 72) hours of a person’s detention in county jail<sup>357</sup> has already begun to improve local outcomes, all made possible by strong public-private partnership between jails, courts, and service providers.<sup>358</sup> Despite the synergies faster screenings have created, funding for more beds is still needed, especially to support the implementation of jail-based competency restoration programs.<sup>359</sup> Although the Texas Legislature has created a grant program for that purpose,<sup>360</sup> there’s some apprehension that there won’t be enough money to go around.<sup>361</sup>

#### M I S C E L L A N E O U S   I S S U E S

Witnesses brought an assortment of other matters to the committee’s attention:

- Requirements were put in place during this past session for informing defendants about the opportunity and procedures for judicial clemency,<sup>362</sup> and El Paso County was one of the leaders in promptly instituting the policy. In doing so, it discovered that the Texas Department of Public Safety, which houses the records affected when

clemency is granted, doesn't have procedures in place to process the orders, effectively negating them for now.<sup>363</sup>

- Local law enforcement agencies have stopped field-testing suspected drugs in El Paso and some other locales over safety fears because of the increased prevalence of fentanyl, which can be harmful or even deadly if inhaled or allowed to remain on unprotected skin.<sup>364</sup> This has precluded arrests on-scene in many cases and led to both case backlogs and public safety problems as offenders must be located months later following lab tests that confirm the nature of the contraband.<sup>365</sup> Although the safety of our law enforcement officers is paramount, there are adequate preventative measures that can be taken (if they can be afforded) to protect them while still permitting field-testing in most cases.<sup>366</sup>
- The Texas Department of Public Safety's drug testing laboratories are only testing the suspected substance with the highest charging level when multiple substances are submitted in a single case, citing costs.<sup>367</sup> For example, if several grams of heroin and less than one gram of cocaine are both submitted, only the heroin will be tested, leaving prosecutors unable to formally charge the offender for the cocaine. In turn, that weakens the case against the offender and creates uncertainty for the accused in cases of actual innocence because a charge wasn't fully investigated.
- Indigent defense funding remains a macro-level issue throughout the state. Only 12% of indigent defense costs are borne by the state, with the rest falling on local governments that are struggling with increasing caseloads and commensurately lower quality of representation.<sup>368</sup> Resources are also specifically lacking for providing appointed counsel with specialized training in mental health issues and advocacy.<sup>369</sup> The Texas Indigent Defense Commission has significant grant and matching programs contingent on collaborative reform efforts, so additional state-level funding channeled through the commission could effectively increase the quality of representation to the level guaranteed by the state and federal constitutions.

## Recommendations

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The committee makes the following recommendations to the 86th Texas Legislature:

### **Support Specialty Courts**

The proven effectiveness of specialty courts warrants an increase in funding where possible and a legislative mandate for programs like veterans courts in areas where significant critical

populations can be served. The Legislature should also work to ensure evenhanded funding among courts and equality of programming options such as pre-adjudication intake. Finally, the Legislature should expand the underdeveloped, underutilized mental health specialty courts described by Chapter 125 of the Government Code to create parity with other types of specialty courts and mandate their creation in large counties.

#### **Create a Specialty Court Information Management System**

A centralized statewide information management system would greatly improve data collection and dissemination among the growing number of specialty courts in Texas. Any such system should be developed in close collaboration with the judges and support staff of these courts so that relevant information is tracked and usage is practical.

#### **Permit Probation Assessment Flexibility**

Amend Article 42A.301 to allow both presentence and (alternatively) prompt post-sentence risk and needs assessments. Courts opting for the latter should be required to consider the assessment and modify the basic discretionary conditions of community supervision as appropriate, with the court documenting having done so.

#### **Review Statutory Driver's License Suspensions**

A comprehensive review of driver's license suspensions should be performed, and the Legislature should consider eliminating many of them. Those that remain should be revised for clarity and consolidated into a single statutory location to eliminate confusion.

#### **Promote Community Supervision Best Practices**

Probation departments should be encouraged or even required to adopt evidence-based practices rooted in risk-needs responsivity and cultural competency. Validated instruments should also be used from the intake stage onward to plan and administer supervision, treatment, and aftercare.

#### **Fund Efforts to Improve Mental Health Diversion & Restoration**

Texas must fully fund initiatives to improve screenings and interventions, promote effective competency restorations and other treatments, and reduce recidivism among those living with mental illness. Otherwise, the cost will inevitably be passed on to local governments, both in direct diversionary and jail costs and greater danger to public and prisoner safety.

### **Clarify Procedures for Judicial Clemency**

The Legislature should work with the Texas Department of Public Safety and criminal courts throughout the state to ensure that judicial clemency orders can be enforced and are well-understood by all stakeholders.

### **Mandate Drug Field-testing in Most Cases & Provide Funds for Safety**

Law enforcement agencies should be required to field test narcotics when a seizure or arrest is made except in exigent or extraordinary circumstances. Before any such mandate, though, the Legislature should collaborate with authorities to promulgate best practices and provide funding for necessary resources like opioid antagonists to be carried by patrol officers so that tests can be carried out safely.

### **Improve Funding for Drug-testing Laboratories**

Additional funding should be allocated to drug-testing laboratories if feasible to increase certainty and speed in the resolution of drug cases.

### **Increase Funds Available to the Texas Indigent Defense Commission**

The constitutional guarantee of effective indigent defense should be promoted through significantly increased state resources in coordination with the Texas Indigent Defense Commission, which would provide matching funds to local jurisdictions along with guidance and oversight as systems are reformed.

### **Monitor Ongoing Implementation**

Many of the criminal justice bills passed by the 85th Texas Legislature reflect long-term goals that should continue to be monitored moving forward to ensure effective local implementation and appropriate state involvement where assistance or legislative changes are needed.

## CHARGE \*1—PROTECTIVE ORDERS

Review the applicable portions of the state’s penal laws and make legislative recommendations regarding whether existing protective order laws are sufficient or could be amended to include ‘red flag’ or mental health protective orders or whether ‘red flag’ or mental health protective orders should be independently created to allow law enforcement, a family member, a school employee, or a district attorney to file a petition seeking removal of firearms from a potentially dangerous person and providing for mental health treatment for the potentially dangerous person, while preserving the fundamental rights of the Second Amendment and ensuring due process.

### Hearing

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The committee held a hearing on June 25, 2018 in room E2.014 of the Texas Capitol to consider supplemental charge one. This is the official witness list generated from electronic witness affirmation forms:

Barnes, Jim (Self)  
Bean, Carla (Dallas District Attorney’s Office)  
Beauchamp, Scott (Self)  
Bolgiano, John (Self)  
Briscoe, Rick (Self; Open Carry Texas)  
Brockington, Patti (Moms demand action for gun sense in america)  
Browne, Gretchen (Moms Demand Action for Gun Sense in America)  
Butler, Bree (Self; Orange Generation)  
Carpenter, Shannon (Self)  
Carter, David (Self)  
Chaplin, Vicka (Self; Educational Fund to Stop Gun Violence)  
Choi, Kelly (Self)  
Cross, Kelly (Bexar county presiding civil mental health judge)  
Dolle, Gene (Self; Upshur County Pct 1 Constable’s office)  
Dunning, Randall (Self)  
Eastland, Bill (Self)

Ervin, Leslie (Self; Texas Gun Sense)  
Eshraghi, Selina (Self; March For Our Lives Austin)  
Glass, Kathie (Self)  
Glass, Tom (Self)  
Greer, John (Self)  
Greer, Phyllis (Self)  
Grisham, CJ (Self; Open carry texas)  
Hansch, Greg (Self; National Alliance on Mental Illness (NAMI) Texas)  
Hayes, Aaryce (Disability rights texas)  
Hedtke, Amy (Self)  
Heffernan, Conor (Self)  
Herman, Guy (Self; Statutory Probate Judges of Texas)  
Hobbs, Ariel (Self; Sylvester Turner's Mayors Commission)  
Holcomb, Terry (Self)  
Horton, Colleen (Self; Hogg Foundation for Mental Health)  
Hunter, Jeremiah (Self; We The People-Longview Tea Party)  
Jackson, Alma (Self; Texas Republican Party)  
Kappelman, John (Self)  
Kasprzyk, Bailey (March for Our Lives Corpus Christi)  
Keller, Merily (Self; Texas Suicide Prevention Council)  
King, Edward (Self)  
Landivar, Jorge (Self)  
Lesko, Mike (Texas DPS resource witness)  
Lindell, Amelia (Self)  
Martinez, Mel (Self; Wichita Falls Metropolitan Community Church)  
McClinton, Marcel (Self; Orange Generation)  
Mendoza, Elva (Self; Moms Demand Action for Gunsense in America)  
Moninger, Steve (Texas DPS resource witness)  
Murphy, Joseph (Self)  
O'Mara, Esta (Self)  
Ostos, Isabel (March for our lives corpus christi)  
Palmer, Joe (Self)  
Patterson, Jerry (Self)  
Perez, Cecilia (Cissy) (Self)  
Phan, Linda (Texas Council on Family Violence)  
Ponce, Kathy (Self; Tea Party Patriots)  
Rodriguez, Kennedy (Self)  
Ross, Leesa (Self; Be Smart)  
Rost, Kyra (Self)  
Schmidt, Dwayne (Self)

Scruggs, Ed (Self; Vice Chair Board of Directors for Texas Gun Sense)  
Sieli, Tony (Self; Lone star gun rights)  
Spiller, Lee (Citizens Commission on Human Rights)  
Staney, William (Houston Police Department, Mental Health Division)  
Sutton, Sandra (Self)  
Swirsky, Alexie (Self)  
Switzer, Gyl (Texas gun sense)  
Theobald, Paul (Self; ATX Dem Vets)  
Tippetts, Mark (Governor campaign for Mark Tippetts)  
Tripp, Alice (Texas State Rifle Association)  
Varney, Jeremiah (Dallas County District Attorney's Office)  
Warne, Judy (Self)  
White, Carmen (Dallas County District Attorney's Office)  
Zeigler, Abigail (Self)  
Registering, but not testifying:  
Alhayek, Waed (Self)  
Bachman, Mariah (Self)  
Bachman, Solomon (Self; North Texas Patriots for Liberty)  
Bailey, Deb (Self)  
Blystone, Chris (Self; Libertarian Party of Franklin County)  
Braden, Miron (Self; Texas Youth Hunting Program)  
Brieger, John (Self)  
Brosnihan, Kerry (Self)  
Bruton, Julie (Self)  
Butler, Brooklynn (Self; Orange Generation)  
Clendennen, Jeffrey (Self; McLennan County High School Democrats)  
Coe, Debra (Self; Moms Demand Action)  
Cox, Mike (Self)  
Dett, Tina (Self; Moms demand action)  
Dianovich, Elizabeth (Texas Firearms Freedom, Open Carry Texas, Lonestar Gun Rights)  
Dianovich, Jeannette (Open Carry Texas, Lonestar Gun Rights, Texas Firearms Freedom)  
Dianovich, Joe (Texas Firearms Freedom, Open Carry Texas, Lonestar Gun Rights)  
Doerr, Katherine (Self; Moms demand action for gunsense in america)  
Forst, Ginger (Self; Moms Demand Action)  
Giorda, Elizabeth (Self)  
Greene, Melanie (Self; Moms Demand Action for Gun Sense in America)  
Grisham, Emily (Self)  
Harris, Eriic (Self)  
Hower, Mistie (Moms Demand Action)  
Jackson, Christopher (Self)

King, James (Self)  
Legere, Barbara (Moms demand action)  
Lewis, Christopher (Self)  
Longhurst, Joseph (Self)  
Maynard, Beth (Self)  
McNutt, Chris (Self; Texas Gun Rights)  
Mica, Tara (NRA)  
Milam, Claire (Self)  
Morosky, Pearl (Self)  
Olson, Jenifer (Self; Moms demand action for gun sense in america)  
Olson, Wade (Self)  
Packer, Chasey (Self)  
Pham, Theresa (Self; Moms Demand Action)  
Pintchovski, Susan (Self; Moms Demand Action Texas)  
Pous, Lisa (Self; Survivor Voice)  
Price, Jennifer (Self)  
Schwartz, Ann (Self)  
Scott, TJ (Self)  
Sheehan, Kerry (Self; Moms Demand Action for Gunsense)  
Veling, Gretchen (Self; Moms demand action)  
Wall, Catharine (Self)  
Wheeler, Dianne (Self)  
York, Ruth (Self)  
Zeitz, Carl (Self; Moms Demand Action)  
Zeitz, Margaret (Self; MOMS Demand Action)

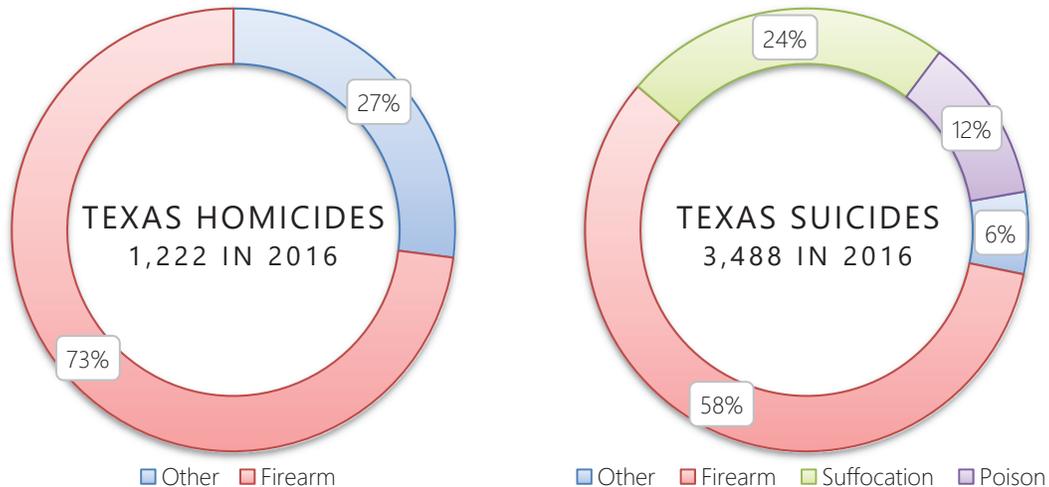
## Background

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Our Constitution provides for an individual right to firearms ownership.<sup>370</sup> That right is widely exercised, with roughly 42% of American households reporting possession of at least one gun<sup>371</sup> and estimates pegging the number of privately held firearms in this country at between 270 and 310 million—near or exceeding our total population.<sup>372</sup>

There are wide disagreements about the upshot of these numbers for public policy, particularly when considering positive factors like defensive use of force<sup>373</sup> and sporting, but guns do play a role in a substantial number of killings every year.<sup>374</sup> In 2016, the last year for which data is available, there were 14,415 homicides by firearm in the United States.<sup>375</sup> The highest raw number was in Texas (3,353), although we're only middle-of-the-road among states in firearms-related deaths per capita.<sup>376</sup> Data from the year before that (the last available dataset

fully breaking down deaths by firearm) showed that a staggering 22,018 of the total 36,252 shooting deaths in America were suicides.<sup>377</sup> Texas follows the same pattern:<sup>378</sup>



Mass shootings account for only a small percentage of overall gun deaths, but these tragedies (especially when they’ve happened in our schools) have become a focal point in the public debate on firearms and safety.<sup>379</sup> One natural consideration has been how future mass shootings can be prevented, and protective order laws—known variously in this context as red flag laws, gun violence protective orders, and extreme risk protective orders (“ERPOs,” which this report will use)—have become a central part of that conversation:

It’s become a common refrain after each new mass shooting: “There were red flags.”

Before 26 people died in a rural church in Sutherland Springs in November, the shooter had escaped from a mental health facility, received a domestic violence conviction and had a standoff with police. Before the February massacre of 17 students and staff at a high school in Parkland, Florida, there were repeated calls to the police and multiple warnings about a potential school shooting to the FBI.

