



Bringing Balance to Pretrial Proceedings: Solutions for Early Representation of Indigent Defendants

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Key Points

- Defendants in cases that could result in jail time are constitutionally entitled to legal representation if they cannot afford it.
- The conditions set at the initial hearing, including posting a money bond, often determine whether defendants are able to obtain release prior to trial, but typically indigent defendants are not represented by counsel until at least several days later.
- Making representation available earlier in the pretrial process could provide greater balance in pretrial proceedings.
- Policy solutions could right-size the system, allowing indigent defense resources to focus on a limited number of cases.

Introduction

In recent years, there has been a surge of interest in Texas prison reform. Prison, however, is just one component of the criminal justice system. It is jails, the front door of the justice system, that touch the most people. Nationally, there are 12 million annual jail admissions, about 19 times the number of those entering state and federal prisons.¹ Although the terms are sometimes used interchangeably, prisons and jails are different. A prison is a state-level facility for a felony offender who has been convicted. A jail is a local facility that holds sentenced misdemeanor offenders. A jail also holds people who have been arrested and are awaiting trial, meaning they have yet to be convicted of the charged offense.

Jails of course house many people who will eventually enter prison, but they generally contain more people who will not. This is either because they will not be convicted, will receive a sentence of form of community supervision, or will be sentenced to time already served prior to trial. Many counties seeking to control jail costs are looking at ways to identify and divert pretrial defendants who do not pose a substantial risk of flight or re-arrest so that limited jail resources can be prioritized to best protect public safety.

With the prosecutor and judge both working for the government, the question arises as to who is going to advocate for the defendant during the pretrial process, including identifying and calling attention to facts that may indicate the defendant is a good candidate for a lower bail amount, diversion, or a pretrial supervision program. Given that 71 percent of felony defendants in Texas are determined to be indigent along with more than 40 per-

cent of Class A and B misdemeanor defendants and therefore ultimately assigned counsel, this is a question that necessarily implicates the public purse.² While the Texas Indigent Defense Commission, which gives grants to counties to defray a small share of indigent defense costs, is funded through court fees rather than general tax revenue, county tax dollars pay for most of the indigent defense costs in Texas. Indeed, the total cost of indigent defense in Texas in 2014 was \$230 million, of which just under \$43 million was covered by formula-based and discretionary grants from the Texas Indigent Defense Commission.³

Texas counties have a constitutional duty bolstered by the Texas Fair Defense Act to provide counsel. In the vast majority of cases, this is accomplished through appointing a private lawyer, although a handful of Texas counties use public defenders' offices for some cases, such as a public defender's office in Harris County that focuses mostly on matters involving the mentally ill. Comal County is piloting a model where defendants can choose from a list of qualified attorneys vetted by the judiciary. A 2012 Texas Public Policy Foundation paper recommended such a client choice approach, sometimes referred to as "Gideon vouchers," because it would empower defendants and ensure attorney fidelity to the client rather than a judge who may be eager for quick pleas that move their docket.⁴

The issue of providing counsel at the first appearance hearing or magistration when pretrial conditions such as bail are set is particularly challenging, given that many defendants in jailable misdemeanor cases do

not even have representation by the next hearing, which is the arraignment when the charges are read aloud in court and a plea is taken. In 2013, 27 percent of the nearly 560,000 jailable misdemeanor defendants in Texas did not have an attorney at arraignment, and in Florida, two-thirds lacked counsel at this stage either because they were not offered counsel or waived counsel.⁵

Individuals concerned about limiting the size and scope of government should not necessarily fret about the fact that the courts have established the right to counsel as a “positive right” in a Constitution that is otherwise full of primarily “negative rights.”⁶ As a 2010 Cato Institute report explained, “of all the services that governments provide to the poor, [indigent defense] is arguably the one most defensible on libertarian (as well as other) grounds. Judicial proceedings, including the opportunity to present a defense, are an intrinsic part of a broader service that government provides to the public as a whole—law enforcement and social protection.”⁷ The Cato report goes on to observe that this “service is one of government’s most basic tasks, and indeed is typically seen as the primary *raison d’être* of the state.”⁸

A solution for leveling the playing field between an individual and the government and reducing unnecessary jail costs by ensuring facts favorable to the defendant are identified and considered as early as possible in the process would be to provide legal representation for indigent defendants at hearings at which bond and other pretrial conditions are set or at a bond reduction hearing that would occur very shortly afterward. Ever since the 1963 U.S. Supreme Court ruling in *Gideon v. Wainwright*, representation in criminal proceedings that could result in a sentence of incarceration has been viewed as a fundamental, constitutional right.⁹

