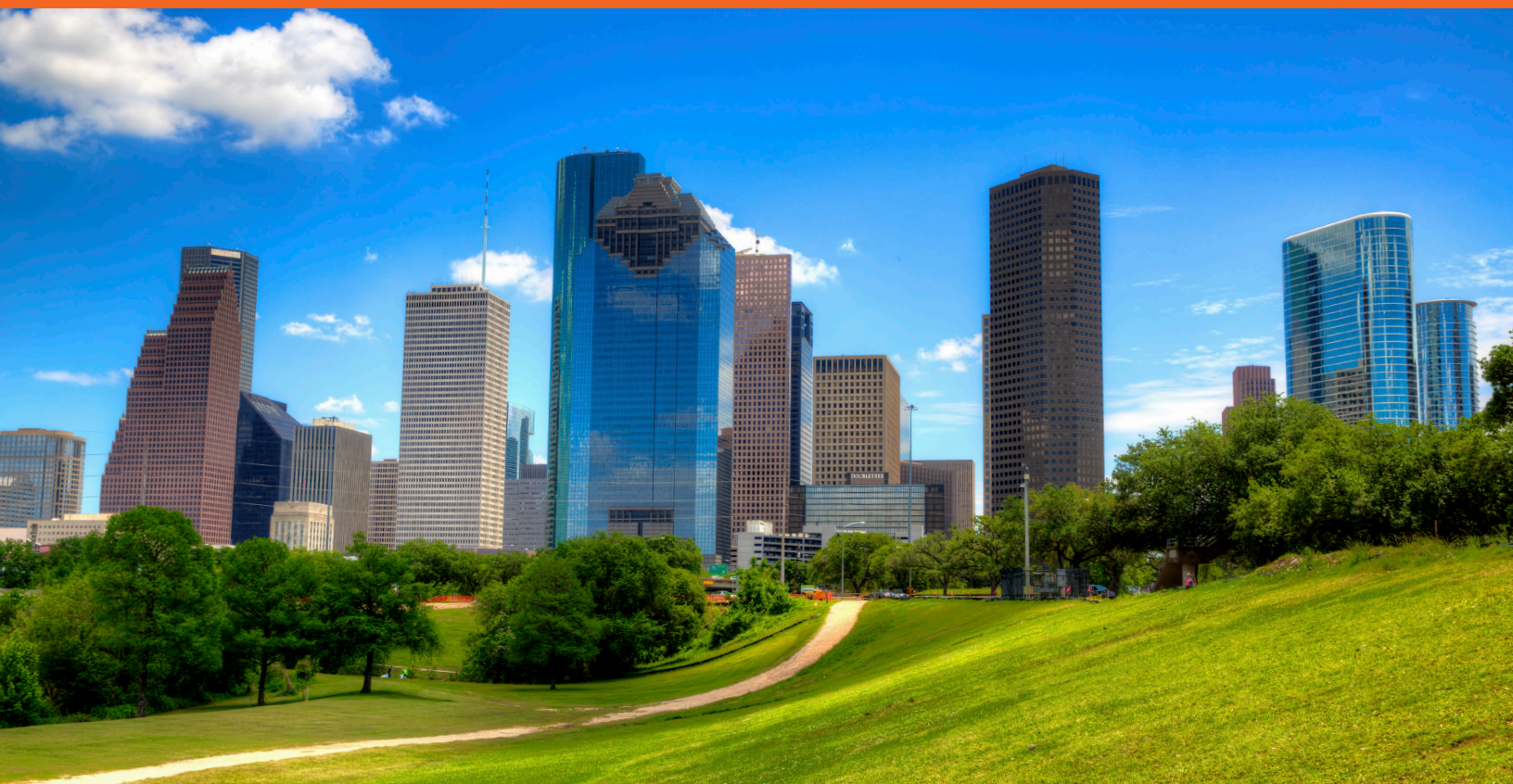




Rice University's Baker Institute for Public Policy

# DRUG POLICY

TEXAS CRIMINAL  
JUSTICE COALITION



## SECOND CHANCES: THE ECONOMIC AND SOCIAL BENEFITS OF EXPANDING DRUG DIVERSION PROGRAMS IN HARRIS COUNTY

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“Second Chances: The Economic and Social Benefits of Expanding Drug Diversion Programs in Harris County”

## Introduction

In recent years, the United States has experienced a sea change in drug policy. Along with the four states that have legalized recreational use of marijuana (Alaska, Colorado, Oregon, and Washington), many others have relaxed criminal penalties for nonviolent drug possession offenses. The federal government has taken similar steps, with the U.S. Department of Justice moving away from the steep mandatory minimum sentences that arose during the peak of the drug war, and the president himself commuting the sentences of individuals convicted of nonviolent drug offenses.

The wave of drug reform has touched even the most conservative states in the country, including Texas. Though none ultimately would become law, a number of bills introduced during the state's 2015 legislative session would have reduced or even eliminated the criminal penalties associated with some drug offenses. As reform efforts have continued across Texas, the Harris County District Attorney's Office implemented its First Chance Intervention Program, which allows a defendant arrested for possession of two ounces or less of marijuana to be diverted from the criminal justice system if the arrest is his or her first offense.

This report reviews the broader issues with current approaches to drug enforcement that have facilitated calls for reform, then demonstrates the need for drug policy reform in Harris County (Houston's home) prior to implementation of the First Chance Intervention Program (FCIP). Next, the report evaluates the FCIP and suggests ways in which policy outcomes can be improved through the program's expansion. Finally, the report concludes with a number of recommendations for Harris County going forward.

