



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Law Review

Volume 6 | Issue 1

2-2019

Honoring Innocent Until Proven Guilty: Switching the Default Rule from Pretrial Detention to Pretrial Release in Texas's Bail System

Stephen Rispoli

Baylor University Law School, Stephen_Rispoli@baylor.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/lawreview>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Law and Politics Commons](#), and the [Legislation Commons](#)

Recommended Citation

Stephen Rispoli, *Honoring Innocent Until Proven Guilty: Switching the Default Rule from Pretrial Detention to Pretrial Release in Texas's Bail System*, 6 Tex. A&M L. Rev. Arguendo 41 (2019).

Available at: <https://scholarship.law.tamu.edu/lawreview/vol6/iss1/17>

This Arguendo (Online) is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

**HONORING INNOCENT UNTIL PROVEN GUILTY:
SWITCHING THE DEFAULT RULE¹ FROM PRETRIAL DETENTION TO PRETRIAL RELEASE IN
TEXAS'S BAIL SYSTEM**

*Stephen L. Rispoli**

ABSTRACT

Texas's current prison population consists of far more pretrial detainees than convicted criminals. Despite United States and Texas constitutional protections, the default rule in many jurisdictions, including Texas, detains misdemeanor and non-violent felony defendants unless they can post a monetary bond or get a surety to post the bond for them ("bail bond") to obtain their release. Most pretrial detainees remain detained due not to their alleged dangerousness, but rather because they simply cannot afford to post bail (or get someone to post it for them). As a result, many pretrial detainees find themselves choosing between hamstringing their financial future or remaining in detention until trial. If Americans are serious about "honoring the presumption of innocence," we must reform the way that misdemeanor and non-violent felony defendants are treated while awaiting trial. Rather than treat them as guilty and keep them in jail unless they can pay for their release, the standard should be to release them unless there is a very good reason for not doing so.

By changing the default option from pretrial detention to pretrial release, many Texas judges will be more pre-disposed to release misdemeanor and non-violent felony defendants on conditions other than the posting of monetary bail. This switch will result in fewer people being detained simply because they cannot afford to be released—which will prevent adverse economic consequences to already disadvantaged citizens.

Proposed reform has been discussed for decades. Reforming the bail system in Texas is a current, critical need. This criminal justice issue undermines the public's faith in our system of justice and detrimentally affects the economic and social status of countless citizens who will ultimately be found not guilty. Doing nothing weakens our overall rule-of-law system and ultimately erodes the foundation upon which our society is built.

* Stephen L. Rispoli, Baylor Law J.D. '12, Texas Law LL.M. '18, is the Assistant Dean of Student Affairs and Pro Bono Programs at Baylor Law School. He is indebted to Dean Brad Toben, Dean Leah Teague, Professor Lauren Fielder, Texas Court of Criminal Appeals Presiding Judge Sharon Keller, and David Slayton, for their support, helpful comments, and feedback.

¹ This phrase, "switching the default rule," is borrowed from Professor Cass Sunstein's article, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002). Professor Sunstein's influential law review article captures the essence of how one simple shift in thinking can dramatically affect outcomes. Such a shift in bail reform could result in a tremendous benefit to society.

TABLE OF CONTENTS

FOREWORD, BY JUDGE SHARON KELLER

I. INTRODUCTION

II. THE INSTITUTION OF BAIL—IN TEXAS AND BEYOND

 A. *The History of Bail*

 B. *Development of the Texas Bail System*

 C. *Texas Issues*

 D. *Conclusion*

III. CHALLENGES TO THE BAIL SYSTEM

 A. *Eighth Amendment Challenges to Bail Systems*

 B. *Reforms Attempted and Bail Lobby Pushback*

 C. *Litigation to the Rescue?*

 D. *Conclusion*

IV. HOW DOES OUR CRIMINAL JUSTICE SYSTEM AFFECT THE RULE OF LAW?

V. HOW WOULD SWITCHING THE DEFAULT RULE AFFECT THE BAIL SYSTEM?

VI. BAIL SYSTEM IN OTHER JURISDICTIONS

 A. *Federal System*

 B. *Washington, D.C.*

 C. *New Jersey*

 D. *Foreign Countries' Bail Systems*

 1. Countries with a Bail System

 2. Countries without a Bail System

 E. *Conclusion*

VII. SWITCHING THE DEFAULT RULE—TEXAS SHOULD IMPLEMENT A NO MONETARY BOND RELEASE SYSTEM FOR MISDEMEANORS AND NON-VIOLENT FELONY OFFENSES WHERE THE DEFENDANT IS UNABLE TO AFFORD TO PAY BAIL, IS NOT A FLIGHT RISK, AND IS NOT DANGEROUS TO THE COMMUNITY

FOREWORD, BY JUDGE SHARON KELLER, PRESIDING JUDGE, TEXAS COURT OF CRIMINAL APPEALS

Bail reform is a topic of much discussion these days, and rightly so. Many studies have been done and many articles have been written that detail the unhappy consequences—to those accused of a crime and to taxpayers alike—of the current system in Texas. In this Article, Dean Rispoli brings to the issue new arguments based on fields such as history and, intriguingly, psychology.

The purpose of bail, as he says, is to ensure the presence of the accused at trial. But over the years, we seem to have lost sight of that original goal. As a result, there are times when a person who cannot afford bail faces the prospect of losing a job and being unable to take care of one's family. Studies have shown that people who are not released promptly from jail prior to trial are more likely to plead guilty and more likely to re-offend. Additionally, the outcomes of cases where the accused is not released on bail are less favorable than the outcomes of those who are promptly released. All of this seems contrary to our ideas about the presumption of innocence, and that is one reason that the matter of bail reform has become the topic of conversation that it has.

Another reason is the cost to the taxpayers. Studies show that when people realize how much it costs to keep an accused person in jail, they are likely to conclude that bail reform is an idea worth pursuing. The confluence of humanitarian concerns and cost issues makes this a propitious time for rethinking pre-trial release.

Dean Rispoli has a new angle on bail that derives from the psychology of choice. As it turns out, there are ways to encourage certain choices while nevertheless leaving judges free to do what they do: make judgements about pre-trial release. The details of these studies and the conclusions to which they lead are a fascinating part of Dean Rispoli's article. His take on this important issue is insightful and compelling.

I. INTRODUCTION

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

- 8th Amendment to the Constitution of the United States

“Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.”

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be ‘dangerous.’ Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves.”

- Justice Thurgood Marshall²

The detention bail system has become a common fixture in American life.³ Yet while discussions around the bail system emphasize the need for reform, possible remedies for those currently suffering at the hands of the system’s deficiencies have fallen through the cracks.⁴ Texas’s current prison population consists of far more pretrial detainees than convicted criminals.⁵ The default rule in many jurisdictions, including Texas, detains misdemeanor and non-violent felony defendants unless they can post a monetary bond or get a surety to post the bond for them (“bail bond”) to obtain their release.⁶ Most pretrial detainees remain detained not due to their alleged dangerousness, but rather because they simply cannot afford to post bail (or get someone to post it for them).⁷ As a result, many pretrial detainees find themselves choosing between hamstringing their financial future or remaining in detention until trial. Of course, choosing to

² United States v. Salerno, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting).

³ LastWeekTonight, *Bail: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 7, 2015), <https://www.youtube.com/watch?v=IS5mwymTIJU> [https://perma.cc/JK6K-LLAC].

⁴ See Kamala D. Harris & Rand Paul, *Kamala Harris and Rand Paul: To Shrink Jails, Let’s Reform Bail*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html> [https://perma.cc/XYC9-G63K].

⁵ Nathan L. Hecht, Chief Justice, The Supreme Court of Tex., Address to the 85th Texas Legislature (Feb. 1, 2017).

⁶ Default rules tend to be “sticky,” meaning that most people will stick to the default rule simply because it is the default rule. See Sunstein, *supra* note 1, at 109; see also Eli Rosenberg, *Judge in Houston Strikes Down Harris County’s Bail System*, N.Y. TIMES (Apr. 29, 2017), https://www.nytimes.com/2017/04/29/us/judge-strikes-down-harris-county-bail-system.html?mcubz=0&_r=0 [https://perma.cc/5GLR-DQFV]. (last visited May 14, 2018).

⁷ Harris & Paul, *supra* note 4.

remain in detention until trial also has significant financial ramifications, such as losing employment, and significant personal ramifications, such as children being left at home alone.

Reforming the bail system in Texas is a current, critical need. This criminal justice issue undermines the public's faith in our system of justice and detrimentally affects the economic and social status of countless citizens who will ultimately be found not guilty. To do nothing weakens our overall rule-of-law system and ultimately erodes the foundation upon which our society is built.

In many other jurisdictions, the default of pretrial release for defendants has been in place for many years. Other jurisdictions have switched the default rule for misdemeanor and non-violent felony defendants from pretrial detention to pretrial release (with non-monetary conditions). By changing the default option, many Texas judges will be more predisposed to release misdemeanor and non-violent felony defendants on conditions other than the posting of monetary bail. This switch will result in fewer people being detained simply because they cannot afford to be released—which will prevent adverse economic consequences to already disadvantaged citizens. The positive impact on our economy, current criminal justice system, and the rule of law will be monumental.

II. THE INSTITUTION OF BAIL—IN TEXAS AND BEYOND

“Twenty years ago, not quite one-third of [Texas’s] jail population was awaiting trial. Now the number is three-fourths. Liberty is precious to Americans, and any deprivation must be scrutinized. To protect public safety and ensure that those accused of a crime will appear at trial, persons charged with breaking the law may be detained before their guilt or innocence can be adjudicated, but that detention must not extend beyond its justifications. Many who are arrested cannot afford a bail bond and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs and families, and are more likely to re-offend. And if all this weren’t bad enough, taxpayers must shoulder the cost—a staggering \$1 billion per year.”

- Hon. Nathan L. Hecht, Texas Supreme Court Chief Justice⁸

A. *The History of Bail*

Bail, which invokes the question of whether to release a person accused of a crime between arrest and trial, is an ancient concept—dating back at least to the time of Plato.⁹ This question of release, and more importantly, how to secure a defendant's presence in court, has likely been hotly debated ever since the institution began.¹⁰ Bail is meant to complement the common law presumption of innocence by allowing a person charged of a crime to remain free until trial as long

⁸ Hecht, *supra* note 5.