As mass shootings continue, more and more states have adopted “red flag” laws that allow law enforcement, and sometimes family members or other parties, to ask a court to order the seizure or surrender of guns from people who are deemed dangerous by a judge.<sup>380</sup>

Roughly a dozen states (some legislation is pending finalization) now have ERPOs, although the procedures and standards involved vary among them.<sup>381</sup> The concept of a Texas ERPO system was suggested specifically in Governor Abbott’s School Safety Plan,<sup>382</sup> which was developed in the wake of the mass shootings at First Baptist Church in Sutherland Springs and at Santa Fe High School. The governor’s report also noted ERPOs’ potential to prevent firearm suicides.<sup>383</sup>

EXISTING TEXAS LAWS

A vocal subset of Texans believe the government shouldn't impose any law related to firearms, full-stop, and that even existing laws are invalid or at least unwise.<sup>384</sup> While the question of what the law ought to be is always subject to debate, that uncompromising reading of "shall not infringe" as prohibiting any regulation is simply not what the law is. As Justice Scalia wrote in the *Heller* decision, the Second Amendment is "not unlimited" and isn't offended by many longstanding restrictions on the who, where, and what of firearms possession and sale.<sup>385</sup>

Of course, just because we can doesn't mean we should, so that leaves a threshold question of whether other laws already cover the situations ERPOs would address, as some have argued.<sup>386</sup> Several other types of protective orders that can legally part a person from their firearms have existed for many years. The most well-known are family violence protective orders, which may first be obtained on an emergency or *ex parte* basis but then require a civil hearing where the possibility of future violence must be proven by clear and convincing evidence;<sup>387</sup> no conviction or criminal charge is necessary.<sup>388</sup> Similar protective orders designed to prevent sexual assault, stalking, and human trafficking are also already part of Texas law.<sup>389</sup>

There are significant enforcement gaps in these laws, however, because there aren't any statutory provisions for who may collect firearms, where and how they can be stored, and similar logistical issues. Instead, different jurisdictions either have no enforcement mechanisms beyond the court's order itself or have created systems through grant funding or at the expense of local taxpayers.<sup>390</sup> There's no statutory guidance for situations in which weapons can't be returned or aren't claimed when eligible, leaving some authorities left holding them indefinitely.<sup>391</sup> Information sharing is also inconsistent at best, so authorities in one county may be unaware of an order granted in another.<sup>392</sup>

Emergency detention is another current legal tool some believe adequately addresses the same fact patterns as an ERPO.<sup>393</sup> Any peace officer who believes someone has a mental illness that's creating a substantial risk of serious harm to themselves or others may take that person into custody without a warrant and deliver them to mental health authorities (or jail, in an emergency).<sup>394</sup> In a closer parallel to ERPOs, any adult may petition a court to order the detention of someone whose mental illness has made them dangerous (an "EDO").<sup>395</sup>

A peace officer acting on his or her own initiative may seize any firearms in the person's possession, but no similar authority exists when executing an EDO,<sup>396</sup> plus there's no black

letter law that lets officers determine whether the person has access to other weapons that aren't in their immediate possession at the time of detention.<sup>397</sup> As with protective orders, this information is inadequately shared—it isn't even reported to the National Instant Criminal Background Check System<sup>398</sup>—and there's no state-level prohibition on sale or transfer of firearms to people under these kinds of orders.<sup>399</sup> Finally, the detentions themselves are limited in both time, lasting only as long as “risk of harm is imminent unless the person is immediately restrained,”<sup>400</sup> and by capacity, since a lack of available beds is a widespread problem.<sup>401</sup>

More fundamentally, though, emergency detention doesn't apply to many cases ERPOs would cover because of its focus on mental illness. There's a widely held misconception that mental illness is linked to violence,<sup>402</sup> but only 5% of all violent crime and 4–7% of mass shootings are perpetrated by people who have a diagnosed mental illness.<sup>403</sup> While there's obviously some intersection between violence and mental illness,<sup>404</sup> the latter isn't a proxy for dangerousness; it's fairer to say that many dangerous people have problems with overall mental *health*, which is distinct from mental illness in a clinical sense.<sup>405</sup> A history of violence, struggles with substance abuse, and a certain subset of personality disorders are far more predictive of violent behavior,<sup>406</sup> and many school shooters are simply angry and alienated.<sup>407</sup> While the risks associated with certain forms of mental illness should be considered, people living with mental illness shouldn't be deprived of their rights on that basis alone—doing so isn't just fundamentally unfair, but it can create a huge pool of false negatives that misses threats and discourages gun owners who need mental health help from seeking it out.<sup>408</sup>

#### ERPO EFFECTIVENESS

The next consideration is whether an ERPO could effectively fill these gaps; in other words, would it work? One argument against efficacy is a replacement effect where other means of violence, like knives,<sup>409</sup> simply take the place of firearms. Knife attacks, including mass stabbings, do occur at greater rates in countries with strict gun control,<sup>410</sup> and there are numerous knife attacks in the United States.<sup>411</sup> However, guns are generally far more lethal than knives and other weapons,<sup>412</sup> which is borne out in statistics involving both homicide<sup>413</sup> and suicide<sup>414</sup>—especially considering the power of a firearm to turn an impulsive choice into an irreversible one.<sup>415</sup> So, while even completely eliminating gun violence wouldn't eliminate violence itself, any replacement effect is likely to be incomplete and less lethal.

A similar question is whether those likely to commit violence or suicide can be identified. Research suggests they can. As the Heritage Foundation points out, “gun-related murders are carried out by a predictable pool of people” and “almost all mass public shooters have extensive histories of mental health issues . . . , disturbing behaviors, or interpersonal

violence.”<sup>416</sup> Comprehensive data supports the notion that red flags are very real,<sup>417</sup> and there are also well-documented identifiable warning signs that precede suicide.<sup>418</sup>

Moving from the theoretical to the practical, the best example of whether ERPOs are effective is how they’ve been used in states that have them. Connecticut, which has had ERPOs for many years, has shown similar fact patterns in usage across cases: ERPOs have typically been invoked after fearful friends or loved ones alerted authorities to an armed person who then “appeared to the police to be severely psychotic, intoxicated, emotionally agitated, or some combination of these states.”<sup>419</sup> Over three in five of those cases involved suicide as the primary risk, and there’s been a measurable decrease in suicide owing to ERPOs.<sup>420</sup>

California’s law is much newer, and 86 ERPOs—which provide for a 21-day removal of firearms there—were issued in the first year the law took effect.<sup>421</sup> Ten of those were in San Diego, which released a list of the circumstances surrounding each:

A 39-year-old San Carlos man, who fired a gun at trees, rats, raccoons and his neighbor’s backyard while drunk and high on prescription drugs.

A 23-year-old ex-Marine who walked into a Kearny Mesa auto parts store with a loaded handgun, but called police before shooting anyone.

A 60-year-old Otay Mesa man who grabbed a .38-caliber revolver and fled his home after his family discovered he was molesting his grandchild. He was arrested with his gun in his vehicle.

An 81-year-old man from the Carmel Mountain area who threatened to shoot his wife and a neighbor because he believed they were having an affair.

A 53-year-old Allied Gardens man with significant mental health issues who used a firecracker to damage a neighbor’s front door. Officers seized a rifle with a bayonet and two illegal high-capacity magazines from his apartment.

A 38-year-old Allied Gardens man who threatened to kill himself, his wife and their young child if she left him. His wife had overheard him crying in a bathroom and cocking his .40-caliber pistol.

A 28-year-old Mission Valley man who grabbed a gun case and threatened suicide, then threw his girlfriend to the ground when she tried to call for help. Police seized two handguns, two rifles and a shotgun.

A 33-year-old Mid-City man who locked his wife in a car with him, threatening her with a loaded firearm. Police searched the car and found a meth pipe and two loaded firearms that didn’t belong to him. Later, he surrendered a Glock 9mm and a .380-caliber handgun.

A 35-year-old Allied Gardens man with a history of domestic violence, who owned several guns including a 9mm pistol, a Mosquito semi-automatic pistol, a Springfield .40-caliber pistol, and a Mossberg shotgun. His wife feared he might kill her.

A 40-year-old La Jolla man who told his fiancée in a text message that he wanted to shoot her in the head, then threatened her ex-boyfriend while holding a knife behind his back. The La Jolla man surrendered a handgun and an AR-15 semi-automatic rifle.<sup>422</sup>

While proving a negative—a crisis was averted because an ERPO was issued—is next to impossible, these do describe volatile situations where intervention was warranted. Existing Texas protective orders cover some of these situations, and others might be temporarily

resolved by a misdemeanor arrest or EDO (neither of which would affect firearms access afterwards), but authorities would be powerless to act in several of the scenarios described above without an ERPO system.

#### D U E P R O C E S S & A B U S E

Regardless of whether an ERPO could be useful and effective, there's concern that they lack adequate due process protections.<sup>423</sup> Due process is guaranteed by both the federal and state constitutions.<sup>424</sup> In our courts, it's

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The question here is not what good a law will do if executed properly; the question is, what harm will it do if it's misused? . . . We need to prosecute actions and people, not ideas.

CJ GRISHAM, OPEN CARRY TEXAS

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operationalized through a bundle of rights collectively known as procedural due process: fundamentally, the opportunity for a person whose life, liberty, or property is jeopardized by state action to be heard on the matter in a meaningful way.<sup>425</sup> Of course, this is a floor and not a ceiling, so our laws can always guarantee more if appropriate. While some of the ideas around when firearms can be legally removed—only after a criminal conviction<sup>426</sup> or only after a jury trial,<sup>427</sup> for example—aren't constitutionally required, the entire array of procedures is available as appropriate in crafting any ERPO law. Undeniably, poorly drafted legislation could leave innocent actors without adequate recourse in our courts.

That's vital because procedural due process is the frontline of defense against abuse, which was also a chief concern for many witnesses. Although there's been no public uproar over real-world abuses in the many years that similar protective orders have disarmed dangerous people,<sup>428</sup> there's no doubt that allegations in support of an ERPO could, like any accusation in our justice system, be weaponized to serve personal vendettas.<sup>429</sup> Even when a person falsely accused prevails, the financial cost of fighting a bogus claim in court can be crippling.<sup>430</sup> Any ERPO must therefore include strong deterrents for bad actors, such as criminal penalties and liability for attorney's fees in the case of a false report as well as procedures that allow any allegation to be vigorously tested in court in the first place.

With no specific legislation before the committee during the interim, determining what technical objections like this mean is difficult. Synthesizing the testimony taken, though, the committee understands the position of some Texans opposed to ERPOs to be that a law with proper due process and protections against abuse could be crafted but hasn't yet been (either in past proposals here or laws in other states). The position of others is clearly that the very concept of an ERPO is antithetical to due process, so none could ever be acceptable.

## FURTHER WORK NEEDED

Guns and gun control are incredibly divisive, difficult topics to navigate. Although often thought of as a partisan issue, the divisions aren't always clear. The National Rifle Association has voiced support for ERPOs as long as they contain appropriate due process protections,<sup>431</sup> as have some conservative thought leaders,<sup>432</sup> while the American Civil Liberties Union opposed the version created in Rhode Island.<sup>433</sup> Bipartisan ERPO legislation has been proposed at the federal level,<sup>434</sup> while in Texas, the Democratic platform supports ERPOs<sup>435</sup> and the Republican platform opposes them.<sup>436</sup>

Clearly, no consensus has been reached in Texas; it may or may not be possible to design an ERPO measure we can agree on. We must defend the rights of Texans, but the clock is ticking as we decide how to tackle the thousands of Texas deaths by gun homicide and suicide every year.<sup>437</sup> So, whether it's an ERPO or other measures, the Texas Legislature shouldn't throw up its hands in surrender to the status quo because solutions are challenging.

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I asked myself, when Sandy Hook happened, why did this happen? Now I'm asking, when will it happen again? Don't let these deaths become . . . statistics. Please *do something*.

KELLY CHOI, STUDENT

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The committee heard from families who felt powerless to stop their loved ones from going down a path of violence and have lived with the heartbreak of “if only” ever since.<sup>438</sup> The committee heard from Texas teachers who are

worried because every school has “that kid”—the one raising red flags who educators lack the resources to help or stop<sup>439</sup>—and from far too many young people who've met “that kid” on the wrong side of a rifle in their schools and places of worship.<sup>440</sup> And the committee heard from responsible Texas gun owners worried that an overreaching government might sacrifice their constitutional rights on the altar of public safety. The problem is bigger and the conversation is longer than the single hearing we had over the interim.

## Recommendations

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The committee makes the following recommendations to the 86th Texas Legislature:

### **Promote Mental Health, Suicide Prevention, & School Safety Measures**

The best ERPO is one that never has to be used, which means addressing the root causes of mass shootings and firearm suicides. The Legislature should broadly support measures aimed at improving mental health resources, preventing suicides, and increasing school safety. That should include not only an investment in those resources but a focus on early intervention before people become a danger to themselves or others.

### **Fix Existing Protective Order Enforcement**

Our existing protective orders need statutory enforcement mechanisms to be effective. The law should specify who can seize and store weapons, how and when they're returned, and how long they must be held if unclaimed for an extended period after restoration of rights. Options should be broad and cost-effective, making use of public-private partnerships if appropriate.

### **Make Firearms a More Central Part of EDO Procedures**

Officers executing an EDO should have the same clear legal authority to seize firearms as those who initiate an emergency detention themselves, and the inquiry about, search for, and temporary seizure of all firearms the detainee owns should be allowed so that those in a mental health crisis aren't returned to a stockpile of weapons if a mental health facility can't or won't accept them. Like existing protective orders, there should be clearer procedures and adequate resources to deal with the firearms-related aspects of these orders, including restoration.

### **Consider a State Law Related to Certain Forms of Mental Illness & Firearms**

Texas should consider a state law prohibiting the sale or transfer of a weapon to a person who's previously been adjudicated as suffering from serious mental illness associated with violence or self-harm. We recognize that mental illness as such isn't linked to violence, and the overwhelming majority of Texans contending with mental illness are strong, productive people whose rights must be respected. Any such proposal, then, must be narrowly tailored, appropriately tracked, have clear procedures for restoration of rights, and avoid stigmatizing those with mental illness or discouraging those who need help from seeking it.

### **Continue the Conversation About ERPOs**

The committee's hearing demonstrated that there's significant disagreement among Texans about what, if any, approach is appropriate for ERPOs. Protecting both the safety and the constitutional rights of Texans isn't easy, but we owe it to the families who've lost loved ones and future generations of students and teachers to fully explore all solutions. The 86th Legislature should continue the conversation about ERPOs beyond the single hearing the committee had this interim as it decides how best to keep Texans safe.

### **Include Strong Due Process & False Allegation Penalties**

That conversation should include strong due process protections, including a clear and convincing evidence standard, substantive evidence of risk, a court-ordered mental health examination if appropriate, the option for appointed counsel, and clear procedures for appeal and restoration. There should also be a criminal penalty for false allegations and liability for attorney's fees if a judge determines allegations were baseless or brought in bad faith.

## CHARGE \*2—SAFE STORAGE

Examine current statutes designed to protect minors from accessing firearms without proper supervision and make recommendations to ensure responsible and safe firearm storage, including enhancing the penalty to a felony when unauthorized access results in death or bodily injury.