## Part I: Drug Policy Failures Highlight the Need for Reform

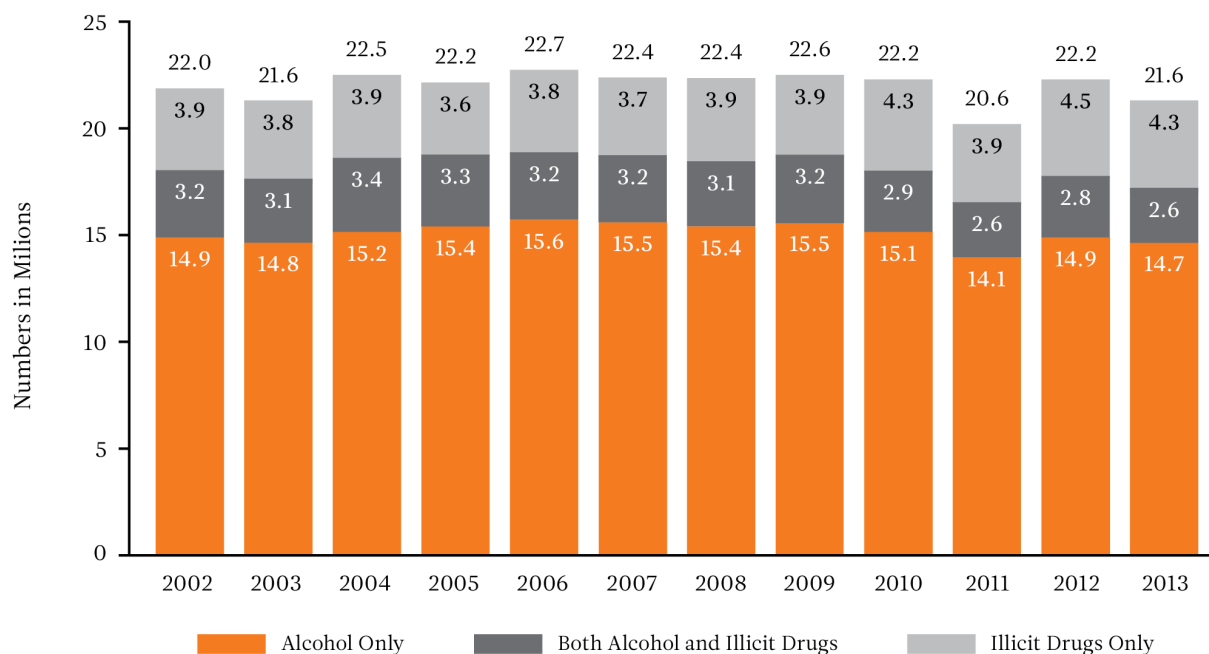
The growing consensus regarding the need for drug law reform reflects mounting evidence that the war on drugs has failed in a number of ways. Among the justifications for the passage of increasingly strict drug laws, which started in the late 1980s and continued in the decades following, was the need to curb drug addiction while also improving public safety. More than 20 years later, the data overwhelmingly show that drug laws have failed to accomplish either of these goals. The following sections discuss in greater detail the shortcomings of a strict enforcement approach to drug policy.

### *The Efficacy of Drug War Policies is Overestimated*

The wealth of available data on drug addiction indicates that strict enforcement of drug laws is disproportionate to the actual prevalence of drug addiction in the general population. While most people understand that someone who has an occasional drink is not an alcoholic, this fact is less accepted as it relates to drug use. According to 2013 National Institute on Drug Abuse data, about 14 percent of Americans (37.6 million individuals) have tried cocaine, but only 0.6 percent (1.6 million) had used it in the past month. And while “nearly 44 percent of Americans—and more than half of those younger than 50—have used marijuana at some point in their lives, only 7.5 percent have used in the past month.”<sup>1</sup>

While there is a population whose drug use constitutes abuse or dependence, it is quite small. An estimated 4.3 million people 12 and older—less than 1.5 percent of the population—abused or were dependent on illicit drugs in 2013, a number that has remained relatively stable over the past decade. To put this in perspective, more than three times as many people—14.7 million—abused or were dependent on alcohol that same year<sup>2</sup> (see Figure 1). For this small percentage of individuals who do have a problem with drugs, arrest and incarceration are unlikely to treat their addiction. There is a growing consensus in the scientific community that a “sizable portion of Substance Use Disorders—somewhere between 40 and 60 percent—can be traced to genetic vulnerability, including mental illness.”<sup>3</sup> In these cases, it is the particular social and psychological difficulties facing the individual user, rather than the drug itself, that are the problem. The legality of drug use is unlikely to factor into this person’s decision about whether to use drugs. Instead, these individuals could reap greater benefit from treatment that addresses the underlying issues that predispose them to drug use in the first place.

**Figure 1. Substance Dependence or Abuse in the Past Year Among Persons Aged 12 or Older (2002–2013)**



Source: Substance Abuse and Mental Health Services Administration, Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings, Fig 7.1.

Far from deterring drug use, continued arrests for low-level drug possession may encourage users to turn to “legal” highs that have far more negative health impacts. This is evident most recently in the rapidly rising use of synthetic drugs that, by having a constantly changing chemical composition, stay one step ahead of law enforcement and policymaking. In Texas, evidence suggests that marijuana use among adolescents has declined in the last decade, but this trend is accompanied by a troubling rise in the use of prescription and synthetic drugs, including synthetic marijuana, which has much more serious health consequences than plant-based marijuana.<sup>4</sup>

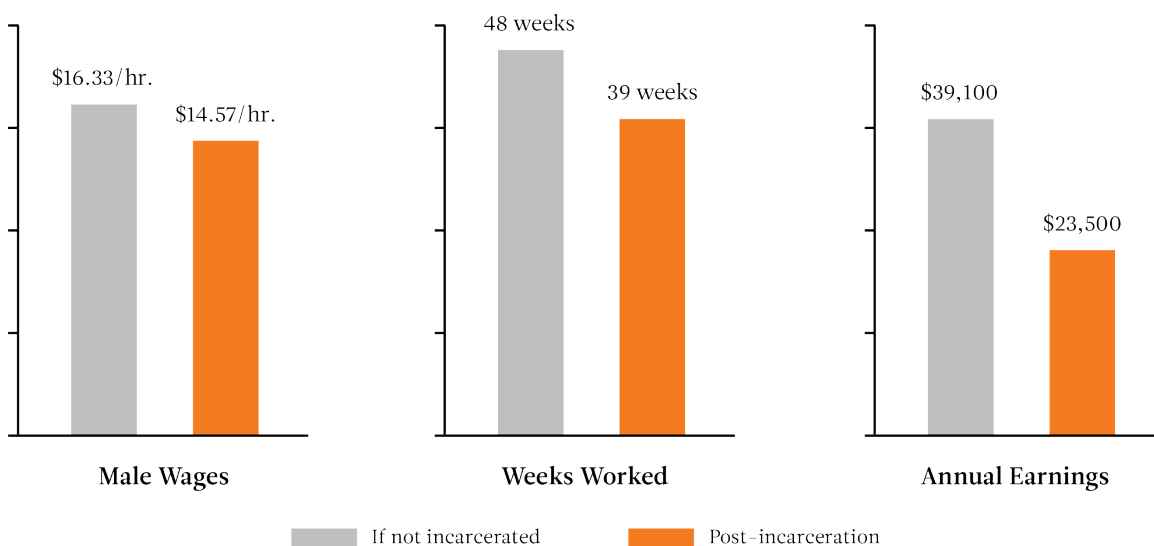
Studies show that strict enforcement policies fail in both preventing drug use and making the public safer. The earliest justifications for strict drug laws rested on the premise that they were necessary to ensure public safety. But several studies have found that incidents of other crime are increasing even when marijuana and other low-level drug possession offenses are strictly enforced.<sup>5</sup> For instance, a study on the relationship between marijuana arrests and property crime and homicide rates from 1994 to 2001 found possession arrests to be related to an increase in property crime and sale arrests to be related to an increase in burglary and homicide rates.<sup>6</sup> While the causal mechanisms of this relationship are unclear, crime and arrest data at a minimum suggest that aggressive enforcement of marijuana laws does not lead to a decrease in crime. Current marijuana policies, therefore,

do not improve public safety, but they do create considerable human and economic costs, as discussed below.

*Drug War Policies Create Significant Collateral Consequences*

The consequences of a drug arrest extend far beyond a criminal record. The briefest stint of incarceration increases the risk that a person will lose current employment and makes it more difficult to find work upon release. Even after controlling for factors such as education, age, and geographic location, “past incarceration has been found to reduce subsequent wages by 11 percent, cut annual employment by nine weeks and reduce yearly earnings by 40 percent”<sup>7</sup> (see Figure 2). This decreases the likelihood that ex-offenders will reintegrate into society successfully and increases the odds that they may have to turn to illegal activity to earn a living.

