

# CRIMINAL JUSTICE & GOVERNMENT REFORM TASK FORCE



For more information about this document, please contact the Texas Conservative Coalition

Research Institute:

Texas Conservative Coalition Research Institute

P.O. Box 2659, Austin, TX 78768

(512) 474-6042

www.txccri.org

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### **Texas Conservative Coalition Research Institute**

2021-2022 Criminal Justice & Government Reform Task Force

**Final Report** 

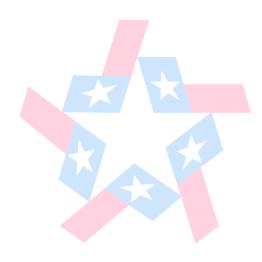


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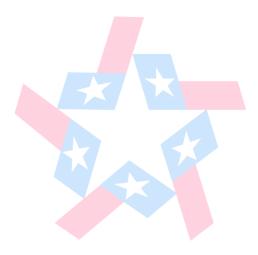
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### I. Introduction

The 2021-22 TCCRI Criminal Justice & Government Reform Task Force explored a variety of areas to help ensure that the state and local governments in Texas operate efficiently and with due respect for the rights of Texans. Newly added to the Task Force's responsibilities was the "legislative reform" aspect of the Task Force, which explored ways to make the legislative process more efficient and transparent. The Task Force pays particularly close attention to public safety, making recommendations related to the number of officers serving a particular population, to remedy issues related to district attorneys who are not fulfilling the obligations of the offices they were elected to serve, and to bail reform. Once again, the Task Force recommends reforming and/or abolishing the practice of civil asset forfeiture. With respect to further criminal justice reforms, the Task Force continues to make recommendations related to reforming the state's State Jail Felony tier of crimes. Lastly, the Report recommends a number of election-related reforms, as well as reasonable reforms to taxpayer benefits given to public sector union employees.





### II. Public Safety

Murders in Texas and the United State as a whole soared in 2020 and have remained elevated. This rapid spike in homicide numbers, and brazen acts of criminality in various parts of the country, have made public safety an increasingly important public policy issue. In October 2022, Gallup reported that 56 percent of Americans- the highest percentage in five decades- say crime is worse in their area than it was a year ago.¹ Policymakers must demonstrate a recognition that protecting the physical safety of the public is the first goal of government.

There have been key developments in the area of public safety in Texas in recent years. Voters in some of the state's larger cities have elected district attorneys with non-traditional views of law and order, the Legislature passed a key bail reform bill in the second called special session in September 2021, and the city of Austin voted down a proposition in November 2021 that would have set a minimum police officer to resident ratio. There will be no shortage of criminal justice issues for the 88<sup>th</sup> Legislature to consider. The Legislature should consider the following measures to promote public safety:

- Increase oversight of progressive prosecutors to ensure that they are not effectively vetoing criminal laws enacted by the Legislature to secure public safety;
- Require cities in Texas to maintain a minimum number of officers per a given number of residents;
- Continue reforming the state's bail system to ensure that the defendants who pose a threat to public safety and/or are a flight risk can be denied bail and detained pre-trial; and
- Improve the collection of data relating to the criminal justice system so that policymakers can better analyze trends and adjust current policies to benefit the state.

Before discussing each of these issues in detail, this Task Force Report will first provide an overview of important data on the state's criminal justice system.

### A. Part One: Background on the Current State of Crime in Texas

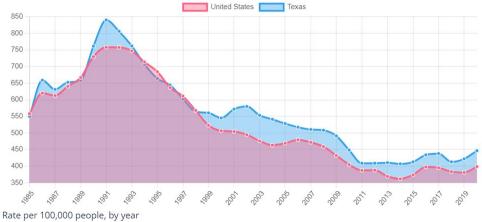
Some background on crime in Texas and on the country as a whole is helpful for understanding the criminal justice debate today. Two key questions are: how have crime rates changed over time, and how have incarceration rates changed over time?

The Federal Bureau of Investigation (FBI) provides information that sheds light on the first question, although its data on crime rates is divided into violent crime data and property crime data. According to the FBI, "Violent crime is composed of four offenses: homicide (murder and nonnegligent manslaughter), rape, robbery, and aggravated assault. Violent crimes involve force or threat of force." Property crime as defined by the FBI for crime reporting purposes includes burglary, larceny-theft, motor vehicle theft, and arson.<sup>3</sup>



Table 1 below illustrates the violent crime rate in both Texas and the United States from 1985-2020.

Table 1: National and Texas Violent Crime Rates, 1985-2020⁴
Rate of Violent Crime Offenses by Population



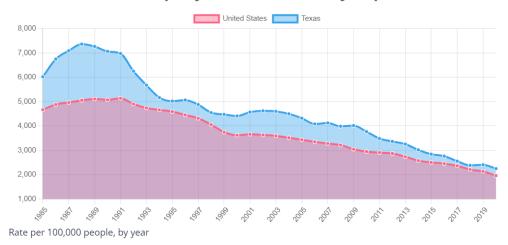
As the graph indicates, the violent crime rate peaked in 1991 and then began a long and significant decline, with an uptick evident since 2019 (although as discussed below, the increase in *murders* after 2019 was dramatic). These trends hold true for both the United States and Texas, although the national violent crime rate remains lower than that of Texas. In 2020, Texas' violent crime rate was 12 percent

Table 2 illustrates the property crime rate in each of Texas and the United States from 1985-2020.

Table 2: National and Texas Property Crime Rates, 1985-2020

higher than the corresponding national rate: 446.6 per 100,000 people, versus 398.5 per 100,000

Rate of Property Crime Offenses by Population



The trends evident are similar to those in the violent crime rate data in Table 1: after a peak in the late 1980's or early 1990's (1988 in the case of the Texas data, and in 1991 in the case of the federal data),



people, respectively.

there is a gradual but pronounced decline over the next (approximately) 30 years. As with violent crime, property crime in Texas in 2020 was meaningfully but not dramatically higher than in the U.S. as a whole: 14.6 percent higher. In absolute terms, the national property crime rate was 1,958.2 per 100,000 people, versus Texas' rate of 2245 per 100,000 people. Texas over time has closed the gap between both its property crime rate relative to the U.S. as a whole. Unlike with violent crime, however, there was no uptick in property crimes in 2020 in either national or Texas terms.

The FBI's data is subject to some limitations. First, it does not cover all crimes, such as fraud and "simple" assault.<sup>6</sup> Second, the data is based on the information that state-level entities report to the FBI, and the reporting rate is not 100 percent. For example, in 2020, 1,062 of 1,158 law enforcement agencies in Texas submitted data to the FBI.<sup>7</sup> Of course, the omission of crime rates by the roughly 100 non-reporting agencies could affect the overall data for the state, even though the FBI attempts to statistically adjust for those omissions.

The above graphs in Tables 1 and 2 illustrate data only through 2020; the FBI's post-2020 data has additional limitations. The FBI transitioned to a new crime reporting system as of January 1, 2021, which will include more detail and will show higher crime rates relative to years before 2021, all else being equal.<sup>8</sup> As it turns out, many law enforcement agencies struggled to report under the new system. The FBI attempted to supply the missing data by extrapolating from reported data, but the results are imprecise in that the FBI had to use wide ranges. For example, the state of New York in 2021 had a violent crime rate of between 45 and 159 per 100,000 people- a range so broad that the estimate is practically worthless.<sup>9</sup>

Further complicating matters, this reporting transition took place at around the same time as two other key events: the COVID-19 pandemic and the George Floyd-related protests and riots across the country. Each of these events conceivably affected crimes rates across the country, but reliable data is lacking. But what can be said with certainty is that the homicide rate in the United States increased dramatically starting in 2020. Because it leaves a dead body, homicide is a crime that can be tracked reasonably well. In 2021, the FBI estimated that 21,570 homicides took place in the United States, a stunning increase of 4,900 from 2019 (i.e., an increase of more than 29 percent).

This conclusion accorded with that of the Centers for Disease Control and Prevention (CDC) and the National Center for Health Statistics (NCHS). The CDC provides a useful alternative data source for homicides because it collects data from death certificates, whereas the FBI collects it from law enforcement agencies. The transcript of an interview conducted by NCHS is worth quoting at length because it illustrates just how shocking the jump in the murder rate from 2019 to 2020 was:

[T]he 30 percent jump in homicide in 2020 was the biggest one-year increase in over a century, with the lone bigger increase coming way back in 1905, essentially a statistical blip that was likely the result of changes to the national death registry at a time when the National Vital Statistics System was first being constructed. Prior to 2020, the biggest



increase in the national homicide rate came in 2001, the year of the September 11 attacks, when the rate increased 20 percent.<sup>10</sup>

The 2020 surge in homicides was even worse in Texas than in the nation as a whole. Murders in the state increased by 37.3 percent- 1,927 murders, up from 1,403 in 2019. Additionally, aggravated assaults increased by more than 16 percent compared to 2019. On a positive note, there were fewer rapes, robberies, and property crimes other than motor vehicle thefts.

While Americans hoped that such a dramatic one-year spike would be an aberration, and that murders would decline to 2019 levels, the FBI reported that murders increased nationally by 4.3 percent in 2021.<sup>14</sup> Although that estimate was based on less-than-ideal reporting by law enforcement agencies, that number is consistent with the findings of private organizations.<sup>15</sup> This trend has unfortunately been seen in Texas as well; the murder rate in Texas increased another 6.5 percent from 2020 to 2021, and the rape rate increased 9.5 percent.<sup>16</sup> On the positive side, the robbery rate plummeted by 17 percent, and property crime overall declined by 4.5 percent.<sup>17</sup>

Furthermore, although official data for 2022 will not be available until 2023, there are indications from news reports that the spike in homicides that Texas saw in 2020 and 2021 is not fading. Thus far in 2022, Dallas<sup>18</sup> and San Antonio<sup>19</sup> have seen significant year over year increases in homicides, while homicides in Houston<sup>20</sup> and Austin<sup>21</sup> are staying level.

In summary, the roughly 30-year decline in violent crime from in Texas (approximately) 1990 through 2019 gave way in 2020 to a stunning rise in homicides, which shows no signs of fading. While some types of violent crime may have actually declined from 2019 levels, homicide numbers are the key focus for two reasons. First, homicides are unlikely to go unreported, as many assaults, rapes, and robberies do. Second, homicide is the most serious crime there is; it is cold comfort to tell Texans that the overall violent crime rate is not rising even as homicides soar.

Given the trend of declining crime in both Texas from (roughly) 1990 through 2019, it is illuminating to examine the changes in the state's prison population over that time period. Table 3 below illustrates the explosive rise in the incarceration rate in Texas after 1991, particularly during the 1990's.

Table 3: Incarceration Rates in Texas, 1991 to 2020

Year	Total # of Prisoners in Federal or State Prison	County Jail Population	All Persons Incarcerated	State Population	Incarceration Rate (per 1,000 People)
1991	51,677	39,761	91,438	17,339,904	5.27
1991	61,178	52,023	113,201	17,650,479	6.41
1993	92,103	62,083	154,186	17,996,764	8.57
1994	118,195	56,694	174,889	18,338,319	9.54
1995	127,766	41,740	169,506	18,679,706	9.07
1996	132,383	51,172	183,555	19,006,240	9.66
1997	140,351	52,719	193,070	19,355,427	9.97



1998	144,510	54,891	199,401	19,712,389	10.12
1999	163,190	57,731	220,921	20,044,141	11.02
2000	166,719	55,416	222,135	20,949,316	10.60
2001	162,070	58,235	220,305	21,334,855	10.33
2002	162,003	62,355	224,358	21,723,220	10.33
2003	166,911	61,382	228,293	22,103,374	10.33
2004	168,105	61,279	229,384	22,490,022	10.20
2005	169,003	66,250	235,253	22,928,508	10.26
2006	172,116	69,286	241,402	23,507,783	10.27
2007	171,790	67,885	239,675	23,904,380	10.03
2008	172,506	65,514	238,020	24,326,974	9.78
2009	171,249	66,064	237,313	24,782,302	9.58
2010	173,649	68,183	241,832	25,253,466	9.58
2011	172,224	61,540	233,764	25,674,681	9.10
2012	166,372	61,196	227,568	26,059,203	8.73
2013	168,280	63,989	232,269	26,448,193	8.78
2014	166,043	62,360	228,403	26,956,958	8.47
2015	163,909	60,151	224,060	27,469,114	8.16
2016	163,703	63,679	227,382	27,862,596	8.16
2017	162,203	62,625	224,828	28,304,596	7.94
2018	163,628	65,719	229,347	28,702,243	7.99
2019	158,429	65,825	224,254	29,001,602	7.73
2020	135,906	63,971	199,877	29,217,653	6.84

Sources<sup>22</sup>

Note on methodology: Column titled "Total # of Prisoners in Federal or Sta<mark>te Pri</mark>son" shows prisoner count as of December 31<sup>st</sup> of the applicable year. Column titled "County Jail Population" shows the population of the county jails on the January 1<sup>st</sup> following the applicable year. For example, the 2019 population of 65,825 is actually as of January 1, 2020.