### Hearing

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The committee held a hearing on June 25, 2018 in room E2.014 of the Texas Capitol to consider supplemental charge two. This is the official witness list generated from electronic witness affirmation forms:

Alexander, Jay (Texas DPS Resource Witness only if needed)  
Baca, Cheryl (Self; Travis co 4H shooting sports club)  
Barker, Sebastian (Self)  
Barnes, Jim (Self)  
Bolgiano, John (Self)  
Briscoe, Rick (Self; Open Carry Texas)  
Brown, Rayford K (Self)  
Carter, David (Self)  
Cross, Kelly (Bexar county presiding civil mental health judge)  
Dolle, Gene (Self; Upshur County Pct 1 Constable's office)  
Dunning, Randall (Self)  
Eastland, Bill (Self)  
Elliff, D. Scott (Self)  
Glass, Kathie (Self)  
Glass, Tom (Self)  
Greer, John (Self)  
Greer, Phyllis (Self)  
Grisham, CJ (Self; Open carry texas)  
Hedtke, Amy (Self)  
Herman, Guy (Self; Statutory Probate Judges of Texas)  
Hodges, Brad (Self)  
Holcomb, Terry (Self)  
Hunter, Jeremiah (Self; We The People-Longview Tea Party)  
Jackson, Alma (Self; Texas Republican Party)  
Kelberlau, Willaim (Self)

Keller, Merily (Self; Texas Suicide Prevention Council)  
King, Edward (Self)  
Landivar, Jorge (Self)  
Lesko, Mike (Texas DPS resource witness)  
Martinez, Mel (Self; Wichita Falls Metropolitan Community Church)  
Mendoza, Elva (Self; Moms Demand Action for Gunsense in America)  
Mitchell, Chris (Texas Wildlife Association)  
Norwood, Jesse (Self)  
Norwood, Jon (Self)  
Norwood, Matthew (Self)  
Palmer, Joe (Self)  
Patterson, Jerry (Self)  
Perez, Bresdon (Ccc)  
Ponce, Kathy (Self; Tea Party Patriots)  
Price, Jennifer (Self)  
Ross, Leesa (Self; Be Smart)  
Schmidt, Charles (Self)  
Schmidt, Dwayne (Self)  
Schmidt, Teppi (Self)  
Scruggs, Ed (Self; Vice Chair Board of Directors for Texas Gun Sense)  
Shelton, Aaron (Self)  
Sieli, Tony (Self; Lone star gun rights)  
Stone, Alexzandrea (CCC chris courage change)  
Swirsky, Alexie (Self)  
Switzer, Gyl (Texas gun sense)  
Theobald, Paul (Self; ATX Dem Vets)  
Tippetts, Mark (Governor campaign for Mark Tippetts)  
Tripp, Alice (Texas State Rifle Association)  
Zeigler, Abigail (Self)  
Registering, but not testifying:  
Bachman, Mariah (Self)  
Bachman, Solomon (Self; North Texas Patriots for Liberty)  
Bailey, Deb (Self)  
Barker, Elisabeth (Self)  
Blystone, Chris (Self; Libertarian Party of Franklin County)  
Brieger, John (Self)  
Brosnihan, Kerry (Self)  
Bruton, Julie (Self)  
Coe, Debra (Self; Moms Demand Action)  
Cox, Mike (Self)

Dett, Tina (Self; Moms demand action)  
Dianovich, Elizabeth (Texas Firearms Freedom, Open Carry Texas, Lonestar Gun Rights)  
Dianovich, Jeannette (Open Carry Texas, Lonestar Gun Rights, Texas Firearms Freedom)  
Dianovich, Joe (Texas Firearms Freedom, Open Carry Texas, Lonestar Gun Rights)  
Doerr, Katherine (Self; Moms demand action for gunsense in america)  
Dolle, Joyce (Self)  
Eshraghi, Selina (Self; March For Our Lives Austin)  
Forst, Ginger (Self; Moms Demand Action)  
Giorda, Elizabeth (Self)  
Greene, Melanie (Self; Moms Demand Action for Gun Sense in America)  
Grisham, Emily (Self)  
Hower, Misty (Moms Demand Action)  
Jackson, Christopher (Self)  
Keys, Jeffrey (Self)  
Keys, Tamara (Self)  
King, James (Self)  
Legere, Barbara (Moms demand action)  
Lewis, Christopher (Self)  
Longhurst, Joseph (Self)  
Maynard, Beth (Self)  
McMahan, Stacy (Self)  
McNutt, Chris (Self; Texas Gun Rights)  
Mica, Tara (NRA)  
Milam, Claire (Self)  
Morosky, Pearl (Self)  
Nelson, Susan R (Self; Texas Gun Sense)  
Olson, Wade (Self)  
Packer, Chasey (Self)  
Pham, Theresa (Self; Moms Demand Action)  
Pintchovski, Susan (Self; Moms Demand Action Texas)  
Schwartz, Ann (Self)  
Sheehan, Kerry (Self; Moms Demand Action for Gunsense)  
Veling, Gretchen (Self; Moms demand action)  
Wall, Catharine (Self)  
York, Ruth (Self)  
Zeitz, Carl (Self; Moms Demand Action)  
Zeitz, Margaret (Self; MOMS Demand Action)

## Background

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There's long been concern about children accessing firearms, and that's only been amplified by recognition that the guns involved in many school shootings often belonged to the shooter's parents.<sup>441</sup> Beyond those headlines, accidental discharges by children who've gotten hold of a firearm are far more common, with over 8,300 kids treated in United States emergency rooms for gunshot wounds every year.<sup>442</sup> Texas is no stranger to these issues, and storage requirements have been a point of contention as a result.<sup>443</sup> Governor Abbott's recent school safety plan recommended several changes to strengthen the state's safe storage laws.<sup>444</sup>

Under the primary existing law, enacted in 1995, it's a crime to make a firearm accessible to a child.<sup>445</sup> Liability occurs when a child gains access to a loaded firearm because of the offender's criminal negligence in either failing to secure it or leaving it in a place a child is likely to be able to get it.<sup>446</sup> Securing the firearm means "to take steps that a reasonable person would take to prevent the access to a [loaded] firearm by a child" but doesn't require any specific form of storage.<sup>447</sup> "Child" actually means a person younger than 17 under the statute,<sup>448</sup> so it doesn't apply to 17-year-olds like the Santa Fe shooter.<sup>449</sup> The penalty is either a fine-only class C misdemeanor if no one's hurt or a class A misdemeanor if death or serious bodily injury occur.<sup>450</sup> There are also affirmative defenses for hunting, sporting, or other lawful uses under adult supervision, defense of property or people, situations where the child obtained the weapon through unlawful entry, and for when the use was part of an agricultural enterprise.<sup>451</sup>

Beyond these criminal provisions, safe storage laws in Texas have been limited to some educational efforts, most notably the Department of Public Safety's recent release of online materials promoting and explaining safe storage.<sup>452</sup>

## Discussion

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### ORIGINAL PURPOSE

The committee had the useful opportunity to hear about the background and original purpose of our current safe storage law from its author, former land commissioner and state senator Jerry Patterson. It originally began as a prescriptive measure that would've mandated trigger locks, safes, or similar specific methods of storage.<sup>453</sup> After much consideration, legislators arrived at the current construct designed around liability, which allows Texans wide latitude to make decisions about how firearms should be stored but holds them accountable for child access if those decisions prove criminally negligent from a reasonable person's perspective.<sup>454</sup> This reflects the legislative judgment that what's appropriate is very fact-specific—it may be

perfectly reasonable (and therefore legal) to keep a handgun in a nightstand, loaded but without a round in the chamber, in a home with a crawling child who can't possibly rack the slide, but increasingly secure solutions are probably needed as that child grows.<sup>455</sup>

In terms of penalties, the primary reason the law was left at a misdemeanor level was to avoid overly punishing parents who may have already lost a child due to an accidental shooting.<sup>456</sup> That was also the reason behind the seven-day prohibition on arrest after the death of a child that was built into the law.<sup>457</sup> The law has led to between two and three hundred arrests since its creation but has only resulted in 61 convictions<sup>458</sup> (which doesn't necessarily indicate acquittals or dismissals in the remaining cases—they may have had alternative resolutions such as deferred adjudication or pretrial diversion).

#### ISSUES & APPROPRIATE APPROACH

Some Texans take issue with storage laws altogether, including our current one, based on the notion that government shouldn't regulate firearms at all.<sup>459</sup> A more common view is that whatever the propriety of the existing law, it serves no deterrent purpose and its rare application proves its lack of utility, suggesting that penalties shouldn't be increased or that an increase would be meaningless.<sup>460</sup> Research supports the idea that safe storage laws have little effect on deterring crime, including mass shootings, but strong reductions in accidental shootings and youth suicides are verifiable.<sup>461</sup> Beyond that, the issue of proportionate justice is a compelling one: while the relatively gentle approach of the law is appropriately sympathetic towards parents already grieving the death of a child, many families would find the same penalty wholly insufficient if their child was killed because of a non-parent's criminal negligence.<sup>462</sup>

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We all know that everything is bigger here in Texas, and that includes our hearts and our ideas. We look forward to . . . reasonable regulations which will protect all Texans from gun violence, whether accidental or intentional, while ensuring that we do not violate either the due or judicial process rights of all Texans.

PAUL THEOBALD, U.S. NAVY VETERAN

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Firearm theft is also something that isn't covered by the current law; in fact, the statute contains an affirmative defense such that a firearm taken by a child through burglary creates no liability.<sup>463</sup> Beyond endangering children, these guns end up used in street crime as well as mass shootings,<sup>464</sup> and thefts of unsecured firearms in vehicles are rampant in some parts of the state.<sup>465</sup> However, conflicting laws allow firearms to be carried in most places but create certain gun-free zones and other restricted areas,<sup>466</sup> which means that Texans who lawfully carry firearms are sometimes required to leave them in their vehicles.<sup>467</sup> Expanding liability in

that context raises questions of fairness as well as the specter of re-victimization and disincentivizing victims to report firearms stolen.<sup>468</sup>

There's generally widespread agreement on promoting safe storage practices in Texas through a public awareness campaign and similar efforts,<sup>469</sup> although some oppose any additional taxpayer funding for such endeavors<sup>470</sup> and others have suggested that programs like the National Rifle Association's "Eddie Eagle"<sup>471</sup> or advertising by private companies hoping to sell safe storage solutions to consumers<sup>472</sup> already provide those services at no cost. But our existing law is reactive, not proactive, and frontend measures like improving education are the best way to reduce the chance of tragedy before it happens.<sup>473</sup>

While there are some proponents of specific storage requirements,<sup>474</sup> Texans are generally resistant to specific methods or manners of storage being legislated. Many rightly argue that if storage requirements are too restrictive, one of the basic purposes of firearms ownership—defense of one's home—would be undermined, since emergencies necessitate rapid access to firearms.<sup>475</sup> The concept of individual liberty coupled with responsibility for criminal negligence is certainly more palatable to many Texans.<sup>476</sup>

Finally, when considering the appropriate age that constitutes a child, a change covering those 17 and under may be fairly uncontroversial<sup>477</sup> and would square with the age requirement for purchasing a long gun.<sup>478</sup> However, there's a serious defect in current law that would only be compounded by enhanced penalties, which is how it intersects with real-world practices in youth hunting and shooting sports. Most young people involved in these activities begin at a very young age, and supervision naturally declines as they develop expertise: many 16-year-olds who compete in shooting sports, for example, drive themselves to matches and may not be "supervised" (depending on the definition) by an adult there.<sup>479</sup> Although the committee is unaware of our safe storage law ever being used to prosecute the parent or coach of a child participating in these activities, our current law does already expose them to unwarranted liability, and as an affirmative defense, would burden them with proving their innocence in court after arrest if it were applied to them. That should be remedied immediately.

## Recommendations

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The committee makes the following recommendations to the 86th Texas Legislature:

### **Encourage Safe Storage**

The most passionate gun owners tend to be among the most informed and proficient, but not all gun owners know how to secure their firearms appropriately. Increased public awareness

about the dangers and criminal liability associated with failing to responsibly store firearms and education about appropriate storage systems should be fully funded and thoughtfully implemented.

#### **Consider Increasing Some Penalties**

There are reasonable public policy reasons for limiting most safe storage violations to a misdemeanor. That's not true for situations in which the offender isn't the parent or guardian of a slain child—even discounting deterrence, proportionality for the offense means that the option of felony prosecution should at least be available when a parent buries a child because of the criminally negligent behavior of an unrelated adult. The Legislature should seriously reconsider what the appropriate penalty range is for those situations.

#### **Raise the Age**

With the vital caveat to follow, there's no reason not to amend section 46.13 of the Texas Penal Code to set the age of "child" to those under 18, which is the same age a person can purchase a long gun on their own.

#### **Create Hunting & Shooting Sports Exceptions**

Ambiguity in our current law exposes the parents and coaches of children engaged in hunting and shooting sports to criminal liability. An exception should be created to protect adults who reasonably make a firearm available to a child for participation in bonafide hunting and shooting sports activities without direct supervision.

#### **Don't Mandate Forms of Storage**

Requiring certain forms of firearm storage is a one-size-fits-all solution that won't work for every Texas household and which could interfere with the right to self-defense. Our safe storage law should remain a question of liability for criminal negligence, not a prescription for certain limited forms of storage.

#### **Don't Create Liability for Stolen Guns**

When a firearm is stolen, our system should penalize the thief, not the victim. The "burglary exception" in our current safe storage law shouldn't be changed.

## LETTERS FROM MEMBERS

Below please find letters from Vice Chair Todd Hunter and Representative Barbara Gervin-Hawkins, respectively, caveating and commenting on their support for this report.



**TODD HUNTER**  
TEXAS HOUSE OF REPRESENTATIVES  
DISTRICT 32  
NUECES (PART)

January 22, 2019

Texas House Members,

I have reviewed the House Committee on Criminal Jurisprudence Interim Report. There are several issues that will need more review and study before I can finalize an opinion on certain specifics and recommendations, but as Vice Chair, I believe the House should have an opportunity to review and provide input on all of these matters.

Respectfully,

  
Todd Hunter  
State Representative - District 32



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STATE REPRESENTATIVE  
BARBARA GERVIN-HAWKINS

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DISTRICT 120  
BEXAR COUNTY

November 12, 2018

The Honorable Joe Moody  
Texas House of Representatives  
P.O. Box 2910  
Austin, TX 78768

Dear Chairman Moody,

It has been my pleasure to serve under your leadership on the House Committee on Criminal Jurisprudence during the 85th Legislature. I have reviewed our committee's interim report and am grateful for the work that you and your staff have done to complete the report. I have submitted my signature to the report; however, my signature should not be taken as an endorsement of each policy recommendation presented in this report.

Regarding control for historical discrimination, I appreciate the recommendation that Texas should not move forward with widespread risk considerations until we can be sure that we are not institutionalizing discrimination under a guise of objectivity. On the recommendation of developing partnerships with the bails bonds industry, I agree that bail bonds companies represent a significant infrastructure that's already been developed. I appreciate the recommendation that the legislature and local governments look for ways to work with bail bonds companies rather than usurp their role. We have significant work to be done in the 86th legislative session regarding best practices as well as potential tools for issuing bonds that protect communities and decrease recidivism. I believe that with further research we can find tools that work in conjunction with the existing infrastructure. I would also like to emphasize the importance of human interaction with defendants, which can be impossible to replicate with a statewide tool. In addition, I would like to offer an opinion on the committee's charge to investigate the safe storage of firearms and regulation of children's access to firearms. I do not want to unjustly punish parents whose children are involved in shooting sports or recreational hunting; however, I also want to ensure that there is adequate parental supervision and that weapons are handled responsibly. Although I may not agree with all of the recommendations presented in the interim report, I also recognize the diversity of viewpoints in our committee. Our ideas may differ on policy, but I know that we are all committed to ensuring a fair and just judicial process in our state.

I would like to reiterate my gratitude to Chairman Moody for his leadership over our committee and his staff's hard work on this report. Moving forward, I am committed to working with my colleagues in order to craft policy solutions that create a fair and equitable criminal justice system for all Texans.

Respectfully,

A handwritten signature in black ink that reads "Barbara Gervin-Hawkins".