**Figure 2:** Incarceration Reduces Earnings Power: Estimated Effect of Incarceration, Predicated at Age 45



Source: The Pew Charitable Trusts by Bruce Western and Becky Pettit, 2009.

The consequences associated with a drug-related criminal record are significant even in situations where a person is not incarcerated. A drug possession conviction can detrimentally impact access to higher education, student loans, employment opportunities, occupational licenses, public housing, and food stamps.<sup>8</sup> Felony drug convictions also result in the loss of voting rights in many states, including Texas,<sup>9</sup> disenfranchising a large and disproportionately minority population.<sup>10</sup> The economic costs associated with a drug possession conviction, felony or not, can also be extreme. Fines, bail, court costs, attorney fees, seized assets, and lost wages add up to a significant financial burden for many of those arrested. The full costs associated with a drug possession arrest are difficult to pinpoint

because there is great variation among individual cases. However, one Washington-based study found that the average cost of bails, fines, and court fees from marijuana possession arrests was \$1,675.<sup>11</sup> The average cost of legal representation for those who hired private attorneys was \$4,250, while lost income varied widely, from \$200 to \$3,000.<sup>12</sup>

The families and communities of those incarcerated also feel the impact of draconian drug laws. A family member's incarceration increases the odds of financial difficulty and divorce. Children especially are affected by this instability.<sup>13</sup> As of 2009, more than 2.7 million children had an incarcerated parent.<sup>14</sup> Of these parents serving time, one-fourth were incarcerated for a drug conviction. This amounts to 1 percent of all children in the United States with a parent serving time for a drug offense; for black children, it is almost 4 percent.<sup>15</sup> This leaves these children at considerable economic disadvantage, as over half of incarcerated parents are the main financial providers for their children.<sup>16</sup> It can also create educational difficulties. Young boys with an incarcerated parent, particularly an incarcerated father, are more likely to display aggressive behavior and be suspended or expelled from school, even after controlling for other factors.<sup>17</sup> Financial stability and education in youth are strong predictors of one's chances for upward mobility later in life; thus, parental incarceration creates a severe handicap that is likely to affect these children throughout their lives. This handicap increases the likelihood that a child will become an adult who needs governmental assistance, suffers detrimental health consequences, or turns to crime.

### *Drug War Policies Disproportionately Impact Youth and Minority Communities*

The war on drugs was engineered through strict enforcement of drug laws and harsh punishments for low-level offenders, and marijuana users bore the brunt of the enforcement. From 1990 to 2002, marijuana possession arrests accounted for 70 percent of the total growth in drug arrests.<sup>18</sup> This trend has continued in many places in the decade since, and Texas has been a leader in targeting marijuana users for criminal punishment. Between 2001 and 2010, the rate of marijuana possession arrests in the state increased by 17 percent.<sup>19</sup> In 2013, approximately 52 percent of drug arrests in Texas were for marijuana, with 98 percent of those arrests for marijuana possession.<sup>20</sup>

Data indicate that young people and minorities are most affected by strict marijuana enforcement policies. In 2010, over three-quarters of marijuana possession arrests in the United States were of people under 30, and over one-third were teenagers and preteens.<sup>21</sup> While illicit drug use is most common among 16- to 29-year-olds, it drops steadily as people enter their 30s and family and career responsibilities dictate a change in lifestyle. There is little evidence to suggest that strict enforcement patterns have a significant impact on whether teens or young adults decide to use marijuana or any other drug.<sup>22</sup>

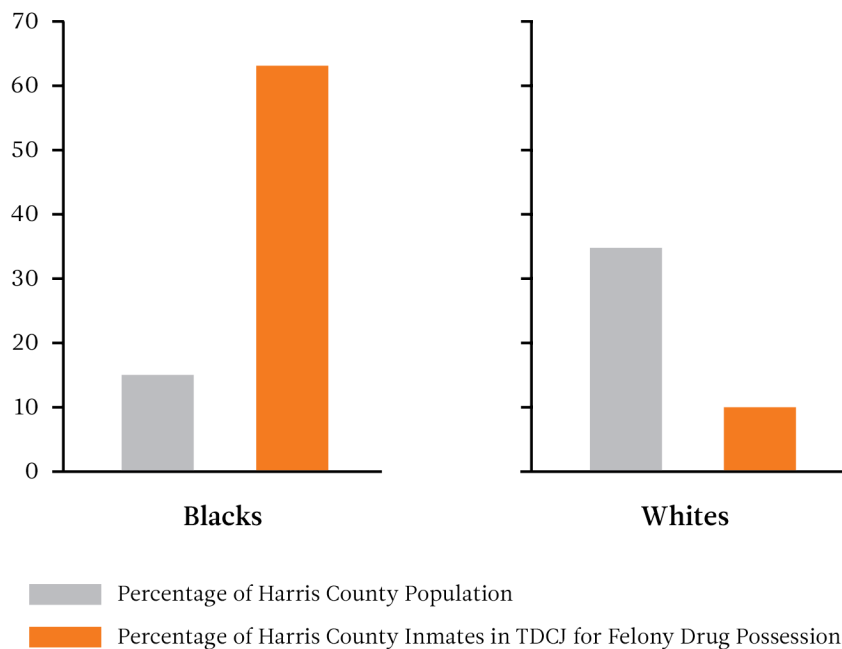
These arrests might never have occurred if the drug in question had been alcohol, and most of the convictions and sentences would not have been levied if the defendants had been white. "In 2013, the rate of Substance Use Disorder<sup>23</sup> was 7.4 percent among blacks, 8.4 percent among whites, and 8.6 percent among Hispanics, but blacks are arrested more than

three times as often as whites and make up 45 percent of inmates in state prisons for drug offenses.”<sup>24</sup>

Racial disparities in marijuana arrests are a problem both nationally and in Texas. According to 2010 data from the American Civil Liberties Union (ACLU), blacks in Texas were 2.33 times more likely to be arrested for marijuana possession than whites. In Harris County, they were roughly three times more likely to be arrested for marijuana possession than whites.<sup>25</sup>

Minorities in Harris County also are more likely to be targeted for other drug arrests than non-minorities. In FY2012, blacks accounted for almost 50 percent of all felony drug possession arrests, even though they made up only 19 percent of the county’s population. This disparity continues beyond the point of arrest, as blacks make up roughly 66 percent of those incarcerated for felony drug possession in Harris County. In contrast, only 13 percent of those incarcerated for felony drug possession in the county are white<sup>26</sup> (see Figure 3). As has been noted, these glaring disparities have “increased the cynicism of minorities, who know they are the victims of discrimination. That cynicism easily extends to other laws and to law in general, loosening the psychic bond to society and its norms, and that harms democracy and the rule of law.”<sup>27</sup>

**Figure 3.** Overrepresentation of Blacks Among Harris County Inmates in Texas Department of Criminal Justice for Drug Possession



