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## Power and Procedure in Texas Bail-Setting

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# POWER AND PROCEDURE IN TEXAS BAIL-SETTING

*Amanda Woog & Nathan Fennell\**

## ABSTRACT

*As advocates', lawyers', and legislators' bail reform efforts intensify in Texas and throughout the country, we consider the limits of pretrial procedural protections when judges do not follow the law, access to courts is limited, and people do not have quality assistance of counsel. Given this reality in most bail-setting courts in Texas, formal procedural requirements, like mandating that bail-setting magistrates consider certain factors when making initial bail decisions, do not achieve their promise. More than a procedural or legal problem to be addressed, we consider the nation's addiction to pretrial detention as one that was created by—and must be addressed through—exercises of social and political power. We identify ways that organizers are working to shift power in the pretrial context, encourage lawyers and activists alike to think about legal change in this arena as a necessary but not sufficient condition for meaningful reform, and hope to inspire further collaboration toward the power-shifting goals we see as necessary for long-term success.*

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## I. INTRODUCTION

CASH is an unjust and ineffective proxy for determining whether a person should be detained pretrial.<sup>1</sup> The cash bail system has resulted in millions of people being caged pretrial simply because they lack the financial resources to purchase their liberty.<sup>2</sup> Compounded by racialized policing and court practices, the money bail system disproportionately targets Black and poor people, operating as a system of racial control.<sup>3</sup> The impacts are profound: families are separated,<sup>4</sup> jobs and housing have been lost,<sup>5</sup> and the people in jail pretrial face a greater

1. See *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1132 (S.D. Tex. 2017), *aff'd in part, reversed in part*, 882 F.3d 528 (5th Cir. 2018), *withdrawn and substituted by* 892 F.3d 147 (5th Cir. 2018) (“The reliable evidence in the present record shows no meaningful difference in pretrial failures to appear or arrests on new criminal activity between misdemeanor defendants released on secured bond and on unsecured financial conditions. But even a few days in pretrial detention on misdemeanor charges correlates with—and is causally related to—higher rates of failure to appear and new criminal activity during pretrial release and beyond. Misdemeanor pretrial detention is causally related to the snowballing effects of cumulative disadvantage that are especially pronounced and pervasive for those who are indigent and African-American or Latino.”); see also Lisa Foster, Off. for Access to Just., Remarks at the American Bar Association’s 11th Annual Summit on Public Defense (Feb. 6, 2016) <https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit> [https://perma.cc/C29W-425K] (“Bail exacerbates and perpetuates poverty because of course only people who cannot afford the bail assessed or to post a bond—people who are already poor—are held in custody pretrial. As a consequence, they often lose their jobs, may lose their housing, be forced to abandon their education, and likely are unable to make their child support payments.”); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1354 (2014) (“[Being jailed] increases the likelihood that detainees will commit future crimes, substantially impacts the quality of their defense, and encourages plea bargains—all of which increase the likelihood that the detainee will be convicted, imprisoned, and subjected to prolonged deprivation of liberty, privacy, and other fundamental elements of human existence.”); CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, ARNOLD FOUND., *THE HIDDEN COSTS OF PRETRIAL DETENTION*, 10–11 (2013) [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf) [https://perma.cc/C965-YKLJ] (finding correlation between pretrial detention and increased likelihood of failures to appear, new criminal activity, and post-disposition recidivism).

2. See John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems*, ABA (Nov. 30, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/economic-justice/criminal-justice-debt-problems/#:~:text=nationwide%2C%20more%20than%2060%20percent,cannot%20afford%20to%20post%20bail.&text=A%20study%20out%20of%20Kentucky,commit%20another%20low%2Dlevel%20offense](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/#:~:text=nationwide%2C%20more%20than%2060%20percent,cannot%20afford%20to%20post%20bail.&text=A%20study%20out%20of%20Kentucky,commit%20another%20low%2Dlevel%20offense) [https://perma.cc/ZFA9-R95E].

3. Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 938 (2013) (noting that “nearly every study” on the topic has found that African Americans are disproportionately affected); see also Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. (forthcoming 2022) (“[T]he [criminal] court system largely legitimizes and perpetuates the racialized violence and control of police and prisons widely criticized by abolitionists.”).

4. SANETA DE VUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CTR. FOR HUM. RTS., *WHO PAYS? THE TRUST COST OF INCARCERATION ON FAMILIES 31–35* (2015) (describing the impact on families from forced separation by incarceration).

5. LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., *JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION* 4 (2019) (“Studies on pretrial detention have found that even a small number of days in custody awaiting trial

chance of conviction and longer sentences.<sup>6</sup>

Using access to cash to determine whether a person is jailed or freed pretrial also raises constitutional issues. People who cannot pay cash bail or the typical 10% bondsman's fee for release are held "pretrial,"<sup>7</sup> while those who can pay the set amount are freed, despite the U.S. Supreme Court's having long held that "the State . . . may not . . . imprison a person solely because he lacked the resources to pay [a fine or restitution]." That case, *Bearden v. Georgia*,<sup>8</sup> and *United States v. Salerno*,<sup>10</sup> which affirmed the importance of procedural protections for people detained pretrial without bail in the federal system, are now being used in federal courts to challenge state and local cash bail systems.<sup>11</sup>

As a result, the past five years have seen significant litigation and doctrinal development around the constitutional framework for setting bail in local courts. Though it failed to answer the substantive question of when a person's pretrial liberty may be restrained by the state, *ODonnell v. Harris County* represented the most significant legal development in Texas in generations by setting the procedural bar for how judges should initially set bail—establishing that judges cannot automatically set an unaffordable bail without considering whether some other amount and type of bail condition would be appropriate.<sup>12</sup> However, our observations on the ground show that the procedural protections against wealth-based detention that *ODonnell* promised are rarely, if ever, being realized in local courts. Courts continue to decline to inquire into defendants' financial situations, making it impossible to comply with *ODonnell*'s requirement that courts take into account ability to pay when setting bail.<sup>13</sup> Put simply, these courts routinely violate settled constitutional law.

In criminal courts across the country, there is an enormous gap between established constitutional law and everyday practice.<sup>14</sup> Using *ODonnell* and its impact on the ground as a case study, this Essay ad-

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can have many negative effects, . . . harming [the arrestees'] housing stability and employment status.").

6. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 (2012) ("Several studies show that incarcerated defendants are more likely than those released pretrial to be found, or to plead, guilty and serve prison time.").

7. Pretrial is largely a misnomer with less than 3% of state and federal criminal cases going to trial. RICK JONES, GERALD B. LEFCOURT, BARRY J. POLLACK, NORMAN L. REIMER & KYLE O'DOWD, NAT'L ASS'N CRIM. OF DEF. LAWS. THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018).

8. *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983).

9. *Id.*

10. 481 U.S. 739, 746 (1987).

11. *See, e.g.*, *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018).

12. *Id.* at 157–61.

13. *See id.* at 163 ("[T]he County must implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances, taking into account . . . ability to pay.").

14. ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 15 (2019) (observing constitutional violations of poor people's rights in criminal courts "are simultaneously illegal and the norm"); *see also* Justin Murray, *Policing Procedural Errors in the Lower Criminal Courts*, 89 FORDHAM. L. REV.

dresses a straightforward problem: local courts are not complying with established law. We argue that the enforcement issue is not one of doctrine or process, but rather one of power. Drawing on a range of grass-roots organizing strategies already at work,<sup>15</sup> we propose power-shifting approaches to enforce constitutional law. We see these approaches as part of a broader movement to shift power away from state actors and toward impacted people and communities.<sup>16</sup>

## II. WHEN COURTS IGNORE THE LAW

Maranda ODonnell was twenty-two years old with a four-year-old daughter when she was arrested for a misdemeanor traffic offense in Harris County, Texas.<sup>17</sup> Her bail was set at \$2,500, and because she could not pay that amount or a bondsman's fee, she was detained in the Harris County Jail.<sup>18</sup> She told counsel, "I was never asked if I could afford my bail . . . I live paycheck to paycheck[.] I'm worried about whether my job will still be there when I get out. I cannot afford to buy my release from jail."<sup>19</sup>

In 2016, attorneys with Civil Rights Corps, Susman Godfrey LLP, and Texas Fair Defense Project filed a class-action lawsuit on behalf of Ms. ODonnell and others in the Harris County Jail who were detained on misdemeanor charges and could not afford bail.<sup>20</sup> The lawsuit "alleg[ed] that Harris County's postarrest incarceration policies and practices imposed a 'wealth-based detention system' of keeping misdemeanor defendants in jail only because they could not pay secured money bail, while those who could pay were promptly released, in violation of the Fourteenth Amendment's Equal Protection and Due Process Clauses."<sup>21</sup> After an eight-day evidentiary hearing in 2017, the district court granted the plaintiff's motion for preliminary injunctive relief, making extensive find-

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1411, 1412–13 (2020) (describing how lower courts allowed routine shackling of people charged with crimes, despite the requirement of individualized circumstances).

15. See Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 853 (2021) ("[M]ovement law scholars study actually existing forms of social movement resistance: campaigns for legal and political change as well as prefigurative arrangements or experiments. The work shows a care and a concern for the unique contributions of social movements not simply in representing subordinated peoples, but as a locus for experiments, processes, and imaginations for transformational change.").

16. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 803 (2021) ("The power lens gets at a separate objective, broadly stated as shifting power away from the police and toward the populations who are policed, people who are often poor and Black, Latinx, or Indigenous."); Clair & Woog, *supra* note 3 (identifying power-shifting as an abolitionist strategy); see also Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 795 (2018) (describing the limitations of a litigation-based reform strategy).

17. Memorandum and Opinion Approving the Proposed Consent Decree and Settlement Agreement, *ODonnell v. Harris County*, No. 4:16-cv-01414, 2019 WL 6219933, at \*1 (S.D. Tex. Nov. 21, 2019).

