ODonnell v. Harris County

251 F. Supp. 3d 1052

United States District Court for the Southern District of Texas

April 28, 2017

MEMORANDUM AND OPINION SETTING OUT FINDINGS OF FACT AND CONCLUSIONS OF LAW

Lee H. Rosenthal, Chief United States District Judge

Introduction

"Twenty years ago, not quite one-third of [Texas's] jail population was awaiting trial. Now the number is three-fourths. Liberty is precious to Americans, and any deprivation must be scrutinized. To protect public safety and ensure that those accused of a crime will appear at trial, persons charged with breaking the law may be detained before their guilt or innocence can be adjudicated, but that detention must not extend beyond its justifications. Many who are arrested cannot afford a bail bond and remain in jail awaiting a hearing. Though presumed innocent, they lose their jobs and families, and are more likely to re-offend. And if all this weren't bad enough, taxpayers must shoulder the cost—a staggering $1 billion per year." The Honorable Nathan L. Hecht, Chief Justice of the Texas Supreme Court, *Remarks Delivered to the 85th Texas Legislature*, Feb. 1, 2017.

This case requires the court to decide the constitutionality of a bail system that *1058 detains 40 percent of all those arrested only on misdemeanor charges, many of whom are indigent and cannot pay the amount needed for release on secured money bail. These indigent arrestees are otherwise eligible for pretrial release, yet they are detained for days or weeks until their cases are resolved, creating the problems that Chief Justice Hecht identified. The question addressed in this Memorandum and Opinion is narrow: whether the plaintiffs have met their burden of showing a likelihood of success on the merits of their claims and the other factors necessary for a preliminary injunction against Harris County's policies and practices of imposing secured money bail on indigent misdemeanor defendants. Maranda Lynn ODonnell, Robert Ryan Ford, and Loetha McGruder sued while detained in the Harris County Jail on misdemeanor charges. They allege that they were detained because they were too poor to pay the amount needed for release on the secured money bail imposed by the County's policies and practices. (Docket Entry Nos. 3, 41, 54). They ask this court to certify a Rule 23(b)(2) class and preliminarily enjoin Harris County, the Harris County Sheriff, and—to the extent they are State enforcement officers or County policymakers—the Harris County Criminal Court at Law Judges, from maintaining a "wealth-based post-arrest detention scheme." . . .

This case is difficult and complex. The Harris County Jail is the third largest jail in the United States. . . . Although misdemeanor arrestees awaiting trial make up about 5.5 percent of the Harris County Jail population on any given day . . . about 50,000 people are arrested in Harris County on Class A and Class B misdemeanor charges each year. . . . The arrests are made by a number of law-enforcement agencies, including the Houston Police Department and the police forces of smaller municipalities, the Texas Department of Public Safety, and the Harris County Sheriff's Office. . . . Harris County's bail system is regulated by State law, local municipal codes, informal rules, unwritten customary practices, and the actions of judges in particular cases. The legal issues implicate intertwined Supreme Court and Fifth Circuit precedents on the level of judicial scrutiny in equal protection and due process cases and on the tailoring of sufficient means to legitimate ends.

Bail has a longstanding presence in the Anglo–American common law tradition. Despite this pedigree, the modern bail-bond industry and the mass incarceration on which it thrives present

important questions that must be examined against current law and recent developments. Extrajudicial reforms have caused a sea change in American bail practices within the last few years. Harris County is also in the midst of commendable and important efforts to reform its bail system for misdemeanor arrests. The reform effort follows similar work in other cities and counties around the country. This work is informed *1059 by recent empirical data about the effects of secured money bail on a misdemeanor defendant's likely appearance at hearings and other law-abiding conduct before trial, as well as the harmful effects on the defendant's life.

The plaintiffs contend that certainly before, and even with, the implemented reforms, Harris County's bail system for misdemeanor arrests will continue to violate the Constitution. This case is one of many similar cases recently filed around the country challenging long-established bail practices. Most have settled because the parties have agreed to significant reform. This case is one of the first, although not the only one, that requires a court to examine in detail the constitutionality of a specific bail system for misdemeanor arrestees. This case is also one of the most thoroughly and skillfully presented by able counsel on all sides, giving the court the best information available to decide these difficult issues.

One other complication is worth noting at the outset. Since this case was filed, the 2016 election replaced the Harris County Sheriff and the presiding County Judge of Criminal Court at Law No. 16. . . . The new Sheriff and County Judge have taken positions adverse to their codefendants, although each continues to oppose certain aspects of the plaintiffs' request for preliminary injunctive relief.[2] Nonparty County officials, including the newly elected Harris County District Attorney and one of the Harris County Commissioners, have filed amicus briefs supporting the plaintiffs. . . . Harris County's Chief Public Defender has filed a declaration supporting the defendants. . . . The lines of affinity and adversity between the defendants and their nonparty County colleagues are not always clear.

Even with the factual and legal complexities, at the heart of this case are two straightforward questions: Can a jurisdiction impose secured money bail on misdemeanor arrestees who cannot pay it, who would otherwise be released, effectively ordering their pretrial detention? If so, what do due process and equal protection require for that to be lawful? Based on the extensive record and briefing, the fact and expert witness testimony, the arguments of able counsel, and the applicable legal standards, the answers are that, under federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the rights of the indigent accused.

Because Harris County does not currently supply those safeguards or protect those rights, the court will grant the plaintiffs' motion for preliminary injunctive relief. The reasons and the precise, limited relief granted are set out in detail below.

More specifically, the court finds that:

- Harris County has a consistent and systematic policy and practice of imposing secured money bail as de facto orders of pretrial detention in misdemeanor cases.

*1060 • These de facto detention orders effectively operate only against the indigent, who would be released if they could pay at least a bondsman's premium, but who cannot. Those who can pay are released, even if they present similar risks of nonappearance or of new arrests.

- These de facto detention orders are not accompanied by the protections federal due process requires for pretrial detention orders.

- Harris County has an inadequate basis to conclude that releasing misdemeanor defendants on secured financial conditions is

more effective to assure a defendant's appearance or law-abiding behavior before trial than release on unsecured or nonfinancial conditions, or that secured financial conditions of release are reasonably necessary to assure a defendant's appearance or to deter new criminal activity before trial.

• Harris County's policy and practice violates the Equal Protection and Due Process Clauses of the United States Constitution.

The court accordingly orders that:

• Harris County and its policymakers—the County Judges in their legislative and rulemaking capacity and the Harris County Sheriff in his law-enforcement capacity—are enjoined from detaining misdemeanor defendants who are otherwise eligible for release but cannot pay a secured financial condition of release.

• Harris County Pretrial Services must verify a misdemeanor arrestee's inability to pay bail on a secured basis by affidavit.

• The Harris County Sheriff must release on unsecured bail those misdemeanor defendants whose inability to pay is shown by affidavit, who would be released on secured bail if they could pay, and who have not been released after a probable cause hearing held within 24 hours after arrest.

The court does *not* order: relief in cases involving felony charges or a mix of misdemeanor and felony charges; the elimination of secured money bail; changes to Texas State law; changes to the written Harris County Criminal Courts at Law Rules of Court; modification of prior federal court orders, including the consent decree in *Roberson v. Richardson*; or a right to "affordable bail" under the Eighth Amendment. Instead, the relief ordered is consistent with Texas state and Harris County law as written, is required by the Equal Protection and Due Process Clauses, and is justified by the plaintiffs' evidence. The relief is narrow so as not to interfere with the improvements the County is working to implement by July 1, 2017.

The reasons for these rulings are set out in the detailed findings and conclusions below.

I. Findings of Fact

. . .

D. The Use of Bail in Harris County Misdemeanor Pretrial Detention

1. The Statutory Framework

The Texas Code of Criminal Procedure defines "bail" as "the security given by the *1085 accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond." TEX. CODE CRIM. PRO. art. 17.01. Except for certain types of felonies, "a magistrate may, in the magistrate's discretion, release the defendant on his personal bond without sureties or other security." *Id.* art. 17.03(a). A personal bond requires the defendant to swear an oath that if he or she fails to appear, the principal sum the court sets becomes due. *Id.* art. 17.04. The magistrate granting a personal bond may assess a nonrefundable bond fee "of $20 or three percent of the amount of the bail fixed for the accused, whichever is greater." *Id.* art. 17.42, § 4(a). Magistrates may postpone, reduce, or waive the fee. *Id.* art. 17.03(g).

Texas law does not facially provide for release on no financial conditions. The "personal bond" defined in Texas law differs from what other jurisdictions call a personal bond or a personal recognizance bond by requiring a principal sum that becomes due if the defendant fails to appear. . . .

The Texas Code of Criminal Procedure states that "[t]he amount of bail to be required in any case is to be regulated by the court, judges, magistrate or officer taking the bail; they are to be governed in the exercise of this discretion"

by five rules:

> 1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
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> 2. The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3. The nature of the offense and the circumstances under which it was committed are to be considered.
>
> 4. The ability to make bail is to be regarded, and proof may be taken upon this point.
>
> 5. The future safety of a victim of the alleged offense and the community shall be considered.