After peaking in 1999, the incarceration rate fell slightly, remained relatively constant for a number of years, and then began to gradually decline. The dramatic decrease in the incarceration rate in 2020 is attributable in large part to COVID-19.<sup>23</sup> As the federal Bureau of Justice Statistics noted in its report for 2020, the trend was nationwide: the number of admissions to state and federal prison fell a remarkable 40 percent between 2019 and 2020.<sup>24</sup>

Comparing the crime rate with the incarceration rate in Texas over the last three decades, one could hypothesize that Texans adopted a "lock 'em up" approach after facing escalating crime that peaked in 1991. It is certainly possible- even intuitive- that incarcerating more criminals was a contributing factor in the decline in the crime rate post-1991. Indeed, some commentators have said as much.<sup>25</sup> Other commentators argue that the nation as a whole began to see declining crime rates after the early 1990's, and that the declines were often larger in states that adopted a more rehabilitative approach to criminals.<sup>26</sup>



Crime is of course influenced by many factors. As the FBI notes, comparing the effectiveness of law enforcement agencies based on crime data is inadvisable, because the variables that affect crime, such as economic conditions, relative youthfulness of the population, and cultural norms, differ dramatically from one location to the next.<sup>27</sup>

For purpose of this Task Force Report, it is enough to note that crime rates in Texas fell dramatically from the early 1990's to 2020, when there was a shockingly rapid spike in the murder rate. During the almost 30-year period of falling crime rates, Texas at first increased its incarceration rate dramatically, but saw ongoing declines in that rate post-2006. This initial decline in incarceration predates the progressive prosecutor movement (discussed in the following section of this Task Force Report) by about a decade. Moreover, it should be emphasized that the state has demonstrated a willingness to experiment with more rehabilitation-oriented measures, such as veterans courts and drug courts, when sound arguments for them are made. The state should by all means continue to critically examine its policies on criminal justice and public safety, but the burden of proof should be on progressive prosecutors and their supporters to explain how alleged overincarceration in Texas the last few decades was counter-productive to public safety.

### B. Part Two: The Progressive Prosecutor Movement

In recent years, a number of large cities in the U.S. have elected prosecutors who reject traditional law-and-order principles in favor of purportedly focusing on the root causes of criminals' actions. These "progressive prosecutors" are often reluctant to push for prison sentences and even fines for a variety of criminal offenses, believing that doing so simply increases the likelihood that a defendant will spiral into further criminal activity. Crime rates in the cities of these prosecutors cast doubt on the wisdom of this approach. A particularly troubling trend is the open refusal of some prosecutors to prosecute entire classes of offenses. Such refusal goes well beyond the bounds of traditional prosecutorial discretion and is essentially equivalent to local prosecutors overriding state law.

Although there is no formal definition of the progressive prosecutor movement, its adherents tend to hold the following beliefs:

- Prosecutors have the right to refrain from prosecuting certain categories of criminal offenses;
- Prison sentences currently imposed on defendants are often longer than optimal;
- Diversion is superior to incarceration for many drug-related and nonviolent offenses, as well as for many juvenile, young adult, and mentally ill offenders;
- The criminal justice system in practice discriminates against poor defendants and certain racial minorities;
- Even when a defendant is alleged to have taken action that constitutes a felony, a misdemeanor charge is often preferable;
- The practice of cash bail should be greatly limited or abolished;
- Parole should be granted more frequently than it currently is;



- Probation should be altered so that defendants are not penalized for technical violation of their terms of probation, and drug and alcohol use should not constitute violations of these terms; and
- Police misconduct is widespread and should be taken into account by prosecutors in weighing charges against defendants and in prosecuting police officers.

It should be acknowledged that some arguments of progressive prosecutors have a measure of truth. For example, there is little question that the practice of requiring cash bail often favors wealthier defendants. Nevertheless, these prosecutors' actions on the whole are troubling because they usurp the legislature's role and jeopardize public safety.

A few examples of progressive prosecutors' behavior will illustrate their departure from traditional norms of law enforcement. In Los Angeles, George Gascón issued a directive pursuant to which he refused to prosecute defendants under California's "Three Strikes" law, which enhances sentences for repeated felons. In prosecuting such defendants, the DA refused to include previous strikes against defendants, in the hope that they would be spared a longer sentence. In a press release, Gascón has claimed that the 28-year old Three Strikes law has done "tremendous harm to our communities." His argument that he can refrain from alleging prior "strikes" against defendants in court has been rejected by a lower court and a state appellate court, and will soon be heard by the California Supreme Court.

In San Francisco, recently-recalled DA Chesa Boudin campaigned on the idea that immigrants in the United States illegally should be prosecuted for the crimes they commit in a way that minimize their chances of deportation. For example, Boudin said he might charge an illegal immigrant accused of dealing drugs could be charged as being an accessory after the fact rather than possessing with the intent to sell, because the latte could result in deportation of the immigrant by federal authorities.<sup>30</sup>

In Philadelphia, District Attorney Larry Krasner has implemented a special unit to review nonviolent charges (such as theft or drug charges) against defendants up to the age of 25 to determine whether they would be better rehabilitated through means other than incarceration.<sup>31</sup> The rationale for this policy is that young people are more impulsive than older people. That is the rationale for much of the juvenile justice system in the United States, but extending the idea of "youth" in the criminal justice context to people aged 25 is controversial. Krasner has also overseen plummeting conviction rate for illegal gun ownership even as arrests for that offence skyrocket;<sup>32</sup> he believes that arresting people for illegal gun ownership will impose social and human costs on society and "will end up locking up thousands of people just to prevent dozens of future shootings."<sup>33</sup>

Progressive prosecutors hold office in Philadelphia, Chicago, Boston, and Los Angeles (technically, they hold office in the counties encompassing these cities), to name just a few cities. However, they have begun to face scrutiny, even from former supporters. San Francisco, perhaps the most liberal city in the country, recalled its progressive prosecutor Chesa Boudin in July 2022 after the city saw dramatic increases in homicides and burglaries.<sup>34</sup> His counterpart in Los Angeles, George Gascón, was facing a recall until the discovery of errors in the process of gathering signatures to initiate the recall.<sup>35</sup> The



Pennsylvania House of Representatives impeached Krasner in November 2022; his trial in the Pennsylvania Senate will commence in January 2023.<sup>36</sup>

Krasner, a former defense attorney, is a particularly interesting case. Under Krasner, murders in Philadelphia jumped 40 percent from 2019 to 2020, and then increased another 12 percent in 2021.<sup>37</sup> Since he took office in 2018, over 260 attorneys in his office have departed, contributing to a loss of expertise and experience in the office.<sup>38</sup> Shuaiyb Newton, a prosecutor who worked under Krasner in the office and initially supported him, became disillusioned and left the office in 2020. An excerpt from a December 2021 Philadelphia Inquirer story gives insight into the workings of Krasner's office:

He wasn't really trying to prosecute. He was trying to indoctrinate," said Newton, who was initially intrigued by Krasner's pitch for more equitable justice in communities like North Philadelphia, where Newton grew up. By the time he quit in 2020, he said, he came to believe Krasner was more interested in protecting defendants than crime victims and everyday citizens. "He would hire people that didn't think anybody belonged in jail at all. Why are you a prosecutor? He hired people who would cry after convicting someone.<sup>39</sup>

To date, self-styled reformers have been elected in Texas, although their policies are not as controversial as those of prosecutors such as Krasner. Nevertheless, some prosecutors in Texas have taken steps which raise concerns that they are improperly substituting their judgement for the Legislature's. To ensure that Texas avoids a situation in which the progressive prosecutor movement takes root in the state, the Legislature should consider possible responses to prosecutorial overreach.

### C. Part 3: Progressive Prosecutors in Texas

Voters in several large counties in Texas have elected progressive prosecutors, such as José Garza (Travis County District Attorney), Joe Gonzalez (Bexar County Criminal District Attorney<sup>40</sup>), and John Creuzot (Dallas County District Attorney). Below is a brief summary of the policies advanced by each of these three figures.

José Garza, elected Travis County District Attorney in 2020:

- Restructured pre-trial diversion programs to increase the number of defendants eligible for them, such as those with a criminal history, and to ensure that prosecutors take the initiative in offering pre-trial diversion.<sup>41</sup>
- Will not consider a defendant to be a flight risk simply because the defendant has missed court appearances.<sup>42</sup>
- Will not seek death penalty against any defendant;<sup>43</sup>
- Requires all prosecutors to seek approval from their superiors before seeking a prison term of 20 years or more for a defendant.<sup>44</sup>



- Continued the practice of not prosecuting defendants for possession of small amounts of drug, and expanding that practice to include defendants selling a small amount of drugs, unless those sellers pose a threat of violence to public safety.<sup>45</sup>
- Expedited "arrest reviews," in which prosecutors review police offers' probable cause affidavits and sometimes dismiss charges before the suspect is brought before a magistrate. 46
- From March through June of 2021, Garza's office rejected 142 felony cases, a 735 percent increase for the same months in 2020. Of these 142 rejected cases, 93 were state jail felony charges for drugs. Other rejected felony charges included aggravated robbery and aggravated assault with a deadly weapon.<sup>47</sup>

Joe Gonzalez, elected Bexar County Criminal District Attorney in 2018 and again in 2022:

- Altered an existing "cite-and-release" program to minimize arrests of people charged with certain offenses, including possession of small amounts of marijuana, driving with an invalid license, and misdemeanor theft, although officers retain the discretion to make arrests.
- Declines to prosecute possession of under one ounce of marijuana, unless the defendant is a danger to public safety.<sup>49</sup>
- Declines to prosecute possession of "harder" drugs if the amount in question is less than 0.25 grams.
- Declines to prosecute criminal trespass of homeless people if certain criteria are met (e.g., the trespass is on commercial premises and the homeless person is not on probation and does not have a violent criminal history).<sup>50</sup>
- Implemented a presumption of release without cash bail for misdemeanor offenses and state jail felonies, unless the defendant is a flight risk or a threat to public safety.<sup>51</sup>
- Greatly expanded diversion programs by eliminating fees and not requiring admissions of guilt, and permitted upfront dismissal of charges once the defendant is enrolled.

John Creuzot, elected Dallas County District Attorney in 2018 and again in 2022:

- Declines to prosecute most first-time misdemeanor marijuana prosecution cases. In 2020, Creuzot's office rejected 3,331 marijuana possession cases out of 3,612 filed.<sup>52</sup>
- In felony drug cases, refrain from holding the defendant in jail until laboratory testing of the suspected drugs is complete.
- Dismisses all criminal trespassing charges that do not involve a residence or intrusion into a property.<sup>53</sup>
- Makes release with no bail or pre-trial conditions of release the presumption in misdemeanor
  cases. The same presumption applies to state jail felony cases, provided the defendant has no
  conviction in the five preceding years. In all cases, the presumption can be overridden by clear
  and convincing evidence that the defendant will fail to appear and/or is a threat to public
  safety.<sup>54</sup>



- Declines to prosecute theft of personal items (e.g., groceries) valued at less than \$750 unless the alleged theft was for economic gain.
- Pushed for lower probation terms, with presumptive terms ranging from six months for misdemeanors to five years for first-degree felonies.<sup>55</sup>
- Expanded diversion programs for various classes of defendants, such as young adult offenders (ages 17-24) and those accused of prostitution.<sup>56</sup>
- Refrains from requesting prison time for defendants on probation who violate probation in a way that is deemed not to threaten public safety, such as failing to pay fines.<sup>57</sup>

All three of the above Texas district attorneys have reportedly received donations from George Soros or groups affiliated with him.<sup>58</sup>

### D. Responding to Progressive Prosecutors

The Legislature cannot simply vote to remove progressive prosecutors from office. Article 5 of the Texas constitution provides for four-year terms for county attorneys, <sup>59</sup> district attorneys, <sup>60</sup> and criminal district attorneys. <sup>61</sup> Article 5, Section 24 states as follows:

REMOVAL OF COUNTY OFFICERS. County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables, and other county officers, may be removed by the judges of the district courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

Article 5 provides no other guidance on the protocol for removal. However, Article 15, Section 7 of the constitution provides that "The Legislature shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution." <sup>62</sup>

As at least one court has noted, the Legislature has provided for the removal of county attorneys, district attorneys, and criminal district attorneys<sup>63</sup> in Chapter 87 of the Local Government.<sup>64</sup> Following the constitution, this law provides in relevant part that district attorneys, criminal district attorneys, and county attorneys can be removed from office for, among other things, "incompetency" and "official misconduct." Incompetency is defined in part as "gross carelessness in the discharge of those duties."<sup>65</sup> Official misconduct is defined as "intentional, unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law. The term includes an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law."<sup>66</sup>

The statutory process for actual removal effectively requires a person to file a petition with the district judge alleging the grounds for the removal of the prosecutor. For the removal process to proceed, the



judge must approve it. If he or she does not, no appeal from that decision can be made. If the judge does approve of the petition, a jury must then determine whether the alleged grounds for removal exist.

Although the Legislature cannot simply vote to remove a district attorney, it does have the power to define what constitutes "incompetency" or "official misconduct." Article 5, Section 24 includes "other causes defined by law" as grounds for removal of county attorneys. The Legislature could reasonably exercise this power to clarify that prosecutors who refuse to prosecute entire classes of offences are guilty of official misconduct. Such a refusal to prosecute behavior could be inferred from a prosecutor's words or a pattern of behavior.

Defenders of progressive prosecutors will no doubt argue that such action by the Legislature encroaches upon district attorneys' constitutional office and interferes with the well-established concept of prosecutorial discretion. But it is closer to the truth to say that progressive prosecutors flout the constitutional role of the Legislature. It is the Legislature that is tasked with making the laws in Texas.

There is no hint in the Texas constitution or other law that district attorneys may simply disregard laws with which they do not agree. Like all elected officials in Texas, district attorneys take an oath to "faithfully execute the duties of the office...[and] preserve, protect, and defend the Constitution and laws of the United States and of this State." Prosecutorial discretion has traditionally permitted district attorneys to consider the unique circumstances of a case and to allocate scarce resources by exercising judgment over which cases to prosecute. But that is distinguishable from declining to prosecute cases because a district attorney believes that the Legislature erred in criminalizing certain behavior.

