



**EXPOSE INJUSTICE. TEACH CHANGE. RIGHT WRONG.  
HEAL PAIN. JOIN US. [RFKHumanRights.org](https://RFKHumanRights.org)**

April 26, 2021

Via Email

*"Usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?"*

**– U.S. Attorney General Robert F. Kennedy**

Dear Lieutenant Governor Patrick and House Speaker Phelan,

Robert F. Kennedy Human Rights is an international human rights organization dedicated to realizing Robert Kennedy's vision of a more just and peaceful world. We advocate for an end to the United States' overreliance on incarceration and the elimination of unjust pretrial detention policies that disproportionately affect the poor and communities of color. *We write to express our opposition to House Bill 20, which will create an unconstitutional pretrial system that heavily discriminates against Black, Brown and low-income people by mandating statewide use of pretrial risk assessment tools for those who cannot afford their freedom.* Pretrial risk assessment tools have proven to:

1. Rely on racist data and reify systemic racism in the criminal legal system
2. Exacerbate the vicious cycle of mass incarceration and poverty
3. Cause enormous harm to Black, Brown, and low-income communities without increasing public safety.

**Pretrial Risk Assessment Tools Rely on Racist Data and Reify Systemic Racism in the Criminal Legal System.**

Pretrial risk assessments intensify racial disparities in the criminal legal system because they validate racial profiling in policing.<sup>1</sup> Pretrial risk assessments, or big data pretrial algorithms, are "tools" used to predict the likelihood that an individual will be arrested again or fail to appear in court if released into the community while awaiting trial. Although pretrial risk assessments are often marketed as offering an "objective" and

---

<sup>1</sup> The Bail Project, Pretrial Algorithms, The Bail Project, Available at: <https://bailproject.org/newsroom/pretrial-algorithms/>

“evidence-based” way for judges to determine risk, they are fundamentally biased and result in the increased incarceration of Black, Brown, and low-income people.

Because Black and Brown people are disproportionately stopped by the police, arrested, charged with higher-level offenses, prosecuted, and sentenced to incarceration, predictions based on those factors reinforce systemic racism by automatically labeling people of color as higher risk.<sup>2</sup> Algorithmic predictions about who is more or less likely to commit a crime do not eliminate human bias—they simply automate it.<sup>3</sup>

### **Pretrial Risk Assessments Tools Exacerbate the Vicious Cycle of Mass Incarceration and Poverty.**

HB 20’s mandated use of pretrial risk assessment tools would funnel even more Black and Brown and low-income people into Texas’s overcrowded jails, further cementing the vicious cycle of mass incarceration and poverty. Risk assessments portray people without money as higher risk, cycling non-violent poor people into unnecessary incarceration. The vast majority of non-appearances are for simple, excusable reasons, and are often tied to an individual’s low-income status.<sup>4</sup> Most non-appearances occurred because a person was stuck in traffic, did not have access to transportation, could not take off work without risk of losing their job, or did not have access to child care.<sup>5</sup>

A blanket approach to predicting who will or will not appear in court leads to a vicious cycle of incarceration and poverty: the risk assessments score low-income people as “higher risk;” higher risk ratings result in higher bond amounts; higher bond amounts lead to a greater chance that a person cannot afford to pay that amount; inability to pay for release leads to an increased likelihood of a person being locked up in jail before trial; and pretrial detention increases the likelihood of future incarceration (even on a multi-generational scale).

Kentucky’s risk assessment tool, the same tool recommended for adoption in Texas, deems people without a permanent address as high risk, presuming that they will fail to appear for subsequent court dates. But according to the Kentucky site manager for the

---

<sup>2</sup> Rashida Richardson, Jason Schultz, and Kate Crawford, Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice, 94 N.Y.U. L. REV. ONLINE 192 (2019), Available at SSRN: <https://ssrn.com/abstract=3333423>

<sup>3</sup> Julia Angwin, Jeff Larson, Surya Mattu and and Lauren Kirchner, Machine Bias, ProPublica, May 23, 2016, Available at: <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (arguing that machine bias is especially harmful to Black people).

<sup>4</sup> Ethan Corey, Puck Lo, The ‘Failure To Appear’ Fallacy, The Appeal, January 9, 2019, Available at: <https://theappeal.org/the-failure-to-appear-fallacy/>

<sup>5</sup> See Lauryn P. Gouldin, “Defining Flight Risk,” University of Chicago Law Review, 85:677 (2018), pp. 729–35, [https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/02%20Gouldin\\_ART\\_SA%20%28JPM%29.pdf](https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/02%20Gouldin_ART_SA%20%28JPM%29.pdf); Daniel Bernal, “Note, Taking the Court to the People: Real-World Solutions for Nonappearance,” Arizona Law Review 59:547 (2017), 547–71, <http://arizonalawreview.org/pdf/59-2/59arizrev547.pdf>.