TEX. CODE CRIM. PRO. art. 17.15.

In Harris County, "magistrates" include Hearing Officers and County Judges. *See id.* art. 2.09. In addition to a magistrate's discretion to issue a personal bond, the Texas Code of Criminal Procedure permits the arresting officer to release defendants *1086 accused of certain misdemeanors by citation only. *Id.* art. 14.06. The Code permits the arresting officer to cite-and-release those arrested for Class A or B misdemeanors for possessing small amounts of marijuana or certain other controlled substances, criminal mischief causing damage up to $2,500, graffiti, theft of property or service up to the value of $2,500, supplying contraband to prisoners, or driving without a license. *Id.* Major Patrick Dougherty testified that the Houston Police Department and Harris County follow the cite-and-release practice only for traffic-related Class C misdemeanor arrestees. Hearing Tr. 3–2:47–48 ("All Houston police officers basically book all their prisoners in the City Jail, regardless of whether it is a felony, misdemeanor or a Class C offense."), 52. The Harris County District Attorney has recently implemented a cite-and-release policy, as well as a diversionary program, for misdemeanor arrests for possessing small amounts of controlled substances. . . . Under the County's diversionary program, the District Attorney's office postpones charges for misdemeanor arrestees who agree to complete educational courses. These arrestees are not subjected to the booking and bail setting processes described below because the District Attorney declines charges at that time. Hearing Tr. 4–1:21–22.

The Texas Government Code permits the County Judges to "adopt rules consistent with the Code of Criminal Procedure ... for practice and procedure in the courts. A rule may be adopted by a two-thirds vote of the judges." TEX. GOV'T CODE ANN. § 75.403(f). At least three times since the beginning of 2016, the Harris County Criminal Courts at Law Judges, sitting en banc and voting by two-thirds majority, adopted or amended the Harris County Criminal Courts at Law Rules of Court. The current version is the Rules of Court as amended on February 9, 2017. The Rules of Court contain a misdemeanor bail schedule, *id.* Rule 9, and provide that "[t]he initial bail amount may be changed on motion of the court, the hearing officer, or any party subject to the following criteria":

> 4.2.3.1.1. the bail shall be sufficiently high to give reasonable assurance that the defendant will comply with the undertaking;
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> 4.2.3.1.2. the nature of the offense for which probable cause has been found and the circumstances under which the offense was allegedly committed are to be considered, including both aggravating and mitigating factors for which there is reasonable ground to believe shown, if any;
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> 4.2.3.1.3. the ability to make bail is to be regarded, and proof may be taken upon this point;
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> 4.2.3.1.4. the future safety of the victim and the community may be considered, and if this is a factor, release to a third person should also be considered; and
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> 4.2.3.1.5. the criminal law hearing officer shall also consider the employment history,

> residency, family affiliations, prior criminal record, previous court appearance performance, and any outstanding bonds of the accused.

Id. Rule 4.2.3. The County Rules of Court state that "all law enforcement officials in Harris County shall cause the pretrial detainees in their respective custody, who have been charged with a class A or class B misdemeanor, to be delivered to the criminal law hearing officer not later than *1087 24 hours after arrest." *Id.* Rule 4.2.1.1. Misdemeanor defendants arrested without a warrant who are not given a probable cause hearing within 24 hours after arrest must be released on a personal bond of no more than $5,000 when the 24 hours have expired. *See* TEX. CODE CRIM. PRO. art. 17.033 . . . .

At the 24–hour hearing, commonly referred to as the probable cause hearing, in addition to finding probable cause for the arrest, Hearing Officers are to "set the amount of bail required of the accused for release and shall determine the eligibility of the accused for release on personal bond, cash bond, surety bond, or other alternative to scheduled bail amounts, and shall issue a signed order remanding the defendant to the custody of the sheriff." Rules of Court 4.2.2.1.11. On August 12, 2016, the County Judges amended the County Rules of Court to provide that "personal bonds"—unsecured appearance bonds—"are favored" in twelve specific misdemeanor categories. *Id.* Rule 12. Rule 12 lists five circumstances in which personal bonds "are disfavored," including when "the defendant has demonstrated a risk to reoffend or harm society" or "has previously failed to appear in court as instructed." *Id.*

The next step in the process is scheduling cases for arraignment, referred to as the "first appearance settings." Arrestees released on secured money bail before booking are scheduled for arraignment one week from the day of their arrests (or on a Friday if the arrest was over a weekend). *Id.* Rule 4.1.2. Those released on a personal bond are scheduled for arraignment the same day, or the next business day if released after 9:00 a.m. *Id.* Rule 4.1.4. Those booked into the County Jail who request counsel are scheduled for arraignment the next business day, when counsel may be appointed. *Id.* Rule 24.9.1.

On February 9, 2017, the County Judges amended the County Rules of Court to provide first appearance settings for all misdemeanor arrestees booked into the County Jail the next business day after booking, "regardless of whether the defendant has been released from custody." *Id.* Rule 4.1.2. At this first appearance, the County Judge must "review conditions of release, bail amount set, and personal bond decision and modify if good cause exists to do so." *Id.*

2. Arrest and Booking

According to the 2015 annual report of Harris County Pretrial Services, 50,947 people were arrested in Harris County on only Class A or Class B misdemeanor charges in 2015. . . . In that year, 27.9 percent were arrested by the Harris County Sheriff's Office. The rest were arrested *1088 by other law-enforcement agencies, principally the Houston Police Department. *Id.* . . .

Before this suit was filed, an unwritten policy required Pretrial Services to obtain two verified references before a defendant could be released on a personal bond. . . . In August 2016, the County Judges sent a letter to the Hearing Officers changing the policy to permit release on personal bond with only one verified reference. . . . The verification requirement is not codified in the County Rules of Court or in State law. Until the August 2016 letter, the requirement appears to have been an unwritten policy promulgated by County Judges and enforced as a practice or custom by Hearing Officers and by Pretrial Services personnel.

Pretrial Services officers complete a validated risk-assessment form, which uses a point-weighting system to itemize and evaluate the defendant's risk of flight or risk of new criminal

activity during pretrial release. . . . A risk-assessment tool is "validated" when its risk indicators have been empirically shown to reliably predict outcomes such as nonappearance or new criminal activity. . . .

The current risk-assessment tool that Harris County Pretrial Services uses assigns points to seventeen different risk indicators. . . . Under "Criminal Risk Items," arrestees are given a point if the current charge involves a crime of violence, a point if the defendant is on probation, a point if the defendant is on parole, a point for a prior misdemeanor conviction and another point for multiple prior convictions, a point for a prior felony conviction and another point for multiple prior convictions, a point for a past failure to appear, and a point if the defendant has a formal "hold," such as an outstanding warrant from another jurisdiction. . . .

Under "Background Risk Items," a defendant receives a point for being male, a point for lacking a high school diploma or GED, a point for not having a land line phone, a point for living with someone other than a spouse or family, a point for not owning an automobile, a point for lacking full-time employment, and a point for being under 30 years of age. . . .

The point totals from both the Criminal Risk Items and Background Risk Items *1090 are added to reach a single score which is set on a risk scale. *Id.* Defendants with three points or fewer are scored as low risk, four to five points are scored as "low moderate risk," six to seven points are scored as moderate risk, and eight points or above are scored as high risk. *Id.* Criminal risk points are weighted the same way as background risk points. A 29–year–old man who works part-time and rents and apartment with a roommate, who does not own a car or a land line phone, but who has no criminal history would receive the same risk score as an older woman on probation who has multiple felony convictions, a past failure to appear, an outstanding warrant and a current charge involving a crime of violence. Both cases would be assigned at least six points and be categorized as "moderate" risk. *See id.* Mr. Banks testified that for defendants whose risk scores are increased because of the background factors that correlate with poverty rather than criminal activity, the standard Pretrial Services procedure is to recommend release on personal bond, notwithstanding the higher risk score. . . .

The collected information, verified references, risk-assessment score sheet, and the Pretrial Services recommendation for release are all gathered into a report and transmitted to a Hearing Officer for the defendant's probable cause hearing. . . . Mr. Banks testified that currently, if Pretrial Services makes a recommendation, it recommends either that a Hearing Officer grant a personal (unsecured) bond with standard conditions (such as supervision by Pretrial Services), grant a personal (unsecured) bond with additional conditions (such as geographic restrictions), or "detain." . . . Mr. Banks explained that Pretrial Services makes a recommendation to "detain" misdemeanor arrestees with immigration or other warrant holds on their record. . . . A recommended high bail setting is intended to keep arrestees detained to address the hold. . . . But, as explained below, secured money bail, if unpaid, prevents the defendant from addressing the hold or from being transferred to the agency imposing the hold, extending the overall time spent in custody. Mr. Banks testified that Pretrial Services also recommends "detain" for "high risk" arrestees. . . . Because Texas law prohibits pretrial preventive detention in most misdemeanor cases, a recommendation to "detain" is a recommendation to set a high secured bail in order to detain until a judicial officer considers the case or the case is terminated. . . . A defendant who pays the bail is released, despite the "high risk" category and the recommendation to detain.