⁹ Harold Don Teague, *The Administration of Bail and Pretrial Freedom in Texas*, 43 Tex. L. Rev. 356, 356 n.1 (1965).

¹⁰ *See id.* at 356.

as there is some assurance that the defendant will not skip out of the trial.¹¹ This assurance has traditionally been secured through the personal promise of the defendant or a representative of the defendant, or by forfeiture of a large sum of money if the defendant did not appear at the trial.¹² In medieval England, a defendant did not pay sureties in order to be released.¹³ Instead, if the defendant did not appear at trial, the sureties were then seized and a fine was imposed on them.¹⁴

In the United States, the common practice has developed into requiring “sureties to deposit money or real property . . . as assurance that the bail amount would be paid if the accused failed to appear for trial.”¹⁵ Although this assurance was originally made by the accused or a friend, professional bail bondsmen are now the predominant source.¹⁶ Professional bondsmen typically place collateral with the court to cover their liability and are allowed to write bonds up to that amount (or sometimes, pay the bond in full to the court). If the defendant defaults, the bondsmen must pay the amount of the bond or the bondsmen’s collateral is taken. Bail bondsmen charge a “nonrefundable percentage usually around [ten] percent” to the defendant for this service.¹⁷ Professional bail bondsmen seems to be a unique American concept, given that most other countries have banned commercial bail bond companies.¹⁸ Yet only four American states—Illinois, Kentucky, Oregon, and Washington—have abolished the practice.¹⁹

The United States Constitution does not grant a *right* to bail. Instead, it states that “*excessive* bail shall not be required.”²⁰ This provision provides little guidance; but, “prior to ratification of the Bill of Rights, Congress provided in the Judiciary Act of 1789 that ‘upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death’”²¹ In *Stack v. Boyle*, the Supreme Court recognized that the concept of innocence until proven guilty requires the bail system.²² Further, the Court stated that the “sole purpose of bail is to ensure the presence of the accused at trial.”²³

Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit

¹¹ Tex. Const. art. I, § 11 (comment).

¹² Teague, *supra* note 9, at 357.

¹³ ODonnell v. Harris Cty., 251 F. Supp. 3d 1052, 1069 (S.D. Tex. 2017) (citing 2 Frederick William Polluck & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 514 (2d ed. 1984) (1898)), *aff’d as modified*, 882 F.3d 528 (5th Cir. 2018).

¹⁴ *Id.*

¹⁵ Teague, *supra* note 9, at 357.

¹⁶ *Id.* at 358.

¹⁷ Jolie McCullough, *How Harris County’s Federal Bail Lawsuit Spreads Beyond Houston*, TEX. TRIB. (Oct. 2, 2017, 12:00 AM), <https://www.texastribune.org/2017/10/02/how-harris-countys-bail-lawsuit-spreads-beyond-houston/#bailreform> [<https://perma.cc/6Z3K-7CX8>]. In most cases, the bondsman or bail bond company is never required to pay the bond amount. Should default occur, the bondsman or bail bond company must pay the full bond amount for which the defendant was released.

¹⁸ Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/us/29bail.html> [<https://perma.cc/2YCP-XKJ8>]. (last visited May 13, 2018).

¹⁹ *Id.*

²⁰ U.S. Const. amend. VIII (emphasis added).

²¹ Teague, *supra* note 9, at 357 (citing Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 73, 91).

²² Teague, *supra* note 9, at 358–59 (citing *Stack v. Boyle*, 342 U.S. 1 (1951)).

²³ Teague, *supra* note 9, at 359.

of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is “excessive” under the Eighth Amendment Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.²⁴

This requires that the bail amount for each defendant must be determined on a case-by-case basis taking into account the different circumstances of each person and the nature of the charged crime, rather than a blanket bail system.²⁵

B. *Development of the Texas Bail System*

Texas’s bail system has been a focus of discussion and proposed reform for over fifty years.²⁶ The Texas Constitution, like the U.S. Constitution, also has a provision concerning bail: “[a]ll prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident”²⁷ The Texas Constitution further states that the judge has limited discretion to deny bail after examining the evidence.²⁸ This language, from Article I, Section 11, is complemented by Article I, Section 13—which is similar to the Eighth Amendment of the U.S. Constitution, but also includes what is commonly referred to as an “Open Courts” clause:²⁹

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open; and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.³⁰

Like the U.S. Supreme Court, the Texas Court of Criminal Appeals—the highest criminal court in Texas—has also held that the purpose of bail is not just to secure release, but also to secure the accused’s presence at trial.³¹ In Texas, there are three options for a defendant to be released from jail while awaiting trial: (1) through personal bond, where sureties or other security may not be required, but the defendant must pay a “pre-determined amount of money if she does not appear

²⁴ *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

²⁵ *Teague*, *supra* note 9, at 359 (citing *Stack*, 342 U.S. at 5).

²⁶ *See Teague*, *supra* note 9, at 356.

²⁷ Tex. Const. art. I, § 11.

²⁸ *Id.* The Texas Code of Criminal Procedure mirrors the language in this provision. Tex. Code Crim. Proc. Ann. art. 1.07 (West 1984).

²⁹ Many state constitutions contain “Open Courts,” “Access to Courts Clauses,” or “Remedy Clauses,” all of which are based on Chapter 40 of the Magna Carta. *See Piselli v. 75th St. Med.*, 808 A.2d 508, 517 (2002). Magna Carta Chapter 40 provides: “Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.” [“To no one will we sell, to no one will we refuse or delay, right or justice.”]. WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 395 (2d ed. 1914).

³⁰ Tex. Const. art. I, § 13. The portion of this section that mirrors the Eighth Amendment of the United States Constitution is also provided in identical form in Tex. Code Crim. Proc. Ann. art. 1.09 (West 1984).

³¹ *Ex parte Reis*, 33 S.W.2d 435, 437 (1930).

for future hearings;”³² (2) by “posting a refundable cash bond for the full amount of the bond;”³³ or (3) by “obtaining the services of a commercial surety who will post the bond for a nonrefundable fee.”³⁴

Also like the U.S. Supreme Court, Texas courts do not provide much guidance for determining what is a reasonable amount of bail. However, while the judge³⁵ has discretion to set the amount of bail, that amount should not be so high as to be “used as an instrument of oppression.”³⁶ Further, Article 17.15 of the Texas Code of Criminal Procedure provides some factors that can assist the judge in “determining the amount of a defendant’s bail:”

- (1) The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
- (2) The power to require bail is not to be used as an instrument of oppression.
- (3) The nature of the offense and the circumstances of its commission are to be considered.
- (4) The ability to make bail is to be regarded, and proof may be taken on this point.
- (5) The future safety of a victim of the alleged offense may be considered.³⁷

In addition, the following factors can be taken into consideration:

- (1) the possible punishment for the offense;
- (2) the accused’s work record;
- (3) the accused’s family [and community] ties;
- (4) the accused’s length of residency;
- (5) the accused’s prior criminal record, if any;
- (6) the accused’s conformity with the conditions of any previous bond;
- (7) the existence of outstanding bonds, if any; and
- (8) aggravating circumstances alleged to have been involved in the charged offense.³⁸

³² Dayla S. Pepi & Donna D. Bloom, *Take the Money or Run: The Risky Business of Acting as Both Your Client’s Lawyer and Bail Bondsman*, 37 ST. MARY’S L.J. 933, 939 (2006) (citing Tex. Code Crim. Proc. Ann. art. 17.01–.09 (West 2005)); Tex. Code Crim. Proc. Ann. art. 17.03 (West 1984).

³³ Pepi & Bloom, *supra* note 32; Tex. Code Crim. Proc. Ann. art. 17.02 (West 1984).

³⁴ Pepi & Bloom, *supra* note 32.

³⁵ For ease of reference, the term “judge,” as used in this Article, will refer to any official who has the authority to set bail within a jurisdiction.

³⁶ *Nguyen v. State*, 881 S.W.2d 141, 143 (Tex. App.—Houston [1st Dist.] 1994, no pet.).

³⁷ *Id.* (citing Tex. Code Crim. Proc. Ann. art. 17.15 (Vernon Supp. 1994)).

³⁸ TEX. JUDICIAL COUNCIL, CRIMINAL JUSTICE: COMMITTEE REPORT AND RECOMMENDATIONS 5–6 (2016), <http://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf> [<https://perma.cc/GF9U-97NT>] (citing *Ex Parte Scott*, 122 S.W.3d 866 (Tex. App.—Fort Worth 2003, no pet.); *Ex Parte Ragston*, 422 S.W.3d 904 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Ex Parte Castellanos*, 420 S.W.3d 878 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Brown v. State*, 11 S.W.3d 501 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Jobe v. State*, 482 S.W.3d 300 (Tex. App.—Eastland 2016, pet. ref’d); *Cooley v. State*, 232 S.W.3d 228 (Tex. App.—Houston [1st Dist.] 2007, pet. ref’d); *Ex Parte Hunt*, 138 S.W.3d 503 (Tex. App.—Fort Worth 2004, pet. ref’d); *Ex Parte Ruiz*, 129 S.W.3d 751 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *In re Hulin*, 31 S.W.3d 754 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *Nguyen*, 881 S.W.2d at 141; *Ex Parte Goosby*, 685

Thus, it seems that Texas judges have broad discretion in setting the amount of bail and can take employment, and likely student status situations into account when determining bail. Yet problems persist in the Texas bail system.³⁹

C. Texas Issues

There are countless individual stories about the impact of defendants' failures to afford bail and the detrimental effects it has on Texas families—such as parents leaving children at home unattended for long periods of time,⁴⁰ individuals losing their jobs,⁴¹ and the inability of people to afford a small \$2,500 bond thereby being forced to spend weeks or months in jail waiting for trial.⁴² But the number of people affected is staggering. Roughly twelve million Americans are arrested and booked into local jails every year.⁴³ It is estimated that approximately “450,000 people are in pretrial detention in the United States”—both for those denied bail and for “those unable to pay the bail that has been set.”⁴⁴ A majority of these people are held in jails at the municipal or county level.⁴⁵ Nearly three out of five inmates in these jails nationwide are merely awaiting trial.⁴⁶ In New York City alone, nearly 45,000 inmates are in jail because “they can't pay their court-assigned bail,” even when it is \$500 or less.⁴⁷ Overall, the additional detention costs taxpayers approximately \$14 billion yearly.⁴⁸

Texas, the second largest state in the nation, has an unusually large number of pretrial defendants in jail. An October 2016 report by the Texas Judicial Council estimates that 75% of the Texas jail population consists of defendants awaiting trial—all while they are presumed innocent.⁴⁹ This total is up from “just over [32%]” in 1994.⁵⁰

S.W.2d 440 (Tex. App.—Houston [1st Dist.] 1985, no pet. h.); and *Ex Parte Rubac*, 611 S.W.2d 848 (Tex. Crim. App. 1981)).