18. *ODonnell v. Harris County*, 227 F. Supp. 3d 706, 722 (S.D. Tex. 2016).

19. Memorandum and Opinion Approving the Proposed Consent Decree and Settlement Agreement, *supra* note 17, at \*1.

20. *Id.* at \*47.

21. *Id.* at \*3.

ings of fact and conclusions of law.<sup>22</sup>

The defendants appealed, and in 2018, the Fifth Circuit decided *ODonnell v. Harris County*,<sup>23</sup> later described as both “historic”<sup>24</sup> and “ground-breaking.”<sup>25</sup> The Fifth Circuit decision affirmed that the Harris County bail system violated the due process and equal protection rights of people arrested for misdemeanors by setting bail without any meaningful consideration of what amount the person could pay or whether any other non-monetary conditions would reasonably accomplish the same goals as secured cash bail.<sup>26</sup> The panel primarily relied on factual evidence that magistrates were using a bail schedule to set money bail for people arrested on misdemeanors after only a cursory consideration of the allegations and without inquiring into the person’s financial situation, and that they were categorically denying arrestees personal bonds at the direction of elected judges who hired them.<sup>27</sup> For people without access to cash, money bail was a de facto detention order.<sup>28</sup>

The *ODonnell* court stuck a procedural band-aid on the wealth-based detention problem the plaintiffs sought to redress. Rather than providing clear guidance on the circumstances under which the state may detain a person pretrial, the court presented a scheme of procedural protections that must be afforded to a person who is to be detained pretrial on money bond.<sup>29</sup> Though the *ODonnell* court left open the question of whether a person can be detained pretrial when alternative conditions of release would adequately serve the government’s interests, *ODonnell*’s procedural requirements should have still been a shake-up for the Texas criminal

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22. *Id.* at \*4.

23. 892 F.3d 147 (5th Cir. 2018).

24. Gabrielle Banks, *Appeals Court Approves Most of Federal Ruling that Harris County’s Bail Practices Unconstitutional*, HOUS. CHRON. (Feb. 14, 2018), <https://www.chron.com/news/houston-texas/houston/article/Appeals-court-affirms-federal-ruling-on-Harris-12614456.php> [<https://perma.cc/2EGK-LKH5>]; see also Meagan Flynn, *In Historic Decision, Federal Judge Says Harris County Bail System Is Unfair to the Poor*, HOUS. PRESS (Apr. 28, 2017), <https://www.houstonpress.com/news/federal-judge-says-harris-county-bail-system-is-unfair-to-poor-defendants-9397124> [<https://perma.cc/JTZ7-APY>].

25. Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 91–92 (2018) (“The ongoing role of class in the adjudication of cases involving fundamental rights was also recently on display in a groundbreaking set of criminal procedure cases involving money bail.”).

26. See *ODonnell*, 892 F.3d at 163.

27. See *id.*

28. *Id.* at 154.

29. *Id.* at 163 (“[T]he County must implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee’s circumstances, taking into account the various factors required by Texas state law (only one of which is ability to pay). These procedures are: notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker.”). William Stuntz has argued that judge-created criminal constitutional procedure “has substantial unappreciated costs,” including incentivizing overcriminalization, creating protections much more likely to be available to rich defendants, and raising the potential for racial discrimination. See generally William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3, 30 (1997). Rather, courts should intervene in other non-procedural ways: through substantive constitutional regulation and requirements for defense funding. See *id.* at 75–76.

courts that determine bail.<sup>30</sup> Courts may not automatically assign secured money bail in every case;<sup>31</sup> rather, they are required to consider each person's case individually—including the person's ability to pay a secured bail and whether unsecured bail would be more appropriate—before setting an amount and type of bail.<sup>32</sup>

Despite *ODonnell*'s having been decided in 2018, Texas courts frequently violate its central holding. The practices that led to the *ODonnell* ruling—routine setting of money bail for misdemeanor offenses without meaningful consideration of the person's individual circumstances or ability to pay<sup>33</sup>—are ubiquitous in Texas. After *ODonnell* it is clear that, as a matter of law, those practices are unconstitutional,<sup>34</sup> yet there has been no indication that courts or counties across Texas have changed their practices to comply with this newly clarified constitutional requirement. Rather, available evidence suggests that the Fifth Circuit's ruling in *ODonnell* has not led to any meaningful change in the vast majority of Texas jurisdictions, which continue to violate the Constitution with their bail-setting practices. Below, we summarize this evidence.

First, evidence from pending court cases reveals no significant changes in bail practices following the Fifth Circuit's *ODonnell* ruling. In *Daves v. Dallas County*, video evidence from July 2018 “reveal[ed] that Magistrate Judges routinely deny personal release bonds. The vast majority of arrestees are instead given secured financial conditions of release.”<sup>35</sup> It also showed “Magistrate Judges still routinely treat the [bail] schedules as binding, and make no adjustment in light of an arrestee's inability to pay.”<sup>36</sup> These are remarkably similar practices to those struck down by federal courts in Harris County in 2018.<sup>37</sup> Galveston County similarly continued to operate an unconstitutional bail schedule, even after the

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30. See *ODonnell*, 892 F.3d at 164–66.

31. We use the term “secured money bail” to refer to money that must be paid, in the form of cash or a surety bond, before a person can be released from jail, which in Texas correlates with a “bail bond.” TEX. CODE CRIM. PROC. ANN. art. 17.02 (West 2015). This is different from “unsecured money bail,” which allows someone to be released from jail without paying money up-front, but with the promise that if you do not appear in court, you will pay the set amount to the court. *ODonnell*, 892 F.3d at 153. In Texas, that is referred to as a “personal bond.” TEX. CODE CRIM. PROC. ANN. art. 17.03 (West 2017). Once a person has been arrested, there is no mechanism in Texas law to release them without either a secured or unsecured financial bond, unlike many states that have some version of a “release on recognizance” option available. Ryan Kellus Turner & Henry W. Knight, *Making it Personal in the Age of Bail Reform: The Misunderstanding, Utility, and Limits of Personal Bonds in Texas*, 20 TEX. TECH ADMIN. L.J. 67, 74–75 (2019).

32. TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 1993). Even prior to *ODonnell*, many courts had been ignoring article 17.15(4), which describes the factors a magistrate must consider when setting bail and requires that “[t]he ability to make bail is to be regarded, and proof may be taken upon this point.” *Id.* art. 17.15(4).

33. *ODonnell*, 892 F.3d at 153.

34. *Id.* at 161.

35. *Daves v. Dallas County*, 341 F. Supp. 3d 688, 692 (N.D. Tex. 2018), *aff'd in part and remanded*, 984 F.3d 381 (5th Cir. 2020), *reh'g en banc granted, order vacated*, 988 F.3d 834 (5th Cir. 2021).

36. *Id.*

37. See *id.* at 691–93.

Fifth Circuit's first ruling in *ODonnell*.<sup>38</sup>

Second, in other parts of Texas where it is possible to observe bail-setting,<sup>39</sup> we have seen no meaningful consideration of ability to pay or alternatives to cash bail. Texas Fair Defense Project staff members and interns have observed magistration proceedings in multiple counties since the *ODonnell* ruling and have heard from people who have been the subjects of those hearings in many counties. In courts where people do not have defense counsel at bail-setting hearings (the vast majority of courts), magistrates continue not to inquire into or consider ability to pay bail, violating the Fifth Circuit's requirements.

Finally, both before and after *ODonnell*, magistrates setting bail in Texas typically do not ask people about their finances before setting bail, which makes it impossible for them to consider that person's ability to pay. In most counties, the only time a court considers finances is if the person requests a court-appointed lawyer and fills out a financial affidavit for the purposes of appointment of counsel.<sup>40</sup> But that often happens after the magistrate has already set bail, and the magistrate does not even look at the financial affidavit (in many counties still referred to as a "pauper's oath") unless they are also tasked with appointing counsel.<sup>41</sup> Some counties still maintain a written bond schedule on their websites.<sup>42</sup>

This is not just a Texas problem. Researchers in Georgia found that statewide practices there had largely failed to shift after new federal appellate and state legislative requirements mandating that magistrates consider ability to pay when setting bail.<sup>43</sup> After the Eleventh Circuit's opinion in *Walker v. City of Calhoun*<sup>44</sup> and a new state statute explicitly requiring ability-to-pay findings before setting misdemeanor bail, researchers found that less than half of the counties in the study made any financial inquiry at all before setting bail.<sup>45</sup> Only two counties engaged in the "full financial evaluation required by [Georgia law]."<sup>46</sup> Texas is not unique, then, in the judiciary's refusal to consider someone's finances

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38. *Booth v. Galveston County*, 352 F. Supp. 3d 718, 730, 744 (S.D. Tex. 2019), *argued* No. 19-40785 (5th Cir. Aug. 3, 2020) ("[A]lthough the County contends that 'steps have been taken to put in place additional procedural safeguards to ensure an arrestee's ability to pay is taken into consideration,' the record is not altogether clear as to what actual changes have been made to the County's bail setting process.").

39. The difficulty of observing these hearings and the impact of that opacity on the potential for systemic change is discussed *infra*, Section III(A).

40. *See, e.g., Booth*, 352 F. Supp. 3d at 725–26 (describing one such practice in Galveston County in 2018).

41. *See id.* at 726.

42. *E.g., Standard Bond Schedule*, LEON CNTY, TEX., <https://www.co.leon.tx.us/page/leon.DCCriminal> [<https://perma.cc/CZ5G-N6SP>].

43. Andrea Woods, Sandra G. Mayson, Lauren Sudeall, Guthrie Armstrong & Anthony Potts, *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia*, 54 GA. L. REV. 1235, 1269–70 (2020).

