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No Star State: What's Right and Wrong About Criminal Justice Reform in Texas

Marie Gottschalk*

INTRODUCTION

For more than a decade, Texas has been widely hailed across the political spectrum as a model for criminal justice reform. The origin story of the so-called Texas Miracle dates back to 2007 when legislators decided against spending an estimated \$2 billion on new prison construction to accommodate projections that the state would need an additional 17,000 prison beds by 2012.¹ Instead, lawmakers enacted modest changes in probation and parole to divert some people to community supervision.² They also restored some funding for substance abuse and mental health treatment that had been slashed a decade earlier.³ Champions of the Texas Miracle have portrayed the 2007 legislation as a decisive turning point that spurred major drops in the crime rate and the prison population, saving taxpayers billions of dollars.⁴

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¹ *Justice Reinvestment State Brief: Texas*, THE COUNCIL OF STATE GOV'TS JUST. CTR., <https://csgjusticecenter.org/projects/justice-reinvestment/past-states/texas/> [<https://perma.cc/E7N6-67GE>] [hereinafter *Justice Reinvestment State Brief: Texas*]; THE COUNCIL OF STATE GOV'TS JUST. CTR., JUSTICE REINVESTMENT IN TEXAS: ASSESSING THE IMPACT OF THE 2007 JUSTICE REINVESTMENT INITIATIVE (Apr. 2009), <http://www.ncsl.org/portals/1/Documents/cj/texas.pdf> [<https://perma.cc/H6GE-86WF>] [hereinafter COUNCIL OF STATE GOV'TS JUST. CTR.].

² *Justice Reinvestment State Brief: Texas*, *supra* note 1; COUNCIL OF STATE GOV'TS JUST. CTR., *supra* note 1.

³ *Justice Reinvestment State Brief: Texas*, *supra* note 1; COUNCIL OF STATE GOV'TS JUST. CTR., *supra* note 1.

⁴ Mark Holden & Brooke Rollins, *Commentary: Texas Saved \$3B Closing Prisons. Why Rehabilitation Works*, STATESMAN (Feb. 9, 2018),

Although the 2007 changes may have prevented a surge in new prison construction, they did not spark a major contraction of the penal system or in state spending on corrections. Nor did the 2007 changes propel a large drop in crime rates, which had been steadily falling in Texas and in much of the United States since the mid-1990s.⁵

As the Texas District and County Attorneys Association (TDCAA) once observed, “‘criminal justice reform’ is almost too broad a topic to mean much nowadays.”⁶ A closer look at Texas’s actual record reveals that the state has been a laggard not a leader on criminal justice reform, except in the area of addressing wrongful convictions. On other important issues—including ending the war on drugs, juvenile justice reform, curtailing cash bail and civil asset forfeitures, the death penalty, reducing the use of life sentences and solitary confinement, privatization of penal facilities and services, moderating penalties for sex offenses, exploitation of penal labor, jailing people unable to pay criminal fines and fees, and ameliorating the harsh conditions of confinement—Texas has led from behind, as elaborated below. The applause that Texas has garnered for the prisons it chose not to build in 2007 and for the handful of penal facilities it has shuttered since then has overshadowed the fact that the Lone Star State continues to be one of the most punitive states in the nation.

As discussed below, numerous criminal justice reform proposals—none of them radical—have been beaten back in the Texas Legislature since 2007, thanks to the fierce opposition of the TDCAA, the bail industry, the for-profit prison sector, police unions, and individual legislators, some of

<https://www.statesman.com/news/20180209/commentary-texas-saved-3b-closing-prisons-why-rehabilitation-works> [<https://perma.cc/MMR3-2PBT>].

⁵ UNITED HEALTH FOUND., PUBLIC HEALTH IMPACT: VIOLENT CRIME (2019), <http://www.americahealthrankings.org/explore/annual/measure/Crime/state/TX> [<https://perma.cc/BHV3-GEPX>].

⁶ *Legislative Update: Week 11*, TEX. DIST. & CNTY. ATT’YS ASS’N (Mar. 24, 2017), http://attorneys1131.rssing.com/chan-9901008/all_p23.html#item447 [<https://perma.cc/T4K4-2VDA>] [hereinafter TDCAA].

whom have been hailed as criminal justice reform crusaders. Furthermore, public officials and policymakers in Texas have not availed themselves of the potent non-legislative, discretionary powers they possess, including greater use of executive clemency, parole, and compassionate release, to reduce the prison and jail population and to improve the conditions in penal facilities.

For all the hype, Texas remains “more or less the epicenter of mass of incarceration on the planet,” according to Scott Henson of *Grits for Breakfast*, the indispensable blog on criminal justice and law enforcement in Texas.⁷ Other states have far surpassed Texas in reducing the size of their incarcerated populations and in providing safer and more humane lockups that are not such blatant affronts to the Eighth Amendment’s prohibition on cruel and unusual punishments, as detailed below.

About 250,000 people are incarcerated in jails and prisons in Texas—more than the total number of people confined in Germany, France, Japan, and the United Kingdom combined.⁸ If Texas were a country, its

⁷ *Reasonably Suspicious Podcast*,

GRITS FOR BREAKFAST (Nov. 21, 2018), <http://gritsforbreakfast.blogspot.com/2018/11/reasonably-suspicious-podcast-tx.html> [<https://perma.cc/T6P9-FJFM>].

⁸ These figures include everyone confined to state penal facilities for adults (154,500), county jails (64,000), juvenile facilities (3,500), federal prisons (21,000), and involuntary commitment (1,400) in Texas. It does not include people incarcerated in federal immigrant detention facilities. These figures were calculated by the author based on the following sources: E. ANN CARSON, U.S. DEP’T OF JUST., PRISONERS IN 2019 8 tbl.4 (Oct. 2020); TEX. COMM’N ON JAIL STANDARDS (hereinafter TCJS), ABBREVIATED POPULATION REPORT 9 (Nov. 1, 2020), <https://www.tcjs.state.tx.us/wp-content/uploads/2020/11/AbbRptCurrent.pdf> [<https://perma.cc/A5CK-Q6F5>]; TEX. JUV. JUST. DEP’T, ANNUAL REPORT TO THE GOVERNOR AND LEGISLATIVE BUDGET BOARD (Dec. 2019), <https://www.tjjd.texas.gov/index.php/doc-library/send/338-reports-to-the-governor-and-legislative-budget-board/2285-tjjd-annual-report-to-the-governor-and-legislative-budget-board-2019> [<https://perma.cc/J3E6-RAL9>];

Population Statistics: Inmate Population Breakdown, FED. BUREAU OF PRISONS (Nov. 26, 2020), https://www.bop.gov/mobile/about/population_statistics.jsp#pop_totals [<https://perma.cc/PQ42-7LNG>]; *Texas Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/TX.html> [<https://perma.cc/W2VD-VC3L>]. For country-by-country incarcerated populations, see *Highest to Lowest - Prison Population*

incarceration rate would rank eighth in the world, just behind Oklahoma and six other southern states.⁹

Over 700,000 people are in prisons and jails and on probation, parole, or some other form of community supervision in Texas.¹⁰ That amounts to about one out of every thirty adults in the state.¹¹ That is enough to fill a city the size of El Paso, Texas. Only five other states have higher proportions of their residents under state control.¹²

Texas operates some of the meanest and leanest prisons and jails in the country. Those who have served time in the Lone Star State likely know what “Texas tough” means.¹³ Two meals a day on weekends during budget shortfalls.¹⁴ Cellblocks without air-conditioning, fans or even enough water

Total, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All [<https://perma.cc/W3KZ-RDWF>].

⁹ For state and worldwide rankings, see LAURA M. MARUSCHAK & TODD D. MINTON, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2017-2018 11–12 app. 1 (August 2020); *Highest to Lowest - Prison Population Rate*, WORLD PRISON BRIEF, https://prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [<https://perma.cc/45S2-SZHJ>].

¹⁰ For the number of incarcerated adults and juveniles in Texas, see *Justice Reinvestment State Brief: Texas*, *supra* note 1; see COUNCIL OF STATE GOV'TS JUST. CTR., *supra* note 1. For the number of adults on parole or probation in Texas (474,600), see MARUSCHAK & MINTON, *supra* note 9, at 12 app. 1. For the number of juveniles under community supervision in Texas (16,600), see TEX. JUV. JUST. DEP'T, COMMUNITY JUVENILE JUSTICE APPROPRIATIONS, RIDERS AND SPECIAL DIVERSION PROGRAMS 13 (Dec. 2019), <https://www.tjjd.texas.gov/index.php/doc-library/send/338-reports-to-the-governor-and-legislative-budget-board/2285-tjjd-annual-report-to-the-governor-and-legislative-budget-board-2019> [<https://perma.cc/2YG6-3X4C>].

¹¹ Calculated by author based on data in MARUSCHAK & MINTON, *supra* note 9, at 12 app. 1.

¹² *Id.* at 11–12 app. 1.

¹³ ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE ch. 3 (2010).

¹⁴ Manny Fernandez, *In Bid to Cut Costs at Some Texas Prisons, Lunch Will Not Be Served on Weekends*, N.Y. TIMES (Oct. 21, 2011), <https://www.nytimes.com/2011/10/21/us/texas-reduces-weekend-meals-for-prisoners.html> [<https://perma.cc/774B-V9KW>].

to drink in triple-digit heat.¹⁵ Understaffed, overwhelmed, and unsafe lockups in isolated rural areas.¹⁶

Despite this dismal record, leading politicians and policymakers from Barack Obama to Donald Trump have lauded Texas for being “smart on crime” and for incubating Right on Crime, the criminal justice movement associated with brand-name conservatives, including Newt Gingrich, Grover Norquist, and the Koch brothers.¹⁷ Right on Crime promotes, in its own words, “The conservative approach to criminal justice: fighting crime, supporting victims, and protecting taxpayers.”¹⁸ It has emphasized framing mass incarceration as a dollars-and-cents problem for taxpayers that requires a pragmatic, bipartisan approach focused on the bottom line and not on the racial, economic, and social inequities that built the carceral state and sustain it today.¹⁹ This bipartisan haze has obscured Texas’s actual record in reducing the number of people under state control and in fostering a safe, humane criminal justice system that is respectful of human dignity. Excessive praise for the Texas model has diverted attention away from the real obstacles to real criminal justice reform in Texas. It also has shrouded more promising political developments that may finally turn Texas into a leader in efforts to dismantle the carceral state.

¹⁵ Candice Bernd et al., *America’s Toxic Prisons: The Environmental Injustices of Mass Incarceration*, PRISON LEGAL NEWS (Apr. 2, 2018), <https://www.prisonlegalnews.org/news/2018/apr/2/americas-toxic-prisons-environmental-injustices-mass-incarceration/> [https://perma.cc/V63K-59DW].

¹⁶ Keri Blakinger, *‘It’s a Crisis’: Nearly One in Three Guards Left the Texas Prison System Last Year*, HOUS. CHRON. (Jan. 25, 2019), <https://www.chron.com/news/houston-texas/houston/article/It-s-a-crisis-Nearly-one-in-three-guards-13562752.php> [https://perma.cc/S2Q3-B5X8].

¹⁷ Barack Obama, *Commentary, The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 824–26 (2017); Hannah Wiley, *Trump Administration Looks to Texas as It Pushes a Criminal Justice Reform Bill*, TEX. TRIB. (Dec. 3, 2018), <https://www.texastribune.org/2018/12/03/first-step-act-prison-reform-texas-criminal-justice/> [https://perma.cc/64P4-ZHXY].

¹⁸ RIGHT ON CRIME, rightoncrime.com [https://perma.cc/38GF-WGX7].

¹⁹ *Id.*

I. TEXAS BY THE NUMBERS: WHO COUNTS?

Trends in incarceration rates and in the total number of people confined to state prisons, county jails, and other penal facilities are key indices of a state's record on criminal justice reform. Claims that Texas has been a model in reducing the reach of the carceral state rest partly on a highly selective interpretation of these important figures. Incarceration trends in Texas are subject to more varied interpretations partly because of differences between the official figures compiled by the Texas Department of Criminal Justice (TDCJ), which oversees state prisons and parole in Texas, and the yearly state-by-state tallies compiled by the U.S. Department of Justice's Bureau of Justice Statistics on the number of people in state prisons. In short, state and federal officials differ over who counts as a state prisoner in Texas. In addition, the tendency to focus on the decline in the number of people confined in the state's approximately 100 prisons without considering how many people are confined in Texas's approximately 245 county jails tends to cast the state's record in a more favorable light.²⁰

Tracking the total number of incarcerated people is more of a shell game in Texas than in many other states. As part of the 2007 measures, the state increased the number of prison beds—it just did not refer to them as that.²¹ Texas legislators expanded the number of beds in locked-down facilities designated for substance abuse treatment.²² They also increased the use of “intermediate sanction facilities” (ISFs), which are de facto prisons where parole violators are confined, typically for a few months, for technical violations such as a failed drug test.²³ According to Republican Jerry

²⁰ E-mail from William Turner, Texas Commission on Jail Standards Research Specialist, to Lexie Shah (Dec. 21, 2020) (on file with author).

²¹ *Justice Reinvestment State Brief: Texas*, *supra* note 1; COUNCIL OF STATE GOV'TS JUST. CTR, *supra* note 1.

²² *Justice Reinvestment State Brief: Texas*, *supra* note 1; COUNCIL OF STATE GOV'TS JUST. CTR, *supra* note 1.

²³ MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 109 (2016).

Madden, a state representative at the time who was a key architect of the 2007 measures, “[t]he dirty little secret is we built about 4,000 beds, but we made them short-term substance-abuse facilities and after-care in communities.”²⁴ “Those are lockup facilities. They’ve got razor wire,” concurred Democrat John Whitmire of Houston, the longest-serving senator in the Texas Legislature and the other leading architect of the 2007 criminal justice package.²⁵

State and federal figures differ considerably because the TDCJ excludes from its state prison counts thousands of people confined under its authority to local jails, substance abuse treatment facilities, and ISFs. But even using the TDCJ’s narrower definition of who counts as a state prisoner, the drop in the state prison population has been modest—just seven percent, or about 10,500 people, between 2007 and 2019.²⁶ This averages out to a decline of about seventeen people each week in the Texas state prison system—which numbered more than 100 facilities—over this period.²⁷

Using the U.S. Department of Justice’s more comprehensive figures of who counts as a state prisoner in Texas, and including county jail populations in assessing trends in incarceration, Texas’s reform record looks even more slight. Between 2007 and 2019, the total number of people held in state prisons and county jails in Texas fell from about 233,000 to

²⁴ Donald Gilliland, *Prison System 6: An Unlikely Duo Break the Cycle in Texas*, PENN LIVE (Mar. 3, 2011), https://www.pennlive.com/specialprojects/2011/03/in_texas_an_unlikely_duo_break.html [https://perma.cc/W6AD-T4H3].

²⁵ *Id.*

²⁶ In 2007, the Texas Department of Criminal Justice reported 152,661 people in state prisons. In 2019, it reported 142,169. TEX. DEP’T OF CRIM. JUST., FISCAL YEAR 2007 STATISTICAL REPORT 1 (July 2008), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2007.pdf [https://perma.cc/8GST-WNRB] [hereinafter TDCJ 2007]; TEX. DEP’T OF CRIM. JUST., FISCAL YEAR 2019 STATISTICAL REPORT 1 (Aug. 31, 2019), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2019.pdf [https://perma.cc/6WNC-F5HC] [hereinafter TDCJ 2019].

²⁷ See TDCJ 2007, *supra* note 26; see also TDCJ 2019, *supra* note 26.

225,500.²⁸ This tiny three percent drop of 7,500 people amounted to a decline on average of just twelve people per week—or fewer than two people each day—across the hundreds of jails and prisons in Texas during these dozen years.²⁹

An examination of trends in the incarceration rate—rather than the year-to-year totals in the number of people in Texas’s prisons and jails—paints a more favorable picture. Between 2007 and 2018, the incarceration rate in Texas fell from about 900 per 100,000 people to about 750 per 100,000 people, a decline of around seventeen percent.³⁰ But it is hard to credit the 2007 measures for this drop. The incarceration rate had already been falling for several years prior to 2007 after reaching a high plateau of about 1,000 per 100,000 residents between 1995 and 2000.³¹ The ongoing decline was

²⁸ The author calculated the 2007 population figure based on data in *Incarceration Trends: Texas, Full Profile*, VERA INST. OF JUST., <http://trends.vera.org/rates/texas> [<https://perma.cc/Z8VL-L8MJ>]. As of late 2019, state-run penal facilities in Texas held 158,820 people, and county-run jails held an additional 66,696 people. JACOB KANG-BROWN, CHASE MONTAGNET, EITAL SCHATTNER-ELMALEH & OLIVER HINDS, VERA INST. OF JUST., PEOPLE IN PRISON IN 2019 1 tbl.1 (2020); TEX. COMM’N ON JAILS & STANDARDS, 2019 ANNUAL REPORT 15 (Feb. 1, 2020), <https://www.tcjs.state.tx.us/wp-content/uploads/2020/07/2019-TCJS-Annual-Jail-Report.pdf> [<https://perma.cc/JW6K-QE85>].

²⁹ See *id.*

³⁰ This is the incarceration rate for adults in state and county penal facilities in Texas. For 2007 figure, see JOSHUA AIKEN, PRISON POL’Y INITIATIVE, ERA OF MASS INCARCERATION: WHY STATE OFFICIALS SHOULD FIGHT JAIL GROWTH tbl.4 (May 31, 2017), https://www.prisonpolicy.org/reports/jailsovertime_table_4.html [<https://perma.cc/62Z8-8GZM>]. For 2018 figure, see MARUSCHAK & MINTON, *supra* note 9, at 12 app. 1. If immigrant detention, federal penitentiaries, and juvenile facilities are included, the rate soars to 891 per 100,000 residents as of 2105. *Texas Profile, PRISON POL’Y INITIATIVE*, <https://www.prisonpolicy.org/profiles/TX.html#:~:text=Texas%20has%20an%20incarceration%20rate,incarcerated%20in%20Texas%20and%20why> [<https://perma.cc/T9FW-8FKA>]. The drop in the imprisonment rate for state-run penal facilities alone (that is, excluding county jails) was 21% between 2007 and 2019. See HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP’T OF JUST., PRISONERS IN 2007 18 tbl.6 (Dec. 2008), <https://www.bjs.gov/content/pub/pdf/p07.pdf> [<https://perma.cc/8MZW-XE44>]; E. ANN CARSON, U.S. DEP’T OF JUST., PRISONERS IN 2019 12 tbl.7 (Aug. 2020), <https://www.bjs.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/67KL-TEVN>].

³¹ AIKEN, *supra* note 30.

largely due to several factors that pre-date the 2007 reforms, including the state's booming population, its declining crime rate, and an increase in releases by the Texas Board of Pardons and Paroles.³²

The onset of COVID-19 has spurred some fluctuations in the number of people in prison and jail in Texas and elsewhere. Between March and September 2020—the first six months of the COVID-19 pandemic—the state prison population declined by 21,000, an epic contraction that was about twice the *total* drop for the previous dozen years.³³ The Texas Criminal Justice Coalition, an advocacy group, attributed the decrease to factors directly related to the pandemic, including plummeting crime rates, declining activity in felony court due to emergency restrictions, and a backlog of sentenced defendants in county jails waiting to be transferred to state facilities.³⁴ The Texas Criminal Justice Coalition warned that the decrease in the state prison population might be short-lived.³⁵ Indeed, in October 2020 the state prison population began rising again.³⁶ In its biennial budget request for fiscal years 2022–23, the TDCJ cited projections from the Legislative Budget Board that the number of incarcerated people

³² Between 1999 and 2017, the state's population grew at more than twice the nationwide rate (38% compared to 17%). Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, THE SENT'G PROJECT (Sept. 17, 2019), <https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/> [<https://perma.cc/D6EA-CFRC>]. For trends in parole releases, see *infra* notes 241–51.

³³ LEGIS. BUDGET BD., TEX., MONTHLY TRACKING OF ADULT CORRECTIONAL POPULATION INDICATORS (Apr. 2021), https://www.lbb.state.tx.us/Documents/Publications/Info_Graphic/817_MonthlyReport_Mar.pdf [<https://perma.cc/3XVX-R3Z7>].

³⁴ DOUGLAS SMITH, TEX. CRIM. JUST. COAL., RESPONSE TO INTERIM CHARGE 4: TEXAS HOUSE COMMITTEE ON APPROPRIATIONS S/C ON ARTICLES I, IV, AND V (Sept. 30, 2020), <https://texascjc.org/system/files/publications/TCJC%20Testimony%20on%20Article%20V%20%28Charge%204%29%2C%209.30.20.pdf> [<https://perma.cc/M3WH-K3AV>].

³⁵ *Id.*

³⁶ LEGIS. BUDGET BD., TEX., *supra* note 33.

in state prisons and of people serving parole and felony probation would hold steady over the next five years.³⁷

At the start of the pandemic, some counties scrambled to thin the number of people in their local jails. The total county jail population fell by nearly 13,000 people—or about nineteen percent—between March 1 and May 1, 2020.³⁸ This was a remarkable drop, especially considering that thousands of people were backing up in county jails as transfers to state prisons were curtailed to reduce spread of the virus.³⁹ But after May, the county jail population began steadily rising almost every month.⁴⁰

Trends in incarceration rates and the total number of people locked up are critical tools to gauge a state's record on criminal justice reform. But viewed in isolation, they can be misleading yardsticks. As a recent Vera Institute report cautioned, using statewide trends in incarceration rates and the number of people incarcerated “as the measure of success can mislead observers into viewing the ‘era of reform’ in too rosy a light.”⁴¹ In Texas, as in dozens of other red and blue states, incarceration rates have been slowing or declining in urban areas while rising in rural communities, even though rural areas tend to have much lower crime rates.⁴² Across the country,

³⁷ TEX. BD. OF CRIM. JUST., LEGISLATIVE APPROPRIATIONS REQUEST FOR FISCAL YEARS 2022-2023 ii (Oct. 9, 2020), https://www.tdcj.texas.gov/documents/bfd/FY_2022-23_LAR.pdf [<https://perma.cc/LW2C-HZ2Y>].

³⁸ TEX. COMM’N ON JAIL STANDARDS, TEXAS COUNTY JAIL POPULATION (May 1, 2020), <http://www.tcjs.state.tx.us/wp-content/uploads/2020/05/POPSUMCurrent.pdf> [<https://perma.cc/4VEX-RXR9>].

³⁹ Jolie McCullough, *Texas Prisons Will Accept County Jail Inmates Again, Three Months After the Coronavirus Halted Intake*, TEX. TRIB., (June 16, 2020), <https://www.texastribune.org/2020/06/16/texas-prisons-jails-coronavirus/> [<https://perma.cc/TL87-A6KX>].

⁴⁰ TEX. COMM’N ON JAIL STANDARDS, TEXAS COUNTY JAIL POPULATION (Nov. 1, 2020), <https://www.tcjs.state.tx.us/wp-content/uploads/2020/11/POPSUMCurrent.pdf> [<https://perma.cc/2DNP-2DHN>].

⁴¹ Jacob Kang-Brown et al., *The New Dynamics of Mass Incarceration*, VERA INST. JUST. (June 2018), <https://www.vera.org/publications/the-new-dynamics-of-mass-incarceration> [<https://perma.cc/9PQL-LQNK>].

⁴² *Id.* at 22.

“there is an almost universal urban-to-rural shift in prison admissions, regardless of whether admissions are declining in the state as a whole.”⁴³

Furthermore, while the number of incarcerated men in Texas has inched downward, the number of incarcerated women has continued to grow, as it has in many other states.⁴⁴ Since 1980, the number of women held in Texas state prisons has ballooned by nearly 1,000 percent.⁴⁵ Texas’s female incarceration rate of 178 per 100,000 residents ranks fifteenth from the top in state-by-state rankings.⁴⁶ Texas’s rate for women is thirteen to forty-two times higher than the rates for women incarcerated in Western Europe.⁴⁷

II. TEXAS COMPARED TO OTHER STATES

In 2007, Texas’s total incarceration rate of about 900 per 100,000 residents ranked sixth in the nation.⁴⁸ By 2018, the state had fallen just one spot to be tied with Arizona for seventh place.⁴⁹ As for how Texas compares with other states in reducing the number of people in state prisons, excluding jails, Texas lags behind the national average, even if we use the TDCJ’s more generous accounting of a seven percent drop in state

⁴³ *Id.*

⁴⁴ LINDSEY LINDER, TEX. CRIM. JUST. COAL., AN UNSUPPORTED POPULATION: THE TREATMENT OF WOMEN IN TEXAS’ CRIMINAL JUSTICE SYSTEM (Apr. 2018), https://www.prisonpolicy.org/scans/tcjc/Womens_Report_Part_2.pdf [<https://perma.cc/R29Q-YSZ9>]. Between 2005 and 2016, the male prison population fell by 1% in Texas while the female prison population rose by 18%. BLUEPRINT FOR SMART JUSTICE: TEXAS, AM. C.L. UNION (2018), <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-TX.pdf> [<https://perma.cc/DW7R-UG6T>] [hereinafter ACLU].

⁴⁵ Christopher Connelly, *Texas Lawmakers Move to Meet Women’s Needs in Prisons*, KERA NEWS (May 24, 2019), <https://www.keranews.org/post/texas-lawmakers-move-meet-womens-needs-prisons> [<https://perma.cc/79JB-E6FF>].

⁴⁶ Aleks Kajstura, *States of Women’s Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/women/2018.html> [<https://perma.cc/ERA7-NL9P>].

⁴⁷ *Id.*

⁴⁸ See AIKEN, *supra* note 30.

⁴⁹ Author calculated rankings for 2018 based on data in MARUSCHAK & MINTON, *supra* note 9, at 11–12 app. 1.

prisoners as the benchmark.⁵⁰ Between 2007 and 2018, the national average for the states was an eight percent decline.⁵¹ The drops in some other large states, notably New York (a decline of twenty-one percent) and California (a drop of nearly twenty-five percent), dwarf the seven percent decline in Texas.⁵²

Faced with these numbers, champions of the Texas model seem to be implying that the Lone Star State's criminal justice record should be graded on a curve when measured against what New York, New Jersey, California, and other coastal blue states have achieved. They have exploited the widespread myth that criminal justice reform is so much harder to engineer in Texas because it is a deep red state in the heart of Dixie, with the implication that it has been saddled since the days of the Alamo with an unforgiving, eye-for-an-eye political culture of frontier justice.⁵³ This mythology has diverted attention away from closely examining the specific political factors that spurred the prison boom in Texas and the ones that stand in the way of anything more than cosmetic reform today.⁵⁴

For all the talk about crimson Texas, the Lone Star State was actually a late entrant in the race to build more prisons that took off around much of

⁵⁰ See TDCJ 2007, *supra* note 26; see also TDCJ 2019, *supra* note 26.

⁵¹ Jacob Kang-Brown, Eital Schattner-Elmaleh & Oliver Hinds, *People in Prison in 2018*, VERA EVIDENCE BRIEF 2 tbl.2 (Apr. 2019), <https://www.vera.org/downloads/publications/people-in-prison-in-2018-updated.pdf> [<https://perma.cc/SSG3-ZXRF>].

⁵² *Id.* at 3 tbl.3.

⁵³ See, e.g., Cory Booker, *End One-Size-Fits-All Sentencing*, in SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE 10 (Inimai Chettiar & Michael Waldman eds., 2015); Marc Levin, *A System That Rewards Results*, in SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE 68 (Inimai Chettiar & Michael Waldman eds., 2015).

⁵⁴ Marie Gottschalk, *Tougher than the Rest: No Criminal Justice Reform "Miracle" in Texas*, PRISON LEGAL NEWS (Jan. 1, 2021), <https://www.prisonlegalnews.org/news/2021/jan/1/tougher-rest-no-criminal-justice-reform-miracle-texas/> [<https://perma.cc/JSV9-X9CF>].

the country in the early 1980s.⁵⁵ The 1980s electoral realignment in Texas—not the state’s reputed conservative culture of frontier justice—set the stage for its belated prison boom in the 1990s.⁵⁶ As a rift between the old guard and progressive wing weakened the state’s Democratic Party, the Republican Party became competitive in Texas for the first time in more than a century. Politicians in both parties then sought an electoral advantage by entering the law-and-order race to see who could be toughest on people who ran afoul of the law.⁵⁷

When Republican governor William P. Clements returned to office in 1987, he laid the foundation for the prison boom with the help of business leaders and law enforcement groups, notably the TDCAA, a powerful organization of prosecutors.⁵⁸ Despite the dire straits of the Texas economy at the time, Clements succeeded in securing a major general obligation bond for prison expansion, thus jettisoning a longstanding commitment to pay-as-you-go fiscal management.⁵⁹ The ongoing legal reverberations of the landmark 1980 *Ruiz v. Estelle* decision, in which a federal district court declared that Texas’s overcrowded and unhealthy prisons were unconstitutional, provided Clements and other hard-liners with an opportunity to expand, bureaucratize, and professionalize the state’s penal system.⁶⁰

Once law-and-order politics were unleashed in Texas, penal hard-liners in both parties faced little resistance because they operated in a political system with low levels of political and civic participation. This lack of participation was due to several factors, including abysmal voter turnout

⁵⁵ See Michael Campbell, *Politics, Prisons, and Law Enforcement: An Examination of ‘Law and Order’ Politics in Texas*, 45 L. & SOC’Y REV. 631 (2011) (discussing the origins of the prison boom in Texas).

⁵⁶ *Id.* at 635.

⁵⁷ *Id.* at 632, 641–42, 645–47.

⁵⁸ *Id.* at 651–57.

⁵⁹ *Id.*

⁶⁰ *Id.* at 640–41; *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

and the lack of powerful statewide associations for African-Americans, low-income people, and Latinos—the groups most likely to be ensnared in the state’s growing dragnet.⁶¹ In the 1990s, Democratic governor Ann Richards presided over an unprecedented prison boom and record-breaking incarceration rates that did not begin to decline until her successor, George W. Bush, left office in 2000.⁶²

In the 1980s when Texas was under federal court order to ease prison overcrowding due to the settlement in the *Ruiz* case, parole release rates shot up.⁶³ Once the prison building spree was at full throttle, the parole board rapidly curtailed parole releases. Release rates for all parole cases plummeted from seventy-nine percent in 1990 to just thirty-nine percent in 1993.⁶⁴ This drop helped spur a near doubling of incarceration rates for state prisoners in just five years between 1993 and 1998.⁶⁵

Another important contributing factor to a rise in the prison population was a 1993 law that created a new category of offenses by reclassifying some misdemeanors and low-level felonies as “state jail felonies” to keep people convicted of lesser offenses out of state prison.⁶⁶ Texas never funded the promised services and programs to divert more people to probation, but

⁶¹ Campbell attributes the low level of civic involvement to several institutional factors, including Texas’s frequent elections, its off-year gubernatorial contests, numerous constitutional amendments related to trivial aspects of government, and a deep-seated patriarchal political culture. Campbell, *supra* note 55, at 658.

⁶² For trends in incarceration rates for these years, see *supra* notes 27–28.

⁶³ PAUL M. LUCKO, BD. OF PARDONS & PAROLES, TEXAS STATE HISTORICAL ASSOCIATION: HANDBOOK OF TEXAS ONLINE (June 12, 2010), <https://tshaonline.org/handbook/online/articles/mdbjq> [<https://perma.cc/39JT-M4FR>].

⁶⁴ Rachel Gandy, *Explaining Texas’ Overnight Prison Boom*, PRISON POL’Y INITIATIVE (Aug. 7, 2015), https://www.prisonpolicy.org/blog/2015/08/07/texas_overnight_boom/ [<https://perma.cc/H8PL-CNSV>].

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁶ TEX. PENAL CODE ANN. § 12.35 (2017); Patrick Graves, *Texas State Jails: Time for a Reboot?*, COMPTROLLER TEX. GOV (Aug. 2019), <https://comptroller.texas.gov/economy/fiscal-notes/2019/aug/jails.php> [<https://perma.cc/22RT-CMAF>].

it did fund a new system of state jails—which mushroomed to about seventeen facilities.⁶⁷ In 2019, the Texas House Committee on Criminal Justice declared this effort to create a less restrictive and less expensive alternative to state prison “a complete failure.”⁶⁸ Because of a massive net widening, thousands of people convicted of low-level crimes ended up warehoused in state jails run by the TDCJ.⁶⁹

The extent of racial and ethnic disparities is another critical yardstick by which to evaluate a state’s criminal legal system. In the case of Texas, the Black-to-white ratio for people confined in its state prisons (excluding county jails) is four to one, compared to a national average of five to one, and a ratio of twelve to one for state prisons in New Jersey and Wisconsin.⁷⁰ As for Hispanic people and white people, Texas is locking them up in state prisons at nearly identical rates, with a Hispanic-to-white disparity of just 1.2 to one.⁷¹

However, in the case of Texas, being below the national average in racial and ethnic disparities in state prisons is not necessarily something to celebrate or boast. Texas has some of the lowest racial and ethnic disparities in incarceration because it has some of the highest incarceration rates not only for African-Americans and Hispanic people, but also for non-Hispanic white people.⁷² The incarceration rate for white people in Texas is extraordinary, surpassing the rate of any other state. The Prison Policy Initiative calculated that the combined jail and prison incarceration rate for

⁶⁷ Graves, *supra* note 66.

⁶⁸ Matt Clarke, *Texas Lawmakers Consider State Jails a “Complete Failure,”* PRISON LEGAL NEWS (June 5, 2019), <https://www.prisonlegalnews.org/news/2019/jun/5/texas-lawmakers-consider-state-jails-complete-failure/> [<https://perma.cc/77HQ-V8PW>].

⁶⁹ Graves, *supra* note 66.

⁷⁰ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT’G PROJECT (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/BAH9-KMA5>].

⁷¹ *Id.*

⁷² *Id.*

white people in Texas is 768 per 100,000 white residents.⁷³ This figure would comfortably put the Lone Star State's incarceration rate for non-Hispanic white people at the top of country-by-country global rankings of incarceration rates, along with nine other states.⁷⁴

In short, when it comes to locking people up, Texas is, like many other southern states, more of an equal opportunity incarcerator compared to states in other regions. Regional differences in patterns of economic disadvantage help explain why. White people in the South tend to be poorer than white people in other regions, while southern Black people "have a disadvantage equal to or less than that of U.S. [Black people] generally."⁷⁵

III. THE LEGISLATIVE RECORD ON CRIMINAL JUSTICE REFORM

Since the purported big bang of criminal justice reform legislation in 2007, Texas has yet to enact any landmark measures to slash the number of people in prison and jail or improve penal conditions.⁷⁶ The average sentence length of people in prison in Texas has remained unchanged at nineteen years over the last decade, according to an analysis by the ACLU.⁷⁷ Since 2005, the average sentence length for people committed to

⁷³ The Prison Policy Initiative's figure for the total incarceration rate for the United States is considerably higher than that of the BJS or Institute for Crime and Justice Policy because it includes in its calculations all types of carceral facilities—not just state prisons and county jails but also halfway houses, federal prisons, and immigrant detention. Furthermore, its 2014 analysis is based on data from the 2010 census. *Discover Your State*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/> [https://perma.cc/4NYU-RCA7].

⁷⁴ *Id.*; Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [https://perma.cc/258F-K72Z]; *Highest to Lowest - Prison Population Total*, *supra* note 8.

⁷⁵ Richard Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201, 234 (2009).

⁷⁶ *Press Ignores Most Important TX De-Incarceration Legislation of 2015 Session*, GRITS FOR BREAKFAST (Aug. 31, 2015), <http://gritsforbreakfast.blogspot.com/2015/08/press-ignores-most-important-tx-de.html> [https://perma.cc/X8W9-QKG9].

⁷⁷ ACLU, *supra* note 44.

Texas prisons has increased by thirty-five percent.⁷⁸ This figure would be even higher if it factored in people who have been sentenced to life or life without parole.⁷⁹

Since 2007, lawmakers have created hundreds of new crimes and dozens of enhanced penalties.⁸⁰ These include everything from making cheating or lying about the size of a fish caught in a tournament a third-degree felony (punishable by up to ten years in prison) to new draconian criminal penalties to quash environmental activism, especially opponents of fossil fuels.⁸¹

In anticipation of the 2021 legislative session, which opened in January, the TDCAA tweeted last November that lawmakers had proposed dozens of new crimes and penalty increases.⁸² The TDCAA then quipped, “Some things never change,” followed by a shrug emoji.⁸³ Once again, Texas lawmakers appeared unlikely to enact even modest reforms, such as the

⁷⁸ TEX. CRIM. JUST. COAL., SPEND YOUR VALUES, CUT YOUR LOSSES 2021 DIVESTMENT PORTFOLIO: SMART AND SAFE JUSTICE SYSTEM SOLUTIONS THAT PUT COMMUNITIES FIRST 7 (Nov. 2020), <https://www.texascjc.org/system/files/publications/Spend%20Your%20Values%20Cut%20Your%20Losses%20Portfolio.pdf> [https://perma.cc/66TS-PYQD].