Barbara Gervin-Hawkins

## ENDNOTES

- <sup>1</sup> H.J. of Tex., 85th Leg., R.S. 263–64 (2017).
- <sup>2</sup> Tex. H. Rule 3, § 7, H. Res. 4, 85th Leg., R.S., 2017 H.J. of Tex. 2, 53–54.
- <sup>3</sup> Speaker Joe Straus, *Interim Committee Charges, Texas House of Representatives, 85th Legislature*, at 9, available at [https://house.texas.gov/\\_media/pdf/interim-charges-85th.pdf](https://house.texas.gov/_media/pdf/interim-charges-85th.pdf).
- <sup>4</sup> See Speaker Joe Straus, *Speaker Straus Issues New Committee Charges Related to School Safety*, Texas House of Representatives, Jun. 1, 2018, available at <https://house.texas.gov/news/press-releases/?id=6533> (releasing initial supplemental charges modified by internal memoranda before hearing).
- <sup>5</sup> See generally Eric S. Blake & David A. Zelinsky, *National Hurricane Center Tropical Cyclone Report: Hurricane Harvey*, The National Hurricane Center, available at [https://www.nhc.noaa.gov/data/tcr/AL092017\\_Harvey.pdf](https://www.nhc.noaa.gov/data/tcr/AL092017_Harvey.pdf) (overview of Hurricane Harvey damage).
- <sup>6</sup> See, e.g., Brian Rogers, *Hurricane Harvey Damage to Harris County Criminal Courthouse Under Review*, The Houston Chronicle, January 6, 2018, available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Hurricane-Harvey-damage-to-Harris-County-criminal-12476558.php> (detailing cost and timeline of damage to principal criminal courthouse in Houston).
- <sup>7</sup> *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Judge Vanessa Velasquez) (tape available from the House Video/Audio Services Office).
- <sup>8</sup> *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Judge Susan Brown) (tape available from the House Video/Audio Services Office).
- <sup>9</sup> *Id.*
- <sup>10</sup> *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of David Slayton) (tape available from the House Video/Audio Services Office).
- <sup>11</sup> Judge Vanessa Velasquez, *supra* note 7.
- <sup>12</sup> Zach Despart, *Defense Lawyers Urge Harris County to Stop Jailing Inmates in Louisiana*, The Houston Chronicle, Aug. 29, 2018, available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Defense-lawyers-urge-Harris-County-to-stop-13197552.php>.
- <sup>13</sup> *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Chris Daniel) (tape available from the House Video/Audio Services Office).
- <sup>14</sup> *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Judge Jana Whatley) (tape available from the House Video/Audio Services Office).
- <sup>15</sup> *Id.*
- <sup>16</sup> Chris Daniel, *supra* note 13.
- <sup>17</sup> *Hearing on Interim Charge 1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of the Honorable Kim Ogg) (tape available from the House Video/Audio Services Office).
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.*
- <sup>20</sup> David Slayton, *supra* note 10; see generally TEX. GOV'T CODE ANN. § 22.0035 (codifying Texas Supreme Court authority to modify or suspend certain provisions during disaster).
- <sup>21</sup> David Slayton, *supra* note 10; see generally TEX. CONST. art. V, § 7 (requiring district court to be held in county seat unless otherwise provided by law); TEX. GOV'T CODE ANN. § 22.0035 (providing procedures for conduct of district court outside the county seat after certain disasters).

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- <sup>22</sup> This infographic originally created and published in: Adam B. Smith, *2017 U.S. Billion-dollar Weather and Climate Disasters: A Historic Year in Context*, National Oceanic and Atmospheric, Jan. 8, 2018, available at <https://www.climate.gov/news-features/blogs/beyond-data/2017-us-billion-dollar-weather-and-climate-disasters-historic-year>.
- <sup>23</sup> Judge Susan Brown, *supra* note 8; Judge Jana Whatley, *supra* note 14.
- <sup>24</sup> Judge Jana Whatley, *supra* note 14.
- <sup>25</sup> Judge Susan Brown, *supra* note 8; The Honorable Kim Ogg, *supra* note 17; David Slayton, *supra* note 10.
- <sup>26</sup> Judge Susan Brown, *supra* note 8; The Honorable Kim Ogg, *supra* note 17; Judge Vanessa Velasquez, *supra* note 7.
- <sup>27</sup> Chis Daniel, *supra* note 13.
- <sup>28</sup> Judge Jana Whatley, *supra* note 14; David Slayton, *supra* note 10.
- <sup>29</sup> Jolie McCullough, *Texas Leads the Nation in Executions, but Its Death Row Population is Dropping*, The Texas Tribune, Dec. 14, 2017, available at <https://www.texastribune.org/2017/12/14/texas-leads-nation-executions-its-death-row-population-dropping/>.
- <sup>30</sup> *Id.*
- <sup>31</sup> *Id.*
- <sup>32</sup> David Masci, *5 Facts About the Death Penalty*, Pew Research Center Fact Tank, Aug. 2, 2018, available at <http://www.pewresearch.org/fact-tank/2018/08/02/5-facts-about-the-death-penalty/>.
- <sup>33</sup> Death Penalty Information Center, *Searchable Execution Database*, accessed on Oct. 30, 2018, available at <https://deathpenaltyinfo.org/views-executions>.
- <sup>34</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).
- <sup>35</sup> *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).
- <sup>36</sup> *See, e.g., Ex parte Moore*, 470 S.W.3d 481, 487 (Tex. Crim. App. 2015) (observing that court had repeatedly asked the Texas Legislature to act on *Atkins*); *In re Allen*, 462 S.W.3d 47, 54 (Tex. Crim. App. 2015) (stating flatly that “Legislation is required” to resolve uncertainty in *Atkins* issues); *Ex parte Hearn*, 310 S.W.3d 424, 427 (Tex. Crim. App. 2010) (noting continued lack of legislative guidance).
- <sup>37</sup> *Allen*, 462 S.W.3d at 54.
- <sup>38</sup> *Moore v. Texas*, 137 S. Ct. 1039, 1052–53 (2017).
- <sup>39</sup> The Court of Criminal Appeals has since based its new standards on the Diagnostic and Statistical Manual (Fifth Edition)’s three-pronged approach that examines deficits in general mental abilities, impairment in adaptive functioning, and onset during the developmental period. *Ex parte Moore*, No. WR-13,374-05, at \*2 & 11–14 (Tex. Crim. App. 2018), available at <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=3db1c6a0-2d77-42e3-8d7e-cf8b21d56f07&coa=coscca&DT=OPINION&MediaID=4f58472d-cb50-4342-b4ac-5738635ac619>.
- <sup>40</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(2) & (f)(2).
- <sup>41</sup> *Id.* (a)(1).
- <sup>42</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Kristin Houle) (tape available from the House Video/Audio Services Office).
- <sup>43</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Judge Elsa Alcalá) (tape available from the House Video/Audio Services Office).
- <sup>44</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Shane Claiborne) (tape available from the House Video/Audio Services Office).

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- <sup>45</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Michael Barba) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Kathleen Wells) (tape available from the House Video/Audio Services Office).
- <sup>46</sup> Michael Barba, *supra* note 44; Kathleen Wells, *supra* note 44.
- <sup>47</sup> Shane Claiborne, *supra* note 43.
- <sup>48</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Janie Metzinger) (tape available from the House Video/Audio Services Office).
- <sup>49</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Greg Hansch) (tape available from the House Video/Audio Services Office).
- <sup>50</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Ana Martinez) (tape available from the House Video/Audio Services Office).
- <sup>51</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Susybelle Gosslee) (tape available from the House Video/Audio Services Office); Janie Metzinger, *supra* note 48.
- <sup>52</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Shannon Edmonds) (tape available from the House Video/Audio Services Office).
- <sup>53</sup> Ana Martinez, *supra* note 50.
- <sup>54</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Kyle Piccola) (tape available from the House Video/Audio Services Office).
- <sup>55</sup> Greg Hansch, *supra* note 49.
- <sup>56</sup> Shannon Edmonds, *supra* note 52.
- <sup>57</sup> *See Moore*, No. WR-13,374-05, at \*2 & 11–14 (announcing the adoption of standard from the American Psychiatric Association, *Diagnostic & Statistical Manual of Disorders*, 5th ed. (2013)).
- <sup>58</sup> In broad strokes, Judge Alcalá's 67-page dissent (joined by judges Bert Richardson and Scott Walker) raised the following concerns:
- In contrast to the majority opinion's flawed approach, I would set forth a comprehensive standard for evaluating intellectual disability in a manner that fully comports with current medical standards. Specifically, with respect to the adaptive functioning inquiry that is at issue in this case, I would hold that that inquiry may not place undue emphasis on a person's adaptive strengths as a basis for offsetting clear evidence of his deficits; it may not place undue weight on a person's behavior while incarcerated; and it may not impose a heightened burden for establishing adaptive deficits that essentially operates to permit the execution of mildly intellectually disabled people.
- Id.* (Alcalá, J., dissenting), at \*4.
- <sup>59</sup> Shannon Edmonds, *supra* note 52; *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of Amanda Marzullo) (tape available from the House Video/Audio Services Office).
- <sup>60</sup> Judge Elsa Alcalá, *supra* note 42.
- <sup>61</sup> Shannon Edmonds, *supra* note 52.
- <sup>62</sup> *Id.*
- <sup>63</sup> *See Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (written testimony of Texas Defenders Service) (available from House Comm. on Crim. Jur. Office) (noting that insanity defense employs standard so stringent it's rarely satisfied even by defendant with debilitating mental illness).
- <sup>64</sup> Judge Elsa Alcalá, *supra* note 42.

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- <sup>65</sup> Amanda Marzullo, *supra* note 59.
- <sup>66</sup> Shannon Edmonds, *supra* note 52.
- <sup>67</sup> *Hearing on Interim Charge 2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (statement of the Honorable Allen Place) (tape available from the House Video/Audio Services Office).
- <sup>68</sup> Shannon Edmonds, *supra* note 52.
- <sup>69</sup> Amanda Marzullo, *supra* note 59.
- <sup>70</sup> Kristin Houle, *supra* note 41; Amanda Marzullo, *supra* note 59; the Honorable Allen Place, *supra* note 67. The same sentiments were strongly echoed at another, broader hearing, where the current instructions were described as an outright “fraud on the jury.” *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 26, 2018) (statement of Joe Spencer) (tape available from the House Video/Audio Services Office).
- <sup>71</sup> *See, e.g.*, Jolie McCullough, *Texas Death Penalty Juror Hopes to Change Law as Execution Looms*, The Texas Tribune, Mar. 28, 2017, available at <https://www.texastribune.org/2017/03/28/texas-death-penalty-juror-hopes-change-law-execution-looms/> (recounting case in which death penalty juror would’ve changed vote if he had known he could’ve stopped execution as single dissenter).
- <sup>72</sup> Allen Place, *supra* note 67.
- <sup>73</sup> *See, e.g.*, *Article 42.12(3g) Affirmative Finding – Deadly Weapon*, Texas District & County Attorneys Association, available at [https://www.tdcaa.com/sites/default/files/jury\\_charge/42.12%283g%29DeadlyWeapon.doc](https://www.tdcaa.com/sites/default/files/jury_charge/42.12%283g%29DeadlyWeapon.doc) (jury charge for deadly weapon special issue).
- <sup>74</sup> Amanda Marzullo, *supra* note 59.
- <sup>75</sup> TEX. CODE CRIM. PROC. ANN. art. 11.073.
- <sup>76</sup> *Ex parte White*, 506 S.W.3d 39, 52 (Tex. Crim. App. 2016).
- <sup>77</sup> 21 U.S.C. § 812, Schedule I(c)(10).
- <sup>78</sup> *Marijuana Overview*, National Conference of State Legislatures, Oct. 4, 2018, available at <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.
- <sup>79</sup> *Id.*
- <sup>80</sup> *State Medical Marijuana Laws*, National Conference of State Legislatures, Oct. 17, 2018, available at <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.
- <sup>81</sup> *See generally* TEX. HEALTH & SAFETY CODE ANN. ch. 487 (Texas Compassionate-use Act).
- <sup>82</sup> *Id.* § 481.121(b)(1).
- <sup>83</sup> TEX. PENAL CODE ANN. § 12.22.
- <sup>84</sup> TEX. CODE CRIM. PROC. ANN. art. 42A.053(f).
- <sup>85</sup> TEX. PENAL CODE ANN. § 49.04(b).
- <sup>86</sup> *E.g., id.* § 28.03(b)(2) (criminal mischief); *id.* § 28.08(b)(2) (graffiti); *id.* § 31.03(e)(2) (theft).
- <sup>87</sup> Dr. Katharine A. Neill & Dr. William Martin, *Marijuana Reform: Fears and Facts*, at 6, The Baker Institute for Public Policy, March 10, 2017, available at [https://www.bakerinstitute.org/media/files/research\\_document/bcc67aa7/BI-Brief-031017-MJReform.pdf](https://www.bakerinstitute.org/media/files/research_document/bcc67aa7/BI-Brief-031017-MJReform.pdf).
- <sup>88</sup> *Id.*
- <sup>89</sup> Tex. H.B. 81, 85th Leg., R.S. (2017); Tex. H.B. 507, 84th Leg., R.S. (2015).
- <sup>90</sup> Tex. H.B. 2165, 84th Leg., R.S. (2015).
- <sup>91</sup> *Texas Democratic Party 2018–2020 Platform*, Texas Democrats, June 23, 2018, available at <https://www.txdemocrats.org/our-party/texas-democratic-party-platform/>.

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- <sup>92</sup> 2018 Republican Party of Texas Platform, Republican Party of Texas, June 21, 2018, available at <https://www.texasgop.org/platform/>.
- <sup>93</sup> Allie Morris, *Marijuana Activists ‘Thrilled’ as Gov. Abbott Proposes No Jail Time for Possession*, The Houston Chronicle, Oct. 4, 2018, available at <https://www.houstonchronicle.com/news/politics/article/Marijuana-activists-thrilled-as-Gov-Abbott-13282478.php>.
- <sup>94</sup> Alex Samuels, *As More States Legalize Marijuana, Advocates See Signs Suggesting Texas May Move That Way*, The Texas Tribune, July 26, 2018, available at <https://www.texastribune.org/2018/07/26/texas-legalize-marijuana-2019-legislative-session/>.
- <sup>95</sup> Sanford Nowlin, *While Other States Decriminalized, Texas Ranked No. 1 in Marijuana Arrests*, San Antonio Current, May 4, 2018, available at <https://www.sacurrent.com/the-daily/archives/2018/05/04/while-other-states-decriminalized-texas-ranked-no-1-in-marijuana-arrests>.
- <sup>96</sup> Dr. Katharine A. Neill & Dr. William Martin, *supra* note 87, at 5.
- <sup>97</sup> See, e.g., *Hearing on Interim Charge 3* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of the Honorable Allen Place) (tape available from the House Video/Audio Services Office) (noting that, in considering shifting societal priorities, present enforcement regime not working); *Hearing on Interim Charge 3* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Colt DeMorris) (tape available from the House Video/Audio Services Office) (calling current enforcement “a failed policy” and favoring civil penalties as more fiscally responsible).
- <sup>98</sup> *Hearing on Interim Charge 3* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Ballard Shapleigh) (tape available from the House Video/Audio Services Office).
- <sup>99</sup> See Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, Time Magazine, Apr. 24, 2014, available at <http://time.com/76356/a-misdemeanor-conviction-is-not-a-big-deal-right-think-again/> (overview of collateral consequences for misdemeanor convictions).
- <sup>100</sup> TEX. TRANSP. CODE ANN. § 521.372.
- <sup>101</sup> Colt DeMorris, *supra* note 97.
- <sup>102</sup> *Hearing on Interim Charge 3* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Joel Bishop) (tape available from the House Video/Audio Services Office).
- <sup>103</sup> *Hearing on Interim Charge 3* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Leila Melendez) (tape available from the House Video/Audio Services Office).
- <sup>104</sup> *Id.*
- <sup>105</sup> Tony Plohetski, *Are Big Texas Cities Going Easier on Pot?*, The Austin-American Statesman, Sept. 25, 2018, available at <https://www.statesman.com/news/20160915/are-big-texas-cities-going-easier-on-pot>.
- <sup>106</sup> Colt DeMorris, *supra* note 97.
- <sup>107</sup> *Hearing on Interim Charge 3* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Jennifer Vandenbosch) (tape available from the House Video/Audio Services Office).
- <sup>108</sup> *Id.*
- <sup>109</sup> *Id.*
- <sup>110</sup> Although there’s no “standard plea agreement” in El Paso, those facing possession of marijuana charges can generally expect an offer ranging from a conditional dismissal to a conviction that entails a small fine or simply credit for time-served. Ballard Shapleigh, *supra* note 98.
- <sup>111</sup> Jennifer Vandenbosch, *supra* note 107.
- <sup>112</sup> *Hearing on Interim Charge 3* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Magdalena Morales Aina) (tape available from the House Video/Audio Services Office); Joel Bishop, *supra* note 102.

