

Political Analysis of Proposed Texas HB 76

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Executive Summary

HB 76 is a package of criminal justice reforms whose proponents have branded it “Today’s Texas Justice” or TTF. With only a few exceptions, opposition is not high-profile or well-organized, although many Texans will have misgivings that the measures are “soft” on crime. Proponents include many high-profile organizations and legislators. An unprecedented level of bipartisan support makes passage of the bill look likely, but a persistent campaign based on emotional appeals regarding fear of crime could succeed in weakening the legislation or even defeating it entirely.

Background

Texas is currently part of a wave of bipartisan efforts to reform criminal justice laws as “An increasingly strong bipartisan coalition is pushing for reforms to the criminal justice system.”¹ Interests as varied as the Tea Party and #BlackLivesMatter, as well as more traditional left-wing advocacy groups and right-wing small-government budget hawks, have coalesced around a variety of proposals to save money and increase the fairness of the Texas criminal justice system. Reformers have won multiple victories at the state level, including reforming grand jury selection and adjusting the dollar amounts that determine penalties for property crime. Other efforts, such as decriminalizing marijuana and raising the age for the adult criminal justice system to 18, made significant legislative progress in 2015, despite their eventual failure.

HB 76 has four major components: a reduction in sentences for minor drug possession, an end to money-based pre-trial release, a reduction in barriers to re-entry, and raising the age for the adult criminal justice system to 18.

Reducing Sentences for Minor Drug Offenses

In 2015, HB 2165, which would have decriminalized the buying and selling of marijuana, cleared the House Criminal Jurisprudence Committee 5-2, although it was ultimately defeated. HB 76 is less ambitious, seeking only to reduce the penalty for possession of less than an ounce of marijuana from a Class B misdemeanor (maximum penalty: 6 months in jail, \$2000 fine) to a Class C misdemeanor (maximum penalty: \$500 fine) and to reduce the penalty for possession of less than a gram of Penalty Group 1 controlled substances from a state jail felony (maximum penalty: 2 years in state jail, \$10,000 fine) to a Class A misdemeanor (maximum penalty: one year in local jail, \$4,000 fine).

A major advantage for proponents is, frankly, the widespread use and acceptance of marijuana and, to a lesser extent, other drugs. According to a June, 2015 poll, 68% of Texans “strongly” or “somewhat” support the reduction of penalties for marijuana.² In addition, many on the left see harsh drug laws as part of the “over-policing” of African-American and Latino

¹ Scott Henson, “Raising the Bars for Texas Criminal Justice Reform,” *The Texas Observer*, March 21, 2016, <https://www.texasobserver.org/raising-the-bars-criminal-justice-reform/>.

² Ross Ramsey, “UT/TT Poll: Texans Divided on Gay Marriage,” *The Texas Tribune*, accessed May 7, 2016, <https://www.texastribune.org/2015/06/24/uttt-poll-texans-divided-gay-marriage/>.

communities giving proponents a potential “race card” to play. On the right, the criminalization of an activity that many Texans consider harmless or almost so evokes fears of “big government.”

The strongest tool that opponents of HB 76 have is the general stigma attached to drugs in general, especially regarding children. Drugs are associated, especially by older Texans, with lawlessness, laziness, brain damage, and general criminality. Even ardent legalization proponents will generally concede that drugs are not good for children, and opponents can make the argument that *any* relaxation of drug laws will result in more usage, which will invariably result in children having more and easier access to illegal drugs.

Replacing Money Bonds With Citations and Pre-trial Services

Upon arrest, people are taken to a booking facility (usually the county or city jail) and held there until one of three things happens: a judge allows them to go free on “personal recognizance” (i.e., an unsecured promise to return for the disposition of their case), a judge sets a bond amount and allows them to go free (until their case is disposed) after they or a bail company posts the set amount, or a judge orders that they be held without bail until their case is disposed. A case is said to be “disposed” after a trial is held, the defendant pleads to a lesser charge, or the charges are dismissed.

HB 76 would completely eliminate money bonds in favor of three different mechanisms: citation releases, risk-based pre-trial services, and due process detention.

