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# Dividing Bail Reform

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# DIVIDING BAIL REFORM

(FORTHCOMING IOWA LAW REVIEW)

Shima Baradaran Baughman*

*There are few issues in criminal law with greater momentum than bail reform. In the last three years, states have passed hundreds of new pretrial release laws, and there are now over 200 bills pending throughout the states. These efforts are rooted in important concerns: Bail reform lies at the heart of broader recent debates about equitable treatment in the criminal justice system. Done right, bail keeps dangerous individuals off the streets; done wrong, it keeps those with less economic means in jail longer. Some jurisdictions are eliminating money bail. Others are adopting risk assessments to determine who to release. Still others are changing state statutes and constitutions and factors that judges consider in the bail decision.*

*All of these reforms are fundamentally flawed. This is because near all of these bail reform efforts consider all crimes as interchangeable—failing to distinguish minor and serious crimes. This Article is the first to identify this pervasive shortcoming in bail reform and makes two important contributions to the literature. First, it distinguishes between minor and serious crimes, and proposes systematic changes to bail reform based on the seriousness of the crime. It argues that individuals charged with misdemeanors—accounting for the vast majority of criminal cases—should be released presumptively and not detained except in rare circumstances. This right is rooted in history and constitutional rights and even squares with a plain interpretation of current state laws. Second, it shows how rethinking bail will matter in important ways, demonstrating that this modest-seeming proposal can have widespread theoretical and practical impact. Indeed this change will dramatically alter the landscape of state bail laws, bail schedules and risk assessments. In addition, it will have serious impact on some of the most important criminal law debates of our time, including equity of application in criminal law, prison overcrowding, and due process protection.*

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* Professor of Law and Presidential Scholar, University of Utah College of Law. Special thanks to the participants of the *Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System* conference at the Boston University School of Law for engaging with me on this topic, including Julian Adler, Judge Stephanos Bibas, Jenn Rolnick Borchetta, Robert Boruchowitz, Judge David Breen, Jeffrey Fagan, Malcolm Feeley, Sarah Geraghty, Samuel Gross, Eisha Jain, Irene Joe, Wendy Kaplan, George Kelling, Issa Kohler-Hausman, Gerry Leonard, Karen Pita Loor, Sandra Mayson, Alexandra Natapoff, Jenny Roberts, David Rossman, Judge Shira Scheindlin, Megan Stevenson, Susan Terrey, and Judge Michael Vitali. I am also indebted to RonNell Anderson Jones and Cathy Hwang. I am grateful for the assistance of Madeline Aller, Melissa Bernstein, Tyler Hubbard, Ross McPhail, Emily Mabey Swensen, Angela Turnbow, Brittany Swicord, Patti Beekhuizen, Joseph West, Mariah Savage and Eli LeCates for research and editorial assistance on this article. A University of Utah faculty research grant made this research possible.

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TABLE OF CONTENTS

I. INTRODUCTION .......... 3
II. BAIL AND MISDEMEANOR DEFENDANTS: NATIONWIDE APPROACHES .... 11
A. Brief History of Misdemeanor Bail Right .......... 12
B. Pretrial Stage is Especially Important for Misdemeanors .......... 15
C. Pretrial Release Options for Misdemeanors .......... 21
1. Citations in Lieu of Custody .......... 22
2. Release on Personal/Own Recognizance (ROR) .......... 28
3. Money Bail .......... 30
4. Conditional Release for Misdemeanors .......... 33
5. Misdemeanor Detention before Trial .......... 35
III. THE FELONY-CENTRIC NATURE OF BAIL REFORM .......... 37
A. Felony Factors Applied to Misdemeanors Wholesale .......... 40
1. Defendant Appearance at Trial .......... 42
2. Dangerousness of Defendant .......... 46
3. Nature of the Charge and weight of evidence .......... 52
3. Criminal Record .......... 55
4. Community Ties, Residential and Employment Circumstances .... 56
B. Money Bail Schedules Prohibit Misdemeanor Defendants from Release .......... 58
C. The Danger of Risk Assessments .......... 69
IV. CONCLUSION .......... 78

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## I. INTRODUCTION

Many American jurisdictions have undertaken bail reform efforts in recent years.[1] States and cities have eliminated money bail,[2] adopted new state laws,[3] and changed factors for considering bail.[4]

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[1] *See, e.g.*, 725 ILL. COMP. STAT. 5/110-5(a-5) (2018) (creating a presumption that any conditions of release imposed shall be nonmonetary in nature and that courts shall impose the least restrictive means necessary); IND. CODE § 35-33-8-3.8 (2017) (mandating that courts consider releasing a defendant without money bail if the results of a pretrial risk assessment show that the defendant does not present a substantial risk of flight or danger); CAL. PENAL CODE § 1320.10 (West) (effective Oct. 1, 2019) (classifying defendants as low-risk, medium-risk, or high-risk and setting various conditions for release based on these categories); CONN. GEN. STAT. § 54-64a(a)(2) (2017) (barring cash-only bail for certain crimes and restricting the use of financial considerations for release in misdemeanor crimes); N.J. STAT. ANN § 2A:162-17 (West 2017) (creating categories of pretrial release conditions applicable in certain circumstances); COLO. REV. STAT. § 16-4-105 (2017) (imposing conditions on bond for certain offenses); UTAH CODE. ANN. § 77-20-1 (West 2017) (allowing persons eligible for bail to be released with or without money bail based on the court's discretion); ARIZ. REV. STAT. § 13-3967 (2018) (permitting any person with a bailable public offense to be released on his own recognizance or on the execution of bail, as specified by the court); ALASKA STAT. § 33.07.010 (Lexis Advance 2018) (pretrial services program that provides pretrial risk assessment, makes recommendations concerning pretrial release decisions and provides supervision); N.Y. CRIM. PROC. LAW § 530.20 (2018) (requirements that the court "must or may" order recognizance or bail, unless the offense falls into a limited category of exceptions); TEX. CODE CRIM. PROC. ART. 17.03–17.033 (Lexis Advance 2017) (creates instances in which eligible defendants may be released on a personal, non-monetary, bond at the court's discretion); *see also* TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION UPDATE, NAT'L CONF. OF ST. LEGISLATURES (Apr. 2018), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialenactments_2017web_v02.pdf; PRETRIAL JUSTICE INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f9d452f6-ac5a-b8e7-5d68-0969abd2cc82&forceDialog=0.

[2] CAL. PENAL CODE § 1320.10 (West) (effective Oct. 1, 2019), *Thompson v. Moss Point*, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015), TEX. CODE CRIM. PROC. ART. 17.03-17.033 (Lexis Advance 2017), *Powell v. City of St. Ann*, No. 4:15-CV-00840-RWS (E.D. Mo. Sept. 3, 2015), *Pierce et al. v. City of Velda*, 2015 WL 10322003, at *1 (E.D. Mo. June 3, 2015).

[3] *See, e.g.*, CAL. PENAL CODE § 1320.10 (West) (effective Oct. 1, 2019); 2017 NEW MEXICO COURT ORDER 0006 (C.O. 0006) (The New Mexico Supreme Court: "A designee shall release a person from custody on personal recognizance, subject to [] conditions of release . . . if the person has been arrested and detained for a . . . misdemeanor, subject to [] exceptions . . . ."); 2017 ARIZONA COURT ORDER No. 2014-12 (The Arizona Supreme Court: "Arizona Code of Judicial Administration section 5-201 authorizes courts to operate pretrial service programs… 5-201(E)(1) approves use of the validates pretrial risk assessment tools…")

[4] SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL

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The motivations behind these efforts are admirable, as problems with bail are a major contributor to the staggering problem of mass incarceration. But the reforms are missing a fundamental first step. All of these efforts ignore a vital piece of the puzzle: misdemeanors.

This isn't a small piece. The United States criminal justice system is largely made up of misdemeanors.[5] About 90% of arrests—and the majority of the 13.2 million annual convictions—are based on misdemeanor charges.[6] And most of these defendants end up in jail—not because they are ineligible for release—but simply because they cannot afford to pay bail.[7]

Constitutionally, release before trial is a clearly established, historically supported right for defendants charged with minor crimes.[8] From the time of medieval English law until very recently, a natural bail dividing line existed between what we now call misdemeanors and felonies.[9] Those charged with nonviolent or less serious crimes were expected to be released in almost all cases, while those charged with capital crimes would be granted bail where they would be unlikely to flee.[10] Over time, though, due to a blurring of crimes and disintegration of due process, the landscape shifted. Now, individuals charged with most crimes—both misdemeanor and felony—face a presumption of detention rather than a

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IN AMERICA'S CRIMINAL JUSTICE SYSTEM 1–17 (2018) (discussing changing factors in pretrial release throughout various states).

[5] ISSA KOHLER-HAUSMANN, MISDEMEANORLAND, 164–65 (2018); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 732, 764 (2018); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 743 (2017); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012).

[6] Natapoff, *supra* note **Error! Bookmark not defined.**, at 1315. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 281, 256-58 (Basic Books 2018) (conducting a comprehensive review of misdemeanors filed nationwide).

[7] "Bail means jail," is the reality expressed by misdemeanor defense attorneys in New York City. KOHLER-HAUSMANN, *supra* note 5, at 64–65.

[8] Misdemeanor bail is a longstanding constitutional right that can be traced back to the Magna Carta. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 727, 728 (2011) [hereinafter Baradaran, *Presumption of Innocence*] (noting that the Magna Carta spawned a presumption of innocence which led to "presumed bail for all noncapital cases"); Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 861 863 (2018) [hereinafter Baughman, *History of Misdemeanor Bail*] (explaining that reasonable bail "has been codified since the Magna Carta").

[9] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 837 (discussing how, under the common law, those charged with felonies had fewer rights because of the often violent and serious nature of the crime while those charged with misdemeanors were generally released on bail).

[10] *Id.* at 871 ( "[T]he general rule and practice was that those charged with anything other than a capital crime were released on bail, unless there was strong evidence that the defendant would flee the jurisdiction"); Baradaran, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 728–29 (explaining that "English bail law presumed that defendants would be released").

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presumption of pretrial release.[11] In the modern U.S. criminal system,[12] a significant number of those charged with misdemeanors end up in jail.[13] Once defendants end up in jail, they are more likely to stay in jail and take a plea deal or admit guilt even if they are innocent, and their chances of winning their cases decreases dramatically.[14] While almost all defendants charged with misdemeanors should be released before trial as a constitutional right, a significant number end up in jail.[15]

This Article is the first to recognize the historical difference between treatment of misdemeanor and felony bail and advocate a return to this approach. Relying on original hand-collected data from all fifty states on existing state laws and bail reforms, this Article proposes that a misdemeanor-felony distinction is imperative to ongoing bail reforms. It shows that most jurisdictions are treating misdemeanor cases exactly the same as felony cases when it comes to bail.[16] It then demonstrates

[11] BAUGHMAN, *supra* note 4, at 4; Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 871 (explaining that there is no longer a presumption of pretrial release in misdemeanor cases); Baradaran, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 752.

[12] Baradaran, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 748; Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 863.

[13] BAUGHMAN, *supra* note 4, at 1–17; *see* Charlie Gerstein, *Plea Bargaining and the Right to Counsel and Bail Hearings*, 111 MICH. L. REV. 1513, 1534 (2013) (noting that in New York, "25 percent of nonfelony defendants are held on bail"); Napatoff, *supra* note **Error! Bookmark not defined.**, at 1321–22 ("In New York, the vast majority of such defendants cannot pay their bail"); ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N CRIM. DEF. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (estimating based on a sample of twelve states that approximately 2.5 million people in the United States are held on bail they cannot afford for misdemeanor charges every year).

[14] BAUGHMAN, *supra* note 4, at 82–85 (explaining that "justice is much more attainable from outside of a prison cell" because "preparing one's case is much more difficult when the defendant is in jail than if the defendant were immediately released," that "[e]ven for prisoners in pretrial detention who are innocent, accepting a plea bargain for time served is very tempting because they just want to leave jail and return to their families and jobs," and that "[m]ost defendants are not released before trial because they cannot afford to pay bail"); KOHLER-HAUSMANN, *supra* note **Error! Bookmark not defined.**, at 164–65 (defendants "are much more likely to take a plea to get out of jail than they would if they were outside fighting the case").

[15] See *supra* note 13.

[16] While national data is spotty, the numbers we do have reveal that many jurisdictions are detaining misdemeanor defendants as often as all other defendants. Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 732 ("[T]he universe of human knowledge is accessible from tiny devices that we carry everywhere . . .. Yet we know absurdly, embarrassingly, vanishingly little about our misdemeanor justice system"); NATAPOFF, *supra* note 6, at 281 (providing a helpful national analysis of misdemeanor cases in 2015); see also *infra* note 201 and 206.