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- <sup>113</sup> Colt DeMorris, *supra* note 97.
- <sup>114</sup> The Honorable Allen Place, *supra* note 97.
- <sup>115</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 354–55 (2001) (holding Fourth Amendment didn’t preclude arrest of Texas woman for not wearing seatbelt).
- <sup>116</sup> Compare TEX. TRANSP. CODE ANN. § 521.372(b), *with id.* § 521.371(3) & 23 U.S.C. § 159(c).
- <sup>117</sup> See 8 U.S.C. § 1227(a)(2)(B) (allowing for deportation or denial of naturalization for “drug abusers” or for a second marijuana conviction at any level).
- <sup>118</sup> TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2) & (c); see *Texas Dep’t of Pub. Safety v. G.B.E.*, 459 S.W.3d 622, 629 (Tex. App.—Austin 2014, pet. denied) (holding expunction is arrest-based, meaning each offense from arrest must be expungable or none are); *Travis Cnty. Dist. Attorney v. M.M.*, 354 S.W.3d 920, 923 (Tex. App.—Austin 2011, no pet.) (same).
- <sup>119</sup> See TEX. CODE CRIM. PROC. ANN. art. 1.051(c) (providing indigent defendants entitled to appointed counsel for crimes “that may result in punishment by confinement”).
- <sup>120</sup> *Penalties and Collateral Consequences for Marijuana Possession*, Texans for Responsible Marijuana Policy, Oct. 31, 2018 (available from the House Comm. on Crim. Jur. Office).
- <sup>121</sup> Dr. Katharine A. Neill & Dr. William Martin, *supra* note 87, at 3–4.
- <sup>122</sup> *Id.* at 4.
- <sup>123</sup> *Id.* at 6.
- <sup>124</sup> See Dr. Richard Compton, *Marijuana-Impaired Driving: A Report to Congress* (DOT HS 812 440), National Highway Traffic Safety Administration, July 2017, at 22–26 (finding no statistically significant difference in traffic accident rates in states and countries that have either decriminalized or legalized marijuana).
- <sup>125</sup> Dr. Katharine A. Neill & Dr. William Martin, *supra* note 87, at 5–7; see Jennifer Vandenbosch, *supra* note 107 (describing results of diversion program in El Paso County).
- <sup>126</sup> Annie Daniel & Jonathan Silver, *From Michael Morton’s Wrongful Conviction to Exoneration (Timeline)*, The Texas Tribune, Aug. 13, 2016, available at <https://www.texastribune.org/2016/08/13/michael-morton-timeline/>.
- <sup>127</sup> *Id.*; see Tex. S.B. 1611, 83rd Leg., R.S. (2013) (instituting the “Michael Morton Act”).
- <sup>128</sup> See, e.g., Keri Blakinger, *It’s absolutely perjury’: Prosecutor’s Affidavit Raises More Questions in Brown Case*, The Houston Chronicle, Mar. 8, 2018, available at <https://www.chron.com/news/houston-texas/article/It-s-absolutely-perjury-Prosecutor-s-affidavit-12738744.php> (detailing case in which dispute exists whether prosecutor read email from detective regarding potentially exculpatory evidence not shared with defense).
- <sup>129</sup> Tex. H.B. 34, 85rd Leg., R.S. (2017).
- <sup>130</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Vasquez v. State*, 830 S.W.2d 948, 949 (Tex. Crim. App. 1992). Even prosecutors are strongly incentivized to help prevent this level of deficiency by the defense, since it can undermine a case in a later writ. See generally Andrea L. Westerfield, *Preventing Claims of Ineffective Assistance of Counsel*, The Prosecutor, July–Aug. 2011, available at <https://www.tdcaa.com/journal/preventing-claims-ineffective-assistance-counsel> (discussing appropriate prosecutorial responses to poor performance by defense counsel).
- <sup>131</sup> There was significant disagreement between parties and courts in a well-known appeal that wound its way through the Texas and federal systems over whether an attorney who slept through significant portions of a death penalty trial provided constitutionally ineffective assistance to his unsurprisingly convicted client. Linda Greenhouse, *Inmate Whose Lawyer Slept Gets New Trial*, The New York Times, June 4, 2002, available at <https://www.nytimes.com/2002/06/04/us/inmate-whose-lawyer-slept-gets-new-trial.html>.
- <sup>132</sup> Texas Defender Service, *Lethally Deficient: Direct Appeals in Texas Death Penalty Case*, 2016, at X, available at <http://texasdefender.org/wp-content/uploads/TDS-2016-LethallyDeficient-Web.pdf>.

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- <sup>133</sup> See Dr. Dottie Carmichael *et al.*, *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission*, Texas A&M University Public Policy Research Institute, January 2015, at XV–XVI, available at [http://www.tidc.texas.gov/media/31818/150122\\_weightedcl\\_final.pdf](http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf) (describing issues in criminal defense caseloads).
- <sup>134</sup> The moniker comes from the case establishing a defendant’s right to all exculpatory evidence in the state’s possession: *Brady v. Maryland*, 373 U.S. 83 (1963).
- <sup>135</sup> *Hearing on Interim Charge 4* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Stacey Soule) (tape available from the House Video/Audio Services Office).
- <sup>136</sup> *Hearing on Interim Charge 4* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Shannon Edmonds) (tape available from the House Video/Audio Services Office).
- <sup>137</sup> *Hearing on Interim Charge 4* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Gerry Morris) (tape available from the House Video/Audio Services Office).
- <sup>138</sup> Stacey Soule, *supra* note 135.
- <sup>139</sup> Shannon Edmonds, *supra* note 136; see Rob Kepple, “*Setting the Record Straight on Prosecutorial Misconduct*”—*Five Years Later*, The Texas Prosecutor, Jan.–Feb. 2018, available at <https://www.tdcaa.com/journal/%E2%80%9Csetting-record-straight-%C2%ADprosecutorial-misconduct%E2%80%9D%E2%80%94five-years-later> (detailing efforts to improve training and promote transparent practices among prosecutors).
- <sup>140</sup> Shannon Edmonds, *supra* note 136.
- <sup>141</sup> Michael Hall, *False Impressions*, Texas Monthly, January 2018, available at <https://www.texasmonthly.com/articles/false-impressions/>.
- <sup>142</sup> Tex. S.B. 1287, 84th Leg., R.S. (2015).
- <sup>143</sup> Spencer S. Hsu, *Sessions Orders Justice Dept. to End Forensic Science Commission, Suspend Review Policy*, The Washington Post, Apr. 10, 2017, available at [https://www.washingtonpost.com/local/public-safety/sessions-orders-justice-dept-to-end-forensic-science-commission-suspend-review-policy/2017/04/10/2dada0ca-1c96-11e7-9887-1a5314b56a08\\_story.html?noredirect=on&utm\\_term=.da4cb7f79bcc](https://www.washingtonpost.com/local/public-safety/sessions-orders-justice-dept-to-end-forensic-science-commission-suspend-review-policy/2017/04/10/2dada0ca-1c96-11e7-9887-1a5314b56a08_story.html?noredirect=on&utm_term=.da4cb7f79bcc).
- <sup>144</sup> Compare, e.g., Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, The Huffington Post, Feb. 11, 2016, available at [https://www.huffingtonpost.com/entry/prosecutor-misconduct-justice\\_us\\_56bce00fe4b0c3c55050748a](https://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bce00fe4b0c3c55050748a) (quoting Judge Alex Kozinski’s statement that serious discipline of prosecutors “almost unheard of” and misconduct at “epidemic” levels throughout United States), with Rob Kepple, *supra* note 139 (arguing “there’s indeed plenty of accountability . . . from State Bar discipline and criminal investigation, to removal from office and courts of inquiry”).
- <sup>145</sup> Shannon Edmonds, *supra* note 136.
- <sup>146</sup> *Hearing on Interim Charge 4* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Linda Acevedo) (tape available from the House Video/Audio Services Office).
- <sup>147</sup> Shannon Edmonds, *supra* note 136. Moreover, an intermingling of the civil and criminal systems may see prosecutors directly and personally confronted by the power of wealth, leaving modestly paid public servants unable to pursue justice freely against the rich or well-connected. *Id.*
- <sup>148</sup> Matt Ferner, *supra* note 144.
- <sup>149</sup> *Id.*; Pamela Colloff, *Ex-DA Who Sent Exoneree Anthony Graves to Death Row is Disbarred*, Texas Monthly, Jun. 15, 2015, available at <https://www.texasmonthly.com/the-daily-post/ex-da-who-sent-exoneree-anthony-graves-to-death-row-is-disbarred/>.
- <sup>150</sup> Pamela Colloff, *supra* note 149.
- <sup>151</sup> Tex. S.B. 7, 77th Leg., R.S. (2001).

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- <sup>152</sup> Scott Ehlers, *Overview of Texas Indigent Defense*, Texas Indigent Defense Commission, at 4–5, *available at* [http://www.tidc.texas.gov/media/57759/170425\\_MABA-Ehlers.pdf](http://www.tidc.texas.gov/media/57759/170425_MABA-Ehlers.pdf).
- <sup>153</sup> *Id.* at 6–13.
- <sup>154</sup> *Id.* at 7–33.
- <sup>155</sup> *Hearing on Interim Charge 4* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Geoffrey Burkhart) (tape available from the House Video/Audio Services Office).
- <sup>156</sup> Some Texas counties have appointment rates lower than 10% compared to a typical average rate of 80%. *Id.*
- <sup>157</sup> *Id.*; Gerry Morris, *supra* note 137.
- <sup>158</sup> Geoffrey Burkhart, *supra* note 155; Gerry Morris, *supra* note 137.
- <sup>159</sup> Scott Ehlers, *supra* note 152, at 6.
- <sup>160</sup> Stacey Soule, *supra* note 135.
- <sup>161</sup> *Id.*
- <sup>162</sup> Linda Acevedo, *supra* note 146.
- <sup>163</sup> Shannon Edmonds, *supra* note 136.
- <sup>164</sup> *Hearing on Interim Charge 4* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Mike Ware) (tape available from the House Video/Audio Services Office).
- <sup>165</sup> *Id.*
- <sup>166</sup> *Hearing on Interim Charge 4* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Mar. 23, 2018) (written testimony of Mike Ware) (available from the House Comm. on Crim. Jur. Office).
- <sup>167</sup> Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, Stateline, Jul. 31, 2018, *available at* <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws>.
- <sup>168</sup> Tex. S.B. 967, 85th Leg., R.S. (2017); Tex. H.B. 3978, 85th Leg., R.S. (2017).
- <sup>169</sup> Tex. S.B. 339, 85th Leg., R.S. (2017); Tex. H.B. 142, 85th Leg., R.S. (2017).
- <sup>170</sup> *See, e.g.*, Robert C. Davis *et al.*, *Effects of SB1636 on Processing and Dispositions of Sexual Assault Cases in Texas*, Police Foundation, Jan. 31, 2017, *available at* [https://texassak.org/wp-content/uploads/2016/05/PF\\_Effects-of-SB1636-on-Processing-and-Dispositions-of-Sexual-Assault-Cases-in-Texas\\_3.2.17.pdf](https://texassak.org/wp-content/uploads/2016/05/PF_Effects-of-SB1636-on-Processing-and-Dispositions-of-Sexual-Assault-Cases-in-Texas_3.2.17.pdf) (finding little impact attributable to Texas's first universal testing law and identifying financial and practical barriers responsible).
- <sup>171</sup> Alex Samuels, *After Crowdfunding Law, Texans Raise Nearly \$250,000 Toward Testing Rape Kits*, The Texas Tribune, Jun. 8, 2018, *available at* <https://www.texastribune.org/2018/06/08/crowdfunding-Texas-rape-kit-testing-victoria-neave-wendy-davis/>.
- <sup>172</sup> End the Backlog, *Texas*, accessed on Oct. 24, 2018, *available at* <http://www.endthebacklog.org/texas>.
- <sup>173</sup> This infographic originally created and published in: Dr. Noël Busch-Armendariz *et al.*, *Health and Well-Being: Texas Statewide Sexual Assault Prevalence Study*, University of Texas at Austin—Institute on Domestic Violence & Sexual Assault, Aug. 2015, at 17, *available at* <http://rapecrisis.com/wp-content/uploads/2015/09/TX-SA-Prevalence-Study-Final-Report-4-2015.pdf>.
- <sup>174</sup> *Id.* at 19.
- <sup>175</sup> *Id.* at 17.
- <sup>176</sup> *Hearing on Interim Charge 5* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Kyle Piccola) (tape available from the House Video/Audio Services Office).

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- <sup>177</sup> *Hearing on Interim Charge 5* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Chris Kaiser) (tape available from the House Video/Audio Services Office); see TEX. PENAL CODE ANN. § 22.01(a)(3) (criminalizing “offensive contact” as class C misdemeanor).
- <sup>178</sup> Adela Uchida, *Bill Filled to Make Gropping More Serious Crime in Texas*, CBS Austin News, Jan. 27, 2017, available at <https://cbsaustin.com/news/local/bill-filed-to-make-groping-more-serious-crime-in-texas>.
- <sup>179</sup> Chris Kaiser, *supra* note 177; see TEX. PENAL CODE ANN. § 22.011(b)(5) (consent lacking only when “the actor has intentionally impaired the other person’s power to appraise or control [their] conduct by administering any substance without the other person’s knowledge”).
- <sup>180</sup> *Hearing on Interim Charge 5* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Gerry Morris) (tape available from the House Video/Audio Services Office).
- <sup>181</sup> *Id.*
- <sup>182</sup> Wendy Murphy, *Title IX Protects Women. Affirmative Consent Doesn’t*, The Washington Post, Oct. 15, 2015, available at [https://www.washingtonpost.com/news/in-theory/wp/2015/10/15/title-ix-protects-women-affirmative-consent-doesnt/?utm\\_term=.e504e526c952](https://www.washingtonpost.com/news/in-theory/wp/2015/10/15/title-ix-protects-women-affirmative-consent-doesnt/?utm_term=.e504e526c952).
- <sup>183</sup> Dr. Noël Busch-Armendariz, *supra* note 172, at 17; Chris Kaiser, *supra* note 177.
- <sup>184</sup> *Hearing on Interim Charge 5* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Aja Gair) (tape available from the House Video/Audio Services Office).
- <sup>185</sup> *Id.*
- <sup>186</sup> Mari Kate Mycek, *Homeless Women Say ‘Me Too,’ But No One Listens*, The Huffington Post, Mar. 13, 2018, available at [https://www.huffingtonpost.com/entry/opinion-mycek-me-too-homeless\\_us\\_5aa6c75ee4b03c9edfae87f1](https://www.huffingtonpost.com/entry/opinion-mycek-me-too-homeless_us_5aa6c75ee4b03c9edfae87f1).
- <sup>187</sup> Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR, Jan. 8, 2018, available at <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>; accord Leigh Ann Davis, *People with Intellectual Disability and Sexual Violence*, The Arc, Mar. 2011, available at <https://www.thearc.org/document.doc?id=3657>.
- <sup>188</sup> Aja Gair, *supra* note 184.
- <sup>189</sup> Kyle Piccola, *supra* note 170.
- <sup>190</sup> *Hearing on Interim Charge 5* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Ashley Ford) (tape available from the House Video/Audio Services Office).
- <sup>191</sup> *Id.*; Kyle Piccola, *supra* note 170.
- <sup>192</sup> Aja Gair, *supra* note 184.
- <sup>193</sup> Tex. H.B. 281, 85th Leg., R.S. (2017).
- <sup>194</sup> *Hearing on Interim Charge 5* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Gene McCleskey) (tape available from the House Video/Audio Services Office).
- <sup>195</sup> End the Backlog, *supra* note 172.
- <sup>196</sup> Ashley Ford, *supra* note 190; Chris Kaiser, *supra* note 177. Notably, the statewide electronic tracking system for sex offense evidence has the potential to greatly improve data collection and evaluation. Chris Kaiser, *supra* note 177.
- <sup>197</sup> Chris Kaiser, *supra* note 177.
- <sup>198</sup> *Hearing on Interim Charge 5* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Alice Amilhat) (tape available from the House Video/Audio Services Office).
- <sup>199</sup> *Id.*
- <sup>200</sup> Tex. S.B. 12, 83rd Leg., R.S. (2013).

