

“THE STATUS OF BAIL REFORM IN TEXAS:
HOW THE PASSAGE OF THE DAMON ALLEN ACT CHANGED THE
LANDSCAPE”

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I. THE POLITICS OF TEXAS BAIL REFORM

When it comes to the politically contentious issue of bail reform in Texas, progressives may win in federal court, but conservatives still control the Capitol in Austin. Consequently, the tension between two competing agendas—protecting civil liberties on one hand and ensuring public safety on the other—has made progress on bail reform incremental at best. The slow pace of progress became evident in September 2021, when Governor Abbott signed Senate Bill 6 into law. Bill 6 was highly criticized; some civil rights advocates view the bill as a regressive step that threatens to undermine the due process rights of the criminal accused.

Senate Bill 6, known as the “Damon Allen Act,” comes on the heels of several civil rights challenges of the cash bail system in Texas. Most notably, in 2017, progressives scored a major victory for the civil rights of indigent defendants in the landmark case of *O’Donnell v. Harris County*, which ruled that Harris County’s bail policies were unconstitutional on both due process and equal protection grounds.¹ Bail reformers now oppose the Damon Allen Act, focusing much of their criticism on two provisions of the new law. The first is a restriction

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¹ *O’Donnell v. Harris Cty.*, 892 F.3d 147, 161–63 (5th Cir. 2018).

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on the use of unsecured personal bonds, which permits for a defendant’s pretrial release without paying a cash bond. Second is a provision imposing a heightened burden on charitable bonds, paid by third party organizations on behalf of the accused.²

II. REMEMBERING STATE TROOPER DAMON ALLEN

The Texas Legislature passed this bail legislation in memory of former State Trooper Damon Allen, whose tragic death galvanized support for the law.³ During a routine traffic stop in 2017, a man who was released from jail on a cash bond after allegedly assaulting a police officer killed Allen in the line of duty. Weeks before the murder, despite the foreseeable risk to public safety, a judge set the bail for Allen’s future killer at \$15,500, which only required payment of a small fraction to the bail bondsman (approximately \$1,500) to post bond for pre-trial release. Given the violent nature of the suspect’s alleged offense coupled with the devastating consequences of his pre-trial release, the relatively low bond in this case shocked the conscience of many Texas lawmakers on both sides of the aisle. The public outcry in response to Allen’s murder also served as a major impetus for the enactment of this law. A provision of the Act making it easier for judges to consider a defendant’s full criminal history when setting bail (rather than just the current charges) enjoyed broad bipartisan support in Austin.

However, other provisions of the law drew criticism for failing to directly address the issue of low cash bonds granted to high-risk defendants, such as the one that released Allen’s killer. One controversial provision of the law eliminated personal bonds for those accused of violent crimes, thus requiring them to post a cash bond to be released from jail before trial.⁴ The prohibition of personal bonds in such cases will undoubtedly make it harder for many defendants to be released on bail, but Democrats argue this ban is poorly tailored to address the core issue of protecting the public from dangerous offenders who are able to secure a cash bond, such as Damon Allen’s killer.⁵

III. WHY NOT BAN PERSONAL BONDS?

Critics of the ban on personal bonds point out that the type of bond granted to a criminal defendant is a poor gauge of that defendant’s flight risk or likelihood of re-offending. By contrast, the conditions of supervision during pre-trial release

² TEX. CODE CRIM. PROC. ANN. art. 17.021.

³ Off. of the Texas Governor, *Governor Abbott Signs Damon Allen Act Into Law At Safer Houston Summit* (Sept. 13, 2021), <https://gov.texas.gov/news/post/governor-abbott-signs-damon-allen-act-into-law-at-safer-houston-summit>.

⁴ Jolie McCullough, *Texas Bill to Require Cash Bail for Those Accused of Violent Crimes Becomes Law*, THE TEXAS TRIBUNE (Sept. 13, 2021, 9:00 AM), <http://www.texastribune.org/2021/09/03/texas-bail-legislation-abbott>.

⁵ *Id.*

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and the specific risk factors assessed during a bond hearing are far better indicators of flight risk or likelihood of re-offending. Accordingly, opponents argue that the Damon Allen Act is drastically overinclusive, applying to any defendant accused of a violent crime regardless of other risk factors. Furthermore, many violent offenders, like the perpetrator who killed Damon Allen, can afford to post a cash bond and would therefore be unaffected by the restriction on personal bonds.⁶ For these reasons, the prohibition on personal bonds is simultaneously overinclusive (applying unnecessarily to indigent defendants at low risk of flight or re-offending) and underinclusive (not applying to high-risk defendants if they can afford a cash bond).