⁷⁹ *Id.*

⁸⁰ Between 2007 and 2017, the state created over 250 new crimes and over 125 enhancements, according to the TDCAA’s internal “unofficial” count. The TDCAA does not “track bills that repeal crimes or reduce punishments.” E-mail from Shannon Edmunds, Director of Governmental Relations, TDCAA, to Marie Gottschalk, Professor of Pol. Sci. (Mar. 12, 2019) (on file with author).

⁸¹ Matthew Martinez, *It’s a Felony to Cheat in a Texas Fishing Tournament—As This Guy Found Out, Cops Say*, FORT WORTH STAR-TELEGRAM (Mar. 14, 2019), <https://www.star-telegram.com/news/state/texas/article227741894.html>; Manny Fernandez, *Texas Fishing Contests Lure Competitors and Fraud*, N.Y. TIMES (Oct. 1, 2012), <https://www.nytimes.com/2012/10/02/us/texas-fishing-tournaments-lure-competitors-and-fraud.html?> [https://perma.cc/R2EM-G6SD]; Candice Bernd, *Despite Attempts to Soften Penalties, Texas Legislature Passes Bill to Charge Pipeline Protesters with Felonies*, TEX. OBSERVER (May 27, 2019), <http://www.texasobserver.org/pipeline-protest-bill-passes-texas-legislature-felony/> [https://perma.cc/Q65F-2D22].

⁸² TDCAA (@TDCAA), TWITTER (Nov. 20, 2020, 1:46 PM), <https://twitter.com/TDCAA/status/1329903866159108098> [https://perma.cc/4GEA-AFQR].

⁸³ *Id.*

moderate drug-penalty reductions that lawmakers in Utah and Oklahoma—two other crimson states—passed recently.⁸⁴

As the Texas Legislature has remained busy by creating new crimes and stiffening penalties each session, the constitutional right to legal representation for criminal defendants in the state has continued to erode. Once a pioneer in indigent defense, Texas now lags far behind most of the rest of the country in providing low-income people with lawyers. According to an investigation by the *Texas Observer*, “The state exercises almost no oversight of indigent defense, and most counties still administer their programs through an antiquated process rife with conflicts of interest.”⁸⁵

Texas ranks third from the bottom in state government spending per capita on indigent criminal defense services, funding only about fifteen percent of the cost of providing court-appointed counsel.⁸⁶ The rest comes from counties and local governments, which particularly disadvantages defendants in poorer jurisdictions with higher crime rates and anemic property tax bases to fund indigent defense and other government services.⁸⁷

⁸⁴ *Understaffing at Texas Prisons Reaching Dangerous Levels*, GRITS FOR BREAKFAST (Aug. 31, 2015), <https://gritsforbreakfast.blogspot.com/2020/11/understaffing-at-texas-prisons-reaching.html> [<https://perma.cc/GEJ6-JKS9>].

⁸⁵ Emily DePrang, *Poor Judgment: In Harris County, the Indigent Defense System Works Great—for Everyone but the Indigent*, TEX. OBSERVER (Oct. 12, 2015), <https://www.texasobserver.org/poor-judgment> [<https://perma.cc/8NLV-E5DU>].

⁸⁶ *In Your State*, GIDEON AT 50, <http://gideonat50.org/in-your-state/> [<https://perma.cc/Q2XA-9CFK>]; TEX. ASS’N OF CNTYS., INDIGENT DEFENSE: LEGISLATIVE BRIEF (Jan. 2019), <https://www.county.org/TAC/media/TACMedia/Legislative/Legislative-Brief/2021/Legislative-BriefIndigent-Defense-Brief-Feb2021.pdf> [<https://perma.cc/KFF6-4GFF>].

⁸⁷ *Texas*, GIDEON AT 50, <http://gideonat50.org/in-your-state/texas> [<https://perma.cc/GZR8-FSG8>].

IV. NO CEASEFIRE IN THE WAR ON DRUGS

The war on drugs rages on in Texas, which has yet to reduce the penalties for even low-level drug crimes, let alone more serious offenses. In 2019, the number of new misdemeanor cases fell to its lowest level since 1991, but the number of new felony cases filed in Texas reached a near all-time high.⁸⁸ The number of new felony cases filed has been rising each year since 2014.⁸⁹ This rise has been “driven primarily by an increase in drug possession cases,” according to the annual report of the Texas Judiciary.⁹⁰

Reducing marijuana penalties is a popular political issue for Republican and Democratic voters and lawmakers in Texas.⁹¹ In 2019, the Texas House overwhelmingly approved a measure to lighten up on marijuana offenses by reducing penalties for people caught with small amounts.⁹² But this measure died in the Senate, thanks to staunch opposition from Republican Lieutenant Governor Dan Patrick, the Texas Sheriffs Association, rural and suburban police unions, and State Senator John Whitmire (D-Houston), chairman of the Criminal Justice Committee and widely hailed as a top criminal justice reformer.⁹³ The fate of modest marijuana reforms in the

⁸⁸ TEX. OFF. OF CT. ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2019 ii (2019), <http://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf> [https://perma.cc/4ZNV-8XAM].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Ross Ramsey, *Led by Democrats and Young Adults, Most Texas Voters Want to Legalize Marijuana*, TEX. TRIB. (June 27, 2018), <https://www.texastribune.org/2018/06/27/marijuana-democrats-young-adults-texas-poll/> [https://perma.cc/XK6F-DCYZ]; Forrest Milburn, *The Texas Republican Party Platform Supports Some Marijuana Expansions*, TEX. TRIB. (May 24, 2019), <https://www.texastribune.org/2019/05/24/dan-patrick-against-republican-party-platform-texas-marijuana/> [https://perma.cc/9ST7-AZYJ].

⁹² Alex Samuels, *Texas House Passes Bill That Reduces Penalties for Texans Caught with Small Amounts of Marijuana*, TEX. TRIB. (April 29, 2019), <https://www.texastribune.org/2019/04/29/texas-marijuana-house-penalty-reduction-bill/> [https://perma.cc/B2QK-7ZRV].

⁹³ Michael Barajas, *The Big Blue Obstacle to Bipartisan Criminal Justice Reform*, TEX. OBSERVER (May 3, 2019), <https://www.texasobserver.org/the-big-blue-obstacle-to-bipartisan-criminal-justice-reform/> [https://perma.cc/Z6XL-GCAK]; Governor Abbott

current legislative session, which is scheduled to end in late May, is uncertain, but top lawmakers and analysts agree that sweeping reforms are unlikely.⁹⁴

In 2019, Texas lawmakers may have somewhat unwittingly decriminalized marijuana—due to a measure to legalize hemp and hemp-derived products like CBD that sailed through the legislature. The new law changed the definition of marijuana based on THC content.⁹⁵ Many prosecutors stopped pursuing misdemeanor marijuana cases because they did not have the technology and resources to test THC content.⁹⁶ Police departments got the message, and the number of arrests and prosecutions for marijuana possession plunged.⁹⁷

In other ways, the war on drugs has not abated in the Lone Star State. Texas has lagged behind many other states in embracing harm reduction strategies—such as needle exchange programs, wide distribution of Narcan (the lifesaving opioid overdose reversal drug), and access to medication-assisted treatment with methadone or buprenorphine—to address substance

Radically Scales Back Support for Reduced Pot Penalties, GRITS FOR BREAKFAST (Apr. 10, 2019), <http://gritsforbreakfast.blogspot.com/2019/04/governor-abbott-radically-scales-back.html> [https://perma.cc/72LF-9JFW]; Michael Arria, *Texas Sheriffs Stand Against Marijuana Policy Reform*, APPEAL (Mar. 4, 2019), <https://theappeal.org/texas-sheriffs-stand-against-marijuana-policy-reform/> [https://perma.cc/T2TV-YV47].

⁹⁴ Ben Adlin, *Top Texas Lawmakers Say Medical Marijuana Expansion Is on the Table for 2021*, MARIJUANA MOMENT (Jan. 13, 2021), <https://www.marijuanamoment.net/top-texas-lawmakers-say-medical-marijuana-expansion-is-on-the-table-for-2021/> [https://perma.cc/6XNC-MG6G].

⁹⁵ Megan Menchaca, *CBD, Hemp, Medical Marijuana? Here's What You Need to Know About Texas' Change in Pot Laws.*, TEX. TRIB. (Jan. 28, 2020), <https://www.texastribune.org/2020/01/28/texas-marijuana-laws-2020-what-you-need-know/> [https://perma.cc/UPH3-HY2T].

⁹⁶ Jolie McCullough, *Texas Leaders: Hemp Law Did Not Decriminalize Marijuana*, TEX. TRIB. (July 18, 2019), <https://www.texastribune.org/2019/07/18/greg-abbott-texas-leaders-hemp-marijuana-law/> [https://perma.cc/DFV6-JD8X].

⁹⁷ TEX. OFF. OF CT. ADMIN., *supra* note 88, at 16; TEX. DEP'T OF PUB. SAFETY, 2018 TEXAS ARREST DATA 68 (2018), <https://www.dps.texas.gov/crimereports/18/citCh9.pdf> [https://perma.cc/847N-4JHV]; TEX. DEP'T OF PUB. SAFETY, CRIME IN TEXAS 2019 19 (2019), <https://www.dps.texas.gov/crimereports/19/cit2019.pdf> [https://perma.cc/9LJV-GD8H].

abuse problems and to stem the mounting devastation of the opioid epidemic. Even in the face of spiking overdose deaths, the city of Austin refused a donation in spring 2020 to equip each police officer with Narcan, also known by its generic name naloxone.⁹⁸

Until recently, Texas was one of only about a dozen states—and the only large state—that had no officially sanctioned needle exchange program to curtail the spread of HIV/AIDS and other needle borne infectious diseases.⁹⁹ Proposals for such programs have repeatedly run aground in the Texas Legislature and been thwarted by local district attorneys.¹⁰⁰ In 2007, the legislature cleared Bexar County, which includes San Antonio, to run the state's first pilot needle exchange program.¹⁰¹ Twelve years later, Bexar County finally approved funding for the program, thanks partly to the blessing of Joe Gonzales, the county's new district attorney.¹⁰² Texas is one of just five states that does not have a Good Samaritan law that provides some legal protections for people who call for help in the case of an unintentional drug overdose.¹⁰³

⁹⁸ Bryce Newberry, *Austin Police Department Refuses Narcan Donation as Community Leaders Question Why, Overdoses Spike*, KVUE (Apr. 21, 2020), <https://www.kvue.com/article/news/local/austin-police-refuse-narcan-donation-overdoses-spike/269-1a06dd67-5fd1-4159-adb7-a6c8a69f4b7c> [https://perma.cc/V8S6-TBGU].

⁹⁹ *Sterile Syringe Exchange Programs*, KAISER FAM. FOUND. (2018), <https://www.kff.org/hiv/aids/state-indicator/syringe-exchange-program-is-finally-funded/> [https://perma.cc/8ZP7-UQWT].

¹⁰⁰ *Meth a Bigger Problem than Opioids in Texas*, GRITS FOR BREAKFAST (June 19, 2018), <http://gritsforbreakfast.blogspot.com/2018/06/meth-bigger-problem-than-opioids-in-texas.html> [https://perma.cc/43BL-S8U2]; Sanford Nowlin, *Bexar County's Needle Exchange Program Is Finally Fully Funded. Lawmakers Should Make Sure It Stays That Way.*, SAN ANTONIO CURRENT (Sept. 25, 2019), <https://www.sacurrent.com/the-daily/archives/2019/09/25/bexar-countys-needle-exchange-program-is-finally-funded-lawmakers-should-make-sure-it-stays-that-way> [https://perma.cc/XNP5-CTVP].

¹⁰¹ See Nowlin, *supra* note 100.

¹⁰² See *id.*

¹⁰³ Legal Science, *Good Samaritan Overdose Prevention Laws*, PRESCRIPTION DRUG ABUSE POL'Y SYS. (July 1, 2018), pdaps.org/datasets/good-samaritan-overdose-laws-1501695153 [https://perma.cc/XY2S-6C63].

V. THE DEATH PENALTY AND THE “OTHER DEATH PENALTY” IN TEXAS

As leading lawmakers, public officials, policymakers, advocates, and the media in Texas and across the country extolled Texas for being a leader in criminal justice reform thanks to the 2007 measures, the state was becoming more punitive by several key yardsticks. Until 2005, Texas was one of the few states that did not have a life without the possibility of parole (LWOP) statute, preferring the death penalty for serious crimes.¹⁰⁴ Since then, Texas legislators have sanctioned LWOP and expanded the list of crimes punishable by it, including certain sexual assaults.¹⁰⁵ Life sentences are much cheaper and easier for prosecutors to secure than death sentences and are subject to far less public scrutiny.¹⁰⁶

The number of people sentenced to life in Texas has exploded even though serious crime is at its lowest level in decades. As of 2019, more than one out of every ten state prison inmates in Texas were serving a life sentence or a “virtual” life sentence of at least sixty years.¹⁰⁷ Over 1,200 of them had been sentenced to LWOP, also known as the “other death penalty” or “death by incarceration.”¹⁰⁸

In 2012, the U.S. Supreme Court ruled in *Miller v. Alabama* that sentencing juvenile defendants to mandatory life sentences without the

¹⁰⁴ *Texas Governor Signs Life Without Parole Bill into Law*, DEATH PENALTY INFO. CTR (June 17, 2005), <https://deathpenaltyinfo.org/news/texas-governor-signs-life-without-parole-bill-into-law> [https://perma.cc/UE6V-MALS].

¹⁰⁵ *Id.*; H.B. 8, 2007 Leg., 80th Reg. Sess. (Tex. 2007), <https://capitol.texas.gov/billlookup/history.aspx?legsess=80r&bill=hb8> [https://perma.cc/ZG3L-6E4U].

¹⁰⁶ Death sentences in Texas fell from a high of forty-six in 1995 to four in 2019. *Execution List 2019*, DEATH PENALTY INFO. CTR. (Dec. 11, 2019), <http://deathpenaltyinfo.org/executions/2019> [https://perma.cc/JK4U-YXMP].

¹⁰⁷ See TDCJ 2019, *supra* note 26, at 17; see also Joshua Vaughn, *What Does Death by Incarceration Look Like in Pennsylvania? These Elderly, Disabled Men Housed in a State Prison.*, APPEAL (Nov. 20, 2019), <https://theappeal.org/death-by-incarceration-pennsylvania-photo-essay/> [https://perma.cc/4P77-U3DZ].

¹⁰⁸ See TDCJ 2019, *supra* note 26, at 17.

possibility of parole (JLWOP) was unconstitutional.¹⁰⁹ Four years later in *Montgomery v. Louisiana*, it ruled that *Miller* should be applied retroactively.¹¹⁰ Many states, both blue and red, responded by rewriting their sentencing laws to permit minors convicted of serious crimes to receive a parole hearing after serving twenty-five years or even less.¹¹¹ Not Texas though, which requires juveniles sentenced to life to serve forty years before receiving a parole hearing.¹¹² If current trends continue, they are likely to die in prison before obtaining a hearing. Less than five percent of the people serving life sentences in Texas who are granted a parole hearing are ever actually released.¹¹³

As the number of life sentences exploded in Texas, the state has not entirely lost its appetite for capital punishment. Although the annual number of executions is down in Texas, the state continues to operate the most active death chamber in the United States by far. Of the country's twenty executions in 2019, nine of them were in Texas.¹¹⁴

¹⁰⁹ *Miller v. Alabama*, 567 U.S. 460 (2012).

¹¹⁰ *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

¹¹¹ Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (Feb. 18, 2021), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [<https://perma.cc/FH3A-KXZ5>].

¹¹² TEX. CRIM. JUST. COAL., 2019 LEGISLATIVE AGENDA 12 (2019), <https://www.texasjc.org/system/files/publications/2019%20Legislative%20Agenda.pdf> [<https://perma.cc/UJT8-T7ZL>].

¹¹³ Keri Blakinger, *Convicted Young, Longtime Texas Inmates Hope Second Look Bill Could Give Them a Second Chance*, HOUS. CHRON. (Feb. 8, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Convicted-young-longtime-Texas-inmates-hope-13602510.php> [<https://perma.cc/BD8F-Q44Z>]; Ashley Nellis & Elizabeth Henneke, *Texas Should Stop Spending Billions to Incarcerate So Many People for Life*, TRIBTALK (July 20, 2017), <https://www.tribtalk.org/2017/07/20/texas-should-stop-spending-billions-to-incarcerate-so-many-people-for-life/> [<https://perma.cc/4A9M-ZHMP>].

¹¹⁴ Executions in Texas peaked in 2000, when the state put forty people to death. *Texas Death Penalty Facts*, TEX. COAL. TO ABOLISH THE DEATH PENALTY, <https://tcadp.org/get-informed/texas-death-penalty-facts/> [<https://perma.cc/Z8WP-FGVX>]. For 2019 execution figures, see *Execution List 2019*, DEATH PENALTY INFO. CTR. (Dec. 11, 2019), <http://deathpenaltyinfo.org/executions/2019> [<https://perma.cc/GG46-JWBP>].

In the 2018–2019 legislative session, Texas lawmakers wrangled with proposals to remedy the state’s procedures for determining whether a defendant is intellectually disabled and therefore ineligible to receive a death sentence.¹¹⁵ The U.S. Supreme Court had forced this issue in Texas after intervening not once but twice in vacating the death sentence of Bobby Moore, who has an IQ of about seventy and had been sentenced to death in 1980.¹¹⁶ The 2019 bill was so watered down in the state Senate that capital punishment reformers dismissed it as “worthless.”¹¹⁷ In the end, no measure was enacted.¹¹⁸ In June 2020, Texas paroled Moore.¹¹⁹

VI. SEX OFFENSES AND CRIMINAL JUSTICE REFORM

Just as the war on drugs continues in Texas, so does the war on people charged with sex crimes. The hoopla about the “smart on crime” measures enacted in 2007 to stem future prison growth diverted attention from the draconian measures lawmakers enacted that same year to stiffen what were already tough penalties for sex offenses.¹²⁰ Texas lawmakers acted in the midst of a moral panic unleashed after the body of “Baby Grace,” an unidentified toddler beaten to death, was discovered in a Galveston riverbed

¹¹⁵ H.B. 1139, 2019 Leg., 86th Reg. Sess. (Tex. 2019); Vicky Camarillo, *Death Penalty Bill Gets Watered Down to ‘Nothing’ Before Passing Senate*, TEX. OBSERVER (May 23, 2019), <https://www.texasobserver.org/death-penalty-reform-bill-gets-watered-down-to-nothing-before-passing-senate/> [<https://perma.cc/F4NS-5UDK>].

¹¹⁶ *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Moore v. Texas*, 139 S. Ct. 666 (2019); Lauren Gill, *Texas Prisoner Whose Case Changed the State’s Death Penalty Law Is Granted Parole*, APPEAL (June 9, 2020), <http://theappeal.org/texas-prisoner-whose-case-changed-the-states-death-penalty-law-is-granted-parole/> [<https://perma.cc/2RPG-6NTC>].

¹¹⁷ Camarillo, *supra* note 115.

¹¹⁸ H.B. 1139, 2019 Leg., 86th Reg. Sess. (Tex. 2019).

¹¹⁹ Neil Vigdor, *Texas Inmate Who Spent Nearly 40 Years on Death Row Is Granted Parole*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/us/texas-death-row-bobby-moore.html> [<https://perma.cc/35HY-L9C3>].

¹²⁰ John T. Floyd, *Texas Stiffens Punishment for Sex Offenders*, <https://www.scribd.com/document/45640914/11-28-07-WFP-SEX-OFF> [<https://perma.cc/BT6N-NDET>]; H.B. 8, 2007 Leg., 80th Reg. Sess. (Tex. 2007).

in October 2007.¹²¹ Possessed by what one seasoned criminal defense attorney characterized as a “lynch mob mentality,” the legislature converted some second and third-degree sex offenses involving children that had carried sentences ranging from two to twenty years into first-degree felonies with penalties of five to ninety-nine years or life in prison.¹²² Texas lawmakers also eliminated parole for many of these offenses and made second convictions punishable by a life sentence or even capital punishment.¹²³ (The following year, a divided U.S. Supreme Court ruled in *Kennedy v. Louisiana* that imposing the death penalty for child rape was unconstitutional.¹²⁴) Compared to fifteen years ago, more people are now serving time for sex offenses than drug offenses in Texas state prisons.¹²⁵

People convicted of sex offenses in Texas face some of the toughest community notification, residency, and registry laws and restrictions in the country. Texas operates one of the country’s most expansive and intrusive registries for people found guilty of sex offenses. Nearly 100,000 people—or about 350 out of every 100,000 people in Texas—are listed on the state’s public sex offender registry, a rate well above the national average.¹²⁶ Since

¹²¹ Harvey Rice, *Baby Grace’s Stepfather Sentenced to Life in Prison*, HOUS. CHRON. (Nov. 6, 2009), <http://www.chron.com/news/houston-texas/article/Baby-Grace-s-stepfather-sentenced-to-life-in-1728500.php> [<https://perma.cc/6CC6-LCT8>].

¹²² Floyd, *supra* note 120; H.B. 8, 2007 Leg., 80th Reg. Sess. (Tex. 2007).

¹²³ Floyd, *supra* note 120; H.B. 8, 2007 Leg., 80th Reg. Sess. (Tex. 2007).

¹²⁴ Linda Greenhouse, *Supreme Court Rejects Death Penalty for Child Rape*, N.Y. TIMES (June 26, 2008), <https://www.nytimes.com/2008/06/26/washington/26scotuscnd.html> [<https://perma.cc/LR9K-4KKY>].

¹²⁵ TEX. DEP’T OF CRIM. JUST., FISCAL YEAR 2007 STATISTICAL REPORT 9 (July 2008), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2007.pdf [<https://perma.cc/PVF7-X6PA>]; TEX. DEP’T OF CRIM. JUST., FISCAL YEAR 2018 STATISTICAL REPORT 9 (Feb. 2019), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2018.pdf [<https://perma.cc/V28G-TNN7>] [hereinafter TDCJ 2018].

¹²⁶ The national average is 279 per 100,000 people. NAT’L CTR. FOR MISSING & EXPLOITED CHILD., REGISTERED SEX OFFENDERS IN THE UNITED STATES AND ITS TERRITORIES PER 100,000 POPULATION 1 (Dec. 4, 2018), <https://leg.mt.gov/content/Committees/Interim/2019-2020/Law-and->

2011, this is more than a fifty percent increase in the number of people listed on the public registry.¹²⁷

The names and other personal information of everyone on the registry—not just people considered high risk, as in some other states—are publicly available in Texas.¹²⁸ About ninety percent of the people on the Texas registry are classified as low risk, according to the Texas Department of Public Safety.¹²⁹

Texas is one of just ten states that requires children found guilty of a sex crime in criminal or juvenile court proceedings to register, according to a 2013 report by Human Rights Watch.¹³⁰ Thousands of children have been listed on the state's sex offender registry, some of them as young as age ten.¹³¹ Human Rights Watch has called for exempting all youths and teenagers convicted of sex crimes from registration, community notification, and residency requirements.¹³²

Justice/Meetings/Nov-2019/sj19-doj-map-sex-offenders-per-capita-november-2019.pdf [https://perma.cc/KKT8-ZLET].

¹²⁷ In 2011, the first year Texas began collecting active registrant data, about 65,000 were listed on the state's sex offender registry. E-mail from Samantha Duncan, Support Operations Supervisor, Sex Offender Registration Bureau, Tex. Dep't of Pub. Safety, to Marie Gottschalk, Professor of Pol. Sci (Apr. 1, 2019) (on file with author).

¹²⁸ *Sex Offender Registry Export*, TEX. DEP'T OF PUB. SAFETY, THE TEX. PUB. SEX OFFENDER WEBSITE, <https://publicsite.dps.texas.gov/SexOffenderRegistry/Home/Export> [https://perma.cc/XDB5-73YE].

¹²⁹ Eric Dexheimer, *Program to Corral Ballooning Sex Offender Registry Failing*, STATESMAN (Sept. 3, 2016), <https://www.statesman.com/NEWS/20160903/Program-to-coral-ballooning-sex-offender-registry-failing> [https://perma.cc/YDE2-JGSR].

¹³⁰ HUM. RTS. WATCH, *RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 10* (May 2013), https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf [https://perma.cc/Y5JY-KR4R].

¹³¹ Sarah Stillman, *The List*, NEW YORKER (Mar. 7, 2016), <https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> [https://perma.cc/7EMW-RWHR].

¹³² David Crary, *Sex-Offender Registries: Should Kids Be Listed?*, YAHOO! NEWS (May 1, 2013), https://news.yahoo.com/sex-offender-registries-kids-listed-041001666.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAABNpuqZ3oJhOhmSfBpAWwTrbWvmTnD9o6WDxn-PttMR4oaPsGpP0IN1cjpzUu49QyDT1ZmQNv1GI1Bk6p3Mj7igexJqVSAM9QvJg3sVR

Failing to properly register can draw stiff criminal penalties in Texas. Nearly 2,000 people are incarcerated in Texas state prisons for that offense.¹³³ In 2005, a jury sentenced a Texas man to fifty-five years in prison for missing by a few days the one-week deadline to inform authorities he had moved.¹³⁴

In 2011, Texas created a mechanism for people to delist from the registry.¹³⁵ But this turned out to be a cumbersome, little-known, and expensive process that in some cases cost people tens of thousands of dollars to get their names off the registry.¹³⁶ As of 2016, only a few dozen people had succeeded in having their names removed from the registry.¹³⁷

The evidence is compelling that expansive public registries, as well as community notification and residency laws for people convicted of sex offenses, do not substantially reduce the incidence of sex offending and may actually make some people more likely to reoffend.¹³⁸ Nonetheless, proposals to make these restrictions even more onerous continue to resurface in the Texas Legislature. Advocates seeking to defeat such measures have had few allies in Texas.¹³⁹

These restrictions place enormous hardships on people convicted of sex offenses who have completed their sentences and are trying to move on with their lives.¹⁴⁰ For example, some jurisdictions in Texas have denied

SY7ieIMT-0v-9FvVKGcPRLjB-F6Pbwkm_9TMPFDl6vA7mL3MWo10IEqAFyNV83CfMxTj [https://perma.cc/2JYV-7VKS].

¹³³ TDCJ 2018, *supra* note 125, at 9.

¹³⁴ Breeden v. State, No. 05-06-00862-CR, 2008 WL 787934 (Tex. Ct. App. Mar. 26, 2008).

¹³⁵ Dexheimer, *supra* note 129.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ GOTTSCHALK, *supra* note 23, at 204–09.

¹³⁹ *Texas Voices Standing Against Sex Offender Residency Restrictions*, GRITS FOR BREAKFAST (Apr. 26, 2015), <http://gritsforbreakfast.blogspot.com/2015/04/texas-voices-standing-against-sex.html> [https://perma.cc/L88F-5WSN].

¹⁴⁰ GOTTSCHALK, *supra* note 23, at 208–09.

people listed on the registry access to public shelters during hurricanes.¹⁴¹ Others permit them to evacuate to public shelters but only if they wear special identifying bracelets.¹⁴²

VII. JUVENILE JUSTICE—OR NOT—IN TEXAS

On several key indicators, Texas has lagged behind the rest of the country in juvenile justice reform. As discussed earlier, Texas took a tough stance on the issue of JLWOP in the wake of the *Miller* decision.¹⁴³ Furthermore, Texas is one of three states that still prosecutes all seventeen-year-olds as adults.¹⁴⁴ Raise-the-age bills have repeatedly stalled in the Texas Legislature, reportedly because some legislators have balked at the higher expense of transferring these cases to the juvenile court system.¹⁴⁵ Juveniles awaiting trial as adults in Texas jails are routinely kept in long-term isolation with no access to education programs and little human contact.¹⁴⁶

¹⁴¹ Morgan Gstalter, *How Are Sex Offenders Tracked During a Storm?*, BEAUMONT ENTER. (Sept. 16, 2017), <https://www.beaumontenterprise.com/news/article/How-are-sex-offenders-tracked-during-a-storm-12202796.php> [<https://perma.cc/YQ5G-S68L>]; *Reasonable Shelter Denied to Registrants Facing Horrific Storms*, TEX. VOICES (Sept. 6, 2017), <http://texasvoices.org/reasonable-shelter-denied-to-registrants-facing-horrific-storms/> [<https://perma.cc/E9GV-7NX7>].

¹⁴² Gstalter, *supra* note 141.

¹⁴³ *Miller v. Alabama*, 567 U.S. 460 (2012).

¹⁴⁴ Cheyna Roth, *Gov. Whitmer Signs Bills Raising Age of Michigan's Juvenile Offenders*, MICH. RADIO (Oct. 31, 2019), www.michiganradio.org/post/gov-whitmer-signs-bills-raising-age-michigans-juvenile-offenders [<https://perma.cc/V8Q3-A7AD>].

¹⁴⁵ *Fixing Longstanding Criminal-Justice Problems in a Black-Budget Year*, GRITS FOR BREAKFAST

(Jan. 11, 2019), <http://gritsforbreakfast.blogspot.com/2019/01/fixing-longstanding-criminal-justice.html> [<https://perma.cc/CE5A-SF43>]; Steffi Lee, *Criminal Justice Groups Push to "Raise the Age" in Texas*, KXAN NEWS (Oct. 8, 2019), <https://www.kxan.com/news/texas/criminal-justice-groups-push-to-raise-the-age-in-texas/> [<https://perma.cc/3FYJ-PSWZ>].

¹⁴⁶ Matthew Clarke, *Despite Reforms, Juvenile Offenders in Texas Remain Endangered*, PRISON LEGAL NEWS (June 2014), <https://www.prisonlegalnews.org/news/2014/jun/5/despite-reforms-juvenile-offenders-texas-remain-endangered/> [<https://perma.cc/2QR7-DZVM>].

In 2012, Texas was forced to transform its juvenile justice system after media exposés documented widespread physical and sexual abuse of youths that state officials were aware of but had not addressed.¹⁴⁷ Violence and abuse continue to plague state juvenile facilities despite the overhaul.¹⁴⁸ A “stunningly high number” of juveniles in detention are placed in solitary confinement, according to an ombudsman’s report.¹⁴⁹ In 2018, Debbie Unrug, the ombudsman of the Texas Juvenile Justice Department, was fired, allegedly in retaliation for exposing major abuses and other problems at the state’s youth lockups during her eight years in office.¹⁵⁰

Texas has been exceptionally punitive to juveniles in other ways. Until recently, Texas treated truancy as a criminal matter.¹⁵¹ In 2015, Senator John Whitmire successfully led the charge in the Texas Legislature to decriminalize truancy.¹⁵² The main catalyst for this reform was not the Right on Crime-Smart on Crime coalition with which he is closely identified but rather the explosive findings of an investigation by Texas Appleseed.¹⁵³ This Austin-based non-profit reported that Texas prosecuted twice as many truancy cases in adult criminal court as all other states

¹⁴⁷ Sarah Cate, *Devolution, Not Decarceration: The Limits of Juvenile Justice Reform in Texas*, 18 PUNISHMENT & SOC’Y 578 (2016).

¹⁴⁸ *Id.*

¹⁴⁹ MICHELE DEITCH ET AL., U. TEX. AUSTIN, UNDERSTANDING AND ADDRESSING YOUTH VIOLENCE IN THE TEXAS JUVENILE JUSTICE DEPARTMENT: REPORT OF THE INDEPENDENT OMBUDSMAN xxii (May 2013), <https://law.utexas.edu/faculty/publications/2013-Understanding-and-Addressing-Youth-Violence-in-the-Texas-Juvenile-Justice-Department-Report/download> [<https://perma.cc/XPL6-4XR2>].

¹⁵⁰ Michael Barajas, *Texas Juvenile Justice System Loses an Advocate, Gains Another Career Cop*, TEX. OBSERVER (Feb. 2, 2018), <https://www.texasobserver.org/texas-juvenile-justice-system-loses-advocate-gains-another-career-cop/> [<https://perma.cc/MAD7-XWKM>].

¹⁵¹ Alisa Semiens, *Truancy Reform Legislation Headed to the Governor*, TEX. OBSERVER (June 1, 2015), <https://www.texasobserver.org/truancy-reform-legislation-headed-to-the-governor/> [<https://perma.cc/RJ5W-VL92>].

¹⁵² *Id.*

¹⁵³ *Id.*

combined.¹⁵⁴ An impending investigation at the time, conducted by the U.S. Department of Justice looking into truancy cases in Dallas, also helped forced the issue of decriminalizing truancy.¹⁵⁵

Even though Texas eliminated criminal penalties for truancy, its school-to-prison pipeline has not been ruptured. Harris County, which includes Houston, routinely sends hundreds of youths to juvenile lockups each year—often for weeks at a time—for minor probation infractions, such as curfew violations, school absences, and failed drug tests.¹⁵⁶ An exceptional feature of the Texas pipeline is a ticketing system in which schools pursue criminal charges against students for minor infractions, such as misbehavior in class, disturbing the peace, and swearing.¹⁵⁷

In 2013 and 2015, lawmakers enacted measures to curtail the ticketing system and the discretion of school-based police officers to bring criminal charges.¹⁵⁸ As a result, the number of school-based tickets, complaints, arrests, and use of force incidents dropped significantly.¹⁵⁹ But “Texas

¹⁵⁴ DEBORAH FOWLER ET AL., TEX. APPLESEED, CLASS, NOT COURT: RECONSIDERING TEXAS’ CRIMINALIZATION OF TRUANCY 1 (Mar. 2015), https://www.texasappleseed.org/sites/default/files/TruancyReport_All_FINAL_SinglePages.pdf [<https://perma.cc/KQ4C-TB4P>]; Press Release, Department of Justice, Department of Justice Announces Investigation of the Dallas County Truancy Court and Juvenile District Courts (Mar. 31, 2015), <https://www.justice.gov/opa/pr/departments-justice-announces-investigation-dallas-county-truancy-court-and-juvenile-district> [<https://perma.cc/JHL7-PSMA>].

¹⁵⁵ Claudio Sanchez, *In Texas, Questions About Prosecuting Truancy*, NPR (Apr. 27, 2015), <https://www.npr.org/sections/ed/2015/04/27/400099544/in-texas-questions-about-prosecuting-truancy> [<https://perma.cc/CC3M-Y7UR>].

¹⁵⁶ Meagan Flynn, *Harris County Jails Hundreds of Juveniles Each Year for Minor Probation Violations*, HOUS. CHRON. (Jan. 31, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-jails-hundreds-of-juveniles-each-12538140.php> [<https://perma.cc/9FYU-LBX2>].

¹⁵⁷ Therese Edmiston, *Classroom to Courtroom: How Texas’s Unique School-Based Ticketing Practice Turns Students into Criminals, Burdens Courts, and Violates the Eight Amendment*, 17 TEX. J. ON C.L. & C.R. 181, 183 (2012).

¹⁵⁸ Deborah Fowler et al., *Tex. Appleseed & Texans Care for Child., Dangerous Discipline: Executive Summary* (Dec. 2016), <http://stories.texasappleseed.org/dangerous-discipline-executive-summary> [<https://perma.cc/2AX6-39YH>].

¹⁵⁹ *Id.*

school districts continue to rely on police officers, juvenile probation, and courts to address low-level, school-based behaviors” despite extensive research showing that this approach is harmful to youths.¹⁶⁰

VIII. FINES AND FEES

Texas is exceptionally punitive in other respects. In the Lone Star State, a person may be arrested, booked, and jailed for nearly any violation, including most misdemeanor traffic offenses, such as a broken tail-light or failure to signal.¹⁶¹ Each year hundreds of thousands of people end up in Texas jails because they are unable to post bail or pay off fines and fees for offenses that are technically not punishable by jail time.¹⁶² These individuals are essentially trapped in what the ACLU of Texas calls “modern-day debtors’ prisons.”¹⁶³

Class C misdemeanors—the lowest-level offenses in Texas—routinely result in a “cascade of unconstitutional and devastating consequences.”¹⁶⁴ People unable to pay off their traffic tickets or other Class C fines quickly end up in a Kafkaesque maze that “virtually guarantees” that they will receive even more tickets, fines, and penalties.¹⁶⁵ Many of them eventually end up in jail and are incarcerated without a hearing, legal representation, or inquiry into their ability to pay.¹⁶⁶ These fines and fees are a major means to generate revenue from low-income people to pay for essential public

¹⁶⁰ *Id.*

¹⁶¹ *End Arrests for Non-Jailable Offenses*, TEX. CRIM. JUST. COAL., <https://www.texasjc.org/end-arrests-non-jailable-offenses> [https://perma.cc/A2VQ-4FL3].

¹⁶² *Class C Misdemeanor Arrests and Incarceration in Texas, by the Numbers*, GRITS FOR BREAKFAST (Mar. 30, 2019), <https://gritsforbreakfast.blogspot.com/2019/03/class-c-misdemeanor-arrests-and.html> [https://perma.cc/686M-HXZA].

¹⁶³ *No Exit, Texas: Modern-Day Debtors’ Prisons and the Poverty Trap*, ACLU OF TEX. (Nov. 2016), https://www.aclutx.org/sites/default/files/no_exit_texas_-_modern-day_debtors_prisons_and_the_poverty_trap_11-2016.pdf [https://perma.cc/Z6U6-25XR].

¹⁶⁴ *Id.* at 1.