44. 901 F.3d. 1245, 1272 (11th Cir. 2018) ("[B]ecause [the City] has effectively conceded that its original bail policy was unconstitutional, the district court may enjoin a return to that original policy.").

45. Woods et al., *supra* note 43, at 1256.

46. *Id.*



before assessing cash bail in the face of clear legal mandates to do so.<sup>47</sup> Acknowledging and reckoning with the failure of judges to comply with settled bail law is especially necessary in this moment, as counties and states across the country undertake “bail reform.”<sup>48</sup>

Thus, people who get arrested in Texas today fare largely the same as they did before the *ODonnell* ruling. The procedural requirements established by the court have not been widely adopted by bail-setting magistrates, whose intransigence is enabled by the lack of accessibility to those proceedings and the lack of a robust institutional public defense function to ensure that the law will be applied in individual cases.<sup>49</sup>

### III. POWER SHIFTING TO ENFORCE CONSTITUTIONAL RIGHTS

The experience post-*ODonnell* lays bare the fact that legal doctrine is not self-executing; it requires judges and other powerful actors to follow and implement it. Even more, judges have shown that we cannot depend on them to recognize or enforce the constitutional rights of poor people in their day-to-day courtroom practices. There have been historic moments of constitutional crisis in the United States when other branches of government refused to comply with constitutional law; for example, when governors refused to desegregate schools following *Brown v. Board of*

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47. For an exploration of the problem of lower courts not implementing or complying with the law, see Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 903 (2015) (challenging the assumption “that courts nearly always comply with controlling doctrine, except perhaps in areas of profound political or cultural disagreement”).

48. The highest courts in Massachusetts, *Brangan v. Commonwealth*, 80 N.E.3d 949, 954 (Mass. 2017), and California, *In re Humphrey*, 482 P.3d 1008, 1021 (Cal. 2021), have recently ruled that courts must take into account a defendant’s financial resources when setting bail amounts. Unfortunately, some evidence suggests that these new requirements have had minimal impact on the states’ respective pretrial detention practices. See GEN. CT. OF MASS., FINAL REPORT OF THE SPECIAL COMMISSION TO EVALUATE POLICIES AND PROCEDURES RELATED TO THE CURRENT BAIL SYSTEM 12 n.11 (2019) (finding that release and detention statistics “remained largely consistent” when comparing the seventeen-month periods before and after the *Brangan* decision); JOHANNA LACOE, ALISSA SKOG & MIA BIRD, CAL. POL’Y LAB, BAIL REFORM IN SAN FRANCISCO: PRETRIAL RELEASE AND INTENSIVE SUPERVISION INCREASED AFTER HUMPHREY 1 (2021) (finding a slight increase in releases but a significant increase in pretrial supervision conditions and no measurable effect on the overall jail population in San Francisco following the *Humphrey* decision).

49. The term “magistrate” under Texas law includes essentially any judge of any court with authority over any other function, including a number of judicial positions explicitly established for the purpose of making bail decisions. TEX. CODE CRIM. PROC. ANN. art. 2.09 (West 2021). While any magistrate can set initial bail in a case, in practice it is often done by some combination of justices of the peace and municipal judges in more rural areas, and by dedicated bail hearing officers in more densely populated areas. We use the term “magistrate” to refer to any judicial officer who sets the initial bail in a case but will not preside over the case later if charges are formally filed, which is how the vast majority of bail-setting occurs in Texas. Some are directly elected, such as justices of the peace; some are appointed or hired by the locally elected judges and report to them, like the hearing officers in Harris County; and others are hired by the mayor or city council on a fixed-term contract, such as many municipal court judges.

*Education*, revealing the lack of judicial power to *execute* the law.<sup>50</sup> But what happens when judges do not execute the law in the one place where they have the power to do so: their own courtroom? What of the routine constitutional violations that occur on a daily basis in criminal courts across the country? How do we get Texas courts to comply with settled bail law?

Power is at the root of the problem: judges do not follow the law because they have the power to disregard it, and the people who suffer the violations have historically lacked the power to push back. Jocelyn Simonson's work on policing offers a model for examining the issue of recalcitrant bail courts through a "power lens."<sup>51</sup> She writes, "A focus on power . . . asks whether directly impacted people have real influence on the scope and policies of policing in their neighborhoods, counties, cities, and states."<sup>52</sup> Simonson defines power as the ability "to influence policy outcomes . . . and control the distribution of state resources . . . to make decisions with observable results, whether it is through the power to enact policy or the power to check state actors."<sup>53</sup>

As Simonson's work suggests, enforcing individual rights in the pretrial process would require shifting power to the communities most affected by the violations.<sup>54</sup> A power-shifting approach would seek to empower those communities to regulate the pretrial system by including methods to check the court players who permit and perpetuate daily constitutional violations.<sup>55</sup> This approach "depends on an understanding that the mass criminalization of the last century has had racialized, community-level effects in neighborhoods that are most heavily targeted for policing and from which the most people have been incarcerated," and it recognizes the role legal elites have had in creating and perpetuating this system.<sup>56</sup>

This is not to say that doctrine does not play an important role. Indeed, there are different legal regimes that are more or less effective in realizing constitutional rights and ultimately ending wealth-based detention and reducing pretrial detention.<sup>57</sup> For example, the consent decree en-

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50. See *The Southern Manifesto and "Massive Resistance" to Brown*, NAACP LEGAL DEF. FUND, <https://naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/southern-manifesto-massive-resistance-brown> [<https://perma.cc/8YQC-XLP4>]; see also THE FEDERALIST NO. 78 (Alexander Hamilton) ("[The judiciary] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

51. Simonson, *supra* note 16, at 792.

52. *Id.* at 803.

53. *Id.* at 804.

54. See *id.* at 813–14.

55. See *id.* at 853.

56. *Id.* at 504. See generally KARAKATSANIS, *supra* note 14.

57. See, e.g., Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2288–90 (recommending regime that responds with support rather than detention or surveillance with respect to criminogenic risk). Advocates, scholars, and policymakers should consider structural design questions, including how and whether judges will implement reforms, when considering changes to legal regimes. For example, Matthew Tokson has shown that "judges' aversion to increased decision costs," such as spending more time on making a decision, can influence noncompliance. Tokson, *supra* note 47, at 904.

tered in *ODonnell* has meaningfully reduced misdemeanor wealth-based detention in Harris County,<sup>58</sup> likely because it requires a substantive outcome (release) rather than simply a procedural protection (consideration of ability to pay).<sup>59</sup> But this example also supports our thesis: the landmark settlement was reached after an unprecedented electoral victory by judges who, spurred by a years-long campaign by community organizers, campaigned on bail reform.<sup>60</sup> An exploration of the optimal doctrinal framework for connecting constitutional doctrine to everyday practice is beyond the scope of this Essay, but is an important consideration for attorneys, advocates, and organizers.

Below, we detail power-shifting approaches to enforce *ODonnell*. We first identify current structural barriers to enforcing the constitutional rights of people charged with crimes in the pretrial context, which have implications for a power-shifting approach to enforcement. These structural barriers include the lack of access to bail hearings and the lack of quality defense counsel pretrial. We then identify power-shifting strategies to challenge court pretrial practices, including the routine violation of constitutional law. Alongside increased access to bail hearings and a strengthened defense function, these power-shifting approaches could be effective in enforcing constitutional rights in bail-setting courts amid broader efforts to create community-based visions for pretrial justice.<sup>61</sup>

#### A. THE PROBLEM OF ACCESS

As an initial matter, the lack of public access to bail hearings makes it extremely difficult to observe what judges are doing and should cause deep public concern.<sup>62</sup> In Texas, except in rare circumstances, bail is ini-

58. BRANDON L. GARRETT & SANDRA GUERRA THOMPSON, THE INDEP. MONITOR FOR THE O'DONNELL V. HARRIS CNTY. DECREE, MONITORING PRETRIAL REFORM IN HARRIS COUNTY: FIRST SIXTH MONTH REPORT OF THE COURT-APPOINTED MONITOR 3 (2020) (noting the consent decree “represent[ed] the first federal court-supervised remedy governing bail” and resulted in increased use of personal bond, reduction in racial disparities for pretrial release, decline in pretrial detention days, and no change in recidivism).

59. *Id.* at 2 (stating that “Local Rule 9” of the Harris County courts “rescinded the secured money bail schedule, and provided for a new set of procedures, requiring prompt release of misdemeanor arrestees except for five carve-out categories of arrestees”).

60. Michael Hardy, *How Houston is Leading the Way on Keeping Poor Defendants Out of Jail*, TEX. MONTHLY (Dec. 5, 2019), <https://www.texasmonthly.com/news-politics/how-houston-leading-way-keeping-poor-defendants-out-jail/> [<https://perma.cc/62EE-FX3E>] (“Complicating the county’s case was the fact that voters kept booting out its top elected defenders in favor of pro-bail-reform candidates.”); see *infra* note 142.

61. We are not arguing that constitutional enforcement *should* be a goal in a power-shifting approach, and indeed it might not be a goal for people, families, and communities working to change pretrial systems. Rather, constitutional rights can be useful tools in a broader movement, and power-shifting strategies can help vindicate those rights. See Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1291–98 (2015) (framing the participatory defense movement as a response to the failings of the Sixth Amendment and a vindication of due process right to be heard); see also Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6–8 (2019) (outlining a theory of an abolitionist reading of the Constitution).