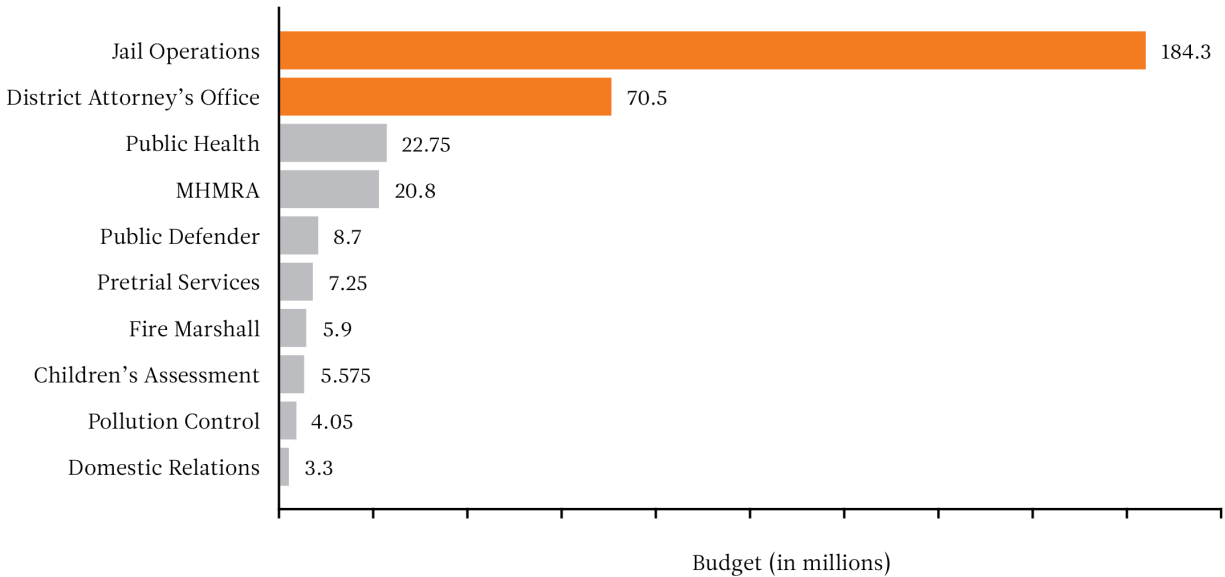
Source: Texas Criminal Justice Coalition, *Harris County Communities: A Call for True Collaboration Restoring Community Trust*, 2013.



## Part II: The Need for Drug Policy Reform in Harris County

In Harris County, the need for drug reform is a stark reality given the high social and economic costs of enforcement. Criminal justice spending has far outpaced all other general revenue expenditures in the last decade. By FY2012, criminal justice accounted for 70 percent of the county’s total general revenue budget.<sup>28</sup> The jail system, faced with overcrowding, has been quite expensive to maintain; in FY2013, roughly \$175 million was spent on Harris County jail operations. Currently, there is no indication that these costs will decline, as the county’s budget for FY2016 allocated \$184 million for jail operations alone (see Figure 4). Several factors have increased the burden on Harris County’s criminal justice system, but two primary and related contributors are the enforcement of marijuana possession laws and the misdemeanor bail system.

**Figure 4.** Harris County Departmental Budgets, Fiscal Year 2015–16



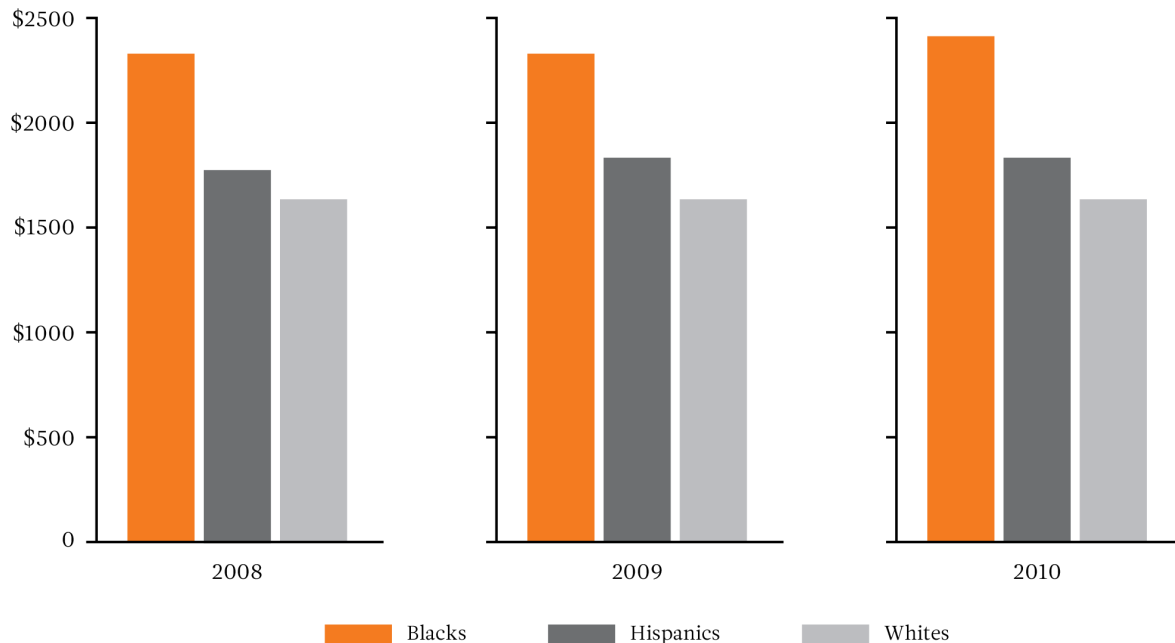
Source: Harris County Budget Management Department, *Final Budget, FY 2015-2016*, 2015.

In Texas, possession of two ounces or less of marijuana is classified as a Class B misdemeanor, punishable by incarceration of up to 180 days and a maximum fine of \$2,000.<sup>29</sup> Possession of two to four ounces is classified as a Class A misdemeanor, with a penalty of up to a year of incarceration and a maximum fine of \$4,000.<sup>30</sup> The impact of a misdemeanor marijuana arrest is amplified by Harris County’s bail schedule, which establishes a bail amount based on the alleged offense.<sup>31</sup> For misdemeanor marijuana possession arrests, bail amounts can range from \$500 to \$5,000.<sup>32</sup> The schedule’s reliance on the alleged offense to calculate bail amounts (rather than tailoring bail to individual financial circumstances) is responsible for the fact that more than three-quarters of the

inmates in the Harris County Jail have not been convicted of the crime for which they were arrested; they are merely awaiting trial.<sup>33</sup>

According to a report from Project Orange Jumpsuit, the pretrial detention rate for Harris County misdemeanor defendants whose bond was set at \$500 was 22 percent, meaning that one in five first-time defendants charged with a Class B misdemeanor will remain in jail for an average of almost nine days due to inability to make bond.<sup>34</sup> As bond increases, so do pretrial detention rates; when bond is set between \$2,001 and \$4,999, the pretrial detention rate rises to 56 percent.<sup>35</sup> This burden falls hardest on blacks and Hispanics, who consistently are required to pay more for bail than whites even when charged with similar offenses. For example, in 2010 the average bond for offenses involving less than 5 pounds of marijuana was \$1,686 for white defendants, compared to \$1,795 for Hispanic defendants and \$2,397 for black defendants. As Figure 5 shows, these disparities have been consistent over several years.<sup>36</sup> Because a higher bond increases the likelihood of pretrial detention, minorities—blacks especially—are at greater risk of being detained. This, in turn, increases the chances of incarceration, as detained defendants are more than three times as likely to face jail time than defendants who can afford to make bail.<sup>37</sup>

**Figure 5.** Average Bond for Marijuana Offenses Less Than Five Pounds



Source: Initiative on Neuroscience and Law, *Harris County TX Data*, Ormachea, et al. 2015.