Citation release is what happens when you are issued a speeding ticket: instead of being arrested and booked, signing the ticket is a promise to either pay your fine or appear in court to contest it. HB 76 would expand citation releases to include all offenses that do not carry a possible jail penalty, including most minor drug and property offenses.

Pre-trial services means that rather than simply releasing someone on their promise to return—or securing that promise with a money bond—the legal system assesses the risk that a defendant poses and then determines an appropriate level of monitoring and supervision to ensure the defendant neither flees the jurisdiction before case is disposed nor commits further crimes. This can include regular meetings with an officer of the court (similar to probation or parole), electronic monitoring, drug testing, drug treatment, etc.³ HB 76 would release the vast majority of those arrested, subject to pre-trial services.

Due process detention is reserved for when the state can convince a judge that no level of pre-trial services can adequately guarantee that a defendant will neither flee the jurisdiction nor commit further crimes. Defendants would have access to counsel (which rarely, if ever happens under the current release system) for due process detention.

Proponents of HB 76 can point to the inherent unfairness of people with ready access to money returning home while their poorer fellow-citizens remain in jail for weeks or even months, even though they may have committed no crime. Further, the numbers (and the cost) are staggering: there are about 40,000 people in Texas jails awaiting trial on any given day, with an average stay of 21 days, and the proportion of those held pending trial (as opposed to under a sentence after their trial) is growing: in 2001, it was only 39%, but by 2015 it was about 60%.⁴ Citation release for non-jailable Class C misdemeanors almost became law in 2001, before being vetoed by Rick Perry, but “with backing from grassroots conservatives such as state Senator Konni Burton, the idea has taken on new life.”⁵ Also, no less a conservative jurist than Supreme Court Chief Justice wrote, in the

³ “The Solution,” *Pretrial Justice Institute*, accessed May 7, 2016, <http://www.pretrial.org/solutions/>.

⁴ Brian Rogers, “Harris County Being Eyed for Bail Reform,” *Houston Chronicle*, June 26, 2015, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Experts-eyeing-bail-reform-in-Harris-County-6352519.php>.

⁵ Henson, “Raising the Bars for Texas Criminal Justice Reform.”

Salerno decision, “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”⁶ This principle could be a strong talking point for proponents.

Opponents could make ready use of a “Willie Horton” strategy, emphasizing fears of dangerous criminals being granted a “Get Out of Jail Free” card. No system is perfect, and the elimination of money bonds would undoubtedly turn loose a certain number of potential murderers and rapists. Opponents could easily point to the example of Dante Thomas, who was arrested in February, 2016 for murdering his aunt while he was out on bail for the previous murder of his girlfriend—to which he had already confessed.⁷

Removing Barriers to Re-Entry

HB 76 takes four specific steps to reduce the effect that previous felony convictions will have on offenders in the community. First, the bill would expand orders of disclosure (i.e., “sealing your record”) to include minor convictions, and not just deferred adjudications. It would eliminate the lifetime prohibition on SNAP benefits (food stamps) for offenders with any drug conviction (misdemeanor or felony), it would “ban the box,” meaning that employers could not ask if an applicant had a felony conviction on their employment application, although employers would be free to ask the question and to run background checks at later points in the hiring process, and it would require state licensing agencies to show good cause for withholding a professional license because of a previous felony conviction.

Proponents of the bill can argue that when offenders face barriers to employment, they are more likely to re-offend. In fact, previously incarcerated individuals who are employed are at least three times less likely to re-offend than those who are unemployed.⁸ This not only saves the state a great deal of money, but obviously makes communities safer by reducing crime. For “ban the box,” supporters can show that both Austin and Travis County have passed local ordinances along these lines, and show no ill effects. No one likes the idea of children going hungry, and supporters can argue that a *lifetime* ban on SNAP benefits—even for misdemeanors—means that a 12 year-old could easily be going hungry because their mother or father was caught getting high once, twenty years ago, and Texas is one of only a few states with such a prohibition.⁹ State agencies’ broad ability to deny occupational licenses based on any conviction for any offense can be painted as a classic example of senseless bureaucracy (with bipartisan appeal). The example of a qualified electrician denied a license because he once dredged for oysters after sunset will strike many as comical, memorable, and deplorable.