62. See Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2175–77 (2014) (arguing that lack of public access to bail hearings is

tially set by a magistrate within forty-eight hours of a person's initial arrest.<sup>63</sup> This bail-setting hearing usually happens in tandem with the magistrate's responsibility to inform the person arrested of certain procedural rights and often coincides with the magistrate's determination of probable cause for the arrest in the case of a warrantless arrest<sup>64</sup> (which constitutes the vast majority of arrests in Texas, as elsewhere<sup>65</sup>). In almost every jurisdiction in the state, these combination "magistration" hearings occur physically inside a jail.<sup>66</sup> In a number of counties, there are multiple jail facilities where magistration occurs; in addition to the county jail,<sup>67</sup> magistrations are sometimes performed in small, unregulated municipal lockups.<sup>68</sup> In some counties, magistration happens *in personam*, with the magistrate physically inside the jail building, along with the people arrested.<sup>69</sup> In many parts of Texas, the magistrate appears in the jail only by video on a closed-circuit television screen—a common practice even long before the COVID-19 pandemic.<sup>70</sup>

These custodial bail-setting hearings are nearly impossible for an outsider to observe. The hearings often occur at irregular times, without any notice of when they will be scheduled. Due to their occurrence physically

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also unconstitutional). Attorneys from Civil Rights Corps, Texas Fair Defense Project, and ACLU-TX brought a First Amendment claim on behalf of organizational plaintiffs Faith in Texas and Texas Organizing Project challenging this practice in *Daves v. Dallas County*, 341 F. Supp. 3d 688, 691 (N.D. Tex. 2018).

63. TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (West 2017).

64. *Id.*

65. See *Valid Searches and Seizures Without Warrants*, LEGAL INFO. INST., CORNELL L. SCH., <https://www.law.cornell.edu/constitution-conan/amendment-4/valid-searches-and-seizures-without-warrants> [https://perma.cc/UZ27-2S53].

66. See, e.g., Robin Ramsay, *Duties and Responsibilities of the Texas Magistrate*, TEX. MUN. CTS. EDUC. CTR. 3 [https://www.tmcec.com/files/4414/4985/5485/Duties\\_and\\_Responsibilities\\_of\\_the\\_Texas\\_Magistrate\\_Ramsay\\_-\\_New\\_Magistrates.pdf](https://www.tmcec.com/files/4414/4985/5485/Duties_and_Responsibilities_of_the_Texas_Magistrate_Ramsay_-_New_Magistrates.pdf) [https://perma.cc/ZNZ4-RA8Q] (describing in a training for new magistrates that "[j]ail is hardly a [sic] 'open' environment (court)"); *Interlocal Agreement Between Travis County and City of Austin for Booking and Related Services*, TRAVIS CNTY. 1, <http://www.austintexas.gov/edims/document.cfm?id=274056> [https://perma.cc/FMK9-JML9] (describing Magistration occurring in the Travis County jail); *Jail Questions & Answers*, HAYS CNTY., <https://hays-countytx.com/law-enforcement/sheriff/corrections-bureau/jail-questions-answers> [https://perma.cc/A7CV-AT4A] (same for Hays County).

67. See, e.g., *Jail Division*, THE COLONY, TEX., <https://www.thecolonytx.gov/269/Jail-Division> [https://perma.cc/5S6L-6FGS] ("As with all Municipal Jails, persons arrested and charged with more serious offenses will be booked, arraigned and housed until such time as they bond out or are transferred to the county sheriff's department. This usually occurs within 72 hours."); *Jail Unit*, RED OAK, TEX., <https://www.redoaktx.org/874/Jail-Unit> [https://perma.cc/33PR-M4ZE] (describing the process of Magistration hearings (referred to as "arraignment" in the page) in the municipal jail before transferring arrestees to the county jail).

68. Brandi Grissom, *Accountable to No One*, TEX. TRIB. (Sept. 17, 2010), <https://www.texastribune.org/2010/09/17/city-jails-unregulated-despite-deaths-complaints> [https://perma.cc/GK6H-AD3S].

69. E.g., *Daves v. Dallas County*, 341 F. Supp. 3d 688, 691 (N.D. Tex. 2018), *aff'd in part*, 984 F.3d 381 (5th Cir. 2020), *reh'g en banc granted, order vacated*, 988 F.3d 834 (5th Cir. 2021).

70. E.g., Lise Olsen, *Videotapes Reveal Flaws in Harris County Bail Bond Hearings*, HOUS. CHRON. (Nov. 30, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Videotapes-reveal-flaws-in-Harris-County-bail-10642138.php> [https://perma.cc/7VBV-VXEU].

inside a jail facility, the public is refused access to the building for purported security reasons. In counties without a single centralized location for magistrature hearings, an observer might be unable to find out where someone is being held, where the magistrature will take place, or whether the person is to be transferred to the county jail until the processing is over. In short, in the vast majority of Texas counties, it is impossible to observe someone's bail-setting hearing, whether in person or otherwise.<sup>71</sup>

Given the lack of public access, the importance of the liberty interest at stake, and the fact that magistrature hearings occur for all levels of alleged criminal offenses, one might think that there would be a record of these hearings for attorneys and the public to view after the hearing has concluded. Unfortunately, this is usually not so. There is no requirement that these hearings occur on the record, and a court reporter is rarely engaged for magistrature hearings.<sup>72</sup> While some counties do maintain audio or video recordings of magistrature hearings, the practice is inconsistent, and the recordings have proven extremely difficult to access, even in the discovery process of large-scale federal litigation about these precise practices.<sup>73</sup>

As a result, bail-setting predominantly occurs in a "black box" where the only people aware of what was actually said in the hearings are a magistrate, the (in all likelihood) unrepresented person arrested, and possibly other state actors like a pretrial services agent or bailiff. It is ex-

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71. Mustafa Z. Mirza, *In Dallas County, Bail Is Set in Secret—and Often in Seconds*, TEX. TRIB. (Sept. 5, 2018), <https://www.texastribune.org/2018/09/05/Dallas-County-Bail-Machine> [<https://perma.cc/3395-T7YR>]. Texas courts' transition to Zoom for many hearings during the COVID-19 pandemic has brought some relief on this front, and several magistrate courts that were previously unviewable by the public are now streamed live for the public to watch. We are hopeful that this practice will continue for jurisdictions that use video technology for bail-setting hearings even after the pandemic, but there is no indication that this will occur.

72. Technically, Code of Criminal Procedure article 15.17(a) provides for records of magistrature hearings, but they have serious production and retention problems. *See* TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (West 2017) ("A record of the communication between the arrested person and the magistrate shall be made. The record shall be preserved until the earlier of the following dates: (1) the date on which the pretrial hearing ends; or (2) the 91st day after the date on which the record is made if the person is charged with a misdemeanor or the 120th day after the date on which the record is made if the person is charged with a felony."). Furthermore, the records themselves are not required to be a full transcription; often the record is a form filled out by the magistrate about the admonitions given and whether the person requested a court-appointed lawyer, but the form does not explain what factors went into the bail determination. *See id.* art. 15.17(f) ("A record required under Subsection (a) or (e) may consist of written forms, electronic recordings, or other documentation as authorized by procedures adopted in the county under [the Indigent Defense Plan]."). The Legislature may try to address these problems of documentation in the future. In 2019, a bill to extend recording timelines passed both chambers before being vetoed by Governor Abbott. *See* TEX. SENATE RSCH. CTR., S.B. 815 BILL ANALYSIS, SRC-ARR S.B. 815 86(R) (2019); Press Release, Office of the Texas Governor, Governor Abbott vetoes SB 815 (June 15, 2019), <https://gov.texas.gov/news/post/governor-abbott-vetoes-sb-815> [<https://perma.cc/MTE6-ZJJA>].

73. *See, e.g.*, First Amended Complaint–Class Action at 21 n.12, *Daves v. Dallas County*, 341 F. Supp. 3d 688 (N.D. Tex. 2018) (No. 18-11368), *aff'd in*, 984 F.3d 381 (5th Cir. 2020), *reh'g en banc granted, order vacated*, 988 F.3d 834 (5th Cir. 2021) (No. 3:18-CV-0154-N).

tremely difficult to monitor judges' behavior when the public cannot watch what they are doing or read what happened in the courtroom.<sup>74</sup>

## B. THE PROBLEM OF REPRESENTATION

In theory, accused people have the assistance of a lawyer who vindicates their constitutional rights in criminal cases that could result in a carceral sentence. In practice, this is rarely the case for poor people charged with crimes in Texas, especially in the pretrial setting.<sup>75</sup>

Across Texas's 254 counties, only five counties provide counsel at magistration in any circumstance (one of those provides it at only some locations where bail is set, such that only 60% of people charged with crimes in the county receive counsel).<sup>76</sup> At least two more counties provide lawyers for a "bail review hearing" within forty-eight hours for some people who are not released after their initial bail-setting, but lawyers are not provided when bail is first set.<sup>77</sup> In the vast majority of counties, arrested persons are booked into jail, presented to magistrates in jails, and have their bail set—all before having any opportunity to request or consult with a lawyer. This lack of representation significantly impacts a person's case: having a lawyer dramatically increases the likelihood that a person will be released on personal bond or have their bail reduced.<sup>78</sup>

74. This is not to say that no records of the results of the magistration hearing exist, but none of the underlying information going into the decisions is made public. There is a public record of the bail amount set but not any of the considerations that went into setting it. There is a public record of whether a person was appointed a defense lawyer but often not of the individual's financial situation or whether that information was available to the magistrate when the bail amount was set.

75. See Stuntz, *supra* note 29, at 12 ("By buying less criminal defense, the state can buy less enforcement of constitutional criminal procedure.").

76. Brief for Texas Fair Defense Project as Amicus Curiae Supporting Appellee at 4–7, *Booth v. Galveston County*, 352 F. Supp. 3d 718 (S.D. Tex. 2019) (No. 3:18–CV–00104), *argued* No. 19–40785 (5th Cir. Aug. 3, 2020) (describing the state of counsel at magistration in Texas and outlining the five counties providing it in early 2020). In the past year, two additional counties in Texas (Potter and Hays) have embarked on one-year externally funded research projects where half of arrested people are randomly assigned to be provided a lawyer at the initial bail-setting hearing while the other half are not. It is unclear whether those counties will continue providing any amount of representation at magistration after the grant funding expires. TEX. INDIGENT DEF. COMM'N, ANNUAL REPORT FOR FISCAL YEAR 2020, at 25 (2021).