The structure of the bail system in Harris County contributes to greater incarceration, creating significant costs. According to the Harris County Criminal Justice Coordinating Council, the cost of one day of incarceration ranges from \$40 to \$45 for an inmate in the general population with no health issues, and from \$285 to \$300 for an inmate requiring mental health housing.<sup>38</sup> Overall, it costs an estimated \$75 to \$80 per day to house the average inmate, in addition to the one-time booking fee of \$250—meaning taxpayers and defendants alike pay an exorbitant cost to sustain a system with minimal (if not nonexistent) benefit to public safety. As roughly 30 percent of misdemeanor cases in Harris County involve marijuana possession or theft,<sup>39</sup> a large share of the jail’s budget is spent on detaining individuals charged with low-level, nonviolent offenses and who have not yet been convicted of a crime. For example, the booking fees for misdemeanor marijuana cases alone add up to \$216,250 per month, or just under \$2.6 million per year—a hefty sum that could be better spent on arresting, prosecuting, and housing offenders who commit violent crimes or on supporting substance abuse treatment and prevention efforts.

### **Part III: Harris County’s First Chance Intervention Program**

Recognizing that enforcement of marijuana possession laws had become a drain on county resources and a burden on individual defendants, Harris County District Attorney Devon Anderson in October 2014 launched the First Chance Intervention Program (FCIP) for first-time marijuana offenders.<sup>40</sup>

The FCIP “recognizes the principle that first-time offenders who commit low-level, nonviolent offenses are often self-correcting, without the need for more formal and costly criminal justice intervention. It also frees up law enforcement, jail, prosecution, and court resources that would otherwise be expended in the arrest and prosecution of the offender.”<sup>41</sup> To be eligible for the program, an individual must be detained or arrested for possession of two ounces or less of marijuana (with no additional charges); may not have outstanding warrants or holds, adult criminal convictions, probation or deferred adjudication records, or currently be on bond, deferred adjudication, or probation; and must not already be a participant in the First Chance program or another pretrial intervention program.<sup>42</sup> Eligible individuals are given the chance to avoid a criminal record by completing an eight-hour cognitive class or eight hours of community service.<sup>43</sup> After an eligible individual is detained, he or she must contact Pretrial Services within three business days to schedule an intake appointment, then complete an intake interview and a short assessment. Participation in the FCIP lasts for either 60 or 90 days, during which time the individual must not break the law and must pay a non-refundable \$100 program fee (which may be reduced or waived) and complete either the community service or cognitive class.<sup>44</sup>

More than 1,300 individuals enrolled in FCIP between the program’s launch in October and April 30, 2015, though a vast majority of those participants enrolled after being charged (84 percent were post-charge enrollees, while only 16 percent were pre-charge).<sup>45</sup> These numbers indicate that while the program is popular with judges, law enforcement

has been hesitant to buy into the program, which is not uncommon when a jail diversion program is launched.<sup>46</sup> Nonetheless, the program has been quite successful, as nearly 90 percent of those enrolled have either completed the program or are actively participating.<sup>47</sup> Further, the program has precipitated a large drop in marijuana case filings, with a spokesman for the district attorney's office reporting a 20 percent drop in Class B marijuana cases filed in Harris County compared to the same period in 2014.<sup>48</sup>

As law enforcement continues to learn about and buy into the program, Harris County can expect to see further reductions in marijuana filings as well as increased savings in both human capital and taxpayer dollars. At a minimum, the county saves the \$250 booking fee for every pre-booking diversion, as well as any costs that would have been spent incarcerating a defendant who could not afford bail.

### **Part IV: Improving Policy Outcomes Through Expansion of the First Chance Intervention Program**

The Harris County District Attorney's Office has a promising opportunity to build on the success of the FCIP by expanding it to apply to other charges. Program expansion would allow defendants and taxpayers alike to see better outcomes while experiencing continued public safety in the community. One opportunity that poses low risk and high opportunity for reward involves extending the program to low-level, nonviolent offenses that can be remedied with restitution and community service, such as repeat marijuana cases, low-level theft offenses (such as shoplifting), and arrests involving small amounts of other drugs. The following sections outline a path for expansion to these areas.

#### *Expansion to all Marijuana Charges and Low-Level Thefts*

The creation of and support for the FCIP demonstrates acknowledgement by decision-makers that prosecuting misdemeanor marijuana possession is not an efficient use of taxpayer dollars or public safety resources. This is not limited to Harris County; in counties across Texas, prosecutors have stopped pursuing misdemeanor marijuana cases.<sup>49</sup> Because of its size, Harris County stands to benefit significantly from ceasing prosecution of all misdemeanor marijuana offenses regardless of prior nonviolent convictions. Expansion of the FCIP to these offenses could bring savings of \$216,250 per month in booking fees, along with another \$77,850 in projected costs of incarcerating defendants who cannot make bond. All told, expansion would save valuable law enforcement and prosecutorial resources while also saving more than \$3.5 million per year.

Preliminary data from the FCIP suggests that expanding the program could aid in reducing some of the racial disparities in Harris County's justice system. As of April 30, 2015, 33 percent of those who had taken part in the program were black (representing 442 individuals), and 37 percent (508 individuals) were Hispanic.<sup>50</sup> While the overall numbers are low compared to the 2,921 total misdemeanor marijuana arrests between January 2015 and April 2015, the current program targets only *first-time* offenders. Expanding the

program to all marijuana possession offenders would significantly increase the pool of eligible individuals, many of whom would likely be black and Hispanic, according to current arrest statistics.

FCIP program expansion also could address the age disparity in drug enforcement. As of April 30, FCIP participants had a median age of 20, indicating that a majority of those arrested for first-time marijuana possession are young adults. By expanding the program to all marijuana possession cases, Harris County could significantly reduce the number of young adults burdened with a criminal record, which in turn would leave the possibility of more educational and career opportunities intact for that population.

The improvements seen from the diversion of marijuana offenses could also be realized with other nonviolent crime cases if the FCIP were expanded. For example, rather than continue to spend scarce resources prosecuting first-time misdemeanor theft cases, a program similar to the FCIP that required offenders to pay restitution to victims would allow for improved outcomes for victims, defendants, taxpayers, and the criminal justice system. Presently, misdemeanor theft defendants cost the county an average of \$191,750 in booking fees per month. Thus, expanding the program to theft cases makes good fiscal sense and could potentially save Harris County \$2.3 million per year.