³⁹ McCullough, *supra* note 17.

⁴⁰ Cary Aspinwall, *Overlooked: As Women Go to Jail in Record Numbers, Who's Watching Out for Their Kids? No One*, DALLAS NEWS (June 22, 2017), <https://interactives.dallasnews.com/2017/overlooked/> [<https://perma.cc/YVN4-VF2K>].

⁴¹ McCullough, *supra* note 17.

⁴² Cary Aspinwall, *A Brief History of Texas Bail Reform, as 5th Circuit Looks at Jail Lawsuit*, DALLAS NEWS (Oct. 2017), <https://www.dallasnews.com/news/crime/2017/10/04/brief-history-texas-bail-reform-5th-circuit-looks-jail-lawsuit> [<https://perma.cc/L89V-X3AB>].

⁴³ Jason Tashea, *Bail Industry Battles Reforms that Threaten its Livelihood*, ABA JOURNAL (Mar. 2018), http://www.abajournal.com/magazine/article/bail_industry_battles_reforms/ [<https://perma.cc/8RGP-XGRA>].

⁴⁴ Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/B36K-6S8Z>].

⁴⁵ James A. Allen, “*Making Bail*”: *Limiting the Use of Bail Schedules and Defining the Elusive Meaning of “Excessive” Bail*, 25 J.L. & POL’Y 637, 640 (2017).

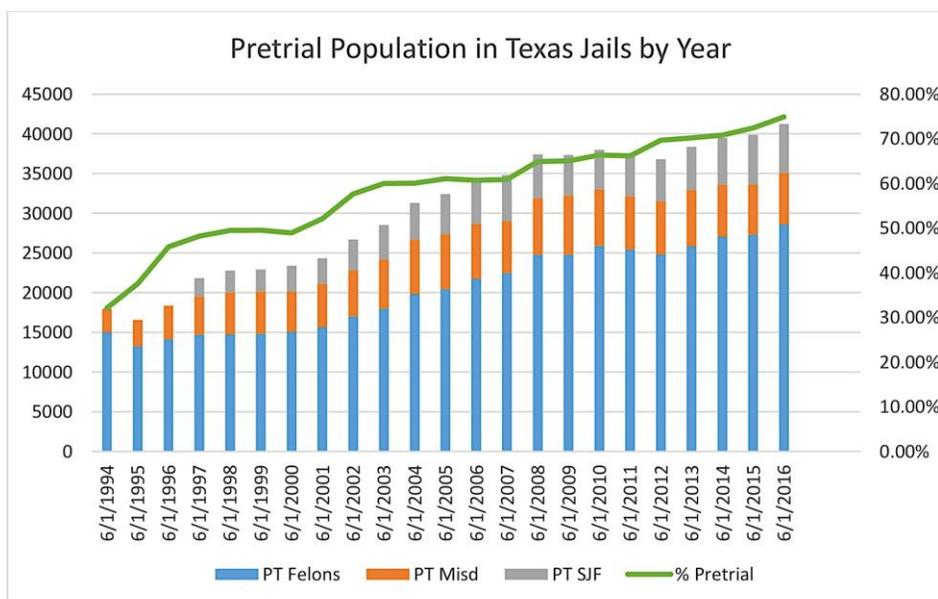
⁴⁶ Tashea, *supra* note 43.

⁴⁷ Pinto, *supra* note 44.

⁴⁸ Tashea, *supra* note 43.

⁴⁹ TEX. JUDICIAL COUNCIL, *supra* note 38, at 2.

⁵⁰ *Id.*



51

Five percent of Texans who spend three days or less in jail are likely to lose their jobs, whereas 14% of Texans who spend more than three days in jail are likely to lose their jobs.⁵² These Texans report difficult financial situations, “residential stability” issues, and are “less likely to be able to support dependent children.”⁵³ Moreover, there is also a racial disparity as African-American defendants are more likely to receive “higher bail amounts than are white arrestees with similar charges and similar criminal histories.”⁵⁴

Worse still, these pretrial inmates are much more likely to plead guilty than they otherwise would have and are much more likely to re-offend than they otherwise might have.⁵⁵ Low-risk defendants who spend more than two or three days in jail are “[40%] more likely to commit new crimes before trial than equivalent defendants held no more than [twenty-four] hours.”⁵⁶ If held for more than eight days, “the likelihood of recidivism increases to [51%] more likely to commit another crime within two years.”⁵⁷ Further, allowing monetary bond without risk assessment is more dangerous.⁵⁸ Most crimes committed by people out of jail on monetary bond are felonies, and likely to be violent felonies.⁵⁹ In addition, victim costs are higher.⁶⁰

These statistics show not only costs to defendants awaiting trial—they also pose significant burdens on taxpayers. In 2016, “[a]ccording to the Texas Commission on Jail Standards, the

⁵¹ *Id.*

⁵² *Id.* at 4.

⁵³ *Id.*

⁵⁴ TEX. JUDICIAL COUNCIL, *supra* note 38, at 4.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 3–4 (citing C.T. LOWENKAMP, M. VAN NOSTRAND, & A. HOLSINGER, THE HIDDEN COSTS OF PRETRIAL DETENTION (2013)).

⁵⁷ *Id.* at 4 (internal quotations omitted).

⁵⁸ TEXAS A&M PUB. POL’Y RES. INST., LIBERTY AND JUSTICE: PRETRIAL PRACTICES IN TEXAS 27 (2017), http://www.txcourts.gov/media/1437499/170308_bond-study-report.pdf [<https://perma.cc/5UG7-6M7S>].

⁵⁹ *Id.*

⁶⁰ *Id.* at 28.

average cost per day to house an inmate in a Texas county jail is \$60.12.”⁶¹ The 2016 estimate of 41,243 inmates costs local governments nearly \$2.5 million per day.⁶² Assuming the population remains steady, “the annual cost to local governments to house pretrial inmates is \$905,028,085.”⁶³ Combined with the statistics regarding pleading guilty and recidivism, this can cause an unending spiral of time spent in jail.

Many of these problems stem from the “fixed schedules”⁶⁴ that many Texas counties use to assess bail amounts.⁶⁵ While the court setting bail can consider the conditions noted above regarding employment, education, risk to public safety, etc., these conditions are permissive—the court does not have to take them into consideration.⁶⁶ Further, most of the cases dealing with excessive bail only provide guidance on what judges *cannot* do because the judge has discretion when setting the amount.⁶⁷

Tarrant and Travis counties provide an interesting contrast of this issue. A traditional cash bail system is used in Tarrant County while Travis County uses a “data-based questionnaire to assess risk.”⁶⁸ Travis County allows “many low-risk defendants out on a personal bond, which has no upfront fee” but does carry a financial penalty if defendants fail to show up for court.⁶⁹ Tarrant County’s traditional system, on the other hand, is 12% more likely to release violent offenders from jail, while low-risk offenders wait in jail for long periods of time.⁷⁰

D. Conclusion

As evidenced by the statistics noted above, the default rule in Texas seems to be pretrial detention rather than pretrial release, regardless of the factors that the judges may consider.⁷¹ Given these unfavorable results and disparate impacts across the state, and the significant burden to taxpayers to fund a malfunctioning system, reform is clearly needed. Even so, Robert Kennedy advanced some of the same arguments advocating for reform when he was attorney general, and the issue is still unresolved.⁷² So, how will legislatures and courts attempt to deal with this issue?

⁶¹ TEX. JUDICIAL COUNCIL, *supra* note 38, at 3.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See generally RECOMMENDED BOND SCHEDULE, <http://assets.documentcloud.org/documents/3245982/DallasCountyBondSchedule.pdf> (last visited Dec. 12, 2018) [<https://perma.cc/E9H7-79GD>].

⁶⁵ See Aspinwall, *supra* note 40.

⁶⁶ *Id.*

⁶⁷ See, e.g., *Nguyen v. State*, 881 S.W.2d 141, 143 (Tex. App.—Houston [1st Dist.] 1994, no pet.).

⁶⁸ Kera Christopher Connelly, *Texas Lawmakers, Judges Push for Major Bail Reform*, HOUS. PUB. MEDIA (Mar. 10, 2017, 8:13 AM), <https://www.houstonpublicmedia.org/articles/news/2017/03/10/191236/texas-lawmakers-judges-push-for-major-bail-reform/> [<https://perma.cc/8Z92-Q2BA>].

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Aspinwall, *supra* note 40 (discussing “fixed schedules”); Tex. Code Crim. Proc. Ann. art. 17.15 (West 1984).

⁷² Pinto, *supra* note 44.