Pretrial Services does not directly ask defendants whether they can pay the bail amount set or what amount they could pay. . . . Mr. Banks testified that instead, Pretrial Services asks a "litany" of questions about a

defendant's assets, income, and expenses. . . . Defendants sometimes refuse to be interviewed, and the record indicates that they may do so because they do not understand that the interview is non-adversarial and that providing responsive answers is the only way they can be released on nonfinancial conditions. . . . Other defendants are confused by the questions. For instance, "Do you have a place to stay?" may be taken to mean "Can you afford rent or housing?" But it could also mean "Are you likely to leave the jurisdiction because you do not have a place to live here?" Answering the first *1091 question in the negative when the second question is the one asked can—and in Harris County does—become the basis for detention rather than release on unsecured financial conditions. . . .

If Pretrial Services officers at the City Jail determines that an arrestee is a good candidate for release on personal bond, they may forward the interview papers to their counterparts at the County Jail for "early presentment" to a Hearing Officer. . . . The Hearing Officer may approve or deny release on personal bond using only the charging papers (the DIMS report) and interview papers prepared for the early presentment. . . . If the Hearing Officer approves release on personal bond, the arrestee can be released from the City Jail without being transported to or booked in the County Jail. . . . Early presentment depends on the availability of Pretrial Services personnel. The record evidence clearly shows that early presentments are rare. In 2015, only 90 out of 21,748 Houston Police Department arrestees were released on personal bonds after early presentment. . . .

Arrestees who do not pay for release or obtain release on personal bond by early presentment at the City Jail are taken to and booked in the Harris County Jail. . . . Transport buses run every two hours, but Major Dougherty testified that capacity limits at the County Jail Inmate Processing Center create significant delays. These limits prevent paper-ready misdemeanor arrestees from being transported to the County Jail on the next available bus. . . . Because the Inmate Processing Center is the only holding facility for County arrestees, they are given priority over arrestees waiting for transport from the City Jail, which adds to the delays. . . .

Major Dougherty testified that those arrested without a warrant by the County are taken either directly to the County Jail or to one of four outlying County detention centers, with transport to the County Jail within 4 hours. . . . Once at the County Jail, County arrestees go through the same process as City arrestees—they are charged, fingerprinted, drug and alcohol tested, and interviewed by Pretrial Services in the Inmate Processing Center next to the Jail. . . . The Inmate Processing Center runs 24 hours a day, 7 days a week. The booking process takes between 8 and 12 hours. . . . Booking at the County Jail relies on a paper, rather than an electronic, system. . . . Arrestees with the financial means to do so may pay their money bonds or a bondsman's premium while still in the Inmate Processing Center and be released, usually within 12 to 15 hours of arrest. . . . While in the Processing Center, arrestees do not have access to counsel or family members. *1092 . . . Those who do not pay their secured money bonds while in the Processing Center are assigned and transferred to a housing unit in the County Jail. *Id.* . . .

3. The Probable Cause and Bail–Setting Hearing

The Hearing Officers hold probable cause hearings every 2 hours, 24 hours a day, 7 days a week. . . . Defendants arrested without a warrant who have completed processing at the Inmate Processing Center are put on the next available docket for a probable cause hearing. . . . Probable cause hearings are conducted by videolink connecting a Hearing Officer's courtroom, an Assistant District Attorney's office, and a large room in the County Jail. . . .Up to forty-five arrestees may be adjudicated at a single probable cause hearing. . . . When an arrestee's case is called, the arrestee stands on a marked square in the center of the room and faces a screen showing the Hearing Officer and

Assistant District Attorney. . . . The hearings are recorded. . . .

Hearings typically last about one to two minutes per arrestee. . . . During this brief period, the Assistant District Attorney reads the charge, and the Hearing Officer determines probable cause and sets bail. . . . Hearing Officers have discretion to release arrestees on personal bond, to impose additional conditions of release (such as geographical restrictions), or to raise or lower the bail amount from the scheduled amount. *See* TEX. CODE CRIM. PRO. art. 17.03, 17.15, 17.40–44. For those misdemeanor arrestees who have not had their Pretrial Services papers given to a Hearing Officer for early presentment—the vast majority—the first setting is their earliest opportunity to be considered for release on a personal bond. . . .

As noted, under Texas law, misdemeanor defendants arrested without a warrant must be released on an unsecured personal *1093 bond if a magistrate does not find probable cause within 24 hours of arrest. TEX. CODE CRIM. PRO. art. 17.033. The Houston City Jail is not equipped to provide videolink hearings and does not provide opportunities for live presentment to the Hearing Officers. . . . When the Inmate Processing Center at the County Jail is at capacity and arrestees cannot be transported promptly from the City Jail, those who have not paid and been released may wait at the City Jail more than 24 hours before they are transported to the County Jail and can have their probable cause and bail-setting hearing before a Hearing Officer. . . . To avoid releasing these arrestees on unsecured personal bonds at the 24–hour time limit, the customary unwritten practice is to hold in absentia "paper hearings." . . . At a paper hearing, the Hearing Officer finds probable cause based on the DIMS report that the arresting officer prepared and that the Assistant District Attorney used to draw up the charge. . . . Pretrial Services forms are not made available at paper hearings. The DIMS report does not provide any of the defendant's financial information. Hearing Officers do not set bail or consider eligibility for unsecured personal bonds at paper hearings. . . .

Defendants almost never have counsel at the probable cause and bail-setting hearing. . . . Those who are indigent have not yet had counsel appointed. Those who can afford counsel have either paid their bonds and been released or have not been able to arrange their counsel's presence. . . . Both the Sheriff's deputies and the Hearing Officers instruct the defendants not to speak except to answer specific questions, lest they incriminate themselves. . . . Because the Hearing Officers are not judges of courts of record, they do not make written findings or issue reasoned opinions explaining why they set bail on a secured or unsecured basis, or why they select the bail amount imposed. . . . The video recordings show that Hearing Officers occasionally state that bail is set at a certain level or that a personal bond is denied "based on your priors" (see below). Hearing Officers occasionally make notes on the Pretrial Services forms, such as "Criminal History"; "Safety of Community"; or "Safety." . . . These cryptic, one-to-three word notations are just that. They do not show that Hearing Officers weighed the statutory factors in setting bail, much less how they did so.

Chief Hearing Officer Blanca Villagomez testified that before granting an unsecured personal bond, she "look[s] at the five factors obviously that are set out in Article 17.15. I listen to the prosecutor and whatever allegations that led to their charge, secondly. I will look at all of the information that is available to me that is provided by Pretrial Services and reach a conclusion on that." . . . She testified that on occasion, based on the circumstances and the evidence presented, she has denied release on an unsecured personal bond to defendants who score low on the risk scale because she perceived a threat to public safety. On other occasions, she disregards a high risk score based on background resource factors, such as not owning a land line phone or a car. . . . Judge Villagomez testified that she does not reach a conclusion on whether secured money bail will

operate as a condition of detention, but that she does realize that detention, rather than release, will be the outcome of setting secured money bail for indigent defendants more than "rare[ly]." . . . She nevertheless sets bail on a secured basis at the scheduled amounts in those cases. . . . She *1094 testified that she believes it is lawful under Texas law to require a secured money bail she knows a defendant cannot pay "if I have taken in all of the factors in 17.15 into consideration because [ability to pay] is not the only one." . . .

Hearing Officer Eric Hagstette testified that he discounts high risk scores when they are based on background factors showing poverty rather than a history of nonappearance or criminal activity. . . . He did not disagree with Judge Villagomez's approach. He testified that the Hearing Officers "all go about our job pretty much the same way, do what we are statutorily required to do during these hearings and then make the decision with the information that is available and is presented at the hearing." . . . He explained that he does not impose secured money bail with an intent to detain but that "[t]he intent is to set a bond that is sufficiently high based on the factors I'm obligated to consider." . . . When asked how he would approach a defendant with no job, no income, no assets, and a history of failing to appear, for whom the scheduled bond amount would be $4,000, he testified that he would not release that defendant on an unsecured $4,000 bond because "[i]t depends again on the other factors being balanced." . . .

Judge Villagomez testified that she does not and cannot keep track of how many times she raises or lowers a bond, how often she rejects a Pretrial Services recommendation, or whether, and how often, defendants she releases on unsecured personal bonds fail to appear at hearings. . . . Judge Hagstette testified that he raises and lowers bail amounts in roughly equal numbers—"I knock them down and I raise them up"—but he does not know how often those he releases on unsecured personal bonds fail to appear. . . .