The U.S. Supreme Court has further held that to comply with the Sixth Amendment, the right must attach at the point that adversarial proceedings have commenced, and that “adversarial proceedings” commence when the suspect learns the charge against him and his liberty is subject to restriction.¹⁰ In 2008, the U.S. Supreme Court further ruled in *Rothgery v. Gillespie County* that counsel must be appointed within a “reasonable time” after the right attaches.¹¹ In Texas, this right ostensibly attaches at the first appearance (the hearing described in Article 15.17

of the Code of Criminal Procedure when the defendant is magistered and pretrial conditions such as bail are set), though the defendant must request counsel at this juncture to trigger the period of “reasonable time.” Neither the Supreme Court nor Texas courts have never explicitly ruled, however, on whether counsel must be provided at this initial hearing when bail and other pretrial conditions are determined and what constitutes a reasonable time.

No county in Texas currently provides indigent clients counsel at the initial hearing at which bail and other pretrial conditions are set.¹² The Texas Code of Criminal Procedure requires that counsel be assigned to indigent defendants within four days in counties with populations of 250,000 and six days in other counties.¹³ The Texas Indigent Defense Commission seeks to monitor compliance and reports that, on average, appointment does in fact occur after four days in the counties above 250,000 and after six days in the other counties.¹⁴ It typically takes several days after appointment for the counsel to meet with the client, which would mean that in most cases at least a week would pass before a bond reduction hearing would be requested, which might then occur a few days later, thereby clocking in at perhaps 10 days after arrest.¹⁵

The issue of timely pretrial representation was brought to the forefront by a 2013 opinion by the Maryland Court of Appeals (the court of last resort in Maryland). This decision held that the right attaches at the point of the bond hearing, and thus counsel at that stage is indeed constitutionally required.¹⁶ The Maryland Legislature subsequently enacted legislation, HB153 in 2013, to comply with the ruling.¹⁷

Texas courts have not made such a ruling, but from the perspective of policymakers, the issue nonetheless warrants attention. Whether indigent counsel is constitutionally required is a legal question that is separate from the policy question of whether early representation would be wise. Currently, in Texas and most jurisdictions, the only people present at the magistration at which bond is typically set (which often occurs in jail), are the judge, the defendant, sheriff’s deputy, and sometimes the prosecutor.* If bail is set so high that the defendant remains in jail prior to trial, that is more leverage for the prosecutor to secure a quick plea, which in turn helps the judge move the docket.

* For example, Rule 6.12 of the Harris County District Courts provides that at the initial appearance of the defendant the court determines if probable cause exists, whether the defendant should be appointed a lawyer, and whether to set bond, and if so, in what amount.

Providing counsel at a defendant's initial appearance or at a subsequent bond reduction hearing held within 48 hours of the initial appearance could reduce jail costs, provide better public safety and reentry outcomes, and perhaps most importantly, advance liberty by putting the defendant and the government on more equal footing. However, this step must be taken in conjunction with other policy changes that reduce the total number of defendants who qualify for government-funded lawyers so that limited, existing indigent defense resources can be reallocated over a smaller universe of cases.

The Costs of Pretrial Incarceration

Jails are one of the top expenses in county budgets, and given that nationally 62 percent of those in county jails are awaiting trial, there is a significant cost associated with pretrial incarceration.¹⁸ Consider, for example, Harris County, where most of Houston is located. Approximately 6,000 offenders (out of about 9,000 daily) are merely awaiting trial or some other disposition.¹⁹ The cost of housing each one of these jail inmates for one day is \$59.²⁰ Thus, each day, about \$360,000 is being spent on pretrial detention in Harris County, though undoubtedly some individuals should be held prior to trial due to the danger they present.