III. CHALLENGES TO THE BAIL SYSTEM

A. Eighth Amendment Challenges to Bail Systems

While the text of the Eighth Amendment seems promising, Supreme Court jurisprudence has not elaborated on or defined what “excessive bail” actually means.⁷³ In *Stack*, the Court examined the bail amounts set for defendants charged as Communists.⁷⁴ The Court first stated that “a person arrested for a non-capital offense shall be admitted to bail.”⁷⁵ Further, the Court noted that bail should not be “set at a figure higher than an amount reasonably calculated” to ensure the defendant will appear at trial. As such, the Court found that the amounts of bail set for the defendants were excessive because they significantly exceeded the maximum fine for the offense.⁷⁶ The bail amount for the *Stack* defendants was five times the maximum amount of the fine.⁷⁷

The concurring opinion by Justice Jackson, joined by Justice Frankfurter, did provide some hope for the future.⁷⁸ Justice Jackson stated that the use of blanket bail systems was a clear violation of Federal Rule of Criminal Procedure 46(c),⁷⁹ which requires a finding that the defendant will flee or pose a danger to society.⁸⁰ However, subsequent major Eighth Amendment decisions such as *Carlson v. Landon*⁸¹ and *United States v. Salerno*⁸² have not provided much guidance for today’s issue. Neither discussed “excessive bail” in a manner that elaborates on how the Eighth Amendment applies to low-risk defendants arrested for minor crimes. Nor have there been any other major Eighth Amendment cases dealing with “excessive bail.” As such, legislatures and courts struggling with these issues do not have much to rely upon when crafting solutions.

B. Reforms Attempted and Bail Lobby Pushback

In the 85th Texas legislative session, a bill was introduced that would have accomplished major reform in Texas’s bail system.⁸³ Senate Bill 1338, authored by Senator John Whitmire, a Democrat from Houston and Chair of the Senate Criminal Justice Committee, would have changed

⁷³ See *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *Carlson v. Landon*, 342 U.S. 524, 533–34, 545 (1952). *Carlson v. Landon*, however, decided only one year after *Stack*, muddied the issue of defendants’ ability to receive bail. *Carlson*, 342 U.S. at 539–40. The Court held that bail could be refused for aliens charged as Communists because of their potential danger to society. *Id.* at 541–46. Unfortunately, the issue of “excessive bail” was not addressed in *Carlson*.

⁷⁴ *Stack*, 342 U.S. at 3.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 5.

⁷⁷ See *id.* at 3, 5.

⁷⁸ *Id.* at 7–18 (Jackson, J., concurring).

⁷⁹ *Id.* at 9.

⁸⁰ FED. R. CRIM. P. 46.

⁸¹ *Carlson*, 342 U.S. at 546; see *supra* note 73 for a discussion of *Carlson*.

⁸² *United States v. Salerno*, 481 U.S. 739, 743 (1987). *Salerno* involved members of the Genovese crime family, who were on trial for organized crime. *Id.* at 744. The offenses are much different than the average crime than those for which many Americans are currently detained in municipal and county jails across the country.

⁸³ See Mike Ward, *Bail Bondsmen: Reform Bill Will Drive Us Out of Business*, HOUSTON CHRONICLE (Apr. 4, 2017), <https://www.houstonchronicle.com/news/houston-texas/texas/article/Bail-bondsmen-Reform-bill-will-drive-us-out-of-11050902.php> [https://perma.cc/JF7T-3N2B].

the process by which courts decide who is released and who is detained until trial.⁸⁴ The bill drew heavily upon the findings of the Texas Judicial Council’s 2016 Report, noted above.⁸⁵ Rather than allowing judges to follow the “fixed schedule,” judges would have to make one of three decisions within forty-eight hours of arrest “based on the risk of failure to appear in court or presence of danger to the public or victim:”

1. Release on a personal bond, with or without conditions;
2. Release on a surety or monetary bond, with or without conditions; or
3. Deny release until the trial court conducts a pretrial hearing during the next [ten] days.⁸⁶

In essence, the bill would have switched the default rule from the use of “fixed schedules” to making the judge pick one of three options. In addition, the bill would have empowered judges to use risk assessments to decide which defendants receive bail “based on [the] likelihood to come back to court or commit new crimes.”⁸⁷ Further, it would allow judges to deny bail for “high-risk defendants charged with violent offenses before trial, no matter how much money they have.”⁸⁸ Finally, the bill would have encouraged judges to use “[l]east-restrictive release conditions” for low-risk defendants to “make sure they come back to court and that the community remains safe.”⁸⁹

The bill had wide bipartisan support being co-authored by Senator Judith Zaffirini, a Democrat from Laredo,⁹⁰ and sponsored by House Representative Andy Murr, a Republican from Kerrville.⁹¹ Chief Justice Hecht of the Texas Supreme Court and Judge Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, both spoke in favor of the bill before the Senate Criminal Justice Committee hearing.⁹² The witness list at the Senate Committee hearing shows that many bail system and criminal justice reform groups, including the Texas Public Policy Foundation, and the Texas Young Republican Federation testified, or showed up to the hearing, in support of the bill.⁹³

⁸⁴ Whitmire, *Bill Analysis*, SENATE RES. CTR. (Apr. 20, 2017), <https://capitol.texas.gov/tlodocs/85R/analysis/html/SB01338S.htm> [<https://perma.cc/C5JM-NVAC>].

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Whitmire, *Bill Analysis*, SENATE RES. CTR. (Apr. 20, 2017), <https://capitol.texas.gov/tlodocs/85R/analysis/html/SB01338S.htm> [<https://perma.cc/C5JM-NVAC>].

⁹⁰ Whitmire & Zaffirini, *Authors*, TEX. LEGISLATURE ONLINE, <https://capitol.texas.gov/billlookup/Authors.aspx?LegSess=85R&Bill=SB1338> (last visited Dec. 27, 2018) [<https://perma.cc/5BCD-AQQQ>].

⁹¹ Whitmire, *Senate Bill 1338 Sponsors*, TEX. LEGISLATURE ONLINE, <https://capitol.texas.gov/billlookup/Sponsors.aspx?LegSess=85R&Bill=SB1338> (last visited Dec. 27, 2018) [<https://perma.cc/Q2XD-P5QN>]. See also Ward, *supra* note 83 (highlighting the wide bipartisan nature of the bill).

⁹² Connelly, *supra* note 68.

⁹³ *Witness List* (Apr. 4, 2017, 1:30 PM), <https://capitol.texas.gov/tlodocs/85R/witlistbill/html/SB01338S.htm> [<https://perma.cc/TGR2-57K6>].

As noted in the Senate Research Center’s analysis, the bill would not have done away with surety or monetary bonds as they are “one of the previously listed judge’s decisions.”⁹⁴ However, the opponents of the bill, mostly bail bondsmen, felt that this measure would “have a negative impact on their earnings.”⁹⁵ In a letter sent by the Professional Bondsmen of Texas to bond brokers across Texas, the bill was labeled an “existential threat,” that “[e]veryone will be negatively affected or put out of business” by the legislation.⁹⁶ Opponents of the bill also claimed that it would “overwhelm” many justices of the peace who supervise bail hearings because many are not attorneys.⁹⁷ Further, they claimed that \$7 million in bail fees and “millions more in forfeiture fees” would no longer be collected by counties.⁹⁸

The bill noted, though, that those defendants who would benefit from this bill were not bonding out, and thus it would not have an impact on bail bondsmen’s business.⁹⁹ As critics of the bail bond system point out, the current system has a disproportionate impact on poor and middle-class defendants.¹⁰⁰ Yet it seems that the bail bondsmen lobby won this battle—the bill did not pass the House of Representatives before the session ended, killing the bill until the next legislative session.¹⁰¹

C. *Litigation to the Rescue?*

The bail system in Harris County has been the focus of critics and potential reform for years.¹⁰² A recent case—*ODonnell v. Harris County, Texas*—has challenged Harris County’s system and was somewhat successful in enacting reform.¹⁰³ Three people—who had been “detained because they were too poor to pay the amount needed for release” under Harris County’s system—brought the case.¹⁰⁴ The bail amounts at issue in this case ranged from \$2,500 to \$5,000 for the three plaintiffs.¹⁰⁵ The issue before the court was the “constitutionality of a bail system that detains [40%] of all those arrested only on misdemeanor charges, many of whom are [otherwise

⁹⁴ Whitmire, *supra* note 84.

⁹⁵ *Id.*

⁹⁶ Connelly, *supra* note 68.

⁹⁷ Ward, *supra* note 83.

⁹⁸ *Id.*

⁹⁹ Whitmire, *supra* note 84.

¹⁰⁰ Liptak, *supra* note 18.

¹⁰¹ Whitmire & Zaffirini, *History*, TEX. LEGISLATURE ONLINE <https://capitol.texas.gov/billlookup/History.aspx?LegSess=85R&Bill=SB1338> (last visited Dec. 29, 2018) [<https://perma.cc/3WS9-2M26>].

¹⁰² See Marcia Johnson & Lockett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J.L. & SOC. POL’Y 42, 45 (2012).

¹⁰³ *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1069 (S.D. Tex. 2017), *aff’d as modified*, 882 F.3d 528 (5th Cir. 2018). Of course, this litigation was not popular with the bail bond industry. The same letter sent by the Professional Bondsmen of Texas regarding Senate Bill 1338 also mentioned this litigation. Connelly, *supra* note 68. In addition to this case, U.S. District Judge David Godbey in Dallas has issued a similar ruling to the *ODonnell* case, except that it also applies to felony defendants. *Daves v. Dallas Cty.*, No. 3:18-CV-0154-N, 2018 WL 4510136, at *1 (N.D. Tex. Sept. 20, 2018).

¹⁰⁴ *ODonnell*, 251 F. Supp. 3d at 1058.

¹⁰⁵ *Id.* at 1062–63.

eligible for pretrial release but are] indigent and cannot pay the amount needed for release on secured money bail.”¹⁰⁶

The court found that Harris County’s bail system violated the Equal Protection and Due Process Clauses, and issued an injunction releasing all those who have been detained for misdemeanor offenses and were unable to afford bail.¹⁰⁷ The district court found that:

Due process requires: (1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee’s eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee’s appearance at hearings and law-abiding behavior before trial; and (5) timely proceedings within [twenty-four] hours of arrest.¹⁰⁸

The Fifth Circuit, however, held that the trial court’s holding was too restrictive.¹⁰⁹ The Fifth Circuit’s modification in its opinion does not require that judges issue “a written statement of their reasons” for setting a specific bail amount and did away with the twenty-four-hour requirement because it was deemed too strict.¹¹⁰ Overall, the Fifth Circuit largely affirmed the opinion of the district court, and Harris County’s bail system is better for it. However, this does not switch the default rule of a monetary bond being required for most defendants to obtain release while awaiting trial. Thus, there is more to be done.