The Pretrial Services Annual Report provides system-wide statistics on how often Hearing Officers implement or reject Pretrial Services recommendations. . . . In 2015, for the 9,388 defendants for whom Pretrial Services recommended release on unsecured personal bond with standard conditions of supervision, Hearing Officers denied a personal bond 56.3 percent of the time. . . . In 1,831 cases, Hearing Officers granted release on unsecured personal bonds on the condition that Pretrial Services could verify the references. . . . The data do not show in how many cases that did or did not happen. For the 4,816 defendants for *1095 whom Pretrial Services recommended release on personal bond with enhanced supervisory conditions, Hearing Officers denied a personal bond 84.8 percent of the time. . . . For the 11,935 defendants for whom Pretrial Services made no recommendation, Hearing Officers denied a personal bond 96.9 percent of the time. . . . For the 4,716 defendants for whom Pretrial Services recommended "detain" (15.3 percent of all defendants interviewed by Pretrial Services), Hearing Officers denied a personal bond 97.1 percent of the time. . . . Overall, Hearing Officers reject Pretrial Services recommendations for release on a personal bond 66.3 percent of the time. . . . Pretrial Services acknowledges the wide discrepancy between what they recommend based on the County's validated risk-assessment tool and what the Hearing Officers order based on the preset bail schedule. The Frequently Asked Questions page on the Pretrial Services public website asks, "Why aren't there more Personal Bonds approved?" The answer: "Good question!" . . .

Among all cases in which Pretrial Services interviewed the misdemeanor defendant, whether Hearing Officers granted release on secured or on unsecured financial conditions, the Hearing Officers lowered the bail amount from what was stated on the charging document in 7.2 percent of cases and raised the bail amount in 10.7 percent of cases. . . . In 2015, Hearing Officers lowered the amount below $500—the minimum amount on the bail schedule—in 4 cases, out of nearly 51,000

arrests with bail set. . . . The plaintiffs' expert, Dr. Stephen Demuth, credibly testified that from the beginning of 2015 to the end of January 2017, Hearing Officers adhered to the prescheduled bail amount stated on the charging documents in 88.9 percent of all misdemeanor cases. . . . When they do change the amount, they raise it about 67 percent of the time. . . .

Dr. Demuth presented credible evidence based on Harris County's administrative data that from January 2015 through January 2017, only 9.7 percent of all misdemeanor arrestees were granted release on an unsecured personal bond, with or without additional nonfinancial conditions. . . . That figure is consistent with the Pretrial Services annual reports, which show that 8.5 percent of misdemeanor arrestees were granted an unsecured personal bond in 2015, and 10.8 percent in 2016. . . . In 2015, 46.1 percent of arrestees were released on a surety bond, 5.1 percent on a cash bond, and the remaining 40.3 percent were detained until case disposition. In 2016, the figures were nearly identical: 43.4 percent released on a surety bond, 5.6 percent on a cash bond, and 40.1 percent detained until case disposition. . . .Virtually all misdemeanor arrestees detained until disposition have a secured bail amount set that, if paid, would result in the prompt release of the arrestee. . . .

The court credits the Hearing Officers' testimony that they consider the *1097 Article 17.15 factors in some way. But their impressions about how frequently certain case outcomes occur is not reliable and not worthy of greater weight than the data presented in the Pretrial Services Annual Report. The Hearing Officers' testimony that they do not "know" whether imposing secured money bail will have the effect of detention in any given case . . . and their testimony that they do not intend that secured money bail have that effect, is not credible. Other record evidence, including the Pretrial Services public reports; the high number and percentage of misdemeanor defendants detained rather than released because they are subject to secured money bail at the scheduled amount; the high number and percentage whose bail is set by the schedule rather than by an individualized inquiry; the infrequency of deviations from imposing the scheduled bail amount on a secured basis; and the video recordings of probable cause hearings, which consistently show an indifference as to whether pretrial detention will result from setting secured bail, all weigh heavily in favor of finding little to no credibility in the Hearing Officers' claims of careful case-by-case consideration under the *Roberson* order and the Article 17.15 factors.

This is not a personal criticism of any one or all of the Hearing Officers. To say that their job is difficult is a dramatic understatement. The sheer numbers of defendants the Hearing Officers confront on a daily basis makes individual consideration extraordinarily difficult. The absence of counsel adds to the difficulty. The Hearing Officers clearly work steadily and hard. They see a difficult population—including both misdemeanor and felony defendants—every day and all day. It is unsurprising that a system of virtually automatic adherence to a bail schedule has developed, given the large number of defendants, the small number of Hearing Officers, and the limited time for hearings.

The record contains 2,300 recordings of misdemeanor probable cause hearings before the Hearing Officers. The recordings begin in March 2016—before the lawsuit was filed—and continue through early November 2016. . . . The court has reviewed many hours of footage. The results are consistent and support this court's findings and conclusions. Two hearings are illustrative. The court chooses them not because they are extreme examples of any particular feature, but because they appear pretty ordinary. Neither hearing is procedurally unusual. The parties did not cite or play either one at the motion hearing.

*1098 D. M. was arrested early in the morning of August 24, 2016 and charged with possessing less than two ounces of marijuana. . . . His probable cause hearing was at 4:00 p.m. the

same day. . . . The recording shows the following:

> • The Hearing Officer finds probable cause and tells the defendant, "Your bond is incorrect based on" his five prior felony and nine misdemeanor convictions. . . .
>
> • The defendant responds that he has only one prior felony conviction. The Hearing Officer spends the bulk of the unusually long four-and-a-half minute hearing thumbing through the defendant's record and counting convictions. The Hearing Officer counts as prior felony convictions two felony charges that were reduced to misdemeanor convictions but still does not arrive at five felony convictions. He tells the defendant, "Either way your bond was incorrectly set, so it's now set at $5,000, which is what it should have been set at. [I'm] going to deny your personal bond based on all your priors." . . .
>
> • The defendant requests a personal bond because his fiancée is pregnant and he is the only income earner in the household. The Hearing Officer responds, "I take all that into consideration" but again points to the defendant's prior convictions. The defendant points out that he has never missed a court appearance for any of those prior arrests and convictions. The Hearing Officer cuts him off, stating, "That is one factor, the other factor is everything else.... Based on the nature of the offenses for which you were charged, I'm not going to consider you" for a personal bond. . . .
>
> • The defendant confirms he will need a court-appointed lawyer. The Hearing Officer concludes that if the defendant would like a personal bond, he can ask the County Judge for one in the morning at his first appearance. . . .

If the defendant had been able to pay a bondsman's premium, he would have been released notwithstanding his criminal history. D.M. appeared before a County Judge the next day and pleaded guilty. He was released later that day. . . .

A. G. was arrested on October 1, 2016 at 9:30 p.m. for unlawfully wielding a five-inch knife. . . . His probable cause hearing was held the next afternoon. It is one of the more recent recordings in evidence. . . . The recording shows the following:

> • The Hearing Officer finds probable cause and confirms the scheduled secured money bail amount of $2,500. . . .
>
> • The defendant confirms that he will need a court-appointed lawyer and tries to ask a question. The Hearing Officer cuts him off, stating, "Nobody who's got the criminal history you have out of Florida is going to get a pretrial [bond] from me, for fear of what would happen to the safety of the community." The defendant again tries to speak. The Hearing Officer again cuts him off: "I have more people to consider than you in this, and the safety of the public is one of them." The defendant tries a third time to speak, and again the Hearing Officer shouts over him, saying "You're not going to be able to talk to me because I'm not letting you talk, because I'm going by what I feel is best for the community." . . .
>
> • After a pause, the defendant quietly asks if he may speak. The Hearing *1099 Officer shouts "No!" The defendant pauses again and then states that his only criminal history is a 25–year–old matter in Florida and that he is nearly finished with his exams to become a medical professional. The Hearing Officer responds that "your 25 year ago tendencies seem to be revisiting me, and I am afeared for the people in the State of Texas." . . .
>
> • The Hearing Officer again confirms that the defendant will need a court-appointed attorney, then dismisses him. As the defendant leaves the room, the Hearing Officer quips to the Assistant District Attorney that it "makes me feel better" that the defendant is returning to detention. The Assistant District Attorney laughs. . . .

The defendant's first appearance before a County Judge was held the next day but then reset for October 7, 2016. . . . At the rescheduled hearing, after seven continuous days in detention, A.G. was released on an unsecured personal bond. . . . His case remained pending at the time of the most recent data production from the County. There is no indication that he has failed to appear or has been re-arrested since October 2016. . . .

The two recordings illustrate what many other recordings confirm. Hearing Officers treat the bail schedule, if not as binding, then as a nearly irrebuttable presumption in favor of applying secured money bail at the prescheduled amount. Amounts that deviate from the schedule are treated as "incorrect," and requests for a personal bond, if not denied outright, are deferred until the County Judge holds a later hearing. Hearing Officers routinely adjust initial bail settings to conform to, not to deviate from, the bail schedule. Defendants who try to speak are commanded not to, shouted down, or ignored. . . .