In addition to the above step, the Legislature should ensure that local voters are able to easily learn the crime trends in their counties. Currently, the Department of Public Safety publishes arrest and conviction numbers for counties, <sup>68</sup> but the presentation of the data is difficult to follow and the average Texan has no way of easily locating it. The Legislature could take steps to promote transparency regarding the policies of district attorneys, just as it has regarding local property taxes. Specifically, the Legislature could require all district attorneys to annually publish on the applicable county's website the following data for each of the previous five years, disaggregated by (1) specific offence, (2) felony or misdemeanor classification, and (3) violent, property, and drug offence:

- The number of crimes committed in the county;
- The number of arrests in the county;
- The outcome of these arrests. Possible outcomes include prosecution for the offence for which the defendant was arrested; prosecution for a lesser offense; refusal to prosecute; pre-trial diversion; deferred adjudication; and community supervision.
  - 1. <u>Policy Recommendation</u>: Categorize Refusal to Prosecute Entire Classes of Crimes as Official Misconduct



Chapter 87 of the Local Government Code should be amended to provide that a district attorney's refusal, whether explicit or implied, to prosecute entire classes of offences based on the personal belief that such conduct should not be criminalized is "official misconduct" and grounds for removal as outlined in in the constitution and statute.

### 2. <u>Policy Recommendation</u>: Require District Attorneys to Publish Annual Data

Require district attorneys to annually publish crime, arrest, and prosecution data for offences in their respective counties, disaggregated as described above. This information will help hold district attorneys accountable.

### E. Part Three: Maintaining Adequate Police Forces in Texas Cities

The killing of George Floyd by a Minneapolis police officer in May 2020 sparked nationwide protests and riots across the United States. Calls for racial justice sometimes include demands to "defund the police." Rep. Cori Bush, a Missouri Democratic congresswoman, defended expenditures for her private security detail in 2021, arguing that ""I get to be here to do the work, so suck it up — and defunding the police has to happen. We need to defund the police and put that money into [the] social safety net." Nationally-acclaimed author Ibram X. Kendi, in praising another author with whom he was conversing, stated "I think one of the overarching points that you just demonstrated in so many different ways is: The theory that police can reduce harm or create safety is fundamentally flawed, because the police inherently are harmful."

The city of Seattle offers an instructive lesson on how defunding the police can go awry, especially when its effect on police morale is taken into account. In 2020, Seattle's City Council endorsed slashing funding for police by 50 percent, although ultimately it ended up adopting smaller but still significant cuts in 2021 and again in 2022.<sup>71</sup> This reduced funding was attributable to moving certain services, such as parking enforcement, out of the Seattle police department's responsibilities.

Unsurprisingly, accusations of widespread racism and calls to defund the police affected police morale. As the city's former police chief said in an October 2021 interview: "The defunding movement in many ways makes people so demoralized. I know in Seattle when officers left, many of them on their exit interviews laid the blame mostly at the city council for not supporting them through budget and other avenues." Since 2020, over 400 Seattle police officers either quit or retired, leaving just 1,137 officers as of June 2022. Crime in Seattle, as in many other U.S. cities, rose in 2021 and, as of June 2022, had continued to rise in 2022. The situation deteriorated to the point that, in June 2022, the *Seattle Times* reported that some sexual assault cases were not being investigated due to police staffing shortages. Eventually, the City Council recognized its error and reversed course; in August 2022 it approved bonuses of up to \$30,000 for newly-hired officers. In an almost comical turn to the saga, earlier this



year the city stated that it would have to refund 100,000 parking tickets and void another 100,000 because it discovered that civilian parking enforcement personnel had not been granted legal authority to issue tickets when the parking enforcement responsibilities were removed from the police department.<sup>77</sup>

The city of Austin was also sympathetic to calls to defund the police, although as discussed below, the Legislature has taken steps to ensure that a Seattle-style debacle does not happen in Texas. In August 2020, the Austin City Council unanimously voted to slash \$150 million from the police budget of \$434 million, 78 with much of the funding being directed to social services. The Texas Tribune reported that this reduction was among the largest percentage decreases in the nation in 2020. 79 The budget cuts resulted in the elimination of 150 officer positions. 80

In September 2021, the *Austin American-Statesman* and KVUE-TV reported that problems had arisen in the wake of the reduced funding. Police response times increased; several City Council members acknowledged that unprecedented attrition had left the police department with a barebones patrol staff; <sup>81</sup> the city recorded its highest murder rate ever; and some residents expressed fears over declining quality of life as police officers focused their energies away from relatively minor infractions such as public intoxication and noise violations.

For the fiscal year beginning October 1, 2021, the city reversed the \$150 million in budget cuts, although it did not reinstate the 150 police officer positions. 82 Due to the passage of House Bill 1900 (87R; Goldman, et al.) earlier in 2021, the city of Austin will suffer penalties if it attempts to reduce police funding in the future.

HB 1900 addresses cities with a population over 250,000 that reduce their police budget unless such reduction was either in proportion to reductions in the city's overall budget, or was approved by the criminal justice division of the office of the governor. The bill penalized these "defunding" cities by limiting their annexation and property taxation powers, as well as deducting from the city's share of sales tax revenue the funds that the state spends on law enforcement activities in the city.

Although HB 1900 was a positive step, it does not prohibit all attempts to circumvent the spirit of the law. For example, defunding proponents could attempt to re-classify expenses that have traditionally been outside of police budgets (e.g., mental health workers) as part of the police budget, which would them enable them to slash funding for police officer salaries without running afoul of HB 1900. Or they could steer existing officers to "desk" duties rather than enforcement.

Senate Bill 23 (87R; Huffman), applicable to counties with a population of more than 1 million, limits potential circumvention attempts by generally requiring counties to hold an election before reducing the budget of a law enforcement agency (other than a 911 call center) with primary responsibility for policing, criminal investigation, and answering calls for service. An election is also required if funding or resources for such a law enforcement agency are diverted to a different law enforcement agency.



The Legislature should consider imposing a "floor" on the number of police officers a city employs per 1,000 residents. Of course, a number of factors can affect the optimal size of a given city's police force; population density, crime rates, and response times are just a few of the variables that could be relevant. The optimal number of police officers cannot be precisely determined for every city, but it is self-evident that every city requires a minimum officer to resident ratio to protect public safety.

A 2015 report by the federal Bureau of Justice Statistics (based on 2013 data) found that the average ratio of full-time police officers to population in over 2,000 U.S. cities was 2.1, with that figure reaching 2.3 if the analysis were restricted to cities with at least 250,000 residents.<sup>83</sup> Those figures have inched up over the intervening years. According to the federal Bureau of Justice Statistics, in 2019 the average ratio of full-time police officers to population in over 2,000 U.S. cities was 2.3, with that figure reaching 2.6 if the analysis were restricted to cities with at least 250,000 residents.<sup>84</sup> Table 4 below lists a sample of large U.S. cities and their corresponding officers per 1,000 residents ratio.

Table 4: Full-time police officers per 1,000 population, select U.S. cities, 2019 (figures for Texas cities are asterisked)

City Officers per 1,000 Residents		
Washington, D.C.	5.40	
Chicago	4.86	
New York City	4.36	
Philadelphia	4.14	
Baltimore	4.13	
St. Louis	4.00	
Detroit	3.79	
Atlanta	3.15	
Milwaukee	3.13	
Boston	3.07	
New Orleans	2.93	
Miami	2.70	
San Francisco	2.56	
Los Angeles	2.49	
Tampa, FL	2.34	
Dallas*	2.26*	
Houston*	2.23*	
Denver	2.13	
Nashville	2.05	
Minneapolis	2.00	
Charlotte-Mecklenburg	1.93	
Honolulu	1.91	
Jacksonville	1.90	
Seattle	1.85	
Austin*	1.83*	
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Fort Worth*	1.80*
Oklahoma City	1.78
Louisville	1.76
Phoenix	1.73
El Paso*	1.71*
Oakland	1.70
San Antonio*	1.47*
Sacramento	1.32
San Diego	1.22
AVERAGE	2.58

In November 2021, Austin voters decisively defeated Proposition A, which would have required the city to employ 2 police officers per 1,000 residents and ensure that officers spend at least 35 percent of their time on "community engagement" (i.e., time that is not spent on responding to calls). <sup>85</sup> The latter provision reflects expert recommendations that police departments have staffing levels such that officers' entire work time is not consumed with responding to calls. <sup>86</sup> An October 2021 news article quoted a professor of criminal justice at the University of Nevada-Las Vegas as saying, "This [2.0/1,000] ratio is a common general guideline that many cities strive for."

Averages, both in Texas and the U.S. as a whole, suggest that a floor of 2 full-time police officers per 1,000 residents is sensible. That requirement could be accompanied by a provision that officers spend at least 35 of their time on community engagement. If a city satisfied the minimum ratio but its officers spent (for instance) 90 percent of their time responding to service calls, then the city would be obligated to hire more officers.

### 1. <u>Policy Recommendation</u>: Maintain a 2:1,000 police officer to resident ratio

Cities in Texas should be required to maintain a ratio of at least 1.5 full-time police officers per 1,000 residents, and set a minimum percentage of community engagement time for officers to ensure they are not overloaded.

#### F. Part Four: Bail Reform

The Eighth Amendment to the U.S. Constitution states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This language, however, does not grant a defendant an absolute right to bail. The Bail Reform Act of 1984,<sup>88</sup> a federal statute that applies to federal court proceedings, permits denial of bail if a court finds that no conditions of release can reasonably assure (1) that the defendant will appear for trial, and (2) the safety of the community. The U.S. Supreme Court upheld the constitutionality of the Bail Reform Act in *United States v. Salerno*, 481 U.S. 739 (1987).<sup>89</sup>



The Texas constitution<sup>90</sup> further narrows the circumstances in which bail can be denied. A defendant in Texas may not be released on bail if he is accused of a capital crime and the "proof is evident." (The only capital crime in Texas is capital murder, which is a subset of murders where particular aggravating circumstances exist, such as when the victim was a young child<sup>91</sup>). In addition, a court has discretion to deny bail if the defendant is accused of:

- A felony, and the defendant has been convicted of felonies on two prior occasions. Both the
  commission of, and conviction for, the first felony must precede the commission of, and
  conviction for, the second felony;
- A felony, alleged to have been committed while on bail for a prior felony for which the defendant has been indicted;
- A felony involving the use of a deadly weapon, and the defendant has been convicted of a prior felony; or
- A violent or sexual offense committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony.

Thus, a defendant accused of anything other than capital murder who has no prior felony conviction cannot be denied bail in Texas. For example, a young man who is arrested for threating to commit a mass shooting cannot be denied bail.

The question of whether bail should be denied must balance two competing interests. On the one hand, giving the government the power to jail people without a trial invites government overreach and presents a grave threat to an individual's liberty. Politically motivated prosecutions, or prosecutions originating from an unethical prosecutor's feelings towards the defendant, are always possible. A prosecutor can exert enormous leverage over an innocent person who faces the prospect of being jailed for months before a trial and all the resulting disadvantages, such as separation from family and friends, reputational damage, and job loss. Suffering punishment from the state without a trial is in great tension with the presumption of innocence to which all defendants are entitled.

On the other hand, there are clearly defendants who would pose a serious threat to the community if they were released while criminal charges against them are pending. And while there is a presumption of innocence for defendants facing trial, arrest in Texas requires probable cause. Thus, a person facing trial in Texas very likely faces at least some credible evidence against him. Releasing on bail a defendant facing a charge of attempted murder or sexual abuse of a child makes it possible for a defendant who in fact committed the alleged crime(s) to re-offend. If a person credibly accused of a serious crime is released on bail and goes on to re-offend while out on bail, public anger and loss of faith in the justice system are natural results.

The case of Damon Allen, a state trooper shot and killed on Thanksgiving in 2017, is instructive. In 2015, Dabrett Black, the killer, beat a law enforcement officer and tried to take his gun. The initial assault charge was downgraded to a misdemeanor and the charge of trying to take the officer's gun was



dropped.<sup>92</sup> After serving a short stint in jail, Black was arrested again in 2017 for fleeing from officers and then intentionally crashing his car into a deputy's car. He was released on a bond of just \$15,000.

There were a number of warning signs concerning Black. In 2014, his mother called Veterans Affairs and reported that he had a gun and had threatened her and others. After the 2015 arrest, Black stated that, "He [the deputy Black beat] got his a-- whooped, and I tried to take his gun. That's how dangerous I can actually get. With somewhat of a right mind, I would have killed him." After the 2017 incident in which he rammed a deputy's car, he stated "the way I look at it, it's another lawman down instead a black man down except he's still walking away with his life."

The judge who set the \$15,000 bond in 2017 regretted his decision, but noted that he was not aware of any previous conviction for Black and that ""A \$10,000 bond for him [Black] might be equivalent to a \$100,000 bond to a rich person...We have to be careful that we don't just convict people just because they're put in jail. We set a bond to ensure they show up in court." <sup>96</sup>

The 87<sup>th</sup> Legislature succeeded in passing one bail reform law: Senate Bill 6 (87S2; Huffman). That bill's key provisions included:

- Eliminating release on personal bond (i.e., an unsecured promise to appear) for defendants who
  are either charged with a violent offense, or are charged with a felony while out on bail, or
  under community supervision, for a violent crime.
- Instructing the Office of Court Administration (OCA) to maintain a public safety report system
  (PSRS), which would provide magistrates with, among other things, a defendant's criminal
  history, the pending charges against him, and previous failures of the defendant to appear in
  court after being released on bail.
- Creating registration and reporting requirements for a charitable bail organization operating in a given county.
- Requiring magistrates to impose the least restrictive conditions of release and the bail amount necessary to ensure that the defendant appears in court and does not jeopardize public safety.
- Authorizing indigent defendants who cannot afford to post the bail required by a court's bail schedule to file an affidavit requesting a reduction in the bail amount.
- Requiring the Office of Court Administration to publish an annual report detailing the number of persons for whom bail was set after arrest (broken down by offence), the number of monetary bonds, and the number of personal bonds.