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- <sup>201</sup> Compare TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b) (allowing extraneous offense evidence notwithstanding Rules of Evidence to prove character and conformity), with TEX. R. EVID. 404(b)(1) (establishing extraneous offense evidence “not admissible to prove . . . that on a particular occasion the person acted” the same way).
- <sup>202</sup> TEX. R. EVID. 404(b)(2).
- <sup>203</sup> *Hearing on Interim Charge 5* Before the House Comm. on Crim. Jur., 85th Leg. Interim (May 23, 2018) (statement of Amy Derrick) (tape available from the House Video/Audio Services Office).
- <sup>204</sup> *Id.*
- <sup>205</sup> Gerry Morris, *supra* note 180.
- <sup>206</sup> See *How the CAC Model Works*, Children’s Advocacy Centers of Texas, accessed on Oct. 24, 2018, available at <https://www.cactx.org/how-the-cac-model-works> (outlining core components of CAC work, to include forensic interviewing).
- <sup>207</sup> Chris Newlin *et al.*, *Child Forensic Interviewing: Best Practices*, OJJDP Juvenile Justice Bulletin, Sept. 2015, at 6, available at <http://www.nationalcac.org/wp-content/uploads/2016/07/Child-Forensic-Interviewing-Best-Practices.pdf>.
- <sup>208</sup> TEX. CODE CRIM. PROC. ANN. art. 39.15(a)(3) & (c).
- <sup>209</sup> Gerry Morris, *supra* note 180.
- <sup>210</sup> *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Jeep Darnell) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Joe Spencer) (tape available from the House Video/Audio Services Office).
- <sup>211</sup> Jeep Darnell, *supra* note 210.
- <sup>212</sup> Gerry Morris, *supra* note 180.
- <sup>213</sup> See Tony Fabelo, *Implementing the Texas State Jail System: How Will It Work?*, Criminal Justice Policy Council—Bulletin from the Executive Director, Dec. 1993, at 1 (offering contemporary account of state jail system).
- <sup>214</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Judge John Creuzot) (tape available from the House Video/Audio Services Office).
- <sup>215</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of the Honorable Allen Place) (tape available from the House Video/Audio Services Office).
- <sup>216</sup> TEX. PENAL CODE ANN. § 12.35(a) & (b).
- <sup>217</sup> In theory, this is awarded through participation in “educational, vocational, treatment, or work program[s].” TEX. CODE CRIM. PROC. ANN. art. 42A.559(f)–(h). In reality, a lack of available programs means diligent participation is generally awarded through a presumption the convicting court may enter at sentencing. See *id.* art. 42.0199 (requiring convicting court to enter presumptive grant or denial of diligent participation credit).
- <sup>218</sup> See TEX. PENAL CODE ANN. § 12.44(a) & (b) (providing option for state jail conviction with county jail time as well as direct misdemeanor reduction of state jail felonies).
- <sup>219</sup> See *id.* § 12.425 (outlining separate enhancement provisions for habitual state jail felony offenders).
- <sup>220</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Douglas Smith) (tape available from the House Video/Audio Services Office).
- <sup>221</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Bryan Collier) (tape available from the House Video/Audio Services Office).
- <sup>222</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Tricia Forbes) (tape available from the House Video/Audio Services Office).

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- <sup>223</sup> Judge John Creuzot, *supra* note 214; *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Shannon Edmonds) (tape available from the House Video/Audio Services Office); the Honorable Allen Place, *supra* note 215.
- <sup>224</sup> Douglas Smith, *supra* note 220.
- <sup>225</sup> Bryan Collier, *supra* note 221. Many of these programs also fail to use evidence-based practices and generally lag behind the advances made in probation resources in the last two decades. Doug Smith, *supra* note 220.
- <sup>226</sup> Nor would these facilities necessarily provide appropriate treatment—there’s actually very little information on what services each facility provides and how effective they are. Judge John Creuzot, *supra* note 214.
- <sup>227</sup> Douglas Smith, *supra* note 220.
- <sup>228</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Terra Tucker) (tape available from the House Video/Audio Services Office).
- <sup>229</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (written remarks of Bryan Collier) (available from the House Comm. on Crim. Jur. Office).
- <sup>230</sup> Shannon Edmonds, *supra* note 223.
- <sup>231</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of David Gillian) (tape available from the House Video/Audio Services Office).
- <sup>232</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Laurie Molina) (tape available from the House Video/Audio Services Office).
- <sup>233</sup> Terra Tucker, *supra* note 228.
- <sup>234</sup> Shannon Edmonds, *supra* note 223.
- <sup>235</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Marc Levin) (tape available from the House Video/Audio Services Office).
- <sup>236</sup> Bryan Collier, *supra* note 221; Marc Levin, *supra* note 235.
- <sup>237</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Matt Simpson) (tape available from the House Video/Audio Services Office).
- <sup>238</sup> Marc Levin, *supra* note 235.
- <sup>239</sup> Matt Simpson, *supra* note 237.
- <sup>240</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of BJ Wagner) (tape available from the House Video/Audio Services Office); see Ken Kalthoff, *Right Care Program to Help Mentally Ill in Dallas*, NBC-DFW, Apr. 14, 2017, available at <https://www.nbcdfw.com/news/local/Right-Care-Program-to-Help-Mentally-Ill-in-Dallas-419510143.html> (detailing mental illness intervention program in Dallas area).
- <sup>241</sup> BJ Wagner, *supra* note 240.
- <sup>242</sup> Tricia Forbes, *supra* note 222.
- <sup>243</sup> Leah Bunkovitz, *Harris County: Tired of Sending People to Jail?*, The Houston Chronicle, Apr. 28, 2016, available at <https://www.houstonchronicle.com/local/gray-matters/article/Can-Harris-County-afford-to-be-tough-on-crime-7379815.php>.
- <sup>244</sup> Ted Oberg, *Harris County to Make Justice System ‘Fairer’ for Poor and Minority Arrestees*, ABC-13, Apr. 13, 2016, available at <https://abc13.com/news/harris-co-to-make-justice-system-fairer-/1290139/>.
- <sup>245</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Judge Brock Thomas) (tape available from the House Video/Audio Services Office).
- <sup>246</sup> *Id.*

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- <sup>247</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Dr. Theresa May) (tape available from the House Video/Audio Services Office).
- <sup>248</sup> *Id.*
- <sup>249</sup> Judge John Creuzot, *supra* note 214; Dr. Theresa May, *supra* note 247; Judge Brock Thomas, *supra* note 245.
- <sup>250</sup> Dr. Theresa May, *supra* note 247. Harris County has benefited from multi-million-dollar criminal justice grants over the last few years that have been used to jumpstart progressive programs. *Harris County*, MacArthur Foundation, accessed on Oct. 25, 2018, available at <https://www.macfound.org/grantees/7482/>.
- <sup>251</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Roxane Marek) (tape available from the House Video/Audio Services Office).
- <sup>252</sup> *Id.*
- <sup>253</sup> *Hearing on Interim Charge 6* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 29, 2018) (statement of Dr. Gregory Dillon) (tape available from the House Video/Audio Services Office).
- <sup>254</sup> See, e.g., Chris Rogers, *Local City Faces Financial Crisis After Jail Closes*, KCEN-TV, July 6, 2018, available at <https://www.kcentv.com/article/news/local/local-city-faces-financial-crisis-after-jail-closes/454768963> (describing economic woes of City of Bartlett in wake of state jail closure there); but see Brandi Grissom, *In Two Cities, Opposite Reactions to Jail Closure*, The Texas Tribune, Aug. 2, 2013, available at <https://www.texastribune.org/2013/08/02/two-cities-opposite-reactions-state-jail-closing/> (describing jail closure welcome by City of Dallas and residents there).
- <sup>255</sup> Shannon Edmonds, *supra* note 223.
- <sup>256</sup> Judge John Creuzot, *supra* note 214.
- <sup>257</sup> TEX. CONST. art. I, §§ 11–11c; see U.S. CONST. amend. VIII (prohibiting excessive bail).
- <sup>258</sup> TEX. CODE CRIM. PROC. ANN. art. 17.02.
- <sup>259</sup> *Id.* art. 17.03.
- <sup>260</sup> TEX. CODE CRIM. PROC. ANN. art. 17.15; *Ex parte Green*, 940 S.W.2d 799, 801 (Tex. App.—El Paso 1997, no pet.); *Miller v. State*, 855 S.W.2d 92, 93–94 (Tex. App.—Houston [14th Dist.] 1993, pet. ref’d); see *Ex parte Rubac*, 611 S.W.2d 848, 849 (Tex. Crim. App. 1981) (applying similar considerations to appeal bonds).
- <sup>261</sup> See TEX. CODE CRIM. PROC. ANN art. 17.033 (setting deadlines for release on bond).
- <sup>262</sup> See Dr. Paul Heaton, Dr. Sandra Mayson, & Dr. Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 717 (2017), available at <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf> (demonstrating that detained defendants in Harris County 25% more likely than bailees to plead guilty, with 43% more chance of jail sentence and 200% longer sentences).
- <sup>263</sup> See Cary Aspinwall & Naomi Martin, *Poor People Locked Up Longer than the Rich, Violating Constitution in Dallas, Lawsuit Alleges*, Dallas Morning News, Jan. 21, 2018, available at <https://www.dallasnews.com/news/dallas-county/2018/01/21/poor-people-locked-longer-rich-violating-constitution-dallas-lawsuit-alleges> (describing bond practices in Dallas and several other Texas cities).
- <sup>264</sup> Keri Blakinger and Nick Powell, *Galveston County Hit with Bail Lawsuit Similar to Harris County Case*, The Houston Chronicle, Apr. 9, 2018, available at <https://www.houstonchronicle.com/neighborhood/galveston/article/ACLU-sues-Galveston-County-over-money-bail-system-12817130.php>; Meagan Flynn, *Dallas County’s Bail System Hit with Lawsuit Mirroring Harris County Case*, The Houston Chronicle, Jan. 22, 2018, available at <https://www.chron.com/news/houston-texas/article/Lawsuit-against-Dallas-County-s-bail-system-goes-12514792.php>; Eli Rosenberg, *Judge in Houston Strikes Down Harris County Bail System*, The New York Times, Apr. 29, 2017, available at <https://www.nytimes.com/2017/04/29/us/judge-strikes-down-harris-county-bail-system.html>.

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- <sup>265</sup> Jolie McCullough, *Texas Gov. Greg Abbott Proposes Bail Reform After Death of DPS Trooper*, The Texas Tribune, Aug. 7, 2018, available at <https://www.texastribune.org/2018/08/07/greg-abbott-bail-reform-proposal/>.
- <sup>266</sup> Sam DeGrave, *Texas Supreme Court Justice, House Corrections Chair Want to End ‘Unconstitutional’ Practice of Debtors’ Prison*, The Texas Observer, Feb. 23, 2017, available at <https://www.texasobserver.org/texas-justice-house-corrections-chair-want-end-unconstitutional-practice-debtors-prison/>; Katie Greer, *How Texas is Moving to End Debtors’ Prisons*, The Washington Examiner, Apt. 9, 2018, available at <https://www.washingtonexaminer.com/opinion/op-eds/how-texas-is-moving-to-end-debtors-prisons>.
- <sup>267</sup> Dan King, *The Dickensian Return of Debtors’ Prisons*, The American Conservative, Jul. 19, 2018, available at <https://www.theamericanconservative.com/articles/the-dickensian-return-of-debtors-prisons/>.
- <sup>268</sup> Tex. S.B. 1913, 85th Leg., R.S. (2017); Tex. H.B. 351, 85th Leg., R.S. (2017).
- <sup>269</sup> *U.S. v. Salerno*, 481 U.S. 739, 755 (1987).
- <sup>270</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Jeffrey Clayton) (tape available from the House Video/Audio Services Office).
- <sup>271</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Chief Justice Nathan Hecht) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Presiding Judge Sharon Keller) (tape available from the House Video/Audio Services Office).
- <sup>272</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Mary Mergler) (tape available from the House Video/Audio Services Office); Presiding Judge Sharon Keller, *supra* note 271.
- <sup>273</sup> Jolie McCullough, *supra* note 265.
- <sup>274</sup> *Id.*
- <sup>275</sup> Jeffrey Clayton, *supra* note 270; *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Ken W. Good) (tape available from the House Video/Audio Services Office).
- <sup>276</sup> TEX. CODE CRIM. PROC. ANN. arts. 17.16(a)(2), 22.01, & 22.13(a)(4).
- <sup>277</sup> Ken W. Good, *supra* note 275.
- <sup>278</sup> Express-News Editorial Board, *Bail Reform’s Time has Come for Bexar County and Texas*, San Antonio Express-News, Aug. 28, 2018, available at <https://www.mysanantonio.com/opinion/editorials/article/Bail-reform-s-time-has-come-for-Bexar-County-13164670.php>. (quoting Marc Levin, Texas Public Policy Foundation); accord Mary Mergler, *supra* note 272.
- <sup>279</sup> Julieta Chiquillo & Cary Aspinwall, *Dallas County’s Bail System is Unfair to the Financially Challenged, Federal Court Rules*, The Dallas Morning News, Sept. 30, 2018, available at <https://www.dallasnews.com/news/courts/2018/09/20/federal-court-orders-dallas-county-make-individual-assessments-before-setting-bail>.
- <sup>280</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of the Honorable Kim Ogg) (tape available from the House Video/Audio Services Office).
- <sup>281</sup> Presiding Judge Sharon Keller, *supra* note 271.
- <sup>282</sup> *Id.*
- <sup>283</sup> Jolie McCullough, *supra* note 265.
- <sup>284</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Michael Haugen) (tape available from the House Video/Audio Services Office); the Honorable Kim Ogg, *supra* note 280; see Jeffrey Clayton, *supra* note 270 (arguing judges need facts and circumstances behind risk score instead of score itself).

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- <sup>285</sup> See generally Chris Baird, *A Comparison of Risk Assessment Instructs in Juvenile Justice*, National Council on Crime and Delinquency, Aug. 2013, available at <https://www.ncjrs.gov/pdffiles1/ojdp/grants/244477.pdf> (reviewing variety of risk assessment tools used throughout United States).
- <sup>286</sup> Dr. Dottie Carmichael *et al.*, *Liberty & Justice: Pretrial Practices in Texas*, Texas A&M University Public Policy Research Institute, Mar. 2017, at 37, available at [http://www.txcourts.gov/media/1437499/170308\\_bond-study-report.pdf](http://www.txcourts.gov/media/1437499/170308_bond-study-report.pdf).
- <sup>287</sup> Chief Justice Nathan Hecht, *supra* note 271; Presiding Judge Sharon Keller, *supra* note 271.
- <sup>288</sup> Marc Levin & Michael Haugen, *Open Roads & Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration, Right on Crime*, May 2018, at 14, available at <https://files.texaspolicy.com/uploads/2018/08/16104511/2018-04-RR-Rural-Pretrial-Incarceration-CEJ-Levin-Haugen-1.pdf>.
- <sup>289</sup> See Dr. Megan T. Stevenson, *Assessing Risk Assessment in Action*, Minn. L. Rev. (forthcoming), at 52, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3016088](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016088) (reviewing data showing 3% increase in failures to appear and 1% increase in re-arrests after statutory mandate of risk-assessment tools in bond setting).
- <sup>290</sup> See generally Dr. Dottie Carmichael *et al.*, *supra* note 286 (reporting findings of inter-county comparison study).
- <sup>291</sup> *Id.* at 15–34.
- <sup>292</sup> *Id.* at 17–18. However, the tradeoff for this lower-cost approach would be depriving judges of some valuable information that can't be obtained outside of an interview, such as a defendant's "employment status, residential stability, and recent drug use." *Id.* at 17.
- <sup>293</sup> Dr. Megan T. Stevenson, *supra* note 289, at 58.
- <sup>294</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of David Slayton) (tape available from the House Video/Audio Services Office).
- <sup>295</sup> See Dr. Dotti Carmichael *et al.*, *supra* note 286, at 24–31 (summarizing cost issues in risk-based pretrial supervision); Criminal Justice Policy Program, *Moving Beyond Money: A Primer on Bail Reform*, Harvard Law School, Oct. 2016, at 14–18, available at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (reviewing pretrial monitoring conditions in effective risk-based release systems).
- <sup>296</sup> See, e.g., Stacie Rumenap, *Bail Reform: A Slap in the Face to Victims and Survivors*, TribTalk, Jun. 19, 2018, available at <https://www.tribtalk.org/2018/06/19/bail-reform-a-slap-in-the-face-to-victims-and-survivors> (criticizing risk-based bond systems for failing to hold abusers accountable).
- <sup>297</sup> Presiding Judge Sharon Keller, *supra* note 271.
- <sup>298</sup> Michael Haugen, *supra* note 284; Chief Justice Nathan Hecht, *supra* note 271.
- <sup>299</sup> Ken W. Good, *supra* note 275.
- <sup>300</sup> See Jessica Brand, *Bail Reform Shouldn't Be Derailed*, TribTalk, Dec. 15, 2017, available at <https://www.tribtalk.org/2017/12/15/bail-reform-should-not-be-derailed/> (describing Harris County nonappearance numbers as "woefully misleading — and quite possibly far from accurate" based on discussions with "numerous legal experts working in Harris County").
- <sup>301</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Emily Gerrick) (tape available from the House Video/Audio Services Office).
- <sup>302</sup> David Slayton, *supra* note 294.
- <sup>303</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of the Honorable Allen Place) (tape available from the House Video/Audio Services Office).
- <sup>304</sup> *Id.*