D. Conclusion

As legislators and courts examine this issue and attempt to effect reform, they will need guidance. Luckily, they will not be without any examples of systems where bail seems to be working from which to draw methods and procedures. This Article will next examine why fixing the bail system is important to the rule of law (and how to measure effectiveness); the importance of switching the default rule; and then turning to other jurisdictions where bail systems are different from that of the average American state and seem to be effective.

¹⁰⁶ *Id.* at 1057–58. The court also noted that Harris County Jail is the third largest in the country and over 50,000 people are arrested each year in Harris County for misdemeanors. *Id.* at 1058. These “misdemeanor arrestees awaiting trial make up about [5.5%] of the Harris County Jail population on any given day.” *Id.*

¹⁰⁷ *Id.* at 1161. It is not inconsistent that this case is decided upon due process and equal protection rather than the Eighth Amendment because the Fifth Circuit has already held that “[t]he incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.” *ODonnell*, 882 F.3d 528, 539 (5th Cir. 2018) (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc)).

¹⁰⁸ *ODonnell*, 251 F. Supp. 3d at 1153.

¹⁰⁹ *ODonnell*, 882 F.3d at 542.

¹¹⁰ *Id.*

IV. HOW DOES OUR CRIMINAL JUSTICE SYSTEM AFFECT THE RULE OF LAW?

“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

- United States v. Salerno, 481 U.S. 739, 755 (1987).

The rule of law is, generally, the notion that everyone is equal under the law.¹¹¹ Under this precept, all people, regardless of rank and status, are entitled to fair treatment within the system that governs society, and equitable rules and procedures.¹¹² Another core feature of this concept places “limits on the exercise of power by [the] government.”¹¹³

The United Nations defines the rule of law as “a principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”¹¹⁴ The World Justice Project (“WJP”) provides a more detailed definition of the rule of law:

[A] rules-based system in which the following four universal principles are upheld: (1) the government and its officials and agents are accountable under the law; (2) the laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property; (3) the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and (4) access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the [demographics] of the communities they serve.¹¹⁵

These definitions include protections for every citizen, regardless of socio-economic status. Further, both state that *all* people are accountable under the law. Of critical importance regarding criminal justice, is that the laws are equally enforced and protect both people and property.

The WJP uses a variety of basic concepts and factors to evaluate the rule of law, most of which relate to the functioning of the court system in a given country.¹¹⁶ The criminal justice

¹¹¹ Juan C. Botero & Alejandro Ponce, *Measuring the Rule of Law*, WORLD JUST. PROJECT 5 (Nov. 2011), <http://ssrn.com/abstract=1966257> [<https://perma.cc/NK54-3E4M>].

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ UNITED NATIONS SEC. COUNCIL, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* 4 (Aug. 23, 2004), <https://www.un.org/ruleoflaw/files/2004%20report.pdf> [<https://perma.cc/7JTJ-S8FJ>].

¹¹⁵ Botero & Ponce, *supra* note 111, at 5 (noting that this definition was “originally articulated by William H. Neukom in 2007, and it has since been vetted with thousands of individuals in over one hundred countries.”).

¹¹⁶ *See id.* at 9–17. The first factor, “limited government powers,” “measures the extent to which those who govern are subject to law.” *Id.* at 9. The second factor, “absence of corruption,” contemplates the “use of public power for private gain.” *Id.* at 10. The third factor, “order and security,” “measures how well the society assures the security of persons and property.” *Id.* The fourth factor, “fundamental rights,” analyzes the “system of positive law” that protect human rights. *Id.* at 11. The fifth factor, “open government[,] allows for a broader level of access,

system is a critical institution within a rule-of-law society.¹¹⁷ It is the system by which grievances are addressed and actions are brought “against individuals for offenses against society.”¹¹⁸ The WJP criminal justice factor evaluates the system based upon seven criteria. First, in determining whether the system is effective, it “[m]easures whether perpetrators of crimes are effectively apprehended and charged. It also measures whether police, investigators, and prosecutors have adequate resources, are free of corruption, and perform their duties competently.”¹¹⁹ Second, to determine whether the system is “timely and effective,” it “[m]easures whether perpetrators of crimes are effectively prosecuted and punished. It also measures whether criminal judges and other judicial officers are competent and produce speedy decisions.”¹²⁰ Third, the project determines whether the “correctional system is effective in reducing criminal behavior” by “[m]easur[ing] whether correctional institutions are secure, respect prisoners’ rights, and are effective in preventing recidivism.”¹²¹ The fourth factor “[m]easures whether the police and criminal judges are impartial and whether they discriminate in practice based on socio-economic status, gender, ethnicity, religion, national origin, sexual orientation, or gender identity” to determine whether the system is impartial.¹²² The fifth factor examines the corruption of the system by “[m]easur[ing] whether the police, prosecutors, and judges are free of bribery and improper influence from criminal organizations.”¹²³ The sixth factor studies whether the “system is free of improper government influence” by “[m]easur[ing] whether the criminal justice system is independent from government or political influence.”¹²⁴ Finally, and most critical to the discussion in this Article, the seventh factor scrutinizes “due process of the law and rights of the accused” by measuring:

[W]hether the basic rights of criminal suspects are respected, including the presumption of innocence and the freedom from arbitrary arrest and unreasonable pre-trial detention. It also measures whether criminal suspects are able to access and challenge evidence used against them, whether they are subject to abusive treatment, and whether they are provided with

participation, and collaboration between the government and its citizens, and plays a crucial role in the promotion of accountability.” *Id.* at 12. The sixth factor is “effective regulatory enforcement,” which “measures the fairness and effectiveness in enforcing government regulations.” *Id.* at 13. The seventh factor, “access to civil justice,” “measures whether ordinary people can resolve their grievances through formal institutions of justice in a peaceful and effective manner, as well as in accordance with generally accepted social norms rather than resorting to violence or self-help.” *Id.* at 13–14. The eighth factor measures whether the system has an “effective criminal justice system[] . . . capable of investigating and adjudicating criminal offenses effectively and impartially, while ensuring . . . the rights of suspects” and protecting victims. *Id.* at 14–15. The final factor, “informal justice,” refers to the ways that countries resolve disputes in “traditional, tribal, and religious courts as well as community-based systems.” *Id.* at 15.

¹¹⁷ *Id.* at 14.

¹¹⁸ *Id.*

¹¹⁹ See WORLD JUSTICE PROJECT, WORLD JUSTICE PROJECT RULE OF LAW INDEX 2017–2018 13 (2018), https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_0.pdf [<https://perma.cc/E9WW-SYLU>].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

adequate legal assistance. In addition, it measures whether the basic rights of prisoners are respected once they have been convicted of a crime.¹²⁵

The American constitutional experiment with the rule of law “has appeared to be singularly innovative and successful and thus serves as a world model.”¹²⁶ Specifically, the Bill of Rights has been consistently incorporated in rebuilding and developing countries seeking a rule-of-law system.¹²⁷ The protections outlined in the Bill of Rights—such as the right against unreasonable searches and seizures, right to remain silent, and the right to a fair trial—form some of the core criminal protections implemented in other countries.¹²⁸

As such, it is surprising that the United States’ global rank on the WJP’s 2017 Rule of Law Index is nineteenth out of 113.¹²⁹ This rank places the United States behind Denmark, Norway, Sweden, the United Kingdom, and many other Western European countries.¹³⁰ Further, the United States is twentieth out of 113 for criminal justice.¹³¹ Again, the United States ranks behind most Western European countries.¹³²

These rankings are based on questionnaires given to the public and to subject-matter experts in each country.¹³³ Like many of the questions asked for the Rule of Law Index, the criminal justice questions were subjective.¹³⁴ The questionnaire asked for opinions regarding: prison “conditions and overcrowding;” “rehabilitative programs and recidivism;” availability of “facilities for dangerous and less serious offenders;” prison escapes; “percentage [] of convicted criminals released from prison [who] relapse into criminal behavior;” police discrimination; judge impartiality; corruption of public officials; whether suspects were presumed innocent; likelihood of “torture and abusive treatment to suspects;” whether and when suspects receive legal counsel; whether the suspects are provided translators; whether defendants were allowed access to the evidence to be used against them; what rights prisoners have; and whether the government interferes in the operations of the criminal justice system.¹³⁵

Unfortunately, neither the surveys nor the Rule of Law Index analyzed the substantive laws or procedures of each country to determine which laws or procedures were most conducive to higher ratings. Nevertheless, the subjective responses of the participants are still helpful. When

¹²⁵ *Id.*

¹²⁶ Martin Shapiro, *The Globalization of Law*, 1 *IND. J. GLOBAL LEGAL STUD.* 37, 48 (1993).

¹²⁷ *Id.* at 48–49.

¹²⁸ See, e.g., Stefano Maffei & David Sonenshein, *The Cloak of the Law and Fruits Falling From the Poisonous Tree: A European Perspective on the Exclusionary Rule in the Gäfgen Case*, 19 *COLUM. J. EUR. L.* 21, 23–25 (2013); see also, e.g., Margaret K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 *N.Y.U. J. INT’L L. & POL.* 629, 636–48 (2011).

¹²⁹ WORLD JUSTICE PROJECT, *supra* note 119, at 16.

¹³⁰ *Id.*

¹³¹ *Id.* at 39.

¹³² *Id.*

¹³³ WORLD JUSTICE PROJECT, *METHODOLOGY* 152, https://worldjusticeproject.org/sites/default/files/documents/rolindex2016_methodology.pdf (last visited Dec. 29, 2018) [<https://perma.cc/P7NA-8DN7>].