¹⁶⁵ *Id.* at 2.

¹⁶⁶ *Id.* at 1.

services, such as the courts, the police, and hospital trauma centers.¹⁶⁷ In small and large municipalities across Texas, these onerous penalties are disproportionately ladled on African-Americans and Latinos.¹⁶⁸

Local courts and hundreds of law enforcement agencies across the state participate in the Texas Warrant Roundup to collect outstanding fines and fees.¹⁶⁹ This annual period of “aggressive warrant enforcement . . . is timed to coerce people into handing over their tax refund checks,” most notably refunds from the federal Earned Income Tax Credit (EITC).¹⁷⁰ The EITC was designed to provide tax relief for low- and moderate-income workers.¹⁷¹

A Brennan Center report that examined fines and fees in several counties in Texas and elsewhere concluded that these legal financial obligations were an “inefficient source of government revenue.”¹⁷²

Some judges in Texas require people remanded to jail for failure to pay off their fines and fees to labor for a set number of hours.¹⁷³ This practice harkens back to the convict-leasing system that developed in Texas and much of the South after the Civil War.¹⁷⁴ Under this system, which persisted well into the twentieth century in many southern states, people convicted of minor infractions were leased out to private contractors to work off their debts.¹⁷⁵ This captive labor force, which was predominantly

¹⁶⁷ *Id.* at 15.

¹⁶⁸ *Id.* at 10–11.

¹⁶⁹ *Id.* at 8.

¹⁷⁰ *Id.* at 10.

¹⁷¹ *Id.* at 8–9.

¹⁷² MATTHEW MENENDEZ ET AL., N.Y.U., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES 5 (Nov. 21, 2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf [<https://perma.cc/P7DG-YXNQ>].

¹⁷³ *Id.*

¹⁷⁴ MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH 1866-1928 (1996).

¹⁷⁵ *Id.*

African-American, labored in brutal conditions that were considered worse than slavery.¹⁷⁶

The national uproar over the July 2015 death of Sandra Bland shone a scorching light on the criminal legal system in Texas and on Class C misdemeanors. Bland, a twenty-eight-year-old African-American woman, died in a rural Texas jail three days after being apprehended in a controversial traffic stop for failing to signal a lane change.¹⁷⁷ She had been jailed after being charged with a low-level misdemeanor, which carries no jail time if found guilty, because she was unable to raise \$515 to pay a bail company to post bond.¹⁷⁸ Medical examiners ruled her hanging death, which occurred three days after she was arrested, a suicide.¹⁷⁹

Two years after Bland's death, lawmakers finally enacted the Sandra Bland Act in 2017.¹⁸⁰ Under fierce pressure from law enforcement groups, legislators stripped provisions from the original bill to restrict police arrests for Class C violations and address racial profiling in traffic stops.¹⁸¹ The final version of the act merely required the police and counties to collect data on how many people are arrested for Class C misdemeanors and was primarily a mental health bill, as discussed in more detail later.¹⁸²

¹⁷⁶ DAVID OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996).

¹⁷⁷ Debbie Nathan, *What Happened to Sandra Bland*, THE NATION, (Apr. 21, 2016), <https://www.thenation.com/article/archive/what-happened-to-sandra-bland/> [<https://perma.cc/5UNF-F6WT>].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Johnathan Silver, *Texas House Sends Sandra Bland Act to Governor*, TEX. TRIBUNE (May 19, 2017), <https://www.texastribune.org/2017/05/19/texas-house-passes-sandra-bland-act/> [<https://perma.cc/YJU6-CA7M>].

¹⁸¹ Jolie McCullough & Cassandra Pollock, *The Texas Lawmakers Who Led the Sandra Bland Act Are Pushing to Reinstate the Police Reforms Stripped from Their Original Bill*, TEX. TRIBUNE (June 9, 2020), <https://www.texastribune.org/2020/06/09/texas-sandra-bland-act-police/> [<https://perma.cc/WRY5-MX26>].

¹⁸² Silver, *supra* note 180; Julie Anderson, *Senate Bill 1849 Breaking Down the Sandra Bland Act—85th Legislature*, TEX. CNTY. PROGRESS (Dec. 3, 2017), <https://countypress.com/senate-bill-1849-breaking-down-the-sandra-bland-act-85th-legislature/> [<https://perma.cc/F6LD-Y9R8>].

To its credit, the Sandra Bland Act imposed important new requirements on police to document all traffic stops, including the race, gender, and ethnicity of the driver; the reason for the stop; whether the vehicle was searched; and the outcome of the stop.¹⁸³ As a result of these measures, there is now more information on how many people are arrested for Class C violations in Texas each year.¹⁸⁴ In 2017, an estimated 76,000 people were arrested for such offenses, making them one of the largest arrest categories.¹⁸⁵ The detailed granular data now available on traffic stops has revealed remarkable differences across Texas in how often police stop motorists as well in the rate of arrests and use of force resulting in injury during these encounters.¹⁸⁶

However, the Sandra Bland Act did not initially yield meaningful data to assess the extent of discriminatory practices by police in Texas, despite legislators' intent.¹⁸⁷ In its rulemaking process, the Texas Commission on Law Enforcement (TCOLE), the agency in charge of collecting the information on police stops, eliminated the "racial" data from the racial profiling reports, making it next to impossible to gauge discriminatory policing in traffic stops.¹⁸⁸ As one criminal justice analyst dryly noted, "It's too bad we lost out on the racial part of the racial profiling bill."¹⁸⁹ Recently, the TCOLE appears to have shifted course. As of January 1,

¹⁸³ S.B. 1849, 2017 Leg., 85th Reg. Sess. (Tex. 2017).

¹⁸⁴ *As Jarring #SandraBland News Arrives, Texas House Will Consider Limiting Arrests for Fine Only Offenses*, GRITS FOR BREAKFAST (May 5, 2019, 1:10 PM), <http://gritsforbreakfast.blogspot.com/2019/05/as-jarring-sandrabland-news-arrives.html> [<https://perma.cc/YUD7-FF3B>].

¹⁸⁵ *See id.*

¹⁸⁶ *See* JUST LIBERTY, THOUSANDS OF SANDRA BLANDS: ANALYZING CLASS-C-MISDEMEANOR ARRESTS AND USE-OF-FORCE INCIDENTS AT TEXAS TRAFFIC STOPS 1 (2019).

¹⁸⁷ Eric Dexheimer et al., *Texas Was Supposed to Collect Racial-Profiling Data. It Left Out Most of the 'Racial' Part*, HOUS. CHRON. (June 25, 2020), <https://www.houstonchronicle.com/news/houston-texas/texas/article/texas-race-profiling-data-cops-police-traffic-stop-15365887.php> [<https://perma.cc/2V3F-QZNU>].

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

2021, police departments are required to report the detailed racial and ethnic data on traffic stops mandated by the Sandra Bland Act, nearly four years after this bill was enacted.¹⁹⁰

In a separate measure enacted in 2017, Texas legislators eliminated “some of the most comically absurd elements” of its fine system.¹⁹¹ Lawmakers required courts to provide alternatives to jail—including community service, payment plans, and sliding-scale fines—for people but who are at risk of being incarcerated because they cannot afford the financial penalties.¹⁹² Since then, the number of people jailed for failing to pay their fines and fees has declined significantly.¹⁹³ But in fiscal year 2018, half a million people still spent time in Texas jails for failure to pay their fines and fees.¹⁹⁴

In 2019, lawmakers agreed to amend the 2017 legislation in yet another effort to compel recalcitrant local judges to waive Class C fines for indigent people unable to afford them.¹⁹⁵ That year, yet another attempt to impose limits on arrests and jail time for Class C misdemeanors was defeated

¹⁹⁰ *Racial Profiling Reports: Law Enforcement Agency Requirements*, TEX. COMM’N ON L. ENF’T, <https://www.tcole.texas.gov/content/racial-profiling-reports> [<https://perma.cc/YN5U-VZCG>].

¹⁹¹ *Build on Momentum to End Texas Debtors Prison Practices*, GRITS FOR BREAKFAST (Nov. 1, 2018, 5:59 PM), <http://gritsforbreakfast.blogspot.com/2018/11/build-on-momentum-to-end-texas-debtors.html> [<https://perma.cc/3QN3-7TZK>].

¹⁹² See David A. Díaz, *New Law Designed to Protect Texans from Being Jailed for Minor Traffic Tickets Has Resulted in 300,00 Fewer Arrest Warrants, Announces Rep. Canales*, EDINBURG POL.: TITANS TEX. LEGISLATURE (Sept. 7, 2018), <https://edinburgpolitics.com/2018/09/07/law-protect-texans-minor-traffic-tickets-fewer-arrest-warrants/> [<https://perma.cc/9ZP7-L9CE>].

¹⁹³ See *id.*

¹⁹⁴ *Build on Momentum to End Texas Debtors Prison Practices*, GRITS FOR BREAKFAST (Nov. 1, 2018, 5:59 PM), <http://gritsforbreakfast.blogspot.com/2018/11/build-on-momentum-to-end-texas-debtors.html> [<https://perma.cc/3QN3-7TZK>].

¹⁹⁵ See *Scaling Back Justice Debt Biggest #cjreform Accomplishment of 2019 #txlege*, GRITS FOR BREAKFAST (May 30, 2019, 7:18 AM), <http://gritsforbreakfast.blogspot.com/2019/05/scaling-back-justice-debt-biggest.html> [<https://perma.cc/3EWH-9V9W>].

despite widespread bipartisan support.¹⁹⁶ An “all-out blitz” fueled by a “massive disinformation campaign launched by police unions” was partly to blame.¹⁹⁷ The Democratic Party’s mismanagement of the bill was also at fault.¹⁹⁸

The battle over proposals to reform Class C misdemeanors in 2019 was especially bitter. Charley Wilkison, the executive director and chief lobbyist of the Combined Law Enforcement Association of Texas (CLEAT), the state’s largest police union, described it as “war.”¹⁹⁹ In a rare move, lawmakers actually denounced CLEAT on the floor of the House for its “underhanded” and “dishonorable” tactics.²⁰⁰ Rep. Joe Moody (D-El Paso), the Speaker Pro Tempore of the House, called out CLEAT for defeating a compromise measure that would not have restricted the police’s ability to arrest anyone but would have simply granted judges greater leeway to dismiss charges.²⁰¹

Wilkison and his supporters also were incensed over lawmakers’ attempts in 2019 to finally close the “dead suspect loophole” in the Texas Public Information Act, which is discussed in greater detail below.²⁰² This

¹⁹⁶ *How Confused Texas Democrats Killed #SandraBland Legislation, Twice*, GRITS FOR BREAKFAST (May 14, 2019, 4:32 PM), <http://gritsforbreakfast.blogspot.com/2019/05/how-confused-texas-democrats-killed.html> [https://perma.cc/4ADS-WJ8R].

¹⁹⁷ *Call Your State Senator to Support #SandraBland Legislation!*, GRITS FOR BREAKFAST (May 23, 2019, 2:55 PM), <http://gritsforbreakfast.blogspot.com/2019/05/call-your-state-senator-to-support.html> [https://perma.cc/YK4N-4GLM].

¹⁹⁸ *See How Confused Texas Democrats Killed #SandraBland Legislation, Twice*, GRITS FOR BREAKFAST (May 14, 2019, 4:32 PM), <http://gritsforbreakfast.blogspot.com/2019/05/how-confused-texas-democrats-killed.html> [https://perma.cc/4ADS-WJ8R].

¹⁹⁹ Christopher Hooks, *How Texas’ Powerful Police Union Went to War Against Criminal Justice Reform*, TEX. MONTHLY (May 29, 2019), <https://www.texasmonthly.com/politics/how-texas-powerful-police-union-went-to-war-against-criminal-justice-reform/> [https://perma.cc/HNN6-4N99].

²⁰⁰ *Id.*

²⁰¹ *See id.*

²⁰² *See id.*

provision permits police, prisons, and jails to permanently keep secret files about suspects who will not face charges in court—which ends up stymying investigations and public scrutiny of instances of deaths in custody, including instances of people killed by the police.²⁰³ Once again, police unions prevailed in retaining the loophole.²⁰⁴

To their credit, in 2019, lawmakers finally repealed the much reviled Driver Responsibility Surcharge, a fee that was established in 2003 to address a budget shortfall and fund hospital trauma centers.²⁰⁵ This program added annual fees on top of the price of tickets for unpaid fines.²⁰⁶ After trying for a dozen years, reformers succeeded in getting rid of this Alice-in-Wonderland penalty, which was a huge burden for low-income people.²⁰⁷ Unable to pay off their driving-related fines, many people ended up locked into a cycle of perpetual debt—to the tune of \$2.5 billion, by one estimate—and risked being arrested and sent to jail as fines and fees escalated and their licenses were suspended.²⁰⁸ Other comparably punitive license-suspension programs in Texas have yet to be abolished.²⁰⁹

Some local officials are not waiting for state legislators to act. Cities and counties across Texas have terminated contracts with the Texas Department

²⁰³ See *id.*

²⁰⁴ See *id.*; *86th Legislative Wrap-Up: The Righteous Battle CLEAT Fought*, COMBINED L. ENF'T ASS'N OF TEX. (Dec. 16, 2019), https://www.cleat.org/86thlegislative_wrapup/ [<https://perma.cc/XZ7G-TU76>].

²⁰⁵ Troy Closson, *Texas' Driver Responsibility Program Ends Next Month. Here's What that Means for You.*, TEX. TRIB. (Aug. 20, 2019, 12:00 AM), <https://www.texastribune.org/2019/08/20/Texas-driver-responsibility-program-repeal-what-that-means-explained/> [<https://perma.cc/6R6H-5LFN>].

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ Emily Gerrick & Mary Mergler, *Commentary: Lawmakers Need to Fix Another Program that Buries Texas Drivers in Fines*, STATESMAN (July 5, 2019, 8:46 PM), <https://www.statesman.com/opinion/20190705/commentary-lawmakers-need-to-fix-another-program-that-buries-texas-drivers-in-fines> [<https://perma.cc/7F99-9T25>].

²⁰⁹ See *id.*; see also Tex. Fair Def. Project & Tex. Appleseed, *Driven by Debt: How Driver's License Suspensions for Unpaid Fines and Fees Hurt Texas Families*, TEX. APPLESEED, <http://stories.texasappleseed.org/driven-by-debt> [<https://perma.cc/5XQZ-K2KR>].

of Public Safety for the OmniBase Program, which places holds on the driver's licenses of people with unpaid fines and fees, preventing them from renewing their licenses.²¹⁰ This program disproportionately affects African-Americans and low-income people in Texas.²¹¹

As the Texas legislature began its biennial session in January 2020, the persistent problems with Class C misdemeanors were back on the agenda. Banning arrests for Class C offenses was part of the George Floyd Act, introduced by members of the Texas Legislative Black Caucus.²¹² Named in honor of the African-American man who grew up in Houston and was killed by Minneapolis police in May 2020, the measure would also ban chokeholds, require police officers to intervene or de-escalate in cases of excessive force by their colleagues, and would strip officers of "qualified immunity"—a powerful shield that protects them from civil lawsuits.²¹³ Though most of these provisions are unlikely to pass in the current legislative session, Texas may finally ban arrests for all Class C traffic offenses, which constitute an estimated four out of five of all Class C arrests, according to Grits for Breakfast.²¹⁴

²¹⁰ See Def. News Serv., *Harris County to End OmniBase Program that Disproportionately Impacts Blacks*, DEFENDER NETWORK (July 16, 2020), <https://defendernetwork.com/news/harris-county-to-end-omnibase-program-that-disproportionately-impacts-black-low-income-residents/> [https://perma.cc/Q79R-ZLNR].

²¹¹ TEX. APPLESEED & TEX. FAIR DEF. PROJECT, DRIVEN BY DEBT: HOUSTON 5–6 (2020), <https://www.texasappleseed.org/sites/default/files/DrivenByDebt-Houston-July2020.pdf> [https://perma.cc/5KLC-V9Q2].

²¹² KSLA Staff, *George Floyd Act Seeks to Make Major Reforms to Policing in Texas*, KNOE (Nov. 14, 2020), <https://www.knoe.com/2020/11/15/george-floyd-act-seeks-to-make-major-reforms-to-policing-in-texas/>; STAFF OF TEX. H. CRIM. JURIS. COMM., 2021 LEG., 87TH REG. SESS., NOTICE OF FORMAL REQUEST FOR INFORMATION (Tex. 2020).

²¹³ Destinee Patterson, *George Floyd Act Seeks to Make Major Reforms to Policing in Texas*, KSLA News (Nov. 18, 2020), <https://www.ksla.com/2020/11/14/george-floyd-act-seeks-make-major-reforms-policing-texas/> [https://perma.cc/9ULS-XRS6].

²¹⁴ *Assessing Status of Police-Reform Bills As #txlege Reaches Inflection Point*, GRITS FOR BREAKFAST (Apr. 23, 2021), <https://gritsforbreakfast.blogspot.com/2021/04/assessing-status-of-police-reform-bills.html> [https://perma.cc/ZJH4-DYF4].

The one recent bright spot in the handling of Class C misdemeanors is actually due to COVID-19. At the start of the pandemic in March 2020, Fort Worth police announced they would stop arresting people for low-level C-Class misdemeanors if a ticket could be issued instead.²¹⁵ The department said it made the decision in an effort to prevent their officers from getting or spreading the virus.²¹⁶

IX. REFORM OF BAIL AND CIVIL ASSET FORFEITURES

To the dismay of many criminal justice reform advocates, the 2017 Sandra Bland Act did not overhaul the cash bail system in Texas. The United States is one of only two countries with a for-profit bail industry.²¹⁷ Under the commercial bail system that prevails, defendants who cannot afford to post bail either remain in jail or must pay a commercial bail bond company a non-refundable fee (usually ten percent of their bail, which is not returned even if they are found innocent).²¹⁸ The commercial bail system has come under attack “in recent years because it keeps the poorest, rather than the most dangerous, defendants behind bars.”²¹⁹ The industry siphons off massive amounts of money from low-income communities. Commercial bail companies operate like predatory payday lenders, charging extortionate fees and interest rates and carrying on their activities with little government oversight.²²⁰ They wield extraordinary powers in many jurisdictions, including broad latitude to arrest their clients for minor

²¹⁵ Nichole Manna, *Fort Worth Police Will Give Citations for Low-Level Crimes Amid Coronavirus Outbreak*, FORT WORTH STAR-TELEGRAM (Mar. 17, 2020, 5:00 AM), <https://www.star-telegram.com/news/coronavirus/article241254951.html>.

²¹⁶ *Id.*

²¹⁷ Jessica Silver-Greenberg & Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html> [<https://perma.cc/97YQ-TSFP>].

²¹⁸ *See id.*

²¹⁹ *See id.*

²²⁰ *See id.*

infractions (such as missing a payment); to monitor financial, medical, and other personal data; and to impose curfews and other restrictions on their lives.²²¹

The bail bonds industry in Texas is one of least regulated in the country.²²² In most other states, insurance regulators at the state level monitor the bail bonds industry.²²³ In Texas, however, the industry is regulated at the local level—by bail bond boards in larger counties and by local sheriffs in smaller ones.²²⁴ One prosecutor observed that Texas counties that do not have bail boards “are just the wild, wild West” because they lack the capacity and the authority to monitor bail agents.²²⁵

A movement to end cash bail has been gaining ground around the country. In New Jersey, lawmakers essentially eliminated commercial bail bonds in the wake of a 2017 government report that the state’s bail system was “highly prone to subversion by unscrupulous and improper practices that make a mockery of the public trust.”²²⁶

Texas is at the epicenter of the battle against ending cash bail, which the bail bonds industry views as an existential threat. Texas politicians lead the country in political contributions received from the bail industry, which has close ties to ALEC, a coalition of conservative lawmakers and corporations.²²⁷ The American Bail Coalition, the industry’s main trade

²²¹ See *id.*

²²² See *Smaller Texas Counties Struggle with Bail Bond Regulations*, DALL. NEWS (Dec. 29, 2011, 9:22 PM), <https://www.dallasnews.com/news/2011/12/29/smaller-texas-counties-struggle-with-bail-bond-regulation/> [https://perma.cc/YM2W-7P6T].

²²³ See *Bail Bond Agent Licensure*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 23, 2013), <https://www.ncsl.org/research/civil-and-criminal-justice/bail-bond-agent-licensure.aspx> [https://perma.cc/836E-5JGA].

²²⁴ See *Smaller Texas Counties Struggle with Bail Bond Regulations*, *supra* note 222.

²²⁵ *Id.*

²²⁶ John Buntin, *The Fight to Fix America’s Broken Bail System*, GOVERNING (Oct. 2017), <https://www.governing.com/topics/public-justice-safety/gov-bail-reform-texas-new-jersey.html> [https://perma.cc/T6GN-JQDM].

²²⁷ See COLOR OF CHANGE & ACLU, *SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM* 2, 41 (2017).

association, once described ALEC as its “life preserver.”²²⁸ Despite support from top Democratic and Republican lawmakers, major church groups, and other organizations, proposals to even modestly reform cash bail have floundered in the Texas Legislature.²²⁹

In response to calls to end mass incarceration and cash bail, the commercial bail industry in Texas and other states has been repositioning itself to expand into new markets. ALEC has promoted early-release bonds and other measures that would require people seeking diversion or parole to purchase a commercial bond, with bail bond agents responsible for monitoring and disciplining their behavior and slapping on fees, fines, and surcharges they deem out of compliance.²³⁰

Texas is the wild West in other respects besides commercial bail. The state continues to operate one of the most permissive, abusive, and lucrative civil asset forfeitures systems in the country. Police and prosecutors have wide latitude to seize cash, property, and other assets that they claim are related to criminal activity, even if the person involved is never actually charged with a crime.²³¹ Civil asset forfeitures are essentially slush funds for law enforcement agencies in Texas and elsewhere.²³² Bills to curb civil asset forfeitures in Texas continue to go nowhere, due to unwavering opposition from the TDCAA, police departments, and some top state officials.²³³ In 2019, the legislature, in defiance of national trends to curb civil asset forfeitures, actually approved a measure to expand them.²³⁴

²²⁸ *Id.* at 40.

²²⁹ See Carimah Townes, *The Criminal Justice Gospel*, SLATE (Oct. 24, 2017, 11:14 AM), <https://slate.com/news-and-politics/2017/10/religious-leaders-in-texas-are-on-a-crusade-to-end-cash-bail.html> [<https://perma.cc/6SQA-JBX7>].

²³⁰ See Alysia Santo, *When Freedom Isn't Free: ALEC and the Bail Bond Industry Have a New Plan to Empty Prisons—For a Price*, WASH. MONTHLY (Apr. 2015), <https://washingtonmonthly.com/magazine/maraprmay-2015/when-freedom-isnt-free/> [<https://perma.cc/S57K-S98E>].

²³¹ GOTTSCHALK, *supra* note 23, at 34–35.

²³² *Id.*

²³³ See Edgar Walters & Jolie McCullough, *Texas Police Made More than \$50 Million in 2017 from Seizing People's Property*, TEX. TRIB. (Dec. 7, 2018, 12:00 AM),

X. WRONGFUL CONVICTIONS

To its credit, Texas has emerged as a national leader in preventing and uncovering wrongful convictions and in compensating people who have been exonerated. Texas leads the country in exonerations by far. Of the more than 2,400 exonerations tallied nationally between 1989 and 2019, fifteen percent of them were from Texas.²³⁵ The state has become the “gold standard in innocence reform,” according to Michelle Feldman, a legislative strategist at The Innocence Project.²³⁶ But this was not a result of the Right on Crime-Smart on Crime coalition.

This bright spot has come from a dark place. Claims of innocence have literally been more of a life-and-death issue in Texas than anywhere else. Since 1976, when the U.S. Supreme Court reinstated capital punishment with the *Gregg v. Georgia* decision, Texas has led the nation in executing people.²³⁷ As the death penalty capital of the Western world, Texas was poised to become ground zero in the problem of wrongful convictions.²³⁸

Winds blowing from several directions for more than two decades culminated in the perfect storm to propel pioneering reforms in Texas

<https://www.texastribune.org/2018/12/07/texas-civil-asset-forfeiture-legislature/>
[<https://perma.cc/52E4-6MXS>].

²³⁴ *TDCAA Legislative Update: Week 20, Part I*, TEX. DIST. & CTY. ATT’YS ASS’N (May 23, 2019), <https://www.tdcaa.com/legislative/tdcaa-legislative-update-week-20-part-i/>
[<https://perma.cc/5SRB-4EBN>]; H.B. 2613, 2019 Leg., 86th Reg. Sess. (Tex. 2019).

²³⁵ *Exonerations by State*, THE NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> [<https://perma.cc/9QBR-M3G6>].

²³⁶ See Jolie McCullough & Justin Dehn, *How Some See Texas as the “Gold Standard” Against Wrongful Convictions*, TEX. TRIB. (Sept. 20, 2017, 12:00 AM), <https://www.texastribune.org/2017/09/20/texas-lawmakers-hope-prevent-wrongful-convictions/> [<https://perma.cc/6PX3-CLKH>].

²³⁷ See *Gregg v. Georgia*, 428 U.S. 153 (1976); DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (Jan. 2021), <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> [<https://perma.cc/NTY8-GMDP>].

²³⁸ See DEATH PENALTY INFO. CTR., *supra* note 237; *Executions Around the World*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world> [<https://perma.cc/YA4H-8NE9>].

related to wrongful convictions. In the late 1990s, the U.S. Supreme Court handed down several decisions that regulated but did not abolish the death penalty.²³⁹ By then, DNA testing in criminal cases, which was first introduced in court a decade earlier, had become widespread, resulting in a string of high-profile exonerations. In 2003, a slew of exonerations in Illinois prompted Republican Governor George Ryan to commute the sentences of everyone on death row.²⁴⁰ Opponents of capital punishment began altering their political strategy to focus intently on the injustice of executing innocent people.²⁴¹ This proved to be a winning strategy to whittle away at public support for the death penalty while illuminating just how fallible and unfair the criminal legal system is more generally.²⁴²

The issue of executing the innocent had particular salience in Texas not only because it had the country's most active death row but also because the state had a treasure trove of preserved DNA evidence available for testing.²⁴³ This was partly thanks to Dallas County's longstanding practice of saving evidence in storage lockers rather than discarding it after all appeals were exhausted in a case.²⁴⁴ Dallas prosecutors preserved this evidence because they thought it might be useful in the future in reaffirming someone's guilt.²⁴⁵ However, in the early 2000s, Dallas County alone was responsible for more DNA exonerations than every state except Illinois and New York.²⁴⁶ In 2001, Texas lawmakers mandated the automatic preservation of biological evidence in felony cases and permitted any

²³⁹ See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 224–27 (2006).

²⁴⁰ See FRANK R. BAUMGARTNER ET AL., *THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE* 51–52 (2008).

²⁴¹ See *id.* at 54.

²⁴² See *id.*

²⁴³ See Michael Hall, *The Exonerated*, TEX. MONTHLY (Nov. 2008), <https://www.texasmonthly.com/articles/the-exonerated/> [<https://perma.cc/23E7-RNP9>].

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

convicted person to apply for post-conviction DNA testing.²⁴⁷ Four years later, the state began funding innocence clinics at several public law schools.²⁴⁸

A wave of embarrassing and troubling high-profile exonerations in Texas, many of them linked to prosecutorial misconduct, forced the hand of Texas legislators. So did the growing innocence movement in Texas. Established in 2006, the Texas chapter of The Innocence Project, working alongside its parent organization on the case of Timothy Cole, helped engineer a major political shift in the terrain surrounding the issue of wrongful convictions.²⁴⁹ Cole was an African-American veteran who died in prison after an asthma attack in 1999. He had been serving a twenty-five-year sentence for a 1986 rape conviction based on mistaken identity from a faulty photo lineup.²⁵⁰ Ten years after his death, DNA evidence exonerated Cole, and Governor Rick Perry granted him a posthumous pardon.²⁵¹ In 2009, the legislature enacted the Tim Cole Act, which established increased monetary and other assistance for exonerees.²⁵² That same year, lawmakers established an investigative panel on wrongful convictions.²⁵³

²⁴⁷ See *Texas, INNOCENCE PROJECT*, <https://www.innocenceproject.org/texas/> [<https://perma.cc/PL2M-VTSJ>].

²⁴⁸ See DOTIE CARMICHAEL & HEATHER CASPERS, TEX. A&M PUB. POL'Y. RSCH. INST., AN EVALUATION OF THE TEXAS INNOCENCE PROJECTS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION 1 (2015) [<https://perma.cc/65KM-38V6>] ("In 2005, the General Appropriations Bill passed by Texas's 79th Legislature contained a provision for \$400,000 each year of the biennium to be administered by the Texas Indigent Defense Commission for the support of innocence clinics at the state's four public law schools.").

²⁴⁹ See *Mission & History*, INNOCENCE PROJECT TEX., <https://innocencetexas.org/history-mission> [<https://perma.cc/9597-LV9JJ>].

²⁵⁰ See Paul Kix, *Recognition: How a Travesty Led to Criminal-Justice Innovation in Texas*, NEW YORKER (Jan. 11, 2016), <https://www.newyorker.com/magazine/2016/01/18/recognition-annals-of-justice-paul-kix> [<https://perma.cc/4EL3-38YR>].

²⁵¹ *Id.*

²⁵² John Shaw, *Exoneration and the Road to Compensation: The Tim Cole Act and Comprehensive Compensation for Persons Wrongfully Imprisoned*, 17 TEX. WESLEYAN L. REV. 593, 609–12 (2011).

²⁵³ Kix, *supra* note 250.

In 2013, the Texas Legislature passed the Michael Morton Act, named after another man who was wrongfully convicted in a case of prosecutorial misconduct.²⁵⁴ The act grants defendants the statutory right to review the state's evidence against them without a court order.²⁵⁵ At the time, the criminal discovery statute in Texas fell far short of best practices promoted by the American Bar Association and adopted by most states.²⁵⁶ In 2017, Texas lawmakers enacted measures to limit the use of jailhouse informants, mandate the recording of police interrogations in cases of serious crimes, and tighten the procedures for conducting police lineups.²⁵⁷ Although implementation of these reforms has been uneven in law enforcement agencies across Texas, the state has made considerable strides in addressing the problem of wrongful convictions in comparison to other jurisdictions.

At the local level, a couple of district attorneys in Texas have been pioneers in tackling the problem of wrongful convictions. Notably, Craig Watkins—the state's first African-American district attorney—established the country's first conviction integrity unit to investigate claims of wrongful convictions. It has since become a national model for prosecutors.²⁵⁸

XI. PAROLE

Except in the area of wrongful convictions, Texas lawmakers have not been trailblazers in enacting measures that reduce the number of people

²⁵⁴ TEX. APPLESEED & TEX. DEF. SERV., *TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT'S FIRST YEAR* iii (2015), <https://www.texasappleseed.org/sites/default/files/2015MortonAct-FinalReport.pdf> [<https://perma.cc/2FPZ-ZCNL>].

²⁵⁵ *Id.* at ii.

²⁵⁶ *Id.*

²⁵⁷ McCullough & Dehn, *supra* note 236.

²⁵⁸ See Jessica Pishko, *No Country for Innocent Men*, *FRONTBURNER* (May 15, 2018, 11:30 AM), <https://www.dmagazine.com/frontburner/2018/05/dallas-county-exonerations-innocent-conviction-integrity-unit/> [<https://perma.cc/2P99-XSS3>]; see also Alex Samuels, *Study Finds Harris County Leads Nation in Exonerations*, *TEX. TRIB.* (Mar. 7, 2017, 12:00 AM), <https://www.texastribune.org/2017/03/07/report/> [<https://perma.cc/SU9T-TRGU>].

under state control and that foster safer, less abusive conditions in the state's jails and prisons. Public officials, policymakers, and administrators have formidable non-legislative powers to pursue these objectives, but they have been generally unwilling to wield them. These discretionary powers include greater use of parole, executive clemency, and compassionate release to reduce the prison population.

The actions of the Texas Board of Pardons and Paroles (TBPP) have been far more consequential in reducing the size of the state prison population than the overhyped 2007 reforms. For decades now, the board has acted as a key accelerator and a critical brake on the state prison population. As discussed earlier, the incarceration rate in Texas peaked in the late 1990s. After that, it began a downward slide that continues to this day. Several factors explain why, including rising parole release rates, the boom in the state's population (which has grown by more than a third over the last two decades), and the ongoing decline in crime rates.²⁵⁹

Further, the total number of people in prisons and jails in Texas peaked around 2010 and has been falling most years since then, partly thanks to a modest uptick in parole approval rates beginning in 2012. Since then, the parole release rate has continued to hover around thirty-five percent a year, which still is a far cry from the fifty percent or more release rates on the eve of the 1990s prison boom.²⁶⁰ Despite the state's extensive parole guidelines, parole decisions in Texas remain highly discretionary, as evidenced by the vast differences in parole approval rates among the seven board members and fourteen commissioners who serve on the TBPP. In recent years,

²⁵⁹ See VERA INST. JUST., INCARCERATION TRENDS IN TEXAS (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf> [<https://perma.cc/4M2V-YY6Z>]; see also TEX. DEP'T PUB. SAFETY, CRIME IN TEXAS 5 (2017), <http://www.dps.texas.gov/crimereports/17/toc.pdf> [<https://perma.cc/YNE7-3G6N>].

²⁶⁰ See THE TEX. BD. OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT: FY 2018 4 (2018); *Incarceration Trends*, VERA INST. JUST., <http://trends.vera.org/rates/texas> [<https://perma.cc/FD8E-5U5M>].

approval rates have varied widely among TBPP members, ranging from percentages in the low twenties to the mid-to-upper forties.²⁶¹

Nearly half of all state prison admissions in Texas each year concern revocations of parole or probation, most of them for “technical violations,” not new offenses, which is about the national average.²⁶² About sixteen percent of all state prisoners in Texas are currently locked up as the result of a technical violation, which is below the national average of one in four.²⁶³ As in many other states, Texas imposes far more conditions on people on probation or parole than it once did. Probationers and parolees in Texas are often saddled with dozens of conditions, including community supervision fees, curfews, drug tests, prohibitions on travel and living arrangements, and even strictures on punctuality for court appearances, to name just a few.²⁶⁴ The Prison Policy Initiative’s comprehensive analysis of parole systems across the United States gave Texas an F.²⁶⁵

Changes in the institutional structure of parole and pardon boards in Texas and elsewhere could provide public officials with some important political insulation from potentially controversial release decisions. States almost always staff these boards with political appointees, which makes

²⁶¹ See *id.* These calculations do not include the approval rate for the board’s chair, which tend to be considerably higher due to policies governing which cases the chair weighs in on. Telephone Interview by Alexandra Shah with Timothy McDonnell, Chief of Staff, Tex. Bd. Pardons & Paroles (April 5, 2019).

²⁶² See COUNCIL OF STATE GOV’TS JUST. CTR., *CONFINED AND COSTLY: HOW SUPERVISION VIOLATIONS ARE FILLING PRISON AND BURDENING BUDGETS* (June 2019), <https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf> [<https://perma.cc/W83P-WFMW>]; see also COUNCIL OF STATE GOV’TS JUST. CTR., *TEXAS: SUPERVISION VIOLATION DATA SNAPSHOT* (June 2019), <https://csgjusticecenter.org/publications/confined-costly/?state=TX#primary> [<https://perma.cc/TVL8-CQ6M>].

²⁶³ See COUNCIL OF STATE GOV’TS JUST. CTR., *supra* note 262.

²⁶⁴ Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1698, 1708 (2015).

²⁶⁵ Jorge Renaud, *Failure Should Not Be an Option: Grading the Parole Release Systems of All 50 States*, PRISON POL’Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [<https://perma.cc/9H4W-4L7S>].

them more vulnerable to the wrath of public opinion. In 1968, the President's Commission on Law Enforcement and the Administration of Justice recommended that the boards be composed of psychologists, social workers, corrections officials, and other professionals with specialized training and expertise to evaluate offenders' suitability for release.²⁶⁶ That recommendation remains largely unrealized.²⁶⁷ In nearly every state, including Texas, governors appoint all members of the parole board.²⁶⁸ Two-thirds of the states—including Texas—have no professional qualifications for parole board membership.²⁶⁹

XII. EXECUTIVE CLEMENCY

Another key discretionary power is executive clemency. Pardons and commutations were once vital features of the U.S. criminal legal system. Executive clemency was a key mechanism to manage the prison population, correct miscarriages of justice, restore the rights of former offenders, and make far-reaching public statements about the criminal legal system.²⁷⁰

In an address to the American Bar Association in 2003, U.S. Supreme Court Justice Anthony Kennedy raised fundamental questions about the fairness of the U.S. legal justice system. He listed many concerns, including that the pardon process has been “drained of its moral force” as executive

²⁶⁶ See Edward E. Rhine et al., *Improving Parole Release in America*, 28 FED. SENT'G REP. 96, 96–104 (2015).

²⁶⁷ See *Id.*

²⁶⁸ Mario A. Paparozzi & Joel M. Can, *A Profile of Paroling Authorities in America: The Strange Bedfellows of Politics and Professionalism*, 89 PRISON J. 411, 415 (2009).