### *Trace Cases: An Opportunity for Policy Improvement*

While marijuana has been the dominant focus of drug reform, a strong case can be made for offering incarceration alternatives for other drug offenses as well. Texas laws regarding other controlled substances are, like marijuana laws, quite strict. For commonly abused controlled substances such as cocaine, methamphetamine, heroin, and others,<sup>51</sup> possession of an amount of less than 1 gram (or less than a package of Splenda) can be classified as a state jail felony, which carries harsh punishment.<sup>52</sup> Given the evidentiary limits of testing such small quantities of substances, many large Texas counties no longer attempt felony prosecutions for possession of what amounts to “trace” amounts of drugs, although Harris County continues to do so.<sup>53</sup>

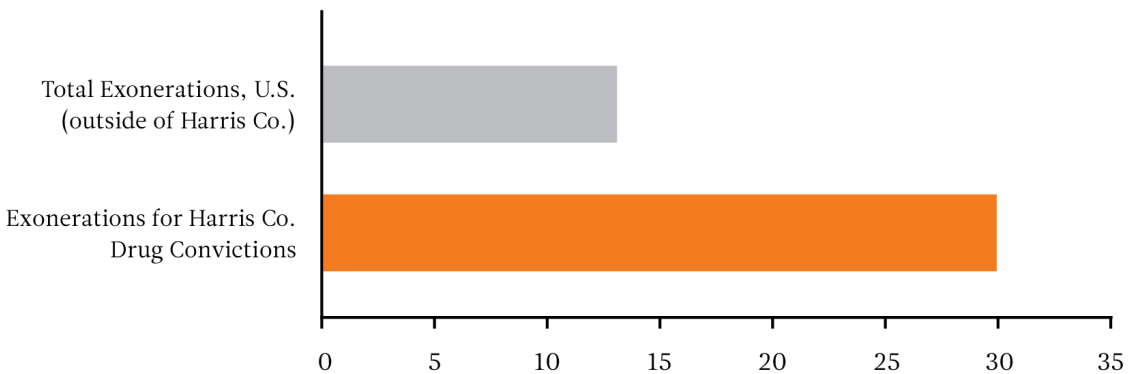
Harris County’s pursuit of felony possession charges for trace cases has fluctuated since 2008. In 2010, under District Attorney Pat Lykos, the county ended the practice of filing felony charges against defendants possessing less than 1/100th of a gram of a controlled substance.<sup>54</sup> The results were drastic—the number of felony charges in trace cases was nearly cut in half, from 10,674 in 2009 to 5,942 in 2010.<sup>55</sup> Instead of the rise in property crimes and burglaries that some predicted, the number of burglaries and robberies dropped dramatically after the policy change.<sup>56</sup> Additionally, the Houston Police Department’s clearance rates in murder, rape, and aggravated assault cases significantly increased.<sup>57</sup> But the policy of prosecuting trace cases as felonies was reinstated by Mike Anderson after he was elected district attorney in 2012, and current District Attorney Devon Anderson continues that practice. According to the Harris County Clerk’s Office, the number of felony trace cases filed has steadily increased over the past two years, with last year’s total of 9,801 indicating a return to pre-2009 trends.<sup>58</sup>

As with misdemeanor marijuana and theft cases, strict adherence to a bond schedule makes Harris County's policy on prosecuting trace cases as felonies exorbitantly expensive. The county's bond schedule specifies a \$2,000 bond for a defendant with no criminal record charged with a fourth degree (state jail) felony. It is \$5,000 for defendants with one previous conviction and \$15,000 for defendants with two or more convictions. According to the Project Orange Jumpsuit report, 39 percent of all felony defendants held on a bond of \$2,000 or less were detained for an average of 16.5 days.<sup>59</sup> As with misdemeanor cases, increased bond amounts bring higher pretrial detention rates and longer stays. As of June 2015, nearly 1,500 inmates charged with state jail felonies in the Harris County jail were being detained without having been convicted of the crime for which they were arrested—a 36 percent increase from June 2014.<sup>60</sup> Along with the individual consequences facing defendants who cannot make bail, taxpayers are suffering; at \$75 per person per day, these inmates are costing Harris County taxpayers \$111,900 per day. Maintaining this population for a full year would cost taxpayers over \$40 million.

The cost of the trace case policy is not limited to housing defendants prior to trial and incarcerating them upon conviction. In 2014, Harris County received some unwanted notoriety when a number of defendants convicted of drug offenses were exonerated after lab tests showed the substances for which they were arrested were either legal or misidentified.<sup>61</sup> This is in stark contrast to the much lower rate of exonerations in the rest of the country—Harris County exonerated 30 defendants convicted of drug offenses in 2014, more than twice the number of exonerations for all defendants convicted of any crime in any other U.S. jurisdiction in 2014 (see Figure 6). In its June 2015 newsletter, the National Registry of Exonerations noted: “Almost 60 percent of the new drug-crime exonerees since 2012 are defendants who pleaded guilty in a single jurisdiction, Harris County, Texas (Houston), and were cleared when crime lab tests found no illegal drugs in the materials seized from them.”<sup>62</sup> Along with the impact a wrongful conviction has on the defendant, Harris County also must absorb the costs associated with undoing a fully prosecuted case.

Following the exonerations, the district attorney's office announced it would no longer “make a recommendation nor agree to entry of a plea of guilty or no contest in a felony controlled substance case before the identity and amount of the controlled substance has been confirmed by a crime laboratory.”<sup>63</sup> To ensure that these defendants would not plead guilty prior to receiving lab results, the DA's policy change necessitated an initial outlay of more than \$1 million by the Houston Forensic Science Center, which conducts the testing for illegal substances.<sup>64</sup> Along with the initial expense, expediting the testing in these cases shifts investigative and forensic resources away from violent and serious property crimes. Additionally, while this policy will ensure a reduction in wrongful convictions, it will likely lead to longer pretrial detention rates for defendants awaiting drug test results. As of June 2015, nearly 1,500 inmates were being held pretrial on state jail felony charges, a 36 percent increase over the past year, causing an influx of low-level, nonviolent offenders into the Harris County Jail.<sup>65</sup>

Figure 6. Exonerations in the United States, 2014 — Convictions



Source: National Registry of Exonerations, 2015.

*Benefits of Expanding the First Chance Intervention Program to Trace Cases*

Harris County’s brief abstention from trace case prosecution saw a drop in burglaries and robberies and an increase in violent crime clearance rates, suggesting that expanding the FCIP to trace cases could have a positive impact on public safety and also result in additional savings in valuable resources. This is demonstrated by Seattle’s experience. Before developing the FCIP, Harris County leaders traveled to Seattle to observe its Law Enforcement Assisted Diversion (LEAD) program. The Seattle LEAD program, which was initially developed with funding from the Houston-based Laura and John Arnold Foundation, combines diversion with intensive case management in an effort to reduce the number of “frequent fliers” who cycle through its criminal justice system.<sup>66</sup> After two years, the Seattle program reduced jail bookings, jail days, prison incarceration, felony cases, and costs associated with the criminal justice and legal system utilization.<sup>67</sup> The reduction in system utilization costs was substantial, amounting to savings of \$8,061 per program participant per year.<sup>68</sup> An independent analysis of the program found that from October 2009 to July 2014, LEAD participants were 58 percent less likely to be arrested compared to a control group that met the same criteria as LEAD participants. The participating group was also 39 percent less likely than the control group to be charged with a felony.<sup>69</sup> This significant reduction in recidivism adds to cost savings while at the same time improving public safety.