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- <sup>305</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (statement of Kelvin Banks) (tape available from the House Video/Audio Services Office); the Honorable Kim Ogg, *supra* note 280.
- <sup>306</sup> Jeffrey Clayton, *supra* note 270.
- <sup>307</sup> Criminal Justice Policy Program, *supra* note 295, at 24. Ironically, this backdoor approach to preventative detention may still fail to keep very dangerous people who nonetheless have means behind bars. Emily Gerrick, *supra* note 301.
- <sup>308</sup> Unsurprisingly, jurisdictions that have expanded pretrial detention have seen massive increases in its use and burgeoning jail populations as a result. Jeffrey Clayton, *supra* note 270.
- <sup>309</sup> *Id.*
- <sup>310</sup> Emily Gerrick, *supra* note 301; Presiding Judge Sharon Keller, *supra* note 271; Mary Mergler, *supra* note 272; David Slayton, *supra* note 294.
- <sup>311</sup> Emily Gerrick, *supra* note 301.
- <sup>312</sup> The Honorable Allen Place, *supra* note 303.
- <sup>313</sup> *See* Kelvin Banks, *supra* note 305 (discussing Harris County’s decision to create positions and programs aimed directly at identifying and combatting racially disparate results from patrol encounters to sentencing).
- <sup>314</sup> *Id.*; David Slayton, *supra* note 294.
- <sup>315</sup> Jeffrey Clayton, *supra* note 270; Ken W. Good, *supra* note 275.
- <sup>316</sup> Jeffrey Clayton, *supra* note 270.
- <sup>317</sup> As witnesses pointed out, over 100 civil rights groups across the country have expressed opposition to the use of predictive algorithms in pretrial release decisions because those tools may simply replicate the systemic racial divides they purport to remedy. Jeffrey Clayton, *supra* note 270. Those groups, however, also insist that the solution is that our system “can — *and should* — abolish systems of monetary bail . . . *without* adopting such tools.” African American Ministers in Action *et al.*, *The Use of Pretrial “Risk Assessment” Instruments: A Shared State of Civil Rights Concerns*, at 2, available at <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>.
- <sup>318</sup> John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, Wash. L. Rev. (forthcoming), at 24, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3041622](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041622).
- <sup>319</sup> Dr. Paul Heaton, Dr. Sandra Mayson, & Dr. Megan Stevenson, *supra* note 262, at 717–18 & n. 20; Chief Justice Nathan Hecht, *supra* note 271; Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, *The New York Times*, Mar. 31, 2018, available at <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html>; *see* Jolie McCullough, *supra* note 265 (noting bail reform proponents identify resistance of bail bond industry as major obstacle to reform).
- <sup>320</sup> *See Frontier Ins. v. State*, 64 S.W.3d 481, 483 (Tex. App.—El Paso 2001, no pet.) (validating “split bonds” that include cash or surety as well as personal bond conditions); *Allegheny Cas. Co. v. State*, 52 S.W.3d 894, 900 (Tex. App.—El Paso 2001, no pet.) (same).
- <sup>321</sup> David Slayton, *supra* note 294.
- <sup>322</sup> *Id.*
- <sup>323</sup> Mary Mergler, *supra* note 272.
- <sup>324</sup> *Hearing on Interim Charge 7* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Aug. 30, 2018) (written remarks of Texas Appleseed & Texas Fair Defense Project) (available from the House Comm. on Crim. Jur. Office).
- <sup>325</sup> *Id.*
- <sup>326</sup> *Id.*

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- <sup>327</sup> *Id.*
- <sup>328</sup> Mary Mergler, *supra* note 272; Texas Appleseed & Texas Fair Defense Project, *supra* note 324.
- <sup>329</sup> TEX. GOV'T CODE ANN. § 121.002(c).
- <sup>330</sup> *Specialty Court Programs*, Office of the Texas Governor | Greg Abbott, *accessed on* Oct. 22, 2018, *available at* [https://gov.texas.gov/organization/cjd/specialty\\_courts](https://gov.texas.gov/organization/cjd/specialty_courts).
- <sup>331</sup> George Dziuk, *Specialty Courts: An Issue Brief from Legislative Budget Board Staff* (ID: 3015), Legislative Budget Board, July 2016, *available at* [http://www.lbb.state.tx.us/Documents/Publications/Issue\\_Briefs/3015\\_Specialty\\_Courts\\_0701.pdf](http://www.lbb.state.tx.us/Documents/Publications/Issue_Briefs/3015_Specialty_Courts_0701.pdf).
- <sup>332</sup> *See Financing the Judiciary in Texas Legislative Primer*, Texas Legislative Budget Board, at 2, *available at* [http://www.lbb.state.tx.us/Documents/Publications/Primer/3140\\_Financing\\_Judiciary\\_Texas.pdf](http://www.lbb.state.tx.us/Documents/Publications/Primer/3140_Financing_Judiciary_Texas.pdf) (noting \$807.8 million in state funds appropriated to judiciary in 2016–17 biennium).
- <sup>333</sup> *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Judge Robert Anchondo) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Judge Angelica Juarez Barill) (tape available from the House Video/Audio Services Office).
- <sup>334</sup> Judge Angelica Juarez Barill, *supra* note 333; *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Silvia Serna) (tape available from the House Video/Audio Services Office).
- <sup>335</sup> Judge Angelica Juarez Barill, *supra* note 333.
- <sup>336</sup> Judge Robert Anchondo, *supra* note 333.
- <sup>337</sup> *Id.*; *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Ray Duke) (tape available from the House Video/Audio Services Office).
- <sup>338</sup> Judge Robert Anchondo, *supra* note 333; Ray Duke, *supra* note 337.
- <sup>339</sup> Judge Robert Anchondo, *supra* note 333; Judge Angelica Juarez Barill, *supra* note 333.
- <sup>340</sup> *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Magdalena Morales Aina) (tape available from the House Video/Audio Services Office).
- <sup>341</sup> *Id.*
- <sup>342</sup> *Id.*; *Evidence Based Practices* (FS-EBP#1b), Texas Department of Criminal Justice, Nov. 2, 2005, at 1, *available at* [https://www.tdcj.state.tx.us/documents/cjad/CJAD\\_Evidence\\_Based\\_Practices\\_Fact\\_Sheet.pdf](https://www.tdcj.state.tx.us/documents/cjad/CJAD_Evidence_Based_Practices_Fact_Sheet.pdf).
- <sup>343</sup> Magdalena Morales Aina, *supra* note 340; Dr. Jan Looman & Dr. Jeffrey Abracen, *The Risk Need Responsivity Model of Offender Rehabilitation: Is There Really a Need for a Paradigm Shift?*, *International Journal of Behavioral Consultation and Therapy*, January 2013, *available at* <http://psycnet.apa.org/fulltext/2014-12592-007.html>.
- <sup>344</sup> Magdalena Morales Aina, *supra* note 340.
- <sup>345</sup> *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Arnold Patrick) (tape available from the House Video/Audio Services Office).
- <sup>346</sup> Dr. Tony Fabelo, Dr. Geraldine Nagy, & Seth Prins, *A Ten-Step Guide to Transforming Probation Department to Reduce Recidivism*, Council of State Governments Justice Center, 2011, at 13–28, *available at* [https://www.bja.gov/Publications/CSG\\_10Step\\_Guide\\_Probation.pdf](https://www.bja.gov/Publications/CSG_10Step_Guide_Probation.pdf).
- <sup>347</sup> Tex. S.B. 1584, 85th Leg., R.S. (2017).
- <sup>348</sup> Arnold Patrick, *supra* note 345; *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Judge Alma Trejo) (tape available from the House Video/Audio Services Office).
- <sup>349</sup> Judge Alma Trejo, *supra* note 348.

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- <sup>350</sup> Arnold Patrick, *supra* note 345.
- <sup>351</sup> *Mental Illness and the Criminal Justice System*, The Hogg Foundation, accessed on Oct. 23, 2018, available at <http://hogg.utexas.edu/for-grantees-grantseekers/mental-illness-criminal-justice>.
- <sup>352</sup> Dr. Emilie Attwell Becker, *Mental Health Services in Texas Jails*, Texas Medicine, November 2016, available at <https://www.texmed.org/Nov16Journal/>.
- <sup>353</sup> *Id.*
- <sup>354</sup> St. John Barned-Smith, *What We've Learned from Sandra Bland's Death, Two Years Later*, The Houston Chronicle, July 13, 2017, available at <https://www.chron.com/news/houston-texas/article/Two-years-later-Sandra-Bland-s-suicide-still-11287622.php>. Sandra Bland's untimely death was also situated within a trend of a suicide attempt rate that's more than doubled within the last four years. Keri Blakinger, *Suicide Attempts Have More Than Doubled in Texas Prisons*, The Houston Chronicle, Feb. 5, 2018, available at <https://www.chron.com/news/houston-texas/article/Attempted-suicides-rise-sharply-in-Texas-prisons-12553728.php>.
- <sup>355</sup> Tex. S.B. 1849, 85th Leg., R.S. (2017).
- <sup>356</sup> *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Kristi Daugherty) (tape available from the House Video/Audio Services Office).
- <sup>357</sup> Tex. S.B. 1326, 85th Leg., R.S. (2017).
- <sup>358</sup> Kristi Daugherty, *supra* note 356.
- <sup>359</sup> *Id.*
- <sup>360</sup> Tex. S.B. 292, 85th Leg., R.S. (2017).
- <sup>361</sup> Kristi Daugherty, *supra* note 356.
- <sup>362</sup> Tex. H.B. 1507, 85th Leg., R.S. (2017).
- <sup>363</sup> Judge Alma Trejo, *supra* note 348.
- <sup>364</sup> *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of Jennifer Vandenbosch) (tape available from the House Video/Audio Services Office).
- <sup>365</sup> *Id.*
- <sup>366</sup> *Fentanyl Safety Recommendations for First Responders*, Office of National Drug Control Policy, Aug. 30, 2018, available at <https://www.whitehouse.gov/ondcp/key-issues/fentanyl/>.
- <sup>367</sup> Jennifer Vandenbosch, *supra* note 364.
- <sup>368</sup> *Hearing on Interim Charge 8* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Apr. 26, 2018) (statement of William Cox) (tape available from the House Video/Audio Services Office).
- <sup>369</sup> *Id.*
- <sup>370</sup> See generally U.S. CONST. amend. II (right to bear arms); TEX. CONST. art. I, § 23 (same); *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (interpreting Second Amendment as individual right).
- <sup>371</sup> Kim Parker et al., *America's Complex Relationship with Guns*, Pew Research Center, Jun. 22, 2017, at 4, available at <http://www.pewsocialtrends.org/wp-content/uploads/sites/3/2017/06/Guns-Report-FOR-WEBSITE-PDF-6-21.pdf>.
- <sup>372</sup> Drew Desilver, *A Minority of Americans Own Guns, But Just How Many Is Unclear*, Pew Research Center, Jun. 4, 2013, available at <http://www.pewresearch.org/fact-tank/2013/06/04/a-minority-of-americans-own-guns-but-just-how-many-is-unclear/>.

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- <sup>373</sup> See Paul Hsieh, *Any Study of ‘Gun Violence’ Should Include How Guns Save Lives*, Forbes, Mar. 20, 2018, available at <https://www.forbes.com/sites/paulhsieh/2018/03/20/any-study-of-gun-violence-should-include-how-guns-save-lives/#642f2b085edc> (noting data on defensive use of firearms limited but shows they’re used defensively far more often than for crime).
- <sup>374</sup> Susan Scutti, *Gun Homicides on the Rise, CDC Says*, CNN, Jul. 26, 2018, available at <https://www.cnn.com/2018/07/26/health/common-methods-of-homicide-cdc/index.html>
- <sup>375</sup> *Firearm Mortality by State: 2016*, Centers for Disease Control and Prevention, Jan. 10, 2018, available at [https://www.cdc.gov/nchs/pressroom/sosmap/firearm\\_mortality/firearm.htm](https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm)
- <sup>376</sup> *Id.*
- <sup>377</sup> Sherry L. Murphy *et al.*, *Deaths: Final Data for 2015*, National Vital Statistics Reports, Nov. 27, 2017, at 48, available at [https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66\\_06.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_06.pdf).
- <sup>378</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Jun. 25, 2018) (written remarks of Vicka Chaplin) (available from the House Comm. on Crim. Jur. Office).
- <sup>379</sup> See Bonnie Berkowitz, Denise Lu, & Chris Alcantara, *The Terrible Numbers that Grow with Each Mass Shooting*, The Washington Post, Oct. 28, 2018, available at [https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?utm\\_term=.359726343e6f](https://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/?utm_term=.359726343e6f) (providing overview of mass shootings in United States).
- <sup>380</sup> Jolie McCullough, *Will Texas Pass a “Reg Flag” Law to Remove Guns from People Who Are Deemed Dangerous?*, The Texas Tribune, Jun. 18, 2018, available at <https://www.texastribune.org/2018/06/18/texas-gun-red-flag-laws-santa-fe-greg-abbott/>.
- <sup>381</sup> *Extreme Risk Protective Orders*, Giffords Law Center to Prevent Gun Violence, accessed Oct. 28, 2018, available at <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#state>.
- <sup>382</sup> Gov. Greg Abbott, *School and Firearm Safety Action Plan*, Office of the Texas Governor, May 30, 2018, at 34–35, available at [https://gov.texas.gov/uploads/files/press/School\\_Safety\\_Action\\_Plan\\_05302018.pdf](https://gov.texas.gov/uploads/files/press/School_Safety_Action_Plan_05302018.pdf).
- <sup>383</sup> *Id.* at 35.
- <sup>384</sup> See, e.g., *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Bill Eastland) (tape available from the House Video/Audio Services Office) (arguing further legislation would expand on existing impermissible infringements); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Tom Greer) (tape available from the House Video/Audio Services Office) (arguing legislation can’t infringe Second Amendment in any way); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Amy Hedtke) (tape available from the House Video/Audio Services Office) (arguing public safety laws are traditionally infringements and abuses); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Jeremiah Hunter) (tape available from the House Video/Audio Services Office) (arguing no government gun control acceptable).
- <sup>385</sup> *Heller*, 554 U.S. at 626–27.
- <sup>386</sup> See, e.g., *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Rick Briscoe) (tape available from the House Video/Audio Services Office) (stating many mass shootings examples of existing laws not being used); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Alice Tripp) (tape available from the House Video/Audio Services Office) (stating Texas State Rifle Association’s position is current laws sufficient).
- <sup>387</sup> See generally TEX. FAM. CODE ANN. chs. 81–89 (outlining procedures for family violence protective orders). In particular, temporary *ex parte* orders may be entered when a court finds, based on an application for protective order, “that there is a clear and present danger of family violence.” *Id.* § 83.001(a).