Bail Project, her homeless clients who don't have addresses return to court with the organization's assistance—and yet that community support is not accounted for by the risk assessment tool's resulting score.<sup>6</sup> Pretrial algorithms therefore violate the fundamental principle that the legal system's treatment of individuals should be based on that individual's actions and choices—not on a demographic into which they happen to fall. They also ignore the benefits of supportive services that address people's needs through a community-based model that prioritizes comprehensive social services over carceral punishment (i.e. failing to account for the possibility that one receives a ride to court from supportive community services, and is thus likely to appear in court despite not having a car, a home, and/or a cell phone).

Despite these concerns, HB 20 will mandate that every magistrate in the state presiding over a criminal matter consider the results of a risk assessment tool when determining the amount of bond and conditions of release to set in a defendant's case. Instead of penalizing people for past missed court dates, Texas should adopt proven, low-cost alternatives to pretrial detention such as text message reminders.<sup>7</sup>

### **Pretrial Risk Assessment Tools Cause Enormous Harm to Black, Brown, and Low-income Communities Without Increasing Public Safety.**

Texas should not rely on HB 20 to reform pretrial systems or to keep the public safe. It is clear that pretrial detention causes egregious harm and can have lasting social and economic consequences for Black, Brown, and low-income communities. Higher bond amounts imposed without regard for one's ability to pay increase the likelihood that an individual will be caged, away from their family, community, and livelihood, for months or even years. This harm, as another byproduct of a racist criminal legal system, disproportionately affects Black and Brown communities. In Harris County alone, Black people account for 51% of the jail population despite comprising only 20% of the general population.<sup>8</sup> Nation-wide, Black and Brown people receive bail amounts that are twice as high as those white people receive for the same charges and make up 43% of pretrial detainees.<sup>9</sup>

Without comprehensive and protective systemic reforms, any adoption of HB 20 will not have a sustained impact on pretrial release or make communities safer. A 2019 study of

---

<sup>6</sup> <https://theintercept.com/2020/07/12/risk-assessment-tools-bail-reform/>

<sup>7</sup> Associated Press, Text message reminders help people remember their court dates, Los Angeles Times, May 4, 2019, Available at: <https://www.latimes.com/nation/la-na-court-case-text-reminders-defendants-20190504-story.html>

<sup>8</sup> Jail Population History, Harris County, 2020, Available at: <https://charts.hctx.net/jailpop/App/JailPopHistory>; Harris County, Texas, United States Census Bureau, Available at: <https://www.census.gov/quickfacts/fact/table/harriscountytexas/RHI225219%23qf-headnote-a>

<sup>9</sup> Wendy Sawyer, How race impacts who is detained pretrial, Prison Policy Initiative, October 9, 2019, Available at: [https://www.prisonpolicy.org/blog/2019/10/09/pretrial\\_race/](https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/)

the implementation of a risk assessment tool in Kentucky concluded that the tool was not an effective means to reduce pretrial incarceration and did not eliminate racial disparities within pretrial systems.<sup>10</sup> Another 2019 study found that after risk-assessment tools were introduced, in Kentucky white defendants were offered no-bail release much more often than Black defendants.<sup>11</sup> Judges were more likely to overrule the default recommendation to waive a financial bond for moderate-risk accused people if the accused person was Black.

### **Conclusion**

HB 20 further entrenches a criminal legal system where the right to liberty and the presumption of innocence are available only to those who can pay. It will harm Texans by further subjecting them to wealth-based pretrial detention—a burden that will be borne by Black, Brown, and low-income communities.

For these reasons, we oppose House Bill 20.

Sincerely,



Wade McMullen  
SVP Programs & Legal Strategy  
Robert F. Kennedy Human Rights

CC: Chairperson Nicole Collier and Members of the Texas House of Representatives,  
Criminal Jurisprudence Committee

---

<sup>10</sup> Stevenson, Megan, Assessing Risk Assessment in Action (2018). 103 Minnesota Law Review 303 , Available at SSRN: <https://ssrn.com/abstract=3016088> or <http://dx.doi.org/10.2139/ssrn.3016088>

<sup>11</sup> Tim Simonite (city Alex Albright), "Algorithms Should've Made Courts More Fair. What Went Wrong?" Wired, September 5, 2019, <https://www.wired.com/story/algorithms-shouldve-made-courts-more-fair-what-went-wrong/>