²⁶⁹ JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 191 (2003); Tex. State Libr. & Archives Comm'n, *Tex. Bd. of Pardons and Paroles: An Inventory of Board of Pardons and Paroles Minutes and Agenda at the Texas State Archives, 1971, 1973-2005*, <https://legacy.lib.utexas.edu/taro/tslac/40127/tsl-40127.html> [<https://perma.cc/Y65F-3424>].

²⁷⁰ GOTTSCHALK, *supra* note 23 at 186–91.

clemency has atrophied.²⁷¹ Kennedy implored, “A people confident in its laws and institutions should not be ashamed of mercy.”²⁷² The following year, the ABA’s Justice Kennedy Commission recommended, among other things, that states and the federal government revitalize executive clemency.²⁷³

But mercy remains an unpopular option in Texas. The executive clemency process shows even less life today than it did fifteen years ago. The number of non-capital executive clemency cases sent to the TBPP for consideration between 2013 and 2019 averaged about 160 a year.²⁷⁴ Of these, the board recommended on average barely two dozen people to be granted clemency by the governor.²⁷⁵ During Rick Perry’s tenure, one could count on two hands how many people the governor approved for clemency in most years.²⁷⁶ Under Governor Greg Abbott, one hand is usually

²⁷¹ Justice Anthony Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html [<https://perma.cc/Q4V4-HB42>].

²⁷² *Id.*

²⁷³ AM. BAR ASS’N, AMERICAN BAR ASSOCIATION JUSTICE KENNEDY COMMISSION: REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 64–65, 73 (Aug. 2004), https://sentencing.typepad.com/sentencing_law_and_policy/files/JusticeKennedyCommissionReports-11Aug2004.pdf [<https://perma.cc/SBK9-HGJJ>].

²⁷⁴ See TEX. BD. OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT: FISCAL YEAR 2013, <https://www.tdcj.texas.gov/bpp/publications/FY%202013%20AnnualStatisticalReport.pdf> [<https://perma.cc/EU96-Y45A>] [hereinafter ANNUAL STATISTICAL REPORT 2013]; TEXAS BD. OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT: FY 2014, <https://www.tdcj.texas.gov/bpp/publications/FY%202014%20AnnualStatisticalReport.pdf> [<https://perma.cc/WB37-DRGZ>] [hereinafter ANNUAL STATISTICAL REPORT 2014]; TEXAS BD. OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT: FY 2019, https://www.tdcj.texas.gov/bpp/publications/FY_2019_Annual_Statistical_Report.pdf [<https://perma.cc/39TX-QJ68>] [hereinafter ANNUAL STATISTICAL REPORT 2019].

²⁷⁵ See ANNUAL STATISTICAL REPORT 2013, *supra* note 274; ANNUAL STATISTICAL REPORT 2014, *supra* note 274; ANNUAL STATISTICAL REPORT 2019, *supra* note 274.

²⁷⁶ See *Texas Restoration of Rights and Record Relief*, RESTORATION OF RTS. PROJECT (July 18, 2020), <https://ccresourcecenter.org/state-restoration-profiles/texas-restoration-of-rights-pardon-expungement-sealing/> [<https://perma.cc/3WSF-D52P>].

sufficient.²⁷⁷ Of the 180 non-capital cases considered in 2019, the board approved only thirty-eight, and Abbott signed off on only seven.²⁷⁸ The people who do succeed in receiving executive clemency in non-capital cases in Texas are almost always people convicted of low-level offenses who are pardoned years after completing their sentences or people seeking to have their civil rights, driver's licenses, or right to possess firearms restored after a criminal conviction.²⁷⁹

Texas has hundreds of permanently bedridden incarcerated people and many others who are elderly, gravely ill, or are otherwise unable to take care of themselves, let alone commit new crimes.²⁸⁰ But these aged and ailing people are not likely to be granted medical parole, even though the compassionate release laws in Texas have some remarkably liberal features, at least on paper. People with serious mental or physical problems are technically eligible for early release, as are most prisoners older than sixty-five, if they do not pose threats to public safety.²⁸¹ In practice, medical parole in Texas has remained moribund. Since 2007, the number of people screened each year by the TBPP for medical parole has escalated

²⁷⁷ *See id.*

²⁷⁸ ANNUAL STATISTICAL REPORT 2019, *supra* note 274; Ryan Autullo, *Abbott Grants Pardon to Man Who Served 18 Months for Pot Possession in Williamson County*, STATESMAN (Dec. 23, 2019), <https://www.statesman.com/news/20191223/abbott-grants-pardon-to-man-who-served-18-months-for-pot-possession-in-williamson-county> [<https://perma.cc/W8C4-467X>].

²⁷⁹ *Governor Abbott Issues Pardons for Seven Texans*, CBS AUSTIN (Dec. 22, 2017), <https://cbsaustin.com/news/local/governor-abbott-issues-pardons-for-seven-texans> [<https://perma.cc/9XR7-GRGT>]; Autullo, *supra* note 278.

²⁸⁰ *See By Rejecting Obamacare, Texas Foregoes Up to \$240 Million in Federal Funds Per Biennium for Prison Health Care*, GRITS FOR BREAKFAST (June 1, 2014), <http://gritsforbreakfast.blogspot.com/2014/06/by-rejecting-obamacare-texas-forgoes-up.html> [<https://perma.cc/Y76A-DSVP>] (noting that at least 70% of the TDCJ's nearly 500 infirmary beds are filled with inmates who likely will remain bedridden until they die).

²⁸¹ Maurice Chammah, *Bill Looks to Adjust Medical Parole to Help Alleviate Prison Budget*, TEX. TRIB. (Jan. 18, 2013), <https://www.texastribune.org/2013/01/18/lawmakers-look-medical-parole-cut-prison-costs/> [<https://perma.cc/3VUW-LDXF>].

dramatically, but the number of people actually granted early release has remained minuscule, averaging fewer than 100 per year.²⁸²

In 2013, lawmakers introduced legislation that would expand the categories of seriously ill and handicapped people eligible for release but would eliminate medical parole for older inmates still in good health even if they posed no threat to public safety.²⁸³ Supporters of the bill framed medical parole as primarily a dollar-and-cents issue. They argued that the early release, and in some cases deportation, of prisoners with expensive ailments would shift the costs of their care to the federal government (due to Medicaid and Medicare), family members, or their native countries, thus lowering the TDCJ's health care expenses.²⁸⁴ This bill failed, as did a similar measure the year before.²⁸⁵

XIII. CONDITIONS OF CONFINEMENT

The United States is exceptional not only because it locks up so many people but also because brutal, dehumanizing conditions are endemic to its jails and prisons.²⁸⁶ Yet scorecards on criminal justice reform focus primarily on trends in the number of incarcerated people and rarely consider the conditions of confinement.²⁸⁷ This is especially true in the case of Texas.

Three decades ago in *Ruiz v. Estelle*, federal judge William Wayne Justice ruled that Texas had a constitutional duty to relieve massive

²⁸² See TEXAS BD. OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT: FY 2011 11 <https://www.tdcj.texas.gov/bpp/publications/FY%202011%20AnnualStatisticalReport.pdf> [https://perma.cc/E7B9-HWEL]; TEXAS BD. OF PARDONS & PAROLES, ANNUAL STATISTICAL REPORT: FY 2017 11, <https://www.tdcj.texas.gov/bpp/publications/FY%202017%20AnnualStatistical%20Report.pdf> [https://perma.cc/DDV4-23RQ].

²⁸³ Chammah, *supra* note 281.

²⁸⁴ See *id.*

²⁸⁵ *Id.*

²⁸⁶ GOTTSCHALK, *supra* note 23, at 39–43.

²⁸⁷ *Id.* at 120.

overcrowding and other conditions that deprived incarcerated people of basic guarantees of safety and health.²⁸⁸ After *Ruiz* was settled, incarcerated people and their advocates were hopeful that more humane conditions would gradually be imposed on the Texas prison system. Yet on key metrics of the quality of life behind bars—access to health care, staffing, use of solitary confinement, sexual abuse, shackling of pregnant women, and oversight—Texas remains a laggard, as elaborated below.

Prisons and jails are tough places to be throughout the United States, but they are tougher than the rest in Texas. Never very attached to the rehabilitative model to begin with, Texas, along with Arizona, developed an alternative model of criminal justice premised on maximum control at minimum cost with little outside oversight.²⁸⁹ The Lone Star State was a crucible for get-tough innovations, including the three-strikes laws, the use of boot camps, the widespread use of solitary confinement, and the revival of humiliating and degrading punishments like chain gangs.²⁹⁰ This control model remains largely intact.²⁹¹

Together with Arizona, Texas was also a ruthless pioneer in how to stymie federal legal and other oversight of its prisons and jails. As a consequence, since the mid-1990s Texas has faced fewer major court challenges compared to other large states—most notably California—about conditions in its penal system.²⁹²

²⁸⁸ See *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

²⁸⁹ See PERKINSON, *supra* note 13; see also MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2010); GOTTSCHALK, *supra* note 23 at 53–56.

²⁹⁰ See PERKINSON, *supra* note 13.

²⁹¹ See *id.*; see also MONA LYNCH, *supra* note 289; GOTTSCHALK, *supra* note 23, at 53–56.

²⁹² See PERKINSON, *supra* note 13.

XIV. HEALTH CARE IN TEXAS PRISONS AND JAILS

Evidence of inadequate health care was an important plank of the *Ruiz* lawsuit.²⁹³ Yet four decades later, the prison health care system in Texas is once again “teetering on the edge of unconstitutionality” because “it is so underfunded,” according to Michele Deitch, an expert on prison conditions at the University of Texas at Austin.²⁹⁴ In one of the most comprehensive state-by-state studies to date based on data from 2007 to 2011, Texas ranked eighth from the bottom in per capita spending on health care for people incarcerated in state prisons.²⁹⁵ Texas ranked near the bottom even though its prison population has an above-average proportion of elderly people, who have greater—and therefore more costly—health-care needs.²⁹⁶ The Lone Star State may rank even lower today in per capita spending on prison health care because of deep cuts in the 2012–13 biennium budget that have yet to be fully restored.²⁹⁷ These cuts resulted in reductions in prison health-care staff, clinic hours, and mental health services.²⁹⁸ For a time, the TDCJ even ceased providing hepatitis B vaccinations for employees and most incarcerated people.²⁹⁹ Even prior to these cutbacks, the universities that provide most of the medical care for Texas prisons through state contracts warned that the level of care was barely

²⁹³ See *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

²⁹⁴ Jolie McCullough, *Texas House, Senate Budget Plans Tens of Millions Apart on Prisoner Health Care*, TEX. TRIB. (Jan. 18, 2019), <https://www.texastribune.org/2019/01/18/texas-prisons-health-care-texas-legislature-budget-proposals> [<https://perma.cc/85Q5-QT2X>].

²⁹⁵ PEW CHARITABLE TRUSTS & MACARTHUR FOUND., *STATE PRISON HEALTH CARE SPENDING* 4 fig.1 (2014).

²⁹⁶ *Id.* at 26 tbl.C.4; Emily Widra, *Since You Asked: How Many People Aged 55 and Older Are in Prison, by State?*, PRISON POL’Y INITIATIVE (May 11, 2020), <https://www.prisonpolicy.org/blog/2020/05/11/55plus/> [<https://perma.cc/3FF9-N2QA>].

²⁹⁷ STAFF OF LEGIS. BUDGET BD., 2013 LEG., 83RD REG. SESS., *CORRECTIONAL MANAGED HEALTH CARE FOR STATE INCARCERATED ADULT OFFENDERS IN TEXAS* 1 (Tex. 2013).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

constitutional and that the state faced a “looming fiscal crisis” in prison health care.³⁰⁰

In its landmark 2011 *Brown v. Plata* decision, the U.S. Supreme Court declared that the conditions in California’s prison system were unconstitutional because of the inadequate, life-threatening level of health care.³⁰¹ At the time, the Golden State’s per capita spending on inmate health care was about four times that of Texas.³⁰²

The number of people aged fifty-five and older incarcerated in Texas prisons surged sixty-five percent between 2012 and 2019.³⁰³ The average age of someone in a Texas prison is fifty-two years, up from thirty-five years a decade and a half ago.³⁰⁴ Despite a drop in the total prison population, health care costs continued to escalate because of this rapidly aging prison population. Spending on prison health care increased by \$250 million—or fifty-three percent—during this period, yet critical health-care needs remained unmet.³⁰⁵

In its biennium budget request for fiscal years 2020–21, the TDCJ reported that the University of Texas Medical Branch, which provides health care for Texas inmates, had “critical” needs for about \$280 million in additional funding.³⁰⁶ Lawmakers finally agreed to an increase of just \$160

³⁰⁰ BEN G. RAIMER, OWEN J. MURRAY & JOHN S. PULVINO, HEALTH CARE IN THE TEXAS PRISON SYSTEM: A LOOMING FISCAL CRISIS 4–5 (2010); *see also* TDCJ ‘Going California’?: *Prison Health Under-Funded by Nine Figures*, GRITS FOR BREAKFAST (May 20, 2011, 9:39 AM), <https://gritsforbreakfast.blogspot.com/2011/05/tdcj-going-california-prison-health.html> [<https://perma.cc/2Z6F-ZJBF>].

³⁰¹ *See* *Brown v. Plata*, 563 U.S. 493 (2011).

³⁰² THE PEW CHARITABLE TRUSTS & MACARTHUR FOUND., STATE PRISON HEALTH SPENDING 4 fig.1 (2014), <https://www.pewtrusts.org/~media/assets/2014/07/stateprisonhealthcarespendingreport.pdf> [<https://perma.cc/KJ72-3KYQ>].

³⁰³ Tex. Crim. Just. Coal., *supra* note 78, at 7.

³⁰⁴ DOUGLAS SMITH, TEX. CRIM. JUST. COAL., RESPONSE TO INTERIM CHARGE 6: TEXAS HOUSE COMMITTEE ON APPROPRIATIONS S/C ON ARTICLES I, IV, AND V 1 (Sept. 2020).

³⁰⁵ Tex. Crim. Just. Coal., *supra* note 78, at 7.

³⁰⁶ TEX. DEP’T OF CRIM. JUST., FISCAL YEAR 2019 OPERATING BUDGET: FISCAL YEARS 2020-2021 LEGISLATIVE APPROPRIATIONS REQUEST iii (2018).

million for correctional health care in the TDCJ's 2020–21 biennium budget, far below what was deemed essential to maintain minimum standards of care.³⁰⁷

The health-care system in Texas dispenses everyday cruelties. Until recently, the TDCJ refused to provide dentures to incarcerated people so they were forced to eat just soft foods. The TDCJ rescinded this policy only after it was widely reported in the media.³⁰⁸ In 2011, the Texas Legislature raised the co-pay for a medical visit for people incarcerated in state prisons from \$3 a visit to a \$100 annual fee, which was the largest co-pay by far of any state prison system.³⁰⁹ The \$100 co-pay in Texas, which legislators considered doubling to \$200, is even larger than it looks compared to other states because, as discussed in greater detail below, people incarcerated in Texas are not paid for the labor they provide to keep the state's prisons and jails running.³¹⁰ The Texas co-pay was the brainchild of Republican State Representative Jerry Madden, a key architect of the celebrated 2007 changes in penal policy.³¹¹ This co-pay raised just a couple of million dollars each year, a mere drop in the bucket compared to the TDCJ's nearly

³⁰⁷ *Id.* at 3; see also STAFF OF CONF. COMM., GENERAL APPROPRIATIONS ACT FOR THE 2020-21 BIENNIUM, 86TH TEX. LEG. REG. SESS. 2019 V-6 (2019) (on fiscal 2020 and fiscal 2021 figures from Texas Legislature); TEX. DEP'T OF CRIM. JUST., AGENCY OPERATING BUDGET 2020 2 (Aug. 21, 2019).

³⁰⁸ Keri Blakinger, *Texas Prisons to Start 3D-Printing Dentures for Toothless Inmates*, HOUS. CHRON. (Dec. 12, 2018), <https://www.chron.com/news/houston-texas/houston/article/Texas-prisons-to-start-3D-printing-dentures-for-13454914.php> [<https://perma.cc/92U4-2XG8>].

³⁰⁹ LINDSEY LINDER, TEX. CRIM. JUST. COALITION, 2019 FACT SHEET: HB 812 1 (2020); Lindsey Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (Apr. 17, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays/> [<https://perma.cc/9TTK-294W>].

³¹⁰ Sawyer, *supra* note 309.

³¹¹ Maurice Chammah, *Some Inmates Forego Health Care to Avoid Fees*, TEX. TRIB. (Oct. 16, 2012); Max Ravlin-Nadler, *How Medical Copays Haunt Prisoners and Their Loved Ones*, VICE (Jan. 18, 2017), <https://www.vice.com/en/article/kbba8n/how-medical-copays-haunt-prisoners-and-their-loved-ones> [<https://perma.cc/4RZM-EHZG>].

\$570 million budget for correctional health care in 2019.³¹² That year, the legislature agreed to reduce the co-pay to \$13.55, which is still the highest co-pay by far of any state prison system.³¹³

Texas is not among the few states that provide incarcerated people with wide access to new costly antiviral medications that have revolutionized treatment of hepatitis C, a chronic and debilitating disease that can be fatal.³¹⁴ The TDCJ is facing a class-action lawsuit over its policy of denying incarcerated people access to these drugs, which are highly effective at curing this blood borne virus if treatment is started in time.³¹⁵ The lawsuit charges that the prison health care system only prescribes antiviral drugs—known to cure more than ninety percent of patients if prescribed in time—to people who are in the late stages of the disease and who already have liver damage.³¹⁶

XV. COVID-19 BEHIND THE WALLS

COVID-19 has further imperiled the health, safety, and quality of life of people serving time in Texas prisons and jails. The TDCJ and other state and county agencies have been asked to cut their budgets due to falling

³¹² Sawyer, *supra* note 309; Max Rivlin-Nadler, *Texas May Double Healthcare Fees for Its Massive Prison*

Population, VICE (Feb. 23, 2017), https://www.vice.com/en_us/article/vvqw9d/texas-may-double-healthcare-fees-for-its-massive-prison-population [<https://perma.cc/9J TZ-NJRK>]; see also FISCAL YEAR 2019 OPERATING BUDGET, *supra* note 306, at 3.

³¹³ *Summaries of Selected Legislation Passed by the 86th Legislature, Regular Session*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/news/summaries_of_select_legislature_passed_by_86th.html [<https://perma.cc/V334-A6WJ>]; Sawyer, *supra* note 309.

³¹⁴ DOUGLAS SMITH, TEX. CRIM. JUST. COAL., RESPONSE TO INTERIM CHARGE 4: TEXAS HOUSE APPROPRIATIONS S/C ON ARTICLES I, IV, AND V 6 (Sept. 3, 2020).

³¹⁵ Gabrielle Banks & Keri Blakinger, *Texas Inmates Sue for Hepatitis C Drug, Alleging Lack of Treatment Is 'Cruel and Unusual'*, HOUS. CHRON. (Sept. 18, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-inmates-sue-for-hepatitis-C-drug-alleging-14453099.php> [<https://perma.cc/RXA9-3PKY>].

³¹⁶ *Id.*

revenues, and penal authorities have been slow to implement basic health and safety measures to stem the spread of the virus infection, as detailed below.

The pandemic has been a stress test for penal systems throughout the United States and the world, and some states and countries have failed more miserably than others. Texas is one of them. The pandemic could finally kill off the myth of the Texas penal reform miracle. In a grim achievement, the Lone Star State may finally end up leading the nation in reducing its prison and jail population—by releasing a record number of people in body bags.

Of the ten largest penal systems in the United States, Texas has the second highest rate of both COVID-19 infections and deaths among people incarcerated in its state prisons and county jails, according to a November 2020 report by the University of Texas at Austin.³¹⁷ Texas also leads by far among state prison systems and is tied for second place in staff mortality rates due to COVID-19.³¹⁸

In the vaccination plans announced last fall for COVID-19, some states prioritized vaccinating incarcerated people and guards.³¹⁹ Not Texas. It was one of ten states that did not include incarcerated people in its initial roll out plan, which also did not include guards.³²⁰ In a fifty-state analysis of the

³¹⁷ MICHELE DEITCH ET AL., LYNDON B. JOHNSON SCH. OF PUB. AFFS., COVID AND CORRECTIONS: A PROFILE OF COVID DEATHS IN CUSTODY IN TEXAS 12 (2020).

³¹⁸ NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, & MEDICINE, DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY 37–38 tbl.2–3 (2020).

³¹⁹ Katie Rose Quandt, *Incarcerated People and Corrections Staff Should Be Prioritized in COVID-19 Vaccination Plans*, PRISON POL’Y INITIATIVE (Dec. 8, 2020), <https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans/> [<https://perma.cc/J8SM-46UX>].

³²⁰ *Id.*; TEX. DEP’T OF STATE HEALTH SERVS., COVID-19 VACCINATION PLAN: TEXAS (Oct. 2020), <https://dshs.texas.gov/news/updates/Texas-Vaccine-Plan-10-16-2020-DRAFT-CDC-Submission.pdf> [<https://perma.cc/JV6C-P8AL>].

response to COVID-19 in prisons and jails, the Prison Policy Initiative and ACLU gave Texas an F.³²¹

At the start of the pandemic, the TDCJ refused to abide by health and safety guidelines issued by the Centers for Disease Control and Protection in March 2020 to stem the spread of the virus in prisons and jails.³²² It went to court in April to defend its right not to provide basic protections after it was sued by two elderly inmates at the Wallace Pack prison (“Pack”), the geriatric facility that was at the center of the lawsuit over oppressive heat conditions.³²³ Hand sanitizer, the TDCJ insisted, posed a major security risk, even though the state agency could not provide a single instance of an incarcerated person drinking or igniting hand sanitizer (which one Texas state prison manufactures on the cheap thanks to unpaid penal labor).³²⁴

In April 2020, Judge Keith P. Ellison issued a temporary order requiring the TDCJ to provide basic protections, including adequate hand sanitizer, masks, gloves, cleaning supplies, and tissues.³²⁵ He also ordered the TDCJ to devise a plan to test everyone at Pack prison for the virus.³²⁶ He charged that “at a time when hygiene is a life or death matter,” the prison’s actions “reflect a deliberate indifference toward the safety” of its “especially vulnerable” prisoners.³²⁷

³²¹ EMILY WIDRA & DYLAN HAYRE, ACLU SMART JUSTICE & PRISON POL’Y INITIATIVE, *FAILING GRADES: STATES’ RESPONSES TO COVID-19 IN JAILS AND PRISONS* 2 (2020).

³²² Michael Barajas, *How COVID-19 Upended Texas Prisons*, TEX. OBSERVER (May 13, 2020) <https://www.texasobserver.org/how-covid-19-upended-texas-prisons/> [https://perma.cc/5HHL-AFZY].

³²³ Barajas, *supra* note 322.

³²⁴ *Id.*; *Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 1685122 slip op. at 10, 22 (S.D. Tex. Apr. 6, 2020).

³²⁵ Adam Liptak, *Supreme Court Rejects Bid for Virus Protections in Texas Prisons*, N.Y. TIMES (May 14, 2020), [nytimes.com/2020/05/14/us/politics/supreme-court-texas-prison-coronavirus.html](https://www.nytimes.com/2020/05/14/us/politics/supreme-court-texas-prison-coronavirus.html) [https://perma.cc/UU5Z-RE9F].

³²⁶ *Valentine*, slip op. at 10, 22.

³²⁷ *Id.* at 22, 29.

But the country's most politically conservative federal court of appeals quickly threw the TDCJ a legal lifeline, as it has many times before. A three-judge panel of the Fifth U.S. Circuit Court of Appeals in New Orleans issued an injunction against Ellison's court order.³²⁸ Lawyers for the incarcerated men at Pack prison could not muster the necessary four votes from the U.S. Supreme Court to reinstate the emergency order.³²⁹ Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, issued a scorching statement on May 14. "It has long been said that a society's worth can be judged by taking stock of its prisons," Sotomayor wrote.³³⁰ "That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm."³³¹

The TDCJ was slow to implement widespread testing of guards and incarcerated people in state prisons. Once it began ramping up testing in mid-May, the tally of infections skyrocketed. COVID-19 was found to be raging in Duncan prison, a geriatric facility in southeastern Texas where about half of the 400 incarcerated men tested positive by May and six percent had died of the infection as of November 2020.³³²

Instead of seeking to release people or implement all the CDC guidelines, Governor Abbott and the TDCJ ramped up "Texas tough," imposing a massive lockdown on facilities where COVID-19 was detected. As of mid-May 2020, nearly one-third of the people held by the TDCJ were confined

³²⁸ Liptak, *supra* note 325.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *COVID-19 Medical Action Center*, TEX. DEP'T OF CRIM. JUST. (May 28, 2020), https://www.tdcj.texas.gov/covid-19/offender_mac.html [https://perma.cc/L634-Q258][hereinafter *COVID-19 Medical Action Center*]; TEX. DEP'T OF CRIM. JUST., MONTHLY TRACKING OF ADULT CORRECTIONAL POPULATION INDICATORS (May 2020); Katie Park et al., *A State-by-State Look at the Coronavirus in Prisons*, MARSHALL PROJECT (Apr. 16, 2021), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> [https://perma.cc/FNY7-U9HB]; DEITCH ET AL., *supra* note 317, at 6.

to their cells and dorms nearly round-the-clock, denied access to regular showers and even purchases from commissary to supplement the cold, meager, unpalatable food delivered to their cells in brown paper “johnny sacks.”³³³ Some incarcerated people reportedly concealed their symptoms rather than be transferred to solitary confinement, an even more extreme form of isolation.³³⁴

Governor Abbott sought to block local efforts for early release of people held in county jails. He also pushed to use the pandemic as an opportunity to hobble the growing reform movement to rein in cash bail in Texas and was aided in his efforts by the Texas Supreme Court.³³⁵ The sheriff of Harris County, who attempted to expand compassionate release, faced serious pushback from penal hardliners, including the governor.³³⁶ Chaos erupted after Lina Hidalgo, the county’s top elected official, issued an executive order to release of 1,000 people being held for low-level crimes at the Harris County jail, which she called a “ticking time bomb” due to the virus. The courts stepped in to halt the release.³³⁷

³³³ *COVID-19 Medical Action Center*, *supra* note 332; Barajas, *supra* note 322; *COVID-19: Notes of Conference Call on Re-Opening Visitation*, TEX. INMATE FAMS. ASS’N (Jan. 21, 2021), <https://tifa.org/covid19/> [<https://perma.cc/Y6GF-Z4CD>].

³³⁴ *COVID-19 Medical Action Center*, *supra* note 332; Barajas, *supra* note 322; *COVID-19: Notes of Conference Call on Re-Opening Visitation*, TEX. INMATE FAMS. ASS’N (Jan. 21, 2021), <https://tifa.org/covid19/> [<https://perma.cc/Y6GF-Z4CD>].

³³⁵ Michael Barajas, *Greg Abbott’s Power Grab on Bail Reform*, TEX. OBSERVER (Apr. 14, 2020), <http://www.texasobserver.org/greg-abbott-bail-reform-coronavirus/> [<https://perma.cc/5HBN-K9DZ>]; Jolie McCullough, *Texas Supreme Court Sides with Abbott After Judge Halted His Order Restricting Jail Release*, TEX. TRIB. (Apr. 23, 2020), texastribune.org/2020/04/23/texas-greg-abbott-bail-jail-releases [<https://perma.cc/JBJ4-MGRB>].

³³⁶ Gabrielle Banks & St. John Bamed-Smith, *How We Got the Story of Coronavirus in the Harris County Jail*, HOUS. CHRON. (May 21, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-coronavirus-jail-mail-inmates-Harris-covid-15283504.php> [<https://perma.cc/A4T3-W6PK>].

³³⁷ *Court Order Stops Inmate Releases Shortly After First Group Leaves Harris County Jail*, KHOU-11 (Apr. 3, 2020), <https://www.khou.com/article/news/health/coronavirus/first-nonviolent-offenders->

XVI. IN DISREPAIR

The dilapidated state of penal facilities in Texas poses another threat to the health and safety of incarcerated people and prison staff. Some prisons in Texas are more than 100 years old, and many are more than seventy-five years old.³³⁸ Many penal facilities are in dire need of basic repairs and renovations, including leaky roofs, faulty fire alarms, and antiquated water systems. It is an open secret that many incarcerated people in Texas state prisons can let themselves out of their cells using simple tools like a bar of soap, a shoelace, or a domino because so many locks are malfunctioning.³³⁹

About four out of five state prisoners in Texas are housed in units without air-conditioning, according to lawsuits and other reports.³⁴⁰ The state has reported at least twenty-three heat-related deaths since 1998.³⁴¹ Incarcerated people are more susceptible to heat-related illnesses because they tend to be in poorer health than the general population.³⁴² They have higher incidences of chronic health problems that excessive heat exacerbates, including obesity, diabetes, and hypertension.³⁴³ Furthermore,

released-from-harris-county-jail-to-stop-covid-19-spread/285-acdfdbfa-e25b-4fb9-a9d3-2bb0b03df5b8 [https://perma.cc/AX9H-YPRB].

³³⁸ SMITH, *supra* note 314, at 4.

³³⁹ Keri Blakinger, *Breaking Out with a Bar of Soap*, MARSHALL PROJECT (Aug. 11, 2020), <https://www.themarshallproject.org/2020/08/11/breaking-out-with-a-bar-of-soap> [https://perma.cc/R3X2-7HJR].

³⁴⁰ Maurice Chammah, “Cooking Them to Death”: The Lethal Toll of Hot Prisons, MARSHALL PROJECT (Oct. 11, 2017), <https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons> [https://perma.cc/F6NX-5BVB].

³⁴¹ Jolie McCullough, *A State Report Says a Texas Inmate Died from Heat Last Year*, TEX. TRIB. (Feb. 19, 2019), <https://www.texastribune.org/2019/02/19/texas-prison-heat-death/> [https://perma.cc/R2VT-UZFN].

³⁴² LAURA MARUSCHAK & MARCUS BERZOFSKY, U.S. DEP’T OF JUST., MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011-12 1 (2016), <https://www.bjs.gov/content/pub/pdf/mpsfpi1112.pdf> [https://perma.cc/TDN3-BNWU].

³⁴³ DANIEL W. E. HOLT, COLUM. L. SCH., HEAT IN US PRISONS AND JAILS: CORRECTIONS AND THE CHALLENGE OF CLIMATE CHANGE ii (2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf [https://perma.cc/WT89-PG5G].

many drugs—both legal and illicit—raise the risk of heat-related illnesses, including cocaine, ecstasy, antipsychotic drugs, amphetamines, and diuretics.³⁴⁴

A state law requires county jails to maintain temperatures between sixty-five and eighty-five degrees Fahrenheit, but that statute does not apply to state prisons.³⁴⁵ After at least ten inmates died of heat-related causes in Texas prisons during a record-breaking heat wave in summer 2011, Senator Whitmire, the celebrated criminal justice reformer, told reporters he was not alarmed by their deaths.³⁴⁶ He also declared that outfitting Texas prisons with air-conditioning was “unimaginable.”³⁴⁷

In 2013, the state’s leading prison guards’ union announced it would support a lawsuit filed on behalf of incarcerated men challenging the sweltering conditions in Texas prisons.³⁴⁸ The union decided to act after learning the TDCJ was constructing climate-controlled barns to cool pigs

³⁴⁴ *Id.* at 26–28.

³⁴⁵ Jolie McCullough, *Texas May Soon Have to Report the Temperatures Inside Its Uncooled Prisons*, TEX. TRIB. (Mar. 6, 2019), <https://www.texastribune.org/2019/03/06/texas-prison-heat-legislature-reporting/> [<https://perma.cc/XW9G-UA4Y>].

³⁴⁶ Manny Fernandez, *In Texas, Arguing That Heat Can Be a Death Sentence for Prisoners*, N.Y. TIMES (July 28, 2012), <https://www.nytimes.com/2012/07/29/us/in-texas-arguing-that-heat-can-be-a-death-sentence-for-prisoners.html> [<https://perma.cc/MP7L-X4U8>].

³⁴⁷ *Guards May Join Inmates in Complaints over Heat in Texas Prisons*, DALL. MORNING NEWS (Sept. 17, 2013), <https://www.dallasnews.com/news/texas/2013/09/18/guards-may-join-inmates-in-complaints-over-heat-in-texas-prisons/> [<https://perma.cc/2LWF-D3NY>].

³⁴⁸ Annie Melton, *The Heated Battle for Cooled Texas Prisons*, TEX. MONTHLY (June 2, 2014), <https://www.texasmonthly.com/politics/the-heated-battle-for-cooled-texas-prisons/> [<https://perma.cc/SBU8-3QDU>].

raised on penal farms.³⁴⁹ Lance Lowry, a leader of the guards' union in Texas, described seeing colleagues pass out on the job from the heat.³⁵⁰

In response to complaints about excessive heat in the Wallace Pack Unit in southeastern Texas, a low-security facility that holds mostly elderly and ill men, the TDCJ advised inmates to simply drink more water during heat waves.³⁵¹ But the levels of arsenic—a known carcinogen—in the drinking water at Pack greatly exceeded what was permitted by the Environmental Protection Agency.³⁵² In response to an emergency motion filed on behalf of the men at Pack, Judge Keith P. Ellison of the Federal District Court in Houston ordered the TDCJ to provide safe drinking water to the Wallace Pack Unit.³⁵³ The following year, the TDCJ installed a modern water filtration system.³⁵⁴ In 2017, Ellison castigated the TDCJ for being “deliberately indifferent” to the risks posed by the heat at the Wallace Pack Unit and ruled that the conditions were unconstitutional.³⁵⁵ In early 2018, the state agreed to install air-conditioning in this facility after reaching a settlement in the federal class-action lawsuit.³⁵⁶

A 2018 report from the Texas House Committee on Corrections characterized the TDCJ's efforts to address excessive heat problems as

³⁴⁹ Ann Zimmerman, *Extreme Heat Tests Prisons*, WALL ST. J. (Oct. 17, 2013), <https://www.wsj.com/articles/SB10001424052702304441404579123381202026834> [<https://perma.cc/MHP2-3ANA>].

³⁵⁰ Lance Lowry, *In Texas, Inmates and Officers Swelter*, N.Y. TIMES (Nov. 21, 2013), <https://www.nytimes.com/2013/11/22/opinion/in-texas-inmates-and-officers-swelter.html> [<https://perma.cc/U7PR-Q4TH>].

³⁵¹ Bernd et al., *supra* note 15.

³⁵² *Id.*

³⁵³ Final Order, *Cole v. Collier*, F. Supp. (S.D. Tex. 2017) (No. 4:14 Civ.1698), 2018 WL 2766028, at *15.

³⁵⁴ Bernd et al., *supra* note 15.

³⁵⁵ Final Order, *Cole v. Collier*, F. Supp. (S.D. Tex. 2017) (No. 4:14 Civ.1698), 2018 WL 2766028, at *2, 13.

³⁵⁶ Jolie McCullough, *After Lawsuit, Texas Plans to Install Air Conditioning in a Stifling Prison*, TEX. TRIB. (Feb. 2, 2018), <https://www.texastribune.org/2018/02/02/after-lawsuit-texas-says-it-will-install-air-conditioning-its-stifling/> [<https://perma.cc/66T7-7MXN>].

inadequate in the face of ongoing litigation regarding excessive heat in other prisons.³⁵⁷ In spring 2019, lawmakers proposed a long-shot bill that would require keeping the temperature between sixty-five and eighty-five degrees Fahrenheit in state prisons.³⁵⁸ TDCJ officials put a hefty price tag of \$1 billion to air-condition all of its uncooled prisons, an estimate that lawmakers characterized as disingenuous and a gross overestimate.³⁵⁹

In summer 2019, attorneys representing the men at Pack prison were back in court, claiming that dozens of them were being kept in uncooled housing.³⁶⁰ They also charged that TDCJ officials had repeatedly misrepresented and concealed issues related to the oppressive heat conditions at state prisons.³⁶¹ Frustrated over prison officials' failure to follow his court order, Ellison threatened to lock them up in stifling cells.³⁶² TDCJ executive director Bryan Collier admitted in court that the agency had violated the federal orders.³⁶³ Ellison denounced the TDCJ's "indefensible" conduct and compared the sweltering conditions to "almost Geneva code violations."³⁶⁴

³⁵⁷ STAFF OF COMM. ON CORR., TEX. LEG., HOUSE COMM. ON CORR., A REPORT TO THE H.R. 86TH TEX. LEG. (2018), <https://lrl.texas.gov/scanned/interim/85/C817.pdf> [<https://perma.cc/U3QS-V4KU>]; see McCullough, *supra* note 356.

³⁵⁸ McCullough, *supra* note 356.

³⁵⁹ Jolie McCullough, *Texas Officials Say It Would Cost \$1 Billion to Cool Prisons*, TEX. TRIB. (Mar. 21, 2019), <https://www.texastribune.org/2019/03/21/texas-prisons-air-conditioning-1-billion-estimate/> [<https://perma.cc/7MQE-RCAR>].