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that the underlying problem of bail reform efforts is a fundamentally flawed analysis. Even though by every account—historically, constitutionally and according to modern state statutes—misdemeanors are less serious crimes, misdemeanors are treated the same as felonies for bail purposes.[17] Applying the same factors in misdemeanor release as for felony release has caused preventable criminal justice system failures—including prison overcrowding, inequitable treatment of defendants, and due process violations.[18]

Although misdemeanor cases outnumber felony cases three to one,[19] misdemeanor crimes have traditionally been overlooked,[20] underfunded,[21] and

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[17] While constitutionally, a bail right still exists for most crimes—most especially misdemeanors—in recent decades an alarming trend demonstrates that courts regularly deny pretrial release to millions of defendants charged only with misdemeanors. Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 871 (Today, misdemeanor defendants are detained at rates similar to those for felony defendants in some areas).

[18] Because most of the defendants who are denied bail are misdemeanor defendants, many defendants in America are unable to obtain release before trial. There are certainly many contributing factors that have caused this problem, including the neglect of misdemeanors in the overall system, the lack of resources for misdemeanor courts, and the failure of the right to counsel for this important right. Some of these will be discussed in Part II.B.

[19] Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 764 (stating that there were 13.2 million misdemeanor cases in 2016, which is three times as many as felony cases, and that this ratio hasn't changed in a decade).

[20] *Id.* at 734. As Stevenson and Mayson found, ignorance about misdemeanors "has been due, in part, to inattention. Although far from perfect, data on misdemeanors is available; what has been lacking is the will to investigate. Misdemeanors have historically been perceived as unimportant."

[21] The inattention on misdemeanor justice has led to underfunding and neglect with high caseloads and limited resources. DANIEL J. HALL, NAT'L CTR. FOR STATE COURTS, RESHAPING THE FACE OF JUSTICE: THE ECONOMIC TSUNAMI CONTINUES 2 (2011), https://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Hall.ashx (noting that "[s]ome courts are having a difficult time keeping pace with the volume of litigation" and consequently "[i]t now takes more than a year for a misdemeanor case to be set for trial" in many Minnesota districts). Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 282 (2011) ("The high-volume misdemeanor system is clearly in crisis. Misdemeanor defenders handle caseloads far above nationally recommended standards, yet have few resources to investigate and perform the core tasks for their clients' cases. They practice in overcrowded courts where defendants are pressured to enter quick guilty pleas without adequate time to consult with the attorney they may have just met."); Joe, *supra* note **Error! Bookmark not defined.**, at 778 (noting that "in some jurisdictions, misdemeanor offenses comprise almost 80 percent of court dockets and a comparable proportion of public defender caseloads," that "[p]ublic defenders represent at least 80 percent of state criminal court defendants who challenge the validity of their arrests," and that "[t]his massive demand combined with limited resources forces public defender

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misunderstood in this country by scholars and policy makers.[22] And despite misdemeanors comprising the bulk of criminal cases, the American criminal justice system remains almost totally centered on felonies.[23]

This is in part because of disparities in data. Misdemeanor reform in the United States has always been hampered by the sheer difficulty of gauging the contours of the problem. Criminal statutes, cases, and statistical analyses have traditionally focused only on felonies. There is no national database tracking misdemeanors,[24] and data has been limited to a few counties that have tracked their own misdemeanor data in an effort to achieve greater efficiency.[25] Good national data has been nonexistent until recently.[26]

This dearth of information results somewhat because of the partly true but misguided rationale that misdemeanors are less important crimes. Misdemeanors are typically less serious crimes for which punishment can vary but generally incarceration is limited to no more than a year.[27] As less serious charges,[28] misdemeanors are often considered less complicated and with less at stake at sentencing.[29] In contrast, some felonies are punishable up to life in prison or even

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offices to make difficult resource allocation decisions that provide services to one client or group of clients at the expense of providing certain services to others").

[22] Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 734 (highlighting the work of Malcolm Feeley and Jonathon Simon's work on misdemeanors).

[23] *See* Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 176 (2018) [hereinafter Roberts, *Informed Misdemeanor Sentencing*] (discussing that in theories of punishment, criminal law textbooks almost exclusively address felonies).

[24] THOMAS COHEN & BRIAN REVES, U.S. DEP'T. OF JUSTICE, BUREAU OF STATISTICS, *Pretrial Release of Felony Defendants in State Courts*, Nov. 2007, at 1.

[25] *Id.*

[26] *But see* Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 740 and NATAPOFF, *supra* note 6.

[27] Joe, *supra* note **Error! Bookmark not defined.**, at 743, 752 (stating that "[h]istorically, the criminal process for misdemeanor offenses encouraged minimal protection because it placed an offender at little risk for formal confinement or significant socioeconomic consequences.").

[28] There is of course an argument that with the growth in number of felonies and crimes in general, that the line between misdemeanors and felonies is now blurred. More felonies look like misdemeanors and it may be hard to distinguish the two crimes sometimes (and some crimes are even listed as both felonies and misdemeanors). I acknowledge this argument as an important one, and acknowledge that the number of felonies should certainly be reduced and where appropriate less serious felonies should be downgraded to misdemeanors in sentencing schemes. Restoring the original definitions of felonies as serious crimes and misdemeanors as minor crimes is an important step. This will certainly be part of the overarching solution to overcriminalization and ending mass incarceration. However, this is not an argument that will be addressed directly in this article.

[29] Joe, *supra* note **Error! Bookmark not defined.**, at 758 (Foundationally misdemeanors are less serious, but minimizing misdemeanor convictions has serious consequences, due to the collateral effects of such convictions); Roberts, *supra* note 21, at 295 (stating there is "general acceptance that attorneys can handle more misdemeanors than

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death. So while misdemeanors are less serious crimes—and historic evidence is strong that this has always been the case—the treatment and consequences of misdemeanor crimes no longer supports this popular assumption.[30] While misdemeanor sentences are shorter, there is evidence that misdemeanors are not actually less complicated,[31] and often the stakes are just as high in misdemeanor cases as in felony cases. Indeed, there is also evidence that there is a more careless atmosphere for protecting due process with misdemeanor charges.[32] Today any conviction (misdemeanor or felony) has serious collateral consequences.[33] Any jail time even for a less serious crime leads to loss of a job, increased recidivism risk and other devastating effects on defendants' lives.[34]

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felonies . . . [due to] the high numbers of misdemeanors in the criminal justice system, combined with the reality of a limited pool of resources.").

[30] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 848–57.

[31] Roberts, *supra* note 21, at 303–06.

[32] *See* State v. Young, 863 N.W.2d 249, 253 (Iowa 2015); *see also* ODonnell v. Harris Cty., Texas, No. CV H-16-1414, 2017 WL 1735456, *70 (S.D. Tex. Apr. 28, 2017) (evidence shows that defendants charged with misdemeanors who are detained until trial are convicted at a higher rate, plead guilty at a higher rate and receive sentences twice as long then those defendants who are released); *see also* Pedersen v. State, No. A-10958, 214 WL 453693 (Ak. Ct. App. Sept. 10, 2014) (defendant was arrested on a felony charge and was entitled to a preliminary hearing within 10 days, during which if the State could not show probable cause, he was entitled to release, but the State lowered the charge to a misdemeanor to avoid his release). Often attorneys have handled many more misdemeanors at the same time as felonies, and are less experienced. *See* Joe, *supra* note 5, at 743.

[33] John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 FEDERALIST SOC'Y REV. 36, 37 (2018) (noting that criminal convictions "can affect, among other things, an ex-offender's ability to get a job or a professional license; to get a driver's license; to obtain housing, student aid, or other public benefits; to vote, hold public office or serve on a jury; to do volunteer work; and to possess a firearm"); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–36 (2006), ("Collateral consequences . . . include a vast network of 'civil' sanctions that limit the convicted individual's social, economic, and political access. These sanctions flow from both felony and misdemeanor convictions . . . . [M]any attach automatically upon the conviction by operation of law. These federal and state consequences are vast and wide-ranging. Some of the most notable include temporary or permanent ineligibility for public benefits, public or government-assisted housing, and federal student aid; various employment-related restrictions; disqualification from military service; civic disqualifications such as felon disenfranchisement and ineligibility for jury service; and, for non-citizens, deportation.").

[34] BAUGHMAN, *supra* note 4, at 82–89 (discussing pretrial detention's costs to a defendant: a lowered chance of successfully defending a case, a reduced chance of striking a favorable plea bargain, economic harm such as job loss, an increased risk of recidivism, and possible exposure to harsh jail conditions); Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 872–81 (noting that consequences of pretrial

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Although misdemeanors have been overlooked because they have been perceived to impose minor consequences, we now know that these crimes have significant impacts on mass incarceration.[35] A growing focus of recent legal scholarship on misdemeanors attempts to fill this gap because it affects so many Americans every year, particularly disadvantaged groups.[36] Yet, bail reform scholars

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detention include loss of their "jobs, apartments, and sometimes children and family stability," "future arrests and recidivism," "less of an opportunity to prepare her case," deportation, loss of civil rights, ostracism, and loss of public benefits); *see* Roberts, *supra* note 21, at 286–88 (discussing the many collateral consequences of misdemeanor arrests and records in the lives of defendants).

[35] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 844 (noting that misdemeanor charges are much more common than felony charges and flood the criminal justice system). Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 734 (arguing that "[w]e do not know even the most basic facts" about our misdemeanor justice system).

[36] NATAPOFF, *supra* note 6, at 281; Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 732 (discussing the "profound racial disparity in the misdemeanor arrest rate for most—but not all—offense types."); KOHLER-HAUSMANN, *supra* note **Error! Bookmark not defined.** ( discussing the prevalence of misdemeanor adjudication that affects hundreds of thousands of individuals beyond those incarcerated in prisons or convicted of felonies); Roberts, *supra* note 21, at 277 (describing the representation crisis in misdemeanor bail defense and the possibly devastating effects on indigent individuals); Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885 (2018) (describes the various approaches scholars take in addressing mass misdemeanor convictions); Greg Berman & Julian Adler, *Toward Misdemeanor Justice: Lessons from New York City*, 98 B.U. L. REV. 981, 982 (2018) (addressing the nearly two hundred thousand misdemeanor cases each year in New York in which "[t]he vast majority (eighty-six percent) … involve people of color."); Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 674 (2018) (holding misdemeanor injustices caused by the "institutional design of the adversarial process" which is "not up to the task of delivering justice to those charged with misdemeanors."); Jenn Rolnick Borchetta, *Curbing Collateral Punishment in the Big Data Age: How Lawyers and Advocates Can Use Criminal Record Sealing Statutes to Protect Privacy and the Presumption of Innocence*, 98 B.U. L. REV. 915, 916–17 (2018) (explaining that racial disparities in police targeting results in arrest information data that disproportionately affects people of color in bail applications); Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 827–30 (2018) (describing the misdemeanor wrongful conviction narrative as one "of disproportionately harsh consequences, permanence, and racial bias."); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 954–55 (2018) (explaining that the use of misdemeanor charges can be abused by bad actors, and that even lawful actors "lack the ability to regulate whether arrest and conviction records trigger deeply disproportionate civil penalties."); Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1009–10 (2018) (explaining that eighty-five percent of guilty pleas in Harris County, Texas were by innocent defendants who were overwhelmingly male and disproportionately black). See also Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 872–73 (noting the "detrimental and often life-altering" affect that misdemeanors have on defendants with disadvantaged defendants "routinely plead[ing]

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and policy makers still have not recognized the importance of distinguishing misdemeanors and felonies and still propose solutions that equate all crimes.[37] The failure to think carefully about bail reform has produced consequences well beyond the realm of bail itself.

This Article proceeds as follows. Part II provides a rich, layered account of the historical basis for bifurcating misdemeanors and felonies in every part of the criminal justice system. It uncovers the ancient underpinnings of the misdemeanor right to bail, and the ways it has always been treated differently from felony bail. It overviews the bail decision and the risks unique to misdemeanor bail. Finally, it discusses the various pretrial release options faced by a typical misdemeanant in America. Part III demonstrates—with a unique comprehensive state analysis that—sometimes driven by actual state law, and sometimes just by default—judges overwhelmingly use the same factors to determine misdemeanor release as they do to determine felony release. This is an improper application of the constitutional right to bail as misdemeanor defendants and felony defendants have historically been treated differently for bail purposes.[38]

This Article has the potential to impact some of the most important criminal-law debates of our time—and to change the course of hundreds of current pending bills.[39] Bail systems across America need reform in order to prevent the wholesale

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guilty to get out of jail because they cannot afford bail or because they do not want to risk trial.").

[37] Many scholars, including myself, have failed to distinguish felony and misdemeanor differences in scholarship and have focused primarily on felonies. *See e.g.*, TIMOTHY R. SCHNACKE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, "MODEL" BAIL: REDRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION, 190 (2017) http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf; Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 513–23 (2012); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017) (focusing on bail reform in general rather than on misdemeanor bail reform); Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909 (2013) (same).