¹³⁴ *Id.*

¹³⁵ Botero & Ponce, *supra* note 111, at 53–54. See Appendix for the full list of questions.

analyzing other countries' legal systems, knowing what the country's people think about their system is instructive. As courts implement the law, especially criminal law, one party will necessarily feel that the government, through the court, has sided against them.¹³⁶ For many Americans, their interaction with the court and legal system will primarily be through compulsory procedures, such as the criminal law process. "Police, prosecution, and other agencies [of the government] executing criminal law may unjustly deprive a person of her freedoms."¹³⁷ The "appointments, promotion, tenure, and salaries [of judges] depend on the government."¹³⁸ Those subject to the implications of a ruling may believe that the rich and powerful act against their interest in favor of other rich and powerful players.¹³⁹ For example, a criminal defendant will likely view the prosecutor as part of the same rich and powerful group to which the judge also belongs, as they both operate effortlessly within the system.¹⁴⁰ This observation is compounded if the judge rules in favor of the prosecutor.¹⁴¹ In fact, at the moment of the ruling, a "shift occurs from [appealing to a neutral arbiter for a decision] to a structure that is perceived by the loser as two against one."¹⁴² If people perceive their criminal justice system is corrupt or unfair, it will undermine the entire rule-of-law structure.¹⁴³

This perception, in turn, affects other rule-of-law issues, such as access to justice.¹⁴⁴ When the average American's only interaction with the court system is a negative one, people are unlikely to turn to the courts for assistance when they need it in the future.¹⁴⁵ Thus, bail reform and our criminal justice system needs to be as fair and balanced as possible. In determining what the best system of bail may be for Texas (and other states), it is helpful to examine the federal

¹³⁶ See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 19 (1981).

¹³⁷ Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1506 (2006).

¹³⁸ *Id.* "Arguably, only impartial jurors can adequately protect an individual from such abuses." *Id.* (citing RANDOLF N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 18–24 (2003) (stating the conventional wisdom that perceives juries as protecting individuals from being abused by the government)); John B. Attanasio, *Foreword: Juries Rule*, 54 SMU L. REV. 1681, 1681 (2001) ("The jury is one of the key protections of individual rights, shielding the individual against the government. Before government can fine, imprison, or kill a member of the community, that person has a right to a jury trial.").

¹³⁹ See SHAPIRO, *supra* note 136.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 2, 19.

¹⁴² *Id.* at 2.

¹⁴³ See *id.* "The inability to make bail has been a virtual constant in [Tyrone] Tomlin's life. His first encounter with the law came when he was 14 or 15—he recalls being picked up on a robbery charge and sent to Spofford juvenile detention center in the Bronx because his family couldn't pay bail. After a few months, he says, he pleaded guilty and received probation. 'They said it's supposed to teach you a lesson,' he said. 'It just got me worse.' In two-thirds of the times he has pleaded guilty to misdemeanors in the last 14 years, he did so either at arraignment to avoid being sent to Rikers [Island, New York's notorious jail complex] or after already spending as much as two weeks at Rikers. Not once has he been able to pay bail. 'I'm not Johnny Rich-Kid with a silver spoon,' he says. For Tomlin, the historical evolutions of bail and pretrial jurisprudence are abstractions without meaning in his life. Bail is simply a feature of the landscape, the thing that means he is locked up when someone with more money wouldn't be. 'Sure, yeah, I'm mad about it,' he said grudgingly. 'But that's the way it is. I've got to accept it. It's not right, but it's the way it is.' He shrugged. 'What are you going to do?'" Pinto, *supra* note 44.

¹⁴⁴ See SHAPIRO, *supra* note 136.

¹⁴⁵ See *id.*

government's and other states' bail systems, as well as the bail systems of foreign countries that rank more highly than the United States on the Rule of Law Index for guidance.

V. HOW WOULD SWITCHING THE DEFAULT RULE AFFECT THE BAIL SYSTEM?

The default rule, often referred to as the status-quo bias, is a person's natural preference for the current state of affairs.¹⁴⁶ This preference exists because people tend to see the disadvantages of leaving the status quo more than the advantages.¹⁴⁷ This bias has been shown in a variety of studies and in the field.

One experiment with the default rule involved proctors giving a hypothetical situation where the test subjects received a large inheritance from a great-uncle, and the proctors instructed the test subjects to decide how to invest it.¹⁴⁸ The proctors gave the subjects different prompts. Some subjects received a neutral prompt, where the subject could choose to invest the money in a moderate-risk company, a high-risk company, treasury bills, or municipal bonds.¹⁴⁹ Proctors gave other subjects a default rule prompt, where proctors also instructed the subjects that "significant portion of [the money was to be] invested in [a] moderate-risk [c]ompany . . . (The tax and broker commission consequences of any change [were assumed to be] insignificant.)"¹⁵⁰ The proctors also gave the default rule prompt to other subjects with other alternatives pre-selected (high-risk company, treasury bills, etc.).¹⁵¹

The results of the experiment showed that the option presented as the default was much more popular than the other options.¹⁵² In the experiment with two options for each question, the default was preferred over the other option in sixteen of twenty-four cases.¹⁵³ With three options for each question, the default was preferred in thirteen of eighteen cases.¹⁵⁴ The final version, with four options, resulted in the default being preferred in seventeen of twenty-four cases.¹⁵⁵ This strong preference for the default option also seems to increase when there is more than one alternative available.¹⁵⁶

Both New Jersey and Pennsylvania's state car insurance programs are an example of an "unplanned, natural experiment" of the "default rule" effect.¹⁵⁷ New Jersey had created a program

¹⁴⁶ See Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194 (1991).

¹⁴⁷ *Id.* at 197–98.

¹⁴⁸ William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. Risk & Uncertainty 7, 12 (1988).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 12–13.

¹⁵¹ *Id.* at 13.

¹⁵² *Id.* at 14–19.

¹⁵³ *Id.* at 14.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 19.

¹⁵⁷ Sunstein, *supra* note 1, at 114 (citing Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, in CHOICES, VALUES, AND FRAMES 288, 294–95 (Daniel Kahneman & Amos Tversky eds., 2000)).

in which the default included a “relatively low premium and no right to sue.”¹⁵⁸ Buyers were permitted to switch from the default and, for a higher premium, be allowed to sue.¹⁵⁹ Pennsylvania, by contrast, created a program with “a full right to sue and a relatively high premium.”¹⁶⁰ Buyers were permitted to switch from the default and, for a lower premium, be given no option to sue.¹⁶¹ In both states, the default was kept by a majority of insurance buyers. “A strong majority accepted the default rule in both states, with only about [20%] of New Jersey drivers acquiring the full right to sue, and [75%] percent of Pennsylvania drivers retaining that right.”¹⁶² Thus, opting for the default is a strong tendency even when there are relatively low transactional costs in switching.

This default-rule bias has also been proven in studies regarding changes to statutory laws or constitutional provisions that have been designated the default,¹⁶³ patients choosing the default medical option to their detriment,¹⁶⁴ and even that the default chocolate option tastes best.¹⁶⁵

The default-rule bias has proven to be “sticky,” and thus, resistant to change.¹⁶⁶ “Making one option the [default rule] . . . seems to establish a reference point people move away from only reluctantly . . .”¹⁶⁷ Lawyers, and thus judges, also exhibit the default-rule bias.¹⁶⁸ As noted above, using “fixed schedules” or otherwise requiring monetary surety bonds are the norm in Texas. Due to the default-rule effect, this means that the majority of accused persons awaiting trial will receive a monetary surety bond as a requirement of release simply because it is the default.

But what if we were to switch the default rule? Instead of the norm being that monetary bail is required to be released, what if the default rule is that monetary bail is only required in

¹⁵⁸ Sunstein, *supra* note 1, at 114 (citing Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35 (1993)).

¹⁵⁹ Sunstein, *supra* note 1, at 114.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ James R. Zink & Christopher T. Dawes, *The Dead Hand of the Past? Toward an Understanding of “Constitutional Veneration,”* 38 J. POL. BEHAV. 535, 541 (2015).

¹⁶⁴ Gaurav Suri, Gal Sheppes, Carey Schwartz, & James J. Gross, *Patient Inertia and the Status Quo Bias: When an Inferior Option is Preferred*, 24(9) J. PSYCHOL. SCI. 1763, 1763 (2013).

¹⁶⁵ See Scott Eidelman, Jennifer Pattershall, & Christian S. Crandall, *Longer is Better*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 993, 996–97 (2010).

¹⁶⁶ Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1095 (2000).

¹⁶⁷ Camerer, *supra* note 157, at 295.

¹⁶⁸ Stephen M. Garcia, John M. Darley, & Robert J. Robinson, *Morally Questionable Tactics: Negotiations Between District Attorneys and Public Defenders*, 27 PERSONALITY SOC. PSYCHOL. BULL., 731, 737–39 (2001). In a 2001 study of the negotiations between prosecutors and public defenders, lawyers in both groups exhibited the status-quo bias when discussing the status, tactics, and strategies of the other group. *Id.* Further, a 2017 survey states that “65% of law firm leaders say partners resist most change efforts.” Thomas S. Clay & Eric A. Seeger, *2017 Law Firms in Transition*, ALTMAN WEIL vii (2017), http://www.altmanweil.com/dir_docs/resource/90D6291D-AB28-4DFD-AC15-DBDEA6C31BE9_document.pdf [<https://perma.cc/L4Q3-WNMA>]. However, even among law firm leaders, a 2010 survey found that less than 20% stated that their leadership philosophy “embrace[ed] innovation and change.” DEBORAH L. RHODE, *LAWYERS AS LEADERS* 56 (Oxford Univ. Press 2013) (citing Law Firm Leadership 2010 Research on Current Practices and Responsibilities, 10 Law Office Management and Administration 20 (Oct. 2010)).

exceptional circumstances? If judges have to make additional findings to set a monetary amount as a condition of release, what would that do to the number of defendants detained while awaiting trial? The research on the default rule discussed above suggests that it would result in fewer defendants sitting in jail simply because they cannot afford bail.

VI. BAIL SYSTEM IN OTHER JURISDICTIONS¹⁶⁹

Other jurisdictions have experimented with switching the default rule in the bail system, even though they may not call it that when doing so. This Section will discuss jurisdictions that have moved away from requiring monetary bail as a condition of release for most pretrial defendants, and jurisdictions that have traditionally not required monetary bail.