Opponents will be able to push the narrative that criminals shouldn’t be able to cover up their pasts—both “ban the box” and sealing of records will strike many as a potential dangerous hiding of past offenses, which could easily allow dangerous felons to live and work undetected among their unsuspecting fellow citizens. Further, “ban the box” measures can be painted as government interference with how business owners choose to hire workers, and many will agree with the argument that business owners have the right—even the “freedom”—to ask any questions

⁶ United States v. Salerno 481 U.S. 739 (U.S. Supreme Court 1987).

⁷ Deborah Hastings, “Texas Man Makes Bail on Murder, Then Kills Aunt: Reports,” *NY Daily News*, February 13, 2016, <http://www.nydailynews.com/news/national/texas-man-bail-murder-arrested-double-shooting-article-1.2114827>.

⁸ “Limit the Extent to Which Licensing Authorities Can Restrict Work-Ready Individuals with a Criminal Record,” *Texas Criminal Justice Coalition Public Policy Center*, accessed May 7, 2016, <http://publicpolicycenter.texasjc.org/regulate-access-to-records-of-system-involved-individuals-to-encourage-rehabilitation-efforts-and-promote-successful-reentry-limit-the-extent-to-which-licensing-authorities-can-restrict-individuals-w>.

⁹ “Eliminate the Prohibition of SNAP Benefits to Applicants With a Drug Conviction,” *Texas Criminal Justice Coalition Public Policy Center*, accessed May 7, 2016, <http://publicpolicycenter.texasjc.org/eliminate-the-prohibition-of-snap-benefits-to-applicants-with-a-drug-conviction>.

they choose on an application. The fact that proponents will likely bring up Austin and Travis County can be used to good effect among those to whom Austin is seen as a symbol of politics and values out of step with the rest of the state. The proposed lifting of the ban on SNAP benefits could honestly be described as “food stamps for drug dealers,” as it is inevitable that at least some persons with trafficking convictions would now be eligible for SNAP benefits. Occupational licenses have less dramatic appeal, but it could be argued that HB 76 “ties the hands” of state agencies and prevents them from withholding licenses—many of which govern work often done inside private citizens’ homes—from dangerous criminals.

Raising the Age

Raising the age of adult criminal responsibility is a straightforward proposition that voters—regardless of how they feel about it—can quickly grasp. An attempt to raise the age for the adult criminal justice system failed in the legislature in 2015, but showed considerable evidence of public support. Supporters of HB 76 can point to the fact that the vast majority of states routinely process seventeen year-olds in the juvenile system, as well as the growing evidence that seventeen year-olds simply do not have the cognitive or behavioral capacity of adults. Significantly, teens lack fully-developed abilities in impulse control and recognizing the consequences of their actions—precisely the abilities that keep most adults from committing crimes.¹⁰ Also, proponents can point to the multitude of things Texas law currently says seventeen year-olds are not mature enough to do: drink alcohol, buy cigarettes, buy a car, buy a house, etc.. From a logistical and budgetary viewpoint, the federal Prison Rape Elimination Act (PREA) makes housing seventeen year-olds in adult facilities expensive and difficult at best, and impossible at worst: PREA requires “sight and sound” separation between seventeen year-olds and older offenders, which can usually only be accomplished by housing them on separate wings. In smaller county jails, which may have as few as a dozen beds, there are no separate wings, and compliance with the law is virtually impossible. This is the main reason for the Texas Sheriffs’ Association’s support for raising the age. Also, CDC research shows that teens who go through the juvenile system are significantly less likely to re-offend than those placed in adult systems.¹¹

Opponents need look no further for their argument than seventeen year-old Jose E. Reyes, who brutally raped and murdered a fifteen year-old girl in 2015, mutilating her body while she was still alive and beating her to death with a toilet tank lid. While it is true that under HB 76, it would still be possible to transfer a criminal such as Reyes to adult court, examples such as his will be extremely memorable and could have a “Willie Horton” effect, changing the debate from “Should most seventeen year-olds be tried as juveniles,” which is arguable, to “Are seventeen year-olds capable of horrific crimes?” which is clearly not open to debate. In addition, raising the age would dump thousands of seventeen year-olds—including many as brutal and vicious as Reyes—into the juvenile system, which serves children as young as ten. These older, hardened offenders would not only be much harder to treat (and a threat to the younger children they’d suddenly be housed with), but would place a strain on the TJJD—juvenile offenders are much more expensive than adults, and

¹⁰ Laurence Steinberg, “Should the Science of Adolescent Brain Development Inform Public Policy?,” *Issues in Science and Technology*, Spring 2012, <http://issues.org/28-3/steinberg/>.