77. *Booth*, 352 F. Supp. 3d at 738 (describing bail review hearings as a "recent change" in Galveston County); *Orders of the Supreme Court and Texas Court of Appeals*, EL PASO CNTY. COURTHOUSE COUNCIL OF JUDGES 8–9 (June 29, 2020), <http://www.epcounty.com/information/courtresponse.pdf> [<https://perma.cc/9BDW-27EA>] (El Paso County describing bond review dockets).

78. Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002) (finding that people represented by counsel at their bail-setting hearing were two and one half times more likely both to be released on their own recognizance and to have their bail reduced, and that the absence of counsel at bail-setting was "the single most important reason for lengthy pretrial incarceration of people charged with nonviolent crimes"); Declaration of Michael Young at 5, *Booth*, 352 F. Supp. 3d 718 (No. 3:18–CV–00104) (noting counsel at magistration in Bexar County, Texas, resulted in 77% of represented clients being released as opposed to 57% of people unrepresented by counsel).

The outcome of the bail hearing, in turn, has dramatic implications for the likelihood that someone will plead guilty, especially for misdemeanors.<sup>79</sup>

The effects of the lack of counsel at an initial bail-setting could be somewhat mitigated by diligent representation by defense counsel as soon as counsel is appointed. But many people charged with crimes in Texas are never represented by counsel, especially those who are charged with misdemeanors.<sup>80</sup> Among those accused of felonies in Texas, 88% are represented by appointed counsel, but that number plummets to 49% for misdemeanors.<sup>81</sup> The pro se rate for people charged with misdemeanors, as calculated by the Texas Indigent Defense Commission, is 20.4% state-wide, but that masks extraordinary variation among counties; the estimated pro se rate is over 50% when looking only at counties with a population under 50,000.<sup>82</sup> In too many counties, proceedings with names ranging from “jail docket”<sup>83</sup> to “rocket docket”<sup>84</sup> essentially replace bail advocacy, with opportunities for people charged with misdemeanors to plead guilty in exchange for their release.<sup>85</sup> Thus, a significant number of people go through their entire misdemeanor case, from arrest to conviction, in state custody without being represented by a lawyer at any point in the process. These people are unlikely to have formal legal training, and lack access to resources and information that would enable them to make legal arguments applying precedent like *O'Donnell* to their cases. Often, they are prevented from speaking at their bail hearings at all, with the admonition that what they say could be used against them in subse-

79. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–714 (2017); see also Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1515 (2013).

80. See *Indigent Defense Data for Texas*, TEX. INDIGENT DEF. COMM'N, <http://tidc.tamu.edu/public.net/Reports/DataSheet.aspx?cid=1> [https://perma.cc/8DK5-Q8B9].

81. *Id.*

82. TEX. INDIGENT DEF. COMM'N, *supra* note 76, at 17.

83. Neena Satija, *How Judicial Conflicts of Interest are Denying Poor Texans Their Right to an Effective Lawyer*, TEX. TRIB. (Aug. 19, 2019), <https://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense> [https://perma.cc/UXC8-3FRS].

84. Tyler White, *District Clerk Expects 'Rocket Docket' to Reduce Jail Overcrowding*, MIDLAND REP.-TELEGRAM (July 21, 2013), <https://www.mrt.com/news/article/District-clerk-expects-rocket-docket-to-reduce-7445930.php> [https://perma.cc/XQT4-QJNW].

85. See, e.g., Memorandum and Opinion Setting out Findings of Fact and Conclusions of Law, *O'Donnell v. Harris County*, No. 4:16-cv-01414 at \*83–84. (S.D. Tex. Apr. 28, 2017). (“[T]he typical sentence for those pleading guilty at a first appearance is either the time already served in pretrial detention, or some number of days that with a two-for-one or three-for-one credit for the time served would allow release within a day of the first appearance. . . . [M]isdemeanor defendants abandon valid defenses and plead guilty to obtain faster release than if they contested their charges.”). Unless the purpose is to secure guilty pleas, this practice is irrational to the extent that a person offered release with a guilty plea was never offered the opportunity to be released on personal bond to fight the case in court. See Amanda Woog, *Pretrial Detention During a Pandemic Could Be a Death Sentence. Yet, Prosecutors Continue to Use It to Extract Plea Deals*, THE APPEAL (Aug. 4, 2020), <https://theappeal.org/pretrial-detention-during-a-pandemic-could-be-a-death-sentence-yet-prosecutors-continue-to-use-it-to-extract-plea-deals> [https://perma.cc/8AX8-2AJW].

quent proceedings.<sup>86</sup> For this significant portion of Texans who are processed through the carceral system without a lawyer, there is quite literally nobody to help them assert their rights under *ODonnell*.

The situation is not necessarily less dire for the people who have a lawyer appointed to represent them. Many Texans are appointed lawyers that have limited incentive to fight for their pretrial release and sometimes even less capacity to do so, often paid a flat fee of a few hundred dollars per case no matter how much work they put into it.<sup>87</sup> Texas has largely delegated the Sixth Amendment responsibility of appointing and funding counsel to individual counties, which have a patchwork of practices loosely guided by the Fair Defense Act of 2001.<sup>88</sup> A 2015 study established guidelines for the maximum number of cases that an attorney could competently represent in one year,<sup>89</sup> but in 2020, at least 40% of people charged with crimes in Texas who had a court-appointed lawyer were represented by someone whose caseload exceeded that number.<sup>90</sup> In some counties, more than 70% of people charged with crimes are represented by an overburdened attorney.<sup>91</sup>

An attorney seeking to rectify issues with the initial bail-setting could employ a number of remedies. She could file a bond-reduction motion for her client.<sup>92</sup> Or she could petition the trial court for a writ of habeas

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86. TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (West 2017) (“The magistrate shall also inform the person arrested that . . . any statement made by him may be used against him.”). This legal requirement is often expanded upon by the magistrate to include an explicit admonition that they should not or cannot speak. *See* KARAKATSANIS, *supra* note 14. Others have argued that this risk of self-incrimination is a factor triggering the Sixth Amendment right to counsel. Brief for Appellee at 21, *Booth v. Galveston County*, 352 F. Supp. 3d 718 (S.D. Tex. 2019), *argued* 19-40785 (5th Cir. Aug. 3, 2020).

87. SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN ARMSTRONG COUNTY & POTTER COUNTY, TEXAS: EVALUATION OF ADULT TRIAL LEVEL INDIGENT DEFENSE REPRESENTATION 137 (2019), [https://sixthamendment.org/6AC/6AC\\_tx\\_armstrongpotterreport\\_2019.pdf](https://sixthamendment.org/6AC/6AC_tx_armstrongpotterreport_2019.pdf) [<https://perma.cc/ZS8R-HR4E>] (“Appointed counsel in Armstrong and Potter counties rarely attempt to secure pretrial release of their indigent clients who are in custody. One judge went so far as to declare that lawyers ‘never’ file motions for reduced bail. Appointed attorneys concede that they do not prepare and argue motions to reconsider bail on behalf of appointed clients, even though they do so for their retained clients. ‘We don’t argue bail because we don’t get paid for that.’”).

88. Brandi Grissom, *Defenseless*, TEX. TRIB. (May 19, 2010), <https://www.texastribune.org/2010/05/19/advocates-texas-indigent-defense-nearing-crisis> [<https://perma.cc/3ZMJ-9Q9Z>].

89. DOTTIE CARMICHAEL, AUSTIN CLEMENS, HEATHER CASPERS, MINER P. MARCHBANKS, III & STEVE WOOD, TEX. A&M PUB. POL’Y RSCH. INST., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION 34 (2015), <http://www.tidc.texas.gov/media/8d85e69fd4fb841/guidelines-for-indigent-defense-caseloads-01222015.pdf> [<https://perma.cc/6W4D-E57N>].

90. TEX. INDIGENT DEF. COMM’N, *supra* note 76, at 18. That statistic only counts court-appointed criminal defense cases, however. After factoring in self-reported time attorneys spent on other types of cases, including privately retained work, the number of people represented by a lawyer with an excessive caseload would be significantly higher. *See id.*

91. *People’s Sixth Amendment Rights are Being Violated in Harris County Every Day*, RESTORING JUST., <https://www.restoringjustice.org/caseloadlimits> [<https://perma.cc/A396-J5PG>].

92. TEX. CODE CRIM. PROC. ANN. art. 17.33 (West 1966).



corpus and then, if necessary, appeal the denial.<sup>93</sup> But too few appointed lawyers take these paths.<sup>94</sup> Many never file bond-reduction motions, or if they do, they submit a form motion with no individualized information about why the person's bail should be reduced. Habeas petitions challenging pretrial detention, and appeals of denials of those petitions, are even rarer.<sup>95</sup>

Arrested persons with the right to appeal their case can have a lawyer assigned to represent them for appeal following a conviction.<sup>96</sup> But direct appeal is not used to challenge convictions based on improper bail-setting before trial in Texas.<sup>97</sup> Even if the claim were raised on appeal, an appellate court could not grant adequate relief for improper detention of the person before trial—even in the rare event that the error was preserved and records of the bail-setting procedures had not been destroyed by then. The damage has already been done.