Eligibility for the Seattle LEAD program extends to individuals arrested for possession of less than three grams of marijuana or other controlled substances, suggesting that this type of diversion program can be applied to other drugs. The successful implementation of similar diversion programs in other cities—including Albany, New York and Santa Fe, New Mexico—also means that these models can be scaled and tailored to individual jurisdictions. Launching a diversion program customized to suit the needs of Harris County could save considerable resources. For example, a program as cost-effective as the Seattle program targeting trace cases in Harris County would save nearly \$80 million per year.<sup>70</sup>

Even without implementing a comprehensive diversion program, the county could save the \$100,000 per day it now spends housing defendants awaiting trial in trace cases if the district attorney's office chose to stop prosecuting them as felony charges.<sup>71</sup> This policy change would also relieve the county's drug testing lab of the backlog created by the large number of trace cases and instead allow drug testing resources to be spent more effectively on investigating and prosecuting violent, sexual, and property crimes.

Simply put, there is no rational basis to continue the policy of prosecuting trace cases as felonies. In years past, the trace policy has coincided with decreases in public safety (in the form of increased property and violent crimes) and lowered clearance rates by local law enforcement. The same cases that have made Harris County the "American capital of drug crime exonerations"<sup>72</sup> are now costing the county valuable forensic resources that could be better spent investigating violent, sexual, and major property crimes—especially in a jurisdiction that only recently cleared its large backlog of untested rape kits.<sup>73</sup>

Aside from the adverse impact on individual lives, Harris County's policy on trace cases costs local taxpayers over \$40 million in incarceration expenses per year alone. Diversion programs like the one in Seattle have been shown to reduce crime while saving resources to the tune of over \$8,000 per defendant. A program based on the same principles as the district attorney's FCIP and tailored to Harris County trace cases could very well save the county tens of millions of dollars per year.



## Part V: Recommendations for Harris County

1. Harris County should compile criminal justice, public health, and population data for a comprehensive analysis of drug use and abuse among county residents. Understanding the scope of the problem will help in more accurately crafting solutions.
2. Harris County should perform a county-wide evaluation of substance abuse treatment providers to determine if there is more need within the county for accessible, affordable treatment as an alternative to addressing substance abuse almost exclusively through the criminal justice system.
3. Harris County should perform an advanced statistical analysis of the impact of drug laws on its economy, public safety, and overall expenditures.
4. Harris County should continue to expand its First Chance Intervention Program and form a committee to gather and analyze the data necessary to offer it to a greater number of individuals.
5. Harris County should explore instituting a pilot expansion of the First Chance Intervention Program to all misdemeanor marijuana offenses and first-time misdemeanor theft offenses. The county should track outcome differentials between participants in the pilot program and nonparticipants, specifically examining the age, race, and recidivism of participants, as well as costs to the county compared with current policies.
6. Harris County should explore its options for pretrial diversion for defendants charged with felonies for possession of less than one gram of a controlled substance. Some steps could include developing a diversion docket, reducing bail required in such cases and encouraging probation over jail sentences for those found guilty.

## Endnotes

<sup>1</sup> James A. Baker, III, Institute for Public Policy, *Rx for U.S. Drug Policy: A New Paradigm* (Houston: James A. Baker III Institute for Public Policy at Rice University), 5.

<sup>2</sup> *Ibid.*, 3.

<sup>3</sup> *Ibid.*, 7.

<sup>4</sup> Craig Hlavaty, “Marijuana Use Going Down Among Adolescents, but What’s Replacing it is Likely Worse,” *Houston Chronicle*, July 13, 2015.

<sup>5</sup> Katherine Beckett and Stever Herbert, *The Consequences and Costs of Marijuana Prohibition*, 31.

<sup>6</sup> Edward M. Shepard and Paul R. Blackley, “The Impact of Marijuana Law Enforcement in an Economic Model of Crime,” *Journal of Drug Issues* (April 2007): 403-424.

<sup>7</sup> The Pew Center for Charitable Trusts, *Collateral Costs: Incarceration’s Effect on Economic Mobility* (Philadelphia: The Pew Center for Charitable Trusts, 2010), 11.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Texas Election Code §11.002; Texans cannot vote while serving any part of a sentence for a felony (incarceration, probation, or parole), but they can vote again once they are “off paper” (having fully completed the sentence).

<sup>10</sup> Christopher Uggen, Sarah Shannon, and Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, (Washington DC: The Sentencing Project, 2012). Authors estimate that in 2010, 29.4 percent of the disenfranchised population in Texas was African-American. According to U.S. Census data from 2010, African-Americans accounted for only 12.6 percent of the general population.

<sup>11</sup> Beckett and Herbert, *Consequences of Marijuana Prohibition*, 33.

<sup>12</sup> *Ibid.*, 34.

<sup>13</sup> *Ibid.*, 18.

<sup>14</sup> *Ibid.*, 18.

<sup>15</sup> *Ibid.*, 20.

<sup>16</sup> *Ibid.*, 21.

<sup>17</sup> *Ibid.*, 21-22.

<sup>18</sup> Ryan S. King and Marc Mauer, “The War on Marijuana: The Transformation of the War on Drugs in the 1990s,” *Harm Reduction Journal*, 3(June 2006): 1-17.

<sup>19</sup> American Civil Liberties Union, *The War on Marijuana in Black and White* (New York: American Civil Liberties Union, 2013).

<sup>20</sup> 2013 Texas Department of Public Safety Arrest Data, at <http://www.txdps.state.tx.us/crimereports/13/citCh9.pdf>.

<sup>21</sup> ACLU, *War on Marijuana*, 38.

<sup>22</sup> Baker Institute, *Rx for U.S. Drug Policy*.

<sup>23</sup> Substance Use Disorder is an umbrella term for repeated patterns of harmful drug use that differentiates it from normal use, indicating abuse and/or dependence in the past 12 months.

<sup>24</sup> Baker Institute, *Rx for U.S. Drug Policy*, 7; See also ACLU, *War on Marijuana*.

<sup>25</sup> ACLU, *War on Marijuana*, 54.

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<sup>26</sup> Rebecca Bernhardt, *Harris County Communities: A Call for True Collaboration*, (Austin: Texas Criminal Justice Coalition, 2013).

<sup>27</sup> Baker Institute, *Rx for U.S. Drug Policy*, 7.

<sup>28</sup> *Ibid.*

<sup>29</sup> See Texas Health and Safety Code § 481.121.

<sup>30</sup> *Ibid.*

<sup>31</sup> Harris County Criminal Courts at Law, Rule 9.