³⁶⁰ Jolie McCullough, *A Judge Told Texas to Put Some Inmates in Air Conditioning*, TEX. TRIB. (Sept. 5, 2019), <https://www.texastribune.org/2019/09/05/texas-prison-air-conditioning-heat-contempt-motion/> [<https://perma.cc/H66U-AUYS>].

³⁶¹ *Id.*

³⁶² Jolie McCullough, *"The Stakes Could Not Be Higher": Judge Threatens to Lock Up Prison Officials over Air Conditioning Violations*, TEX. TRIB. (Sept. 6, 2019), <https://www.texastribune.org/2019/09/06/texas-prison-officials-threatened-prison-air-conditioning/> [<https://perma.cc/38ZJ-JJ8N>].

³⁶³ Jolie McCullough, *"We Failed as an Agency": Texas Prison Officials Admit Violating Court Order on Air Conditioned Units for Inmates*, TEX. TRIB. (Sept. 10, 2019), <https://www.texastribune.org/2019/09/10/texas-prison-bryan-coller-air-conditioning-violation/> [<https://perma.cc/GJ9T-CMC6>].

³⁶⁴ *Id.*

XVII. STAFFING CRISIS

Poor work conditions, including extreme heat and low pay, help explain why the Texas state prison system is in the midst of a staffing crisis that has jeopardized the safety of incarcerated people.³⁶⁵ The annual turnover rate for guards in Texas state prisons has soared to about one-third.³⁶⁶ Nearly one-quarter of the state prisons, including about half of the maximum-security facilities, have vacancy rates for guards of at least thirty-five percent—and some have rates exceeding fifty percent.³⁶⁷ Hiring bonuses and hikes in starting salaries have not resolved the problem, which is especially acute in rural areas where many of Texas's newest prisons and jails were built during the penal boom in the 1990s.³⁶⁸

Chronic staffing shortages have impaired prison safety, making it even harder to recruit and retain guards. Incidents of major use of force in Texas state prisons have increased about fifty percent over the last decade or so (even though the prison population has declined), likely due to chronic staffing shortages, high staff turnover, inexperienced guards, and the brutally hot facilities in the summer.³⁶⁹

³⁶⁵ UNIV. OF TEX. SCH. OF L., HUM. RTS. CLINIC, RECKLESS INDIFFERENCE: DEADLY HEAT IN TEXAS PRISONS 11–12 (2015), <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2015-HRC-USA-Reckless-Indifference-Report.pdf> [<https://perma.cc/ZW57-5S4M>].

³⁶⁶ TEX. DEP'T OF CRIM. JUST., LEGISLATIVE APPROPRIATIONS REQUEST FOR FISCAL YEARS 2022–2023 45 (2020), https://www.tdcj.texas.gov/documents/bfd/FY_2022-23_LAR.pdf [<https://perma.cc/J53V-52BZ>].

³⁶⁷ See TEX. DEP'T OF CRIM. JUST., SUMMARY OF AUTHORIZED AND FILLED POSITIONS FOR CORRECTIONAL OFFICERS AS OF OCTOBER 2020 (Nov. 13, 2020), https://drive.google.com/file/d/1MjVOKG_pxqkCW3A1WpqWKc343TMNH0BA/view [<https://perma.cc/LFR5-9MPZ>]; TEX. DEP'T OF CRIM. JUST., *supra* note 366, at iii.

³⁶⁸ Blakinger, *supra* note 16; Tracy Huling, *Building a Prison Economy in Rural America*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002).

³⁶⁹ Keri Blakinger, *Texas Prison Guard Charged in Connection with Death of Inmate Who Allegedly Spit on Him*, HOUS. CHRON. (Sept. 18, 2018), <https://www.chron.com/news/houston-texas/article/Texas-prison-guard-charged-in-connection-with-13239511.php> [<https://perma.cc/7J64-927Q>]; Jolie McCullough, *Three*

Faced with severe staff shortages, county lockups have employed thousands of unlicensed and untrained guards.³⁷⁰ Until the law was changed in 2019, these guards were permitted to work for up to a year without fulfilling the training requirements to receive a permanent license, which are quite minimal.³⁷¹ The new law now requires them to get their licenses within ninety days.³⁷² Equipped with potentially lethal weapons, such as pepper spray, more than 3,200 temporary guards—or fourteen percent of all guards—are patrolling jails across Texas with little to no training in basic prison safety, the appropriate use of force, how to handle disturbed prisoners, or how to prevent suicide, the leading cause of death in jail.³⁷³ This loophole’s lethal consequences were shockingly apparent in the video of the death of Andy DeBusk. Coming down from a meth high in a privately run jail outside of Fort Worth on Christmas Eve in 2016, DeBusk died after being pepper-sprayed and shackled by poorly trained guards.³⁷⁴

Texas Inmates Have Died at the Hands of Prison Officers as Use of Force Continues to Rise, TEX. TRIB. (Feb. 7, 2020), <https://www.texastribune.org/2020/02/07/texas-prison-deaths-come-staffers-use-force-against-inmates-increases/> [https://perma.cc/4W8E-W8RW].

³⁷⁰ Cary Aspinwall & Dave Boucher, “*They’re Gonna Kill Me*”: *Why Did a Man Die in Jail Near Fort Worth as Untrained Guards Watched?*, DALL. MORNING NEWS (Nov. 18, 2018), <https://www.dallasnews.com/news/investigations/2018/11/18/gonna-kill-man-die-in-jail-near-fort-worth-untrained-guards-watched> [https://perma.cc/TEC7-89K8].

³⁷¹ Editorial, *Death Without Conviction: Start Work Now on Jail Reforms*, PALESTINE HERALD-PRESS (Dec. 30, 2019), https://www.palestineherald.com/news/php-editorial-death-without-conviction-start-work-now-on-jail-reforms/article_d0dfc57c-2b32-11ea-96be-0b7b18ce9e0a.html [https://perma.cc/UK8F-M43U].

³⁷² *Id.*

³⁷³ Editorial, *Death Without Conviction: Without Oversight, Texas Jails Turn Deadly*, PALESTINE HERALD-PRESS (Aug. 3, 2019), https://www.palestineherald.com/news/death-without-conviction-php-editorial-deadly-jails-need-stronger-state-oversight/article_297189da-0830-11ea-af64-7f5060ad1882.html [https://perma.cc/F6NN-UMBR].

³⁷⁴ Aspinwall & Boucher, *supra* note 370.

XVIII. SEXUAL ABUSE IN TEXAS PRISONS AND JAILS

Newsweek and other publications have referred to Texas as the “prison rape capital of the U.S.” because it leads the country in incidents of sexual abuse in prison.³⁷⁵ Almost half of TDCJ facilities surveyed have rates of sexual victimization by staff members and incarcerated people that exceed the national average.³⁷⁶ In some cases, the rates of abuse are two, three, or even four times higher than the national average.³⁷⁷ Texas also leads the nation in the number of state prisons that have a “high” rate of inmate-on-inmate abuse.³⁷⁸ Clements prison in Amarillo, Texas, (named after Governor Clements who, as discussed earlier, launched the prison boom in the late 1980s) ranked first in the nation in sexual victimization by staff that involved physical force, threats of force, or coercion.³⁷⁹ Murray prison in Gatesville, Texas, ranked fourth among women’s prisons nationwide in the proportion of incarcerated women reporting they had been sexually victimized.³⁸⁰ Of the more than 350 jails surveyed nationwide, Houston’s Harris County Jail ranked third in the rate of sexual abuse reported by incarcerated people.³⁸¹

In some respects, Texas has been a leader in tackling sexual abuse in prisons and jails. In other respects, it has lagged way behind. In 2014, Governor Rick Perry sent a defiant letter to Attorney General Eric Holder declaring that Texas would not be complying with the federal Prison Rape

³⁷⁵ Alysia Santo, Opinion, *Texas: The Prison Rape Capital of the U.S.*, NEWSWEEK (June 20, 2015), <https://www.newsweek.com/texas-prison-rape-capital-us-344729> [<https://perma.cc/27VS-6GJ2>].

³⁷⁶ See ALLEN J. BECK ET AL., BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, 47 app. tbl.1 (May 2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<https://perma.cc/XYJ7-YQH8>].

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 12 tbl.3.

³⁷⁹ *Id.* at 14.

³⁸⁰ *Id.* at 43–48 app. tbl.1.

³⁸¹ *Id.* at 12 tbl.3.

Elimination Act (PREA).³⁸² Congress enacted this legislation in 2003, but it took a decade before the Justice Department finally promulgated standards and regulations because of obstructionism from prison administrators nationwide.³⁸³ Perry's successor Greg Abbott said the state would implement PREA's standards "wherever feasible."³⁸⁴ Attorney General Loretta Lynch eventually accepted this highly qualified stance, infuriating advocates fighting to end sexual abuse in U.S. prisons and jails.³⁸⁵ Advocates feared that the DOJ's acceptance of this "Texas exception" weakened PREA's goal of zero tolerance of prison rape and set a precedent for other jurisdictions to selectively implement the act.³⁸⁶ U.S. Senator John Cornyn (R-TX) has played hot and cold on PREA, successfully pushing measures to speed its implementation and maintain adequate federal funding while also pushing amendments to dramatically weaken enforcement.³⁸⁷

A 2016 report by advocacy groups in Texas documented the state's "Texas-sized failure" to comply with PREA.³⁸⁸ Among other things, the

³⁸² Letter from Rick Perry, Governor of Tex., to Eric H. Holder, Jr., Attorney General, U.S. Dep't of Just. (Mar. 28, 2014), <https://drive.google.com/file/d/0B6HJLeMEu3hlUUctaWxnQWVUeDA/edit> [<https://perma.cc/2AZZ-HXKU>]; *Perry: Texas Won't Comply with Federal Prison Rape Elimination Act*, GRITS FOR BREAKFAST (Mar. 28, 2014, 7:44 PM), <https://gritsforbreakfast.blogspot.com/2014/03/perry-texas-wont-comply-with-federal.html> [<https://perma.cc/A3G5-XBR9>].

³⁸³ GOTTSCHALK, *supra* note 23, at 137.

³⁸⁴ Deidre Bannon, *PREA at a Crossroads*, CRIME REP. (Aug. 26, 2015), <https://thecrimereport.org/2015/08/26/2015-08-prea-at-a-crossroads/> [<https://perma.cc/NU86-FT56>].

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ Liz Ryan, *Memo to Texas Sen. Cornyn: Don't Gut PREA*, YOUTH TRANSITION FUNDERS GROUP (Mar. 17, 2015), <http://www.ytfg.org/2015/04/memo-to-texas-sen-cornyn-dont-gut-prea/> [<https://perma.cc/B9S3-U62D>]; Lovisa Stannow & Craig Deroche, *Cornyn Fights Crisis*, JUST DET. INT'L (Nov. 1, 2017), <https://justdetention.org/cornyn-fights-crisis/> [<https://perma.cc/L2F9-JJ6R>].

³⁸⁸ ERICA GAMMILL & ELIA INGLIS, PRISON JUST. LEAGUE & THE TEX. ASS'N AGAINST SEXUAL ASSAULT, A TEXAS-SIZED FAILURE: SEXUAL ASSAULTS IN TEXAS PRISONS 5,

report detailed a culture of “administrative indifference, incompetence, and retaliation.”³⁸⁹ Significantly, the report faulted the practice of routinely placing victims of sexual assault in solitary confinement rather than finding alternative ways to protect them.³⁹⁰

On the plus side, Texas is the only state that has a special agency responsible for prosecuting sexual and other crimes committed in prison.³⁹¹ Thanks to 1997 legislation that created the Special Prosecution Unit, Texas is less dependent on locally connected district attorneys to investigate and bring forth charges.³⁹² This unique agency also serves as a central statewide clearinghouse for information and data about prosecutions and sanctions.³⁹³ But the unit’s special state prosecutors have refused to pursue nearly half of all cases of staff sexual abuse against incarcerated people referred to them by the prison system’s inspector general.³⁹⁴ Although conviction rates for staff accused of sexual abuse have increased, few convictions result in serious penalties.³⁹⁵

XIX. CONDITIONS OF CONFINEMENT FOR WOMEN

Incarcerated women in Texas prisons and jails experience not only higher rates of sexual abuse but also other exceptionally abusive penal conditions. Texas is not among the twenty or so states that permit indiscriminate use of shackles and other restraints during pregnancy, labor, childbirth, and

14 (2016), http://taasa.org/wp-content/uploads/2016/11/BK_A-Texas-Sized-Failure-SA-in-TX-Prisons-Final.pdf [<https://perma.cc/PJ63-7C39>].

³⁸⁹ *Id.* at 8.

³⁹⁰ *Id.* at 5, 14.

³⁹¹ Alysia Santo, *Preying on Prisoners: In Texas, Staffers Rarely Go to Jail for Sexually Abusing Prisoners*, PRISON LEGAL NEWS (June 18, 2015), <https://www.prisonlegalnews.org/news/2015/jun/18/preying-prisoners-texas-staffers-rarely-go-jail-sexually-abusing-inmates/> [<https://perma.cc/9QHL-SCDT>].

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

recovery.³⁹⁶ However, its protections for pregnant women are “weak or ambiguous,” according to a 2017 report by the American Psychological Association.³⁹⁷ A 2009 Texas law prohibits shackling incarcerated women during labor, delivery, and recovery, but it makes an exception for “safety and security” concerns and otherwise permits this dangerous practice during pregnancy.³⁹⁸ Shackling pregnant women puts them and their fetuses at considerable health risks, including falls, dangerous blood clots, and acute psychological trauma, among other things.³⁹⁹ In 2009, lawmakers also mandated that the Texas Commission on Jail Standards (TCJS) establish minimum standards for the health and housing of pregnant women in county jails.⁴⁰⁰ But there is little independent oversight to determine whether county jails meet these minimum standards.⁴⁰¹

Texas was briefly one of the few states that required county jails to report on the conditions of pregnant women in custody.⁴⁰² Thanks to legislation enacted in 2015, county sheriffs were obligated to inform the TCJS about key items, including nutritional standards, access to ob-gyn care, the

³⁹⁶ AM. PSYCH. ASS’N, END THE USE OF RESTRAINTS ON INCARCERATED WOMEN AND ADOLESCENTS DURING PREGNANCY, LABOR, CHILDBIRTH, AND RECOVERY (Aug. 2017), <https://www.apa.org/advocacy/criminal-justice/shackling-incarcerated-women.pdf> [<https://perma.cc/J9AL-M6T6>].

³⁹⁷ *Id.*

³⁹⁸ H.B. 3653, 2009 Leg., 81st Reg. Leg. Sess. (Tex. 2009); LINDSEY LINDER, TEX. CRIM. JUST. COAL., AN UNSUPPORTED POPULATION: THE TREATMENT OF WOMEN IN TEXAS’ CRIMINAL JUSTICE SYSTEM 12–13 (2018), <https://www.texascjc.org/sites/default/files/publications/TCJC-Womens-Part-2.pdf> [<https://perma.cc/6R8K-ZP95>].

³⁹⁹ ACLU REPROD. FREEDOM PROJECT & ACLU NAT’L PRISON PROJECT, ACLU BRIEFING PAPER: THE SHACKLING OF PREGNANT WOMEN & GIRLS IN U.S. PRISONS, JAILS & YOUTH DETENTION CENTERS, <https://www.aclu.org/other/aclu-briefing-paper-shackling-pregnant-women-girls-us-prisons-jails-youth-detention-centers> [<https://perma.cc/W9SQ-CN44>]; AM. PSYCH. ASS’N, *supra* note 396.

⁴⁰⁰ H.B. 3653; LINDER, *supra* note 398.

⁴⁰¹ See discussion *infra* Section XXI.

⁴⁰² ELIZABETH SWAVOLA ET AL., VERA INST. OF JUST., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 17 (2016), <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf> [<https://perma.cc/7L5U-KP7Q>].

availability of substance abuse treatment, and the use of solitary confinement and restraints.⁴⁰³ In its 2016 report, the TCJS documented great disparities in prenatal care between urban and rural jails.⁴⁰⁴ The report found that many rural jails lacked the resources to provide anything beyond basic health care. For example, many jails confining women in Texas had no facilities or protocols for detox, let alone substance abuse treatment programs.⁴⁰⁵ Many of them had no policies regarding the placement of pregnant women in administrative segregation or solitary confinement, and only three percent of the jails reported that they prohibited restraints for any pregnant woman.⁴⁰⁶ One in six reported that they used handcuffs during the routine transportation of pregnant women who were not in labor or recovering from childbirth.⁴⁰⁷ Unfortunately, the legislation requiring local jails in Texas to report on the conditions for pregnant women expired in 2017.⁴⁰⁸

In 2018, the Texas Criminal Justice Coalition documented the persistence of poor conditions of confinement for women—including lack of adequate health care, hygiene products, and even food.⁴⁰⁹ One-third of the women reported that they did not receive enough to eat and often felt hungry.⁴¹⁰ Over half of the women said they did not get enough nutritious food.⁴¹¹ In the largest-ever survey of women incarcerated in Texas state prisons, women reported enormous barriers to staying in touch with their families and loved ones.⁴¹² These barriers are higher in Texas than in many other

⁴⁰³ H.B. 1140, 2015 Leg., 84th Reg. Leg. Sess. (Tex. 2015).

⁴⁰⁴ BRANDON WOOD, TEX. COMM’N ON JAIL STANDARDS, HOUSE BILL 1140 REPORT TO THE TEXAS LEGISLATURE 4, 10, 23, 29 (2016), <https://www.tcjs.state.tx.us/wp-content/uploads/2019/08/HouseBill1140Report-1.pdf> [<https://perma.cc/G776-3PRJ>].

⁴⁰⁵ *Id.* at 4, 23.

⁴⁰⁶ *Id.* at 10, 29.

⁴⁰⁷ *Id.* at 29.

⁴⁰⁸ H.B. 1140, 2015 Leg., 84th Reg. Leg. Sess. (Tex. 2015).

⁴⁰⁹ LINDER, *supra* note 398, at 5.

⁴¹⁰ LINDER, *supra* note 398, at 12.

⁴¹¹ *Id.*

⁴¹² *Id.* at 14–16.

states. Until a mandated rate reduction in 2018, incarcerated people in Texas state prisons were charged some of the highest phone rates in the country.⁴¹³ As of late 2020, the state ranked fourteenth nationwide in phone call affordability.⁴¹⁴ Byzantine rules for placing calls still impede incarcerated people from maintaining contact with family members and others.⁴¹⁵ As for visits, many county jails in Texas have replaced in-person visits with videoconferencing.⁴¹⁶ In 2015, the legislature mandated that county jails permit at least two twenty-minute in-person visits weekly, but it exempted facilities that had already switched over to video-only visits or did not have adequate facilities for in-person visits.⁴¹⁷

In 2019, Texas lawmakers enacted legislation to improve the conditions of confinement for women in Texas state prisons, but it enacted no measures to divert many more women from prison in the first place.⁴¹⁸ The 2019 legislation placed some restrictions on strip searches, mandated higher-quality feminine hygiene products, and required screening of all women for trauma when they are sent to prison. As for pregnant women, it approved new rules governing their nutrition and housing; expanding limits on shackling pregnant women and mothers of newborns and on placing

⁴¹³ See Jolie McCullough, *Texas Prisons Dramatically Cut the Cost of Inmate Phone Calls*, TEX. TRIB. (Aug. 24, 2018), <https://www.texastribune.org/2018/08/24/texas-prison-system-dramatically-cuts-cost-inmate-phone-calls/> [https://perma.cc/V9QV-6D2P]; Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons, and Private Phone Providers*, PRISON POL'Y INITIATIVE app. tbl.4 (Feb. 2019), https://www.prisonpolicy.org/phones/appendix_table_4.html, [https://perma.cc/26VT-N4F5].

⁴¹⁴ *Intrastate (In-State) Collect Prison Phone Rates*, PRISON PHONE JUST., <https://www.prisonphonejustice.org/> [https://perma.cc/4MXL-HUTC].

⁴¹⁵ See *id.*; see also LINDER, *supra* note 398, at 15.

⁴¹⁶ LINDER, *supra* note 398, at 16.

⁴¹⁷ Eva Hershaw, *Senate Backs House on In-Person Inmate Visitation*, TEX. TRIB. (May 25, 2015, 5:00 PM), <https://www.texastribune.org/2015/05/25/senate-backs-house-move-guarantee-person-visitation/> [https://perma.cc/7XXA-NTKW].

⁴¹⁸ H.B. 650, 2019 Leg., 86th Reg. Leg. Sess. (Tex. 2019), <https://capitol.texas.gov/tlodocs/86R/billtext/html/HB00650F.htm> [https://perma.cc/8LJ5-JJ8W].

them in solitary confinement; and requiring all new mothers be allowed to remain with their infants for seventy-two hours after giving birth.⁴¹⁹ These new rules and restrictions apply only to state prisons, not county jails.⁴²⁰

XX. SOLITARY CONFINEMENT

In the 1990s, Texas, together with Arizona, pioneered the extensive use of supermax cells and administrative segregation, commonly known as solitary confinement or restricted housing. People sent to solitary confinement are typically confined to their cells nearly around the clock and are denied any meaningful human contact for days, months, years, or even decades. In 2011, U.N. Special Rapporteur Juan E. Méndez concluded that periods of solitary confinement greater than fifteen days constitute torture.⁴²¹ The U.N.'s "Mandela Rules," the international standards for the treatment of incarcerated people, mandate that no one be kept in isolation for more than fifteen days and that juveniles, pregnant women, and individuals with mental or physical disabilities or illnesses *never* be housed in solitary confinement.⁴²² Even relatively short stints in isolation result in emotional, cognitive, social, and physical pathologies, rendering people more prone to suicide, psychosis, depression, and other mental disorders.⁴²³ For people with pre-existing mental illnesses, solitary confinement compounds these negative consequences. Solitary confinement also

⁴¹⁹ *Id.*

⁴²⁰ See Connelly, *supra* note 45.

⁴²¹ Juan Méndez, *Solitary Confinement Should Be Banned in Most Cases*, U.N. NEWS (Oct. 18, 2011), <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says> [<https://perma.cc/7PD7-M4Z8>].

⁴²² *Id.*

⁴²³ Sharon Shalev, *Solitary Confinement as a Prison Health Issue*, in WORLD HEALTH ORGANIZATION: PRISONS & HEALTH 27 (2014), https://www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf [<https://perma.cc/5CKY-7C9K>].

increases the risk of premature death, even after release, according to a recent study of people released from North Carolina prisons.⁴²⁴

People housed in solitary confinement lose social contact, in many cases for years, therefore limiting their ability to relate to others. Despite this fact, until 2015, the TDCJ routinely released hundreds of people from solitary confinement directly to the streets each year without any step-down or transition programs before they completed their sentences.⁴²⁵

The TDCJ reports that the number of people in solitary confinement in Texas prisons has been falling for more than a decade.⁴²⁶ According to one of the few comprehensive surveys of solitary confinement in the United States, Texas placed in the bottom third of reporting states in the proportion of incarcerated people in administrative segregation in state prisons and compares favorably with the national average of 4.5 percent for all state and federal prisons.⁴²⁷ However, some of the recent reductions in Texas may be more illusionary than real. Incarcerated people transferred out of solitary

⁴²⁴ Lauren Brinkley-Rubenstein et al., *Association of Restrictive Housing During Incarceration with Mortality After Release*, JAMA NETWORK OPEN (Oct. 4, 2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350> [<https://perma.cc/C4NU-LDPM>].

⁴²⁵ In fiscal year 2015, the TDCJ released 981 people directly from administrative segregation to the streets. TEX. DEP'T OF CRIM. JUST., STATISTICAL REPORT: FISCAL YEAR 2015 3 (2015), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2015.pdf [<https://perma.cc/ZZV5-4E4B>]. After that, the numbers plummeted, falling to just eight in 2017. TEX. DEP'T OF CRIM. JUST., FY 2017 STATISTICAL REPORT 3 (2017), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2017.pdf [<https://perma.cc/HQD8-44N4>].

⁴²⁶ Michael Barajas, *Texas Prisons Lead the Nation in Long-Term Solitary Confinement*, TEX. OBSERVER (Oct. 10, 2018), <https://www.texasobserver.org/texas-prisons-lead-the-nation-in-long-term-solitary-confinement/> [<https://perma.cc/N6ZY-WEMB>].

⁴²⁷ ASS'N OF STATE CORR. ADM'RS & THE LIMAN CTR. FOR PUB. INT. L., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL, 12-13 fig.2 & tbl.1.67 (2018), https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf [<https://perma.cc/B4GW-KW92>] [hereinafter ASCA-LIMAN REPORT].

into designated mental health programs in Texas prisons “still live in conditions that seem indistinguishable from solitary.”⁴²⁸

A high proportion of people in segregated housing in Texas state prisons have been diagnosed with mental illnesses. In its 2020–21 budget request, the TDCJ asked legislators for additional money for mental health services for 1,600 people in administrative segregation, which comprises about forty percent of all the state prisoners in isolation.⁴²⁹

Texas leads the country by far in the number of people housed for long periods of time in solitary confinement. Nearly seventy percent of all the incarcerated people in the country who have been isolated for six or more years are housed in Texas state prisons, and nearly half of all incarcerated people in the United States who have been in solitary for three to six years are housed in Texas.⁴³⁰

Texas lags far behind other states in restricting the use of administrative segregation and ameliorating conditions in isolation through legislation, court challenges, and voluntary actions by prison administrators.⁴³¹ Over the last fifteen years, a national movement to end solitary confinement in the United States has been gaining momentum. More recently, top prison

⁴²⁸ Micheal Barajas, *The Prison Inside the Prison*, TEX. OBSERVER (Jan. 21, 2020), <http://www.texasobserver.org/solitary-confinement-texas/> [<https://perma.cc/5TPE-FGD3>].

⁴²⁹ See TEX. DEP’T OF CRIM. JUST., FY 2018 STATISTICAL REPORT 1 (2019), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2018.pdf [<https://perma.cc/RYZ7-3TBT>]; TEX. DEP’T OF CRIM. JUST., FISCAL YEAR 2019 OPERATING BUDGET & FISCAL YEAR 2020-2021 LEGISLATIVE APPROPRIATIONS REQUEST 7 (2018), http://www.tdcj.texas.gov/documents/bfd/Operating_Budget_FY2019_LAR_Summary_FY2020-21.pdf [<https://perma.cc/2ZMQ-92RQ>] (percentage calculated based on demographic information on total people in segregated housing per 2018 report).

⁴³⁰ See ASCA-LIMAN REPORT, *supra* note 427, at 15 tbl.2 (percentages calculated using this table).

⁴³¹ MEAGAN HARDING, TEX. C.R. PROJECT, TORTURE BY ANOTHER NAME: SOLITARY CONFINEMENT IN TEXAS, 7–9 (Oct. 2019), <https://txcivilrights.org/wp-content/uploads/2020/05/2019-SolitaryConfinement-Report.pdf> [<https://perma.cc/GC97-4K8U>].

officials in a number of states—but not in Texas—have become outspoken critics of solitary confinement and have sought to reduce its use. When he was executive director of Colorado’s Department of Corrections, Rick Raemisch became a leading critic, arguing that extreme isolation manufactures and multiplies mental illness.⁴³² First by policy and now by statute, Colorado prohibits placing people with serious mental illnesses in restrictive housing.⁴³³ In fall 2017, Colorado became the first state to limit isolation to fifteen days in accordance with the Mandela Rules,⁴³⁴ and Colorado’s rate of administrative segregation fell to just 0.1%.⁴³⁵ In 2019, New Jersey lawmakers enacted legislation to restrict the use of solitary confinement,⁴³⁶ and legislators in New York State and Democratic Governor Andrew Cuomo struck a deal to implement some changes administratively to limit its use.⁴³⁷

Conditions in solitary confinement in Texas “are some of the most deplorable and onerous in the country,” according to a report by the Texas Civil Rights Project.⁴³⁸ People in administrative segregation in Texas typically spend at least twenty-two hours each day in tiny cells about the size of a parking space with virtually no human contact.⁴³⁹ They are not

⁴³² Bill Lueders, *Wisconsin Rethinks Use of Solitary Confinement*, DAILY CITIZEN (July 22, 2014), https://www.wiscnews.com/bdc/news/local/special-report-wisconsin-rethinks-use-of-solitary-confinement/article_43b34c25-ff01-5a50-86f5-4f49cba21d61.html [https://perma.cc/GSS8-S7EP].

⁴³³ H.B. 21-1211, 2021 Leg. Sess. (Col. 2021).

⁴³⁴ ASCA-LIMAN REPORT, *supra* note 427, at 67; Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html?_r=0 [https://perma.cc/6RJZ-PJY5].

⁴³⁵ ASCA-LIMAN REPORT, *supra* note 427, at 12 tbl.1.

⁴³⁶ Michael Hill, *New Law Restricts Solitary Confinement in New Jersey*, N.J. SPOTLIGHT NEWS (July 15, 2019), <https://www.njtvonline.org/news/video/new-law-restricts-solitary-confinement-in-new-jersey/> [https://perma.cc/K8UF-PQ5X].

⁴³⁷ *New York to Curtail Use of Solitary Confinement in Prisons*, NBC N.Y. (June 21, 2019), <https://www.nbcnewyork.com/news/local/New-York-to-Curtail-Use-of-Solitary-Confinement-in-Prisons-511630832.html> [https://perma.cc/2RY6-NCRQ].

⁴³⁸ HARDING, *supra* note 431, at 7.

⁴³⁹ *Id.* at 1.

permitted physical contact visits or phone calls to family members.⁴⁴⁰ They are not allowed to participate in group education, rehabilitative, or religious programs and are seldom permitted outside for recreation.⁴⁴¹ Although Texas recently made “some minimal changes” to its administrative segregation system, these changes “have not resulted in tangible systemic relief.”⁴⁴²

Solitary confinement cells are sparser and are supposed to be monitored more closely by guards.⁴⁴³ Despite this close monitoring, people housed in solitary confinement in Texas are five times more likely to commit suicide than people housed in the general prison population.⁴⁴⁴ People in administrative segregation typically account for one-quarter to one-third of all suicides in Texas state prisons each year, even though they are barely three percent of the prison population.⁴⁴⁵

Texas continues to use gang affiliation—divorced from whether someone individually misbehaves or actively participates in gang activities—as a key criterion for placing people in restrictive housing.⁴⁴⁶ This helps explain why

⁴⁴⁰ *A Solitary Failure: The Waste, Cost, and Harm of Solitary Confinement in Texas*, ACLU OF TEX. (Feb. 5, 2015), <https://www.aclutx.org/en/report/a-solitary-failure#:~:text=Through%20Your%20Will-,A%20Solitary%20Failure%3A%20The%20Waste%2C%20Cost%20and%20Harm,of%20Solitary%20Confinement%20in%20Texas&text=The%20Texas%20Department%20of%20Criminal,prison%20population%20in%20solitary%20confinement.&text=Solitary%20Confinement%20increases%20crime%20%2D%20Solitary,day%20return%20to%20Texas%20communities> [https://perma.cc/QVR5-PD3R].

⁴⁴¹ *Id.*

⁴⁴² HARDING, *supra* note 431, at 7.

⁴⁴³ ACLU OF TEX., *supra* note 440, at 10.

⁴⁴⁴ *Id.*

⁴⁴⁵ Brandi Grissom, *Suicides and Attempts on the Rise in Texas Prisons*, DALL. MORNING NEWS (Nov. 28, 2015), <https://www.dallasnews.com/news/texas/2015/11/28/suicides-and-attempts-on-the-rise-in-texas-prisons> [https://perma.cc/G4SF-GPPE]; Keri Blakinger, *Suicide Attempts Have More Than Doubled in Texas Prisons*, HOUSTON CHRONICLE, (Feb. 6, 2018), <https://www.chron.com/news/houston-texas/article/Attempted-suicides-rise-sharply-in-Texas-prisons-12553728.php> [https://perma.cc/29YJ-KXCA].

⁴⁴⁶ Keri Blakinger, *Texas Prisons Eliminate Use of Solitary Confinement for Punitive Reasons*, HOUS. CHRON. (Sept. 21, 2017),

African-American men in Texas state prisons are less likely to be placed in solitary confinement than African-American men in other state prison systems, while the opposite is true for Latinos in Texas.⁴⁴⁷ These practices compare unfavorably to those in California.⁴⁴⁸ As part of a 2015 legal settlement, California agreed to no longer use gang affiliation as cause to place people in administrative segregation.⁴⁴⁹ It also agreed to end indefinite isolation.⁴⁵⁰ This settlement resulted in a large drop in the number of people in solitary confinement in the Golden State.⁴⁵¹

Most of the nearly 3,000 people on death row in the United States mark their days in administrative segregation.⁴⁵² Recently, some states—but not Texas—have abolished the practice of automatically placing people sentenced to death in solitary confinement. A 2017 report by the University of Texas School of Law described conditions on death row in Texas as harsh, inhumane, and in violation of international human rights norms and standards.⁴⁵³ The more than 200 people on death row in Texas spend twenty-three hours a day in total isolation, thanks to a policy change in 1999 that mandated isolation for anyone convicted of capital murder. The average time to execution is about eleven years.⁴⁵⁴ Contact visits with

<https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-prisons-eliminate-use-of-solitary-12219437.php> [<https://perma.cc/8RCQ-WVY7>].

⁴⁴⁷ See ASCA-LIMAN REPORT, *supra* note 427, at 25–26 figs.11 & 12.

⁴⁴⁸ See ASCA-LIMAN REPORT, *supra* note 427.

⁴⁴⁹ *Id.* at 83.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* Hispanics comprise over 50% of the solitary confinement population in Texas but only 32% of the prison population. See also ACLU OF TEX., *supra* note 440, at 20.

⁴⁵² Gabriella Robles, *Condemned to Death—And Solitary Confinement*, MARSHALL PROJECT (July 23, 2017), <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement> [<https://perma.cc/BM4R-6RP3>].

⁴⁵³ UNIV. OF TEX. SCH. OF L., HUM. RTS. CLINIC, DESIGNED TO BREAK YOU: HUMAN RIGHTS VIOLATIONS ON TEXAS' DEATH ROW 7 (Apr. 2017), <https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf> [<https://perma.cc/R9AH-WQN5>].

⁴⁵⁴ See DEATH PENALTY INFO. CTR., *Time on Death Row*, <https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> [<https://perma.cc/YWH8-XVV4>]; see also TEX. DEP'T OF CRIM. JUST., *Death Row*

family members or attorneys are completely banned, even at the final visit on the day of execution.⁴⁵⁵ Texas is one of only two states—the other is Oklahoma—that does not even allow people on death row to watch television.⁴⁵⁶ People on death row in Texas face formidable barriers to accessing medical care and religious services.⁴⁵⁷ In an infamous case that drew national attention, Andre Thomas, who had a lengthy history of mental illness dating back to his first suicide attempt when he was nine years old, gouged out both his eyes and ate one of them while awaiting his execution in isolation on death row in Texas.⁴⁵⁸ Thomas's case underscores how the preservation of administrative segregation can lead to potentially deadly outcomes.⁴⁵⁹

XXI. OVERSIGHT OF TEXAS JAILS AND PRISONS

Texas jails and prisons operate with little independent oversight. With the onset of COVID-19, the thick shroud that conceals what actually happens in Texas prisons and jails has become even more opaque as informal channels to the outside world began drying up. Family and media visits, as well as programs run by outside volunteers, have been curtailed or suspended.⁴⁶⁰ So have mail deliveries and phone calls.⁴⁶¹

Information, https://www.tdcj.texas.gov/death_row/dr_facts.html
 [https://perma.cc/GC82-CFYF]; AM. C.L. UNION, A DEATH BEFORE DYING: SOLITARY
 CONFINEMENT ON DEATH ROW 2 (2013),
[aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf](https://www.aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf)
 [https://perma.cc/B82Y-UN94].

⁴⁵⁵ HUM. RTS. CLINIC, *supra* note 453, at 19.

⁴⁵⁶ *Id.*

⁴⁵⁷ *See id.* at 7.

⁴⁵⁸ Michael Hall, *Is Andre Thomas Too Crazy to Be Executed?*, TEX. MONTHLY (June 4, 2018), <https://www.texasmonthly.com/news/texas-murderer-andre-thomas-is-mentally-ill-but-is-he-insane/> [https://perma.cc/L78S-G34S].

⁴⁵⁹ ACLU OF TEX., *supra* note 440, at 51.

⁴⁶⁰ Keri Blakinger, *As COVID-19 Measures Grow, Prison Oversight Falls*, MARSHALL PROJECT (Mar. 17, 2020), <https://www.themarshallproject.org/2020/03/17/as-covid-19-measures-grow-prison-oversight-falls> [https://perma.cc/6TTX-W544].