[38] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.** at 863–64 (Historically, when people were "charged with noncapital crimes, which were misdemeanors, they had the right to release"). A defendant charged with a misdemeanor has a clear historic right to bail, without any judicial investigation. Unless the court can prove an unusual extenuating circumstance, it should be quick to release a misdemeanor defendant.

[39] The collateral consequences of the bail reform flaws identified here are far-reaching and devastating. *See* Roberts, *supra* note 21, at 286–88 (discussing the many collateral consequences of misdemeanor arrests and records in the lives of defendants); Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–18 (2017) (discussing "empirical evidence on the downstream impacts of pretrial detention on misdemeanor defendants"); Natapoff, *supra* note **Error! Bookmark not defined.**, at 1316–17 (discussing the significant harmful consequences that misdemeanor convictions can have on those convicted); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090–91 (2013) (discussing a misdemeanor conviction's effect on "future employment, housing, and many

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stripping of due process rights of defendants. A first step includes dividing misdemeanors and felonies in all aspects of bail, including applying presumptive release in misdemeanor bail, discontinuing the application of felony release factors and money bail to misdemeanors, and fixing faulty risk assessment instruments. Addressing these flaws should have serious implications—with a significant one being that the majority of people detained pretrial can be released, massively reducing prison overcrowding.[40]

## II. BAIL AND MISDEMEANOR DEFENDANTS: NATIONWIDE APPROACHES

Today there are approximately 13 million misdemeanors filed in the United States.[41] Although misdemeanor arrests and cases have declined over the last decade,[42] they still consume the criminal justice system at three times the rate of felonies.[43] Misdemeanors constitute a wide variety of minor crimes. An exhaustive national list is difficult since there are over 3,000 federal misdemeanors and several hundred in each state, and they are growing in number.[44] Some common misdemeanors in the United States are assault, shoplifting, public lewdness, criminal mischief, harassment, some forms of credit card fraud, animal cruelty, criminal trespass, and vandalism.[45] The right to bail for misdemeanor crimes is clear, however has changed today from how it was handled historically.

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other basic facets of daily life").

[40] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 841–42 (noting that our "broken bail system" is the primary cause of mass incarceration); BAUGHMAN, *supra* note 4, at 10.

[41] Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 764.

[42] *Id* at 738.

[43] *Id.* at 764.

[44] Com. v. Flaherty, 25 Pa. Super. 490, 493 (1904) (explaining that "[m]isdemeanors are either by statute or at common law [and] have one characteristic distinction of being 'less than felony' in common"); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, n.32 (2001); Paul Rosenzweig, *Overcriminalization: An Agenda for Change*, 54 AM. U. L. REV. 809 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 746 (2005).

[45] *See* Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 853 (citing ALASKA STAT. ANN. § 11.46.320 (1980 West) (first degree criminal trespass); N.Y. PENAL LAW § 140.15 (2010 McKinney) (second degree criminal trespass); ALASKA STAT. ANN. § 11.61.118 (2010 West) (first degree harassment); ALASKA STAT. ANN. § 11.46.484 (1996 West) (fourth degree criminal mischief); N.Y. PENAL LAW § 145.00 (2008 McKinney) (fourth degree criminal mischief); N.Y. PENAL LAW § 245.00 (2015 McKinney) (public lewdness); CAL. PENAL CODE § 459.5 (2014 West) (shoplifting); S.C. CODE ANN. § 16-11-770 (2007 West) (first conviction of a graffiti vandalism); 720 ILL. COMP. STAT. ANN. 5/17-37 (2011 West) (stating a credit card holder who permits another person to use it with intent to defraud the issuer commits a misdemeanor); CAL. PENAL CODE § 502.6 (2002 West) (the use of a scanning device to obtain the information from a payment card magnetic strip without permission); KY. REV. STAT. ANN. § 434.640 (1978 West) (the

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This Part focuses on several important aspects of misdemeanor bail. Part II.A establishes bail as a historically guaranteed right for misdemeanor crimes. Part II.B explores the unique challenges of misdemeanor bail in today's courts—including the speedy processing and the lack of a right to counsel for misdemeanor defendants. Part II.C overviews the common methods for release on misdemeanor bail throughout the states. All of these preliminary matters are vital to understanding Part III, which focuses on the flaws afflicting bail reform efforts throughout the states.

### *A. Brief History of Misdemeanor Bail Right*

Historically, due process principles prohibited detention before trial for misdemeanor crimes. Defendants charged with noncapital crimes had the right to release.[46] All misdemeanors were noncapital crimes under the common law.[47] And misdemeanor charges came with a guarantee of bail.[48] Eventually, courts gained broad discretion in fixing bail and courts sometimes set bail in murder and other capital (or felony) cases.[49] Bail was provided as a right for misdemeanor cases—not subject to court discretion like felony cases—even when defendant was considered guilty.[50] Indeed, this guarantee to a reasonable bail has been honored under the

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signing of a credit or debit card with intent to defraud the issuer); ALASKA STAT. ANN. § 11.61.140 (2017 West) (animal cruelty); CAL. PENAL CODE § 597t (1971 West) (confining an animal and failing to provide "adequate exercise"); N.Y. PENAL LAW § 245.00 (public lewdness); CAL. PENAL CODE § 490.2 (petty theft); MINN. STAT. ANN. § 609.224 (assault)).

[46] "By the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case . . ." WILLIAM BLACKSTONE, THE AMERICAN STUDENT'S BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND, IN FOUR BOOKS 1002–03 (George Chase ed., 4th ed. 1919).

[47] *See* Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 857 ("Capital crimes under the English common law were serious felonies, like murder, arson, and serious theft and would not allow release where there was strong evidence against the defendant. And all misdemeanors were noncapital crimes, therefore there was no imprisonment before trial when people were charged with misdemeanors.").

[48] *See id. at* 864; JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES 154 (Boston: Little, Brown, and Company, 3d ed. 1880).

[49] *See* Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 858; BISHOP, *supra* note 48, at 154-55.

[50] *See* Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 858; *see also* JOEL PRENTISS BISHOP COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES 155-57 (Boston: Little, Brown, and Company, 3d ed. 1880) ("One held to answer for a misdemeanor may give bail equally whether he is guilty or not."); *see also* JOSEPH CHITTY, ESQ., PRACTICAL TREATISE ON THE CRIMINAL LAW 96 (Brookfield: E. Merriam & Co. 2nd ed. vol. 1, 1832) ("[S]mall misdemeanors, or any offense below felony, must be bailed unless they be excluded from it by some special act of parliament."); JOHN WILDER MAY, THE LAW OF CRIMES 73 (Boston:

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common law as far back as the Magna Carta.[51] Misdemeanor defendants were not detained before trial, and were even released when they had missed a few court dates for misdemeanor offenses.[52] In fact, it was only when a defendant failed to appear in court three times that he was arrested and forced to pay a fine.[53] As such, misdemeanor defendants were released before trial, without regard to their likelihood to appear in court. Overall, historically, misdemeanor bail was respected as a constitutional right.[54]

Bail in misdemeanor cases is considered a matter of right.[55] Indeed, misdemeanor bail has historically been treated as such under the law—and remains a right under the law.[56] Most states continue to distinguish between misdemeanors and felonies, either by constitution or statute.[57] Accordingly, states continue to

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Little, Brown, and Company 2nd ed., 1893) ("Every prisoner must at common law be allowed bail upon a commitment, unless he is charged with a capital offense.").

[51] Magna Carta (1215) ("A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence;")

[52] WILLIAM BLACKSTONE, THE AMERICAN STUDENT'S BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND, IN FOUR BOOKS 75 (George Chase ed., The Banks Law Publishing Co. 4th ed. 1919) (1877) (Misdemeanors came with "great importance to the public [of] the preservation of . . . personal liberty.").

[53] A TRANSLATION OF GLANVILLE 27–28 (John Beames, trans., John Byrne and Co. 1900) (authorized facsimile of the original, University Microfilms, 1969) (It was only upon missing the third summons that the accused's "body shall be taken," and his Pledges (his sureties who would guarantee his appearance) be made to pay a fine.).

[54] Baughman, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 729.

[55] Constantino v. Warren, 684 S.E.2d 601, 604 (Ga. 2009); *see also* Hobbs v. Reynolds, 289 S.W.3d 917, 920 (Ark. 2008) (stating that, under state law, all persons are "bailable" except for in capital offenses); *see also* Williams v. City of Montgomery, 739 So. 2d 515, 518 (Ala. Civ. App. 1999) (discussing the Alabama Bail Reform Act: "In all cases of misdemeanors and felonies, unless otherwise specified, the defendant is, before conviction, entitled to bail as a matter of right . . . ."); *see also* People v. Barbarick, 214 Cal. Rptr. 322, 324–26 (Ct. App. 1985) (finding that because the defendant was charged with only a misdemeanor, he had a statutory right to bail: the power to grant bail "is not . . . an arbitrary discretion to do abstract justice according to the popular meaning of that phrase, but is a discretion governed by legal rules to do justice according to law . . . .") (quotations omitted); People v. Arnold, 132 Cal. Rptr. 922 (App. Dep't Super Ct. 1976); Sellers v. State, 145 S.E.2d 827, 827–28 (Ga. Ct. App. 1965) ("It is only in misdemeanor cases that one convicted is entitled to bail as a matter of law) (citing Code § 27-901) (citing *Bennett v. Davis*, 111 S.E.2d 733 (Ga. Ct. App. 1959)); State v. Langley, 611 P.2d 130, 130 (Haw. 1980) ("Person arrested for petty misdemeanor or misdemeanor offense does not possess absolute right to immediate release, but, rather, a right to release without unnecessary delay on payment of bail."); *see also* State v. Barthold, 110 N.W.2d 493 (1961).

[56] 4 WILLIAM BLACKSTONE, THE AMERICAN STUDENT'S BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND, IN FOUR BOOKS 1001 (George Chase ed., Banks & Brothers 3d ed. 1890) (1877).

[57] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not**

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articulate a right to bail for all noncapital defendants to be released on bail.[58] This of course results in misdemeanor defendants retaining the right to release before trial. Today forty-eight states favor pretrial release for all noncapital defendants, established either by state constitution or statute.[59] According to the National Conference of State Legislatures (NCSL), eighteen states and the District of Columbia require a separate hearing on whether a defendant will be held or released

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**defined.**, at 858–60; *see also* SCHNACKE, *supra* note 37, at 139.

[58] *See e.g.*, Ex parte Colbert, 805 So.2d 687, 688 (Ala. 2001) (internal citations omitted) (stating that Alabama Constitution provides "absolute right to bail in all noncapital cases"); Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 871; SCHNACKE, *supra* note 37, at 139 (noting that states initially indicated that capital defendants should be detained and later added violent felons; but made clear that everyone else should be released).

[59] ALA. CONST. art. I, § 16; ALA. CODE § 15-13-108; ALASKA CONST. ART. I, § 11; ALASKA STAT. ANN. § 12.30.011(d); ARIZ. CONST. art. II, § 22; ARIZ. REV. STAT. ANN. §§ § 13-3961(a), 13-3967(a); ARK. CONST. art. II, § 8; ARK. CODE ANN. § 16-84-110; CAL. CONST. art. I, § 12; CAL. PENAL CODE §§ 1270.5, 1271; COLO. CONST. art. II, § 19; COLO REV. STAT. ANN. § 16-4-101; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; DEL. CODE ANN. tit. 11, §§ 2103 2116; D.C. CODE ANN. § 23-1322; FLA. CONST. art. I, § 14; FLA. STAT. ANN. § 907.041(4); GA. CODE ANN. §§ 17-6-1(e), 17-6-13; HAW. CONST. art. I, § 12; HAW. REV. STAT. ANN. §§ 804-3, 804-4(a); IDAHO CONST. art. I, § 6; IDAHO CODE ANN. § 19-2902; ILL. CONST. art. I, § 9; 725 ILL. COMP. STAT. ANN. 5/110-4; IND. CONST. art. I, § 17; IND. CODE ANN. § 35-33-8-2; IOWA CONST. art. I, § 12; IOWA CODE ANN. § 811.1; KAN. CONST. BILL OF RIGHTS, § 9; KAN. STAT. ANN. §§ 22-2802, 59-29a20; KY. CONST. § 16; LA. CONST. art. I, § 18; LA. CODE CRIM. PROC. ANN. arts. 330–31; ME. CONST. art. I, § 10; ME. REV. STAT. ANN. tit. 15, § 1003(3)–(4); MD. CODE ANN., CRIM. PROC. § 5-202; MASS. GEN. LAWS ANN. ch. 276, §§ 58, 58A; MICH. CONST. art. I, § 15; MICH. COMP. LAWS ANN. §§ 765.5, 765.6(1); MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29; MISS. CODE ANN. § 99-5-33; MO. CONST. art. I, § 20; MO. ANN. STAT. §§ 544.455, 544.470; MONT. CONST. art. II, § 21; MONT. CODE ANN. § 46-9-102; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7; NEV. REV. STAT. ANN. § 178.484; N.H. REV. STAT. ANN. §§ 597:1, 597:1c, 597:2(III-a); N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 13; N.Y. CRIM. PROC. LAW § 510.10; N.C. CONST. art. I, § 27; N.C. GEN. STAT. ANN. §§ 15A-533, 15A-534.6; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OHIO REV. CODE ANN. § 2937.222; OKLA. CONST. art. 2, § 8; OKLA. STAT. ANN. tit. 22, § 1101; OR. CONST. art. I, §§ 14, 43; OR. REV. STAT. ANN. § 135.240; PA. CONST. art. I, § 14; 42 PA. STAT. AND CONST. STAT. ANN. § 5701; R.I. CONST. art. I, § 9; 12 R.I. GEN. LAWS ANN. § 12-13-1; S.C. CONST. art. I, § 15; S.C. CODE ANN. § 22-5-510; S.D. CONST. art. 6, § 8; TENN. CONST. art. I, § 15; TENN. CODE ANN. § 40-11-102; TEX. CONST. art. I, §§ 11, 11a, 11c; TEX. CODE CRIM. PROC. ANN. arts. 17.152–.153; UTAH CONST. art. I, § 8; UTAH CODE ANN. §§ 77-20-1, 77-36-2.5(1); VT. CONST. art. II, § 40; VT. STAT. ANN. tit. 13, §§ 7553, 7553a, 1043, 1044, 1063; VA. CODE ANN. §§ 19.2-120–19.2-120.1; WASH. CONST. art. I, § 20; W. VA. CODE ANN. § 62-1C-1; WIS. CONST. art. I, § 8; WIS. STAT. ANN. §§ 969.01, 969.035; WYO. CONST. art. I, § 14; WYO. STAT. ANN. § 7-10-101. *See also* NATIONAL CONFERENCE OF STATE LEGISLATURE, *Pretrial Release Eligibility* (2013), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx (last visited Apr. 16, 2018).