<sup>32</sup> Per Harris County Misdemeanor Bail Schedule: Bail for Class B misdemeanors, bail is set at \$500 for the first offense and starts at \$500 for the second offense (plus \$500 for each prior misdemeanor conviction and an additional \$1,000 for each prior felony conviction, not to exceed \$5,000). For Class A misdemeanors, bail is set at \$1,000 for the first offense, and \$1,000 for the second offense (plus \$500 for each prior misdemeanor conviction and an additional \$1,000 for each prior felony conviction, not to exceed \$5,000). At <http://www.ccl.hctx.net/attorneys/BailSchedule.pdf>.

<sup>33</sup> Harris County Criminal Justice Coordinating Council June 2015 Jail Population Report.

<sup>34</sup> Gerald R. Wheeler and Gerald Fry, *Project Orange Jumpsuit Report #2: Harris County's Two-Tier Justice System: Longitudinal Study of Effects of Harris County Felony and Misdemeanor Defendants' Legal & Extralegal Attributes on Pretrial Status and Case Outcome* (Houston: Project Orange Jumpsuit, 2014), 9-10.

<sup>35</sup> *Ibid.*, The average length of detention for these inmates is 7.5 days, and over 90 percent are sentenced to time at the Harris County Jail.

<sup>36</sup> Ormachea, et al., *Harris County Data* (Boston: Northeastern University School of Law, 2015). To control for outliers, these figures exclude all bonds above \$10,000.

<sup>37</sup> Wheeler and Fry, *Project Orange Jumpsuit*.

<sup>38</sup> Harris County Office of Criminal Justice Coordination Presentation, September, 12, 2012; in addition to daily costs, there is an additional one-time cost that includes booking/releasing, records, transportation, offsite medical, courts, building and maintenance, utilities, and allocated county overhead.

<sup>39</sup> According to the Harris County Office of Court Administration Misdemeanor Case Activity Detail Reports, misdemeanor theft and marijuana possession accounted for 29.7 percent (18,810 of 63,329) of all misdemeanor cases filed in 2014.

<sup>40</sup> Office of District Attorney Devon Anderson, Harris County, Texas, *First Chance Intervention Program*, 2014.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Office of District Attorney Devon Anderson, Harris County, Texas, *First Chance Intervention Program Houston Police Department and Harris County Sheriff's Office Pilot Agency Comparative Statistics* (as of 4/30/15).

<sup>46</sup> See Katherine Beckett, *Seattle's Law Enforcement Assisted Diversion Program: Lessons Learned from the First Two Years* (Seattle: University of Washington Law, Societies & Justice Program and Department of Sociology, March 2014).

<sup>47</sup> Office of District Attorney Devon Anderson, *First Chance Intervention Program*.

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<sup>48</sup> Terri Langford, “In pockets of Texas, prosecutors just say no to marijuana prosecutions,” *San Marcos Mercury* June 21, 2010, accessed at <http://smmercury.com/2015/06/21/inpocketsoftexasprosecutorsjustsaynotomarijuanaprosecutions/print/>.

<sup>49</sup> Ibid.

<sup>50</sup> Office of District Attorney Devon Anderson, *First Chance Intervention Program, HPD and HCSO Pilot Agency Comparative Statistics*.

<sup>51</sup> For a full list of prohibited controlled substances, see Texas Health and Safety Code § 481.102 et. seq.

<sup>52</sup> Texas Health and Safety Code § 481.115, § 481.116.

<sup>53</sup> Per information provided by Tarrant, Travis, El Paso, and Collin county district attorney’s offices, February 2013.

<sup>54</sup> See e.g. Brian Rogers, “Harris County DA’s easing of crack pipe policy stirs storm,” *Houston Chronicle*, Dec. 8 2009, accessed at <http://www.chron.com/news/houston-texas/article/Harris-County-DA-s-easing-of-crack-pipe-policy-1613537.php>; and Brian Rogers, “Crack policy puts Harris County DA at odds with police,” *Houston Chronicle*, Dec. 5 2011, accessed at <http://www.chron.com/default/article/Crack-policy-puts-Harris-County-DA-at-odds-with-2346724.php#page-2>.

<sup>55</sup> Brian Rogers, “Crack policy puts Harris County DA at odds with police.”

<sup>56</sup> Burglaries dropped 10 percent and robberies dropped 6 percent, See Federal Bureau of Investigation, *Crime in the United States, 2009* (Washington, D.C.: U.S. Department of Justice, September 2012), retrieved December 12, 2014 from [https://www2.fbi.gov/ucr/cius2009/data/table\\_06.html](https://www2.fbi.gov/ucr/cius2009/data/table_06.html); and Federal Bureau of Investigation, *Crime in the United States, 2011*. (Washington, D.C.: U.S. Department of Justice, September 2012), retrieved December 12, 2014 <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-6>.

<sup>57</sup> Houston Police Department, 2010 Annual Report, at [http://www.houstontx.gov/police/departments\\_reports/Annual\\_Report\\_2010.pdf](http://www.houstontx.gov/police/departments_reports/Annual_Report_2010.pdf).

<sup>58</sup> Per electronic search of Harris County Clerk’s Office Records for all new felony assignments in 2014.

<sup>59</sup> Wheeler and Fry, *Project Orange Jumpsuit*.

<sup>60</sup> Harris County Criminal Justice Coordinating Council, *June 2015 Jail Population Report*.

<sup>61</sup> Anita Hassan and Mike Tolson, “Harris County leads way in 2014 exonerations,” *Houston Chronicle*, January 25, 2015, accessed at <http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-leads-way-in-2014-exonerations-6041657.php>.

<sup>62</sup> National Registry of Exonerations, “3 Years Old – 1600 and Counting,” June 2015.

<sup>63</sup> Harris County District Attorney’s Office, *Memorandum of Policy Change*, January 30, 2015.

<sup>64</sup> Interview with Dr. Peter Stout, Director, Houston Forensic Science Center.

<sup>65</sup> Harris County Criminal Justice Coordinating Council, *June 2015 Jail Population Report*.

<sup>66</sup> Susan E. Collins, Heather S. Lonczak, and Seema L. Clifasefi, *LEAD Program Evaluation: Criminal Justice and Legal System Utilization and Associated Costs* (Seattle: University of Washington – Harborview Medical Center, June 2015).

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Applying the cost-savings of the Seattle program (\$8,061 per program participant) to the Harris County felony arrests for possession of under one gram of a controlled substance (9,801 cases filed in 2014) would amount to \$79,005,861 in total savings.

<sup>71</sup> According to the HCCJCC June 2015 Jail Population report, there were 1,492 total inmates charged with state jail felonies awaiting trial. The lowest average cost for housing an inmate is \$45 per day.

<sup>72</sup> National Registry of Exonerations, “3 Years Old – 1600 and Counting.”

<sup>73</sup> See Katherine Driessen, “While some rape kits sat untested, suspects committed more assaults,” *Houston Chronicle*, February 23, 2015, at <http://www.chron.com/news/houston-texas/houston/article/While-some-rape-kits-sat-untested-suspects-6097408.php>.