It must be emphasized that SB 6 does not condemn accused persons to jail before trial. While it is true that persons accused of certain violent or sexual offenses cannot be released on personal bond, they can still be released on bail. Moreover, indigent defendants have the right to petition the court to lower the bail amount. The bill provides for individualized consideration of a defendant's history and will thereby flag defendants like Debrett Black rather than low-level offenders with no criminal history. Even after the enactment of SB 6, it remains true that a wealthy defendant will be more likely to afford the



required bail than a poor defendant. However, the proper response to the charge that SB 6 allows wealthier defendants accused of violent crimes to be released at a greater rate than similarly situated poor defendants is not to allow poor defendants who are a threat to the community to more easily obtain release on bail. Rather, the proper response is to give magistrates the ability to deny bail to anyone who is a threat to society, irrespective of that person's financial situation.

The House failed to adopt a joint resolution related to SB 6 that would have submitted a proposed constitutional amendment to voters. Senate Joint Resolution 3 (87S2; Huffman) would have permitted the denial of bail for defendants who are accused of a sexual offense constituting a first-degree felony, continuous trafficking of human persons, or any violent offense. To deny such defendants bail, a magistrate would have to find, by clear and convincing evidence, that conditions of release and bail would be insufficient to reasonably ensure either public safety or the defendant's appearance in court.

The available data suggests that most defendants who are confined to jail pre-trial are accused of felonies- that is, particularly serious crimes. As of December 2021, approximately 64 percent of the monthly county jail population- which over the last decade has averaged roughly 65,000 people<sup>97</sup>- were awaiting trial on felony (56.2 percent) or state jail felony (8.3 percent) charges, compared to about 7 percent for misdemeanors.<sup>98</sup> Being confined to jail pre-trial indicates that these defendants either could not afford to make bail or, less likely, were denied bail pursuant to the Texas constitution. The state should certainly scrutinize bail procedures for people accused of misdemeanors to ensure that bail is not effectively punishing people who have not received a trial and are not a threat to public safety. But that should be done with the acknowledgement that, in any given month, people confined to jail pre-trial are primarily accused of serious crimes.

The 88<sup>th</sup> Legislature should again attempt to adopt a resolution substantively similar to SJR 3. Rather than using bail as a roundabout means of detaining defendants who are perceived to be ongoing threats to society, the state would be better off simply authorizing the denial of bail to these defendants. This change in law would offer two benefits: first, it would strengthen public trust in the criminal justice system by ensuring that wealthy defendants are not treated more favorably that poor defendants. Second, permitting outright denial of bail would ensure that people who are a clear danger to society but have financial means do not have the opportunity to bail out.

1. <u>Policy Recommendation</u>: Pass a Constitutional Amendment Authorizing the Denial of Bail to Defendants Accused of the Most Serious Crimes and Who Pose a Threat to the Public

The Legislature should adopt a joint resolution authorizing the denial of bail to defendants accused of violent and/or sexual offences who pose a threat to the community or a flight risk.



## G. Part Five: Improve the collection of data relating to the criminal justice system

As noted in the last section of this Task Force Report, SB 6 (87S2) require the OCA to annually publish certain bail and bond data. This is a good first step; however, the state's entire criminal justice system-from arrest through community supervision- needs better data collection and more transparency. Better data is essential to aid policymakers in their attempt to craft solutions that improve public safety. More detailed data could shed light on key topics, such as better identifying defendants who are a threat to flee or to harm the public if bailed out; determining whether punishments for defendants are devoid of bias based on characteristics such as age, wealth, and race; identifying conditions attached to release on bail or community supervision are most likely to achieve their purposes; the overall effect of pre-trial detention on conviction rates; whether defendants who appear before a given judge have markedly different outcomes; and how many defendants see their legal situation deteriorate primarily because of court costs or fines they cannot pay.

To name just one of many issues, recidivism and ways to combat it could be better studied if policymakers had more accessible and specific data. Some data is already accessible to the public. For example, the Legislative Budget Board (LBB) releases a biennial report on recidivism that contains useful data, such as the re-arrest rates for people under community supervision and those that have been released from prison. Bu the data is not as specific as it could be. For example, recidivism rates are disaggregated by offence, but the offence categories are extremely broad: Violent, Property, Drug, and Other. Ideally, the categories could be more specific; for example, recidivism rates for people convicted of simple assault versus those convicted of attempted murder could be worth analyzing separately, because one group might recidivate at much higher rates, or might commit much more serious offences if they in fact recidivate.

Greater transparency and additional data regarding the pre-trial phase of the criminal justice system would also benefit the public. Progressive prosecutors and criminal justice reform advocates often allege that the U.S. criminal justice system (and Texas') incarcerate too many people, treat racial minorities unfairly, and impose harsh penalties on defendants accused of "victimless" drug offences. These charges are difficult to analyze or rebut without more detailed data. Left unchallenged, they erode public trust in the legal system and increase the potential that policymakers will enact well-intentioned but misguided policies.

For example, a claim that charging rates, conviction rates, and/or incarceration terms for drug possession vary by race is almost devoid of substance unless other variables are controlled for. For example, a key question is how many of those convictions, disaggregated by the race of the offender, were plead down from more serious offences, such as a weapons charge or a large-scale distribution of drugs. A person charged with drug possession and assault who receives a plea bargain reducing the charge to drug possession might receive a more severe punishment than one who is charged with simple possession of the same dug, but that does not mean the first person was treated unfairly. Plea



bargaining is ubiquitous and, to some extent, a necessity given the workload that courts and prosecutors would bear if every criminal case went to trial. An "apples to apples" comparison requires this context, among other things.

Similarly, the criminal history of a defendant is critically important, not only in terms of whatever plea deal he might be offered, but also in terms of the sentence imposed upon conviction. Common sense dictates that repeat felons on average will be punished more harshly than first-time offenders, all else being equal. Ideally, Texans should have the ability to access a database and make truly valid comparisons, such as comparing the charging, conviction, and incarceration rates across racial groups for (as an example) first-time offenders arrested for heroin possession. This database could eventually contain data from across the entire criminal justice spectrum, from arrest through the corrections process.

House Bill 970 (87R; Dutton), which did not receive a committee vote, would have brought greater transparency to the pre-trial phase of the criminal justice system. That data collection provisions of that bill can serve as a beginning point in the discussion of how pre-trial data could be collected. Under that bill, prosecutors would have been required to report myriad data to the OCA, including the following:

- The defendant 's sex, race, and disability status;
- The date of the alleged offence, the arrest date, the arraignment date; and the date (if any) that the initial charge was modified;
- The district, precinct, or neighborhood of the arrest;
- The charges listed on the arresting law enforcement agency 's paperwork;
- The charges filed by the prosecutor;
- If the prosecutor declines to prosecute an alleged offense, the reason for that decision;
- The defendant 's eligibility for court-appointed counsel;
- Whether diversion was offered, and it was, whether the defendant accepted it and what the diversion term were;
- Whether the offence carries a minimum sentence, or was eligible for the death penalty;
- The prosecutor 's recommendation on the amount of bail or bond, including release conditions
- Whether bail or bond was imposed;
- Whether bond was secured, unsecured, or payable from another type of arrangement;
- Whether the defendant waived any statutory or constitutional right;
- Whether a plea bargain was offered;
- Whether a time limit for acceptance was included with a plea bargain offer;
- The terms of any plea bargain offer;
- Whether the plea was accepted or rejected;
- Whether discovery was disclosed to the defense or defendant before the plea;
- The judge(s) presiding over pre-trial proceedings;
- The duration of any pre-trial detention that the defendant served;
- The case 's disposition, and whether it was by plea bargain, jury trial, or bench trial;



• The sentencing terms, including fines, probation, suspended sentences, supervision, incarceration, and any forfeiture of property.

A critically important addition to the bill would be the criminal history of the defendant, including deferred adjudication and community supervision. Less important, but still worthwhile, would be the defendant's age and whether the defendant was actually represented by a public defender (the bill lists only the defendant's eligibility for a public defender).

Although the bill would have required extensive reporting of data, most of the data is simple and straightforward. Perhaps reflecting that, the fiscal note projected an annual cost of less than \$900,000 to General Revenue over a five-year period, although local governments anticipated increased compliance costs. The annual impact to the state in terms of All Funds was higher but not prohibitive, at about \$3 million annually. An investment of that magnitude could serve the state well given its potential to make the criminal justice system fairer and more efficient.

#### 1. Policy Recommendation: Improve Data Collection

Data should be collected on all defendants from arrest through sentencing, using HB 970 as a template to the extent of the data it outlines. In addition, include the defendant's age, criminal history, and type of legal counsel, if any.



#### **III.** Civil Asset Forfeiture

### A. Introduction and background

Central to the concepts of liberty and private property is the Fifth Amendment to the United States Constitution, which provides that there shall be no deprivation of "life, liberty, or property without due process of law[.]" Similarly, the Texas Constitution protects "life, liberty, and property . . . except by the due course of the law of the land." The notion that the government may seize private property through civil asset forfeiture, often times without formally accusing the owner of a crime, poses a great danger to these concepts. Indeed, writing in a dissent from a decision by the Texas Supreme Court, Justice Don Willett described the practice of civil asset forfeiture as follows:

A generation ago in America, asset forfeiture was limited to wresting ill-gotten gains from violent criminals. Today, it has a distinctive 'Alice in Wonderland' flavor, victimizing innocent citizens who've done nothing wrong. To some critics, 21st-century excesses are reminiscent of pre-Revolutionary America, when colonists chafed under the slights and indignities inflicted by King George III and Mother England—among them, "writs of assistance" that empowered government to invade homes and seize suspected contraband. Legal scholars have declared these writs "among the key grievances that triggered the American Revolution.<sup>102</sup>

Indeed, while *criminal* asset forfeiture is considerably less objectionable because it requires due process through a criminal conviction before property if forfeited to the government, civil asset forfeiture does not have such protections. This has resulted in well-documented abuses, which is why the Republican Party of Texas, in its 2022 platform, has called "upon the Texas Legislature to abolish civil asset forfeiture...and to ensure that private property only be forfeited upon a criminal conviction." Similarly, the Texas Democratic party, in its 2022 platform, calls for "ensuring civil asset forfeiture only upon a criminal conviction." Thus, reforming civil asset forfeiture reform is now a bipartisan issue.

Nevertheless, proponents of civil asset forfeiture argue that it is a necessary tool used to fight organized crime, cartels, and gangs. The Federal Bureau of Investigation describes asset forfeiture as a tool to punish criminals, deter illegal activity, disrupt criminal organizations, remove the tools of the trade from criminals, to return assets to victims, and to protect communities. The Institute for Justice explains law enforcement opposition is common and fierce:

In 2015, 13 bills were introduced to reform civil forfeiture in Texas— one of the worst states in the country on this issue—but massive pushback from state and local law enforcement killed every one of them. Such opposition to change will likely intensify in the coming years.<sup>106</sup>

The 2015 prediction rang true, as a number of bills were filed in the 85th Legislative Session by strong leaders on both ends of the political spectrum (e.g., Senator Konni Burton (R), Representative Matt



Schaefer (R), Senator Don Huffines (R), and Representative Senfronia Thompson (D)). This continued to be the case in 2017, 2019, and 2021.

### B. The process of civil asset forfeiture

Civil and criminal asset forfeiture are powerful tools that allow law enforcement agencies to seize and appropriate property that was used in or connected with a crime. There are two kinds of "asset forfeiture" in Texas (and elsewhere in the United States). Criminal forfeiture involves property seized from a defendant convicted of a crime. In civil forfeiture cases, however, the government may seize property and assets based on suspicion of its involvement in criminal activity. Civil forfeiture proceedings are legal proceedings not against the alleged *criminal*, but against allegedly offending *property* involved in alleged criminal wrongdoing.

Chapter 59 of the Texas Code of Criminal Procedure governs civil asset forfeiture in Texas. Law enforcement officers in Texas may seize property if they have probable cause to believe that the property is "contraband." Contraband is defined as (1) any property used in the commission of or to facilitate a crime; (2) the proceeds of a crime; or (3) property derived from or purchased with the proceeds of a crime. The contraband can include any real or tangible property, including but not limited to real estate, vehicles, and money. The owner of the property does not have to be charged with a crime for the property to be considered contraband.

Once property is seized by law enforcement, the state has 30 days to file a forfeiture action (in other words, a lawsuit) against the property and to give notice to all persons who have an interest in the property. The state must prove by a "preponderance of the evidence" that the seized property is subject to forfeiture. This means that the state must show that it is "more probable than not" that the property is contraband (as defined). If property is deemed "contraband," then a person with an interest in the property (in other words, its owner) may still keep possession of it, <u>but only if he proves he is an</u> "innocent owner" by a preponderance of the evidence. This is a burdensome process that runs contrary to the presumption of innocence that defendants are entitled to in the U.S. criminal justice system.