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pretrial.[60] In these hearings, the prosecution provides information to the court and based on that information, the court makes a finding as to whether the defendant should be released.[61] However, the states that do require a separate hearing do so only for more serious violent crimes, largely felonies and crimes involving domestic violence.[62] A separate hearing does not take place for misdemeanor cases.[63] Unfortunately, a hearing or a right to bail does not translate into actual release for all misdemeanors because practically speaking these rights are not being respected.[64]

Most Americans who encounter the criminal justice system will do so through the petty offenses that make up misdemeanor charges; they will not be charged with rape or murder.[65] However, especially when it comes to misdemeanors—bail is among the least visible parts of the criminal process.[66] It has been ignored by policy makers and scholars in such a way that we lack a firm understanding of how misdemeanor bail decisions are made nationwide. However, what we do know is that there is a right to bail for misdemeanor offenses.

### *B. Pretrial Stage is Especially Important for Misdemeanors*

[60] NATIONAL CONFERENCE OF STATE LEGISLATURES, *Pretrial Detention*, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx (last visited Apr. 16, 2018) [hereinafter NCSL, *Pretrial Detention*].

[61] *Id.*

[62] *See id.* In twelve states and the District of Columbia have provided courts with explicit time frames within which the hearing must take place. *Id.*

[63] The finding of probable cause and a separate preliminary hearing is not required for misdemeanor cases in many jurisdictions. *See e.g.*, Anjali Pathmanathan, *Myth of Preliminary Due Process for Misdemeanor Prosecutions in New York*, 42 N.Y.U REV. OF LAW AND SOC. CHANGE 83 (2018) (In New York, a defendant must simply read and sign the charging instrument and has no opportunity to contest the truth of the charges and the state does not actually have to present evidence for a prima facie case in a preliminary probable cause hearing). "In some states, preliminary hearings are held in every criminal case. In other states, they are held only if the defense requests them. In still other states, they are held only in felony cases." *Id.*

[64] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 864 ("As the law developed . . . , the use of bail changed from being a general right—particularly for misdemeanor crimes—to something that discriminates between defendants based on ability to pay bail"); SCHNACKE, *supra* note 37, at 140 ("Today, our understanding of a clear in-or-out system, articulated as bail (release) and no bail (detention), is clouded by the fact that our practical administration of bail is completely aberrant to historical notions. Today, we say that a defendant is bailable and yet detain him. We order a defendant to be released, and yet allow a condition of that release to keep him in jail.").

[65] Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 732.

[66] Marian R. Williams, *The Effect of Attorney Type on Bail Decisions*, 28(I) CRIM. JUST. POL. R. 3, 5 (2017) (discussing how the bail systems is particularly unfair for poor defendants for a variety of reasons).

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The consequences of being held in pretrial detention can be significant—even for a misdemeanor. Besides the potential dangers of jail,[67] the consequences of even short jail stays can be catastrophic for misdemeanor defendants—many of whom are poor. These consequences include effects on employment, earnings, family destabilization, housing and even broader community effects where incarcerated people are concentrated.[68] Not only can pretrial detention impact the defendant's personal life, it can influence the ultimate result of the criminal case against her, causing long-term harm. Pretrial detention induces innocent defendants to plead

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[67] *See* Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007); *see also* John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 399–400 (2006); Jonathan Abel, *Staph Sends Pinellas Jail Inmate into Coma*, TAMPA BAY TIMES (Feb. 27, 2008), ttp://www.sptimes.com/2008/02/27/Northpinellas/Staph_infection_sends.shtml [https://perma.cc/G3WL-2MMU].

[68] BAUGHMAN, *supra* note 4, at 87; Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 5–7, (2017) [hereinafter Baughman, *Costs of Pretrial Detention*] (discussing the direct costs to detainees and indirect costs to societies that pretrial detention imposes); MICHAEL REMPEL ET AL., JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM 6 (Jan. 2017), http://www.courtinnovation.org/sites/default/files/documents/NYC_Path_Analysis_Final%20Report.pdf. Heaton et al. *supra* note 39, at 711–12 ("[T]]hose detained pretrial are more likely to commit future crimes . . . ."); Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 872–81 (noting that consequences of pretrial detention include loss of their "jobs, apartments, and sometimes children and family stability," "future arrests and recidivism," "less of an opportunity to prepare her case," deportation, loss of civil rights, ostracism, and loss of public benefits).

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guilty,[69] causes defendants to be convicted three times as often,[70] receive three times longer sentences,[71] higher bail amounts, and even commit more future crime.[72]

Despite the important implications on a defendant's life, the pretrial detention decision is a very quick one that lacks adequate attention by courts or attorneys. Most defendants appear at an arraignment without an attorney, even though the majority of their cases are resolved at this stage. In a 2010 study, researchers observed misdemeanor arraignments in twenty-one Florida counties. The researchers found that in roughly eighty percent of cases, arraignments lasted no longer than three minutes and that seventy percent of cases were resolved at the arraignment.[73] Another study that focused on New York Legal Aid misdemeanor arraignments showed similar results.[74] In this study, 69 percent of all misdemeanor cases were resolved at arraignment.[75] Though the presence of counsel in these situations may be beneficial to some defendants, many "feel enormous pressure from all sides to enter a quick guilty plea."[76] The same terse treatment has been found in

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[69] Heaton et al., *supra* note 39, at 714 ("[A] detained person may plead guilty—even if innocent—simply to get out of jail."); BAUGHMAN, *supra* note 4, at 84 ("Even for prisoners in pretrial detention who are innocent, accepting a plea bargain for time served is very tempting because they just want to leave jail and return to their families and jobs."); State v. Young, 863 N.W.2d 249, 253 (Iowa 2015) ("[P]retrial detention significantly and adversely impacts the truth-finding process by preventing effective assertion of defenses and increasing pressures to plead guilty as a matter of convenience.").

[70] BAUGHMAN, *supra* note 4, at 5 ("Defendants detained before trial are more likely to be convicted if they go to trial, four times more likely to be sentenced to jail, and three times more likely to receive prison sentences than similar people released pretrial.").

[71] Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUSTICE POL'Y REV. 59, 59 (2012); *see also* Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUSTICE REV. 299, 299–316 (2013); Baughman, *Costs of Pretrial Detention*, *supra* note 68. Indeed, misdemeanor sentences are often rushed and deemed insignificant, even though they do accompany jail time that has lifechanging consequences. Roberts, *Informed Misdemeanor Sentencing*, *supra* note 23, at 178–80; J.C. Oleson et al., *The Effect of Pretrial Detention on Sentencing in Two Federal Districts*, 33 JUST. Q. 1103, 1114–17 (2016) (pretrial detention leads to more severe punishment).

[72] Heaton et al., *supra* note 39, at 714; BAUGHMAN, *supra* note 4, at 81.

[73] NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 16–17 (2011). *See also* Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 841 (discussing how such decisions are often "two-minute decisions," and citing research to that effect).

[74] Roberts, *supra* note 21, at 307 (describing a study where lawyers essentially "kn[ew] the going rate" of misdemeanor cases and tried to take only those cases that c[ould] be disposed of at arraignment.").

[75] *Id.*

[76] *Id.*

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studies of felony bail arraignments.[77] In a study conducted in New York City,[78] the authors found that of the misdemeanor cases that were not disposed of at arraignment, 79% were released with no conditions. The other 21% of misdemeanor cases faced the possibility of pretrial detention. Of the 21%, 3% posted bail at arraignment, 25% were detained on bail, and 1% were remanded without bail.[79] With the combination of courts focused on freeing resources for "more serious cases," overworked attorneys trying to resolve misdemeanors as quickly as possible,[80] and defendants who likely do not fully understand the importance of their initial appearance, it is clear that misdemeanor arraignments are not given nearly enough attention. With problems arising at the arraignment stage even when defendants are accompanied by counsel, it is even more troubling that most criminal defendants are not represented at all at the arraignment.[81]

Misdemeanor defendants are also at a special disadvantage because in some public defender offices, misdemeanor cases are largely assigned to less experienced attorneys,[82] who also appear before less experienced judges.[83] Research has shown that there is a correlation with a criminal defense attorney's level of experience and the outcome a criminal case.[84] Criminal defendants with more experienced attorneys are more likely to avoid jail time and receive lower than average sentences.[85] But misdemeanor cases are not always simpler than felony cases. Misdemeanors can present complex factual and legal challenges unto themselves, demanding more time and resources from criminal defense lawyers. The fact that misdemeanors are given to less experienced attorneys and in larger volumes makes it difficult to ensure an

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[77] Sarah Ottone & Christine Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 2, 18 (forthcoming). One study conducted by scholars Sarah Ottone and Christine Scott-Hayward observed arraignments in California courts. The study focused on Los Angeles County and Orange County. The researchers visited fifteen "court locations" to observe arraignments for felonies. Bail hearings were consistently "short and uncontested." *Id.* And in one court the judge did not "explicitly invite argument on bail." *Id.* at 24. Even then, observers found "arguments . . . over the amount of bail were rare" and requests for lower bail were generally denied. *Id.* at 25.

[78] MICHAEL REMPEL ET AL., JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM 1 (Jan. 2017), http://www.courtinnovation.org/sites/default/files/documents/NYC_Path_Analysis_Final%20Report.pdf.

[79] Some individuals detained at arraignment later made bail. The authors found that only 10% of misdemeanors were detained throughout their entire case.

[80] Roberts, *supra* note 21, at 307.

[81] More than half of defendants appear at their initial hearings without counsel. BAUGHMAN, *supra* note 4, at 108–10.

[82] Joe, *supra* note 5, at 743.

[83] Roberts, *Informed Misdemeanor Sentencing*, *supra* note 23, at 188.

[84] Joe, *supra* note 5, at 745.

[85] *Id.*

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attorney is able to protect a defendant's constitutional rights.[86] In addition, only roughly half of judges nationwide are required to obtain a legal qualification to serve as a misdemeanor judge.[87] Some of these judges are also elected, which may disincentivize judges from seeking innovative approaches to handling criminal cases.[88]

Many misdemeanor defendants who appear for their first appearance are not required to have an attorney, even though the Supreme Court has affirmed this right.[89] In *Rothgery v. Gillespie County*, the Supreme Court held that an indigent defendant is entitled to the presence of counsel at every "critical stage" of a criminal case.[90] The Court defines "critical stages" as proceedings between an individual and agents of the State (whether "formal or informal, in court or out, that amount to 'trial-like confrontations,' at which counsel would help the accused in coping with legal problems or ... meeting his adversary[.]")[91] A court hearing regarding pretrial detention is a critical stage in a criminal case since the judge "must consider the weight of the evidence against the accused or the likelihood of conviction when determining conditions of pretrial release."[92] In thirty-two states, however, criminal procedure rules allow a defendant to attend initial appearance before a court without counsel,[93] despite the fact that decisions regarding the defendant's release and amount of bail are often made at these hearings.[94] In 28 states, defendants have no right to counsel when the court initially makes decisions regarding their physical liberty.[95] For instance, though the New York Court of Appeals has decided that

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[86] Soolean Choy, *Extending Meaningful Assistance to Misdemeanor Defendants*, 22 TEX. J. ON C. L. & C. R. 73, 88–89 (2016).