¹¹ “Return Children Under the Age of 18 to the State’s Juvenile Justice System, and Limit the Use of Secure Confinement for Children Under the Age of 13,” *Texas Criminal Justice Coalition Public Policy Center*, accessed May 7, 2016, <http://publicpolicycenter.texascjc.org/return-children-under-the-age-of-18-to-the-states-juvenile-justice-system-and-limit-the-use-of-secure-confinement-for-children-under-the-age-of-13>.

a recent study predicted “an annual cost of around \$60 million annually to the state, plus millions more for many counties” if the age were raised.¹²

Potential Allies of HB 76

There are many natural allies of HB 76, including legislators and advocacy groups. Some are obvious, such as **Texans for Responsible Marijuana Policy**, and some less so, such as the **Texas Sheriffs’ Association**.

Raising the age enjoys considerable support from not only the Texas Sheriffs’ Association, but also “**juvenile court judges in Bexar and Harris counties**” and “**editorial boards at the Houston Chronicle, San Antonio Express-News, [and] Austin American-Statesman.**”¹³

Rep. Gene Wu (D-Houston) has authored a previous bill reducing penalties for marijuana, asking, “Why not send them to JP court to pay a \$150 fine and do hours?...It’s about saving police time, giving courts more range, instead of forcing everybody into jail.”¹⁴ He has also previously presented a bill to raise the age for the adult criminal system to seventeen.¹⁵

Rep. Harold Dutton (D-Houston) authored HB 507 in 2015, reducing penalties for marijuana, and presented a 2015 raise-the-age bill.¹⁶

Sen. Konni Burton (R-Colleyville) has been named as supporting the idea of banning arrests for Class C misdemeanors which don’t carry a possible jail penalty, which would indicate probable support for the pre-trial release portions of HB 76.¹⁷

Rep. Joe Moody (D-El Paso) has authored HB 507 in 2015, reducing penalties for marijuana, and **Rep. David Simpson** (R-Longview) authored an essay entitled “The Christian case for drug law reform”¹⁸ as well as HB 2165 in 2015, which would have legalized marijuana for adults.

Rep. Abel Herrero (D-Corpus Christi) has spoken out in favor of raising the age, saying “A 17-year-old could go into a store and could not buy cigarettes...but they could steal the cigarettes and be punished as an adult.”¹⁹

Advocacy groups which could be counted on for support of HB 76 are numerous, but the most significant might be the **Texas Public Policy Foundation**, which has long and deeply-established roots as a solidly conservative think tank, but which is very much at the forefront of the bipartisan reform movement. They could be counted on for well-reasoned and dispassionate support of the bill, as well as considerable influence within many conservative circles that might not immediately support HB 76. Groups which more obviously would support HB 76 include **Texas Applesseed** as well as the **Texas Criminal Justice Coalition**, which supports an extensive list (38 separate items) of proposed criminal justice reforms, including all of the elements of HB 76.

¹² Patrick Michels, “Too Young to Jail,” *The Texas Observer*, May 12, 2015, <https://www.texasobserver.org/texas-juvenile-justice-reform-and-raising-age-of-criminal-responsibility/>.

¹³ Patrick Michels, “Juvenile Justice Reform Unlikely to Extend to 17-Year-Olds This Session,” *The Texas Observer*, April 1, 2015, <https://www.texasobserver.org/juvenile-justice-17-year-olds-texas/>.

¹⁴ Terri Langford, “Don’t Fear the Reefer: House Mulls Lower Pot Penalties, by Terri Langford,” *The Texas Tribune*, April 8, 2015, <https://www.texastribune.org/2015/04/08/lawmakers-consider-marijuana-possession-penalties/>.

¹⁵ Patrick Michels, “House Hears Broad Support for Bringing 17-Year-Olds Into Juvenile System,” *The Texas Observer*, April 2, 2015, <https://www.texasobserver.org/juvenile-justice-house-support-for-bringing-17-year-olds/>.