These structural barriers are a significant impediment to ending wealth-based detention and permit the aggregation of state power in bail-setting. Judges have virtually unchecked authority to set bail, even when it violates constitutional law, and they exercise significant control over appointed counsel, the only actors who are designated by the system to prevent such abuses. A power-shifting approach will need to contend

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93. Defendants have a statutory right to a habeas writ if their bail amount is oppressive. TEX. CODE CRIM. PROC. ANN. art. 11.24; *see also* Beck v. State, 648 S.W.2d 7, 10 (Tex. Crim. App. 1983) (stating appeal lies to court of appeals rather than court of criminal appeals); *Ex parte* Williams, 619 S.W.2d 180, 183 (Tex. Crim. App. 1981); *cf. Ex parte* Trillo, 540 S.W.2d 728, 732 (Tex. Crim. App. 1976). This is in contrast to the general unavailability of interlocutory appeals in Texas.

94. SIXTH AMEND. CTR., *supra* note 87, at 137; PUB. POL'Y RSCH. INST., TEX. A&M UNIV., BEXAR COUNTY INDIGENT DEFENSE SYSTEM EVALUATION 24 (2020) (finding that appointed lawyers only filed bail reduction motions in only 3% of cases where the client was entitled to *mandatory release* due to delay the filing of an indictment). This is, unfortunately, common across Texas. While we are fortunate to know some fantastically conscientious lawyers who diligently represent their appointed clients despite structural disincentives, we routinely hear from people all over the state telling us their lawyer either ignores their requests to seek a bond reduction or affirmatively tells them they refuse to file one for the client.

95. In Texas there is no interlocutory appeal of a bail reduction motion. Ragston v. State, 424 S.W.3d 49, 52 (Tex. Crim. App. 2014).

96. TEX. CODE CRIM. PROC. ANN. art. 1.051(d) (West 2015).

97. It may be, strictly speaking, possible to present such a claim on appeal if the error was preserved and not waived as part of a plea bargain. *Id.* art. 44.02 (providing for a defendant's right to appeal in criminal cases with substantial limitations on cases resulting in a guilty plea). Appellate courts in Texas have expansive authority upon a proper filing of appeal. *See* Carter v. State, 656 S.W.2d 468, 469 (Tex. Crim. App. 1983) ("Once jurisdiction of an appellate court is invoked, exercise of its reviewing functions is limited only by its own discretion or a valid restrictive statute."). We have been unable to find any Texas post-conviction appellate cases challenging pretrial bail. When Texas appellate courts do consider bail, it is either on appeal from a denied pretrial writ of habeas corpus or it is a challenge to the appeal bond set after the person has been convicted. Because it has never been tested, we do not know whether Texas courts would find that constitutional error in pretrial bail setting was subject to harmless error review, or whether appellate courts would search for proof "beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a).

with and challenge these limitations as part of efforts to end pretrial and wealth-based detention.

### C. POWER-SHIFTING STRATEGIES

This section describes power-shifting strategies already in use by advocates and organizers working to hold court actors accountable. We argue that these approaches should be considered mechanisms for enforcing constitutional rights, as well as for providing a vision for pretrial reform. First, we contend with the role of defense attorneys and offer a vision for how defenders can work with the community to engage in power-shifting rather than legitimize or permit the status quo. At their worst, appointed counsel become arms of the state: failing to diligently represent their clients while providing the state cover for constitutional and other abuses. We suggest accountability mechanisms to challenge these defense attorneys and the defense systems they operate within. Second, we describe power-shifting approaches to holding judges accountable for their pretrial practices, including the routine violations of constitutional law.

#### 1. Role of Defense Counsel

The role of defense counsel pretrial in a power-shifting strategy could be either as co-conspirator or as target. As co-conspirators, defenders have worked with organizers on participatory defense campaigns around bail.<sup>98</sup> For example, in San Jose, California, public defenders and organizers with Silicon Valley De-Bug designed a process meant to disrupt the lightning-fast bail decisions that were happening in felony arraignments and resulting in 75% of people being caged pretrial.<sup>99</sup> Organizers, families of the accused, and community members would stand in the courtroom to offer aid and support to those being considered for pretrial release. In cases that had this intervention, “the rate of . . . release quadrupled” and “reliance on set bail amounts dropped by almost half.”<sup>100</sup> Advocacy in bail hearings saw similar results, with increases in both bail reductions and releases without requiring cash bail.<sup>101</sup> In the face of the COVID-19 crisis, Silicon Valley De-Bug and public defenders also worked together for mass pretrial releases.<sup>102</sup> Because the Constitution

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98. Participatory defense has power-shifting as an express goal. Raj Jayadev, Janet Moore & Marla Sandys, *Participatory Defense as an Abolitionist Strategy*, in TRANSFORMING CRIMINAL JUSTICE: AN EVIDENCE-BASED AGENDA FOR REFORM 2 (Jon B. Gould & Pamela Metzger, eds., forthcoming 2021) (on file with authors) (naming “rebalancing power disparities that benefit police, prosecutors, and prisons” as a goal in participatory defense).

99. *Id.*

100. *Id.*

101. *Id.*

102. Sarah Stillman, *Will the Coronavirus Make us Rethink Mass Incarceration?*, NEW YORKER (May 18, 2020), <https://www.newyorker.com/magazine/2020/05/25/will-the-coronavirus-make-us-rethink-mass-incarceration> [<https://perma.cc/ZB3B-MP89>] (“In mid-March, as the virus spread, [Raj] Jayadev worked with Carson White, an attorney with the public defender’s office, who compiled a list of people seeking release from the county jail. White negotiated with prosecutors, the sheriff’s office, and pretrial services, and an agree-

requires an individualized assessment before setting bail, community work building individual narratives can have a profound impact, both for an individual's life and for constitutional enforcement.<sup>103</sup> Working with organizers on participatory defense campaigns, defenders can use their access and skills as attorneys to support community-led campaigns to get people out of jail and hold judges to the constitutional requirements of individualized assessments.<sup>104</sup>

As these examples show, defenders could work with organizers to create strategies that not only vindicate individuals' rights in the pretrial setting but also disrupt business as usual in those courts. In San Jose, defenders prolonged the hearings at initial bail setting; others could organize mass motion-filing campaigns or offer free counsel to people in bail hearings. By disrupting the efficiency of court "processing," judges may be forced to contend with demands, for example, to hold bail hearings that meet constitutional requirements.

Defenders can also work with organizers to push for open courts, including by filing litigation that would permit courtwatching or otherwise supporting campaigns that would allow observation of bail hearings.<sup>105</sup> Many of the approaches described above are impossible if bail is set in a closed hearing. Working to open up these courts would address the threshold issue of lack of access we detail in Section III(A) and complement community efforts to hold judges and courts accountable described in Section III(C)(ii).

Unfortunately, appointed defense attorneys are often more like cogs in the system than co-conspiring disruptors.<sup>106</sup> The sheer number of cases

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ment was reached to shrink the jail's population by twenty per cent. On March 19th, the county released an initial group of about a hundred and fifty people. Since then, the jail's population has been reduced by more than a thousand.").

103. See Moore et al., *supra* note 61, 1286–87 (2015) (stating the participatory defense model uses narrative as an organizing tool within courtrooms, such as through social biography videos).

104. The legal work described would have a supportive role and would serve the purpose determined by participants and their families and communities. The participatory defense movement deliberately de-centers lawyers and the legal case. *Id.* at 1285 ("It also is important to emphasize that family justice hub meetings are not legal clinics. There are no lawyers in the room. In many respects, that is the point of this new reform model. From a movement-building perspective, the case outcome is not the only measuring stick. Instead, it is equally or even more important that the process transform each participant's sense of power and agency. For this reason, the participatory defense movement shuns the word 'client.' That label reduces people into recipients of services, actions, or change provided or caused by another. In the participatory defense model, the key actors responsible for creating change are the people who face charges, along with their families and their communities.").

105. For example, in *Daves v. Dallas County*, which challenged Dallas County's wealth-based pretrial detention system, the organizational plaintiffs, Faith in Texas and Texas Organizing Project, asserted the Sheriff and County violated the First Amendment by denying public access to legal proceedings where pretrial conditions or release were determined. First Amended Complaint–Class Action *supra* note 73, at 60.

106. Jayadev, Moore, and Sandys have described this as the "peculiar sacredness of public defense . . . how it funnels tax dollars to one group of lawyers (defenders), to make life easier for other government-paid lawyers (prosecutors and judges), by feeding a government-funded carceral machine, which chews up poor people and people of color, who

taken by many defense attorneys prevents meaningful, individualized representation. Flat-fee payment structures incentivize “meet ‘em and plead ‘em”<sup>107</sup> approaches to “defense.”<sup>108</sup> A chummy courthouse culture, in which prosecutors become defense attorneys, who later become judges—all meeting for happy hour after work—hampers the possibility of a zealous defense.<sup>109</sup> On both individual and systemic levels, defense counsel can have a legitimizing effect on the fundamentally unfair and unjust criminal process.<sup>110</sup> Thus, it is important to include defense attorneys and indigent defense systems as targets in power-shifting strategies challenging pretrial systems. Below, we outline some such strategies.

The participatory defense strategies described above have also been used to hold defense attorneys accountable when they fail their clients.<sup>111</sup> A court case and the attorney–client relationship can be impossible to navigate when a person has been appointed an attorney who is not diligently representing them. A person in this situation has her freedom on the line, but attempts to compel the attorney to work for her are met with silence, hostility, or even threats.<sup>112</sup> Judges in Texas often will not consider *pro se* motions for replacement counsel because, ironically, the person is represented.<sup>113</sup> If the person does manage to have their grievances

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lack the political power to fight back.” Jayadev et al., *supra* note 98, at 14. For problems around appointment of counsel in Texas, see *supra* Section III(B).

107. James D. Bethke & Morgan Shell, *Public Defense Innovation in Texas*, 51 IND. L. REV. 111, 141 (2018) (“Few would dispute that excessive caseloads impede an attorney’s ability to provide effective assistance of counsel and often result in a ‘meet and plead’ system of representation. Yet, the problem permeates indigent defense systems in Texas.” (footnote omitted) (quoting CARMICHAEL ET AL., *supra* note 89, at 5)).