[87] RON MALEGA & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS STATE COURT ORGANIZATION, 2011, at 5 (2013) (about 59% are required to obtain a legal qualification aside from a law degree).

[88] Jessica A. Roth, *The Culture of Misdemeanor Courts*, 46 HOFSTRA L. REV. 215, 230–32 (2017).

[89] Rothgery v. Gillespie Cty., 554 U.S. 191, 213 (2008) (The Supreme Court has determined that the right to counsel attaches at a "criminal defendant's initial appearance before a judicial officer . . . ."); John Gross, *The Right to Counsel But Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 3, 840 (2018) (discussing how "Supreme Court has never specifically addressed whether there is a legal requirement that counsel be present at a defendant's initial appearance where his liberty is subject to restriction."); BAUGHMAN, *supra* note 4, at 115, 123 ("The reality of the right to counsel is that it is not universally provided by all states to indigent defendants before their bail hearing." And noting that only ten states provide counsel for the bail hearing.).

[90] Rothgery v. Gillespie Cty, 554 U.S. 191, 212 (2008).

[91] *Id.* at 212 n.16

[92] *Id*.; Gross, *supra* note 89, at 865–66.

[93] Gross, *supra* note 89, at 841.

[94] *Id.*

[95] *Id.* at 841–50 (Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Illinois, Indiana, Louisiana, Michigan, Minnesota, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina,

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indigents are entitled to counsel at bail hearings, indigent defendants are still not always represented at these hearings.[96]

In practice, however, even misdemeanor defendants who are entitled to counsel do not always receive assistance.[97] Data is limited, but in one Bureau of Justice study, thirty percent of convicted and jailed misdemeanor defendants reported that they did not receive representation.[98] Some are not offered representation. Many refuse it, pleading guilty without representation due to a lack of understanding of the collateral consequences of such a plea.[99] In localities in New York, there have been reports of "widespread" lack of representation in misdemeanor cases where the defendant was entitled to counsel.[100] In Williamson County, Texas, a class action filed by the Texas Fair Defense Project showed that hundreds of misdemeanor defendants who were technically indigent were being denied their right to counsel.[101] As of 2007, in Florida the number of misdemeanor defendants represented by counsel has dropped by forty percent since 1999.[102]

Nationally, public defender officers are often overloaded with misdemeanor cases and lack the number of attorneys to meet the demand. Indeed, only 12% of offices nationally are able to meet the demands of national caseloads.[103] And even appearances of misdemeanor defendants often occur with 30 or more at a time who appear at the same time and speak to a prosecutor briefly and stand before a judge. Often defendants do not feel like they have an option other than taking a plea deal and getting through their case.[104] It may come as no surprise that there are no specific

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Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Maine); *see also* BAUGHMAN, *supra* note 4, at 116 (discussing the major disadvantages that defendants face when attending a bail hearing without the benefit of counsel).

[96] Gross, *supra* note 89, at 849–50.

[97] Choy, *supra* note 86, at 82 (citing COMM'N ON THE FUTURE OF INDIGENT DEF. SERV., FINAL REPORT THE CHIEF JUDGE OF THE STATE OF NEW YORK 15 (2006)).

[98] Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1023 (2013).

[99] Roberts, *supra* note 21, at 297, 307 ("They may feel enormous pressure from all sides to enter a quick guilty plea ").

[100] Choy, *supra* note 86, at 81–84.

[101] *Id.* at 84.

[102] Hashimoto, *supra* note 98, at 1028–29 (2013).

[103] JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 10 (2011) (Over 70 percent of county-based public defender offices lacked enough attorneys to meet national caseload standards, while 23 percent of offices had less than half of the necessary attorneys to meet caseload standards. Approximately 12 percent of county public defender offices with more than 5,000 cases per year had enough lawyers to meet standards).

[104] Roberts, *supra* note 21, at 295, 306–07 (describing "assembly line" justice where defendants appear in a large group and are pressured to take plea deals); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972) ("the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result"); State v. Young, 863 N.W.2d 249, 253 (Iowa 2015) (efficiency wins

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professional standards for effective representation specific to misdemeanor practice.[105] In *Strickland v. Washington*, the Supreme Court laid out a two-pronged ineffective assistance test, but even that has never been applied to misdemeanor cases.[106] And misdemeanor defendants are not always entitled to counsel, unlike felony defendants.[107] Rather, the right to counsel in misdemeanor cases is triggered only where the punishment of the charged crime includes jail time—regardless of whether jail time is actually imposed.[108] Thus defendants often do not have counsel at the bail stage, and only receive it later when they face jail time.

Overall, the challenges presented for misdemeanor defendants are significant. Most do not have the right to counsel—their cases are often resolved at arraignment where no attorney has yet been appointed in many cases. They are often represented by overburdened attorneys in overflowing courts. They face little option but to take a plea agreement and the consequences of their case can be significant if they are forced to face even a few days of jail time. Jail time for defendants often means a loss of employment and housing and even increased crime in their future. Despite these devastating factors, national priorities do not often consider the plight of misdemeanor defendants.

The next section discusses another important preliminary matter about misdemeanors: options for pretrial release in misdemeanor cases. In order to understand bail reform efforts, it is important to consider the various ways defendants are (and are not) released before trial.

### *C. Pretrial Release Options for Misdemeanors*

The pretrial process is not standardized among jurisdictions throughout the states. Each state has different misdemeanor release standards, and standards can even vary by city or county in individual states. There has not—to this date—been a comprehensive national analysis of the types and rates of release for misdemeanors. While this section briefly covers each type of release and some comparative release rates, it is by no way comprehensive. Typically, whether being booked into jail or appearing for a bail hearing, the authority will generally conduct an individualized analysis to determine whether the defendant should be released, how she should be released, and the conditions which should apply. Even though a fact specific analysis must take place, it is important to note that most judges are not

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over accuracy in misdemeanor cases).

[105] Choy, *supra* note 86, at 77.

[106] *Id.* Roberts, *supra* note 21, at 283.

[107] *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."). Though only 10 states guarantee counsel at the initial bail hearing for felony cases, it is likely that even fewer states guarantee counsel for misdemeanor cases. BAUGHMAN, *supra* note 4, at 115, 123.

[108] Alabama v. Shelton, 535 U.S. 654, 662 (2002)

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presented with even basic information about the defendant.[109] In many jurisdictions they rely solely on a police probable cause statement, and the hearing takes place in just a couple of minutes.[110] The presumption of bail in misdemeanor cases has survived—in theory, that is, but courts now regularly conduct case-by-case analyses that result in misdemeanor defendants being held in pretrial detention, either due to being denied bail altogether or being unable to pay bail. These case-by-case factors are discussed in detail for felony and misdemeanor cases in Part III.A.

At the initial appearance, the judge has several options in releasing or detaining a defendant. Generally, when a misdemeanor defendant appears the judge can order one of the following. First, release of defendant on personal recognizance.[111] Second, the judge can set a money bail amount that defendant must personally pay or pay with the help of a commercial bail bondsman.[112] If defendant cannot afford bail, the defendant will face detention. Third, the judge can deny bail altogether and order pretrial detention. Fourth, a judge can release a defendant with certain conditions that relate to the crime she is charged with—for instance a restriction of any contact with a victim. A fifth choice, though not usually one of the courts', is for the police officer to issue a citation instead of taking the misdemeanor defendant into custody. Almost all states permit law enforcement to essentially give the misdemeanor defendant a "ticket" or summons for the criminal violation and show up to court at an assigned date.

These misdemeanor release options will be explained in more detail including their release statistics for misdemeanors, starting with citations in lieu of arrest. Understanding the types and availability of release for misdemeanors demonstrates how far we have departed from historic and constitutional guarantees of release and will also set the stage for understanding the differences between felony and misdemeanor bail laws in the next section.

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[109] For instance, a recent survey of judges in Utah "revealed that judges lack basic information when making pretrial release decisions." OFFICE OF THE LEGISLATIVE AUDITOR GENERAL, STATE OF UTAH, A PERFORMANCE AUDIT OF UTAH'S MONETARY BAIL SYSTEM (2017), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ce65ff35-ba9c-77fb-8922-b9417faecd6e.

[110] Predicating their bail decisions mostly on probable cause statements, judges in most of the state have "[l]ittle reliable information about a defendant's risk of flight or danger to the community." OFFICE OF THE LEGISLATIVE AUDITOR GENERAL, STATE OF UTAH, A PERFORMANCE AUDIT OF UTAH'S MONETARY BAIL SYSTEM (2017), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ce65ff35-ba9c-77fb-8922-b9417faecd6e.

[111] *See e.g.*, People v. Maynard, No. 2007KN0002279, 2007 WL 488914 (N.Y. Crim. Ct. Feb. 15, 2007) (stating that if the State is unable to put on a trial within 30 days of the defendant being detained on a misdemeanor charge he or she is entitled to either (1) release on his or her own recognizance or (2) bail).

[112] *Id.*

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### 1. *Citations in Lieu of Custody*

A highly favored method of dealing with misdemeanors nationally is citations in lieu of arrest or custody—where there is no bail hearing. Almost 80 percent of state jurisdictions have a statute that empowers law enforcement to issue either a summons or a citation instead of arresting or continuing custody of a misdemeanor offender. A citation offers a pretrial option that can encourage a defendant to appear while avoiding pretrial cost and collateral consequences. Twenty-four states have established a presumption of "citation in lieu of arrest."[113] This authority is largely provided on a discretionary basis.[114] Arkansas and Mississippi statutes specifically

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[113] NATIONAL CONFERENCE OF STATE LEGISLATURES, *Citation in Lieu of Arrest*, http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx (last visited Apr. 16, 2018).

[114] *See* ALA. CODE § 11-45-9.1 ("Municipality may authorize any law enforcement officer . . . to issue a summons and complaint to any person charged with . . . any Class C misdemeanor or violation not involving violence, threat of violence, alcohol or drugs."); *see also* ARK. R. CRIM. P. 5.2 (officer "may issue a citation . . . ."); *see also* DEL. CODE ANN. tit. 11, § 1907 (1995) ("the officer may, but need not, give the person a written summons"); *see also* FLA. R. CRIM. P. 3.125 ("notice to appear may be issued by the arresting officer"); *see also* HAW. REV. STAT. ANN. § 803-6 (2007) ("the police officer may, but need not, issue a citation"); *see also* IDAHO CODE ANN. § 19-3901 (1983) ("the law enforcement officer may" issue a citation); *see also* IND. CODE ANN. § 35-33-4-1 (2005) (court "may" issue a summons, officer "may" issue summons); *see also* KAN. STAT. ANN. § 22-2408 (2010) ("officer may" issue notice to appear); *see also* LA. CIV. CODE CRIM PROC. ANN. art. 209 (1996) ("the magistrate may issue a summons"); *see also* LA. CODE CRIM. PROC. ANN. art. 211 (2011) (Officer "may issue a written summons"); *see also* MD. CODE ANN., CRIM. PROC. § 4-101 (2016) (Police officer "may" issue a citation); *see also* MISS. CODE. ANN. § 99-3-18 (1980) ("such person may . . . be released" and given "written notice to appear"); *see also* NEV. REV. STAT. ANN. § 178.4851 (2007) (a court, sheriff, or chief of police "may release without bail"); NEV. REV. STAT. ANN. § 178.4851 (2007) ("the person shall, in the discretion of the peace officer, either be given a misdemeanor citation"); *see also* N.H. REV. STAT. ANN. § 594:14 (2014) ("he or she may" issue written summons); *see also* N.M. STAT. ANN. § 31-1-6 (2013) (law enforcement officer "may offer" person arrested for petty misdemeanor a citation in lieu of arrest); *see also* N.C. GEN. STAT. ANN. § 15A-302 (2003) ("An officer may issue a citation" for misdemeanors); *see also* OKLA. STAT. ANN. tit. 22, § 209 (1967) (Law enforcement "may issue citation" for misdemeanor); *see also* OR. REV. STAT. ANN. § 133.055 (2012) ("A peace officer may issue a criminal citation" for misdemeanor and felonies subject to misdemeanor treatment.); *see also* 12 R.I. GEN. LAWS ANN. § 12-7-11 (1977) (peace officer "may issue a summons" for misdemeanor); *see also* TEX. CRIM. PROC. CODE ANN. § 14.06 (2015) (A peace officer "may . . . issue a citation" for some misdemeanors); 21. UTAH CODE ANN. § 77-7-18 (2012) (misdemeanor defendants "may be issued" a citation); *see also* VT. R. CRIM. P. 3 ("officer may issue a citation" for non-witnessed misdemeanors); *see also* WA ST CR LTD JURIS CrRLJ 2.1 (the arresting officer "may serve upon the person a citation" for misdemeanor and gross misdemeanors); *see also* W. VA. CODE ANN. § 62-1-5a (1982) (officer "may issue a citation" any misdemeanor committed in law-enforcements presence); *see also* WIS. STAT. ANN. § 968.085 (2017)

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refuse to limit law enforcement on the factors they should consider, explicitly stating that the ones provided are not exhaustive.[115] Sixteen state statutes do not provide a list of factors at all.[116] Eight states go even farther to favor citation in lieu of custody, requiring that a citation be issued for misdemeanor offenses unless certain exceptions apply.[117]

Whether issuing a citation is discretionary or not, law enforcement officers are almost always required to make an individualized inquiry in determining whether it is appropriate or not.[118] This inquiry in many jurisdictions looks much like the fact-

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(officer "may issue a citation" for misdemeanors); *see also* WYO. STAT. ANN. § 7-2-103 (2011) ("A citation may issue" for any misdemeanor).