A. Federal System

As noted above, the Eighth Amendment provides that “excessive bail shall not be required.”¹⁷⁰ Additionally, though the Supreme Court may not have provided much guidance, the Federal Code of Criminal Procedure does provide more detail.¹⁷¹ If a person charged with an offense is not released upon personal recognizance or unsecured appearance bond, he or she can be released based upon the condition not to commit another crime during release and one or more of several other conditions.¹⁷² These conditions include maintaining employment or education, and

¹⁶⁹Although only the Federal System, Washington, D.C., and New Jersey are discussed in this Article, New Mexico, New Orleans, Alabama, Georgia, and Maryland have also enacted bail reform. *See* ODonnell v. Harris Cty., 251 F. Supp. 3d 1052, 1079-84 (S.D. Tex. 2017).

¹⁷⁰U.S. Const. amend. VIII.

¹⁷¹18 U.S.C. § 3142 (2012). This statute provides:

Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

- (1) released on personal recognizance or upon execution of an unsecured appearance bond, . . . ;
- (2) released on a condition or combination of conditions . . . ;
- (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion . . . ; or
- (4) detained

¹⁷²18 U.S.C. § 3142(c)(1)(B) (2012). This section provides:

[S]ubject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person--

- (i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;
- (ii) *maintain employment*, or, if unemployed, actively seek employment;
- (iii) *maintain or commence an educational program*;
- (iv) abide by specified restrictions on personal associations, place of abode, or travel;
- (v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
- (vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
- (vii) comply with a specified curfew;
- (viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

complying with several other conditions that assure the judge that the person is not a threat to society.¹⁷³ Further, the judge “may not impose a financial condition that results in the detention of the person.”¹⁷⁴ A district court may only set bail beyond a defendant’s ability to pay when the court explains the reason for doing so, for example, if the defendant poses a flight risk.¹⁷⁵ As such, the default is pretrial release, not pretrial detention.¹⁷⁶ The Federal rule seems to have been created to avoid as much disruption of personal life as possible until proven guilty of the crime.¹⁷⁷

B. *Washington, D.C.*

In 1994, Washington, D.C. changed its bail system in reaction to current practices of the judges and prosecutors. D.C.’s code was amended to allow judges to set bail at an amount high enough to “reasonably assure the defendant’s presence at all court proceedings,” yet not high enough that it “result[s] in the preventative detention of the person.”¹⁷⁸ The exceptions to this general rule are for defendants charged with a violent or dangerous crime, are a flight risk, or pose a danger to the community.¹⁷⁹

To explain this change, Judge Truman Morrison, Senior Judge on the Superior Court of the District of Columbia, testified in the *ODonnell* case.¹⁸⁰ Judge Morrison stated that, prior to the 1994 change, judges were using high bail amounts to detain high-risk defendants without stating the grounds for doing so.¹⁸¹ After the change, judges were more transparent about using “preventative detention,” as provided by the rule, to prevent high-risk defendants from being

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *U.S. v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988).

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ D.C. Code Ann. § 23-1321(c)(3) (West 1981).

¹⁷⁹ D.C. Code Ann. § 23-1321(b) (West 1981).

¹⁸⁰ *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1078 (S.D. Tex. 2017).

¹⁸¹ *Id.*

released.¹⁸² Due to this change, most misdemeanor defendants are released upon nonfinancial conditions and supervision by D.C.'s pretrial-services agency.¹⁸³ Currently, only about 1.5% of misdemeanor defendants are detained, even though secured money bail is still available in D.C.¹⁸⁴ Thus, D.C., by switching the default rule from pretrial detention through bond amount to pretrial release, has significantly decreased the number of people in jail for misdemeanor offenses.

C. *New Jersey*

In 2017, New Jersey bail reform took effect and nearly eliminated cash bail for criminal defendants charged with non-violent offenses.¹⁸⁵ Like Texas's attempted Senate Bill 1338 in the 85th Legislative Session, this reform was aimed at preventing "violent repeat offenders" from buying "their way out of jail" and allowing low-risk defendants charged with nonviolent offenses out of jail if they could not afford bail.¹⁸⁶ New Jersey now uses a risk-assessment algorithm to determine who should receive bail and how the amount should be set.¹⁸⁷ This has resulted in a 16% decrease in the county jail population, and "preliminary [research] show[s] a [5%] decrease in violent crime" overall for the year.¹⁸⁸ Thus, New Jersey has switched the default rule from a fixed amount to a risk-assessment algorithm, which appears to be successful in releasing more pretrial defendants.

D. *Foreign Countries' Bail Systems*

Most Western European countries do not have bail systems, or they do have a bail system but use it infrequently. Regardless of system, these countries all lean toward pretrial release for minor offenses, unless the defendant is a flight risk or dangerous to the community.

1. Countries with a Bail System¹⁸⁹

Like the United States, Switzerland has an "innocent until proven guilty" clause in its constitution.¹⁹⁰ As such, Switzerland's constitution provides that "any person in pre-trial detention has the right to be brought before a court without delay," and that the judge must decide whether the "person must remain in detention or be released."¹⁹¹ The criminal justice system allows for release of pretrial defendants through "personal recognizance or bail unless the [judge] believe[s] the person [is] dangerous or a flight risk."¹⁹² However, approximately 27% of all prisoners in

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Tashea, *supra* note 43.

¹⁸⁶ *Id.* Also like Texas, this reform faced staunch opposition from the professional bail bondsmen lobby. *See id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ This discussion is not meant to be an exhaustive description of each country that uses this system. Instead, it is meant only to give examples of different structures that countries use.

¹⁹⁰ CONSTITUTION FÉDÉRALE [CST][CONSTITUTION] Apr. 18, 1999 RO 101, art. 32, para. 1 (Switz.).

¹⁹¹ *Id.* at art. 31, para. 3.

¹⁹² BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *Switzerland 2016 Human Rights Report*, U.S. DEP'T OF ST. 5 (2016), <https://www.state.gov/documents/organization/265692.pdf> [<https://perma.cc/K73E-PDNH>].

Switzerland were pretrial detainees.¹⁹³ More concerning, Switzerland's highest court has ruled that "detention must not exceed the length of the expected sentence for the crime for which a suspect is charged."¹⁹⁴ Thus, unsurprisingly, lengthy detention terms have been reported.¹⁹⁵ Even so, Switzerland's percentage of inmates awaiting trial is much lower than Texas's.

The United Kingdom ("U.K.") does have a bail system, and "defendants awaiting trial have the right to bail."¹⁹⁶ Like other countries, the U.K. does not release those "judged to be flight risks, likely to commit another offense, suspected terrorists, or in other limited circumstances."¹⁹⁷ However, pretrial detention may not exceed 182 days unless it is an exceptional case.¹⁹⁸

Germany also has a bail system, but judges use it infrequently.¹⁹⁹ Judges typically only require bail when there is a "clear risk" that the defendant might flee. Although, in such cases, the defendants are usually not released until trial.²⁰⁰

2. Countries without a Bail System²⁰¹

Sweden, by contrast, has no bail system.²⁰² Although some have criticized Sweden for excessive pretrial detention (likely for high-risk defendants),²⁰³ Swedish judges frequently release pretrial defendants.²⁰⁴ Courts will release people charged with offenses punishable with one year or more of imprisonment unless the person is a flight risk, is dangerous to the community, or will "interfere with ongoing investigations."²⁰⁵ On the other hand, Swedish courts are unlikely to release people charged with offenses punishable with at least two years in prison unless "clearly unjustified."²⁰⁶ However, each person's detention is "reviewed every other week, and [defendants] can appeal against each decision to extend [their] detention."²⁰⁷

¹⁹³ *Id.* at 6.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *United Kingdom 2016 Human Rights Report*, U.S. DEP'T OF ST. 6 (2016), <https://www.state.gov/documents/organization/265700.pdf> [<https://perma.cc/3H9E-C8HN>].

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *Germany 2016 Human Rights Report*, U.S. DEP'T OF ST. 4 (2016), <https://www.state.gov/documents/organization/265636.pdf> [<https://perma.cc/EQ5M-UL7P>].

²⁰⁰ *Id.*

²⁰¹ This discussion is not meant to be an exhaustive description of each country that uses this system. Instead, it is meant only to give examples of different structures that countries use.

²⁰² Per-Olof H. Wikstrom & Lars Dolmen, *World Factbook of Criminal Justice Systems: Sweden*, BUREAU OF JUST. STAT. 14, <https://www.bjs.gov/content/pub/pdf/wfbcjssw.pdf> (last visited Jan. 2, 2019) [<https://perma.cc/AYS2-6QH8>].

²⁰³ *Arrested in: Sweden*, FAIR TRIALS (2015), <https://www.fairtrials.org/arrested-abroad/arrested-in/arrested-in-sweden/> [<https://perma.cc/22NP-ZF2N>].

²⁰⁴ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *Sweden 2016 Human Rights Report*, U.S. DEP'T OF ST. 4 (2016), <https://www.state.gov/documents/organization/265690.pdf> [<https://perma.cc/WU73-E97Z>].

²⁰⁵ *Arrested in: Sweden*, *supra* note 203.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

Norway also does not have a bail system.²⁰⁸ Once police have arrested a person, the judge decides if the defendant should be released or held until trial.²⁰⁹ Those accused of minor crimes are frequently released, while those “accused of serious or violent crimes usually remain[] in custody until trial.”²¹⁰

E. Conclusion

As noted by Judge Rosenthal in *ODonnell* “[w]hether by legislative enactment, judicial rulemaking, or court order, there is a clear and growing movement against using secured money bail to achieve a misdemeanor arrestee’s continued detention.”²¹¹ This shift has taken place not just in other states around the United States, but is also the standard in most Western European countries that score higher on the WJP’s Rule of Law Index than the United States.²¹²

VII. SWITCHING THE DEFAULT RULE – TEXAS SHOULD IMPLEMENT A NO MONETARY BOND RELEASE SYSTEM FOR MISDEMEANORS AND NON-VIOLENT FELONY OFFENSES WHERE THE DEFENDANT IS UNABLE TO AFFORD TO PAY BAIL, IS NOT A FLIGHT RISK, AND IS NOT DANGEROUS TO THE COMMUNITY

“Take a recent case in point, from The Dallas Morning News. A middle-aged woman arrested for shoplifting \$105 worth of clothing for her grandchildren sat in jail almost two months because bail was set at \$150,000—far more than all her worldly goods. Was she a threat to society? No. A flight risk? No. Cost to taxpayers? \$3,300. Benefit: we punished grandma. Was it worth it? No. And to add to the nonsense, Texas law limits judges’ power to detain high-risk defendants. High-risk defendants, a threat to society, are freed; low-risk defendants sit in jail, a burden on taxpayers. This makes no sense.”