#### C. Civil asset forfeiture abuse is well documented

While the publicly stated motivations behind civil asset forfeiture are well-intentioned, it is clear that the practice incentivizes abuse. Indeed, as Kevin D. Williamson of National Review explains in "Civil Asset Forfeiture: Where Due Process Goes to Die," civil asset forfeiture is "one of the most abused powers enjoyed by American government[.]" When the U.S. Supreme Court declined to review a forfeiture case from Texas, *Leonard v. Texas*, Justice Clarence Thomas wrote a dissent that lays out the facially unjust results from such a process:

This system — where police can seize property with limited judicial oversight and retain it for their own use — has led to egregious and well-chronicled abuses. According to one nationally publicized report,



for example, police in the town of Tenaha, Texas, regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights. In one case, local officials threatened to file unsubstantiated felony charges against a Latino driver and his girlfriend and to place their children in foster care unless they signed a waiver. In another, they seized a black plant worker's car and all his property (including cash he planned to use for dental work), jailed him for a night, forced him to sign away his property, and then released him on the side of the road without a phone or money. He was forced to walk to a Wal-Mart, where he borrowed a stranger's phone to call his mother, who had to rent a car to pick him up. These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home. <sup>108</sup>

The example of Tenaha, Texas is well known. Over the course of three years, more than \$3 million in money and property was seized from hundreds of drivers who were never charged with a crime. 109

#### D. The "innocent owner" burden

In another example of civil asset forfeiture abuse in Texas, a used car salesman sold an automobile to a man arrested for drunk driving. The man was also in possession of cocaine. Local law enforcement began civil forfeiture proceedings against the truck, which the salesman had sold to the man on a line of credit. When asserting the "innocent owner" defense in Texas, as the salesman did, such a person has the burden of proving no knowledge of the crime that was committed. Justice Willett dissented from the Texas Supreme Court's decision not to review the case, and explained:

The current Texas civil-forfeiture law, enacted in 1989, greatly expanded both the scope of forfeiture (now including most felonies and some misdemeanors) and the types of property that can be seized (now including homes, land, vehicles, etc.). The government's burden is slight while the citizen's burden is significant. Law enforcement can seize property it believes is "contraband," something it need only show by a preponderance of the evidence. If the property owner doesn't answer the State's forfeiture action, the State keeps the seized property. If the owner has the wherewithal to challenge the seizure, he can assert an "innocent owner" defense, which requires him to prove he "did not know or should not reasonably have known of the [allegedly criminal] act or omission." 110

1. <u>Policy Recommendation</u>: Shift the burden of proof in an "innocent owner" defense from the person alleging the defense, to the government.

While it makes sense in *criminal* asset forfeiture for the owner to prove innocence, that is because the defendant is the person who has been charged with a crime. Such is not the case in an innocent owner



defense asserted by a person not alleged to be part of the crime, much less charged. That the burden is on the person alleging an innocent owner defense instead of law enforcement is part of the reason why Texas has earned a rating of "D+" from the Institute for Justice in its nationwide grades issued for civil asset forfeiture laws:

Texas has terrible civil forfeiture laws, earning a D+. The standard of proof required to forfeit property in Texas is just preponderance of the evidence, and an innocent owner bears the burden of proving that she was not involved in any crimes associated with her property before she can get it back. In addition, law enforcement agencies enjoy a strong incentive to seize property. In cases where a default judgment is entered—as is the case in the majority of forfeiture actions—agencies retain up to 70 percent of forfeiture proceeds. In contested cases—those in which the property owner challenges the basis for the seizure—agencies retain up to 100 percent of proceeds.<sup>111</sup>

In the 85th Legislative Session, Senator Bob Hall filed Senate Bill 1714, which would have shifted the burden of proof in an innocent owner defense from the owner to the government, and imposed a clear and convincing standard of evidence for the government to prove the property is subject to seizure and forfeiture. In the 87<sup>th</sup> Legislative Session, Representative Matt Shaefer filed a similar bill (House Bill 1441), which passed the House but failed to become law. Sixteen states and the district of Columbia require the government to prove that a person asserting innocent ownership was connected with the alleged crime. Passage of such a bill in the 88th Legislative Session would make Texas the 17th. It would be a meaningful reform that would go a long way towards protecting private property and valuing due process.

# 2. <u>Policy Recommendation</u>: Abolish the Practice of Civil Asset Forfeiture in Texas

According to the Institute for Justice, sixteen states require a criminal conviction for "most or all" forfeiture cases. Four states—Maine, North Carolina, New Mexico, and Nebraska—have abolished civil asset forfeiture entirely, allowing the forfeiture process only in criminal proceedings. Several attempts have been made in Texas to eliminate the practice entirely. In the 85th Legislative Session, Senator Konni Burton filed Senate Bill 380, which would have repealed the process of civil asset forfeiture. The following provisions were included in the bill:

Specification of what property is subject to forfeiture and what is exempt; It provided that there is no property right in contraband and that contraband is subject to seizure;

The bill required the conviction of a crime subject to forfeiture, including a sentence of community supervision or deferred adjudication, be obtained prior to forfeiture of the property; The bill raised the standard of proof required to "clear and convincing" evidence in most cases; It prohibited the forfeiture of homestead properties, motor vehicles valued at less than \$10,000, and currency totaling less than \$200;



It set out the process by which property may be forfeited and provided safeguards for the taking of property with respect to which there was an innocent owner or an owner with a bona fide security interest in such property;

It established procedures for a proportionality hearing to determine whether the forfeiture is unconstitutionally excessive in proportion to the alleged crime;

It required that all forfeited property and currency be delivered to the county treasurer in the county in which the property was seized and that property be disposed of by public auction; currency and the proceeds of the auction are to be deposited into the general fund of the county;

It required annual reporting on the number of forfeitures, the value of each category of property forfeited, and the total number of offenses underlying the forfeitures; It provided for the speedy return of property to its rightful owner when charges are dropped or the owner is acquitted, as well as when the court determines that an owner has a bona fide security interest;

It provided for a substitution of assets if the state shows the defendant intentionally transferred, sold, or deposited the property with a third party to avoid the court's jurisdiction; and It allowed for the retention of a civil process in cases where the defendant cannot be put on trial; for example, if the individual is deceased or if the individual has absconded, the state must only prove by a preponderance of the evidence that the defendant is unavailable for trial.

Representative Senfronia Thompson has filed similar bills in the House in the last few sessions, the most recent being House Bill 251 (87R). Another attempt in the 88th Legislative Session should be given serious consideration.



### IV. Criminal Justice Reform

### A. Reform Expunction and Nondisclosure Laws

Nationwide, roughly 50,000 state and federal laws impose penalties or disadvantage convicted felons. 114 Approximately 70 million to 100 million people in the United States have a criminal record that subjects them to thousands of federal and state laws that impact their ability to engage in basic rights and privileges in areas such as housing and employment. 115 That amounts to *more than a quarter of all adults* in the country. In Texas, skim through the various chapters of the Occupations Code and you'll find that required criminal background checks on applicants are a common condition of licensure. 116 In fact, Chapter 53 of the Occupations Code is solely dedicated to laying out the "consequences of a criminal conviction" for a host of professions licensed under the Code. 117 The intent of Chapter 53 is to "enhance opportunities for a person to obtain gainful employment" after the person has been convicted of an offense and has discharged the sentence for the offense. 118 It works by restricting the authority of licensing entities to disqualify licensees or prospective licensees on the basis of criminal convictions to only those convictions that directly relate to the duties and responsibilities of the licensed occupation or certain convictions involving violent offenses.

Chapter 53 is a recognition that criminal records harm the ability to find and keep gainful employment, and it is a good attempt to help assist individuals whose convictions should not harm those employment opportunities. To a lesser degree, policies like "ban the box" laws, which prohibit employers from asking applicants if they have ever been convicted of a crime, attempt to address the same issue. However, "ban the box" laws have been shown in several studies to have the *opposite* of their intended effect because employers unable to inquire about criminal history will discriminate against certain populations that they suspect are more likely to have a criminal history. This effect was demonstrated in a 2018 study conducted by researchers at the University of Oregon and Texas A&M University, which found that employment rates for black and Hispanic men dropped following the passage of ban the box laws.<sup>119</sup>

The described efforts tend to focus on how to help people with criminal records find gainful employment, but an alternate approach is to help people with criminal convictions clear their records when they are eligible to do so. Roughly 90 percent of employers use criminal background checks to screen for criminal records. TCCRI does not take issue with this practice. Indeed, the responsibility businesses have to customers and business partners often requires such prudence. However, existing laws allow individuals in many circumstances to clear or seal certain criminal records when statutory or court ordered conditions are met. Thus, instead of questioning the ability of employers to screen applicants, the focus should shift to those individuals with criminal records, many of whom are eligible to have their records expunged or have an order of nondisclosure granted. Often times they do not do so because the process is cumbersome and costly. Lowering the barriers to that relief for which they are entitled when they satisfy certain conditions should be a priority.



### B. Eligibility and process for expunction

For individuals with certain types of convictions in their criminal record who have satisfied the terms of their sentence, there are two main avenues for shielding those records from disclosure: expunction and nondisclosure.

In Texas, there are several criteria under which a person has a right to expunction. A person who has been arrested for either a felony or a misdemeanor is entitled to have all records and files relating to the arrest expunged if the person is acquitted at trial, convicted and subsequently pardoned or formally found innocent, or if the statute of limitations for prosecution of the crime has passed. A person is also eligible for expunction if they have been arrested, but released without a final conviction and no charge pending and no court-ordered community supervision. The exception to this rule is for Class C misdemeanors, provided that no other crime arising out of the same incident has been charged since the arrest and certain waiting times have been fulfilled, or if the person completed court-ordered treatment or pretrial intervention program. Additionally, a person convicted of unlawful carrying of a weapon prior to September 1, 2021 has a right to an expunction. There are several acts that will prevent a record from being expunged, such as violation of community supervision or not appearing before the court after posting bail, 126 to name two examples.

The procedure for record expunction is cumbersome. A person who has been acquitted of charges must provide notice to the state and request expunction from the presiding court within 30 days of the acquittal. The request for expunction must include the following information (or an explanation for why the information is not included):

- (1) the petitioner's:
  - (A) full name;
  - (B) sex;
  - (C) race;
  - (D) date of birth;
  - (E) driver's license number;
  - (F) social security number; and
  - (G) address at the time of the arrest;
- (2) the offense charged against the petitioner;
- (3) the date the offense charged against the petitioner was alleged to have been committed;
- (4) the date the petitioner was arrested;
- (5) the name of the county where the petitioner was arrested and if the arrest occurred in a municipality, the name of the municipality;
- (6) the name of the agency that arrested the petitioner;
- (7) the case number and court of offense; and
- (8) together with the applicable physical or e-mail addresses, a list of all:



- (A) law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state;
- (B) central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expunction; and
- (C) private entities that compile and disseminate for compensation criminal history record information that the petitioner has reason to believe have information related to records or files that are subject to expunction. 128

Upon the request, the court is required to set a hearing on the matter of expunction no sooner than thirty days from the filing of the request. If the court finds that that the person is eligible, it is required to order the expunction.

For cases in which a person is convicted and subsequently granted relief or pardoned on the basis of actual innocence, the court is automatically required to enter an expunction order within 30 days, though the person is still required to provide the court with all of the same information as a person who was acquitted.

### C. Eligibility and Process for Nondisclosure

Similar in practical effect to expunction, but substantively different in formality, are orders of nondisclosure (OND), which do not erase a criminal record, but shield it from public view. This makes a person free from disclosing certain criminal history in the job application and interview process.

ONDs are governed under Subchapter E-1 of Chapter 411 of the Government Code and are generally available to individuals who have successfully completed deferred adjudication community supervision, which for purposes of an OND means that the following three conditions have been met:

- 1) The person entered a plea of guilty or nolo contendere;
- 2) The judge deferred further proceedings without entering an adjudication of guilt and placed the person under the supervision of the court or an officer under the supervision of the court; and
- 3) At the end of the period of supervision, the judge dismissed the proceedings and discharged the person. 129

However, beyond having completed deferred adjudication community supervision, there are three requirements that must be met in order for the court to have the legal authority to issue an OND.

First, although deferred adjudication community supervision is available for a broad number of crimes, there are several crimes for which an OND is not available, and they permanently make a person ineligible for an OND, even if the crimes are unrelated. Those include:



- Offenses requiring registration as a sex offender<sup>130</sup>
- Aggravated kidnapping;<sup>131</sup>
- Murder;<sup>132</sup>
- Capital murder;<sup>133</sup>
- Human trafficking;<sup>134</sup>
- Injury to a child, elderly individual, or disabled individual;<sup>135</sup>
- Abandoning or endangering a child;<sup>136</sup>
- Violating a court order relating to family violence, sexual assault or abuse, stalking or human trafficking;<sup>137</sup>
- Stalking;<sup>138</sup> or
- Any other offense involving family violence.<sup>139</sup>

Second, a person is ineligible for an order of nondisclosure if the court makes an affirmative finding that the offense for which disclosure is requested involves family violence. <sup>140</sup>

Third, a person is ineligible for an order of nondisclosure if they were convicted or placed on probation or deferred adjudication for another crime, except for fine-only traffic offenses, while already on probation or deferred adjudication for the crime for which an OND is sought.

If a person qualifies for an OND and wishes to obtain one, they are required to file a petition requesting it to the clerk of the court that sentenced them or placed them under community supervision or deferred adjudication. Several documents may be needed, including:

- A copy of the judgement in the case;
- A signed order or document showing that the judge reduced the time required or conditions ordered;
- A signed order showing that the person completed all requirements, paid all fines, costs, and restitutions;
- A discharge order;
- A discharge and dismissal order;
- A signed order or judgement reflecting any affirmative findings made by the judge.

Once an order of nondisclosure has been granted, the court clerk will send the order to the Department of Public Safety, which will have 10 business days to seal the criminal history information subject to the order and forward the order to other relevant agencies.

1. <u>Policy Recommendation</u>: Make Orders of Expunction and Nondisclosure Presumptive and Automatic



Whether a person is acquitted, exonerated, has satisfied the conditions of a sentence or pretrial intervention, or met the requisite waiting periods, the common theme is that they are either eligible for an expunction or order of nondisclosure, or not. That means that the Legislature has already decided that the person should have the opportunity to remove the incident at issue from his or her record, or shield it from public view, yet the barriers to this process prevent or discourage many from doing so. Indeed, cumbersome paperwork and the additional costs of further legal assistance are substantial barriers for many to obtain this relief that is available to them. This is particularly so for defendants who lack advanced education or knowledge of the legal system.