108. SIXTH AMEND. CTR., *supra* note 87 (“We don’t argue bail because we don’t get paid for that.”); see also *Fee Schedule*, NACOGDOCHES CNTY. (Nov. 20, 2009), <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=149> [<https://perma.cc/V7ZQ-Q5S3>] (showing that attorneys are paid a flat \$150 fee for a guilty plea on a misdemeanor and \$250 for a guilty plea on a felony regardless of other efforts put into the case).

109. In a particularly jarring example of the dangers of chummy courthouse culture for people charged with crimes, local defense attorneys were “unfazed” after a Midland prosecutor was found to be moonlighting as a judicial clerk—even on some of the same cases he was prosecuting—with some defense attorneys even defending the scheme. Jessica Priest, *Moonlighting Prosecutor Sent Texas Man to Death Row; 17 Years Later, He Could Get a New Trial*, USA TODAY (Feb. 4, 2021, 7:00 AM), <https://www.usatoday.com/in-depth/news/investigations/2021/02/04/texas-death-row-inmate-could-get-new-trial/4255647001> [<https://perma.cc/3GRT-U4HL>] (“‘Ralph is very honorable. He would never tell a judge how to rule,’ said attorney Tom Morgan, who represented at least 11 defendants in cases in which Petty later worked for the judges.”).

110. See Michael J. Klarman, *Historical Perspectives: Scottsboro*, 93 MARQ. L. REV. 379, 432 (2009) (“[D]ecisions such as *Powell* [affirming the right to counsel] . . . may also have harmed southern blacks by lending legitimacy to a system that remained deeply oppressive.”).

111. Moore et al., *supra* note 61, at 1287 (“Participatory defense holds criminal justice agencies accountable for their acts and omissions. For example, Gail Noble and her seventeen-year-old son Karim challenged both *a defense lawyer’s failure to investigate* and use available evidence of innocence and a judge’s racist assumptions that Karim’s summer job was ‘probably selling drugs.’” (italics added)).

112. See MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 73 (2020).

113. *E.g.*, Robinson v. State, 240 S.W.3d 919, 922 (Tex. Crim. App. 2007) (“[A] trial court is free to disregard any *pro se* motions presented by a defendant who is represented

heard by the judge, by raising them orally in open court, for example, the judge often proves extremely hostile to any suggestion that a poor person should have an attorney of their choice.<sup>114</sup> As a result, the attorney can continue to be unresponsive without fear of any repercussions. In such a situation, the person charged with a crime is trapped. This is where participatory defense has also been effective: it can give a person a lifeline outside the formal criminal legal system and a way to have grievances heard. Public campaigns to pressure judges to replace counsel, either in an individual case or from appointment lists entirely in the case of persistent inadequate representation, are a way to shift power in this context.

Organizers have also pushed for the creation of public defender offices that would foster ways in which appointed lawyers can be accountable to the communities they represent.<sup>115</sup> Public defender offices—when they are adequately resourced and independent—can be an antidote to the structural problems identified above such as overwhelming caseloads, crony culture, and perverse incentives to plead.<sup>116</sup> Perhaps unsurprisingly, these kinds of offices have also been consistently shown to provide better representation than the ad hoc assignment model of providing counsel.<sup>117</sup> They can also have mechanisms for community control and accountability, such as oversight boards composed of community members and directly impacted people and their families, and feedback mechanisms from the people and families served by the office.<sup>118</sup> Direct election of chief public defenders is another instrument for accountability

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by counsel.”); *Hill v. State*, 686 S.W.2d 184, 187 (Tex. Crim. App. 1985) (finding no error in the trial court’s failure to rule on a request for replacement counsel, reasoning that “because appellant did not request a hearing, no error was presented”).

114. *Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990) (“Conflicts of personality and disagreements between counsel and client are not automatic grounds for withdrawal. The trial court is under no duty to search for a counsel until an attorney is found who is agreeable to the accused.”); see also Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. (forthcoming 2021) (describing these hurdles in a section entitled “Beggars Cannot Be Choosers”). But see Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1707 (2016) (arguing that, contrary to common opinion, the Supreme Court has never actually held that there is no right to appointed counsel of choice, and that it is an essential element of the Sixth Amendment guarantee).

115. See, e.g., Michael Barajas (@michaelsbarajas), TWITTER (May 3, 2019, 4:50 PM), <https://twitter.com/michaelsbarajas/status/1124431077081276420> [<https://perma.cc/6T7L-ERCX>] (posting a public defender office proposal from advocates with an oversight board that would include a significant number of people impacted by the criminal legal system); *Travis County Commissioners vote on public defender office budget and oversight board*, GRASSROOTS LEADERSHIP (July 30, 2019), <https://grassrootsleadership.org/releases/2019/07/travis-county-commissioners-vote-public-defender-office-budget-and-oversight-board> [<https://perma.cc/57NY-4H5Y>] (“[W]e will continue to hold our elected officials accountable by demanding that impacted people be part of every process that impacts us and for commissioners to invest more in indigent representation instead of throwing more money into new jail facilities.”).

116. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1775 (2016) (“[T]he sources of the culture of indifference that affects too many criminal defenders has structural causes and . . . the structure of criminal defense in jurisdictions with public defender offices helps fight against that culture.”).

117. TEX. INDIGENT DEF. COMM’N, PUBLIC DEFENDER PRIMER 8 (2020) (“Studies repeatedly find that public defenders improve outcomes.”).

118. See GRASSROOTS LEADERSHIP, *supra* note 115.

sometimes used.<sup>119</sup> Many have recognized the importance of public defender offices' independence from other powerful political players,<sup>120</sup> even advocating for a meta-defender office to safeguard public defenders' independence.<sup>121</sup> As part of these proposals, advocates should also consider structures for increased community accountability, so that defender offices can be accountable to the people they serve and ultimately work with them to shift power towards those communities.

## 2. Judiciary

Judges are the most obvious target for power-shifting approaches to vindicate pretrial constitutional rights because they hold significant power not only in setting bail in an individual's case but also in setting bail policy.<sup>122</sup> They are not typical targets in public campaigns, suggesting relatively untapped potential for organizing to change court practices, especially in places like Texas where most magistrates are elected, and those that are not elected are hired by locally elected officials. Considering the budgetary and policy power judges have—whether in setting bail policy, controlling public defense structures and budgets,<sup>123</sup> or setting culture and norms in their courtrooms—combined with the relative lack of public accountability for judges, they are ripe targets for advocacy. Below, we describe strategies already at work in local communities that could shift power to impacted communities and help enforce existing law: namely, filing ethics complaints for violations of law and other unethical behavior, courtwatching, and organizing around judicial elections. The aim of these strategies is to shift power to directly impacted communities

119. *E.g.* FLA. CONST. art. V, § 18; TEN. CODE ANN. § 8-14-102(b)(1)(A) (2016); S.F., CAL. CHARTER § 13.102(b) (2020). However, disenfranchisement laws undermine the ability of the community impacted by the criminal legal system and the appointed defense system to participate in electoral accountability.

120. *See, e.g., Ten Principles of a Public Defense Delivery System*, ABA 1 (Feb. 2002), [https://www.americanbar.org/content/dam/aba/administrative/le-gal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.pdf](https://www.americanbar.org/content/dam/aba/administrative/le-gal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.pdf) [https://perma.cc/3XPJ-2TA5] (“The public defense function, including the selection, funding, and payment of defense counsel, is independent.”).

121. Irene Oritseweyinmi Joe, *Defend the Public Defenders*, THE ATLANTIC (Mar. 13, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/defend-public-defenders/618001> [https://perma.cc/Y9PF-553A] (arguing for a state-level office to defend public defenders).

122. *See, e.g., O'Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1060 (S.D. Tex. 2017) (ruling that county court at law judges were county policymakers with respect to bail).

123. In Texas, judges hold significant power over public defense structures and funding. The Chief Judge for the Texas Court of Criminal Appeals is the Chair of the Texas Indigent Defense Commission, which controls state funding for indigent defense. *See Who We Are*, TEX. INDIGENT DEF. COMM'N, <http://www.tidc.texas.gov/about-us/who-we-are> [https://perma.cc/46F5-33GQ]. At the county level, criminal judges control the indigent defense plan or the county's plan for providing counsel to people who cannot afford their own attorney. TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (“The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant in the county arrested for, charged with, or taking an appeal from a conviction of a misdemeanor punishable by confinement or a felony.”).

to hold judges accountable for constitutional violations and other courtroom practices.

Every state has a mechanism for holding judges accountable for misconduct.<sup>124</sup> While these bodies are notoriously opaque and permissive,<sup>125</sup> the act of filing a complaint can nonetheless put judges on notice that they are being monitored and lead to changed practices. For example, in Texas, people with ethical complaints against judges can file a complaint with the State Commission on Judicial Conduct.<sup>126</sup> One of the ethical canons says plainly that “[a] judge shall comply with the law.”<sup>127</sup> In October 2020, Texas Fair Defense Project and Texas Civil Rights Project filed a series of complaints against criminal court judges in Harris County who were systematically violating the state’s public defender priority statute.<sup>128</sup> Despite the state law requirement that judges prioritize appointing public defenders when their office has the capacity to take new clients, these judges were ignoring the law and appointing private attorneys instead, who were making gobs of money off of the county and likely providing abysmal representation.<sup>129</sup> Immediately after the complaints were filed, and following media coverage of the complaints, practices changed: In September 2020, 7.8% of criminal appointments went to the public defender office in Harris County.<sup>130</sup> In October 2020, that number was 18.19%.<sup>131</sup> This suggests that when judges are exposed to the possibility of being held *personally* accountable, they might change their practices. This strategy alone will likely not create systemic change, but combined with a broader movement and ongoing monitoring,<sup>132</sup> it could help bring

124. Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020), <https://www.reuters.com/investigates/special-report/usa-judges-misconduct> [<https://perma.cc/4Y3D-UR7V>] (“Each U.S. state has an oversight agency that investigates misconduct complaints against judges.”).