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- <sup>388</sup> *Id.*; *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Jeremiah Varney) (tape available from the House Video/Audio Services Office).
- <sup>389</sup> *See generally* TEX. CODE CRIM. PROC. ch. 7A (outlining procedures for sexual assault, stalking, or human trafficking protective orders).
- <sup>390</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Judge Scott Beauchamp) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Judge Judy Warne) (tape available from the House Video/Audio Services Office).
- <sup>391</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of William Staney (tape available from the House Video/Audio Services Office).
- <sup>392</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Judge Guy Herman) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Linda Phan) (tape available from the House Video/Audio Services Office); Judge Judy Warne, *supra* note 390.
- <sup>393</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Constable Gene Dolle) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Terry Holcomb) (tape available from the House Video/Audio Services Office).
- <sup>394</sup> TEX. HEALTH & SAFETY CODE ANN. § 573.001(a).
- <sup>395</sup> *Id.* §§ 573.011–573.012.
- <sup>396</sup> *Id.* § 573.001(h); *see also* TEX. CODE CRIM. PROC. ANN. art. 18.191 (outlining procedures after firearm seized).
- <sup>397</sup> Constable Gene Dolle, *supra* note 393.
- <sup>398</sup> Judge Judy Werne, *supra* note 390.
- <sup>399</sup> Constable Gene Dolle, *supra* note 393; *compare* 18 U.S.C. § 922(d)(4) (prohibiting sale or provision of firearm to person “adjudicated as a mental defective or . . . committed to any mental institution”), *with* TEX. PENAL CODE ANN. § 46.06 (making no similar provision).
- <sup>400</sup> TEX. HEALTH & SAFETY CODE ANN. § 573.022(a)(2)(C).
- <sup>401</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Judge Kelly Cross) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Greg Hansch) (tape available from the House Video/Audio Services Office).
- <sup>402</sup> Harvard Mental Health Letter, *Mental Illness and Violence*, Harvard Medical School, Jan. 2011, *available at* [https://www.health.harvard.edu/newsletter\\_article/mental-illness-and-violence](https://www.health.harvard.edu/newsletter_article/mental-illness-and-violence).
- <sup>403</sup> Greg Hansch, *supra* note 401; *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Aaryce Hayes) (tape available from the House Video/Audio Services Office).
- <sup>404</sup> Greg Hansch, *supra* note 401.
- <sup>405</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Colleen Horton) (tape available from the House Video/Audio Services Office).
- <sup>406</sup> Harvard Mental Health Letter, *supra* note 402.
- <sup>407</sup> Lisa Howard, *Can Gun Violence Restraining Orders Help Prevent Mass Shootings?*, UC Davis Office of Research, Mar. 7, 2018, *available at* <https://research.ucdavis.edu/gvros/>; *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Mel Martinez) (tape available from the House Video/Audio Services Office).

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- <sup>408</sup> Aaryce Hayes, *supra* note 403; *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of CJ Grisham) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Jorge Landivar) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Paul Theobald) (tape available from the House Video/Audio Services Office).
- <sup>409</sup> *See, e.g.*, Terry Holcomb, *supra* note 393 (referring to mass stabbings such as the 2016 attack in Sagamihara, Japan and the 2014 attack in Kunming, China).
- <sup>410</sup> *See* Austin Ramzy, *China Kindergarten Stabbing Injures 14 Children*, The New York Times, Oct. 26, 2018, available at <https://www.nytimes.com/2018/10/26/world/asia/china-kindergarten-stabbing.html> (reviewing mass stabbings in China in coverage of recent attack); Lizzie Dearden, *Why Is Knife Crime Increasing in England and Wales?*, The Independent, Apr. 27, 2018, available at <https://www.independent.co.uk/news/uk/crime/violent-knife-crime-rise-stabbing-murders-reasons-increase-london-why-a8326171.html> (reviewing rise in stabbing in UK).
- <sup>411</sup> *See* Federal Bureau of Information, *2016 Crime in the United States*, Uniform Crime Reports (2016), available at <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-12> (showing knives used in 1,604 homicides in 2016 in United States).
- <sup>412</sup> *See* Dr. Roger A. Band *et al.*, *Severity-adjusted Mortality in Trauma Patients Transported by Police*, 63:5 *Annals of Emergency Medicine* 608 (2014), available at [https://www.annemergmed.com/article/S0196-0644\(13\)01582-5/fulltext](https://www.annemergmed.com/article/S0196-0644(13)01582-5/fulltext) (demonstrating 33.3% mortality for gunshot victims versus 7.9% mortality for stabbing victims in 5-year emergency room study).
- <sup>413</sup> *See* Federal Bureau of Information, *supra* note 411 (showing guns used in 6.86 times as many homicides as knives).
- <sup>414</sup> *See* R.S. Spicer & T.R. Miller, *Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Methods*, 90:12 *American Journal of Public Health* 1885 (2000), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446422/> (showing 82.5% of suicide attempts with firearms successful compared to only 1.2% with knives); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Meryl Keller) (tape available from the House Video/Audio Services Office) (stating more recent data shows 91% of suicide attempts with firearms successful).
- <sup>415</sup> *See, e.g.*, *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Selina Eshraghi) (tape available from the House Video/Audio Services Office) (describing tragic circumstances of friend's impulsive firearm suicide and finding likelihood of survival if other means chosen); *see also* David Owens, Judith Horrocks, & Allan House, *Fatal and Non-fatal Repetition of Self-Harm: Systematic Review*, 181:3 *The British Journal of Psychiatry* 193 (2002), available at <https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/fatal-and-nonfatal-repetition-of-selfharm/721FD68B3030C46E2070CC08CA869523> (reviewing 90 studies and finding only 5–7% likelihood of later successful suicide after one unsuccessful attempt).
- <sup>416</sup> John Malcolm & Amy Swearer, *Here Are 8 Stubborn Facts on Gun Violence in America*, The Heritage Foundation, Mar. 14, 2018, available at <https://www.heritage.org/crime-and-justice/commentary/here-are-8-stubborn-facts-gun-violence-america>.
- <sup>417</sup> *See generally* Dr. James Silver, Andre Simons, & Dr. Sarah Craun, *A Study of the Pre-attack Behaviors of Active Shooters in the United States Between 2000 and 2013*, Federal Bureau of Investigation, Jun. 2018, available at <https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf> (identifying common characteristics of mass shooters in U.S. over 13 year period).
- <sup>418</sup> *See generally* Dr. David Rudd *et al.*, *Warning Signs for Suicide: Theory, Research, and Clinical Applications*, 36:3 *Suicide and Life-Threatening Behavior* 255 (2006) (developing consensus set of warning signs of suicide).

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- <sup>419</sup> Dr. Jeffrey W. Swanson *et al.*, *Implementation and Effectiveness of Connecticut's Risk-based Gun Removal Law: Does It Prevent Suicides?*, 80 *Law and Contemporary Problems* 179, 192 (2017), *available at* <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4830&context=lcp>.
- <sup>420</sup> *Id.* at 205–06.
- <sup>421</sup> Dana Littlefield, *10 San Diego Residents Under Courts Orders to Give Up Their Guns*, *The San Diego Union-Tribune*, Feb. 16, 2018, *available at* <http://www.sandiegouniontribune.com/news/courts/sd-me-gun-orders-20180216-story.html>.
- <sup>422</sup> *Id.*
- <sup>423</sup> *E.g.*, *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Jim Barnes) (tape available from the House Video/Audio Services Office); CJ Grisham, *supra* note 408; Terry Holcomb, *supra* note 393; Alice Tripp, *supra* note 386.
- <sup>424</sup> U.S. CONST. amends. V & XIV; TEX. CONST. art. I, § 19.
- <sup>425</sup> *See generally* Tex. Att’y Gen. Op. No. JC-0070 (1999) (providing thorough overview of procedural due process standards in Texas law).
- <sup>426</sup> Alice Tripp, *supra* note 386.
- <sup>427</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Kathy Glass) (tape available from the House Video/Audio Services Office).
- <sup>428</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of the Honorable Jerry Patterson) (tape available from the House Video/Audio Services Office).
- <sup>429</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Randall Dunning) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Kathy Ponce) (tape available from the House Video/Audio Services Office).
- <sup>430</sup> Constable Gene Dolle, *supra* note 393; Kathy Ponce, *supra* note 429.
- <sup>431</sup> Chris W. Cox, *We Need to Stop Dangerous People Before They Act*, *National Rifle Association*, Mar. 14, 2018, *available at* <https://www.youtube.com/watch?v=7sNiklO506A&feature=youtu.be>.
- <sup>432</sup> David French, *Gun-Violence Restraining Orders Can Save Lives*, *The National Review*, Mar. 1, 2018, *available at* <https://www.nationalreview.com/magazine/2018/03/19/gun-violence-restraining-orders-save-lives/>.
- <sup>433</sup> ACLU of Rhode Island, *ACLU of Rhode Island Raises Red Flags Over “Red Flag” Gun Legislation*, Mar. 2, 2018, *available at* <http://www.riaclu.org/news/post/aclu-of-rhode-island-raises-red-flags-over-red-flag-gun-legislation>
- <sup>434</sup> Ashley Killough, *Graham, Blumenthal Unveil Their Own Gun Restraining Order Bill*, *CNN*, Mar. 8, 2018, *available at* <https://www.cnn.com/2018/03/08/politics/graham-blumenthal-gun-bill/index.html>.
- <sup>435</sup> *Texas Democratic Party 2018–2020 Platform*, *Texas Democrats*, June 23, 2018, *available at* <https://www.txdemocrats.org/our-party/texas-democratic-party-platform/>.
- <sup>436</sup> *2018 Republican Party of Texas Platform*, *Republican Party of Texas*, June 21, 2018, *available at* <https://www.texasgop.org/platform/>.
- <sup>437</sup> Texas Dep’t of State Health Servs., *Deaths from Selected Causes*, Sept. 24, 2018, *available at* <https://www.dshs.texas.gov/chs/vstat/vs15/t20c.aspx>.
- <sup>438</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Leslie Ervin) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Ariel Hobbs) (tape available from the House Video/Audio Services Office).

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- <sup>439</sup> *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Cecilia “Cissy” Perez) (tape available from the House Video/Audio Services Office).
- <sup>440</sup> *E.g.*, *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Bree Butler) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Conor Heffernan) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of John Kappelman) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Marcel McClinton) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Kennedy Rodriguez) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*1* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Kyra Rost) (tape available from the House Video/Audio Services Office).
- <sup>441</sup> Tawnell D. Hobbs, *Most Guns Used in School Shootings Come from Home*, *The Wall Street Journal*, Apr. 5, 2018, available at <https://www.wsj.com/articles/in-school-shootings-most-guns-come-from-home-1522920600>.
- <sup>442</sup> Lindsey Tanner, *Guns Send Over 8,000 US Kids to ER Each Year, Analysis Finds*, *AP News*, Oct. 29, 2018, available at <https://www.apnews.com/b806812a8f0945128b4c5e47a9f3c739>; see generally Dr. Faiz Gani & Joseph K. Canner, *Trends in the Incidence of and Charges Associated with Firearm-Related Injuries Among Pediatric Patients, 2006–2014*, *Journal of the American Medical Association* (forthcoming), available at <https://jamanetwork.com/journals/jamapediatrics/article-abstract/2707902> (providing overview of firearms-related injuries in children). The data on injury is thoroughly documented, but there’s some dispute about the number of accidental child deaths caused by guns, with credible analyses suggesting significant undercounting of accidental deaths an overcounting of homicides. Michael Luo & Mike McIntire, *Children and Guns: The Hidden Toll*, *The New York Times*, Sept. 28, 2013, available at <https://www.nytimes.com/2013/09/29/us/children-and-guns-the-hidden-toll.html>.
- <sup>443</sup> Nick Powell, *Safe Storage of Guns at Issue in Texas After 3 Young Boys Fatally Shoot Themselves by Accident*, *The Houston Chronicle*, Feb. 9, 2018, available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Accidental-shooting-deaths-of-3-children-in-5-12569775.php>.
- <sup>444</sup> Gov. Greg Abbott, *School and Firearm Safety Action Plan*, Office of the Texas Governor, May 30, 2018, at 37–38, available at [https://gov.texas.gov/uploads/files/press/School\\_Safety\\_Action\\_Plan\\_05302018.pdf](https://gov.texas.gov/uploads/files/press/School_Safety_Action_Plan_05302018.pdf).
- <sup>445</sup> Tex. H.B. 44, 74th Leg., R.S. (1995).
- <sup>446</sup> TEX. PENAL CODE ANN. § 46.13(a) & (b).
- <sup>447</sup> *Id.* (a)(3).
- <sup>448</sup> *Id.* (a)(1).
- <sup>449</sup> Emma Platoff, *The Santa Fe Shooter Used his Father’s Guns. But his Parents Aren’t Liable Under Texas Law*, *The Texas Tribune*, May 21, 2018, available at <https://www.texastribune.org/2018/05/21/texas-has-law-aimed-keeping-parents-guns-out-kids-hands-its-reactive-n/>.
- <sup>450</sup> TEX. PENAL CODE ANN. § 46.13(e).
- <sup>451</sup> *Id.* (c).
- <sup>452</sup> Texas Department of Public Safety, *Proper Firearm Storage to Prevent Theft & Accidental Injury to a Child*, Feb. 2018, available at <https://www.dps.texas.gov/RSD/LTC/flipbook/safestorage/#p=1>.
- <sup>453</sup> *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of the Honorable Jerry Patterson) (tape available from the House Video/Audio Services Office).
- <sup>454</sup> *Id.*

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- <sup>455</sup> *Id.* This is particularly true considering the spectrum of storage and security solutions available today, many of which offer the ability for nearly immediate access by an adult while making it virtually impossible for a child to access a firearm. *See, e.g.*, Texas Department of Public Safety, *supra* note 452 (describing wide range of storage options for firearms).
- <sup>456</sup> The Honorable Jerry Patterson, *supra* note 453.
- <sup>457</sup> *Id.*; *cf.* TEX. PENAL CODE ANN. § 46.13(f).
- <sup>458</sup> The Honorable Jerry Patterson, *supra* note 453; Nick Powell, *supra* note 443.
- <sup>459</sup> *E.g.*, *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Jim Barnes) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Tom Glass) (tape available from the House Video/Audio Services Office).
- <sup>460</sup> *E.g.*, *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Alice Tripp) (tape available from the House Video/Audio Services Office).
- <sup>461</sup> RAND Corporation, *The Effects of Child-access Prevention Laws*, accessed on Oct. 30, 2018, available at <https://www.rand.org/research/gun-policy/analysis/child-access-prevention.html>. This may be particularly true of laws involving stiffer felony penalties. *See* Daniel W. Webster & Marc Starnes, *Reexamining the Association Between Child Access Prevention Gun Laws and Unintentional Shooting Death of Children*, 106:6 *Pediatrics* 1466 (2000), available at <https://www.ncbi.nlm.nih.gov/pubmed/11099605> (observing that aggregate 17% reduction in unintentional child firearm deaths across all states with misdemeanor safe storage penalties eclipsed by Florida's 51% reduction after unique felony penalty implemented).
- <sup>462</sup> *E.g.*, *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Leesa Ross) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Ed Scruggs) (tape available from the House Video/Audio Services Office).
- <sup>463</sup> TEX. PENAL CODE ANN. § 46.13(c)(3).
- <sup>464</sup> Ed Scruggs, *supra* note 462.
- <sup>465</sup> *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (Jun. 25, 2018) (written testimony of Judge David M. Cobos) (available from House Comm. on Crim. Jur. Office).
- <sup>466</sup> *E.g.*, TEX. PENAL CODE ANN. §§ 30.06 & 30.07.
- <sup>467</sup> Tom Glass, *supra* note 459; *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of CJ Grisham) (tape available from the House Video/Audio Services Office).
- <sup>468</sup> *Id.*; Alice Tripp, *supra* note 460; *see Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Terry Holcomb) (tape available from the House Video/Audio Services Office) (noting difference between children getting loaded firearm left out on table and children getting firearm by stealing it).
- <sup>469</sup> *E.g.*, the Honorable Jerry Patterson, *supra* note 453; *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Gyl Switzer) (tape available from the House Video/Audio Services Office).
- <sup>470</sup> *E.g.*, *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Joe Palmer) (tape available from the House Video/Audio Services Office).
- <sup>471</sup> Alice Tripp, *supra* note 460.
- <sup>472</sup> *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Randall Dunning) (tape available from the House Video/Audio Services Office).
- <sup>473</sup> Emma Platoff, *supra* note 449.

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- <sup>474</sup> See, e.g., *id.* (referencing Massachusetts law, which specifies firearms must be locked up when stored).
- <sup>475</sup> E.g., Terry Holcomb, *supra* note 468; *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Alma Jackson) (tape available from the House Video/Audio Services Office); Alice Tripp, *supra* note 460.
- <sup>476</sup> See Terry Holcomb, *supra* note 468 (stating that gun owners should be given liberty but held accountable for conduct that rises to criminal negligence).
- <sup>477</sup> See, e.g., Terry Holcomb, *supra* note 468 (expressing no opposition to raising the age to 18 if uniformity created in criminal liability and other areas of law).
- <sup>478</sup> See TEX. PENAL CODE ANN. § 46.06(a)92) (creating crime when person “sells, rents, leases, or gives . . . any child younger than 18 years of age any firearm”).
- <sup>479</sup> *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Chris Mitchell) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Matthew Norwood) (tape available from the House Video/Audio Services Office); *Hearing on Interim Charge \*2* Before the House Comm. on Crim. Jur., 85th Leg. Interim (June 25, 2018) (statement of Charles Schmidt) (tape available from the House Video/Audio Services Office).