Courts and officers of those courts interact with these individuals in an ongoing capacity. Building in a way of tracking eligibility for expunction or nondisclosure in anticipation of automatic relief if the court's conditions are met is within the ability of those courts. Instead of placing an additional burden on the individual already doing their best to comply, there should be an automated process for expunction or nondisclosure at the end of that individual's interactions with the court for a particular offense, so long as all of the conditions are requirements have been met. This could be as simple as a final hearing in which the court is required to evaluate whether or not the conditions for expunction or OND have been met. If so, it should assist the individual in acquiring the necessary documents and begin the process of moving forward with record relief.

This is admittedly a big-picture reform that will take detailed legislation, but the benefits of such a reform would be myriad. Knowing from the start of the process that record relief will happen so long as the individual stays on the right path should be expected to reduce recidivism and ultimately lessen the burden of the state's court system. Automating this process will also ensure that everyone eligible will take advantage of the relief available to them, which means greater opportunities to re-enter society as productive citizens.

House Bill 3601 (87R; Leach, et al.) offers a template for how to address the issue. The bill sought to place the burden of initiation on the state for identifying first-time offenders who received deferred adjudication for non-violent misdemeanors (subject to certain exceptions) and qualify for ONDs. The bill tasked the Department of Public Safety (DPS) with identifying such persons monthly and notifying courts of such defendants. Once notified, a court would grant the OND, without charging the \$28 fee in current statute. According to the bill's fiscal note, any cost to the state could be absorbed by existing resources, and an impact to local government was not anticipated. HB 3601 passed the House with only one "Nay," but did not receive a vote in the Senate. The Legislature should consider attempting to enact the provisions of HB 3601 again.

#### D. State Jail Felonies

Note: The following section on State Jail Felonies and Probation is a shortened and modified version of a 2018 TCCRI white paper, which can be read <u>here</u>.



State jail felonies are the product of reforms to the Texas Penal Code enacted in 1993 by the 73rd Texas Legislature. Senate Bill 532 (73R) and Senate Bill 1067 (73R) created the state jail system and state jail felonies in order to "alleviate overcrowding in prison and county jails." Under SB 1067, state jail confinement sentences of 180 days to 2 years (and up to \$10,000 in fines) would be immediately suspended and defendants placed under community supervision for two to five years. If an offender took action resulting in revocation of community supervision, then the offender would serve the entire sentence in a state jail. The opportunity for immediate release with a mandatory jail sentence as punishment for violating the terms of that release was a classic carrot and stick approach.

Much has changed since 1993. As a 2015 Interim Report from the House Committee on Criminal Jurisprudence explains, the original intent of the state jail felony program "was to remove low-level criminals from contact with violent offenders as found in the prison system, reduce overcrowding in the prison system, and emphasize treatment and rehabilitation with the goal of reducing recidivism rates for low-level offenders." These goals were meant to be accomplished through work programs, rehabilitation, and educational opportunities.

The legislature subsequently modified the state jail program several times. Senate Bill 15 (74R) made community supervision for state jail felons with one prior conviction discretionary instead of mandatory. Two years later, Senate Bill 663 (75R) removed *all* mandatory community supervision, which allowed judges to sentence all state jail felons directly to state jail. Again, the Interim Report explains that "[t]hese changes resulted in the direct sentencing to state jails for the majority of state jail felonies." It was a hard shift away from community supervision.

Several additional reforms followed, most of which "demonstrated a small move back towards the original intention of state jails[.]"<sup>148</sup> However, state jail facilities are generally considered "less effective than state prisons in rehabilitation, too expensive, and are notorious for high recidivism rates."<sup>149</sup> Thus, they are distinguishable from state prisons and county jails in the opposite way than what was intended.

#### E. Current offenses

There are five categories of felonies in Texas, ranging in seriousness from capital felonies down to state jail felonies. Over 55 crimes are specifically designated as state jail felony crimes in the Penal Code. Those crimes include a broad range of criminal activity including certain categories of fraud and theft, criminally negligent homicide, certain categories of insurance and Medicaid fraud, a fourth prostitution conviction, and certain forms of obscenity, to name a few. In addition to offenses specifically designated as a state jail felony, any offense designated as a felony in the Penal Code without specification is treated as a state jail felony.

Chapter 481 of the Health and Safety Code designates at least an additional 16 different state jail felonies. These include things like possession or delivery of controlled substances, <sup>157</sup> possession of certain amounts of marijuana, <sup>158</sup> and possession or delivery of certain categories of drug paraphernalia. <sup>159</sup>



#### F. Penalties

An individual found guilty of a state jail felony "shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days." <sup>160</sup> In addition to confinement, such an individual may be punished by a fine of up to \$10,000. <sup>161</sup> A state jail felony may be upgraded to a third degree felony if committed using a deadly weapon or if the individual was previously convicted of a crime relating to human trafficking, sexual abuse of children, or a variety of violent offenses, such as murder, sexual assault, or compelling prostitution, to name a few. <sup>162</sup> Additionally, if it is shown at trial that the defendant has previously been convicted of two state jail felonies, a subsequent conviction for a state jail felony "shall be punished for a felony of the third degree." <sup>163</sup> Other repeat convictions may upgrade a state jail felony as high as a second degree felony. <sup>164</sup>

Unlike other categories of felony, state jail felons are housed in specific state jails. They do not serve in the Texas Department of Criminal Justice or in a county jail and they are not eligible for parole. State jail felony sentences are served "day for day," meaning that in addition to no parole, there is no time served reduction for good time as there is in prison sentences for other levels of felony conviction. There is a program called the Diligent Participation Credit program, which allows time credit to state jail felons who diligently and successfully complete certain education, work, and substance abuse programs, but a state jail felon sentenced to state jail will typically serve the full sentence in a state jail. <sup>165</sup>

## G. Penal Code § 12.44

Section 12.44 of the Penal Code is a considerable exception to the rule that state jail felons typically serve a full sentence in a state jail. Under Section 12.44, a state jail felon may be punished as though he or she has committed a misdemeanor. Section 12.44 has two subsections. Section 12.44(a) allows a court to punish a defendant convicted of a state jail felony as though that person committed a Class A misdemeanor "if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice." <sup>166</sup> Section 12.44(b) allows a prosecuting attorney to request that the court authorize prosecution of a state jail felony as a Class A misdemeanor. <sup>167</sup> Section 12.44(a) is heavily utilized and has undermined the purpose of the state jail felony in numerous ways.

Reducing a state jail felony conviction punishment (note that only the punishment is reduced; the conviction is still a state jail felony) to that of a Class A misdemeanor has several benefits for the convicted. First, a Class A misdemeanor is punishable by a fine of up to \$4,000, a jail term of up to one year, or both, which is considerably lower than a state jail felony punishment. Furthermore, instead of being forced to serve a sentence "day for day," which is the case with a state jail felony, inmates may be awarded time for good conduct in accordance with a particular county's time credit policy. In practice, a state jail inmate may be released or let out on parole with only a fraction of the sentence actually served in a jail facility.



In the realm of criminal defense, a culture has grown up around Section 12.44. "For accused persons facing prosecution for certain low-level felony offenses," one criminal defense lawyer blog points out, "Texas Penal Code **Section 12.44** is **like the Holy Grail of plea deals**. Clients continuously ask 'what is a 12.44(a)' . . . 'can I get a 12.44(a)' . . . and 'how does 12.44(a) work?' They ask the same questions about Section 12.44(b)." Another criminal defense blog shared an anecdote indicative of the culture around Section 12.44:

But then I had this client who I was already representing on a Motion to Revoke and we had previously worked out an agreement by which he would spend 30 days in county jail, catch up on some fines and fees he owed as part of his felony probation, and his probation would be continued. . . . Since my client was going to be in county for 30 days, we arranged for his family to take care of his outstanding balance with the probation department.

. . .

I ask him "Did you tell your family not to pay your balance with probation?" and he says, "Yeah, I'm just going to do that thing where I get my offense reduced to a misdemeanor." I tell him, "You are here on [a motion to revoke] for a 3rd degree felony. You cannot get that reduced to a misdemeanor." I was frustrated because now this is the fourth time I have had someone tell me that they are just going to "12.44(b)" their case. 169

Essentially, Section 12.44 allows conviction and release. The accused accrue time served while awaiting disposition of their case, and often times they earn extra days towards a sentence through good time served. By the time the case reaches disposition, a felony conviction with misdemeanor sentence is an appealing option that allows quick release. This is a major contributor to the revolving door nature of state jail felonies.

### H. The Revolving Door

While they were originally meant to emphasize treatment and rehabilitation, reduce overcrowding, and reduce recidivism rates for low-level offenders, state jails have become facilities that achieve very little in the way of those goals. In 2014, the population of individuals sentenced to state jails was 10,616.<sup>170</sup> Because state jails may also house prison transfer inmates, the population is much higher. In total, in 2013, state jails received 22,371 incoming offenders and released 22,601.<sup>171</sup> Only 118 of those offenders were released to community supervision.<sup>172</sup> Indeed, "state jails are no longer the backup to community supervision, but are the primary response to state jail felonies with minimal rehabilitation opportunities and maximum sentences served."<sup>173</sup> Inmates go in, they come out, and few of the original goals of the system are achieved.

Much of the revolving door is related to recidivism rates for state jail felons, which—despite reduction being one of the primary goals of state jail felonies—are actually *higher* than rates of inmates in the state penitentiary.<sup>174</sup>



The Legislative Budget Board has a Criminal Justice Data Analysis (CJDA) team that calculates recidivism rates for correctional populations. Recidivism is defined as "a return to criminal or delinquent activity after previous criminal or delinquent involvement." CJDA looks at data for individuals who were rearrested, adjudicated or re-adjudicated, convicted or reconvicted, and incarcerated or reincarcerated within three years of release from incarceration or within three years of the start of supervision. As the following table provided in the 2021 CJDA analysis shows, the "state jail" cohort is consistently the worst performer in terms of adult offenders being rearrested within three years of release or start of supervision:

REARREST RATES BY FISCAL YEAR OF RELEASE OR START OF SUPERVISION, FISCAL YEARS 2015 TO 2017

COHORT	PERCENTAGE REARRESTED WITHIN THREE YEARS		
	2015	2016	2017
Adult			
Felony Community Supervision	38.8%	36.4%	40.6%
Prison	45.4%	46.8%	47.6%
State Jail	62.8%	62.5%	63.0%
Substance Abuse Felony Punishment Facility	44.0%	43.1%	43.9%
In-prison Therapeutic Community	44.1%	45.4%	46.0%
Intermediate Sanction Facility	57.2%	55.1%	56.2%
Parole Supervision	42.8%	44.5%	45.3%

Table Source: Legislative Budget Board (January 2021)<sup>177</sup>

The state jail cohort also performs poorly in terms of incarceration or reincarceration within three years of release or start of supervision:

## INCARCERATION OR REINCARCERATION RATES BY FISCAL YEAR OF RELEASE OR START OF SUPERVISION FISCAL YEARS 2015 TO 2017

	PERCENTAGE INCARCERATED OR REINCARCERATED WITHIN THREE YEARS		
COHORT	2015	2016	2017
Adult			
Felony Community Supervision	28.3%	28.7%	27.6%
Prison	20.3%	20.8%	20.3%
State Jail	30.9%	29.7%	28.0%
Substance Abuse Felony Punishment Facility	44.3%	45.7%	42.2%
In-prison Therapeutic Community	22.8%	23.8%	21.7%
Intermediate Sanction Facility	39.5%	41.5%	38.5%
Parole Supervision	20.2%	21.0%	20.2%

Table Source: Legislative Budget Board (January 2021)<sup>178</sup>



Given the original intent of state jail felonies, these levels of recidivism should not be acceptable. Furthermore, as state jail felonies have departed from things like community supervision and treatment—options that are available to worse felony offenders—the problem has been exacerbated.

### 1. <u>Policy Recommendation</u>: Repeal Penal Code § 12.44(a)

Section 12.44(a) is used regularly to secure a state jail felony conviction, but without the appropriate punishment. In punishing a felony crime as a misdemeanor and allowing time served awaiting disposition to count towards the sentence, Section 12.44(a) allows offenders to return to the streets quickly, often with little time served. That provides a strong incentive to plead guilty, accept the 12.44 deal, and move through the system. It is a major contributor to the high recidivism rates among state jail felons.

2. <u>Policy Recommendation</u>: Require Jurisdictions to Consolidate their State Jail Felony Cases into a Single Docket

Jurisdictions should consolidate their state jail felony cases into a single docket so that those cases are managed and resolved consistently, and so that the proper treatment and punishment may be sentenced.

3. <u>Policy Recommendation</u>: Enact a tiered system of sentencing for state jail felonies

Punishments for state jail felonies should emphasize early assessment and individualized treatment and rehabilitative services specific to the needs of the offender, and the opportunity to have a case dismissed if the terms of the pretrial intervention contract are met. There should be a focus on quickly determining the proper course of action in order to minimize pretrial detention and the accrual of time. A four-tier system could be devised, with the lower tiers providing incentive for rehabilitation and against recidivism, and the upper tiers providing punishment through mandatory sentencing and repeal of Section 12.44 of the Penal Code. The mandatory sentences for repeat offenses in the later tiers represent a more serious punishment than is currently in statute for state jail felonies. For example:

<u>First State Jail Felony Offense</u>: A first-time offender would be eligible for a 12-month pretrial intervention program with terms set based on a comprehensive risk and needs assessment. Successful completion of a program would result in the case being dismissed and eligibility for an immediate non-disclosure and automatic expunction after a period of time without committing a new felony offense. This punishment makes clear that people make mistakes. Offenders will have to show a recognition of the mistake and a willingness to complete treatment and avoid recidivism. They are rewarded with a clean record. As a first-time offense, this option is preferable to § 12.44 of the Penal Code, which is currently



widely used to plead guilty to a state jail felony in order to receive a misdemeanor punishment. Failure to complete the intervention program would result in jail time of up to 12 months.