To put these figures into perspective, consider that while jail may cost \$59 per offender per day, many of these offenders will eventually be placed on probation, which in Texas, costs about \$2.99 per day.²¹

This pretrial incarceration is not only costly for taxpayers, it is costly for the accused, who—although they do not pose a high risk of committing a serious crime—will miss work while incapacitated, and who may be out of a job upon release. Unemployment is well-known to be a major risk factor for re-offending—or for offending for the first time, if the individual was not guilty in the first place.²² Research has found that low-risk defendants have greater likelihood of committing new crimes than similarly situated defendants held no more than 24 hours, with the percent increase ranging from 17 percent for those held two to three days to more than 40 percent for those held 15 to 30 days.²³

Researchers Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger suggest that the observed higher recidivism rates could be the result of a loss of community stability, as a protracted jail stay undermines employment, housing, marriages, and other protective factors.²⁴

Several studies indicate the importance of pretrial decision making. First, a 2007 Bureau of Justice Statistics study found seven in 10 defendants secured release when bail was set at less than \$5,000, but only one in 10 when bail was set at \$100,000 or more.²⁵ Thus, the amount at which bail is set often determines whether the defendant obtains release prior to trial. Second, two New York City studies found that 46 percent of both felony and misdemeanor defendants who did not make bail were not sentenced to incarceration, with about half never convicted and the other half receiving a non-custodial sentence such as probation.²⁶ Thus, in many cases, the pretrial disposition of the case frequently determines whether a defendant is subjected to incarceration for any substantial period. Additionally, a study of Florida offenders found that, after adjusting for other variables, whether or not defendants were detained until their trial was strongly associated with the likelihood of a prison sentence and longer incarceration sentence.²⁷

One approach to reducing the number of individuals unnecessarily detained prior to jail in local jails—and therefore limiting all of these problems—is to ensure legal representation for indigents at the time of the hearing when bond and other pretrial conditions are determined. Representation may reduce the likelihood of the setting of higher bond amounts which increase the odds of pre-trial detention, and moreover, such a policy may not have any detrimental effect on crime rates.²⁸

Professor Douglas Colbert of the University of Maryland School of Law led an investigation of such a policy change that he called the Lawyers at Bail Project.²⁹ In the project, lawyers were randomly assigned to 300 bond hearings for non-violent offenders and the hearings were compared to those in a control group by a team of researchers who evaluated the “number and nature of the charges, criminal history, nature of the defendant’s ties to the community, demographic characteristics, whether bail was given, and if it was, the amount at which bail was set.”³⁰

Colbert and his team observed that while only 13 percent of suspects without lawyers at the bond hearing were released on their own recognizance, 34 percent of those suspects who did have counsel were released.³¹ Moreover, individuals who had counsel had their average bail set at approximately \$600 less.³² Finally—and of particular importance for counties struggling to contain costs—the median time spent in jail for suspects without counsel was nine days, but for those with counsel it was two days.³³

Colbert's research teams, who interviewed each of the suspects, also uncovered more intangible benefits, sometimes referred to as procedural justice. For instance, the accused who were given representation were more likely to believe they had been treated with respect and that sufficient information, including information favorable to them, was presented.³⁴

Indeed, in addition to legal representation in the process of setting bail, the Constitution Project in a March 2015 paper also recommended that family members be able to attend pretrial hearings.³⁵ An important related fact that may not be brought to the attention of the court without counsel or family present is that, according to a Connecticut study, defendants who are married are three to five times less likely to fail to appear.³⁶

The Mechanics of Providing Representation During the Process of Determining Bail and Pretrial Conditions, and the Limited State Role in Texas

There are differences in pretrial procedures across various counties in Texas, which are reflected in local court rules. However, in many jurisdictions bail is set at the same initial appearance before a judge or magistrate at which it is determined whether the defendant is indigent and therefore requires appointment of counsel. Washington State has expedited the indigency determination to occur before the initial appearance by promulgating a two-page form that asks basic questions and authorizing the provisional appointment of counsel where it cannot be determined initially whether the defendant is indigent.³⁷ In the latter instance, the defendant is informed that this counsel will be removed if it is subsequently determined the defendant is not indigent. In this scenario, counsel could be appointed in time for the initial probable cause and magistration hearing, which must occur within 24 hours of arrest for a misdemeanor under Article 17.033 of the Texas Code of Criminal Procedure and within 48 hours for a felony, if the defendant is still in jail.³⁸