⁴⁶¹ *Id.*

The Texas Commission on Jail Standards (TCJS) has only eight inspectors and enforcement personnel to monitor and annually inspect about 245 public and private jails.⁴⁶² The TCJS does not have enforcement powers, and sheriffs, district attorneys, and other county officials have numerous ways to shield what happens inside local jails from public scrutiny, which is discussed in greater detail below. As for state prisons, the TDCJ has an ombudsman’s office that operates directly under its authority. This state agency has repeatedly succeeded in turning back attempts in the legislature to create independent oversight, even as the scandals and exposés about abuse and horrific conditions in state prisons pile up.⁴⁶³

The Texas Commission on Law Enforcement (TCOLE) recently described the state’s approach to regulating law enforcement as “a fragmented, outdated system with poor accountability, lack of statewide standards, and inadequate training.”⁴⁶⁴ In its comprehensive self-study, the TCOLE (which is responsible for licensing police officers and guards, among other things) conceded that its regulatory role was “by and large, toothless.”⁴⁶⁵ It noted that Texas is one of just several states that does not permit license revocations in cases of serious misconduct.⁴⁶⁶ A guard or

⁴⁶² *Information*, TEX. COMM’N ON JAIL STANDARDS, <https://www.tcjs.state.tx.us/information/> [https://perma.cc/M5FK-KWTT].

⁴⁶³ Hannah Wiley, *Advocates Say the Timing Is Right for Independent Oversight of Texas Prisons*, TEX. TRIB. (Nov. 26, 2018), <https://www.texastribune.org/2018/11/26/advocates-say-time-right-independent-oversight-texas-prisons/> [https://perma.cc/HU9P-E8XN].

⁴⁶⁴ SUNSET ADVISORY COMM’N, TEXAS COMMISSION ON LAW ENFORCEMENT: 2020-2021 87TH LEGISLATURE (2021), <https://www.sunset.texas.gov/public/uploads/files/reports/Texas%20Commission%20on%20Law%20Enforcement%20Staff%20Report%20with%20Commission%20Decisions.pdf> [https://perma.cc/9MAQ-NB9T].

⁴⁶⁵ *TCOLE History*, TEX. COMM’N ON L. ENF’T, <https://www.tcole.texas.gov/content/tcole-history> [https://perma.cc/4C6M-M3S4]; see also *id.*

⁴⁶⁶ *A Chance to Expand Police Oversight: Why Texas Should Begin Charging Cops and Jailers Licensure Fees*, GRITS FOR BREAKFAST (Oct. 26, 2020), <https://gritsforbreakfast.blogspot.com/2020/10/a-chance-to-expand-police-oversight-why.html> [https://perma.cc/V3SE-WKYN].

police officer must first be convicted of a felony before a license may be revoked, which almost never occurs.⁴⁶⁷

XXII. DEATHS IN CUSTODY AND SUICIDES

Along with California, Texas has one of the strongest custodial death reporting laws in the country, dating back to 1983. Police, jails, and prisons must file a report within thirty days, and prosecutors must investigate and bring charges if the law is not followed.⁴⁶⁸ But prosecutors rarely, if ever, bring charges, even in instances of multiple failures to file timely, accurate, and complete reports.⁴⁶⁹

By law, counties are required to report deaths in custody to both the Texas Commission on Jail Standards (TCJS) and the attorney general. But the custodial death tallies for these two agencies differ considerably.⁴⁷⁰ In tabulating their deaths in custody, some counties do not include instances where inmates were transferred to outside medical facilities for treatment and then die. Some counties even release severely ill people to the streets “to avoid the scrutiny that may accompany in custody-deaths.”⁴⁷¹

The barriers to investigating deaths in custody are higher in Texas than in many other states. Some county jails’ refusal to release the medical records of incarcerated people who have died in custody has stymied TCJS investigations. This problem is most acute in county facilities that contract out medical and mental health care to private providers.⁴⁷²

⁴⁶⁷ *Id.*

⁴⁶⁸ David Barer & Josh Hinkle, *Dead & Undone*, KXAN CATALYST (Nov. 23, 2020), <https://www.kxan.com/dead-in-custody/> [<https://perma.cc/W7MT-L3ER>].

⁴⁶⁹ *Id.*

⁴⁷⁰ Jeffery Gerritt, *Death Without Conviction: Start Work Now on Jail Reforms*, PALESTINE HERALD-PRESS (Jan. 23, 2020), https://www.palestineherald.com/news/php-editorial-death-without-conviction-start-work-now-on-jail-reforms/article_d0dfc57c-2b32-11ea-96be-0b7b18ce9e0a.html [<https://perma.cc/7NLB-PRJP>].

⁴⁷¹ *Id.*

⁴⁷² TEX. COMM’N ON JAIL STANDARDS, 2019 SELF EVALUATION REPORT 86 (2019), <http://www.sunset.texas.gov/public/uploads/files/reports/Texas%20Commission%20on%20Jail%20Standards%20SER.pdf> [<https://perma.cc/L48E-XLLY>].

Many U.S. jails routinely release surveillance video, but not in Texas.⁴⁷³ County sheriffs in Texas deploy a “sweeping exemption to state open-records law” and are permitted to “withhold practically any video that local officials can, somehow, tie to terrorism,” thanks to the state’s Homeland Security Act, according to a Pulitzer Prize-winning investigative series in the *Palestine Herald-Press*, a small newspaper in East Texas.⁴⁷⁴ Falsifying observation logs is a common practice for which guards rarely face accountability, even though this is a felony.⁴⁷⁵ Due to the so-called dead suspect’s exemption to the Texas Public Information Act, sheriffs, police chiefs, and district attorneys are permitted “to withhold documents and other information on cases that don’t result in a criminal conviction or deferred adjudication—even after a suspect dies.”⁴⁷⁶ Since negligence “is not typically considered a crime, even when lethal,” this “loophole conceals information, even from family members, on practically all jail and other in-custody deaths.”⁴⁷⁷

⁴⁷³ Editorial, *Death Without Conviction: Texas Needs Access to Jail Videos*, PALESTINE HERALD-PRESS (Jan. 22, 2020), https://www.palestineherald.com/news/php-editorial-death-without-conviction-texas-needs-access-to-jail/article_e33b8600-bfcd-11e9-8134-531ecbee318f.html [<https://perma.cc/K84E-VA6B>].

⁴⁷⁴ *Id.*; *The 2020 Pulitzer Prize Winner in Editorial Writing: Jeffery Gerritt of the Palestine (Tx.) Herald-Press*, THE PULITZER PRIZES, <http://www.pulitzer.org/winners/jeffery-gerritt-palestine-tx-herald-press> [<https://perma.cc/VZA3-JSXX>].

⁴⁷⁵ Editorial, *Death Without Conviction: Deadly Jails Need Stronger State Oversight*, PALESTINE HERALD-PRESS (Jan. 27, 2020), https://www.palestineherald.com/news/death-without-conviction-php-editorial-deadly-jails-need-stronger-state-oversight/article_297189da-0830-11ea-af64-7f5060ad1882.html [perma.cc/BR4D-BMSR].

⁴⁷⁶ Editorial, *Death Without Conviction: Close Dangerous Loophole in Public Information Law*, PALESTINE HERALD-PRESS (Jan. 23, 2020), https://www.palestineherald.com/news/php-editorial-death-without-conviction-close-dangerous-loophole-in-public-information-law/article_23bf5be2-0e3a-11ea-b55f-a7fce5f5be0e4.html [<https://perma.cc/3JLJ-M7BL>].

⁴⁷⁷ *Id.*

XXIII. MENTAL HEALTH PROBLEMS AND INADEQUATE SERVICES

The lack of adequate resources and services for mental health problems and suicide prevention is a key factor in deaths in custody. An exhaustive 2016 University of Texas Law School report on suicides and mental health in Texas jails concluded that these county facilities lacked the “resources, training or will to provide adequate care.”⁴⁷⁸ The 2017 Sandra Bland Act sought to address some of these issues.⁴⁷⁹ It required county jails to divert people with mental health and substance abuse problems to treatment; mandated independent investigation of all jail deaths; and provided funding for electronic sensors or cameras to improve cell checks.⁴⁸⁰ But Texas continues to lag woefully behind in alternative mental health services and facilities for people diverted from jail.

The Texas Jail Project’s county-by-county database documents numerous instances in which Texas county jails failed to comply with the Sandra Bland Act and other state regulations, even in Waller County, the county lockup where Bland died.⁴⁸¹ The Texas Jail Project noted that Waller County Jail:

[K]eeps failing inspections but the county does nothing to fire Sheriff Glenn Smith. He should have been relieved from his position years ago when Sandra Bland died here and he tried to do everything in his power to prevent the FBI from investigating her death. But instead of changing the sheriff, the county seems to

⁴⁷⁸ UNIV. OF TEX. SCH. OF L. C.R. CLINIC, PREVENTABLE TRAGEDIES: HOW TO REDUCE MENTAL HEALTH-RELATED DEATHS IN TEXAS JAILS 6 (2016), <https://law.utexas.edu/wp-content/uploads/sites/11/2016/11/2016-11-CVRC-Preventable-Tragedies.pdf> [perma.cc/Y3XY-H8HZ].

⁴⁷⁹ Riin Aljas & Ryan Little, *Ambitious Texas Law Fails to Make Dent in Jailhouse Suicides*, AP NEWS (Dec. 21, 2019), <http://apnews.com/7b813430797b2c0361fa86d34c8cb71d> [https://perma.cc/P5QU-KFZ7].

⁴⁸⁰ *Id.*

⁴⁸¹ *Waller County Jail Non-Compliance Report*, TEX. JAIL PROJECT, <http://www.texasjailproject.org/organizations/texas-commission-on-jail-standards/non-compliance-reports/2018-12-19-waller/> [https://perma.cc/JM68-FKBL].

have hired a public relations firm which has crafted a message of ‘we know we have a culture problem in our jail and we working to fix it.’ The Sheriff’s words at the Jail Commission’s quarterly meeting in August of 2018.⁴⁸²

An investigation by the *Palestine Herald-Press* of county jails in Texas found numerous instances of, “among other things, excessive force, failures to identify or treat severe mental illness or suicidal tendencies, disregarding prisoners’ pleas, excessive delays in treatment, and a culture of indifference to human suffering.”⁴⁸³

Despite a declining county jail population, deaths in custody (including suicide) increased sharply in Texas jails from 2014 to 2019 before plunging in 2020, for reasons not fully understood.⁴⁸⁴ Figures for deaths in custody, including suicide, may be less reliable or complete for jails in Texas than in other states (which may explain why the mortality rate for Texas jails is actually lower than the national average).⁴⁸⁵ Additionally, the suicide rate for county jails in Texas is down from its 2015 peak.⁴⁸⁶ It hit a low in 2018 but rose again in 2019.⁴⁸⁷ As for Texas state prisons, the number of suicides

⁴⁸² *Id.*

⁴⁸³ Gerritt, *supra* note 470.

⁴⁸⁴ *Pre-Conviction Deaths in Texas Jails Since 2005*, TEX. JUST. INITIATIVE, <https://texasjusticeinitiative.org/publications/pre-conviction-deaths-in-texas-jails> [<https://perma.cc/RGB9-P9P8>].

⁴⁸⁵ See U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 251921, MORTALITY IN LOCAL JAILS, 2000-2016 – STATISTICAL TABLES 18 (2020) (demonstrating that in 2016, the national mortality rate was 149 per 100,000 local jail inmates and in Texas, the figure was 128).

⁴⁸⁶ U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 250169, MORTALITY IN LOCAL JAILS, 2000-2014 – STATISTICAL TABLES 6 (2016).

⁴⁸⁷ *Id.*; Keri Blakinger, *I Just Kept Thinking He Was Coming Home: Suicides in Texas Prisons Hit 20-Year High*, HOUS. CHRON. (Apr. 5, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/I-just-kept-thinking-he-was-coming-home-13746039.php> [<https://perma.cc/5KJB-PXEK>]; E-mail from Bandon S. Wood, Exec. Dir., Tex. Comm’n on Jail Standards, to Marie Gottschalk, Professor of Pol. Sci. (May 28, 2020) (on file with author) (discussing the figure for the total number of suicides in 2019); see also TEX. COMM’N ON JAIL STANDARDS, TEXAS COUNTY JAIL POPULATION (2020), <http://www.tcjs.state.tx.us/wp->

and attempted suicides has risen sharply—as it has in many other states over the last decade—despite the drop in the number of people incarcerated.⁴⁸⁸ The suicide rate for Texas state prisons is considerably higher than the national average for state prisons.⁴⁸⁹ In late 2019, the number of people in Texas state prisons who tried to kill themselves fell sharply, “but only because the state more narrowly redefined what counts as a suicide attempt.”⁴⁹⁰

Five years ago, the TDCJ stepped-up its mental health training for guards to stem suicides.⁴⁹¹ It acted shortly after Governor Abbott vetoed a bill that would have required it to do so.⁴⁹² Prison administrators opposed the

content/uploads/2020/05/POPSUMCurrent.pdf [https://perma.cc/XJ9N-VH5J] (providing 2019 rate calculated from total jail population as of December 1, 2019).

⁴⁸⁸ Brandi Grissom, *Suicides and Attempts on the Rise in Texas Prisons*, DALL. MORNING NEWS (Nov. 28, 2015), <https://www.dallasnews.com/newn/texas/2015/11/28/suicides-and-attempts-on-the-rise-in-texas-prisons> [https://perma.cc/G4SF-GPPE]; Keri Blakinger, *Suicide Attempts Have More than Doubled in Texas Prisons*, HOUS. CHRON. (Feb. 5, 2018), <https://www.chron.com/news/houston-texas/article/Attempted-suicides-rise-sharply-in-Texas-prisons-12553728.php> [https://perma.cc/29YJ-KXCA]; see also U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 250150, MORTALITY IN STATE PRISONS, 2000-2016 – STATISTICAL TABLES 13 (2020).

⁴⁸⁹ The national suicide rate for state prisoners was twenty per 100,000 in 2014, the most recent year with available data from the U.S. Justice Department’s Bureau of Justice Statistics (BJS). (The BJS is supposed to track the number of deaths in jails and prisons throughout the United States, but it is several years behind in releasing this data.) Between 2001 and 2014, the suicide rate for state prisoners in Texas averaged sixteen per 100,000. The number of suicides in Texas state prisons more than doubled between 2013 and 2018, going from a ten-year low of seventeen in 2013 to forty in 2018 (a rate of twenty-seven per 100,000 inmates). U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *supra* note 486, at 5; Ryan J. Reilly, *We Still Don’t Know How Many People Died in American Jails 4 Years Ago*, HUFFPOST (July 13, 2019), https://www.huffpost.com/entry/jail-deaths-statistics-sandra-bland_n_5c1a8d64e4b0446830f98785 [https://perma.cc/QB84-8LD9]; Blakinger, *supra* note 487.

⁴⁹⁰ Keri Blakinger, *Texas Prison Suicide Attempt Figures Drop on a Technicality*, HOUS. CHRON. (Dec. 22, 2019), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-prison-suicide-attempt-figures-drop-on-a-14926073.php> [https://perma.cc/BD7F-5E4U].

⁴⁹¹ Grissom, *supra* note 488.

⁴⁹² *Id.*

legislation and asserted that lawmakers were attempting to micromanage their operations.⁴⁹³

Even though behavioral health services in penal facilities are grossly inadequate, for many people in Texas, getting arrested is the only way to get treatment for their mental health problems. Prisons and jails in Texas have become the main providers of state behavioral health services. However, incarceration often exacerbates pre-existing mental health illnesses and, in some cases, can induce behavioral health problems in individuals who previously had none.⁴⁹⁴ Furthermore, after release from prison or jail, people often have trouble continuing their treatment because, among other things, Texas is one of the few states that has no “conditional release statute” to facilitate ongoing treatment.⁴⁹⁵

Thanks to chronic underfunding, severe staff shortages, the scarcity of state psychiatric beds, and the lack of coordinated, integrated care, Texas ranks forty-ninth among the states in access to mental health care.⁴⁹⁶ It ranks in the bottom fifth among the states in the availability of state hospital psychiatric beds.⁴⁹⁷ Defendants deemed mentally incompetent have languished in local jails across the state because of the shortage of beds in

⁴⁹³ *Id.*

⁴⁹⁴ Emily DePrang, *Barred Care: Want Treatment for Mental Illness in Houston? Go to Jail*, TEX. OBSERVER (Jan. 13, 2014), <https://www.texasobserver.org/want-treatment-mental-illness-go-to-jail/> [<https://perma.cc/RCU7-2R9J>].

⁴⁹⁵ Editorial, *The Largest Mental-Health Facility in Texas Shouldn't Be a Jail*, DALL. MORNING NEWS (Feb. 17, 2019), <https://www.dallasnews.com/opinion/editorials/2019/02/17/largest-mental-health-facility-texas-shouldnt-jail> [<https://perma.cc/6W8U-83YY>].

⁴⁹⁶ *Ranking the States 2018*, MENTAL HEALTH AM., <https://www.mhanational.org/issues/ranking-states-2018-0> [<https://perma.cc/5NL4-79B7>].

⁴⁹⁷ DORIS A. FULLER ET AL., TREATMENT ADVOC. CTR., GOING, GOING, GONE: TRENDS AND CONSEQUENCES OF ELIMINATING STATE PSYCHIATRIC BEDS, 2016 14 (2016), <https://www.treatmentadvocacycenter.org/storage/documents/going-going-gone.pdf> [<https://perma.cc/87Q2-L39Z>].

state mental hospitals.⁴⁹⁸ Advocates for the mentally ill have filed lawsuits against the state, charging that the long wait times are unconstitutional.⁴⁹⁹ In 2019, state lawmakers finally agreed to a \$445 million plan to construct three new mental health hospitals.⁵⁰⁰

XXIV. DOLLARS, SENSE, AND PENAL POLICY

Texas has been a pioneer in how to do mass incarceration on the cheap and how to turn prisons and law enforcement into profit-making centers. Today, it operates not only the largest penal system in the country but also one of the cheapest and meanest. The elite bipartisan coalition that congealed around Right on Crime was premised on unwarranted expectations in Texas and elsewhere that states and counties would begin closing their jails and prisons because they could not afford not to do so.⁵⁰¹ These expectations rested on misrepresentations or misunderstandings about how burdensome penal costs are to state budgets.⁵⁰² Despite the unprecedented prison boom in Texas and elsewhere, spending on corrections remains a tiny fraction of state spending.⁵⁰³ The TDCJ's budget

⁴⁹⁸ Brandi Grissom, *With State Hospitals Packed, Mentally Ill Inmates Wait in County Jails That Aren't Equipped for Them*, DALL. MORNING NEWS (Apr. 21, 2016), <https://www.dallasnews.com/news/politics/2016/04/21/with-state-hospitals-packed-mentally-ill-inmates-wait-in-county-jails-that-aren-t-equipped-for-them/> [<https://perma.cc/PHS5-984D>].

⁴⁹⁹ Brandi Grissom, *State Seeking Room for Mentally Ill Inmates*, TEX. TRIB. (Feb. 2, 2019), <https://www.texastribune.org/2012/02/02/state-seeking-room-mentally-ill/> [<https://perma.cc/NHS4-C2GD>]; Grissom, *supra* note 498.

⁵⁰⁰ Edgar Walters, *Texas House, Senate Approve Budget Deal with Agreements on School Finance, Property Taxes, Hurricane Harvey Recovery*, TEX. TRIB. (May 26, 2019), <http://www.texastribune.org/2019/05/26/texas-budget-house-senate-2019/> [<https://perma.cc/3EL3-687G>].

⁵⁰¹ GOTTSCHALK, *supra* note 23, at 7–10.

⁵⁰² *Id.*

⁵⁰³ GLENN HEGAR, TEX. COMPTROLLER OF PUB. ACCOUNTS, 2020 STATE OF TEXAS ANNUAL CASH REPORT 8–9 (2020), <https://comptroller.texas.gov/transparency/reports/cash-report/2020/cash-report-2020.pdf> [<https://perma.cc/5MTW-L5FK>].

comprises just three to four percent of the state's total budget—or just over half of what it spends on highways each year.⁵⁰⁴

Faced with powerful political interests demanding drastic cuts in government spending (some of which overlap with the powerful economic and political interests that profit from such an expansive penal system), Texas and other states have periodically made symbolic cuts to their corrections budgets. These cuts do not save much money but do create major hardships for people serving time and their families. For example, to address a budget shortfall in 2011, the Texas prison system eliminated lunch for many inmates on weekends (and even ended the long-standing tradition of serving a special last meal for people about to be executed).⁵⁰⁵ State Senator John Whitmire, the Houston Democrat who was a key architect of the 2007 penal reforms, quipped at the time, “If they don’t like the menu . . . don’t come there in the first place.”⁵⁰⁶ Even after state revenues recovered, some people in state prisons continued to receive only two meals a day on weekends.⁵⁰⁷

Most years, the TDCJ’s budget continues to hover around \$3.3 billion in constant dollars, despite the seven percent drop in the number of inmates in state prisons over the last decade and the closure or idling of eleven TDCJ

⁵⁰⁴ STAFF OF CONF. COMM., GENERAL APPROPRIATIONS ACT FOR THE 2018-19 BIENNIIUM, 85TH TEX. LEG. REG. SESS. 2017 V-5 (2017), https://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2018-2019.pdf [<https://perma.cc/6LGQ-THA3>]; STAFF OF CONF. COMM., GENERAL APPROPRIATIONS ACT, 79TH TEX. LEG. REG. SESS. 2005 V-9 (2005), https://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2006-07.pdf [<https://perma.cc/K2AC-D3VB>]; TEX. DEP’T OF TRANSP., TEXAS TRANSPORTATION PLAN: EXECUTIVE SUMMARY ES-4, <https://ftp.dot.state.tx.us/pub/txdot-info/tpp/2040/plan/exec-summary.pdf> [<https://perma.cc/9FWZ-2TR4>].

⁵⁰⁵ Fernandez, *supra* note 14.

⁵⁰⁶ *Id.*

⁵⁰⁷ E-mail from Jeremy Desel, Dir. of Commc’n, Texas Dep’t of Crim. Just., to Lexie Shah (Apr. 18, 2019) (on file with author).

penal facilities since 2011.⁵⁰⁸ This is not surprising. As discussed earlier, the TDCJ's health care costs have been escalating with the spike in the number of elderly incarcerated people.⁵⁰⁹ Furthermore, most prison costs are fixed and not easily cut.⁵¹⁰ Serious savings will only come by shutting down numerous penal facilities and laying off guards and other staff (which typically comprise about two-thirds of prison budgets).⁵¹¹ To save serious money, states and counties also must avoid the creation of an extensive and expensive prison beyond the prison centered on home confinement, elaborate risk-assessment tools, electronic and GPS monitoring, widespread drug testing, and other alternative means of surveillance that the private prison industry has been aggressively investing in and promoting to public officials.⁵¹²

⁵⁰⁸ The TDCJ's annual appropriations for fiscal 2020 and 2021 in the biennium budget approved by Texas lawmakers in 2019 were \$3.4 billion. H.B. 1, 86th Leg., Reg. Sess. (Tex. 2019);

see SUBCOMM. ON ARTICLES I, IV, V, OVERVIEW OF TEXAS DEPARTMENT OF CRIMINAL JUSTICE'S REPAIR, MAINTENANCE, AND UPGRADE OF PRISON FACILITIES 1 (2020), <https://capitol.texas.gov/tlodocs/86R/handouts/C0132020080500001/df086cfe-9b4d-4246-abda-b3e379a6b2a5.PDF> [<https://perma.cc/ZA9H-PJ3C>] (providing an accounting of the shuttered facilities).

⁵⁰⁹ TEX. CRIM. JUST. COAL., *supra* note 78, at 7; Emily Widra, *Since You Asked: How Many People Aged 55 and Older Are in Prison, by State?*, PRISON POL'Y INITIATIVE (May 11, 2020), <https://www.prisonpolicy.org/blog/2020/05/11/55plus/> [<https://perma.cc/2F8J-CK8B>].

⁵¹⁰ For more on the complexities of the relationship between a state's prison population and its carceral budget, see CHRIS MAI & RAM SUBRAMANIAN, *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015* 11–20 (2017), <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends> [<https://perma.cc/D4ZF-ZV5T>].

⁵¹¹ Nationwide, salary and overtime expenditures averaged 44% of state spending on state prisons in 2015, and employee benefits made up an additional 24%. *Id.* at 22; see also GOTTSCHALK, *supra* note 23, at 69; Jamiles Lartey, *Think Private Prison Companies Are Going Away Under Biden? They Have Other Plans*, MARSHALL PROJECT (Nov. 17, 2020), <https://www.themarshallproject.org/2020/11/17/think-private-prison-companies-are-going-away-under-biden-they-have-other-plans> [<https://perma.cc/R562-ELEF>].

⁵¹² Lartey, *supra* note 511; GOTTSCHALK, *supra* note 23, at 69.

XXV. PRIVATIZATION OF PRISONS, JAILS, AND SERVICES

For decades now, Texas has been at the center of efforts to make the criminal legal system pay for itself—and maybe even turn a profit for state coffers. In a 1995 speech to the National Rifle Association, Senator Phil Gramm (R-TX) argued that the fiscal burden of a massive penal system was manageable as long as prisons and jails were liberated to pay their own way.⁵¹³

Texas has been a leader in privatizing prisons and penal services and exporting the for-profit model of punishment to other states and the federal government.⁵¹⁴ In 1985, Texas was the first state to adopt private prisons, and now it has more people housed in for-profit penal facilities than any other state, second only to the federal Bureau of Prisons.⁵¹⁵ Expansion of the private prison industry has been an integral part of a broader conservative political movement in Texas and nationally to hollow out the government and turn many public services over to the private sector.⁵¹⁶

In Texas and elsewhere, the private penal industry and its supporters exploited the Great Recession to further the cause of privatization. It promoted private prisons and jails and the privatization of health care, food, and other services as salves for escalating penal costs and overstressed government budgets.⁵¹⁷

There is scant evidence that for-profit facilities and services save the government much money, but alarming evidence that they jeopardize the health and safety of incarcerated people and staff members. Private jails and

⁵¹³ Phil Gramm, Senator of Tex., Speech at National Rifle Association (Apr. 4, 1995), <https://www.c-span.org/video/?64358-1/gramm-campaign-speech> [<https://perma.cc/3XCL-BPWF>].

⁵¹⁴ SHANE BAUER, AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT 37 (2018).

⁵¹⁵ THE SENT'G PROJECT, PRIVATE PRISONS IN THE UNITED STATES tbl.1 (2019), <https://www.sentencingproject.org/publications/private-prisons-united-states/> [<https://perma.cc/99KV-7ZY9>].

⁵¹⁶ GOTTSCHALK, *supra* note 23, at 64–65.

⁵¹⁷ *Id.*

prisons tend to be more dangerous and less healthy places than public ones, thanks to lower staff salaries, less investment in training, higher staff turnover, less public oversight, and economic incentives to cut corners in health care, food, and other services.⁵¹⁸ Some of the worst headlines about abuse in prisons have involved private facilities in Texas.⁵¹⁹

Since the Great Recession, privatization in corrections has entered a new phase as an increasingly consolidated and powerful prison industry has sought to diversify into probation, parole, re-entry, and other community-based services for profit. Riding the re-entry and recidivism wave in public policy debates, private prison companies in Texas and other states have sought to become leaders in providing what GEO, the large private prison firm, describes as the “corrections lifecycle” (and what critics have called the “treatment industrial complex”), including for-profit substance abuse and mental health treatment programs, electronic ankle bracelets, drug testing, and other products and services to monitor people on parole and probation, and out on bail.⁵²⁰

Privatization of penal facilities and services, such as health care and food, has made its greatest inroads in Texas and other states where government officials and prison administrators have close ties to the prison industry.⁵²¹

⁵¹⁸ For an overview of the literature comparing the costs and conditions of confinement in private and public prisons, see *id.* at 70–73.

⁵¹⁹ *GEO Group Settles \$47.5 Million Texas Prisoner Wrongful Death Suit*, PRISON LEGAL NEWS (Sept. 15, 2010), <https://www.prisonlegalnews.org/news/2010/sep/15/geogroup-settles-475-million-texas-prisoner-wrongful-death-suit/> [<https://perma.cc/3FDN-ZBSA>]; Forrest Wilder, *The Pecos Insurrection*, TEX. OBSERVER (Oct. 8, 2009), <https://www.texasobserver.org/the-pecos-insurrection/> [<https://perma.cc/2UJ3-VN73>].

⁵²⁰ GOTTSCHALK, *supra* note 23, at 68–69; see generally CAROLINE ISAACS, AM. FRIENDS SERV. COMM. OF ARIZ., GRASSROOTS LEADERSHIP & THE S. CTR. FOR HUM. RTS., TREATMENT INDUSTRIAL COMPLEX: HOW FOR-PROFIT PRISON CORPORATIONS ARE UNDERMINING EFFORTS TO TREAT AND REHABILITATE PRISONERS FOR CORPORATE GAIN, https://www.afsc.org/sites/default/files/documents/TIC_report_online.pdf [<https://perma.cc/UF7Z-35MB>] (discussing diversification efforts of for-profit penal companies).

⁵²¹ GOTTSCHALK, *supra* note 23, at 64–68.

The revolving door between the private and public sectors has fortified these ties; so have the huge investments that the prison industry has made in lobbying and campaign contributions.⁵²²

During the prison boom, state officials and private entrepreneurs promoted prisons and jails as engines of economic development, especially in rural communities in Texas and elsewhere.⁵²³ Well-organized consortiums of private companies that specialized in pitching speculative and risky penal projects trolled communities in the South and Southwest desperate for jobs. They used misleading or outright false feasibility studies to sell local public officials on the idea that a speculative jail or prison financed by publicly backed bonds would bring economic salvation.⁵²⁴ In some cases, they bribed local officials to get penal facilities built on spec.⁵²⁵

After the long-term bonds to finance new penal construction were issued and sold, many jurisdictions in Texas and elsewhere found themselves locked into paying for unneeded cells because the promised incarceration windfall never materialized.⁵²⁶ Towns and counties in the South and Southwest have scrambled to avoid defaulting on these bonds by raising taxes and fees, laying off public employees, slashing their budgets, and brokering their empty cells.⁵²⁷ In Texas, local officials also wrangled with

⁵²² *Id.* at 65, 67, 73.

⁵²³ JOHN M. EASON, *BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION* (2017); RUTH WILSON GILMORE, *THE GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007).

⁵²⁴ See Justin Elliott, *Behind Montana Jail Fiasco: How Private Prison Developers Prey on Desperate Towns*, TALKING POINTS MEMO (Oct. 12, 2009, 11:14 AM), <https://talkingpointsmemo.com/muckraker/behind-montana-jail-fiasco-how-private-prison-developers-prey-on-desperate-towns> [<https://perma.cc/J4L5-NS3B>].

⁵²⁵ GOTTSCHALK, *supra* note 23, at 52–53.

⁵²⁶ *Id.*

⁵²⁷ Mitch Mitchell, *Texas Prison Boom Going Bust*, STAR-TELEGRAM (Sept. 3, 2011), https://www.privateci.org/private_pics/TexasPrisonBoom.htm [<https://perma.cc/US37-3KRJ>]; John Burnett, *Private Prison Promises Leave Texas Towns in Trouble*, NPR (Mar. 28, 2011, 12:01 AM), <https://www.npr.org/2011/03/28/134855801/private-prison-promises-leave-texas-towns-in-trouble> [<https://perma.cc/5XGX-A6PX>].

state legislators over whether the state should bail them out for their speculative jail-building sprees.⁵²⁸

Today, the county jail system in Texas has considerable excess capacity, with only about two out of every three beds filled as of late 2020.⁵²⁹ Dozens of county jails in Texas are operating at less than fifty percent capacity.⁵³⁰ Public and private jails in Texas have sought to fill their empty cells by securing contracts to provide cells for people transferred from other counties and from overcrowded state prisons in Texas and other states.⁵³¹

XXVI. IMMIGRANT DETENTION

To offset some of the volatility in the prison industry as the Great Recession battered state and local government budgets and as political pressure mounted to end mass incarceration, CoreCivic, GEO, and other prison companies also looked to the federal government as a safe haven.⁵³² So did state and county officials and prison administrators with empty jail and prison beds.⁵³³ They sought to secure long-term contracts with the federal government to profit from the booming and lucrative market in immigrant detention and offset the expense of all their newly built cells that were empty.⁵³⁴ These contracts have fueled what the Vera Institute of Justice has characterized as a “carceral arms race” in rural communities.⁵³⁵

⁵²⁸ Mike Ward, *Legislative Fight over Buying Empty West Texas Lockup Focuses on Bondholders*, STATESMAN NEWS NETWORK (May 2, 2013, 12:01 AM), <https://www.statesman.com/article/20130502/NEWS/305029711> [<https://perma.cc/Y45G-YTUC>].

⁵²⁹ See TEX. COMM’N ON JAIL STANDARDS, ABBREVIATED POPULATION REPORT FOR 12/1/2020 (DEC. 14, 2020), <https://perma.cc/3H6B-LVNR> (ratio calculated from data in report).

⁵³⁰ See *id.* (percent calculated from data in report).

⁵³¹ GOTTSCHALK, *supra* note 23, at 37–39.

⁵³² *Id.*

⁵³³ *Id.* at 233–34.

⁵³⁴ *Id.* at 68–69.

⁵³⁵ Jack Norton & Jacob Kang-Brown, *If You Build It: How the Federal Government Fuels Rural Jail Expansion*, VERA INST. JUST. (Jan. 10, 2020), <https://www.vera.org/in-our-backyards-stories/if-you-build-it> [<https://perma.cc/7TBH-MV7U>].

Lucrative contracts with the U.S. Marshals Service and Immigration and Customs Enforcement (ICE) to hold federal detainees have allowed counties to build larger local jails to offset the costs of detaining and incarcerating local residents.⁵³⁶

As of 2015, about two-thirds of immigrant detainees in the United States were held in facilities operated by private, for-profit contractors, up from ten percent in the early aughts.⁵³⁷ GEO and CoreCivic have been the greatest beneficiaries of the expansion in immigrant detention, thanks in large part to lucrative, often secretive, contracts negotiated for detention facilities in Texas.⁵³⁸

Texas leads the country in the number of immigrants held in privately run detention facilities and in local jails through contracts with ICE.⁵³⁹ Immigrant detention for families has become the most dynamic and profitable sector for the private prison industry, thanks to the policies of the Obama and Trump administrations. The private prison industry in Texas was a leading beneficiary of Obama's 2014 decision to ramp up family detention on an unprecedented scale in order to demonstrate his tough stance on immigration in the face of an uptick in migrant families from

⁵³⁶ *Id.*

⁵³⁷ Garance Burke & Laura Wides-Munoz, *Immigrants Prove Big Business for Prison Companies*, ASSOCIATED PRESS (Aug. 2, 2012), <https://news.yahoo.com/immigrants-prove-big-business-prison-companies-084353195.html> [<https://perma.cc/5XAT-AHJ4>] (citing ten percent figure); HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 (Dec. 1, 2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf> [<https://perma.cc/WGM8-9YES>] (citing two-thirds figure) [hereinafter DHS PRIVATIZED IMMIGRATION DETENTION FACILITIES REPORT].

⁵³⁸ Lise Olsen, *Private Prisons Boom in Texas and Across America Under Trump's Immigration Crackdown*, HOUS. CHRON. (Oct. 17, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Private-prisons-boom-in-Texas-and-across-America-11944652.php> [<https://perma.cc/B7DY-GJ2A>].

⁵³⁹ See FREEDOM FOR IMMIGRANTS, DETENTION BY THE NUMBERS, <https://www.freedomforimmigrants.org/detention-statistics> [<https://perma.cc/P6BE-NA9N>].

Central America seeking asylum in the United States.⁵⁴⁰ In a major policy reversal, the Obama administration sought to detain these families rather than permit them to settle where they liked in the United States while their asylum applications were processed.⁵⁴¹

In a 2014 deal that only became widely known in August 2016, the Obama administration awarded a \$1 billion no-bid contract to CCA to build two giant immigrant detention facilities in Texas for women and children.⁵⁴² In a sweetheart deal that violated federal procurement rules, ICE agreed to pay CCA for 100 percent of capacity, regardless of how many immigrants it actually housed.⁵⁴³ Immigration activists denounced the choice of CCA, which had operated a family detention center at T. Don Hutto prison in Taylor, Texas, from 2006 to 2009 that was sued by the ACLU. In August 2007, the ACLU reached a settlement with ICE over the conditions at Hutto, where children wearing prison-like uniforms were confined to cells for much of the day and were denied adequate access to health care, education, and recreation.⁵⁴⁴ Just days after the 2014 deal became public, the Obama administration announced to much fanfare in

⁵⁴⁰ See Chico Harlan, *Inside the Administration's \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html?noredirect=on&utm_term=.e0c471ed39ec&wpisrc=n1_heads-draw6&wpmm=1 [https://perma.cc/FYY6-SHPK].

⁵⁴¹ *Id.*

⁵⁴² *Id.*; see also OFF. OF INSPECTOR GEN., U.S. DEP'T HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FEDERAL PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DETENTION SERVICES 3 (Feb. 21, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf> [https://perma.cc/NW3A-GEEG] [hereinafter *OIG ICE PROCUREMENT REPORT*].

⁵⁴³ Harlan, *supra* note 540; OIG ICE PROCUREMENT REPORT, *supra* note 542, at 4.