¹⁶ *Ibid.*

¹⁷ Henson, “Raising the Bars for Texas Criminal Justice Reform.”

¹⁸ David Simpson, “The Christian Case for Drug Law Reform,” *TribTalk*, March 2, 2015, <https://www.tribtalk.org/2015/03/02/the-christian-case-for-drug-law-reform/>.

¹⁹ Michels, “Too Young to Jail.”

Potential Opponents of HB 76

Given the bipartisan mood in favor of reform, there are fewer legislators who could be counted on to automatically oppose HB 76. **Rep. Matt Shaheen** (R-Plano), however, is an adamant opponent of marijuana legalization, proud of his work “to stop attempts at legalizing marijuana.”²⁰ Like Shaheen, **Rep. Jeff Leach** (R-Plano) voted against all three legalization bills that came before the House Criminal Jurisprudence Committee in 2015.

Sen. Craig Estes (R-Wichita Falls) has said that he considers marijuana “an addictive gateway drug” and that legislators should approach future proposals “with extreme caution.” **Rep. James Frank** (R-Wichita Falls) has also expressed his disapproval of legalization laws.²¹ **Rep. Allen Fletcher** (R-Cypress), although not expected to serve in 2017, has served as the Chair of the Select Committee on Emerging Issues In Texas Law Enforcement and works as a prison-industry contractor,²² and might be a force opposing any measure that would reduce the number of prisoners in Texas.

Texas Bail PAC is an industry group that could be expected to vigorously oppose HB 76, as the bill would put the entire bail industry out of business. The PAC opposes pre-trial services, calling it “welfare for criminals,” maintaining that pre-trial services have “been shown in study after study not to work,” and arguing that “bail agents do it better, at no cost to tax-payers, and with a proven record of keeping our streets safe.”²³ **Sen. Juan "Chuy" Hinojosa** (D-McAllen) is the top recipient of contributions from the Texas Bail PAC, while Senator **John Whitmire** (D-Houston) and Hinojosa and Rep. Fletcher received a total of over \$100,000 from “bail industry members.”²⁴

As Texas has closed three prisons recently, HB 76 has the potential to reduce the state prison population enough to make closing of at least one more unit a possibility. **Corrections Corporation of America (CCA)** operates four facilities (all state jails) in Texas with contracts that expire in 2017 and which could be prime targets for closure.²⁵ CCA’s contracts with Texas are worth a considerable sum—\$306,376,491²⁶—and the company could be expected to strenuously oppose HB 76 for that reason. As an active participant in the American Legislative Exchange Council (ALEC), CCA has been known to lobby for tougher sentencing. Between 1998 to 2014, CCA spent about \$21 million lobbying the federal government and an unknown amount lobbying state governments.²⁷ The two other private prison companies that do business in Texas are the two

²⁰ Stephen Carter, “Texas Marijuana Penalty Reduction Bills up in Smoke,” *Texas Cannabis Report*, May 3, 2015, <http://txcann.com/texas-marijuana-penalty-reduction-bills-up-in-smoke/>.

²¹ Christopher Collins, “Local Legislators: No Vote for Legal Weed,” *Times Record News*, February 4, 2016, <http://www.timesrecordnews.com/news/politics/local-legislators-no-vote-for-legal-weed-2a698291-a241-2ecc-e053-0100007fa07d-367574601.html>.

²² Tribune, “Ethics Explorer: Allen Fletcher,” *The Texas Tribune*, accessed May 6, 2016, <https://www.texastribune.org/bidness/explore/allen-fletcher/>.

²³ “Bail PAC,” *Texas Bail PAC A POLITICAL ACTION COMMITTEE*, accessed May 8, 2016, <http://www.pbttx.com/bailpac.htm>.

²⁴ “For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice” (Justice Policy Institute, September 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf.

²⁵ Scott Henson, “Which Prisons, State Jails Might Texas Close Next?,” *Grits For Breakfast*, January 30, 2016, <http://gritsforbreakfast.blogspot.com/2016/01/which-prisons-state-jails-might-texas.html>.