The restriction of personal bonds also runs counter to the recent statewide trend of accommodating reasonable requests for cashless bonds whenever possible.⁷ Particularly in cases involving indigent defendants, where cash bonds would effectively impose a pre-trial detention order (due to the defendant’s inability to pay), personal bonds may be required to avoid violating the defendant’s procedural due process rights.⁸ In fact, the misuse of money bail for indigent arrestees often raises procedural due process issues.⁹ Accordingly, “Texas state law creates a right to bail that appropriately weighs the detainees’ interest in pretrial release and the court’s interest in securing the detainee’s attendance,” thereby forbidding the setting of bail as an “instrument of oppression.”¹⁰

Applying this standard, the Fifth Circuit affirmed the district court’s ruling in *O’Donnell v. Harris County*, that the money bail policies of Harris County were an unconstitutional violation of the due process and equal protection rights of indigent arrestees.¹¹ The court reasoned that because the policy automatically imposed a cash bond on the accused, it failed to consider “the indigent misdemeanor defendants’ ability to pay” and “County Judges almost always set a bail amount that detains the indigent,” thereby failing to “sufficiently protect detainees from magistrates imposing bail as an ‘instrument of oppression.’”¹² Following the *O’Donnell* decision, some large cities, such as Dallas and Houston, began granting pretrial release of lower-risk indigent offenders on cashless personal bonds.¹³ When properly paired with community supervision measures, such as ankle monitors and drug testing, personal bonds can be an effective way to address

⁶ McCullough, *supra* note 5.

⁷ Jolie McCullough, *Harris County Agreed to Reform Bail Practices that Keep Poor People in Jail. Will it Influence Other Texas Counties?* THE TEXAS TRIBUNE (July 31, 2019, 3:00 PM), <http://www.texastribune.org/2019/07/31/harris-county-bail-settlement-dallas-texas>.

⁸ *Id.*

⁹ *O’Donnell*, 892 F.3d at 158.

¹⁰ *Id.*

¹¹ *Id.* at 152.

¹² *Id.* at 159.

¹³ McCullough, *supra* note 7.

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public safety concerns while also protecting the civil rights of indigent defendants.¹⁴

IV. THE PROBLEM WITH RESTRICTING CHARITABLE BONDS

The original bill, proposed by the Texas Senate, included a second controversial provision that restricted non-profit, charitable organizations from posting bonds on behalf of defendants.¹⁵ In recent years, and particularly following the protests in the aftermath of George Floyd’s murder, charitable bonds became a popular strategy for bail reformers to address the inequities of the cash bail system. Many non-profits collected donations to pay the bail of low-income, non-violent offenders.¹⁶ SB 6, in its original form, targeted these organizations, effectively banning their operations and potentially undermining their efforts. However, Democrats in the Texas Legislature refused to vote on the original bill and walked out of the legislative session to show their disapproval of this provision, among other grievances.¹⁷

Republican lawmakers in the Texas Senate responded with an amended bill that included a revised restriction on charitable bail, requiring any non-profit paying cash bonds on behalf of arrestees to be certified by county officials, and a requirement that non-profits release all the records of the defendants whose bail they pay.¹⁸ Critics contend that it is unclear how the new requirements relate to public safety and argue that the underlying purpose of the provision is to discourage these organizations from expanding their operations.¹⁹

V. FINAL THOUGHTS

The putative goal of the bail system is to provide a mechanism for the criminally accused to be released before trial while also ensuring that they appear in court. However, the cash bail system is not ideally designed for that objective. In practice, the money bail system disproportionately detains the poor, regardless of their flight risk, and allows defendants with the means to pay a bail bondsman the benefit of pretrial release.²⁰ This is problematic because pre-trial detention adversely affects a defendant’s ability to participate in his/her own defense and causes many defendants to needlessly sit in jail for months even though they have not been convicted. Though the motivation behind the Damon Allen Act is admirable, the means employed by the legislation are misguided. Cashless personal

¹⁴ McCullough, *supra* note 9.

¹⁵ 2021 Tex. Sess. Law Serv. 2nd Called Sess. Ch. 11 (S.B. 6).

¹⁶ Adamczyk, Alicia. *Twitter Users Raise Millions for Bail Funds for George Floyd Protestors*. (June 2, 2020, 3:03 PM), <https://www.cnn.com/2020/06/02/>.

¹⁷ Daniel Van Oudenaren, *Overhaul of state bail system on the rocks after Democrats break quorum*. THE AUSTIN BULLDOG (July 14, 2021, 10:38 AM), <https://theaustinbulldog.org/>.

¹⁸ McCullough, *supra* note 5.

¹⁹ *Id.*

²⁰ McCullough, *supra* note 9.

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bonds are an important tool to protect the civil rights of the indigent. Removing that tool from the discretion of County Judges is a step in the wrong direction. Moreover, the Act undermines the efforts of non-profit, charitable organizations from posting bond on behalf of the criminally accused. In fact, the only obvious beneficiaries of Governor Abbott’s bail reform are private, for-profit bail bondsmen.