⁵⁴⁴ *Case Summary in the ACLU's Challenge to the Hutto Detention Center*, AM. C.L. UNION, <https://www.aclu.org/other/case-summary-aclus-challenge-hutto-detention-center> [https://perma.cc/HMZ9-KBTP]; *Landmark Settlement Announced in Federal Lawsuit Challenging Conditions at Immigrant Detention Center in Texas*, AM. C.L. UNION (Aug. 27, 2007), <https://www.aclu.org/press-releases/landmark-settlement-announced-federal-lawsuit-challenging-conditions-immigrant> [https://perma.cc/ML4F-CYQ4].

August 2016 that it was phasing out contracts to house federal prisoners in privately run prisons because of safety and security concerns.⁵⁴⁵ Stock for CCA and GEO quickly plummeted but then rebounded months later with the election of Donald Trump.⁵⁴⁶

In its closing weeks, the Obama administration quietly extended CCA's contract for the massive 2,400-bed family immigrant detention facility in Dilley, Texas until 2021.⁵⁴⁷ It also renewed GEO's contract for the South Texas Detention Complex in Pearsall, Texas over the objections of dozens of advocacy organizations that charged in a signed letter that the facility has been dogged by frequent reports of sexual and other abuse of detainees.⁵⁴⁸ These contract extensions came just weeks after an advisory committee of the U.S. Department of Homeland Security had recommended that the department end family detention.⁵⁴⁹ At the time, the committee was also actively considering whether to recommend that the department end the use of all privately-run facilities to house immigrants.⁵⁵⁰

In early 2017, Attorney General Jeff Sessions rescinded Obama's order to phase out federal contracts to private firms to confine federal

⁵⁴⁵ Charlie Savage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html> [https://perma.cc/BR2H-39BT].

⁵⁴⁶ Jeff Sommer, *Trump's Win Gives Stocks in Private Prison Companies a Reprieve*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/your-money/trumps-win-gives-stocks-in-private-prison-companies-a-reprieve.html> [https://perma.cc/6NWU-G4WE].

⁵⁴⁷ Jamie McGee, *CCA Announces ICE Contract Extension*, TENNESSEAN (Oct. 18, 2016), <https://www.tennessean.com/story/money/2016/10/18/cca-announces-ice-contract-extension/92355068/> [https://perma.cc/W9H6-TMAE].

⁵⁴⁸ *Dept. of Homeland Security Urged to Stop Renewal for South Texas Detention Center Contract*, GRASSROOTS LEADERSHIP (Nov. 4, 2016), <http://grassrootsleadership.org/releases/2016/11/dept-homeland-security-urged-stop-renewal-south-texas-detention-center-contract> [https://perma.cc/W95U-UCMB]; McGee, *supra* note 547.

⁵⁴⁹ DHS PRIVATIZED IMMIGRATION DETENTION FACILITIES REPORT, *supra* note 537.

⁵⁵⁰ *Id.*

prisoners.⁵⁵¹ The Trump administration also revealed plans to open more privately run immigrant detention facilities, many of which were slated for Texas.⁵⁵² The Trump administration's controversial immigration policies, including separating families, have spurred some local governments in Texas to terminate their immigrant detention contracts with the federal government.⁵⁵³ But others have sought to retain or expand these contracts.⁵⁵⁴ In August 2020, ICE awarded lengthy contract renewals of ten years each to CoreCivic for its Hutto facility and to GEO for the South Texas Detention Complex as it sought to lock in lengthy contracts before the election, according to critics.⁵⁵⁵

XXVII. EXPLOITATION OF PENAL LABOR

Another key piece of the for-profit model of criminal justice rests on the exploitation of penal labor. Once again, the Lone Star State has been a pioneer. The United States has a long history of exploiting inmate labor to make prisons and penal farms highly productive and lucrative.⁵⁵⁶ Well into the twentieth century, penal systems paid for themselves, thanks to the

⁵⁵¹ Eric Beech, *U.S. Reverses Obama-Era Move to Phase Out Private Prisons*, REUTERS (Feb. 23, 2017), <https://www.reuters.com/article/us-usa-prisons-idUSKBN1622NN> [<https://perma.cc/DPP2-Z8V9>].

⁵⁵² ELENI BAKST, HUM. RTS. FIRST, *AILING JUSTICE: TEXAS 1* (June 2018), https://www.humanrightsfirst.org/sites/default/files/Ailing_Justice_Texas.pdf [<https://perma.cc/Y6BU-4LHB>].

⁵⁵³ Simon Romero, *All Over U.S., Local Officials Cancel Deals to Detain Immigrants*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/migrant-shelters-ice-contracts-counties.html> [<https://perma.cc/NSQ6-TELT>]; Robert Moore, *Texas Companies Turned Down Lucrative No-Bid Contracts to Expand Child Immigrant Camp*, TEX. MONTHLY (June 26, 2018), <https://www.texasmonthly.com/news/texas-companies-turned-lucrative-no-bid-contracts-expand-child-immigrant-camp/> [<https://perma.cc/EFK9-GMVH>].

⁵⁵⁴ Romero, *supra* note 553.

⁵⁵⁵ *Two Notorious Detention Centers Receive New 10-Year Contracts with Private Prison Corporations*, DET. WATCH NETWORK (Aug. 10, 2020), <https://www.detentionwatchnetwork.org/pressroom/releases/2020/two-notorious-texas-detention-centers-receive-new-10-year-ice-contracts> [<https://perma.cc/X8LQ-CPCZ>].

⁵⁵⁶ See PERKINSON, *supra* note 13, at 235.

brutal convict-leasing system in the South and the deadly exploitative prison factories in the North and West.⁵⁵⁷

For many southern states, leasing out convicts was their single largest source of state revenue as they sought to rebuild after the Civil War.⁵⁵⁸ In the late nineteenth and early twentieth century, disputes over whether to forbid convict leasing were one of the most contested issues in the South. By the mid-1920s, Texas and nearly all other southern states had banned the practice. As convict leasing was phased out, state-run chain gangs and penal farms, which were modeled on the old slave plantation system, became the symbols of a more enlightened public notion of economic development and punishment in the Progressive era. The savage and cruel conditions on southern penal farms and chain gangs went largely unchanged and unchallenged until the civil rights and prisoners' rights movements targeted them in the 1960s and 1970s.⁵⁵⁹

In the North and Midwest, prison-based factories contracted out to the private sector were the dominant form of penal labor. In the late nineteenth and early twentieth century, organized labor forged powerful coalitions with penal reformers, politicians, and clergy members that ultimately succeeded in securing landmark state and federal legislation to abolish prison contract labor and replace it with a state-use system of prison industries. With the decline of organized labor and the entrenchment of neoliberalism since the 1970s, these restrictions on the exploitation of penal labor have been eroding.⁵⁶⁰

Incarcerated people perform all sorts of low- and high-skill jobs to keep the country's prisons and jails running, including raising crops, mopping floors, preparing food, working as carpenters and electricians, and even

⁵⁵⁷ GOTTSCHALK, *supra* note 23, at 58–59; GOTTSCHALK, *supra* note 239, at 50–51.

⁵⁵⁸ GOTTSCHALK, *supra* note 23, at 58.

⁵⁵⁹ GOTTSCHALK, *supra* note 239, at 48–52 (providing a brief overview of the history of and political controversies surrounding convict leasing, chain gangs, and penal farms).

⁵⁶⁰ GOTTSCHALK, *supra* note 23, at 58 (providing a brief overview of the history of prison-based factories).

ministering to people dying in prison hospices. Without their labor, the penal system would grind to a halt. Incarcerated workers labor outside the workplace protections that shield civilian workers in the United States.⁵⁶¹

Texas is one of just five states that generally does not pay incarcerated people for their labor.⁵⁶² The wages that incarcerated people receive in other states are abysmal by any standard (the minimum *daily* rate for non-industry prison positions averages just eighty-six cents, down from ninety-three cents in 2001).⁵⁶³ But this money is vital to purchase necessities from the commissary, such as toiletries and food to supplement meager prison fare, and to pay health-care co-pays.⁵⁶⁴

Texas and ALEC, the association of conservative lawmakers, interest groups, and corporations, have been at the epicenter of efforts to pry open the prison labor market for the private sector.⁵⁶⁵ In 1995, ALEC began promoting its Prison Industries Act, which was modeled on a controversial bill that the Texas Legislature had enacted to expand prison industries.⁵⁶⁶ The bill was championed by a Texas lawmaker who moonlighted as a lobbyist for the National Correctional Industries Association.⁵⁶⁷

In the aftermath of the Great Recession, the push to deregulate prison industries accelerated as lawmakers touted prison labor as a salve on their budget crises. A who's who of corporate America discovered the potential

⁵⁶¹ Bob Egelko, *Court Rejects Call for Fair Wages for Prisoners*, S.F. CHRONICLE (Apr. 12, 2010), <http://www.sfgate.com/bayarea/article/Court-rejects-call-for-fair-wages-for-prisoners-3192932.php> [<https://perma.cc/397T-YYK6>].

⁵⁶² Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/QD9S-85PK>].

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, NATION (Aug. 1, 2011), <https://www.thenation.com/article/archive/hidden-history-alec-and-prison-labor/> [<https://perma.cc/T3GY-H3QY>].

⁵⁶⁶ Beth Schwartzapfel, *The Great American China Gang*, AM. PROSPECT (May 28, 2014), <https://prospect.org/justice/great-american-chain-gang/> [<https://perma.cc/RD5Q-EF7H>].

⁵⁶⁷ Elk & Sloan, *supra* note 565.

windfall of captive labor to produce everything from blue jeans to prison-raised tilapia.⁵⁶⁸ When COVID-19 struck, Texas and other states turned to unpaid and underpaid incarcerated people to manufacture masks and even hand sanitizer, which the TDCJ had argued against distributing in state prisons because it reportedly posed a security threat.⁵⁶⁹

XXVIII. THE FRAUGHT POLITICS OF CRIMINAL JUSTICE REFORM IN TEXAS

Criminal justice reform has been a political smokescreen for powerful conservative interests—most notably the political network centered around billionaires Charles Koch and David Koch who died in 2019—to burnish their image of political reasonableness and bipartisanship.⁵⁷⁰ In Washington, D.C., Texas, and across the country, conservatives have made small-bore gestures to reduce the number of incarcerated people while pursuing a radical agenda, whose core pillars include dismantling the social safety net, repressing voter turnout, eviscerating organized labor, and ending public education. If they are successful, this agenda will fortify the interests that sustain the carceral state and that foster social, political, and economic inequality. At the heart of this effort is the “conservative troika”—ALEC, the State Policy Network (an association of state-level think tanks that develop legislation, position papers, and litigation strategies for ALEC), and Americans for Prosperity, the powerful grass-roots

⁵⁶⁸ GOTTSCHALK, *supra* note 23, at 60–61.

⁵⁶⁹ Deanna Hackney & Eric Levenson, *Texas Turns to Prison Labor to Help Cover Face Mask Shortages*, CNN (Mar. 22, 2020), <https://www.cnn.com/2020/03/22/us/texas-coronavirus-mask-trnd/index.html> [<https://perma.cc/T2E2-QA85>].

⁵⁷⁰ Jane Mayer, *New Koch*, NEW YORKER (Jan. 18, 2016), <https://www.newyorker.com/magazine/2016/01/25/new-koch> [<https://perma.cc/9N72-8M6H>].

federation established by the political network of billionaires Charles and David Koch.⁵⁷¹

Over the years, the Koch brothers have “deployed a small fortune to attack laws and policies that protect society’s most vulnerable,” according to Tia Lessin, co-director of the documentary *Citizen Koch*.⁵⁷² They have funneled millions of dollars to Republican candidates and conservative organizations that seek to shred the social safety net. This has included funding an endless stream of ads against the Affordable Care Act directed at Democratic candidates.⁵⁷³ Their spending on Republican candidates who might oppose criminal justice reform dwarfs what they have spent on the issue of criminal justice reform itself, according to Robert Greenwald, director of *Koch Brothers Exposed*.⁵⁷⁴

As Jane Mayer of *The New Yorker* has shown, promoting efforts like Right on Crime allowed the Koch brothers and like-minded conservatives to don cloaks of political reasonableness and moderation while they continued to pursue scorched-earth social, economic, and environmental policies.⁵⁷⁵ Such an agenda serves to bolster, not build down, the carceral state in Texas and elsewhere.

⁵⁷¹ ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESS, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 16, 129, 160 (2019).

⁵⁷² Tim Mak, *Koch Brothers to Bankroll Prison Reform*, DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/koch-bros-to-bankroll-prison-reform>

[<https://perma.cc/N83V-W9XW>]; see also Alexander Hertel-Fernandez, Theda Skocpol & Jason Sclar, *When Political Mega-Donors Join Forces: How the Koch Network and the Democracy Alliance Influence Organized U.S. Politics on the Right and Left*, 32 STUD. AM. POL. DEV. 127–65 (Oct. 2018).

⁵⁷³ Mak, *supra* note 572.

⁵⁷⁴ *Id.*; see also CHRISTOPHER LEONARD, KOCHLAND: THE SECRET HISTORY OF KOCH INDUSTRIES AND CORPORATE POWER IN AMERICA (2019).

⁵⁷⁵ Mayer, *supra* note 570.

XXIX. SHREDDING THE SOCIAL SAFETY NET

The Right on Crime spin on criminal justice reform in Texas has deflected attention away from how its champions have energetically pushed Texas to disinvest from the very items proven to reduce crime and keep people out of jail and prison: better education, good health care, living-wage jobs, affordable housing, and adequate family planning, mental health, and other social services.⁵⁷⁶ Grover Norquist of Right on Crime is the nation's foremost anti-tax crusader. He is widely known for his infamous vow to shrink the government "down to the size we can drown it in a bathtub."⁵⁷⁷ In the face of budget shortfalls and pressure to mend the state's threadbare social safety net, Norquist has repeatedly implored Texas lawmakers to slash spending on education, health, and other social programs and hold the line on new taxes. He has urged them, "Now is not the time to get wobbly."⁵⁷⁸

The social safety net in Texas—never adequate in the best of times—is at risk of collapse thanks not only to the conservative assault on Medicaid and other social supports but also thanks to COVID-19. The pandemic has pummeled state coffers in Texas and elsewhere at a time when the penal, health care, and social service systems need additional resources to combat

⁵⁷⁶ See Ross Ramsey, Emily Ramshaw & Morgan Smith, *Texas Legislature Passes \$15 Billion in Cuts*, TEX. TRIBUNE (May 28, 2011), <http://www.texastribune.org/texas-taxes/budget/liveblog-texas-legislature-passes-15-billion/> [<https://perma.cc/UT3J-45F2>]; see also Bob Moser, *Texas' Wild Tea Party*, NATION (May 11, 2011), <https://www.thenation.com/article/archive/texas-wild-tea-party/> [<https://perma.cc/RYT5-L2EK>].

⁵⁷⁷ See Opinion, *Rethinking Their Pledge*, N.Y. TIMES (Apr. 22, 2011), <https://www.nytimes.com/2011/04/22/opinion/22fri1.html> [<https://perma.cc/WM64-ZU88>]; *Texas Budget Ditches 'Smart on Crime' Approach, Reverting to Old Priorities*, GRITS FOR BREAKFAST (May 29, 2011), <http://gritsforbreakfast.blogspot.com/2011/05/texas-budget-ditches-smart-on-crime.html> [<https://perma.cc/V6XP-XQPJ>].

⁵⁷⁸ Bob Moser, *God Help Us: Will Rick Perry's Blend of Christian-Right, Small-Government, and Pro-Corporate Fervor Land Him in the White House?*, AM. PROSPECT (Nov. 28, 2011), <https://prospect.org/labor/god-help-us/> [<https://perma.cc/5QEh-TGJ5>].

and contain the virus and alleviate the suffering it has wrought. In July 2020, Texas officials directed state agencies to identify possible five percent cuts in their current budgets. The Texas Health and Human Services Commission proposed to slash spending on services that play crucial roles in aiding vulnerable people, including health-care programs for women, children, and low-income people; domestic violence programs; and food stamps, among other things.⁵⁷⁹ The five percent budget cuts proposed by the TDCJ in the face of the pandemic are likely to contribute to a further deterioration in prison conditions.⁵⁸⁰

Even before the pandemic struck, the Lone Star State was at or near the bottom in key indices of social health and well-being. Texas “has long been a low-spending state, often at the expense of the most necessary services,” ranking near the bottom in state spending per capita on education and health care.⁵⁸¹ Overall, the state of Texas spends less per resident than the U.S. average and has the fifth most regressive tax system of any state.⁵⁸² Texas came in forty-first in the Annie E. Casey Foundation’s 2019 state rankings of overall child well-being.⁵⁸³ It has one of the lowest drug treatment admission rates in the country and long wait lists for substance abuse

⁵⁷⁹ Press Release, Texans Care for Children, Draft 5% Budget Cuts Hurt TX Women and Kids (July 9, 2020), <https://txchildren.org/posts/2020/7/9/draft-5-budget-cuts-hurt-tx-women-and-kids> [<https://perma.cc/F62Y-YDTV>].

⁵⁸⁰ Jeremy Wallace & Austin Bureau, *Texas Budget Deficit ‘Not Nearly as Dire’ as Expected*, HOUS. CHRON. (Nov. 30, 2020), <https://www.houstonchronicle.com/politics/texas/article/Texas-budget-deficit-not-nearly-as-dire-as-15764397.php> [<https://perma.cc/CQB6-46W6>].

⁵⁸¹ Eva DeLuna Castro & Dick Lavine, *How Texas Spends Its Money. How Texas Gets Its Money. Why It Doesn’t Add Up*, SAN ANTONIO REP. (Feb. 27, 2013), <https://sanantonioreport.org/how-texas-spends-its-money-how-texas-gets-its-money-why-it-doesnt-add-up/> [<https://perma.cc/QZB4-BAVS>].

⁵⁸² *Id.*

⁵⁸³ ANNIE E. CASEY FOUND., 2019 KIDS COUNT DATA BOOK: TRENDS IN CHILD WELL-BEING 6 (2019), <https://www.aecf.org/m/resourcedoc/aecf-2019kidscountdatabook-2019.pdf> [<https://perma.cc/DE6B-BNQX>].

treatment.⁵⁸⁴ A national leader in defunding health-care services for women and teenagers and family-planning programs, Texas has one of the highest rates of teenage pregnancies and births.⁵⁸⁵ In the biennium budget for 2020–21, Texas cut state funding for health and human services by nearly \$2 billion, including a \$900 million reduction in Medicaid, the government health-care program for impoverished people.⁵⁸⁶ Texas ranks forty-first in state-by-state rankings of government spending per pupil on K-12 education.⁵⁸⁷ The average reading level of the nearly 66,000 people released from Texas state prisons in 2017 was eighth grade.⁵⁸⁸ In the midst of the pandemic, the Texas Department of Housing and Community Affairs pushed through a draconian rule change that would further restrict access to affordable housing and support services for people with criminal records, including those convicted of minor crimes.⁵⁸⁹

The health-care safety net in Texas is so threadbare that Edward Averill, a blind man with one foot amputated, high blood pressure, and diabetes,

⁵⁸⁴ CAITLIN DUNKLEE, TRAVIS LEETE & JORGE ANTONIO RENAUD, TEX. CRIM. JUST. COAL., EFFECTIVE APPROACHES TO DRUG CRIMES IN TEXAS: STRATEGIES TO REDUCE CRIME, SAVE MONEY, AND TREAT ADDICTION 9 (2013).

⁵⁸⁵ *Gender Matters: Changing Teen's Perspective on Gender Roles and Working to Decrease Teen Pregnancy in Travis County, Texas*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://opa.hhs.gov/grant-programs/teen-pregnancy-prevention-program/tpp-successful-strategies/engender-health> [<https://perma.cc/UTD3-WBX7>]; CTRS. FOR DISEASE CONTROL & PREVENTION, 2018 STD SURVEILLANCE REPORT: STATE RANKING TABLES 5 tbl.40 (2019).

⁵⁸⁶ Eva DeLuna Castro, *Top 5 Hidden Gems in the 2020-2021 Texas Budget*, EVERY TEXAN (Nov. 19, 2019), <https://everytexan.org/2019/11/19/top-5-hidden-gems-in-the-2020-2021-texas-budget/> [<https://perma.cc/Z8CB-V7QN>]; Walters, *supra* note 500.

⁵⁸⁷ *Education Spending per Student by State*, GOVERNING, <http://www.governing.com/gov-data/education-data/state-education-spending-per-pupil-data.html> [<https://perma.cc/S6SC-ZSWS>].

⁵⁸⁸ TEX. DEP'T OF CRIM. JUST., FY 2017 STATISTICAL REPORT 3 (2017), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2017.pdf [<https://perma.cc/8YC5-HWBS>].

⁵⁸⁹ Juan Pablo Garnham, *A Controversial Rule Limiting Housing Options for Homeless Texans with Criminal Records Was Softened, But It Still Worries Advocates*, TEX. TRIB. (Nov. 5, 2020), <https://www.texastribune.org/2020/11/05/texas-housing-criminal-record-rule/> [<https://perma.cc/4LV8-VBSA>].

carried out a carefully planned heist at an Austin bank in April 2018 just so he could be admitted to prison and receive desperately needed medical care.⁵⁹⁰ In 2018, the rate of people without health insurance in Texas was nearly eighteen percent—or about twice the national average.⁵⁹¹ Thanks to the pandemic, the uninsured rate in Texas skyrocketed to twenty-nine percent in 2020.⁵⁹²

XXX. THE AFFORDABLE CARE ACT AND CRIMINAL JUSTICE REFORM

Despite having the highest rate of the uninsured in the country, Texas has been at the epicenter of the political and legal trench warfare against the 2010 Affordable Care Act (ACA). The ACA has arguably been the most important piece of criminal justice reform legislation enacted in decades, even though it has not been billed as such. The ACA required states to expand Medicaid coverage to include more categories of low-income people—or else forfeit federal funding. In 2012, the U.S. Supreme Court upheld the ACA except for the Medicaid mandate. Rick Perry of Texas and most other Republican governors chose to opt out of Medicaid expansion, even though the federal government would pick up nearly all the additional costs.⁵⁹³ Perry likened expanding Medicaid to “adding a thousand people to

⁵⁹⁰ Ciara O'Rourke, *The Desperado*, ATAVIST MAG. (Jan. 2019), <https://magazine.atavist.com/the-desperado-ed-averill-bank-robbery-austin-texas> [<https://perma.cc/6JCD-3YMJ>].

⁵⁹¹ Katie Keith, *Uninsured Rate Rose in 2018, Says Census Bureau Report*, HEALTH AFFS. (Sept. 11, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190911.805983/full/> [<https://perma.cc/5RTZ-ZWMU>]; Bryce Covert, *The Pandemic Sent Americans' Health Care Coverage into Free Fall*, NATION (Oct. 21, 2020), <https://www.thenation.com/article/society/covid-healthcare-unemployment/> [<https://perma.cc/JD8R-VZGP>].

⁵⁹² Covert, *supra* note 591.

⁵⁹³ *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Feb. 4, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> [<https://perma.cc/34Y9-CWYC>].

the Titanic.”⁵⁹⁴ His successor Greg Abbott, who filed a lawsuit challenging the ACA’s constitutionality when he was the state’s attorney general, also opposed Medicaid expansion.⁵⁹⁵ Eventually some of the reddest states—including Oklahoma in 2020—reversed course and expanded Medicaid, but not Texas.⁵⁹⁶ Today it is one of just a dozen states holding out against expanding Medicaid under the ACA.⁵⁹⁷ This unwavering opposition to Medicaid expansion starkly calls into question claims by Right on Crime and its allies. They suggest that fiscal concerns in Texas and elsewhere will force states to forge bipartisan coalitions to support “pragmatic,” non-ideological solutions to reduce the prison and jail population simply because they cannot afford not to do so. Texas and the other opt-out states have gone chasing after the pittance of federal dollars authorized in the overhyped First Step Act of 2018 and the reauthorizations of the 2007 Second Chance Act.⁵⁹⁸ Meanwhile, they have eschewed for deeply partisan and ideological reasons the tens of billions of dollars in Medicaid funding that could provide real second chances to people ensnared in the criminal legal system, many of whom, truth be told, never had a first chance. In their indictment against the ACA, congressional Republicans charged at one

⁵⁹⁴ Jay Hancock, *Businesses Will Push Perry to Rethink Medicaid Expansion*, KAISER HEALTH NEWS (July 18, 2012), <http://www.kaiserhealthnews.org/Stories/2012/July/18/Texas-Medicaid-expansion-business.aspx> [https://perma.cc/7FLP-8SSQ].

⁵⁹⁵ Edgar Walters, *With Hospital Funds in Question, Abbott Holds Firm on Medicaid*, TEX. TRIB. (Apr. 20, 2015), <https://www.texastribune.org/2015/04/20/hospital-funds-question-abbott-holds-firm-against/> [https://perma.cc/X6WV-PT6T]; Emma Platoff & Edgar Walters, *After Ginsburg’s Death, High Stakes for Texas’ Legal Challenge to the Affordable Care Act*, TEX. TRIB. (Sept. 25, 2020), <https://www.texastribune.org/2020/09/25/texas-affordable-care-act-supreme-court/> [https://perma.cc/CH9L-G7TN].

⁵⁹⁶ Covert, *supra* note 591.

⁵⁹⁷ *Id.*

⁵⁹⁸ Marie Gottschalk, *Incorrigible: The First Step Act and the Carceral State*, PRISON LEGAL NEWS (Apr. 2, 2019), <https://www.prisonlegalnews.org/news/2019/apr/2/incorrigible-first-step-act-and-carceral-state/> [https://perma.cc/4KM8-2BH2].

point that this legislation would help people released from prison get access to health care.⁵⁹⁹ So much for being smart on crime.

Texas and the other opt-out states have forfeited billions of dollars desperately needed to support health care, substance abuse, and mental health programs that are key for treating low-income people in the community and keeping them out of jail and prison. Research on Medicaid expansion suggests it substantially improves access to care and health outcomes for people involved with the criminal legal system.⁶⁰⁰ If Texas opted in, an additional 1.5 million people would be covered by Medicaid, according to pre-pandemic estimates by the Kaiser Foundation.⁶⁰¹ The numbers would be much higher now given how many people have lost their jobs and health insurance due to COVID-19.

Incarcerated people tend to have higher rates of addiction, mental illness, infections, and chronic illnesses.⁶⁰² In opt-in states, many people serving time on parole, probation, or other types of community corrections are now

⁵⁹⁹ Tom Howell, Jr., *House GOP Wants to Know if Ex-Prisoners Benefit from Medicaid Expansion*, WASH. TIMES (Oct. 9, 2013), <http://www.washingtontimes.com/news/2013/oct/9/house-gop-wants-know-if-ex-prisoners-benefit-medic/> [<https://perma.cc/JQT4-H7A8>].

⁶⁰⁰ Nickolas D. Zaller et al., *Commentary: The Importance of Medicaid Expansion for Criminal Justice Populations in the South*, 5 HEALTH JUST. 1 (Dec. 2017), <https://pubmed.ncbi.nlm.nih.gov/28258527/> [<https://perma.cc/66PZ-RUPR>].

⁶⁰¹ Rachel Garfield et al., *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAM. FOUND. (Jan. 14, 2020), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/> [<https://perma.cc/W5E9-HWPB>].

⁶⁰² Lois M. Davis & Sharon Pacchiana, *Health Profile of the State Prison Population and Returning Offenders: Public Health Challenges*, 10 J. CORR. HEALTH CARE 303 (2004) (noting some of the chronic illnesses include: asthma, hypertension, tuberculosis, diabetes, hepatitis C, and HIV/AIDS); Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761, 761–65 (2009); JENNIFER C. KARBERG & DORIS J. JAMES, *SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES*, 2002 (2020); Ingrid A. Bingswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENGLAND J. MED. 157, 157–65 (2007) (stating that the lack of access to adequate health care on the outside to treat these serious afflictions helps explain the extraordinarily high mortality rate among people released from prisons).

eligible for full Medicaid coverage or for subsidized insurance through the health-care exchanges.⁶⁰³ Furthermore, Medicaid expansion has made it easier for people released from prison and jail to get the substance abuse, mental health, and other treatment they need, which has proven to be a key factor in successful reintegration and desistance from crime. This is why the Idaho Sheriffs Association in red Idaho endorsed a state ballot initiative to expand Medicaid that voters approved in 2018.⁶⁰⁴

In the dozens of states that have expanded Medicaid, nearly all people exiting from prison qualify for coverage. But Medicaid expansion is not a panacea. A 2016 study by Kaiser Health News and The Marshall Project found that many of the Medicaid-expansion states have yet to set up large-scale programs to enroll people released from state prison in health-care plans, and local jails were doing an even poorer job at enrolling people who qualify.⁶⁰⁵ Many prisons and jails lack the staff, the resources, or the will to establish comprehensive enrollment programs.⁶⁰⁶

The surge of additional Medicaid money has provided states and counties with new resources and capacity to provide necessary care.⁶⁰⁷ Medicaid expansion also has played a large role in combatting the opioid epidemic.

⁶⁰³ Alison Evans Cuellar & Jehanzeb Cheema, *As Roughly 700,000 Prisoners Are Released Annually, About Half Will Gain Health Coverage and Care Under Federal Law*, 31 HEALTH AFFS. 931 (2012) (discussing that by some estimates, one-third of people released from state and federal prisons each year would be eligible for Medicaid and another quarter would qualify for subsidized health coverage through the exchanges); ANDREA A. BAINBRIDGE, *THE AFFORDABLE CARE ACT AND CRIMINAL JUSTICE: INTERSECTIONS AND IMPLICATIONS* 6 (2012).

⁶⁰⁴ Daniel Nicheanian, *How Medicaid Expansion & Criminal Justice Reform Intersected, Spotlight On Disenfranchisement in Mississippi, and More*, APPEAL (Nov. 29, 2018), <https://theappeal.org/how-medicaid-expansion-criminal-justice-reform-intersected-a-spotlight-on-disenfranchisement-in-mississippi-and-more/> [https://perma.cc/62QV-Q74X].

⁶⁰⁵ Beth Schwartzapel & Jay Hancock, *Out of Prison, Uncovered*, MARSHALL PROJECT (Dec. 6, 2016), <https://www.themarshallproject.org/2016/12/06/out-of-prison-uncovered> [https://perma.cc/U6F7-8GGV].

⁶⁰⁶ See *id.*

⁶⁰⁷ Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MEDICINE 157 (2007).

States that expanded coverage have seen a much larger increase in Medicaid-covered prescriptions of buprenorphine, the gold standard for treating opioid use disorder.⁶⁰⁸

Since millions of people cycle through U.S. jails each year, local jails in opt-in states have become major sites to enroll people in Medicaid and to obtain health insurance for people with higher incomes through the health-care exchanges established under the ACA.⁶⁰⁹ Although the ACA does not permit people who have been sentenced to participate in the exchanges, defendants who are in custody or in the community pending disposition of their cases are permitted to participate.

By opting out of Medicaid expansion under the ACA, Texas, which already maintains some of the toughest Medicaid eligibility requirements (second only to Alabama's stringent rules), left an estimated \$100 billion in federal dollars on the table over the course of a decade.⁶¹⁰ This works out to more than \$10 billion per year, or about three times the TDCJ's annual

⁶⁰⁸ Lisa Clemans-Cope et al., *Rapid Growth in Medicaid Spending and Prescriptions to Treat Opioid Use Disorder and Opioid Overdose from 2010 to 2017*, URBAN INST. 1 (Mar. 2019),

https://www.urban.org/sites/default/files/publication/99798/rapid_growth_in_medicaid_spending_and_prescriptions_to_treat_opioid_use_disorder_and_opioid_overdose_from_2010_to_2017_4.pdf [<https://perma.cc/6BEF-JR2A>]; see German Lopez, *There's a Highly Successful Treatment for Opioid Addiction. But Stigma is Holding It Back*, VOX (Nov. 15, 2017), <https://www.vox.com/science-and-health/2017/7/20/15937896/medication-assisted-treatment-methadone-buprenorphine-naltrexone> [<https://perma.cc/5V6D-TP7Y>].

⁶⁰⁹ Jocelyn Guyer et al., *State Strategies for Establishing Connections to Health Care for Justice-Involved Populations: The Central Role of Medicaid*, COMMONWEALTH FUND (Jan. 11, 2019), <https://www.commonwealthfund.org/publications/issue-briefs/2019/jan/state-strategies-health-care-justice-involved-role-medicare> [<https://perma.cc/4GV4-U925>].

⁶¹⁰ Louise Norris, *Texas and the ACA's Medicaid Expansion*, HEALTH INS. ORG. (Sept. 8, 2020), <https://www.healthinsurance.org/texas-medicare/> [<https://perma.cc/W395-DXJN>].

budget.⁶¹¹ In addition, Texas also missed out on the boosts in jobs and consumer spending that come with major injections of federal funds.⁶¹²

By opting out, Texas also forfeited the opportunity to shift tens of millions of dollars in state health-care costs for incarcerated people onto the federal tab. Under federal rules, Medicaid is required to reimburse states and counties for many of the costs of incarcerated people in independent hospitals or other health-care facilities *if* they are enrolled in Medicaid.⁶¹³ If Texas opted in, the TDCJ would receive an estimated \$55 million to \$120 million in federal funds each year for prison health care, which amounts to about ten to twenty percent of the more than half-a-billion dollars it spends annually on health care for incarcerated people.⁶¹⁴

Opposition to the ACA and Medicaid expansion has been a nonnegotiable red line for leading conservatives, including the Texas Public Policy Foundation (TPPF).⁶¹⁵ Right on Crime was the brainchild of the TPPF, which has deep and longstanding connections to ALEC, the powerful conservative organization.⁶¹⁶ The TPPF is one of the leading

⁶¹¹ The TDCJ's annual appropriations for fiscal 2020 and 2021 in the biennium budget approved by Texas lawmakers in 2019 were \$3.4 billion. H.B. 1, 86th Leg., Reg. Sess. (Tex. 2019).

⁶¹² *Id.*

⁶¹³ See Ellen Rose Whelan-Wuest, *Medicaid Coverage for Inmates and Reentering Populations in North Carolina* (Apr. 20, 2012) (M.A. thesis, Duke University) (on file with Duke University Library); see also AM. CORR. ASS'N, KEY ELEMENTS OF THE AFFORDABLE CARE ACT: INTERFACE WITH CORRECTIONAL SETTINGS AND INMATE HEALTH CARE 2 (2012); ANITA CARDWELL & MAEGHAN GILMORE, COUNTY JAILS AND THE AFFORDABLE CARE ACT: ENROLLING ELIGIBLE INDIVIDUALS IN HEALTH COVERAGE (2012).

⁶¹⁴ *By Rejecting Obamacare, Texas Forgoes up to \$240 Million in Federal Funds per Biennium for Prison Health Care*, GRITS FOR BREAKFAST (June 1, 2014, 7:19 AM), <https://gritsforbreakfast.blogspot.com/2014/06/by-rejecting-obamacare-texas-forgoes-up.html> [<https://perma.cc/JW3P-4TNM>].

⁶¹⁵ HERTEL-FERNANDEZ, *supra* note 571, at 197–205.

⁶¹⁶ *About Right on Crime*, RIGHT ON CRIME, <https://rightoncrime.com/about/#:~:text=Right%20on%20Crime%20is%20a,offenders%20C%20and%20lowering%20taxpayer%20costs> [<https://perma.cc/9DLH-JARH>]; *New Report Documents Pervasive Influence of ALEC in Texas*, PR WATCH (Aug. 12, 2019),

affiliates of the State Policy Network.⁶¹⁷ Jerry Madden, a leading architect of the 2007 reforms when he served in the Texas Legislature, has close ties to ALEC. In 2011–12, he chaired the organization’s important Public Safety and Elections Task Force and was honored as its “Legislator of the Year.”⁶¹⁸ After retiring from the Texas Legislature in 2013, Madden parlayed his reputation as a criminal justice reformer into a gig with Right on Crime.⁶¹⁹ The TPPF is funded by a who’s who list of conservative individuals, foundations, and corporations, including the Bradley Foundation, Exxon, Big Tobacco, and the Koch Brothers.⁶²⁰ It also receives funding from GEO, the country’s largest private prison company.⁶²¹ The TPPF has not only opposed Medicaid expansion under the ACA but has also advocated for turning the entire federal program into block grants for states to manage as they see fit without much direction from Washington.⁶²²

<https://www.prwatch.org/news/2019/08/13486/new-report-documents-pervasive-influence-alec-texas> [<https://perma.cc/EL5H-LJQC>].

⁶¹⁷ HERTEL-FERNANDEZ, *supra* note 571, at 154–55; *Texas Public Policy Foundation, CTR. FOR MEDIA & DEMOCRACY*, https://www.sourcewatch.org/index.php?title=Texas_Public_Policy_Foundation [<https://perma.cc/RDT8-9KGW>]; REBEKAH WILCE, CTR. FOR MEDIA & DEMOCRACY, EXPOSED: THE STATE POLICY NETWORK: THE POWERFUL RIGHT-WING NETWORK HELPING TO HIJACK STATE POLITICS AND GOVERNMENT (2013), https://www.prwatch.org/files/spn_national_report_final.pdf; *Source Watch*, STATE POL’Y NETWORK (Sept. 21, 2020, 3:22 PM), https://www.sourcewatch.org/index.php?title=State_Policy_Network [<https://perma.cc/DE5R-NELG>].