Ideally, counsel would be present at the initial appearance hearing where bail and other pretrial conditions are set, but jurisdictions that either are unable or unwilling to provide counsel at this stage could ensure a bond reduction hearing with counsel occurs within the next 24 to 48 hours for defendants who remain in jail. In this situation, a bail reduction hearing should be automatically set to occur, although it would be canceled if the defendant has waived it in writing after consulting with counsel or has already been released after meeting the initial bail amount and/or other

conditions set at the initial appearance without representation. At the bail reduction hearing, the defendant would through either hired or appointed counsel be able to present key facts that would support a lower bail amount, such as employment, a stable living arrangement, and strong connections to family and community. The Texas Code of Criminal Procedure allows counsel to request a bond reduction hearing, though the Texas Indigent Defense Commission says such hearings are rare in cases involving appointed counsel.³⁹ This is the case even though the State Bar of Texas's Performance Guidelines for Non-Capital Representation require defense attorneys to advocate for their clients at bail hearings.⁴⁰ While reducing the bond amount that was previously set could avoid some lengthy pretrial jail stays, it is difficult to see how representation at the bond reduction hearing can lead to more defendants obtaining jail release with 24 or 48 hours, as would providing counsel at the initial appearance at which bail and pretrial conditions are set.

Miami-Dade County in Florida and King County (Seattle) in Washington state provide two examples of jurisdictions that have developed models designed to ensure early representation. In Florida, a defendant's first appearance occurs within 24 hours of arrest at which time the court decides on bail and/or other pretrial conditions.⁴¹ Arraignment, where the defendant is presented with the charges, does not occur until 21 days later for defendants in jail and 30 days later for those not in custody.⁴² Since it is not until arraignment that the defendant would be determined to be indigent and assigned counsel, the elected public defender created an early intervention unit solely dedicated to providing representation from the first appearance through the arraignment. This representation includes engaging in any plea negotiations prior to arraignment. Since a defendant cannot enter into a plea without an attorney, this could result in more rapid resolution of cases, which has the potential for reaping jail savings for the many defendants whose plea involves diversion, probation, or some other sentence that does not involve further incarceration.

In King County, the process of delivering early representation is similar, but relied more on the non-profit sector as originally attributed. Indigent defense in the original model was primarily provided through four non-profits that contract with the Office of Public Defender Service.⁴³ There is also a panel that can appoint outside counsel where there is a conflict, such as multiple defendants, or an overload of cases. Counsel is provided by one of these

non-profit agencies at the time of the initial appearance at which bail is set and probable cause is ascertained if the screenings conducted by the Office of Public Defender Service staff based in the courtrooms have determined the defendant is indigent.⁴⁴ As in Miami, in those cases that are not resolved by plea during the initial representation or involve complex issues requiring specialized knowledge, a different counsel is often subsequently assigned.

Ultimately, with Texas having 254 counties that vary dramatically in population and the volume and composition of criminal court cases, any state policy in this area should set a goal of early representation while leaving the mechanics of implementation largely to each county. For example, Andrea Marsh and Alex Bunin of the Texas Fair Defense Project have proposed a pilot program to provide representation for defendants at the first appearance hearing in Harris County, which is one county where a prosecutor does appear at this hearing.⁴⁵

Consistent with the limited state role in indigent defense, it may be possible to incentivize counties to develop innovative solutions for early representation. The Texas Indigent Defense Commission collects and reports certain data such as the number of indigent counsel appointments and amount spent in each county, and conducts on-site audits to review the track record of counties on metrics such as timely provision of counsel. Moreover, the Commission could prioritize for its grants those counties that provide counsel early in the process.

Right-Sizing the System to Concentrate Existing Indigent Defense Resources on Fewer Cases

While expediting the provision of indigent counsel may not present philosophical problems, it could nevertheless present practical challenges—increasing costs—if sensible safeguards are not in place to reduce the number of cases involved. Among these safeguards, policymakers should consider the following: (1) minimizing the total number of hearings through the increased use of police diversion; (2) rapid intake review by prosecutors to weed out cases they do not wish to prosecute; (3) reclassification of offenses; (4) memorandums of understanding with prosecutors for police diversion from jail using strategies such as treatment and mediation for minor offenses involving defendants who do not pose a substantial risk to public safety; and (5) rapid use of risk assessment to identify defendants suitable for release prior to a contested hearing whether through a bail schedule, pretrial supervision, or both.



The most common method of compensating appointed counsel is on a per-case basis. In 2014, Texas counties on average paid indigent defense costs of \$171.68 per misdemeanor case where counsel was provided and \$628.75 per felony case.⁴⁶ Each county would ultimately determine whether to increase these amounts to the

extent that in some cases, these attorneys would have the additional responsibility of appearing at a contested bail hearing. Ultimately, provided that counties have criteria in place to ensure counsel are competent and not carrying an excessive caseload, market forces can drive changes in compensation since counties that pay unreasonably little in light of the work involved will find too few attorneys signing up to receive cases. In Maryland, which unlike Texas primarily relies on public defender's offices rather than private appointed counsel, the state economized partly by using law students to provide representation at bail hearings who have already completed at least a year in law school, and who are now participating in a supervised clinic on pretrial representation.