[115] ARK. R. CRIM. P. 5.2 ("other relevant facts such as . . . ."); MISS. CODE. ANN. § 99-3-18 (1980) ("other facts relating to the persons arrest that would bear on the question of his release").

[116] ALA. CODE § 11-45-9.1 ("Municipality may authorize any law enforcement officer . . . to issue a summons and complaint to any person charged with . . . any Class C misdemeanor or violation not involving violence, threat of violence, alcohol or drugs."); COLO. REV. STAT. ANN. § 16-3-105 (1994) ("arresting authority is satisfied that the person arrested will obey"); CONN. GEN. STAT. ANN. § 54-1h (1984) (misdemeanor defendant "may, in the discretion of the arresting officer" be issued a summons); DEL. CODE ANN. tit. 11, § 1907 (1995) ("the officer may, but need not, give the person a written summons"); IDAHO CODE ANN. § 19-3901 (1983) ("a law enforcement officer may" issue a citation); IND. CODE ANN. § 35-33-4-1 (2005) (court "may" issue a summons, officer "may" issue summons); KAN. STAT. ANN. § 22-2408 (2010) ("officer may" issue notice to appear"); MICH. COMP. LAWS ANN. § 257.728 (2008) ("the arresting officer shall prepare . . . a written citation"); N.H. REV. STAT. ANN. § 594:14 (2014) (officer "may" issue summons); N.M. STAT. ANN. § 31-1-6 (2013) (law enforcement officer "may offer" citation in lieu of arrest for petty misdemeanors); N.C. GEN. STAT. ANN. § 15A-302 (2003) ("An officer may issue a citation" for misdemeanors); OKLA. STAT. ANN. tit. 22, § 209 (1967) (Law enforcement "may issue a citation" for misdemeanors); OR. REV. STAT. ANN. § 133.055 (2012) ("A peace officer may issue a criminal citation" for misdemeanors or felonies subject to misdemeanor treatment); 12 R.I. GEN. LAWS ANN. § 12-7-11 (1977) (peace officer "may issue a summons" for misdemeanor); S.D. CODIFIED LAWS § 41-15-11 (2005) (the arresting officer "shall" issue a summons for misdemeanors); UTAH CODE ANN. § 77-7-18 (2012) (Misdemeanor defendant "may be issued" citation).

[117] KY. REV. STAT. ANN. § 431.015 (2017) ("a peace officer shall issue a citation"); MICH. COMP. LAWS ANN. § 257.728 (2008) ("the arresting officer shall prepare . . . a written citation"); MINN. R. CRIM. P. 6.01 ("must issue a citation and release the defendant"); OHIO REV. CODE ANN. § 2935.26 (1978) (In case of minor misdemeanor, "the officer shall not arrest the person, but shall issue a citation"); PA. R. CRIM. P. 519 ("The arresting officer shall promptly release from custody" first and second degree misdemeanor defendants); S.D. CODIFIED LAWS § 41-15-11 (2005) (the arresting officer "shall" issue a summons for misdemeanors); TENN. CODE ANN. § 40-7-118 (2012) (peace officer "shall issue a citation" for misdemeanors); VA. CODE ANN. § 19.2-74 (2014) ("the arresting officer shall" issue a summons for most misdemeanors).

[118] There may be constitutional problems with this fact finding by officers, but this is beyond the scope of this Article. This section explains that officers in determining to make

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specific analysis courts conduct when making a pretrial detention decision, but there are multiple factors that are specific to law enforcement that are often included. Under most state statutes, whether the defendant is likely to appear for a future court date is a factor law enforcement officers must consider.[119] If defendant is unlikely to appear, the officer will make an arrest instead of issuing a citation. For example, under Hawaii law "[w]hen a police officer arrests a person without a warrant for a misdemeanor, the police may, but need not, issue a citation, if the police officer finds

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an arrest make a factual inquiry into whether the defendant will fail to appear in court or whether defendant poses a danger to others. The officer then determines whether to arrest defendant or issue a citation. It is possible that this level of fact finding should be left to the discretion of a judicial officer, not a peace officer. However, this question is left for another day.

[119] *See, e.g,* ALA. CODE § 11-45-9 ("If any person refuses to give a written recognizance to appear by placing his signature on the summons and complaint, the officer shall take that person into custody and bring him before any officer or official who is authorized to approve bond."); *see also* COLO. REV. STAT. ANN. § 16-3-105 (West) ("When a person has been arrested without a warrant, he may be released by the arresting authority on its own authority if[] . . . The offense for which the person was arrested and is being held is a misdemeanor or petty offense and the arresting officer or a responsible command officer of the arresting authority is satisfied that the person arrested will obey a summons commanding his appearance at a later date."); *see also* DEL. CODE ANN. tit. 11, § 1907 (West) ("In any case in which it is lawful for a peace officer to arrest without a warrant a person for a misdemeanor, the officer may, but need not, give the person a written summons in substantially the following form[] . . . [i]f the person fails to appear in answer to the summons, or if there is reasonable cause to believe that the person will not appear, a warrant for the person's arrest may issue."); *see also* FLA. R. CRIM. P. 3.125 ("If a person is arrested for an offense declared to be a misdemeanor of the first or second degree or a violation . . . notice to appear may be issued by the arresting officer unless[] . . . the accused has no ties with the jurisdiction reasonably sufficient to assure the accused's appearance or there is substantial risk that the accused will refuse to respond to the notice [or] it appears that the accused previously has failed to respond to a notice or a summons"); *see also* HAW. REV. STAT. ANN. § 803-6(b) (West) ("In any case in which it is lawful for a police officer to arrest a person without a warrant for a misdemeanor, petty misdemeanor . . . if the police officer finds and is reasonably satisfied that the person[] [w]ill appear in court at the time designated[]"); *see also* KY. REV. STAT. ANN. § 431.015 (West) ("[A] peace officer shall issue a citation instead of making an arrest for a misdemeanor committed in his or her presence, if there are reasonable grounds to believe that the person being cited will appear to answer the charge."); *see also* NEV. REV. STAT. ANN. § 171.1771 (West) (a police officer may give a citation for a misdemeanor unless "the peace officer has reasonable and probable grounds to believe the person will disregard a written promise to appear in court."); *see also* PA. R. CRIM. P. 519 ("The arresting officer shall promptly release from custody a defendant who has been arrested without a warrant, rather than taking the defendant before the issuing authority, when the following conditions have been met[] . . . the arresting officer has reasonable grounds to believe that the defendant will appear as required."); *see also* TENN. CODE ANN. § 40-7-118 (West) ("No citation shall be issued under this section if . . . [a] reasonable likelihood exists that the arrested person will fail to appear in court."); *see also*

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and is reasonably satisfied that the person . . . will appear in court at the time designated."[120] Many other states allow officers to consider the likelihood of the person receiving the citation to appear in court in determining whether to arrest that individual.[121] Whether the defendant has a history of not appearing for court dates is consequently a factor law enforcement often consider, with seven state statutes specifically addressing it.[122]

Additionally, whether the defendant poses danger is also a judgment a law enforcement officer must often make before issuing a citation or summons.[123] A

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[120] HAW. REV. STAT. ANN. § 803-6 (2007).

[121] *See also* ARK. R. CRIM. P. 5.2; *see also* IDAHO CODE ANN. § 19-3901 (1983); *see also* IOWA CODE ANN. § 805.1 (2002); *see also* KY. REV. STAT. ANN. § 431.015 (2017); *see also* MD. CODE ANN., Crim. Proc. § 4-101 (2016); *see also* MICH. COMP. LAWS ANN. § 257.728 (2008); *see also* MINN. R. CRIM. P. 6.01; *see also* NEB. REV. STAT. ANN. § 29-422 (2017); *see also* NEV. REV. STAT. ANN. § 171.1771 (West through 2017 Regular Session); *see also* N.M. STAT. ANN. § 31-1-6 (2013); *see also* N.C. GEN. STAT. ANN. § 15A-302 (2003); *see also* OHIO REV. CODE ANN. § 2935.26 (1978); *see also* OKLA. STAT. ANN. tit. 22, § 209 (1967); *see also* OR. REV. STAT. ANN. § 133.055 (2012); *see also* TENN. CODE ANN. § 40-7-118 (2012); *see also* TEX. CRIM. PROC. CODE ANN. § 14.06 (2015); *see also* UTAH CODE ANN. § 77-7-18 (2012); *see also* VT. R. CRIM. P. 3; *see also* VA. CODE ANN. § 19.2-74 (2014); *see also* WA ST CR LTD JURIS CrRLJ 2.1; *see also* W. VA. CODE ANN. § 62-1-5a (1982); *see also* WIS. STAT. ANN. § 968.085 (2017); *see also* WYO. STAT. ANN. § 7-2-103 (2011).

[122] ARK. R. CRIM. P. 5.2 ("whether the accused previously has failed to appear in response to a citation."); FLA. R. CRIM. P. 3.125 ("previously has failed to respond" and "past history of appearance"); IOWA CODE ANN. § 805.1 (2002) ("previously failed to appear"); NEB. REV. STAT. ANN. § 29-427 (1974) ("the accused has previously failed to appear"); OHIO REV. CODE ANN. § 2935.26 (1978) (previous failure to appear); VT. R. CRIM. P. 3 ("previously failed to appear"); WA ST CR LTD JURIS CrRLJ 2.1 ("whether the person previously failed to appear"); WIS. STAT. ANN. § 968.085 (2017) ("The accused has previously failed to appear or failed to respond to a citation.").

[123] ARK. R. CRIM. P. 5.2 ("whether detention is necessary to prevent imminent bodily harm to the accused or to another"); *see also* FLA. R. CRIM. P. 3.125; *see also* IOWA CODE ANN. § 805.1 (2002) (a police may issue a citation instead of making a warrantless arrest or continuing custody unless "detention appears reasonably necessary in order to halt a continuing offense or disturbance or to prevent harm to a person or persons."); *see also* KY. REV. STAT. ANN. § 431.015 (2017) ("a peace officer shall issue a citation instead of making an arrest for a misdemeanor committed in his or her presence, if there are reasonable grounds to believe that the person being cited will appear to answer the charge" unless "the misdemeanor is . . . [a]n offense in which the defendant poses a risk of danger to himself, herself, or another person."); *see also* LA. CODE CRIM. PROC. ANN. art. 211 (2011) ("When it is lawful for a peace officer to arrest a person without a warrant for a misdemeanor . . . he may issue a written summons instead of making an arrest if all of the following exist[s]: . . . The officer has no reasonable grounds to believe that the person will cause injury to himself or another or damage to property or will continue in the same or a similar offense unless immediately arrested and booked ."); *see also* MD. CODE ANN., Crim. Proc. § 4-101 (2016) ("a police officer shall charge by citation for[] . . . any misdemeanor or local ordinance

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defendant is unlikely to receive a citation in lieu of arrest if the officer determines that defendant poses a risk of bodily injury to others or himself.[124] Indeed, several states have determined that violent crimes or crimes that indicate that the defendant will be a danger to the community if she is released present a complete bar to the issuance of a citation.[125] About thirteen statutes explicitly name the dangerousness

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violation that does not carry a penalty of imprisonment [and] . . . for which the maximum penalty of imprisonment is 90 days or less . . . if . . . the officer reasonably believes that the failure to charge on a statement of charges will not pose a threat to public safety."); *see also* MINN. R. CRIM. P. 6.01 ("In misdemeanor cases, peace officers who decide to proceed with prosecution and who act without a warrant must issue a citation and release the defendant unless it reasonably appears[] the person must be detained to prevent bodily injury to that person or another[.]"); *see also* TENN. CODE ANN. § 40-7-118 (2012) (stating that a police officer may issue a citation in lieu of making an arrest unless "[t]here is a reasonable likelihood that . . . persons or property would be endangered by the arrested person[.]"); *see also* VT. R. CRIM. P. 3 (stating that a police officer may issue a citation in lieu of making an arrest if the officer has probable cause to believe the defendant has committed misdemeanor, but an arrest may be made if the officer has probable cause to believe an arrest is necessary "to prevent harm to the person detained or harm to another person."); *see also* VA. CODE ANN. § 19.2-74 (2014) (stating if a misdemeanor defendant has been arrested, the officer may then issue a summons to appear in court, unless "person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person . . . "); *see also* WA ST CR LTD JURIS CrRLJ 2.1 ("Whenever a person is arrested or could have been arrested pursuant to statute for a violation of law which is punishable as a misdemeanor or gross misdemeanor the arresting officer[] . . . may serve upon the person a citation and notice to appear in court[]" and in deciding whether to release the defendant, the officer should consider "whether detention appears reasonably necessary to prevent imminent bodily harm to himself, herself, or another, or injury to property, or breach of the peace[.]"); *see also* W. VA. CODE ANN. § 62-1-5a (1982) (a law enforcement officer may issue a citation in lieu of making an arrest for "[a]ny misdemeanor, not involving injury to the person, committed in a law-enforcement officer's presence[,] [p]rovided[] [t]hat the officer may arrest the person if he has reasonable grounds to believe that the person is likely to cause serious harm to himself or others[.]"); *see also* WIS. STAT. ANN. § 968.085 (2017) (stating that a law enforcement officer may issue a citation for misdemeanors and may consider whether "[t]he accused appears to represent a danger of harm to himself or herself, another person or property[]" in deciding whether to release.); *see also* WYO. STAT. ANN. § 7-2-103 (2011) (stating that the police may offer a citation for misdemeanor offenses and release the accused "after investigation, it appears that the person[] . . . [d]oes not present a danger to himself or others[.]").