125. *See generally id.*

126. *See Complaint Form*, STATE COMM’N ON JUD. CONDUCT, <http://www.scjc.texas.gov/public-information/complaint-form> [<https://perma.cc/A9UY-N8CE>].

127. TEX. CODE JUD. CONDUCT, CANON 2(A).

128. *See* Samantha Ketterer, *Two Harris County District Judges Face Favoritism Allegations in Defense Appointments*, HOUS. CHRON. (Oct. 14, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/harris-county-judges-favoritism-allegations-15646882.php> [<https://perma.cc/S43E-NPLG>]. Two more complaints were filed after the Houston Chronicle article. *See* Angela Morris, *4 Houston Judges in Hot Seat for Choosing Private Attorneys over Public Defenders*, TEX. LAW. (Oct. 28, 2020), <https://www.law.com/texaslawyer/2020/10/28/4-houston-judges-in-hot-seat-for-choosing-private-attorneys-over-public-defenders> [<https://perma.cc/8GN2-K5A7>].

129. Neel U. Sukhatme & Jay Jenkins, *Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment’s Right to Counsel*, 70 DUKE L.J. 775, 820, 822, 827 (2021) (finding that attorneys who donated money to judicial campaigns got significantly more appointed cases, earned significantly more money off of appointed cases, and achieved worse results for their clients than attorneys who did not donate money to judges’ campaigns).

130. *The Court Appointments Dashboard*, JUST. ADMIN. DEP’T, <https://jad.harriscountytx.gov/Data/The-Court-Appointments-Dashboard> [<https://perma.cc/2Z68-3XND>].

131. *Id.*

132. County agencies play an important role in creating the transparency needed for ongoing monitoring. In Harris County, the Justice Administration Department publishes an online dashboard with real-time data on court appointments, providing essential information for research and monitoring. *See id.*

judges' practices in line with established law.

Courtwatching is a practice in which the public monitors courtrooms and could include monitoring for constitutional violations and organizing around the observed violations. Organized courtwatching “shift[s] power and build[s] agency among individuals previously delegated to subjects, not objects, of the state”<sup>133</sup> and “can lead to robust engagement with legal and constitutional meanings.”<sup>134</sup> The mere presence of an audience in a courtroom can also change behavior.<sup>135</sup>

Courtwatching also has a “constitutional function” as part of the First Amendment’s guarantee of the public’s right of access and the Sixth Amendment’s guarantee of a defendant’s right to a public trial.<sup>136</sup> The public accountability an audience brings animates these rights.<sup>137</sup> The courtwatcher thus becomes a constitutional enforcer<sup>138</sup> and can monitor for compliance with constitutional requirements, such as individualized bail hearings that require inquiry into ability to pay. The information obtained through observation could be used to further other accountability strategies, such as creating public and media campaigns, filing ethical complaints, and organizing around judicial elections.

Finally, constitutional rights can be enforced through organizing around the most quintessential democratic tool: “If you don’t like who’s in there, vote ‘em out.”<sup>139</sup> In the majority of states, criminal court judges

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133. Jocelyn Simonson, *Community and Racial Justice: Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1618 (2017).

134. *Id.*

135. Simonson, *supra* note 62, at 2177.

136. *Id.* at 2175.

137. *See id.*

138. *See id.* at 2176–77. Accountability lies at the core of the audience’s constitutional functions. *Id.* at 2177. “Echoing throughout Sixth and First Amendment jurisprudence . . . is the idea that the function of the public in the criminal courtroom goes beyond the protection of individuals to implicate the ability of citizens to participate in democracy and to hold the criminal justice system accountable.” *Id.* at 2176–77. *See also* Simonson, *supra* note 133, at 1617–18 (“Courtwatching groups affiliated with larger social movements, for example, gather volunteers to document everyday proceedings in local courts—bond hearings, arraignments, plea bargains—and report to the public the results of their observations. These community groups become self-appointed watchdogs who can present the results of their observations in their own words, on their own terms, and independent of official accounts of policies and trends.”).

139. WILLIE NELSON, VOTE ‘EM OUT (Legacy Recordings 2018); Matthew Clair, *Getting Judges on the Side of Abolition*, BOS. REV. (July 1, 2020), <http://bostonreview.net/law-justice/matthew-clair-getting-judges-side-abolition> [<https://perma.cc/PS8M-QRBD>] (“More than half of states elect trial court judges, and judges who are appointed can be swayed by political pressure and activism.”). Research has suggested that elected judges are more likely to reflect their ideology of their constituents. Claire S.H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges*, 103 AM. ECON. REV. 1360, 1361 (2013) (“The sentencing harshness of elected judges is strongly related to the political ideology of the voters in their districts, while that of appointed judges is not.”). Larry Krasner’s campaign for District Attorney of Philadelphia provides an example for mobilizing a broad grassroots coalition against mass incarceration as part of an electoral campaign, including people and communities directly impacted by incarceration. Kerry “Shakaboona” Marshall & John Bergen, *How prisoners organized to elect a just DA in Philly*, WAGING NONVIOLENCE (Nov. 8, 2017), <https://wagingnonviolence.org/2017/11/prisoners-organized-elect-larry-krasner-philadelphia-district-attorney> [<https://perma.cc/>]



are elected.<sup>140</sup> Judicial races are notoriously overlooked; with the electorate relatively uneducated at the ballot box, many argue that judges should not be elected at all.<sup>141</sup> But the answer to an uneducated electorate cannot be concentrating power in the other branches and disempowering local communities to the advantage of elites. Instead, we see opportunity in the current system to hold judges accountable for unjust and unconstitutional courtroom practices. Indeed, the recent elections in Harris County, Texas, demonstrate the power in this opportunity.

In 2018, the criminal judge elections in Harris County centered around bail reform.<sup>142</sup> The Texas Organizing Project had been waging a campaign for significant changes to the county's bail system and disseminated disturbing videos from bail hearings showing that "local bond hearing officers were routinely setting cash bonds for mentally ill and homeless defendants without taking into account their ability to pay."<sup>143</sup> The mostly Republican county officials and judges refused to settle the pending *ODonnell* litigation, and Democratic candidates ran on promises to settle the lawsuit and bring about massive changes to the cash bail system.<sup>144</sup> Running on bail reform and "Black Girl Magic,"<sup>145</sup> and riding the "blue wave" inspired by Beto O'Rourke's Senate campaign, these candidates unseated fifteen misdemeanor judges.<sup>146</sup> A ground shifting court rule and settlement resulted in "roughly 85 percent of misdemeanor arrestees [be-

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29V4-G6KV] ("In order to shift the race to the left and hold Krasner accountable as he prepares to take office, a broad coalition of progressive groups put aside their differences to focus on winning. The leaders of this alliance are the people most impacted by the city's justice system, including prisoners in Pennsylvania state prisons.").

140. *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <http://judicial-selectionmap.brennancenter.org/?court=trial&phase=first> [<https://perma.cc/9PNA-M9X6>].

141. See, e.g., Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 44-45 (2003). But see Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26(2) J. L., ECON., & ORG. 290, 328 (2010) (measuring judicial performance using three factors and concluding that "[i]t may be that elected judges are, indeed, superior to appointed judges. . . . At a minimum, the conventional wisdom needs to be reexamined").

142. Maura Ewing, *Harris County Judges May Face a Reckoning over Bail on Election Day*, THE APPEAL (Nov. 4, 2018), <https://theappeal.org/harris-county-judges-may-face-a-reckoning-over-bail-on-election-day> [<https://perma.cc/K5Z6-MZLD>] (correctly predicting that the incumbent judges would lose their elections because, at least in part, they refused to improve the county's misdemeanor bail system in the face of litigation and public outcry).

143. Samantha Michaels, *Beto O'Rourke Mobilized So Many Democratic Voters That They Swept Even Local Judges Out of Office*, MOTHER JONES (Nov. 9, 2018), <https://www.motherjones.com/crime-justice/2018/11/texas-harris-county-judges-bail-beto-orourke-juvenile-justice> [<https://perma.cc/D365-PXJ5>]; see also Christopher Connelly, *How One Texas Progressive Group Is Mobilizing Unlikely Black And Latino Voters*, KERA NEWS (Oct. 31, 2018), <https://www.keranews.org/news/2018-10-31/how-one-texas-progressive-group-is-mobilizing-unlikely-black-and-latino-voters> [<https://perma.cc/X5S5-8GJH>] (describing Texas Organizing Project's efforts to mobilize voters from historically marginalized and disenfranchised communities, including around criminal justice reform).

144. Michaels, *supra* note 143.

145. Keri Blakinger, *The Beto Effect: Transforming Houston's Criminal Justice System*, MARSHALL PROJECT (Feb. 25, 2020), <https://www.themarshallproject.org/2020/02/25/the-beto-effect-transforming-houston-s-criminal-justice-system> [<https://perma.cc/89GF-TQB4>].

146. Michaels, *supra* note 143.

ing] automatically released without paying [cash bail].”<sup>147</sup>

#### IV. CONCLUSION

We cannot leave it to the courts to vindicate the constitutional rights of low-income people. Rather than looking to the law to solve the shortcomings of the law, we need to recognize the role that power plays in allowing judges to routinely violate rights. Power-shifting strategies—both inside and outside the courtroom setting—can hold judges accountable and ultimately shift power to the communities most impacted by unjust and unconstitutional pretrial systems.

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147. Blakinger, *supra* note 145.