4. Arrestees Detained "Because of" Indigence

The defendants argue that the plaintiffs' statistical reports do not prove that large numbers of misdemeanor arrestees are detained solely because of indigence and that the plaintiffs are assuming that if those detained could pay for release, they would. . . . Both parties' experts tried to discern from Harris County data whether *1115 and to what extent misdemeanor defendants are detained because they cannot pay a secured money bail. Dr. Demuth relied on a computer program the plaintiffs developed that took "snapshots" of the data on the Harris County Jail's misdemeanor population at particular times on particular dates, pulled each defendant's public records from the County's public-facing online interface, and excluded those with nonfinancial reasons for detention on misdemeanor charges, such as concurrent pending felony charges. . . . The most recent series of snapshots showed that on average, between February 15, 2017 and March 14, 2017, every day in the Harris County Jail there were:

- 328 people charged only with misdemeanors.
- 240 people charged only with misdemeanors and not subject to formal holds, such as warrants from another jurisdiction.
- 154 people charged only with misdemeanors, not subject to holds, who had been in jail for 3 or more days.
- 126 people charged only with misdemeanors, not subject to holds, who had been in jail for 5 or more days.
- 84 people charged only with misdemeanors, not subject to holds, who had been in jail for 10 or more days. . . .

I. Conclusions on Findings of Fact

Historically, bail has served as a mechanism of release from pretrial detention. Recently, many jurisdictions have acknowledged and repudiated long-standing practices of imposing, whether by intent or indifference, secured money bail that misdemeanor defendants are clearly unable to pay, resulting in pretrial detention of defendants otherwise eligible for release. Encouraged in their reforms by the American Bar Association and the U.S. Department of Justice, among others, these jurisdictions have followed two approaches to reforming the use of secured money bail for misdemeanor defendants. Some take the approach that a secured financial condition cannot result in the pretrial detention of misdemeanor defendants who cannot pay it, and who are otherwise eligible to be released. Other jurisdictions permit secured financial conditions of release to result in detention only when the process due before imposing a pretrial preventive detention order is provided. This includes timely, counseled, adversarial hearings at which the defendant may present evidence and the judge must issue a reasoned opinion with written findings explaining why the secured financial condition of release is the only

reasonable way to assure the defendant's appearance at hearings and law-abiding behavior before trial. The first approach recognizes that releasing those who can pay while detaining those who cannot pay would violate the Equal Protection Clause. The second approach recognizes that when secured money bail functions as a detention order against an indigent defendant, *1130 procedural protections are required under the Due Process Clause.

Texas law does not provide for pretrial release on no financial conditions. Texas law permits Harris County's Hearing Officers and County Judges to choose between making financial release conditions secured—requiring a misdemeanor defendant or a surety to pay the amount up front to be released from jail—or unsecured—allowing release with the bond coming due only if the defendant fails to appear at hearings and a magistrate orders the bond forfeited. In setting the bail amount, whether secured or unsecured, Texas law requires Hearing Officers to consider five factors, including the defendant's ability to pay, the charge, and community safety. A federal court consent decree requires Hearing Officers to make individualized assessments of each misdemeanor defendant's case and adjust the scheduled bail amount or release the defendant on unsecured or nonfinancial conditions.

Harris County Hearing Officers and County Judges follow a custom and practice of interpreting Texas law to use secured money bail set at prescheduled amounts to achieve pretrial detention of misdemeanor defendants who are too poor to pay, when those defendants would promptly be released if they could pay. Complying with the County Judges' policy in the bail schedule and the County Rules of Court, Harris County Assistant District Attorneys apply secured bail amounts to the charging documents. The schedule is a mechanical calculation based on the charge and the defendant's criminal history. Although Texas and federal law require the Hearing Officers and County Judges to make individualized adjustments to the scheduled bail amount and assess nonfinancial conditions of release based on each defendant's circumstances, including inability to pay, the Harris County Hearing Officers and County Judges impose the scheduled bail amounts on a secured basis about 90 percent of the time. When the Hearing Officers do change the bail amount, it is often to conform the amount to what is in the bail schedule, if the Assistant District Attorneys have set it "incorrectly." The Hearing Officers and County Judges deny release on unsecured bonds 90 percent of the time, including in a high majority of cases in which Harris County Pretrial Services recommends release on unsecured or nonfinancial conditions based on a validated risk-assessment tool. When Hearing Officers and County Judges do grant release on unsecured bonds, they do so for reasons other than the defendant's inability to pay the bail on a secured basis.

The Hearing Officers and County Judges follow this custom and practice despite their knowledge of, or deliberate indifference to, a misdemeanor defendant's inability to pay bail on a secured basis and the fact that secured money bail functions as a pretrial detention order. The Hearing Officers follow an unwritten custom and practice of denying release on unsecured bonds to all homeless defendants. Those arrested for crimes relating to poverty, such as petty theft, trespassing, and begging, as well as those whose risk scores are inflated by poverty indicators, such as the lack of a car, are denied release on unsecured financial conditions in the vast majority of cases, when it is obvious that pretrial detention will result. Hearing Officers style their orders as findings of "probable cause for further detention," when the only condition of further detention is the misdemeanor defendant's inability to pay secured money bail. . . .

As a result of this custom and practice, 40 percent of all Harris County misdemeanor arrestees every year are detained *1131 until case disposition. Most of those detained—around 85 percent—plead guilty at their first

appearance before a County Judge. Reliable and ample record evidence shows that many abandon valid defenses and plead guilty in order to be released from detention by accepting a sentence of time served before trial. Those detained seven days following a bail-setting hearing are 25 percent more likely to be convicted, 43 percent more likely to be sentenced to jail, and, on average, have sentences twice as long as those released before trial.

Harris County is required by Texas and federal law to provide a probable cause and bail-setting hearing for those arrested on misdemeanor charges without a warrant within 24 hours of arrest. At the hearing, Hearing Officers are supposed to provide "a meaningful review of alternatives to pre-scheduled bail amounts." *Roberson* Order at 1. Although Texas law requires Harris County to release misdemeanor defendants who have not had a hearing within 24 hours, over 20 percent of detained misdemeanor defendants wait longer than 24 hours for a hearing. In some, but not all, of these cases, the Hearing Officers determine probable cause in the defendant's absence, but the Hearing Officers admit that they do not provide a meaningful bail setting in absentia. For those misdemeanor arrestees who are detained for significant periods by the City of Houston Police Department before they are transported to the Harris County Jail, or for those booked into the Harris County Jail on a Friday, the Next Business Day Setting before a County Judge will not occur until after three or four days in pretrial detention.

The record shows that County Judges adjust bail amounts or grant unsecured personal bonds in fewer than 1 percent of the cases. Prosecutors routinely offer, and County Judges routinely accept, guilty pleas at first setting and sentence the misdemeanor defendants to time served, releasing them from detention within a day of pleading guilty. Those who do not plead guilty remain detained until they have a lawyer who can file a motion to contest the charge or the bail setting and request a motion hearing. These hearings are generally held one or two weeks later. The record shows that the motion hearing is the first opportunity a misdemeanor defendant has to present evidence of inability to pay and to receive a reasoned opinion explaining the bail setting. Testimony from the defendants' expert on Harris County court administration establishes that the Next Business Day Setting rule codifies, rather than alters, these customs and practices.

The court finds and concludes that Harris County has a custom and practice of using secured money bail to operate as de facto orders of detention in misdemeanor cases. Misdemeanor arrestees who can pay cash bail up front or pay the up-front premium to a commercial surety are promptly released. Indigent arrestees who cannot afford to do so are detained, most of them until case disposition. Because the County Judges know and acquiesce in this custom and practice in their legislative capacity as rulemakers, this consistent custom and practice amounts to an official Harris County policy.

Harris County does not compile comparative data on failures to appear by release on different bond types. No Harris County policymaker or judicial officer has attempted to examine the relative pretrial success or failure rates of misdemeanor defendants released on secured money bail versus those released on unsecured bail. The reliable, credible evidence in the record from other jurisdictions shows that release on secured financial conditions does not assure better rates of appearance or of law-*1132 abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision. Harris County's proxy data for failure-to-appear is consistent with these studies. The information Harris County does keep shows no significant difference in appearance rates between those released on secured money bail and those released on unsecured appearance bonds, when properly controlling for the differences in risk profiles of the population.

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.

Harris County commendably plans to revise its pretrial processes and bail schedule by July 1, 2017. The County proposes to provide early release on unsecured bonds to "low-risk" misdemeanor defendants and to hold "high-risk" defendants—regardless of ability to pay money bail—until the probable cause hearing. "Moderate-risk" defendants will be granted release on a secured money bail, if they can pay the scheduled amount. The County plans to implement the Arnold Risk–Assessment Tool and integrate its information technology systems to avoid the delays that booking procedures and Pretrial Services interviews create. But Harris County's policymakers and judicial officers have made clear their intent to continue imposing secured money bail on "high-risk" and "moderate-risk" defendants, categories as yet undefined. Those who can pay the secured money bail, no matter their level of risk, will be released. Those who cannot will remain detained.

Except in the narrow case of defendants charged with a crime of family violence after violating a previously imposed condition of release, Texas law does not permit orders of pretrial preventive detention. Proposed legislation would permit magistrates to order preventive detention in certain cases, but only with procedural safeguards, and would forbid the use of secured money bail to accomplish preventive detention based on inability to pay. But for now, Harris County effectively gets around the Texas prohibition on pretrial detention by imposing secured money bail against indigent misdemeanor defendants knowing that they cannot pay. Harris County has its own extra-legal system of pretrial preventive detention through secured money bail that operates on the basis of wealth. It accomplishes this without providing the procedural safeguards typically required of pretrial preventive detention orders.