[124] *See e.g.,* FLA. R. CRIM. P. 3.125 ("If a person is arrested for an offense declared to be a misdemeanor of the first or second degree or a violation . . . notice to appear may be issued by the arresting officer unless[] . . . the officer has reason to believe that the continued liberty of the accused constitutes an unreasonable risk of bodily injury to the accused or others").

[125] *See* ALA. CODE § 11-45-9.1 ("Municipality may authorize any law enforcement officer . . . to issue a summons and complaint to any person charged with . . . any Class C misdemeanor or violation not involving violence, threat of violence, alcohol or drugs."); COLO. REV. STAT. ANN. § 16-3-105 (1994) (stating that law enforcement may not issue a

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of the defendant as a factor for law enforcement to consider with citations.[126] Moreover, a few states have specifically targeted those involving intoxication, particularly DUIs, and have prohibited citations in lieu of arrest for DUI cases.[127]

Overall, citations in lieu of arrest are a viable pretrial release option that many states have adopted to avoid misdemeanor detention. This option can allow an officer to not arrest an individual—and avoid jail time—if certain factors are met. Often the individual must not pose a danger to others, must be able to appear in court, and must not be charged with certain crimes—like a DUI. The growth of citations may be one cause of the decrease in misdemeanor arrests nationwide,[128] and may prove to be a welcome reduction in the future of misdemeanor cases nationwide.[129]

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citation for a domestic violence crime); KY. REV. STAT. ANN. § 431.015 (2017) (law enforcement may issue citations on misdemeanor offense except for violations of protective orders); OR. REV. STAT. ANN. § 133.055 (2012) (police may not issue a citation for assault between family or household members); TENN. CODE ANN. § 40-7-118 (2012) (stating that law enforcement ma not issue a citation for a DUI, or traffic misdemeanors, car accidents resulting in serious bodily injury or death and no driver license—citations are authorized (but not mandatory) for shoplifting, issuance of bad checks, driving with a revoked or suspended license, assault or battery, and prostitution); TEX. CRIM. PROC. CODE ANN. § 14.06 (2015) (stating that law enforcement may not issue a notice to appear for public intoxication); VT. R. CRIM. P. 3 (stating that law enforcement may not issue a citation when misdemeanor is assault against family member, violation of court order, violation of foreign abuse prevention order, misdemeanor offense against vulnerable adult, DUI after prior conviction, violation of hate-motivated crime injunction, violation of condition of release, stalking, simple assault, recklessly endangering another person, failure to register as sex offender or cruelty to a child.); VA. CODE ANN. § 19.2-74 (2014) (stating that law enforcement may not issue a summons for DUIs, minors driving after consuming alcohol); W. VA. CODE ANN. § 62-1-5a (1982) (stating that law enforcement may not issue citations for misdemeanors involving injury to the person); WIS. STAT. ANN. § 968.085 (2017) (stating that law enforcement may not issue citations in domestic abuse cases).

[126] *See* ARK. R. CRIM. P. 5.2; *see also* FLA. R. CRIM. P. 3.125; *see also* IOWA CODE ANN. § 805.1 (2002); *see also* KY. REV. STAT. ANN. § 431.015 (2017); *see also* LA. CODE CRIM. PROC. ANN. art. 211 (2011); *see also* MD. CODE ANN., Crim. Proc. § 4-101 (2016); *see also* MINN. R. CRIM. P. 6.01; *see also* TENN. CODE ANN. § 40-7-118 (2012); *see also* VT. R. CRIM. P. 3; *see also* VA. CODE ANN. § 19.2-74 (2014); *see also* WA ST CR LTD JURIS CrRLJ 2.1; *see also* W. VA. CODE ANN. § 62-1-5a (1982); *see also* WIS. STAT. ANN. § 968.085 (2017); *see also* WYO. STAT. ANN. § 7-2-103 (2011).

[127] VA. CODE ANN. § 19.2-74 (2014); *see also* VT. R. CRIM. P. 3; *see also* CODE ANN. § 40-7-118 (2012); *see also* ALA. CODE § 11-45-9.1.

[128] Stevenson & Mayson, *supra* note **Error! Bookmark not defined.**, at 750 (noting that "more than half of misdemeanor cases in some jurisdictions originate with a citation or summons rather than arrest").

[129] However if citations are accompanied by fines (or require incarceration if defendant cannot pay a fine), this presents a similar problem as money bail and is not good policy.

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*2. Release on Personal/Own Recognizance (ROR)*

In some instances, a court releases a misdemeanor defendant on personal recognizance (ROR). Release on recognizance is where a defendant gives her word to the court that she will appear for her court date.[130] This type of release allows a defendant to be released without posting any money or having a surety sign a bond with the court.[131] Some states have explicit statutory presumptions of release in non-capital cases—especially for misdemeanors.[132] The majority of misdemeanor defendants should ideally be released on recognizance, and this has been the historic default. ROR does not discriminate based on the amount of money a defendant has in her bank account or by her race. But today, nationally only about 24% of state felony and misdemeanor defendants receive ROR.[133] However, some jurisdictions have much higher rates for misdemeanors, like NYC for instance, releases about 75% of misdemeanor defendants on ROR according to one study.[134] However, in

[130] For more detail, see BAUGHMAN, *supra* note 4, at 39–59 (discussing types of pretrial release).

[131] BAUGHMAN, *supra* note 4, at 43; *Recognizance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[132] *See* WASH. SUP. CT. CRIM. P. R. 3.2(a) (West) ("Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance pursuant to rule 3.2.1 or CrRLJ 3.2.1 be ordered released on the accused's personal recognizance pending trial . . . "); *see also* ALASKA STAT. ANN. § 12.30.011(b) (West through 2017 First Regular Session) ("A person charged with a misdemeanor . . . and who is assessed by a pretrial services officer as . . . low to moderate risk shall be released on the person's own recognizance or upon execution of an unsecured appearance bond or unsecured performance bond[.]"); *see also* CAL. PENAL. CODE § 1270 (West through 2017 Regular Session) ("A defendant who is in custody and is arraigned on a complaint alleging an offense which is a misdemeanor . . . shall be entitled to an own recognizance release unless the court makes a finding on the record . . . that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required."); *see also* COLO. REV. STAT. ANN. § 16-4-113(1) (West through 2017 First Regular Session) (requiring ROR for Class 3 misdemeanors); *see also* 2017 NEW MEXICO COURT ORDER 0006 (C.O. 0006) (The New Mexico Supreme Court: "A designee shall release a person from custody on personal recognizance, subject to [] conditions of release . . . if the person has been arrested and detained for a . . . misdemeanor, subject to [] exceptions . . . ."); *see also* CONN. GEN. STAT. ANN. § 54-64a(a)(2) (2017) ("If the arrested person is charged with no offense other than a misdemeanor, the court shall not impose financial conditions of release on the person . . ."); *see also* N.H. REV. STAT. ANN. § 597:2 (2016) ("A person charged with a class B misdemeanor shall be released on his personal recognizance[] . . ."); *see also People ex rel. Alvarez v. Warden, Bronx House of Det.*, 178 Misc. 2d 254, 680 N.Y.S.2d 153 (Sup. Ct. 1998) (finding that, under state law, a defendant is entitled to ROR within 5 days of arrest if an information is not filed against him or her).

[133] BAUGHMAN, *supra* note 4, at 163.

[134] In NYC in 2008, in slightly more than three-quarters (90,605) of the cases, defendants were released pending trial on their own recognizance. HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY

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recent years more defendants are detained pretrial—even for misdemeanors—as ROR rates have decreased substantially since 1990.[135]

To reverse this trend, twenty-one states have enacted statutes providing the presumption of release or non-monetary bail.[136] Though less common, Alabama and New York have specifically given courts permission—maybe even a command—to release on ROR individuals charged with misdemeanor crimes.[137] But all states that have adopted a "presumption of release" have also adopted exceptions to it. Commonly, violent crimes and sex-related crimes are the exception to the presumption of ROR.[138] For example, in Alaska, defendants charged with certain misdemeanor crimes, such as sex offenses and crimes "involving domestic violence," are not entitled to release on personal recognizance.[139] Georgia and Mississippi have also targeted domestic violence crimes as crimes that do not qualify for bail in some instances.[140] Additionally, the court may deny release on personal recognizance if it finds "clear and convincing evidence" that the defendant's court appearance cannot be reasonably assured upon release.[141] More often, courts merely

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DEFENDANTS IN NEW YORK CITY 1 (2010), https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york#.

[135] BAUGHMAN, *supra* note 4, at 163 ("Release on recognizance . . . was the most common type of pretrial release in 1992, but by 2006, this had declined by 33 percent.").

[136] *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Guidance for Setting Release Conditions*, http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx (last visited Feb. 8, 2018) [hereinafter NCSL, *Setting Release Conditions*].

[137] *See* ALA. CODE § 15-13-4 ("Any judge or magistrate . . . may, in his discretion, release on his own recognizance any prisoner charged with a misdemeanor."); N.Y. CRIM. PROC. LAW § 530.20(1) (McKinney 1979) (stating that "the court must order recognizance or bail" for "offenses of less than felony grade only.").

[138] *See* ALASKA STAT. ANN. § 12.30.011(b) (2018) (exceptions for "a sex offense . . . or a crime involving domestic violence"); *see also* CAL. PENAL CODE § 853.6(2) (2009) (Exceptions for crimes specified in Section 1270.1, such as serious and violent felonies); *see also* CONN. GEN. STAT. ANN. § 54-64a(A) (2017) (stating that a misdemeanor defendant may be ROR unless the crime charged involved a "family violence crime"); *see also* N.M. R. CRIM P. 5-408(B)(2) (exception for battery, aggravated battery, assault against a household member, battery against a household member, criminal damage to property of a household member, harassment of household member, stalking, abandonment of child, negligent use of a deadly weapon, enticement of a child, criminal sexual contact, criminal trespass, telephone harassment, violation of protection order, DUI).

[139] ALASKA STAT. ANN. § 12.30.011(b) (West through 2017 First Regular Session); *see also* 2017 New Mexico Court Order 0006 (2017) (there is no presumption of release for the following misdemeanors: battery, "criminal damage to property of a household member," harassment, stalking, "abandonment of child . . . ," "negligent use of a deadly weapon . . . ," "enticement of a child . . . ," "criminal sexual contact . . . ," criminal trespass . . . ," "violating a protective order . . . ," driving under the influence . . .").

[140] Both statutes disallow law enforcement form setting bail before the defendant sees a judge. *See* MISS. CODE ANN. § 99-5-37 (2012); *see also* GA. CODE ANN. § 17-6-1 (2017).

[141] ALASKA STAT. ANN. § 12.30.011(b)(2) (West through 2017 First Regular Session).

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have the discretion to release a defendant on personal recognizance based on certain factors.[142] These factors will be discussed in Part III, and are identical to factors considered for felony release.