- Hon. Nathan L. Hecht, Texas Supreme Court Chief Justice²¹³

Returning to Justice Marshall’s dissent in *United States v. Salerno*, if the United States is serious about “honoring the presumption of innocence,”²¹⁴ we must reform the way that misdemeanor and non-violent felony defendants are treated while awaiting trial. Rather than treat them as guilty and keep them in jail unless they can pay for their release, we should grant their release unless there is a very good reason for not doing so. Even though doing so may occasionally allow the accused to “run[] from trouble and the jail-term the judge had in mind,”²¹⁵ it is preferable

²⁰⁸ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *Norway 2016 Human Rights Report*, U.S. DEP’T OF ST. 3 (2016), <https://www.state.gov/documents/organization/265670.pdf> [<https://perma.cc/5Q6F-LZ9J>].

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1084 (S.D. Tex. 2017).

²¹² WORLD JUSTICE PROJECT, *supra* note 119, at 3.

²¹³ Nathan L. Hecht, Chief Justice of the Supreme Court of Texas, *The State of the Judiciary in Texas: Address to the 85th Texas Legislature* (Feb. 1, 2017) (transcript available at <http://www.txcourts.gov/media/1437289/soj-2017.pdf>) [<https://perma.cc/FT7C-DJWX>].

²¹⁴ *United States v. Salerno*, 481 U.S. 739, 767 (1987).

²¹⁵ George Straight, *The Seashores of Old Mexico*, YOUTUBE (Nov. 22, 2009), <https://www.youtube.com/watch?v=V-9FdWmZqRQ> [<https://perma.cc/6FDH-JYMW>].

to keeping misdemeanor and non-violent felony defendants in prison simply because they cannot afford their release. Thus, courts and legislatures should make pretrial release without bail for misdemeanor and non-violent felony offenses the default, except when the defendant is a flight risk or dangerous to the community.²¹⁶ By making this trend the default rule in Texas and other states, it will increase the average American's perception of, and respect for, the rule of law in the United States.

²¹⁶ See Sunstein, *supra* note 1, at 107.

Appendix

Kaiser B. Effects: Criminal Justice		Average (K1.1, K1.2, K1.3, K1.4, K1.5, K1.6, K1.7)
K1.1: Criminal Justice		Average (K1.1, K1.2)
K1.1: Criminal Justice		Average (K1.1, K1.2)
Q10033	Q10033	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (a) Lack of effective intelligence systems to support criminal investigations
Q10034	Q10034	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (b) Lack of proactive investigation methods, such as undercover operations
Q10035	Q10035	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (c) Lack of prosecutive investigation methods, such as undercover operations
Q10036	Q10036	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (d) Lack of prosecutive investigation methods, such as undercover operations
Q10037	Q10037	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (e) Lack of prosecutive investigation methods, such as undercover operations
Q10038	Q10038	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (f) Lack of prosecutive investigation methods, such as undercover operations
Q10039	Q10039	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (g) Lack of prosecutive investigation methods, such as undercover operations
Q10040	Q10040	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (h) Lack of prosecutive investigation methods, such as undercover operations
Q10041	Q10041	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (i) Lack of prosecutive investigation methods, such as undercover operations
Q10042	Q10042	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (j) Lack of prosecutive investigation methods, such as undercover operations
Q10043	Q10043	SP (0)-NSP (1) On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecution, investigations, judicial police officers, etc.) in the city where you live: (k) Lack of prosecutive investigation methods, such as undercover operations
Q10044	Q10044	% Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10045	Q10045	% (a) Correctly solve or resolve the true perpetrator of a crime? (b) Provide a sense of justice to the victims of a crime? (c) Provide a sense of justice to the families of a crime?
Q10046	Q10046	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10047	Q10047	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10048	Q10048	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10049	Q10049	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10050	Q10050	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10051	Q10051	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10052	Q10052	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10053	Q10053	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10054	Q10054	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10055	Q10055	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10056	Q10056	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10057	Q10057	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10058	Q10058	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10059	Q10059	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:
Q10060	Q10060	Average (Q10044, Q10045) Based on your experience with criminal cases during the previous year, in approximately what percentage (% of them) did the criminal system:

217

217 Botero & Ponce, *supra* note 111, at 52.

8.7.1 The criminal justice system accord the accused due process of law.		Average (8.7.1, 8.7.2, 8.7.3, 8.7.4, 8.7.5, 8.7.6, 8.7.7)
QRQ383	QRQ(C)	Based on your experience with common criminal cases (such as armed robbery) during the last year, approximately what percentage (%) of the suspects: (a) Were in fact presumed innocent during the criminal investigation?
QRQ384	QRQ(C)	Based on your experience with criminal cases during the previous year, in approximately what percentage (%) of them did the criminal system: (a) Correctly indict or accuse the true perpetrator of a crime?
QRQ385	QRQ(C)	Based on your experience with criminal cases during the previous year, in approximately what percentage (%) of them did the criminal system: (b) Erroneously indict or accuse the true perpetrator of a crime?
QRQ386	QRQ(C)	How likely are the police to arrest innocent people and take them to court on false charges in order to solicit witness or to fill a quota?
8.7.2 Arrest and pre-trial detention		Average (QRQ387, QRQ388, QRQ389, QRQ390, QRQ391, QRQ392, QRQ393, QRQ394, QRQ395)
QRQ387	QRQ(C)	How likely is it that the suspect remains in police custody without an indictment (or without formal charges) by the prosecutor, or by the competent judicial or administrative authority: (a) For more than three months?
QRQ388	QRQ(C)	How likely is it that the suspect remains in police custody without an indictment (or without formal charges) by the prosecutor, or by the competent judicial or administrative authority: (b) For more than one year?
QRQ389	QRQ(C)	How likely is it that the suspect remains in police custody without an indictment (or without formal charges) by the prosecutor, or by the competent judicial or administrative authority: (c) For more than three years?
QRQ390	QRQ(C)	How likely is it that the police: (a) Arbitrarily arrest a citizen without probable cause (false arrest)?
QRQ391	QRQ(C)	How likely is it that the police: (b) Use excessive force during arrests?
QRQ392	QRQ(C)	How likely is it that a political dissident is taken from his home to a detention center without any warrant of arrest?
QRQ393	QRQ(C)	How likely is it that the police search without warrant the house of a political dissident?
QRQ394	QRQ(C)	Please answer the following questions to the best of your knowledge: In the last 3 years, have you or someone in your household been subjected to physical abuse by the police or the military?
QRQ395	QRQ(C)	How likely is it that the police interrogators inflict minor physical harm on the detained suspect to admit the crime?
QRQ396	QRQ(C)	How likely is it that the police interrogators inflict severe physical harm on the detained suspect to admit the crime?
8.7.4 Legal representation		Average (QRQ397, QRQ402)
QRQ397	QRQ(C)	If the detained suspect requests access to legal counsel, how likely is it that he/she receives adequate legal counsel from a public defender: (a) During the initial police custody?
QRQ398	QRQ(C)	If the detained suspect requests access to legal counsel, how likely is it that he/she receives adequate legal counsel from a public defender: (b) During pre-trial detention?
QRQ399	QRQ(C)	If the detained suspect requests access to legal counsel, how likely is it that he/she receives adequate legal counsel from a public defender: (c) During the trial?
QRQ400	QRQ(C)	On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecutors, investigators, judicial police officers, etc.) in the city where you live: (a) Insufficient number of state-provided or pro-bono (free-of-charge) attorneys for poor criminal defendants
QRQ401	QRQ(C)	On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems for the criminal investigative services (prosecutors, investigators, judicial police officers, etc.) in the city where you live: (b) Incompetence of state-provided or pro-bono (free-of-charge) attorneys for poor criminal defendants
QRQ402	QRQ(C)	How likely is the detained suspect to be tried and convicted in a secret trial?
8.7.5 Access to translations		QRQ403
QRQ403	QRQ(C)	If the detained suspect does not speak any of the official languages of your country, in practice, how likely is it that he/she obtains access to an interpreter?
8.7.6 Evidence		Average (QRQ404, QRQ405)
QRQ404	QRQ(C)	Based on your experience with common criminal cases (such as armed robbery) during the last year, approximately what percentage (%) of the suspects: (b) Were in fact provided full access to the evidence used against them in court?
QRQ405	QRQ(C)	Based on your experience with common criminal cases (such as armed robbery) during the last year, approximately what percentage (%) of the suspects: (c) Were in fact allowed to challenge the evidence used against them in court?
8.7.7 Rights of prisoners		Average (QRQ406, QRQ410)
QRQ406	QRQ(C)	The following question aims at identifying the main problems faced by the correctional institutions in your country. On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems faced by correctional facilities (jails and prisons) in the city where you live: (a) Harsh conditions and overcrowding
QRQ407	QRQ(C)	The following question aims at identifying the main problems faced by the correctional institutions in your country. On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems faced by correctional facilities (jails and prisons) in the city where you live: (c) Physical abuse by guards and correctional personnel
QRQ408	QRQ(C)	The following question aims at identifying the main problems faced by the correctional institutions in your country. On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems faced by correctional facilities (jails and prisons) in the city where you live: (d) Poor access to health care and malnutrition among inmates
QRQ409	QRQ(C)	The following question aims at identifying the main problems faced by the correctional institutions in your country. On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems faced by correctional facilities (jails and prisons) in the city where you live: (e) Physical abuse between inmates
QRQ410	QRQ(C)	The following question aims at identifying the main problems faced by the correctional institutions in your country. On a scale from 1 to 10 (with 10 meaning a very serious problem, and 1 meaning not a serious problem), please tell us how significant are the following problems faced by correctional facilities (jails and prisons) in the city where you live: (f) Lack of accessible complaint mechanisms

219