II. Conclusions of Law

. . .

*1140 2. The Constitutional Requirements

a. Equal Protection

"The rule of *Williams* and *Tate*, then, is that the State cannot 'impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.' " *Bearden*, 461 U.S. at 667 . . . . The *Bearden* Court concluded that while a state has broad discretion to decide what penalties satisfy its clear interest to deter and punish crime, once the state "determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it," unless a court finds either that (1) the defendant was not actually indigent and was refusing to pay in bad faith, or (2) "alternative measures are not adequate to meet the State's interests in punishment and deterrence." *Id.* at 667–68, 674.

Applying *Williams* and *Tate* to the pretrial bail context, as *Rainwater* did, (and by extension, the post-*Rainwater Bearden* decision), the court concludes that Harris County has broad discretion to impose pretrial release conditions that meet the compelling interest of assuring a misdemeanor defendant's appearance at trial. But once the County has chosen to impose a financial condition of pretrial release, the County may not use that condition to imprison defendants before trial because they lack the means to pay it. *Rainwater*, 572 F.2d at 1056. To do so impermissibly conditions "an absolute

deprivation of a meaningful opportunity to enjoy [the] benefit" of liberty before trial or conviction on the basis of a defendant's poverty. *San Antonio Indep. School District*, 411 U.S. at 20.

Under the Equal Protection Clause as applied in the Fifth Circuit, pretrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest. *Bearden*, 461 U.S. at 674. In this case, the plaintiffs bear the burden of meeting the preliminary injunction requirements, but at the trial on the merits, the County will have the burden under heightened scrutiny to show that there is no reasonable alternative to a policy, custom, and practice of setting money bail on a secured basis in misdemeanor cases. *See, e.g.*, *Lauder*, 751 F.Supp.2d at 933. The judicial defendants bear the burden to show that they make a finding of no reasonable alternative to imposing money bail on a secured, prescheduled basis for indigent defendants.

b. Due Process

In *Turner v. Rogers*, 564 U.S. 431 (2011), the Supreme Court held that a state court's detention order for civil contempt violated the Due Process Clause. *Id.* at 449. The Court reasoned that while a civil contempt proceeding exposing the defendant to detention for up to one year did not require the assistance of counsel, the state had to provide "alternative procedural safeguards" such as "adequate notice of the importance of ability to pay [as an element to prove at the hearing], fair opportunity to present, and to dispute relevant information, and court findings." *Id.* at 448. The Court made clear that these were examples, not a complete description of what was needed for due process. The state could provide different *1141 procedures "equivalent" to those the Court listed. *Id.*

Turner is a helpful starting point for examining the plaintiffs' likelihood of succeeding on their due process claim. Although the Supreme Court has not defined with precision the federal due process requirements for pretrial detention of misdemeanor defendants, at a minimum, state or local governments must provide notice of the importance of ability to pay in the judicial determination of detention, a fair opportunity to be heard and to present evidence on inability to pay, and a judicial finding on the record of ability to pay or a reasoned explanation of why detention is imposed despite an inability to pay the financial condition. *Turner* clarified that these procedures are required by the Due Process Clause even when the Sixth Amendment does not guarantee a right to counsel. Courts are divided over whether an initial bail-setting is a "critical stage" in the criminal process requiring counsel. . . . Harris County does not currently provide counsel at the probable cause and bail-setting hearing but is exploring a pilot program to do so in July 2017.

The defendants cite many cases for the proposition that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." . . . These cases in fact support the plaintiffs' due process claims. The cases the defendants cite involve serious felony charges with potentially lengthy sentences. The appellate courts affirmed the imposition of secured money bail that a defendant could not pay. But the bail was imposed only *after* at least one counseled adversarial hearing, at which the defendant had an opportunity to present evidence and to be heard, with the court stating its findings on the record that either the defendant had not presented evidence of indigence or that no other condition could reasonably assure the defendant's appearance at future hearings or protect the community from additional felony crimes.[84]

The defendants cite only one case relating to detention on a misdemeanor charge, *Fields v. Henry County, Tennessee*, 701 F.3d 180 (6th Cir. 2012). But in *Fields*, the defendant could

afford to pay money bail, and he was not detained because he was unwilling or unable to pay. *See id.* at 183 (the defendant was released on a $5,000 *1142 bail bond). Instead, the defendant objected to Tennessee's policy of detaining all those charged with family-violence offenses for 12 hours and the county's policy of using a bail schedule. *Id.* at 184–85. Because the misdemeanor defendant failed "to point to any inherent problem with the dollar amount set in his case," the Sixth Circuit held that the bail schedule was not per se unconstitutional. *Id.* at 184 ("That is not to say that using a bond schedule can never violate the Excessive Bail Clause.").

The plaintiffs here do not challenge the bail schedules as per se unconstitutional. . . . Nor do the plaintiffs challenge the Texas statute allowing transparent pretrial detention orders in certain family-violence cases. Aside from this one case involving a misdemeanor defendant but not involving the same issues, the defendants rely exclusively on serious felony cases that permitted detention for failure to pay a financial condition only after a counseled, adversarial hearing with findings on the record that no alternative to secured money bail could reasonably assure the defendant's appearance given the potential for a prison sentence of ten years to life and the resulting risk of flight.

Most importantly, in almost every case the defendants cite, the trial court could have—and sometimes did—order preventive detention, but ultimately set a secured financial condition with the possibility of release as a less restrictive alternative to preventive detention.[85] In Texas, however, pretrial preventive detention is not available in misdemeanor cases except for those arrested on charges of family violence who have already violated a condition of pretrial release. *See* TEX. CONST. art. 1 §§ 11b–11c.

The defendants argue that the Texas ban on preventive pretrial detention in most misdemeanor cases is not relevant because the plaintiffs are alleging violations only of federal law and have not pleaded state-law claims. . . . But federal due process protects state-created liberty interests. Liberty interests protected by the Due Process Clause "may arise from two sources—the Due Process Clause itself and the laws of the States." . . . The Supreme Court recognizes "that states may, under certain circumstances, create liberty interests which are protected by the Due Process Clause" and which entitle prisoners "to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that this state-created right is not arbitrarily abrogated." . . .

*1143 "The Supreme Court has adopted a two-step analysis to examine whether an individual's procedural due process rights have been violated. The first question 'asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.' " *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010) . . . . "State law creates protected liberty interests only when (1) the state places substantive limitations on official conduct by using explicitly mandatory language in connection with requiring specific substantive predicates," and (2) the state law requires a specific outcome if those substantive predicates are met." *Fields*, 701 F.3d at 186. A "narrowly limited modicum of discretion" permitted to judicial officers does not deprive prisoners of a constitutionally protected right to be released. . . .

The Texas Constitution prohibits pretrial preventative detention orders in most misdemeanor cases. TEX. CONST. art. 1 §§ 11, 11b–11c . . . .Texas has created a liberty interest in misdemeanor defendants' release from custody before trial. Under Texas law, judicial officers, as all parties admit, have no authority or discretion to order pretrial preventive detention in misdemeanor cases with a narrow exception for certain family-violence cases.

To determine whether the procedures used sufficiently protect state-created liberty interests

under the Due Process Clause, the Fifth Circuit applies the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Meza*, 607 F.3d at 402. A federal court must consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting *Mathews*, 424 U.S. at 335).

In this case, the private interest affected by Harris County's policy is the misdemeanor defendant's interest in release from custody before trial. That interest implicates fundamental constitutional guarantees: the presumption of innocence and the right to prepare for trial. *See Salerno*, 481 U.S. at 749–51; *Stack*, 342 U.S. at 4 . . . . The record evidence shows that misdemeanor defendants in Harris County who are detained until case disposition are convicted at higher rates and given sentences twice as long as those released before trial. They plead guilty at rates much higher than those who are able to secure early release from pretrial detention. Detained misdemeanor defendants experience the multiplying effects of "cumulative disadvantages" when they lose jobs, places to *1144 live, or family visitation rights because of pretrial detention.

The risk of an erroneous deprivation of this liberty interest through the imposition of secured money bail is high. For the indigent, the risk of pretrial liberty deprivation because of the inability to pay secured money bail is certain. That deprivation is erroneous because the record evidence shows that secured money bail is not more effective at increasing the likelihood of appearance or law-abiding behavior before trial than release on an unsecured or nonfinancial condition. The record evidence shows that nearly 85 percent of those released in Harris County on an unsecured personal bond or other nonfinancial conditions do not forfeit their bonds for failing to appear or for committing new criminal activity. The rate is substantially the same as those released on secured money bail.

As for the third factor, the defendants argue that alternatives to their system of detaining misdemeanor arrestees on secured financial conditions would be prohibitively expensive for the County. The defendants argue that adopting the Washington, D.C. system of releasing almost all misdemeanor arrestees before trial would cost the County tens or hundreds of millions of dollars. . . .