- Second State Jail Felony Offense: A second offense would result in probation or 2-4 years in state jail. A drug and alcohol assessment would be mandatory, with up to 12 months of treatment if required by the court. Successful completion of a program (if required) and completion of 50% of the sentence would result in early termination of the probation or state jail term. However, failure to complete mandatory treatment would result in the rest of the sentence being served in state jail.
- Third State Jail Felony Offense: A third offense would result in probation or 3-4 years in state jail. A drug and alcohol assessment would be mandatory, with up to 18 months of treatment if required by the court. Successful completion of a program (if required) and completion of 75% of sentence would result in early termination of the probation or state jail term. Failure to complete the probation terms would result in a mandatory state jail alternative.
- Ø Fourth State Jail Felony Offense: A fourth offense would result in four years of probation or four years in state jail. The offender would submit to a comprehensive assessment and be required to complete the recommended treatment. As an alternative the offender could serve 4 years in State Jail. Individuals offending for a fourth time will not be allowed to continue cycling through the system. The state would force them to commit to long-term treatment or a long-term jail sentence. This is a stricter punishment than is currently imposed on state jail felons.

Reforming the state's approach to state jail felonies is an ambitious plan, but not one that presents insurmountable obstacles. This paper does not recommend decriminalizing certain activities. Nor does it recommend liberalizing punishments. Rather, it proposes a reformed approach to a system that does not work properly. State jail felonies, as currently constructed, do not serve their original purpose. While they have lengthy mandatory sentences, statutory loopholes to those sentences have rendered them relatively meaningless. The approach proposed herein recognizes that certain kinds of treatment and supervision work to reduce recidivism and help offenders re-enter society and become productive citizens. Where those interventions and treatment work to reduce recidivism and lower crime, the state and its residents' benefit. Where those forms of treatment do not work, and offenders pose a repeated or more dangerous threat, the punishments should be mandatory and more severe than they are now.



## V. Election Integrity & Civic Engagement

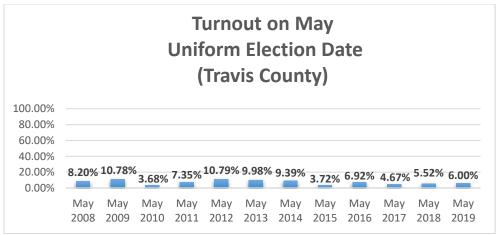
#### A. The Uniform Election Date and Turnout

Voting is the most important way a citizen can impact government. From ballot propositions and bond authorizations to the offices of local utility districts, the Governor, and everything in between, the people have a say in which levers government may pull, and who pulls them. But while a majority of registered voters turn out in November for high-profile elections like President of the United States, Governor, and other statewide offices in Texas, the absence of such big-ticket election items results in election turnout that rarely breaks double-digits.

The smaller elections matter, oftentimes a great deal more than the higher-profile elections. Consider that Humble, a city in Harris County with roughly 7,700 registered voters, elected its Mayor on a May 2019 ballot with only 7.35% of registered voters casting ballots. Contrast that with the November 2018 ballot election for Mayor of Missouri City, another city in Harris County with 3,600 registered voters. Missouri City had turnout of nearly 56%, boosted no doubt by the United States Senate Race between Ted Cruz and Beto O'Rourke at the top of the ticket. 180

Consider also the local debt obligations created through bond elections. From May 2013 through November 2019, 1,445 local bond propositions totaling more than \$106.3 billion have been placed on ballots for voter approval. They range in importance and necessity. The smallest of these was a \$125,000 wastewater bond for the city of Overton. The largest was \$2.5 billion for drainage improvement in Harris County in August 2018. A variety of entities, including water districts, school districts, cities, counties, and community college districts, have this authority. Of the 1,445 local bond propositions during that time, voters approved 1,154 of them for a total debt approval of \$91.3 billion. 182

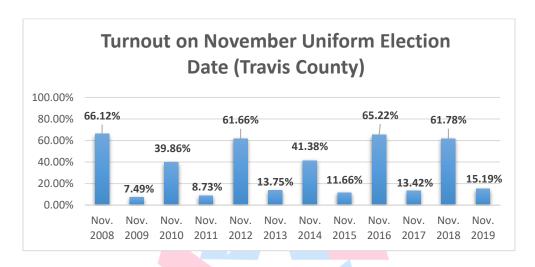
It is a plain truth that voter engagement and turnout is higher in November than it is in May. The following chart illustrates turnout on the May uniform election date, with Travis County voters as the example:





Immediately apparent is the fact that turnout in May broke double-digits only two times in the past decade. Indeed, average turnout in May elections over the decade highlighted in the above chart is 7.2% of registered voters.

Contrast the chart above with the chart below, which tracks registered voter turnout in November elections, again using Travis County at the example:



Two points are readily apparent from this chart. First, it is clear that in even-numbered years, major elections, such as presidential elections and statewide races in Texas, boost overall turnout. State Representatives and State Senators are also elected in even-numbered years. However, even in odd-numbered years, turnout in November elections is consistently higher than all elections held on the May uniform election date. Indeed, every single odd-numbered November election highlighted had turnout higher than the average of 7.2% produced by May election turnout.

Encouraging strong turnout is a bipartisan goal. Indeed, the two major parties and smaller third parties all engage in voter registration and get-out-the-vote campaigns. The Democratic Party in Texas is engaged in the largest voter registration campaign in the state's history in the lead up to the 2020 election. The Republican Party is engaged in similar efforts.

Aside from intra-party primary elections, all elections should be held on the uniform election date in November in order to maximize voter engagement. Several bills were filed and heard on this topic in the 86<sup>th</sup> Legislative Session. House Bill 365 (Cain), for example would have gone even further, by moving elections to November in even-numbered years. Glen Maxey, the Primary Director for the Texas Democratic Party, testified on the bill and stated the party's position that elections should be held when turnout is highest, essentially agreeing with the goal of HB 365 without formally supporting the bill.

There was opposition to HB 365. For example, Chris Davis of the Texas Association of Elections Administrators argued that moving all elections to November would cause long lines, but such an



assertion presumes that the people who vote in both May and November are separate groups of people. That presumption does not withstand scrutiny, as it is highly likely that the voters who turn out in lower numbers in May are more dedicated voters than the general population and it follows that they also already turn out in November. There is also little reason to take seriously the argument that moving May elections to November will increase costs. The fact of the matter is, eliminating low turnout elections in May by moving them to higher turnout elections in November is far more likely to save money than it is to increase costs.

As Alan Vera of the Harris County Republican Party Ballot Security Committee explained in his testimony in favor of House Bill 365: "This is a common sense bill. It's time to end the insane practice of having 3% of the registered voters of a district select the board that governs the district and lay debt obligation on the other 97% of the registered voters." 185

## 1. <u>Policy Recommendation</u>: Hold all Non-Primary Elections on the Uniform Election Date

All non-primary elections should be held on the November uniform election date. People choose to vote or not vote for any number of reasons. It is not the government's business to try to increase turnout or to try to force people to vote. However, a policy of holding elections on dates when turnout and civic engagement is at its highest is good government. The more people weigh in on their city councils, school boards, utility boards, and local debt obligations, the more accountable government will be.

## B. Ballot Transparency and Clarity

Ballot propositions put voters in charge with direct participation in lawmaking. The requirements that must be met in order to put a proposition on a ballot vary from jurisdiction to jurisdiction, but they are common in that they empower voters to decide a matter directly.

Sometimes a local government will choose to place a proposition directly on the ballot. Other times, voters will petition for it against a majority of the local government's wishes. The former typically presents no issue. The latter situation can be problematic when the local government that opposes the proposition is put in charge of ballot language. This is a common problem, as explained in a 2016 *New York Times* piece titled "Why Are Many Ballot Measures So Confusingly Worded?":

There is a whole industry devoted to writing misleading ballot measures and using misleading ads, comprised of think tanks, legislators, lobbyists and the public relations firms they hire. Money and political advantage drives much of what makes it onto the ballots. 186

The piece continues:



It's not easy for voters to deal with this situation. They have to be constantly vigilant about getting informed on the hidden details of ballot initiatives. There are nonprofit institutions monitoring the situation and using social media to get the word out about the reality of some measures, but political leaders also need to support the truth.<sup>187</sup>

This issue is present in Texas. Indeed, ballot language for local propositions has become predictably confusing, so much so that a cynic might suggest that it is done intentionally. Austin, alone, provides a wealth of examples in this regard. In one example, Austin's ballot language for a 2018 proposition on a city audit was accused of being "obviously political, obviously prejudiced, and misleading by the addition of language that is either unsupported by facts and irrelevant material." One critical attorney involved in a lawsuit against the city called it "bogus and illegal," and stated that "they are using the ballot language to argue against the audit." The *Texas Monitor* Reported:

Rather than a question that reflected the language of [a] petition that got more than 33,000 signatures, "Shall a city ordinance be adopted requiring a comprehensive, independent, third-party audit of all city operations and budget," the council, at [Mayor] Adler's insistence, approved this:

"Without using the existing internal city auditor or existing independent external auditor, shall the city code be amended to require an efficiency study of the city's operational and fiscal performance performed by a third-party audit consultant, at an estimated cost of \$1-\$5 million." <sup>189</sup>

A 2016 ballot proposition over repealing ridesharing regulations presents another example. In an article titled "Don't mess up your vote: Here's what Uber, Lyft ballot question means," reporters for the *Austin American-Statesman* explained that voters are "befuddled by the wording they see posted on the Travis County clerk's sample ballot. One of them, who told me her intention was to oppose Uber and Lyft, said she would have inadvertently voted the other way based on what she had read in the ballot language." <sup>190</sup> It is worth posting what voters encountered on the ballot:

#### PROPOSITION 1, CITY OF AUSTIN

Shall the City Code be amended to repeal City Ordinance No. 20151217-075 relating to Transportation Network Companies; and replace with an ordinance that would repeal and prohibit required fingerprinting, repeal the requirement to identify the vehicle with a distinctive emblem, repeal the prohibition against loading and unloading passengers in a travel lane, and require other regulations for Transportation Network Companies?

o For the Ordinance

Against the Ordinance

As the *Statesman* reports, the obvious question asked immediately by most voters is "which ordinance exactly are you asking me about???" <sup>191</sup>



Other examples in Austin abound. In a ballot proposition asking a question directly relating to revision of the city's land development code, the city removed a reference to CodeNext from the ballot language, which is the term that voters had associated with the proposition and campaigned against (and for). Instead, the language was as follows:

Shall a city ordinance be adopted to require both a waiting period and subsequent voter approval period, a total of up to three years, before future comprehensive revisions of the city's land development code become effective?<sup>192</sup>

# 1. <u>Policy Recommendation</u>: Enact Judicial Review of Ballot Language

House Bill 3376 (86R, Klick) and Senate Bill 323 (86R, Huffman), both filed in the 86<sup>th</sup> Legislative Session, were a direct response to this problem. They would have required a three judge panel to review ballot proposition language proposed by political subdivisions. A political subdivision would then be required to submit the ballot proposition language and a brief statement on the purpose of the proposition 123 days before the election. Within 45 days of receipt of the language and explanation, the panel would be required to either approve or disapprove of the language. If the panel disapproves of the language, it would be required to rewrite the language in a manner "that is clear and understandable to the average voter for use in the election." The political subdivision could then either proceed with the approved or revised language. If it chooses to not proceed with revised language written by the panel, it must submit revised ballot language for review again. This is a long overdue change in public policy and should be implemented for future generations of Texans.



#### VI. Public Sector Union Release Time

Texas is a state that values voluntary participation in labor organizations. Indeed, the specific "Right to Organize" under Texas law provides that: "All persons engaged in any kind of labor may associate and form trade unions and other organizations to protect themselves in their personal labor in their respective employment." Indeed, "[a] person's inherent right to work and to bargain freely with the person's employer, individually or collectively, for terms of the person's employment may not be denied or infringed by law or by any organization." <sup>194</sup>

Despite this permissive and encouraging approach to organized labor, Texas prohibits *compelled* participation in organized labor. As a right to work state, Texas law provides that "[a] person may not be denied employment based on membership or non-membership in a labor union."<sup>195</sup> Furthermore, any contract requiring membership in a labor union or to remain in a labor union is void. <sup>196</sup> Right-to-work policies are primarily about the liberty of workers to join or not join organized labor, but the economic benefits of right-to-work laws are well-established.

## 1. <u>Policy Recommendation</u>: Prohibit "Release Time" in Public Employee Union Contracts

Article 3, Section 51 of the Texas Constitution prohibits "the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever[.]" Article 3, Section 52 further restricts the ability of "any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever[.]" Despite these provisions and the general prohibition on compelled support of labor unions, local government contracts often include provisions supportive of union activity, subsidizing them both financially and operationally.