Another limitation on cost is that in many instances defendants will waive counsel. In Maryland, following the court decision requiring appointment of counsel, defendants waived counsel at the bond hearing more than 60 percent of the time.⁴⁷ While defendants have not been surveyed to determine why they took advantage of the representation while others declined it, those defendants who thought they had the most favorable facts to bring to the attention of the court would arguably have the greatest incentive to accept counsel. The Florida study of misdemeanor representation found that waiver of counsel was 10 times more common among those who had secured release prior to arraignment.⁴⁸

However, perhaps the most important precondition for providing counsel earlier in the process without adding to the total cost of the system is reducing the number of individuals entering jail who qualify for indigent representation. This is important not only for controlling costs, but also because in some parts of the state, such as many rural areas, there is a dearth of attorneys available to take court appointments. Fortunately, there are several proven strategies for shrinking the universe of cases in which the right to counsel is triggered, all of which can also reduce jail costs.

Police Diversion

Greater use of police diversion can limit the number of individuals entering jail and charged with an offense carrying jail time (the trigger for the right to counsel), thus allowing limited indigent defense resources to be allocated among a smaller set of cases. Police officers are the first on the scene when a possible crime is reported, and they are the first in the chain of actors to identify the possible mental health or substance abuse problems in a suspect. These problems are generally not treated adequately in jail settings, and thus Texas policymakers should consider expanding the ability of police officers to automatically divert certain offenders to treatment settings. This would require (1) presenting officers with the appropriate training so that they know how to recognize possible mental illness or substance abuse problems and (2) giving officers the legal authority to make diversions.

For example, in 2013 the Texas legislature, under the leadership of Senators Joan Huffman and John Whitmire, authorized a mental health jail diversion program in Harris County that—along with the highly successful 24-hour crisis center and case management system in Bexar County—that could become a model for other jurisdictions.⁴⁹ The Houston program authorized by SB1185 is now serving 148 individuals, 29 percent of whom were homeless, with services such as case management, integrated behavioral health care, and peer support.⁵⁰ Additionally, mental health courts are a proven model for holding these offenders accountable for complying with their treatment and probation conditions.⁵¹ Law enforcement leaders recognize that a jail is not necessarily well suited to mental health or treatment and would welcome the legal authority to bring a suspect directly to a hospital or crisis center rather than to booking and confinement. Greater utilization of approaches, such as the Bexar County crisis model and the Harris County pilot program, in other jurisdictions could help limit the number of mentally ill defendants who are unnecessarily incarcerated prior to trial.

Looking beyond those with mental illness, there is also a role for broader police diversion. In 2007, Texas enacted a cite and summons law with the support of the Combined Law Enforcement Association of Texas (CLEAT) and the Sheriffs' Association of Texas.⁵² Under this statute, police may issue a citation and summons to appear on a specific date in court to individuals for certain misdemeanor offenses, including petty theft and possession of four ounces or less of marijuana. Florida has gone even further when it comes to petty theft and other minor misdemeanors by giving police the discretion to issue civil citations, whereby the defendant must complete some type of privately operated community service or treatment program to avoid criminal charges. The most notable case was Florida State quarterback Jamies Winston who was civilly cited for shoplifting crab legs from a supermarket.⁵³ Early results of the Florida adult civil citation program, which is based on the previously implemented juvenile model, indicate a substantial reduction in recidivism.⁵⁴

Only a handful of counties have implemented the cite and summons law, but in October 2014, Harris County District Attorney Devon Anderson led implementation of a somewhat different plan for marijuana possession offenses involving less than two ounces. Under this First Chance Intervention Program, those arrested for such a first-time offense without any significant prior criminal record are brought to the nearest police substation where they are processed and offered the opportunity to be diverted without being charged if they complete either an eight hour drug education class or eight hours of community service, depending on whether the assessment performed by the officer indicates a need for the class. As of March 2015, over 85 percent of the more than 700 individuals offered this pre-charge diversion accepted the offer and completed the program successfully. Of the remainder, 7 percent rejected the offer and 7 percent failed.⁵⁵