The court concludes that the defendants' testimony and evidence on the County's costs of releasing misdemeanor defendants on alternatives to secured financial conditions is unreliable.

In *Meza*, the Fifth Circuit ruled that a parolee who had not been convicted of a sex offense had a Texas-created liberty interest in being free from requirements to register as a sex offender and to participate in sex-offender therapy. 607 F.3d at 401. Applying the *Mathews* balancing test, the court concluded that the parolee was owed "at least the same [due] process of an inmate, but as a parolee, he should generally be entitled to more favorable treatment than inmates." *Id.* at 409. Applying *Wolff v. McDonnell*, 418 U.S. at 539, on the process required to protect an inmate's state-created liberty interests, the Fifth Circuit held that the parolee was owed "at a minimum: (1) written notice that sex offender conditions may be imposed as a condition of his mandatory

supervision, (2) disclosure of the evidence being presented against [him] to enable him to marshal the facts asserted against him and prepare a defense, (3) a hearing at which [the parolee] is permitted to be heard in person, present documentary evidence, and call witnesses, (4) an impartial decision maker, and (5) a written statement by the factfinder as to the evidence relied on and the reasons it attached sex offender conditions to his mandatory supervision." (citing *Wolff*, 418 U.S. at 560–62).

Under the federal case law defining due process for detention orders in general, as well as case law defining due process for state-created liberty interests, the court concludes that Harris County, in order to detain misdemeanor defendants unable to pay a secured financial condition of pretrial release, must, at a minimum, provide: (1) notice that the financial and other resource information its officers collect is for the purpose of determining the misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; and (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial.

The due process required for pretrial detention orders based on an indigent misdemeanor defendant's failure to pay a secured financial condition of release is similar to the equal protection standard that prevents the government from converting financial conditions or penalties into detention orders without the following: a hearing with notice that pretrial liberty is at stake; with the opportunity to present evidence and to be heard; before a judge who must make findings on the record that *1146 either the arrestee has the ability to pay the amount needed for release, or that the government has no reasonable alternative to imposing detention for the failure to pay.

Due process also requires timely proceedings. In the context of misdemeanor arrests, pretrial detention of even three or four days can significantly increase the rates of nonappearance, recidivism, and the cumulative disadvantages of lost employment, leases, and family custody rights.[92] Due process protections are meaningless if they are provided only after defendants effectively serve their sentences.

Texas and federal law provide guidance that due process requires the necessary hearing to be within 24 hours of arrest in misdemeanor cases. Texas law requires that a misdemeanor defendant arrested without a warrant must be released "not later than the 24th hour after the person's arrest" if a probable cause hearing has not been provided. TEX. CODE CRIM. PRO. art. 17.033(a). "If the person is unable to obtain a surety for the bond or unable to deposit money in the amount of the bond, the person must be released on personal bond." *Id.* In *Sanders*, the federal district court applied the 24–hour standard to setting bail in the City of Houston. 543 F.Supp. at 704. In the *Roberson* order, the federal district court required "a meaningful review of alternatives to pre-scheduled bail amounts" to be held within 24 hours from arrest. . . .

The defendants argue that evidentiary hearings with findings on the record are generally not possible within 24 hours because the available "information is necessarily limited" when the bail-setting hearings occur. They also argue that evidentiary hearings are not required because *Gerstein* permits jurisdictions to meet a less demanding due process standard in finding probable cause and in setting bail. . . . These arguments are unpersuasive. *Sanders* and *Roberson* were issued thirty years ago, before networked computing and communications technologies made it relatively fast and easy to transmit information. Those orders nonetheless set a 24–hour boundary on the time to complete the administrative incidents to arrest in misdemeanor cases in the City of Houston and in Harris County. Under *Roberson*, the County Judges are supposed to direct Pretrial Services "to make every effort to insure that sufficient

information is available ... to determine an accused's eligibility for a personal bond or alternatives to prescheduled bail amounts" for a hearing to be held within 24 hours of arrest. . . . Thirty years later, this 24–hour period is enough for Harris County to gather information on a misdemeanor defendant's ability to pay secured money bail, compile his or her criminal history and any other pending charges or holds, and make a finding as to whether secured money bail or a less restrictive alternative is needed to meet the government's interests.

As for *Gerstein*, the defendants conflate two separate parts of the Supreme Court's opinion. The Court reasoned that "[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel." 420 U.S. at 123, 95 S.Ct. 854. Elsewhere, the Court noted that states are free to develop different pretrial processes. *1147 Some states may choose "to make the probable cause determination at the suspect's first appearance before a judicial officer, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release." *Id.* at 123–24, 95 S.Ct. 854 (internal citations omitted). That does not mean, as the defendants appear to assume, that the minimal procedural protections for finding probable cause under the Fourth Amendment become the maximum procedures required for arraignments, bail-settings, or other proceedings a state chooses to combine with probable cause determinations. *See id.* at 125, 95 S.Ct. 854 n.27 (explaining that the majority opinion addressed due process only under the Fourth Amendment and that the "probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct").

Harris County may combine probable cause and bail-setting determinations in the same hearing. But the County must provide the procedures necessary *both* under the Fourth Amendment for the probable cause determination *and* under the Due Process and Equal Protection Clauses for setting bail and for ordering detention for indigent misdemeanor defendants unable to pay secured money bail.

c. Excessive Bail

As they did at the dismissal stage, the parties dispute whether this case is properly analyzed under the Eighth Amendment's prohibition on excessive bail. . . . For the same reasons stated in its Memorandum and Opinion on the motions to dismiss, the court concludes that this is not an Eighth Amendment case. . . . As explained above, Texas law does not facially provide for release on no financial conditions. *See* TEX. CODE CRIM. PRO. arts. 17.01, 17.03. The requirement that magistrates consider five factors in setting the bail amount applies equally to secured and unsecured financial conditions of release. *See id.* arts. 17.01, 17.15. The plaintiffs do not challenge the existence of Harris County's bail schedule, the scheduled amounts, or the amounts the Hearing Officers and County Judges arrive at in applying the Texas-law factors. The plaintiffs do object to Harris County's customs, practices, and policies of setting money bail amounts on a secured basis for all but a few misdemeanor defendants, effectively detaining without due process those who would be released if they could pay, but who cannot and so are deprived of their pretrial liberty. These claims are not about the scheduled bail amounts in themselves. The claims are about the necessary procedures for requiring those amounts on a secured basis, the fact that those who can pay are promptly released, and the fact that those who cannot pay the secured bail suffer pretrial detention for their misdemeanor charges as a result.

The County Judges argue that the plaintiffs' claims must be analyzed under the Eighth Amendment because when "a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing

these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994). But the plaintiffs' claims and the court's conclusions do not rely on substantive due process. *Williams*, *San Antonio Indep. School District*, and *Rainwater* make clear that detention based on wealth classifications triggers heightened scrutiny for suspect class discrimination under the *1148 Equal Protection Clause. *See* 399 U.S. at 242. *Salerno*, *McConnell* and the cases on state-created liberty interests require procedural, not substantive, due process analysis. *See* 481 U.S. at 746 . . . .

Even if the plaintiffs were bringing an excessive bail claim, the analysis and outcome remain the same. *Salerno* and *McConnell* applied due process principles to analyze an Eighth Amendment claim that bail was excessive when it resulted in the automatic detention of a defendant who could not afford to pay. . . . *Rainwater* applied equal protection principles to scrutinize a pretrial bail system that allegedly resulted in the system-wide detention of indigent arrestees. . . . The defendants assume that if this is an Eighth Amendment case, the plaintiffs' claims are defeated by *McConnell*'s reasoning that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." . . . But the Eighth Amendment cases consistently hold that detention for failure to pay a financial assessment is permissible: (1) for dangerous felonies, in which the potential sentence ranges from ten years to life in prison to capital punishment; (2) after a judicial officer provides due process, including a counseled, adversarial, evidentiary hearing with findings on the record and a reasoned opinion; (3) with a finding that no alternative to the secured financial condition can reasonably meet the government's interests. To the extent they apply, the Eighth Amendment cases support the plaintiffs' arguments. Nonetheless, these cases are not the basis of the claims or of the court's findings and conclusions.

b. The County Judges' Policies and Customs: Equal Protection

. . .

The court finds and concludes on the present record that the plaintiffs have demonstrated a clear likelihood of success on the merits of their allegations. Based on the Pretrial Services monthly and annual public reports, the court finds and concludes that the County Judges know that Harris County detains over 40 percent of all misdemeanor defendants until the disposition of their cases. The County *1151 Judges know that Hearing Officers deny Pretrial Services recommendations for release on unsecured and nonfinancial conditions around 67 percent of the time. They know that Hearing Officers deviate from the bail schedule—up or down—only about 10 percent of the time.[101] The County Judges understand—because all but one of them share the same view—that what Hearing Officers mean when they say they "consider" an arrestee's ability to pay is that they disregard inability to pay if any other factor in the arrestee's background provides a purported basis to confirm the prescheduled bail amount and set it on a secured basis. Harris County's Director of Pretrial Services testified that there is an "[u]nwritten custom" to deny all homeless arrestees release on unsecured or nonfinancial conditions. The County Judges know that Pretrial Services and the Hearing Officers treat homeless defendants' risk of nonappearance as a basis to detain them on a secured financial condition of release they cannot pay. . . . The County Judges testified that they could change these customs and practices legislatively in their Rules of Court, but that they choose not to. . . .