"Release time" (also called "association business leave") is a provision in public employee contracts that pays union officers for engaging in union activity, sometimes exclusively so. According to the Mackinac Center for Public Policy, release time costs federal taxpayers roughly \$122 million annually. <sup>197</sup> State and local figures are more difficult to ascertain, but in Austin, the cost of release time for unionized police, firefighters, and emergency medical personnel in 2012 and 2013 was over \$800,000. <sup>198</sup> The Goldwater Institute estimates the total cost of release time nationally at all levels of government is \$1 billion per year. <sup>199</sup>

What activities are subsidized by release time pay? Mark Pulliam explains in City Journal:

What exactly are union officers allowed to do on the taxpayers' nickel while on "release time"? Under the current union contract, the officers of AFA Local 975 can participate in negotiations, adjust grievances, attend dispute-resolution proceedings, attend union conferences and meetings, and even engage in partisan political activities related to



"wages, rates of pay, hours of employment, or conditions of work" affecting members of the union. In other words, city officials have empowered officers of AFA Local 975 to lobby against the interests of the taxpayers—while being paid by the taxpayers.<sup>200</sup>

Indeed, the contract between the City of Austin and the Austin Firefighters Association, Local 975 requires the city to pay for as much as 5,600 hours of release time each year. That is but one example. The Competitive Enterprise Institute published a report in 2015 highlighting several release time abuses in Texas.<sup>201</sup> The San Antonio Fire Department granted over 4,200 hours of release time in 2012 and another 4,600+ hours in 2013, which cost taxpayers over \$135,000 and \$151,000, respectively.<sup>202</sup> San Antonio's Police Department granted even more release time, issuing over 7,900 hours in 2012 for a taxpayer cost of over \$252,000.<sup>203</sup>

Release time is not exclusively a Texas issue. Indeed, it was prohibited in Missouri as part of a larger legislative package on right to work and organized labor. The language in the Missouri bill reads as follows:

Every labor agreement shall expressly prohibit labor organization representatives and public employees from accepting paid time, other than unused paid time off that was accrued by such public employees, by a public body for the purposes of conducting labor organization-related activities concerning collective bargaining, including, but not limited to, negotiations, bargaining meetings, meet and confer sessions, and any other collective bargaining-related activity, provided that every labor agreement may allow for paid time off for the purposes of grievance-handling, advisory committees, establishing a work calendar, and internal and external communication[.]<sup>204</sup>

Similar language in Texas would reinforce its intention to remain a right to work state where union membership and support are entirely voluntary. Such a statute would reinforce a 1979 opinion from the Texas Attorney General's office that took the position that release time is an illegal gift of public funds for a non-public purpose. Yet, this practice continues. The subsidization of public sector unions should be expressly prohibited in Texas law.



### VII. Endnotes

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- <sup>110</sup> El-Ali v. Texas, 428 S.W.3d 824, 826 (2014) (Willet, J., dissenting).
- 111 Ibid.
- <sup>112</sup> "State Reforms for Civil Forfeiture Laws," Institute for Justice (2023), Link.
- 113 Ihid
- <sup>114</sup> See generally American Bar Association, Nat'! Inventory of the Collateral Consequences of Conviction

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<sup>115</sup> See How to Get Around A Criminal Conviction, N.Y. TIMES, at A22 (Oct. 19, 2015)
<sup>116</sup> See, e.g., Chapter 802, 1102, 2001.
<sup>117</sup> Tex. Occ. Code, Link.
<sup>118</sup> 53.003
<sup>119</sup> Jennifer L. Doleac & Benjamin Hansen, "The Unintended Consequences of "Ban the Box": Statistical
Discrimination and Employment Outcomes When Criminal Histories are Hidden," Texas A&M Dept. of Economics
(Aug. 2018), Link.
<sup>120</sup> "Background Checking—The Use of Criminal Background Checks in Hiring Decisions," SHRM Better Workplaces
Better World (July 19, 2012), Link.
<sup>121</sup> Code of Criminal procedure 55.01(a)(1)
<sup>122</sup> CCP 55.01(a)(2)
<sup>123</sup> CCP 55.01(a)(2)(A)
<sup>124</sup> CCP 55.01(a)(1)(C).
125 CCP 42A.751
<sup>126</sup> CCP 55.01(a-2)
<sup>127</sup> CCP 55.02 Sec. 1
<sup>128</sup> CCP 55.02(b)
<sup>129</sup> Gov Code 411.0715.
<sup>130</sup> Chapter 62, Code of Criminal Procedure.
<sup>131</sup> Section 20.04, Penal Code
<sup>132</sup> Penal Code 19.02
<sup>133</sup> Penal Code 19.03
<sup>134</sup> Penal Code 20A.02 and 20A.03
135 Penal Code 22.04
<sup>136</sup> Penal Code 22.041
<sup>137</sup> Penal Code 25.07; 25.072
<sup>138</sup> 42.072
<sup>139</sup> 71.004.
<sup>140</sup> As defined by 71.004 Family Code
<sup>141</sup> "Facts at a Glance: Comparison of Punishment and Sentencing Provisions in the 1993 and 2003 Penal Codes,"
Texas Legislative Council (Feb. 2005), Link.
142 "Interim Report to the 84th Legislature," House Committee on Criminal Jurisprudence (Jan. 2015), Link.
143 Ibid.
144 Ibid.
145 Ibid.
<sup>146</sup> House Research Organization (HRO), Bill Analysis: SB 15, May 22, 1995, 10.
147 "Interim Report to the 84th Legislature," House Committee on Criminal Jurisprudence (Jan. 2015), Link, p. 47.
<sup>148</sup> Ibid.
<sup>149</sup> Ibid.
<sup>150</sup> Tex. Penal Code § 12.04(a)(1)-(5).
<sup>151</sup> Tex. Penal Code § 30.02(c)(1), 30.04(d)(2); Tex. Penal Code § 31.03(e)(4), 31.04(e)(4), 31.07(b), 31.16(c)(4),
31.18(c)(1), 31.19(d)(1).
<sup>152</sup> Tex. Penal Code § 19.05.
<sup>153</sup> Tex. Penal Code § 35.02(c)(4), (d); Tex. Penal Code § 35A.02(b)(4).
<sup>154</sup> Tex. Penal Code § 43.02(c)(2).
<sup>155</sup> Tex. Penal Code § 43.23(b).
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<sup>156</sup> Tex. Penal Code § 12.04(b).
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<sup>169</sup> South Texas Criminal Defense, "No, You Cannot "12.44(b)" Your 2nd Degree Felony and Quit Listening to Your Cell Mate.....," South Texas Defense: Perspectives From a Small-Town Criminal Defense Practice (Jan. 7, 2009), Link.

<sup>&</sup>lt;sup>182</sup> It is worth pointing out that, as a general matter, and perhaps unexpectedly, that bond propositions are more likely to fail when there is lower turnout, but that is not an argument against more engagement even though TCCRI takes the general position that much of this debt is unnecessary and should be defeated. Data collected from the Comptroller illustrates the success and failure rates of bond propositions held on different election dates:

Date	Number of Bond Elections (\$ Total)	Approved (%)	Defeated (%)
May 11, 2013	123 (\$5 Billion)	100 (81%)	23 (26%)
Nov. 5, 2013	119 (\$5.1 Billion)	86 (72%)	33 (28%)
May 10, 2014	119 (\$7.1 Billion)	94 (79%)	25 (21%)
Nov. 4, 2014	96 (\$6.5 Billion)	85 (88%)	11 (12%)
May 9, 2015	123 (\$5.5 Billion)	103 (84%)	20 (16%)
Nov. 3, 2015	111 (\$10.3 Billion)	100 (90%)	11 (10%)
May 7, 2016	108 (\$5 Billion)	82 (76%)	26 (24%)
Nov. 8, 2016	51 (\$4.7 Billion)	41 (80%)	10 (20%)
May 6, 2017	98 (\$8.2 Billion)	70 (71%)	28 (29%)



<sup>&</sup>lt;sup>157</sup> Tex. Health & Safety Code § 481.115(b), 481.1151(b)(1), 481.116(b), 481.1161(b)(3).

<sup>&</sup>lt;sup>158</sup> Tex. Health & Safety Code § 481.121(b)(3).

<sup>&</sup>lt;sup>159</sup> Tex. Health & Safety Code § 481.125(f).

<sup>&</sup>lt;sup>160</sup> Tex. Penal Code § 12.35(a).

<sup>&</sup>lt;sup>161</sup> Tex. Penal Code § 12.35(b).

<sup>&</sup>lt;sup>162</sup> Tex. Penal Code § 12.35(c).

<sup>&</sup>lt;sup>163</sup> Tex. Penal Code § 12.425(a)

<sup>&</sup>lt;sup>164</sup> See Tex. Penal Code § 12.425(b)-(c).

<sup>&</sup>lt;sup>165</sup> Tex. Code Crim. Proc. § 42A.559.

<sup>&</sup>lt;sup>166</sup> Tex. Penal Code § 12.44(a).

<sup>&</sup>lt;sup>167</sup> Tex. Penal Code § 12.44(b).

<sup>&</sup>lt;sup>168</sup> Pullan & Young, "Section 12.44(a) and (b) for Dummies," *Conroe Criminal Defense Lawyer Blog* (Jan. 18, 2017), Link.

<sup>&</sup>lt;sup>170</sup> "Interim Report to the 84th Legislature," House Committee on Criminal Jurisprudence (Jan. 2015), Link, p. 48.

<sup>&</sup>lt;sup>171</sup> Ibid.

<sup>&</sup>lt;sup>172</sup> Ibid.

<sup>&</sup>lt;sup>173</sup> *Ibid*.

<sup>&</sup>lt;sup>174</sup> Ibid.

<sup>&</sup>lt;sup>175</sup> Legislative Budget Board Staff, "Statewide Criminal and Juvenile Justice Recidivism and Revocation Rates," Legislative Budget Board, 1 (Jan. 2017), Link.

<sup>&</sup>lt;sup>176</sup> Ibid.

<sup>&</sup>lt;sup>177</sup> Ibid.

<sup>&</sup>lt;sup>178</sup> Ibid.

<sup>&</sup>lt;sup>179</sup> Harris County vote history, <a href="https://www.harrisvotes.com/HISTORY/20190504/cumulative/cumulative.pdf">https://www.harrisvotes.com/HISTORY/20190504/cumulative/cumulative.pdf</a> (Last visited in 2021; Data appears to have been removed)

<sup>&</sup>lt;sup>180</sup> Harris County vote history, <a href="https://www.harrisvotes.com/HISTORY/20181106/cumulative/cumulative.pdf">https://www.harrisvotes.com/HISTORY/20181106/cumulative/cumulative.pdf</a> (Last visited in 2021; Data appears to have been removed)

<sup>&</sup>lt;sup>181</sup> Harris County vote history, <u>Link</u>.

Nov. 7, 2017	122 (\$11 Billion)	97 (80%)	25 (20%)
May 5, 2018	91 (\$6.7 Billion)	62 (68%)	29 (32%)
Aug. 25, 2018	1 (\$2.5 Billion)	1 (100%)	0 (0%)
Nov. 6, 2018	98 (\$8.2 Billion)	88 (90%)	10 (10%)
May 4, 2019	92 (\$11.2 Billion)	77 (84%)	15 (16%)
Nov. 5, 2019	93 (\$9.3 Billion)	68 (73%)	25 (27%)

<sup>&</sup>lt;sup>183</sup> Kendall Karson, "Texas Democrats launch largest voter registration campaign to hobble GOP's grip on the state," *ABC News* (Jan. 13, 2020), Link.



<sup>&</sup>lt;sup>184</sup> "Voter Registration," Republican Party of Texas, Link.

<sup>&</sup>lt;sup>185</sup> Public Testimony to House Bill 365 (86R, Cain).

<sup>&</sup>lt;sup>186</sup> George Lakoff, "Why Are Many Ballot Measures So Confusing?" The New York Times, Link.

<sup>&</sup>lt;sup>187</sup> Ibid.

<sup>&</sup>lt;sup>188</sup> Mark Lisheron, "Attorney: City's Ballot Language on Independent Austin Audit 'Political,' Prejudiced." *Internet Archive Way Back Machine* (Aug. 10, 2018), <u>Link</u>.

<sup>&</sup>lt;sup>189</sup> Ibid.

<sup>&</sup>lt;sup>190</sup> Ben Wear, "Don't mess up your vote: Here's what Uber, Lyft ballot question means," *Austin American-Statesman* (Sep. 15, 2018), Link.

<sup>&</sup>lt;sup>191</sup> *Ibid*.

<sup>&</sup>lt;sup>192</sup> Mark Lisheron, "Austin city being sued on ballot issues, misleading voters attorney claims," *Internet Archive Way Back Machine* (Aug. 18, 2018), <u>Link</u>.

<sup>&</sup>lt;sup>193</sup> Tex. Labor Code § 101.001.

<sup>&</sup>lt;sup>194</sup> Tex. Labor Code § 101.003.

<sup>&</sup>lt;sup>195</sup> Tex. Labor Code § 101.052.

<sup>&</sup>lt;sup>196</sup> Tex. Labor Code § 101.053.

<sup>&</sup>lt;sup>197</sup> Perry Chiaramonte, "Critics blast loophole that forces taxpayers to fund public sector union work," *Fox News* (Jan. 12, 2017), <u>Link</u>.

<sup>&</sup>lt;sup>198</sup> Mark Pulliam, "Union Time, Taxpayer Dime," City-Journal (Nov. 15, 2016), Link.

<sup>&</sup>lt;sup>199</sup> Jon Riches, "Public Money for Private Gain," *Goldwater Institute* (Oct. 05, 2014), Link.

<sup>&</sup>lt;sup>200</sup> Mark Pulliam, "Union Time, Taxpayer Dime," City-Journal (Nov. 15, 2016), Link.

<sup>&</sup>lt;sup>201</sup> Trey Kovacs, "A Remedy for the Lone Star State's Taxpayer Giveaway to Unions," *Competitive Enterprise Institute* (Jul. 23, 2015), Link.

<sup>&</sup>lt;sup>202</sup> Ibid.

<sup>&</sup>lt;sup>203</sup> Ibid.

<sup>&</sup>lt;sup>204</sup> House Bill 1413 (Taylor, Jered, 2018), Link.

<sup>&</sup>lt;sup>205</sup> Op. Tex. Att'y Gen. No. MY-89 (1979).