⁶¹⁸ *Meet Jerry Madden*, JERRY MADDEN, <http://www.jerrymadden.org/biography.html> [<https://perma.cc/5WLF-J263>].

⁶¹⁹ *Id.*

⁶²⁰ Forrest Wilder, *Revealed: The Corporations and Billionaires that Fund the Texas Public Policy Foundation*, TEX. OBSERVER (Aug. 24, 2012), <https://www.texasobserver.org/revealed-the-corporations-and-billionaires-that-fund-the-texas-public-policy-foundation/> [<https://perma.cc/B2Q6-XRFV>].

⁶²¹ CAROLINE ISAACS, AM. FRIENDS SERV. COMMITTEE, COMMUNITY CAGES: PROFITIZING COMMUNITY CORRECTIONS AND ALTERNATIVES TO INCARCERATION 10 (2016).

⁶²² TEX. PUB. POL’Y FOUND., 2017-18 LEGISLATOR’S GUIDE TO THE ISSUES 144–47 (Bill Peacock et al. eds., 2016); TEX. PUB. POL’Y FOUND., 2019-20 LEGISLATOR’S GUIDE TO THE ISSUES 136–37 (Bill Peacock et al. eds., 2018).

The TPPF has been a critical player in legal challenges to the ACA, most recently the Texas lawsuit supported by twenty state attorneys general that the U.S. Supreme Court heard oral arguments for in November 2020.⁶²³

XXXI. VOTER SUPPRESSION AND CRIMINAL JUSTICE REFORM

Medicaid expansion has had unanticipated political consequences. It has been associated with increases in voter turnout and other types of political participation for low-income people.⁶²⁴ Medicaid expansion has been a major issue in recent elections in red states, including the 2019 upset victory of Democrat Andy Beshear in Kentucky's gubernatorial race and the re-election of Democrat Governor John Bel Edwards in Louisiana that same year.⁶²⁵ As such, Medicaid expansion is a threat to a central plank of the conservative agenda—voter suppression.

The Republican Party has been at the forefront of efforts in Texas and nationally to suppress the vote through voter intimidation and harsher penalties for voter fraud to enhance the party's power.⁶²⁶ With a few notable exceptions, including Senator Rand Paul (R-TN) and Pat Nolan, formerly of Justice Fellowship, top Republicans associated with criminal

⁶²³ Robert Henneke, *Affordable Care Act Lawsuit*, TEX. PUB. POL'Y FOUND. (Mar. 25, 2019), <https://www.texaspolicy.com/affordable-care-act-lawsuit> [<https://perma.cc/36FT-NZW4>]; *Oral Argument – Audio*: California v. Texas, SUP. CT. OF THE U.S. (Nov. 10, 2020), https://www.supremecourt.gov/oral_arguments/audio/2020/19-840 [<https://perma.cc/2UZP-K3XQ>].

⁶²⁴ Bryce Covert, *The Medicaid Expansion Effect*, NATION (Dec. 16, 2019), <https://www.thenation.com/article/archive/kentucky-medicaid-expansion-voter-turnout/> [<https://perma.cc/7XGW-U45S>].

⁶²⁵ *Id.*

⁶²⁶ Christopher R. Browning, *The Suffocation of Democracy*, N.Y. REV. (Oct. 25, 2018), <https://www.nybooks.com/articles/2018/10/25/suffocation-of-democracy/> [<https://perma.cc/L3ZV-7F4B>]; Christopher Hooks, *What if They Held an Election and Everyone Came?*, TEX. MONTHLY (Nov. 2020), <https://www.texasmonthly.com/politics/voter-suppression-texas-history/> [<https://perma.cc/UWT4-SG7R>]; Jay Riestenberg, *ALEC Agenda Suppresses Voting Rights in Texas, Nationally*, COMMON CAUSE (July 29, 2014), <https://www.commoncause.org/democracy-wire/alec-agenda-suppresses-voting-rights/> [<https://perma.cc/2F8R-URRT>].

justice reform have not championed restoring voting rights of people with criminal records.⁶²⁷ Some leading conservatives associated with Right on Crime have indicated they would support restoring the voting rights of people with felony convictions—but only if there was a quid pro quo that restored their right to carry guns.⁶²⁸ As Grover Norquist explained, “If someone asked me if I would rather vote for mayor or have a gun, I’d rather have a gun.”⁶²⁹

Right on Crime and the TPPF have not made restoration of voting rights a leading issue in Texas, which is one of seventeen states that does not permit people in prison or on parole or probation to vote.⁶³⁰ In the 2016 election, this amounted to about 2.5% of the voting-age population in Texas and nearly six percent of all eligible African-Americans in the state.⁶³¹

Freedom Partners, a national organization with close links to the Koch brothers, did endorse Amendment 4, a 2018 ballot initiative in Florida to restore voting rights to more than a million people convicted of felonies who had completed their sentences.⁶³² But it is unclear how much financial

⁶²⁷ Bill Keller, *Prison Revolt: A Former Law-and-Order Conservative Takes a Lead on Criminal-Justice Reform*, NEW YORKER (June 22, 2015), <https://www.newyorker.com/magazine/2015/06/29/prison-revolt> [<https://perma.cc/DMB2-75UF>]; see *Voting Rights Restoration Efforts in Kentucky*, BRENNAN CTR. FOR JUST. (Aug. 5, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-kentucky> [<https://perma.cc/5USN-NGNZ>].

⁶²⁸ Tim Mak, *Conservatives Would Let Felons Vote and Pack Heat*, DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/conservatives-would-let-felons-vote-and-pack-heat> [<https://perma.cc/5ZJN-A3R5>].

⁶²⁹ *Id.*

⁶³⁰ *Disenfranchisement Laws: Overview*, BRENNAN CTR., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-rights-restoration/disenfranchisement-laws> [<https://perma.cc/9L32-V9LW>].

⁶³¹ MORGAN MCLEOD, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORMS 11 (2017).

⁶³² Steve Bousquet, *Koch-Funded Group Supports Voting Rights for Felons in Florida*, TAMPA BAY TIMES (Sept. 13, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/09/13/koch-funded-group-supports-voting-rights-for-felons-in-florida/> [<https://perma.cc/5FG7-7Z4E>].

and other support Freedom Partners actually gave to the “Second Chance” campaign for Amendment 4, also known as the Voter Restoration Amendment, which Sunshine State voters overwhelmingly endorsed.⁶³³ However, groups associated with the Koch brothers did generously fund Republican candidates in Florida and elsewhere in the 2018 election, including Ron DeSantis, the Republican candidate for governor who spoke out against Amendment 4 during the campaign.⁶³⁴ DeSantis, a former congressman closely allied with President Trump, triumphed over Democrat Andrew Gillum by a razor-thin margin.⁶³⁵ As governor-elect, he quickly sought to undermine Amendment 4.⁶³⁶

In 2019, DeSantis and the state’s Republican-controlled legislature enacted a measure that required people with felony convictions to pay off all fines and other penalties before they would be allowed to vote.⁶³⁷ Those who did not risked being prosecuted for voter fraud.⁶³⁸ Right on Crime and

⁶³³ *Id.*

⁶³⁴ Duncan Hosie, Commentary, *When Will DeSantis Listen to His Own Voters on Ex-Felons’ Voting Rights?*, ORLANDO SENTINEL (Sept. 20, 2020, 6:00 AM), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-desantis-amendment-4-mistake-20200920-dx4ke3tcg5bnvcvvn6pqluc2ym-story.html> [https://perma.cc/PMS4-QTM5].

⁶³⁵ See Ron DeSantis Backed by Freedom Partners Action Fund, SUNSHINE STATE NEWS (July 10, 2018, 4:00PM), <http://sunshinestatenews.com/story/ron-desantis-backed-freedom-partners-action-fund> [https://perma.cc/58X8-LJ92]; Michael Kruse, Matt Dixon & Gary Fineout, *The Governor Who Holds Trump’s Fate in His Hands*, POLITICO (Sept. 16, 2020), <https://www.politico.com/news/magazine/2020/09/16/governor-ron-desantis-florida-trump-410244> [https://perma.cc/SCA2-8LFF].

⁶³⁶ See James Call, *Critics Angry After Ron DeSantis Asks Florida Lawmakers to Review Amendment 4 Implementation*, TALLAHASSEE DEMOCRAT (Dec. 14, 2018), <https://www.tallahassee.com/story/news/2018/12/14/ron-desantis-wants-lawmakers-have-look-amendment-4/2314818002/> [https://perma.cc/58X8-LJ92].

⁶³⁷ See Dara Kam, *Gov. Ron DeSantis Signs Florida Election Bill; Groups Sue Over Voting Rights*, TALLAHASSEE DEMOCRAT (June 28, 2019), <https://www.tallahassee.com/story/news/2019/06/28/desantis-signs-election-bill-groups-sue-over-voting-rights/1602545001/> [https://perma.cc/EQ24-5JE3].

⁶³⁸ Linda So, *Restoring Felon Voting Rights a ‘Mess’ in Battleground Florida*, REUTERS (Oct. 7, 2019), <https://www.reuters.com/article/us-usa-election-florida-felons-insight/restoring-felon-voting-rights-a-mess-in-battleground-florida-idUSKBN1WM0YV> [https://perma.cc/5Z8X-ED2Y].

other Koch-related groups did not join a lawsuit filed by leading civil rights organizations charging that the new legislation undermined the will of Florida voters and was a de facto poll tax.⁶³⁹ In September 2020, the U.S. Court of Appeals for the Eleventh Circuit, overturning a lower court decision, ruled that the mandate that people pay off their fines and fees before being permitted to vote did not violate the equal protection clause of the Constitution's Fourteenth Amendment.⁶⁴⁰

Lately, some of the most notorious prosecutions of people who mistakenly thought they were eligible to vote have occurred in Texas. In 2017, Sharen Wilson, the Republican district attorney of Tarrant County, which includes Fort Worth, sent a chilling message when she charged Crystal Mason, an African-American woman who was on supervised release after serving time for a federal tax fraud conviction, with voting illegally for filing a provisional ballot in the 2016 election.⁶⁴¹ Despite Mason's claims that she did not know she was ineligible to vote, she was sentenced to five years in prison by a state judge.⁶⁴² In March 2020, the ACLU asked the full court of the Second Circuit Court of Appeals to hear

⁶³⁹ *Id.*

⁶⁴⁰ Patricia Mazzei, *Ex-Felons in Florida Must Pay Fines Before Voting*, *Appeals Court Rules*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html> [<https://perma.cc/5TDN-WE45>].

⁶⁴¹ Sam Levine, *Racism Seen as Factor in Differing Sentences for Election Crimes in One Texas County*, HUFFPOST (Apr. 26, 2018), https://www.huffpost.com/entry/crystal-mason-voting-aclu_n_5cd5b788e4b0705e47dbddf2 [<https://perma.cc/8KXT-C7RE>] [hereinafter *Racism Seen as Factor*]; Sam Levine, *Civil Rights Groups Will Help Crystal Mason Appeal 5-Year Prison Sentence for Voting*, HUFFPOST (May 10, 2019), https://www.huffpost.com/entry/tarrant-county-voter-fraud_n_5ae20582e4b02baed1b7fcc2 [<https://perma.cc/RG29-ZVJG>] [hereinafter *Civil Rights Groups Will Help*].

⁶⁴² *Racism Seen as Factor*, *supra* note 641; *Civil Rights Groups Will Help*, *supra* note 641.

Mason's case after a three-judge panel of the federal court denied her appeal of the five-year sentence.⁶⁴³

Wilson also prosecuted Rosa Maria Ortega, a Mexican citizen with learning disabilities and mother of four, who mistakenly thought her green card status entitled her to vote.⁶⁴⁴ Wilson had the enthusiastic assistance of Ken Paxton, the state's Republican attorney general and a leading national figure in echoing Donald Trump's unfounded allegations that U.S. elections are rife with illegal voting.⁶⁴⁵ Wilson refused to negotiate a plea bargain and took the case to trial. Ortega, who said she considered herself a Republican and that she voted for Mitt Romney, was found guilty and received an eight-year prison sentence.⁶⁴⁶ After serving about nine months, Ortega was granted parole in December 2019. She then found herself facing a lifelong punishment as immigration authorities began deportation proceedings against her.⁶⁴⁷

At about the same time that Wilson was pursuing charges against Ortega and Mason, her office accepted a plea deal of five-months probation for Russ Casey, a white man who deliberately forged signatures to get on the

⁶⁴³ See *Court Issues Ruling in Crystal Mason's Appeal*, ACLU TEX. (Mar. 20, 2020), <https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html> [https://perma.cc/8DPE-YHGV].

⁶⁴⁴ *Shame on You, Fort Worth*, HOUS. CHRON. (Apr. 29, 2018), <https://www.houstonchronicle.com/opinion/editorials/article/Shame-on-you-Fort-Worth-Editoria-12870557.php> [https://perma.cc/44YH-CMVF].

⁶⁴⁵ Michael Wines, *Illegal Voting Gets Texas Woman 8 Years in Prison, and Certain Deportation*, N.Y. TIMES, (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html> [https://perma.cc/M3RH-3Y4Y].

⁶⁴⁶ *Id.*

⁶⁴⁷ Gus Garcia-Roberts, *Texas Woman Sentenced to Eight Years for Illegal Voting Paroled, Faces Deportation*, USA TODAY (Feb. 22, 2020), <https://www.usatoday.com/story/news/2020/02/21/rosa-maria-ortega-texas-woman-sentenced-8-years-illegal-voting-paroled-and-faces-deportation/4798922002/> [https://perma.cc/G5NR-X8WL].

primary ballot to win re-election as a justice of the peace.⁶⁴⁸ As the *Houston Chronicle* editorialized at the time,

In Tarrant County, Texas, the criminal justice system sends this message: If you're a [B]lack or Hispanic woman, you'd better make damn sure your vote is legal. If not, your children might have to grow up without their mother, because you might go to prison for a long, long time.⁶⁴⁹

In the 2019 and 2021 legislative sessions, voter suppression bills were a top priority for the Republican Party in Texas, which already has some of the most restrictive voting laws in the nation.⁶⁵⁰ A sweeping bill that would have raised penalties for election-related crimes was turned back in 2019, but Republicans succeeded in enacting other measures to further curtail voting rights in the Lone Star State, and in 2021 were likely to pass additional measures to make it harder to vote, especially in urban areas that had a record turnout in the 2020 elections.⁶⁵¹

⁶⁴⁸ See Anna M. Tinsley, *She Got 5 Years for Voting Illegally. This Judge Got Probation for Rigging His Election*, FORT WORTH STAR-TELEGRAM (Apr. 24, 2018), <https://www.star-telegram.com/news/politics-government/election/article209641279.html>.

⁶⁴⁹ *Shame on You, Fort Worth*, *supra* note 644.

⁶⁵⁰ Andrew Schneider, *Texas Is Among the Most Difficult Places to Vote in the U.S.—And That Could Be Softening Its Historic Turnout*, HOUS. PUB. MEDIA (Oct. 28, 2020), <https://www.houstonpublicmedia.org/articles/news/politics/election-2020/2020/10/28/384854/voter-suppression-blunts-historic-turnout-in-texas/> [<https://perma.cc/59DK-PX5F>]; see also Vicky Camarillo, *In the Texas Legislature's Final Days, Republicans Find New Ways to Attack Voting Rights*, TEX. OBSERVER (May 22, 2019), <https://www.texasobserver.org/in-the-texas-legislatures-final-days-republicans-find-new-ways-to-attack-voting-rights/> [<https://perma.cc/PTU8-SZFU>]; *86th Texas Lege a Killing Field for #cjreform*, GRITS FOR BREAKFAST (June 10, 2019), <https://gritsforbreakfast.blogspot.com/2019/06/86th-texas-lege-killing-field-for.html> [<https://perma.cc/YQ4V-HW5D>] [hereinafter *86th Texas Lege a Killing Field*]; Charlotte Klein, *Texas Republicans Are Taking Voter Suppression to the Next Level*, VANITY FAIR (Apr. 25, 2021), <https://www.vanityfair.com/news/2021/04/texas-republicans-are-taking-voter-suppression-to-the-next-level> [<https://perma.cc/5FR6-22L8>].

⁶⁵¹ Camarillo, *supra* note 650; Klein, *supra* note 650.

XXXII. THE OTHER CRIMINAL JUSTICE REFORM MOVEMENTS IN TEXAS

The excessive national praise garnered by Right on Crime in the media and with advocacy groups, politicians, and other public figures has deflected attention from its slim accomplishments in Texas and elsewhere when it comes to criminal justice reform. This hype has obscured the real obstacles to true criminal justice reform in Texas. It also has shrouded other more promising political developments that may finally turn Texas into a leader in efforts to dismantle the carceral state.

Summing up the state's record on criminal justice reform at the end of the legislative session in 2019, Scott Henson of the *Grits for Breakfast* blog concluded: "86th Texas Lege a killing field for #cjreform."⁶⁵² Eight years earlier, the TDCAA had reached a similar conclusion: "Most of the let-'em-out-early bills failed to pass, thanks to the opposition of prosecutors."⁶⁵³ This was no Texas-sized exaggeration. Like statewide associations of prosecutors in other states, the TDCAA remains a formidable obstacle to far-reaching reforms to slash the prison and jail population, improve the conditions of confinement, end cash bail, and rein in promiscuous civil asset forfeitures and other injustices, such as the jailing of people caught up in Class C misdemeanors. The TDCAA has opposed even modest reforms directed at the so-called non, non, nons—people convicted of non-serious, non-sexual, or nonviolent offenses.

To its credit, the TDCAA candidly acknowledges what many other so-called reformers do not: that serious reductions in the prison and jail population will only come about by reducing the penalties and time served for people convicted of serious crimes.⁶⁵⁴ But the association also calls for

⁶⁵² See *86th Texas Lege a Killing Field*, *supra* note 650.

⁶⁵³ *Legislative Summary of Regular Session*, TEX. DIST. & CNTY. ATT'YS ASS'N (June 1, 2012).

⁶⁵⁴ *Legislative Update: Week 8*, TEX. DIST. & CNTY. ATT'YS ASS'N (Mar. 3, 2017), http://attorneys1131.rssing.com/chan-9901008/all_p23.html#item447 [<https://perma.cc/6SFJ-SSRK>].

drawing a firm line in criminal justice reform between what it calls the “red meat”—people convicted of serious crimes—and others convicted of low-level offenses.⁶⁵⁵ “After all, if the people who gave us the phrase ‘We should be locking up the people we are afraid of, not the people we are mad at’ are now arguing for us to *release the people we are most afraid of*, there could be no end to this,” the association warned. “Prepare yourselves accordingly.”⁶⁵⁶

Compared to the prison building boom years of late 1980s and 1990s, Texas now has a growing number of powerful statewide and local organizations to counter the TDCAA, the police unions, and other opponents of real criminal justice reform. Groups that have been locked out for so long from political power in Texas have been pushing back to claim their rightful place in policymaking and politics. The electoral and political mobilization of low-income people, immigrants, African-Americans, Latinos, and other people disproportionately harmed by the carceral state has, among other things, helped turn once sleepy judicial and district attorney races into real political contests.

In other ways that have gone unheralded, Texas is poised to be a leader in dismantling the carceral state. Criminal justice issues in the Lone Star State receive more informed and extensive media coverage thanks to stalwarts like the award-winning *Texas Observer*; upstarts like the online, non-profit *Texas Tribune* established in 2009; and the outstanding work of individual journalists and bloggers, including Keri Blakinger, formerly of the *Houston Chronicle* and now at The Marshall Project, who spent nearly two years locked up herself; and, of course, Scott Henson of the *Grits for Breakfast* blog.⁶⁵⁷

⁶⁵⁵ *Id.*

⁶⁵⁶ *Id.*

⁶⁵⁷ Terry Gross, *From Convict to Criminal Justice Reporter: ‘I Was So Lucky to Come out of This’*, NPR (Dec. 12, 2018), <https://www.npr.org/sections/health-shots/2018/12/12/676041064/from-convict-to-criminal-justice-reporter-i-was-so-lucky-to-come-out-of-this> [https://perma.cc/F655-BJ8U].

Compared to many other states, Texas now has a dense network of advocacy groups that are producing first-rate reports on the vast injustices of the criminal legal system, sometimes with the help of national organizations that have local affiliates and state chapters in Texas, including the Innocence Project, the Appleseed Foundation, and the ACLU. And while the TDCJ can hardly be called transparent, it does collect and widely disseminate statistics and other data that are vital for tracking the carceral state and dismantling it, unlike departments of corrections in many other states. Furthermore, in 2015, Texas became one of the first states to mandate law enforcement agencies to provide detailed reports to the attorney general whenever police officers shoot someone.⁶⁵⁸ Faced with some intransigent police departments, lawmakers followed up two years later with a measure that permits the state to fine agencies that fail to provide timely and complete reports.⁶⁵⁹

On the electoral front, the failure of the Democrat Party to turn any statewide offices blue in the 2018 or 2020 elections has obscured the political realignment unfolding in Texas. Despite the Republican Party's voter suppression tactics, voter turnout surged in the 2018 midterm elections to rival that of presidential years.⁶⁶⁰ The Republican Party maintained its majority in the Texas House in 2018, but Democrats made substantial gains, picking up ten seats, which left them just nine seats shy of

⁶⁵⁸ *Hundreds of Police Departments in Texas, California Broke Laws on Reporting Police Shootings, Study Finds*, CBS NEWS (Oct. 10, 2016), <https://www.cbsnews.com/news/police-departments-texas-and-california-broke-law-reporting-police-shootings-study/> [<https://perma.cc/R953-5257>].

⁶⁵⁹ Jolie McCullough, *Texas Gov. Abbott Signs Bill to Enforce Reporting of Police Shootings*, TEX. TRIB. (June 15, 2017), <https://www.texastribune.org/2017/06/15/texas-police-shooting-reporting-fine/> [<https://perma.cc/E7U6-E4SG>].

⁶⁶⁰ Matt Zdun, *Texas Voter Turnout in 2018 Races Toward Presidential Election Year Levels*, TEX. TRIB. (Nov. 3, 2018), <https://www.texastribune.org/2018/11/02/early-voting-turnout/> [<https://perma.cc/593G-BX8W>]; Elbert Wang, *Look Up Texas Midterm Turn Out in Your County Against Historic Numbers*, TEX. TRIB. (Nov. 7, 2018), <https://www.texastribune.org/2018/11/07/texas-election-results-turnout-county-look-up/> [<https://perma.cc/D2AU-RGMP>].

becoming the majority party in the 150-member House.⁶⁶¹ As for the state Senate, Republicans lost two seats in 2018.⁶⁶²

Democrats also flipped four important intermediate state appeals courts to become the majority on half of the state's fourteen appeals courts by defeating nineteen incumbent Republican appellate judges.⁶⁶³ In Houston's Harris County, the Democratic Party completed a sweep of all county-wide races, ousting fifty-nine municipal court judges.⁶⁶⁴ Most of the victorious municipal judge candidates, including nineteen Black women who ran on the "Black Girl Magic" slate, supported cash bail reform, unlike their ousted opponents.⁶⁶⁵ In another upset victory, Harris County chose twenty-seven-year-old Lina Hidalgo, an ardent champion of criminal justice reform, as county judge, which is the top elected official in the county and a position akin to county chief executive elsewhere.⁶⁶⁶

As the Texas Legislature continued to dither over what to do about reforming cash bail, the newly elected misdemeanor court judges in Harris County, the state's most populous county, overhauled the bail system in early 2019 with the support of a majority of the county commissioners.⁶⁶⁷ In

⁶⁶¹ *Texas House of Representatives Elections, 2018*, BALLOTPEdia, https://ballotpedia.org/Texas_House_of_Representatives_elections_2018 [https://perma.cc/57XM-4DYR].

⁶⁶² *Texas State Senate Elections, 2018*, BALLOTPEdia, https://ballotpedia.org/Texas_State_Senate_elections [https://perma.cc/97PV-XV8V].

⁶⁶³ Emma Platoff, *Texas Democrats' Biggest Win on Election Night May Have Been the Courts*, TEX. TRIB. (Nov. 8, 2018), <https://www.texastribune.org/2018/11/08/texas-courts-appeals-2018-midterms-beto-orourke/> [https://perma.cc/VY7Y-QHRC]; *Viewing the 2018 Mid-Terms Through a Texas #cjreform Lens*, GRITS FOR BREAKFAST (Nov. 7, 2018), <https://gritsforbreakfast.blogspot.com/2018/11/viewing-2018-mid-terms-through-texas.html> [https://perma.cc/BR8A-BNNE].

⁶⁶⁴ Platoff, *supra* note 663.

⁶⁶⁵ *About the BGM Campaign*, HARRIS CNTY. BLACK GIRL MAGIC, <http://harrisblackgirlmagic.com/about/> [https://perma.cc/ADL2-EKXT].

⁶⁶⁶ Ciara O'Rourke, *The Latina Progressive Who Faced Down Texas Republicans*, POLITICO (Sept. 2, 2020), <https://www.politico.com/news/magazine/2020/09/02/latina-progressive-texas-lina-hidalgo-407001> [https://perma.cc/P32Y-VMEM].

⁶⁶⁷ Gabrielle Banks, *Harris County Judges Unveil Drastic New Plan for Releasing Defendants on No-Cash Bail*, HOUS. CHRON. (Jan. 16, 2019),

July 2019, by a divided 3–2 vote along party lines, the Harris County commissioners approved a settlement in a federal class action suit filed in 2016 by civil rights groups about the bail system.⁶⁶⁸ This was the first case to put the country's cash bail system on trial in federal court.⁶⁶⁹

Criminal justice reform has become a leading issue in some district attorney races in Texas.⁶⁷⁰ After sparring over who was the real criminal justice reformer, Democrat John Creuzot, who is African-American, defeated Republican incumbent Faith Johnson in the 2018 race for district attorney in Dallas.⁶⁷¹ In Fort Bend, an affluent Houston suburb, African-American Brian Middleton defeated Cliff Vacek, the heir apparent of John Healey, one of the state's most conservative district attorneys who had been in power for more than a quarter of a century.⁶⁷²

In Texas, as elsewhere, some district attorney candidates who ran as progressives or reformers have pursued disappointing policies once in office. After running on a reform platform, Democrat Kim Ogg unsuccessfully sought to hire an additional 102 prosecutors in Houston's

<https://www.chron.com/news/houston-texas/houston/article/Harris-County-judges-to-unveil-drastic-new-plan-13541189.php> [<https://perma.cc/8CKZ-PEEV>]; Jolie McCullough, *Courts Have Called Texas Bail Practices Unconstitutional. Will that Push This Year's Reform Efforts to Success?*, TEX. TRIB. (Feb. 4, 2019), <https://www.texastribune.org/2019/02/04/bail-reform-texas-legislature-bills-filed/> [<https://perma.cc/D3TU-CLQP>].

⁶⁶⁸ McCullough, *supra* note 667.

⁶⁶⁹ *Id.*

⁶⁷⁰ Farah Stockman, *How 'End Mass Incarceration' Became a Slogan for D.A. Candidates*, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/us/texas-district-attorney-race-mass-incarceration.html> [<https://perma.cc/XC6M-384L>].

⁶⁷¹ Bill Zeeble, *Democrat John Creuzot Soundly Defeats Dallas County District Attorney Faith Johnson*, KERA NEWS (Nov. 7, 2018), <https://www.keranews.org/politics/2018-11-07/democrat-john-creuzot-soundly-defeats-dallas-county-district-attorney-faith-johnson> [<https://perma.cc/2VWE-NX8L>].

⁶⁷² Brooke A. Lewis & Emily Burleson, *Fort Bend County Democrat Wins District Attorney Race and Longtime GOP County Judge Defeated*, HOUS. CHRON. (Nov. 7, 2018), <https://chron.com/news/houston-texas/houston/article/Fort-Bend-County-Democrat-leading-for-district-13369275.php> [<https://perma.cc/4C56-LSHA>].

Harris County.⁶⁷³ The County Commissioners Court rejected her request but approved a major increase in the public defender budget.⁶⁷⁴ Ogg subsequently announced a controversial program in which her office would use pro bono law firm attorneys to help prosecute misdemeanor cases.⁶⁷⁵ Ogg also tried to scuttle the proposed bail reform settlement in Houston.⁶⁷⁶ In opposing the agreement, she not so subtly invoked the political ghost of the infamous race-baiting Willie Horton commercials that helped sink Michael Dukakis's 1988 campaign and catapulted George H.W. Bush into the White House.⁶⁷⁷

Reformist district attorneys—whose decarceration measures are far more modest than prosecutors like Larry Krasner in Philadelphia and Chesa Boudin in San Francisco—have faced significant pushback from other public officials and law enforcement groups. After Dallas District Attorney John Creuzot announced in spring 2019 that his office would no longer prosecute certain low-level drug and shoplifting cases, the city's large and powerful police officers' union called for his removal.⁶⁷⁸ Governor Abbott

⁶⁷³ Zach Despart & Keri Blakinger, *Kim Ogg's Request for 100 More Prosecutors Criticized by Reformers*, HOUS. CHRON. (Feb. 4, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Ogg-at-odds-with-progressives-over-push-for-more-13599424.php> [https://perma.cc/JE63-PNL5].

⁶⁷⁴ *The Politics of Prosecutors*, APPEAL, <https://theappeal.org/political-report/the-politics-of-prosecutors/> [https://perma.cc/5JNR-J9LB].

⁶⁷⁵ Sarah Lustbader, *In Texas, Prosecutions Gets Privatized*, APPEAL (Feb. 27, 2020), <https://theappeal.org/in-texas-prosecution-gets-privatized/> [https://perma.cc/R99A-J6RR].

⁶⁷⁶ *A First-Cut Reaction to Harris-County DA Kim Ogg's Reasons for Opposing Bail Reform*, GRITS FOR BREAKFAST (Aug. 23, 2019), <https://gritsforbreakfast.blogspot.com/2019/08/a-first-cut-reaction-to-harris-county.html> [https://perma.cc/Y6F7-A6TA].

⁶⁷⁷ Daniel Nicheanian, *Federal Judge Rebukes Houston DA for Using the Willie Horton Strategy*, APPEAL (Sept. 12, 2019), <https://theappeal.org/politicalreport/houston-bail-reform-and-willie-horton-strategy-harris/> [https://perma.cc/C4UD-YN4V].

⁶⁷⁸ Catherine Marfin, *Texas Prosecutors Want to Keep Low-Level Criminals Out of Overcrowded Jails. Top Republicans and Police Aren't Happy*, TEX. TRIB. (May 21, 2019), <https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/> [https://perma.cc/ET5Z-4NNC].

denounced the new policies as “socialism” and “wealth redistribution by theft.”⁶⁷⁹

In the 2020 election, the Republican Party preserved its longtime dominance of the state’s two top civil and criminal courts, with all seven Republican incumbents winning re-election.⁶⁸⁰ This outcome is not so surprising, as the Democratic Party has not won a statewide election in Texas since 1994, and the Republican Party has held all the seats on the Texas Supreme Court and the Court of Criminal Appeals for decades.⁶⁸¹ As in 2018, the real action for criminal justice reform was in down-ballot races. The Democratic Party’s hopes to gain nine seats to take over the Texas House were dashed by a dismal showing in which the party did not gain a single seat. But in the state Senate, Republicans lost one seat and therefore its supermajority, which had allowed the party to singlehandedly control what bills to bring to the floor of the legislature.⁶⁸²

In November 2020, the Democratic Party and key criminal justice reformers made major advances in district attorney races and lower-level

⁶⁷⁹ Ariel Ramchandani, *A Texas Prosecutor Fights for Reform*, ATLANTIC (Oct. 24, 2019), <https://www.theatlantic.com/politics/archive/2019/10/can-john-creuzot-reform-texas-prosecution/600592> [<https://perma.cc/W9VZ-B9KT>]; Sarah Sarder, *‘That’s Socialism’: Texas Gov. Abbott Says Dallas DA’s Justice Reform Plan Is ‘Wealth Redistribution’*, DALL. MORNING NEWS (Apr. 15, 2019), <https://www.dallasnews.com/news/politics/2019/04/15/that-s-socialism-texas-gov-abbott-says-dallas-da-s-justice-reform-plan-is-wealth-distribution/> [<https://perma.cc/C39T-S9AU>].

⁶⁸⁰ *Texas Supreme Court Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/Texas_Supreme_Court_elections,_2020 [<https://perma.cc/VQ4F-VVKV>].

⁶⁸¹ Raga Justin, *Republicans Take Leads in Races for Texas Supreme Court, Court of Criminal Appeals*, HOUS. CHRON. (Nov. 3, 2020), <https://www.houstonchronicle.com/news/article/Republicans-take-early-lead-in-races-for-top-15699234.php> [<https://perma.cc/3Q28-BTQ9>]; Emma Platoff, *Pointing to Pandemic and Election Controversies, Democrats Make Their Case for Texas Supreme Court*, TEX. TRIB. (Oct. 24, 2020), <https://www.texastribune.org/2020/10/24/texas-supreme-court-candidates-pandemic/> [<https://perma.cc/YE3J-RCXJ>].

⁶⁸² Patrick Svitek, *On Election Day, Republicans Lost a Critical Advantage in State Senate*, TEX. TRIB. (Dec. 2, 2020), <https://www.texastribune.org/2020/12/02/texas-dan-patrick-senate-three-fifths-rule/> [<https://perma.cc/B7Y5-EFHL>].

judicial contests. Eight Democrats won intermediate appellate court races in Dallas, Austin, San Antonio, El Paso, and Houston, sweeping aside seven Republican incumbents, while five Republican appellate candidates won contests in Houston and elsewhere.⁶⁸³ In Dallas, Democrats completely swept the Fifth Court of Appeals, ousting all three Republican incumbents.⁶⁸⁴ As recently as 2014, Republicans swept all seventy-three of the judicial races in the city of Dallas.⁶⁸⁵ By 2020, Democrats were in control of all of these judgeships.⁶⁸⁶

Thanks to the 2020 election, the city of Austin is poised to be a catalyst of real criminal justice reform in Texas. Voters chose José Garza, a former public defender and labor and immigrant rights attorney, as district attorney of Travis County, which includes the city of Austin. “We use our criminal justice system like a rug we sweep our problems underneath so we don’t have to look at them,” he declared last June.⁶⁸⁷ Austin voters also elected former city council member Delia Garza, an outspoken critic of the Austin police department, as Austin County Attorney.⁶⁸⁸

⁶⁸³ Angela Morris, *Democrat Judges Sweep 8 Appellate Benches Across Texas, But Republicans Keep Some Strongholds*, LAW.COM (Nov. 4, 2020), <https://www.law.com/texaslawyer/2020/11/04/democrat-judges-sweep-8-appellate-benches-across-texas-but-republicans-keep-some-strongholds/> [<https://perma.cc/66A7-GV76>].

⁶⁸⁴ *Id.*

⁶⁸⁵ HARRIS ELECTIONS ADM’R’S OFF., CUMULATIVE REPORT – OFFICIAL (Nov. 14, 2014), <https://www.harrisvotes.com/HISTORY/20141104/cumulative/cumulative.pdf> [<https://perma.cc/MP68-UBQS>].

⁶⁸⁶ HARRIS ELECTIONS ADM’R’S OFF., CUMULATIVE REPORT – OFFICIAL (Nov. 16, 2020), <https://www.harrisvotes.com/HISTORY/20201103/Official%20Cumulative.pdf> [<https://perma.cc/ZL3X-W9YF>].

⁶⁸⁷ Daniel Nichanian, *Austin and Orlando Elect Prosecutors Who Vow to Fight Mass Incarceration*, APPEAL (Nov. 3, 2020), <https://theappeal.org/politicalreport/jose-garza-monique-worrell-criminal-justice-reform/> [<https://perma.cc/B867-ZFZ7>]; Michael Barajas, *José Garza Redefines ‘Progressive Prosecutor’*, TEX. OBSERVER (Nov. 2, 2020), <https://www.texasobserver.org/jose-garza-redefines-progressive-prosecutor/> [<https://perma.cc/D9QN-KCR9>].

⁶⁸⁸ Jacquelyn Powell, *Delia Garza Lays Out Plans for Change as New Travis County Attorney*, KXAN (July 15, 2020), <https://www.kxan.com/news/local/travis-county/delia->

In short, Texas is in the midst of a deeper political transformation that has radically changed the political landscape compared to thirty years ago at the height of the prison boom or even fifteen years ago when mass incarceration was not yet a national issue. The ballyhooed Right on Crime approach is fundamentally at odds with this transformation. So are some of its leaders, who are top-shelf conservatives. Right on Crime promotes a narrow, top-down, fundamentally conservative approach to criminal justice reform that tinkers around the edges of the carceral state without spurring a major contraction. Uncritical promulgation of this elite-driven, reportedly win-win political model of criminal justice reform has come at a high political cost. This approach rests on a pragmatic vision of politics that is actually deeply ideological and incapable of ameliorating the country's most pressing problems—from mass incarceration to global warming to massive economic and political inequality.

garza-lays-out-plans-for-change-as-new-travis-county-attorney/ [https://perma.cc/2GDZ-QA8X].