These legislative rulemaking choices are not required by Texas law. The Texas Code of Criminal Procedure makes ability to pay one of five factors to consider in setting the bail amount, but the Code does not require bail to be set on a secured basis and does not require that the five factors be used to decide whether to set bail on a secured basis. *See* TEX. CODE CRIM.

PRO. art. 17.01, 17.15. The parties agreed that in County Court No. 16, Judge Jordan follows a different practice. Judge Jordan does not set bail on a secured basis if it would operate to detain an indigent misdemeanor defendant. If a defendant has the means to pay some bail on a secured basis, Judge Jordan considers the five factors to set bail within an amount the defendant can pay. If a defendant cannot pay a financial condition up front, Judge Jordan considers the five factors, sets the bail amount on an unsecured basis, and orders nonfinancial conditions of pretrial supervision to release the defendant while addressing the defendant's risk of nonappearance or of new criminal activity. Judge Jordan's judicial practice is consistent with Texas law and, when done timely, is consistent with equal protection and due process. But as a legislative body that votes to enact policy by a two-thirds majority, the County Judges knowingly acquiesce in and ratify customs and practices so consistent and widespread as to have the force of a policy. That policy is to detain misdemeanor defendants before trial who are otherwise eligible for release, but whose indigence makes them unable to pay secured financial conditions of release.

This policy is not narrowly tailored to meet the County's compelling interest in having misdemeanor defendants appear for hearings or refrain from new criminal activity before trial. Even applying the less stringent standard of intermediate scrutiny, the present record does not show that rates of court appearance or of law-abiding behavior before trial would be lower absent the use of secured money bail against misdemeanor defendants. *See Lauder*, 751 F.Supp.2d at 933 (under intermediate scrutiny, "the requirement of narrow tailoring *1152 is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation") (internal quotations marks and citation omitted). Recent rigorous, peer-reviewed studies have found no link between financial conditions of release and appearance at trial or law-abiding behavior before trial. Harris County policymakers have not attempted to collect, much less review, the County's own data to determine whether secured financial conditions of release work better in Harris County than unsecured or nonfinancial conditions. That lack of inquiry is one indication the policy is not narrowly tailored. The other indication is that both parties' experts evaluated Harris County's data and found no significant difference in appearances at hearings or in new arrests between misdemeanor defendants released on secured money bail and those released on unsecured personal bonds.

To be sure, requiring secured money bail for misdemeanor defendants does not run afoul of equal protection principles when those defendants are actually released. If two defendants take advantage of similarly timed opportunities for pretrial release on secured money bail, the fact that it may be harder for one to come up with the money than the other does not create a suspect classification between the two and does not trigger heightened scrutiny. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 23–24. But when a secured financial condition of release works an absolute deprivation of pretrial liberty because a defendant is indigent or so impecunious that he or she cannot pay even a bondsman's premium required for release, the County must show that requiring a secured money bail is at least more effective than a less restrictive alternative at meeting the County's interests, even if it is not the least restrictive means to do so. *See id.* at 20–22; *Bearden*, 461 U.S. at 672.

Based on the present record, the court finds and concludes that, as a matter of law, Harris County cannot make this showing. The cases in which the government is able to show no reasonable less restrictive alternative to detaining an indigent defendant by imposing a secured money bail all involve charges for serious felonies that carry lengthy potential sentences. The Harris County Criminal Courts at Law have jurisdiction only over misdemeanor cases. The plaintiffs were charged only with misdemeanor offenses and have no pending felony charges. Texas law forbids pretrial

preventive detention of misdemeanor arrestees in all but one category of cases—those who are arrested on family violence charges and who have violated a prior family violence protective order while released before trial. In that narrow category, the State provides enhanced procedures to protect the defendant's liberty interests. *See* TEX. CONST. art. 1, §§ 11b–11c; TEX. CODE CRIM. PRO. art. 17.29–292. Outside that category, Texas law does not distinguish among misdemeanor arrestees in terms of their eligibility for pretrial release. Hearing Officers recognize this approach whenever they permit release on secured money bail. A defendant who can pay is released regardless of risk. Once deemed eligible for release, indigent misdemeanor defendants who cannot pay the secured financial condition of release cannot be detained on that basis without a hearing and judicial findings on the record that no other reasonable alternative is available. In *1153 Harris County misdemeanor cases, reasonable alternatives to continued detention are readily available for indigent defendants unable to pay a secured money bail. Those alternatives include reducing the bail amount, as Judge Jordan does, imposing unsecured money bail, or releasing on nonfinancial conditions of pretrial supervision. . . .

Harris County is not liable for the individual adjudications of its Hearing Officers and County Judges in specific cases, even if those orders detain indigent arrestees because these cannot pay secured money bail. . . . But the County is liable for the legislative and administrative policies of its County Judges who knowingly or with reckless indifference acquiesce in and ratify a custom and practice that achieves pretrial preventive detention on secured financial conditions that defendants cannot pay in over 40 percent of all Harris County misdemeanor cases. . . . The court concludes that the plaintiffs are likely to succeed in proving that the County has a policy of violating equal protection by detaining indigent misdemeanor arrestees before trial.

c. The County Judges' Policies and Customs: Due Process

Due process requires: (1) notice that the financial and other resource information Pretrial Services officers collect is for the purpose of determining a misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial; and (5) timely proceedings within 24 hours of arrest. . . .

The court concludes that the plaintiffs are likely to succeed on at least parts of their due process claim. Of the requirements listed above, Harris County meets only one at the probable cause and bail-setting hearing: an impartial decisionmaker. The County usually provides the hearing within 24 hours, but 20 percent of misdemeanor defendants who remain detained until the hearing wait longer than 24 hours for that hearing. The record evidence shows that misdemeanor defendants are sometimes confused about the financial and other resource information they are asked to provide and how it will affect their eligibility for release, and Hearing Officers do not make written findings or give reasons for their decisions.

The rule requiring a Next Business Day Setting before a County Judge recently came into effect. *See* Rules of Court 4.3.1. Depending on the timing of arrest and booking, this first appearance may occur within 24 hours after arrest, but the record does not indicate how often that happens. Harris County's former court administrator testified that the Next Business Day setting is not a rule change, but a codification of prior practice. The record shows that the practice is for County Judges to routinely deny reductions in the bail amount and to refuse release on unsecured financial conditions in more than 99 percent *1154 of

cases. The record does not show written findings made by County Judges explaining why money bail must be imposed on a secured basis in any specific case.

Except for the Texas Code requirement that misdemeanor defendants be released 24 hours after arrest if probable cause has not been found, the timing of County procedures is regulated by the County Judges' Rules of Court promulgated by the County Judges in their legislative capacity. *See* TEX. CODE CRIM. PRO. art. 17.033. The record evidence shows that thousands of misdemeanor defendants each year are detained longer than 24 hours before they have a bail-setting hearing. Instead of releasing defendants who have not had a probable cause hearing within 24 hours, the County follows an unwritten policy of determining probable cause in absentia, using only the charging papers. The Harris County judicial officers agreed that bail is not meaningfully considered at these in absentia hearings.

The court concludes that Harris County does not provide due process for indigent or impecunious misdemeanor defendants it detains for their inability to pay a secured financial condition of release. Those who cannot pay the secured money bail set at the probable cause hearing before a Hearing Officer must wait days, sometimes weeks, before a County Judge provides a meaningful hearing to review the bail determination. Harris County is liable for the County Judges' policies issued in their legislative or rulemaking capacities that result in systemwide delays in any meaningful determination of the conditions for release.

If the County complied with equal protection requirements, part of the plaintiffs' concerns about due process would be mitigated. If Hearing Officers, as they are supposed to do under the *Roberson* order, tailored nonfinancial release conditions to address through supervision each defendant's risk of nonappearance or new criminal activity, and then released those defendants, the need to present evidence and make written findings about financial conditions would be less urgent. Hearing Officers do not need to issue reasoned opinions explaining their decision to detain someone using secured money bail if the Officers cannot use secured money bail to detain indigent defendants in the first place. . . .

IV. Conclusion

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B. Preliminary Injunction

"Rules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent, befriended or friendless, employed or unemployed, resident or transient, of good reputation or bad." *Rainwater*, 572 F.2d at 1057. Misdemeanor arrestees are often, as Judge Truman Morrison testified, people "living on the edge at the point in their lives that intersects with getting involved in an arrest." . . . In Harris County, they may be homeless. They may lack family, friends, and "co-indemnitors." Some are, no doubt, of bad reputation and present a risk of nonappearance or of new criminal activity. But they are not without constitutional rights to due process and the equal protection of the law. . . .