Seattle has also experienced considerable success with its Law Enforcement Assisted Diversion (LEAD) initiative, in which police officers physically hand off certain low-level drug and prostitution offenders to a case manager. The program is focused on an area of downtown Seattle plagued by homelessness and was partly a response to businesses and residents in the area who expressed concerns about both the impact of street crimes on quality of life and seeing the same people loitering, sleeping on the street, and cycling in and out of jail.⁵⁶ In this program, the case manager utilizes community resources to connect the

individuals to stable housing, mental health treatment, and other interventions based on their assessment. As long as those arrested undergo the assessment they cannot be charged for the offense, but there is, in reality, considerable leverage since the same officers who patrol the area will often encounter the same people again, and any new arrest will be handled in the traditional manner. Additionally, many of the participants have pending cases and prosecutors, police, and case managers meet weekly to discuss the person's progress, which is the chief criterion prosecutors use in deciding how and whether to pursue the prior case. A March 2015 evaluation of the LEAD program found that within a six-month period, participants were 60 percent less likely to be re-arrested than the control group.⁵⁷

Rapid Intake Review

Some jurisdictions, such as Harris County and Dallas County, have assigned a prosecutor to be at the jail to screen cases 24 hours a day, 7 days a week. This prosecutor reviews the charges brought in by law enforcement to identify offenders where the facts in the officer's report do not allege conduct that actually violates a criminal law or where the case is otherwise not suited for prosecution. While police officers are skilled in many areas and may attend continuing education sessions that cover some aspects of the law, it is sensible for an attorney representing the state to review who is deeply familiar with the thousands of criminal laws on the books in most jurisdictions to screen out cases that are not prosecutable at the earliest possible time. To accomplish this, staffing patterns must align with the reality that jails are busiest very late at night and on the weekends, not during business hours.

Officials in Dallas County estimate it costs \$191,000 in salary and benefits to have a prosecutor at the jail around the clock, but that it saves \$174,000 in jail costs.⁵⁸ Furthermore, a prosecutor would ultimately spend the time to review the case at a subsequent time so much of the cost would have been incurred anyway. Perhaps more importantly, there is a strong liberty interest in ensuring individuals do not languish in jail if their alleged conduct did not constitute a crime.

El Paso County has taken the processing of some misdemeanor cases a step further with its District Attorney's

Information Management System (DIMS) that electronically connects police officers making an arrest with a prosecutor on duty around the clock. Within an average of seven hours of arrest, the prosecutor decides whether the alleged conduct is illegal and worthy of prosecution. About 19 percent cases are rejected at the scene, leading to an average of \$663 of savings to the county in costs such as indigent defense and jailing, as well as \$549 in savings to prospective defendants in costs such as lost wages.⁵⁹ These savings total \$1.49 million for the county and \$1.23 million for those arrested.⁶⁰ Furthermore, for misdemeanants processed through the DIMS system, the sheriff applies a bond based on a schedule set by the judiciary, enabling most misdemeanor defendants to be discharged on bail within 24 hours. This comes before the state requirement of magistration within 24 hours for a misdemeanor (48 hours for a felony), thereby saving court costs and avoiding the need to appoint counsel until later in the process. However, defendants who obtain release and return to employment may be able to afford counsel. Given that the average misdemeanor bond in DIMS cases in El Paso is only \$1,102 (of which 10 percent would only be \$110), it is not surprising that most arrestees can post it.⁶¹ Defendants can exercise their right to opt for bond to be set at magistration, though the average bond in these misdemeanor cases is \$2,580.⁶²

In addition to identifying non-prosecutable cases, early prosecutorial screening can identify cases suitable for pre-charge diversion. As discussed below, many district attorney's offices may be comfortable with entering into memorandums of understanding with law enforcement to divert certain categories of cases, particularly involving non-chronic offenders, but inevitably there will be other cases where prosecutors justifiably want to review the specific facts before determining whether a pre-charge diversion is appropriate.

As El Paso's DIMS system shows, given modern technology, it may not be necessary for the on-duty prosecutor to be physically present at the jail, since files could easily be shared electronically. Moreover, while a dedicated on-duty prosecutor may only make sense in the most populous counties, such technology would allow several smaller counties to designate one prosecutor to remotely screen cases around the clock as they come in.

* If a person fails to respond to a Class C misdemeanor citation, a warrant issued which could result in them going to jail. Also, an officer may arrest for a Class C misdemeanor in Texas except for an open container of alcohol in a vehicle and speeding under 100mph, but in the vast majority of cases officers simply issue a citation.