²⁶ “Legislative Budget Board Contracts Database,” *Legislative Budget Board*, accessed May 6, 2016, <http://contracts.lbb.state.tx.us/>.

²⁷ “Corrections Corporation of America,” *SourceWatch*, accessed May 6, 2016, http://www.sourcewatch.org/index.php/Corrections_Corporation_of_America.

companies which, together with CCA, make up “the big three private prisons operators” —**GEO Group and Management and Training Corporation.**²⁸

Districts that face prison closures

The counties and towns where those facilities are located can be expected to push back if opponents of HB 76 successfully make the case that the bill could force closings. These are the four CCA facilities whose contracts expire in 2017 and whose communities could be looking at significant job and revenue losses:

Willacy State Jail, Willacy County

Sen. Eddie Lucio Jr. (D-Brownsville)

Rep. Ryan Guillen (D-Rio Grande City)

Lindsey State Jail, Jack County

Sen. Craig Estes (R-Wichita Falls)

Rep. Drew Springer Jr. (R-Muenster)

Bradshaw State Jail, Rusk County

Sen. Kevin Eltife (R-Tyler)

Rep. Travis Clardy (R-Nacogdoches)

Bartlett State Jail

Sen. Charles Schwertner (R-Georgetown)

Sen. Troy Fraser (R-Horseshoe Bay)

Rep. Marsha Farney (R-Georgetown)

Rep. Jimmie Don Aycock (R-Killeen)

Rep. Molly S. White (R-Belton)

Other practical concerns

As chair of the Senate Criminal Justice Committee, **Sen. John Whitmire** (D-Houston) will carry considerable weight in the struggle over HB 76. However, he has clearly staked out positions that are aligned with some provisions of the bill and opposed to others. He has stated that he will make bail reform his “Highest priority next session,”²⁹ but appears to be adamantly opposed to raising the age for the adult justice system, saying, “I personally, philosophically, believe that if a 17-year old commits a violent act, I see no reason to change that they wouldn’t be [treated] as an adult”³⁰ Both proponents and opponents of the bill should be expected to energetically court Whitmire’s support in the upcoming session.

The **Texas Jail Association** (the professional organization for operators of Texas Jails) and the **Texas Corrections Association** (prison guards, administrators, and employees) do not appear to take an active role in lobbying. However, considering the possible job losses that HB 76 could create, they could both be approached to oppose TTJ.

²⁸ Beryl Lipton, “Texas, the Private Prison State,” blog, *MuckRock*, (June 11, 2017), <https://www.muckrock.com/news/archives/2015/jun/11/texas-private-prison-map/>.

²⁹ Scott Henson, “Bail Reform Roundup,” *Grits for Breakfast*, April 3, 2016, <http://gritsforbreakfast.blogspot.com/2016/04/bail-reform-roundup.html>.

³⁰ Michels, “Too Young to Jail.”

Although **Senator Ted Cruz** has no direct role in state politics, his support could be sought by opponents or proponents of the bill. He has in the past made statements condemning “life-destroying sentences for relatively minor drug offenses,” and arguing that “We need to recognize that young people make mistakes, and we should not live in a world of *Les Miserables*.” However, during his presidential campaign, he strongly denounced federal criminal justice reform,³¹ including a bill by fellow Texas **Senator John Cornyn**, which Cruz called “dangerous for America.”³² Cornyn himself is a former district judge, member of the Texas Supreme Court and Texas attorney general who has spoken out in favor of reform at the federal level.³³

Finally, with **oil revenues** still falling, the state budget process can be expected to be very tight, and much more contentious than before. Although supporters of HB 76 will mostly have the advantage here, as the bill can be expected to have an overall budget-lowering effect, there are specific areas (noted above) in which the bill will force increased state spending, and opponents could target messaging about those costs to budget-conscious legislators and voters.

³¹ Bill Keller, “Justice Reform, RIP?,” *The Marshall Project*, February 12, 2016, <https://www.themarshallproject.org/2016/02/12/justice-reform-rip>.

³² “Criminal Justice Reform (Editorial),” *Houston Chronicle*, February 19, 2016, <http://www.houstonchronicle.com/opinion/editorials/article/Criminal-justice-reform-6843601.php>.

³³ “Criminal Justice Reform (Editorial).”