Reclassify Certain Offenses as Non-Jailable Misdemeanors

Under U.S. Supreme Court precedent, the right to counsel only attaches if an offense is potentially punishable by jail time. Therefore, by simply reclassifying offenses as non-jailable misdemeanors (in Texas these are Class C misdemeanors carrying up to a \$500 fine),* policymakers can reduce the number of cases in which the right to counsel arises. For example, since 1993, the cut off between a Class B and C misdemeanor for property offenses has been \$50. Yet, \$50 in 1993 is the equivalent of \$81.22 today due to inflation.⁶³ By adjusting property offense thresholds for inflation, lawmakers can ensure more petty theft cases do not carry the possibility of a jail sentence.

In the 2015 session, Texas lawmakers are considering legislation such as SB393 by Senator Konni Burton that would update property offense thresholds for inflation, including raising the Class C maximum from \$50 to \$100.⁶⁴ Lawmakers are also considering a proposal, HB414, to reduce the smallest amounts of marijuana possession from a Class B to a Class C misdemeanor, at least for the first few instances.⁶⁵ Given that marijuana possession is the leading reason for arrest in Texas and nationally, this change would likely have a substantial impact on reducing costs associated with both county jails and indigent defense. In 2014 alone in Texas, there were more than 31,000 convictions for the Class B misdemeanor of possessing less than an ounce of marijuana.⁶⁶ Still another proposal, HB883, would add a Class C misdemeanor for low-level graffiti.⁶⁷ Under this legislation, the Class C would be a new option, giving the officer the discretion of either writing a ticket or bringing the person to jail depending on the circumstances.

Of course, offenses should not be reclassified simply to save money on jail costs and indigent defense. However, in addition to policy considerations such as the degree to which the offense implicates public safety, it is sensible for policymakers to look at the data to identify jailable misdemeanors for which sentenced county jail time is extremely rare. This is, in effect, a signal from the market that prosecutors, judges, and juries simply do not view jail as the appropriate sanction in these cases. With regard to possession of small amounts of marijuana, although no statewide data is available on how many sentenced misdemeanants are serving time in county jails, a review of those currently in jail in McLennan County (Waco) shows that all or almost all of the 112 individuals held on marijuana charges, particularly where that is the only charge, are pretrial detainees with a bond amount set,

unless they had just been arrested within the past few days and thus likely had not yet had an appearance to set bail and/or other pretrial conditions.⁶⁸

Finally, while lowering certain higher-level misdemeanors to Class C misdemeanors is sensible, it is important to ensure that, given the lack of counsel in Class C cases, there are not substantial collateral consequences that flow from conviction. To this end, in 2013, Texas lawmakers passed legislation specifying that Class C misdemeanor convictions could not generally be used to deny an occupational license.⁶⁹

Memorandums of Understanding & Victim-Offender Mediation

Some of the diversion programs mentioned above, such as the Harris County First Chance Intervention Program implemented in October 2014, and the Seattle LEAD program involve agreements between the district attorney, police chief(s), and sheriff that cover key questions such as who is eligible and the various steps in the process. These agreements, or memorandums of understanding, can avoid concerns that might otherwise occur about one entity usurping the traditional discretion of another.

Another model for such a partnership is the criminal mediation program in Lubbock, Texas. For more than two decades, the program operated by the Office of Dispute Resolution (part of the county court system), has received referrals from prosecutors and law enforcement. For example, there are forms both prosecutors and police use to refer cases, which makes the process easy and therefore more attractive to utilize. The Lubbock program costs only \$75 a case, a fraction of the cost of the traditional justice system, and lawyers are almost never present for the mediation. Approximately 85 percent of cases are successfully resolved.⁷⁰

National research on mediation consistently demonstrates that results are superior to those achieved through the traditional court process. Restitution agreements are fulfilled in 89 percent of cases.⁷¹ A multi-site study found that 79 percent of victims who participated in mediations were satisfied, compared with 57 percent of victims who went through the traditional court system.⁷² In mediation programs in the U.S. and Canada, victims who went through mediation were more than 50 percent less likely to express fear of re-victimization than the sample of victims who did not go through mediation.⁷³ A meta-analysis found that 72 percent of mediation programs reduced the rate of re-offending.⁷⁴

Including Risk in Bond Schedules and Expedited Referrals to Pretrial Supervision

Right-sizing jails depends in part on better distinguishing between those individuals who pose a high risk of committing a serious crime or fleeing if released prior to trial from those who do not. Such distinctions are difficult to make, however, if counties have no evaluation method other than the “gut feeling” of magistrates, as has been the case historically. Increasingly, however, jurisdictions are using risk assessments to add some rigor to the evaluation process, which should inform all decisions on pretrial conditions, including money bond and the use of pretrial supervision methods such as electronic monitoring.

A national survey found that 64 percent of jurisdictions utilize a bond schedule, although in order to pass constitutional scrutiny these schedules must leave some room for individual determinations in cases where defendants cannot meet the presumptive amount.⁷⁵ For example, Harris County has posted its misdemeanor bond schedule.⁷⁶ These schedules typically list a presumptive bond amount based solely or primarily on the offense for which the defendant has been arrested. For cases involving serious violent crimes, a judge or magistrate should review the case to determine if bail should be offered at all. However, for cases involving misdemeanors and some low-level, nonviolent felonies where the defendant is able to post the presumptive bail amount, defendants can do so in many jurisdictions within several hours of being arrested, which means there is no need for a bail hearing.

If a jurisdiction chooses to use a bond schedule, a weakness of these schedules which should be addressed is that offense type frequently does not correlate with the risk that a defendant will fail to appear or be re-arrested prior to trial. For example, it has been found that the level of severity of an offense under the U.S. Sentencing Guidelines is not correlated with recidivism.⁷⁷ Indeed, research has found that the severity of the offense with which the defendant is currently charged is not correlated with the chance that the defendant will either fail to appear or be re-arrested prior to trial.⁷⁸ While there can be other reasons to consider offense level in pretrial decision-making, including the fact that whether the current charged offense or a prior one is violent sheds light on the chance that the re-arrest would be for a serious offense and a concern for the expectations of safety on the part of victims and the communities, not incorporating those factors that are predictive of failure to

appear and re-arrest is problematic. Thus, when bail schedules are used, they should be modified to take into account the risk level of the defendant, which is based on factors such as prior offenses, other pending charges, and previous failures to appear.

As Kentucky has demonstrated, a static risk assessment incorporating such factors can be completed in minutes without the necessity of even interviewing the defendant.⁷⁹ In the first six months following July 2013 when Kentucky adopted this statewide pretrial risk assessment for all of its courts, a greater percentage of defendants were obtaining release prior to trial while at the same time, new offenses by those released prior to trial dropped nearly 15 percent.⁸⁰

Such an assessment can also serve as the basis for identifying defendants who do not pose a high risk level but are indigent, and therefore are ideal candidates for pretrial supervision without positing a money bond or a personal bond, typically \$25. By administering such an assessment within 24 hours of a defendant being brought to jail, many suitable defendants can be released through posting the presumptive bail amount and/or pretrial supervision without the need for a contested pretrial hearing at which counsel would be present.

As illustrated by the DIMS process in El Paso, a defendant could expeditiously post bond based on a misdemeanor bail schedule and be released prior to the first appearance/magistration hearing at the 24-hour mark, thereby obviating the need for early representation. Similarly, a defendant could be assessed as low-risk by pretrial services and released within 24 hours, achieving the same result. Accordingly, fewer cases would advance to the point where the need for counsel in pretrial proceedings is necessary, though counsel would still need to be provided eventually in many of these cases to conduct plea negotiations and appear at a trial if necessary.

Conclusion

There are some key premises that few would question. First, defendants cannot be expected to capably represent themselves against the government, especially given that on average individuals entering prison in Texas function at less than an 8th grade level and 39 percent of those on probation lack a high school diploma or GED.⁸¹ Second, to vindicate individual liberty and ensure fidelity to the maxim that persons are innocent until proven guilty,

providing counsel to those who cannot afford it is a core responsibility of government, though it need not be performed by government lawyers. Finally, pretrial decision-making is often dispositive as to the actual impact of the case on a defendant's liberty and future as well as jail costs to taxpayers.

It is difficult, if not impossible, to accept these premises and not also recognize the importance of early pretrial representation. The fact that prompt provision of counsel is

not the norm in many jurisdictions likely stems not from a philosophical objection to it, but rather is attributable to the challenge of spreading limited representation resources over a vast volume of cases. Access to counsel during the pretrial decision-making process is fundamental to achieving a more just system, but fairness for defendants need not impose a heavier burden on taxpayers. The best way to expedite the provision of indigent counsel in the pretrial process is to simultaneously shrink the criminal justice system so the same resources can buy more justice. ★

Notes

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