*3. Money Bail*

Money bail is where a defendant must pay an amount of money to a court or to a commercial bondsman to be released before trial.[143] The most popular way money bail is handled is commercial money bail, where a defendant pays a portion of the bail amount to a bail bondsman and then forfeits this money. The bondsman is then responsible to ensure that defendant appears in court. It is currently the most popular type of release for felony defendants nationally.[144]

Between 1990 until 2009, ROR dropped dramatically as money bail increased in popularity nationwide.[145] Between 1990 and 2009, the rate of pretrial release with

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[142] *See* ALA. CODE § 15-13-4 (West through end of 2017 Regular Session) (stating that the judge has the discretion to release misdemeanor defendant on personal recognizance); *see also* ARIZ. REV. STAT. ANN. § 13-3967(A)-(B) (West 2015) (stating that a felony or misdemeanor defendant may be released on personal recognizance or bail, depending on certain factors); *see also* DEL. CODE ANN. tit. 11, § 2105(a) (2013) ("The court shall release a person accused of a bailable crime on the person's own recognizance or upon the execution of an unsecured personal appearance bond"); *see also* KY. REV. STAT. ANN. § 431.520 (2014) (stating that the court may release a felony or misdemeanor defendant on person recognizance or bail "unless the court determines in the exercise of its discretion that such a release will not reasonably assure the appearance of the person as required, or the court determines the person is a flight risk or a danger to others."); *see also* MO. ANN. STAT. § 544.455(1) (2013) ("Any person charged with a bailable offense . . . may be ordered released . . . on his personal recognizance, unless the associate circuit judge or judge determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required."); *see also* NEV. REV. STAT. ANN. § 178.4851(1) (2007) ("Upon a showing of good cause, the court may release without bail any person charged with a misdemeanor or felony.").

[143] *See* BAUGHMAN, *supra* note 4, at 46.

[144] *Id.* at 158.

[145] This is in large part due to the lobbying effort of the national money bail movement. *See* BAUGHMAN, *supra* note 4, 178–79 (describing the efforts of the American Bail Coalition to lobby counties, police, courts, judges, chambers of commerce, rotary clubs, and others to convince them that commercial bail is more effective than pretrial services programs).

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financial conditions crept up from 40 to 62 percent in felony cases.[146] And by the early 2000s, ROR accounted for only twenty-four percent of all pretrial releases.[147]

Misdemeanor defendants are generally not held without bail but are detained because they cannot afford to pay the bail amount, and so remain detained. For instance, in Houston, Texas, between 2008 and 2013, "more than half of all misdemeanor defendants were detained pending trial; their average bail amount was $2,786."[148] A study of Maryland's pretrial release decisions in 2017 found that 19 percent of misdemeanor defendants were held without bail.[149] Other jurisdictions are less likely to set money bail, for instance, a New York City study demonstrates that bail was set for only 21 percent of defendants.[150] Only 1 percent of cases were remanded without bail.[151]

Although firm national numbers do not exist, the numbers of misdemeanor defendants who now have to pay money to be released before trial nationwide has increased. Numbers for misdemeanor release are more difficult to locate, but in New

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[146] *See* BAUGHMAN, *supra* note 4, at 157–59; *see also* Crystal S. Young, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1401 (2017) ("These high rates of pre-trial detention have been coupled with the increasingly prevalent use of financial conditions of release. For example, between 1990 and 2009, the fraction of felony defendants who were released with financial conditions increased from 40% to 62%. Indeed, the majority of defendants are detained before trial because they cannot afford to pay relatively small amounts of bail. In New York City, 46% of misdemeanor defendants in 2013 were detained because they were unable to post bail of $500 or less").

[147] BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

[148] ALEXANDRA NATAPOFF, MISDEMEANORS, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (2017), *available at* https://poseidon01.ssrn.com/delivery.php?ID=177005005066089065095106070102002007009025023051035024067126122026002122011104086081043118057101052027117103024079114015123109021057038082085065006120074017067099089093050038114127119117025081027072115021101094005099094076115100020122086088124117106105&EXT=pdf.

[149] CHRISTINE BLUMAUER ET AL., ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 13 (2018), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6286908b-8228-0970-9c72-e9ee52f91c9b&forceDialog=0.

[150] MICHAEL REMPEL ET AL., JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM (2017), *available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/jail-in-new-york-city/legacy_downloads/NYC_Path_Analysis_Final-Report.pdf (and almost 80% were released on ROR).

[151] MICHAEL REMPEL ET AL., JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM (2017), *available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/jail-in-new-york-city/legacy_downloads/NYC_Path_Analysis_Final-Report.pdf. The study further found that 18 percent of misdemeanor defendants were detained following arraignment, while only 10 percent were detained throughout the case. *Id.*

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York roughly twenty-five percent of misdemeanor defendants must pay to be released before trial.[152] In Baltimore, nearly fifty percent must pay.[153] Similarly, in California about fifty percent of individuals booked on misdemeanors are required to post bail.[154] In Oklahoma County, the largest population center in Oklahoma, 2017 data indicates that 78% of misdemeanor defendants are required to pay to be released.[155] Surprisingly, this is down from 92% of misdemeanor defendants in 2016.[156]

When evaluating this data, it is important to note that numbers vary drastically between judges.[157] One study conducted in Buffalo, New York focused on five judges over a four-month period.[158] Depending on the judge, misdemeanor defendants were required to post bail anywhere from 42 percent to 83 percent of the time.[159] As one researcher notes, "even if money's ability to detain is not eliminated, states may want to create a more rational process for detention that does not rely upon unattainably high monetary conditions of bond to detain certain unmanageable defendants."[160] National data is still not available on misdemeanor release but will hopefully be released soon.[161] Regardless, given the numbers we do have, there is certainly an indication that misdemeanor cases are much less likely than they were historically to be released on ROR. Many misdemeanor defendants now have to pay

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[152] Natapoff, *supra* note **Error! Bookmark not defined.**, at 1321.

[153] *Id.*

[154] SONYA TAFOAY ET AL., PRETRIAL RELEASE IN CALIFORNIA 11 (May 2017), http://www.ppic.org/content/pubs/report/R_0517STR.pdf ("[O]nly one-half of individuals booked for misdemeanors … secure some form of pretrial release.")

[155] Ben Botkin, *Jail stays for low-level misdemeanors differ by county*, ENID NEWS & EAGLE (June 4, 2018), https://www.enidnews.com/news/local_news/jail-stays-for-low-level-misdemeanors-differ-by-county/article_afa901dc-14b6-5ff1-9a4c-a72ca25217f5.html ("In December 2017, Oklahoma County granted no-bail releases to 22 percent of misdemeanor defendants released in December 2017.").

[156] *Id.*

[157] This is similar to felony bail numbers as there is little consistency between judges within the same county and nationwide. *See* Baradaran & McIntyre, *supra* note 37, at 538.

[158] Anna Maria Barry-Jester, *You're Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend on Your Judge*, FIVETHIRTYEIGHT (June 19, 2018), https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/.

[159] *Id.* This is consistent with my own prior research on judges. Baradaran & McIntyre, *supra* note 37, at 526 ("[D]efendants with similar characteristics are released in some jurisdictions but often held in others.").

[160] SCHNACKE, *supra* note 37, at 146.

[161] It looks like National Center for State Courts has just finished the data-gathering stage with data that should be released regarding national misdemeanor detention and other important pretrial issues. *Effective Criminal Case Management Project (ECCM)*, NAT'L CTR. FOR STATE COURTS, https://www.ncsc.org/services-and-experts/areas-of-expertise/caseflow-and-workflow-management/effective-criminal-case-management.aspx (last visited Dec. 19, 2018).

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money bail to be released before trial—and this prohibits most poor defendants from obtaining release before trial.

*4. Conditional Release for Misdemeanors*

Another type of release for misdemeanor defendants is conditional release.[162] This is where a court makes a contract with a defendant to be released in exchange for the defendant following a certain set of conditions while they are released.[163] In sixteen states, court must "impose the least restrictive" conditions to ensure the defendant appears for future court dates.[164] All states except New York, South Carolina, West Virginia, and Utah, permit its courts to apply "any condition [it] . . . considers reasonably necessary" to ensure the defendant's appearance.[165] In other states, the conditions must relate to the crime charged.[166]

In some jurisdictions the relevance requirement is stricter than in others. For example, in a Georgia case, the court of appeals concluded that a trial court acted within its power when it assessed bail to a defendant charged with battery under the condition that the defendant "not intimidate, threaten, harass, verbally or physically abuse or harm [the victim and] to have no contact with [the victim] . . . . Do not telephone or write letters to [the victim]. Do not engage in any type of following or surveillance behavior. . ."[167] But in Texas, the condition must be relevant to ensuring

[162] *See* BAUGHMAN, *supra* note 4, at 52.

[163] *See* Clarke v. State, 491 S.E.2d 450, 451 (Ga. Ct. App. 1997); *see also Dudley v. State*, 496 S.E.2d 341 (Ga. Ct. App. 1998) ("bond pending appeal for misdemeanor offenses . . . does not have to be unconditional, as long as conditions are reasonable under facts and circumstances of case."); *see also* OHIO R. CRIM. P. 46 (listing the available conditions courts may impose on bail).

[164] NCSL, *Setting Release Conditions*, *supra* note 136.

[165] NATIONAL CONFERENCE OF STATE LEGISLATURE, *Pretrial Release Conditions* (2015), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/ [hereinafter NCSL, *Pretrial Release Conditions*].

[166] Dudley v. State, 496 S.E.2d 341, 343 (Ga. Ct. App. 1998) (holding that the trial court had abused its discretion where the defendant was appealing a battery conviction and the judged imposed the following conditions for bail: "[a] total prohibition against working in law enforcement, bail bonding, dog training, or private investigation during post[-]trial motion and appeal process, curfew, travel restrictions, and total banishment from county in which offenses occurred . . .").

[167] Clarke v. State, 491 S.E.2d 450, 451 (Ga. Ct. App. 1997) ("Trial court has inherent authority to place conditions on bail in misdemeanor cases, which will be upheld by Court of Appeals absent an abuse of discretion; placing such conditions on bail is not the same thing as refusing to set bail, which is forbidden by Code in a misdemeanor case. Trial court has inherent discretion to release a misdemeanor defendant on his own recognizance pending trial or to require payment of a bail bond. When a misdemeanor defendant is charged with a violent crime against a specific victim, it is within the trial court's inherent powers to require as condition of bail that the defendant avoid any contact with the victim.").

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the defendant appears in court.[168] In a Texas case, the court determined that a condition that disallowed the defendant from driving a vehicle in a negligent homicide case was not sufficiently related to ensuring the defendant's appearance in court.[169] Washington has a similar rule, requiring courts to consider a number of factors, but ultimately the purpose of the condition on bail is to "reasonably assure" that the defendant appears,[170] and ensure the defendant does not pose a danger to the public or the administration of justice.[171] These factors look similar to those state courts commonly consider in deciding whether to release a defendant on bail or ROR, but these factors do differ in part. [172] For example, a Washington court should consider whether a "responsible member of the community" is willing to "vouch" for the defendant and "assist the accused in complying with conditions of release."[173]

There are numerous conditions courts can apply. In most states, the court may require electronic monitoring and pretrial supervision of the defendant.[174] Most jurisdictions also permit courts to impose restraints on a defendant's movement, such as "house arrest, work release, curfew and in-patient treatment."[175] Other conditions that courts commonly apply include no contact with the victim of the crime which the defendant is charged with (no contact order), travel restrictions, limitations on who the defendant may associate with, and restrictions on where the defendant may live.[176] Additionally, some courts may impose upon the defendant such conditions including committing no crimes and maintaining contact with her attorney.[177] Less common conditions include probation from using controlled substances, substance abuse monitoring and treatment, maintaining employment, and restrictions of possessing firearms.[178] Overall, most conditional release allows a defendant a large amount of freedom to maintain their job and home environment and is often favored by defendants over money bail.

*5. Misdemeanor Detention before Trial*

Some counties automatically detain without bail, at least for a time, certain categories of misdemeanor defendants. Common misdemeanor offenses that are

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[168] Ex parte Anderer, 61 S.W.3d 398, 407 (Tex. Crim. App. 2001).

[169] *Id.*

[170] State v. Rose, 191 P.3d 83, 85–86 (Wash. Ct. App. 2008); *see also* WASH. R. CRIM. P. 3.2 (West 2018) (noting as many as nine non-exhaustive factors courts shall consider).

[171] State v. Rose, 191 P.3d 83, 85 (2017).

[172] *Id.*

[173] *Id.* (citing WASH. R. CRIM. P. 3.2 (West 2018)).

[174] NCSL, *Pretrial Release Conditions, supra* note 165. This is typically through a pretrial supervision program. *See* BAUGHMAN, *supra* note 4, at 52–56.

[175] NCSL, *Pretrial Release Conditions, supra* note 165.

[176] *Id.*

[177] State v. Rose, 191 P.3d 83, 88 (Wash. Ct. App. 2017) (citing WASH. R. CRIM. P. 3.2 (West 2018)).

[178] NCSL, *Pretrial Release Conditions supra* note 165.

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denied bail categorically include domestic violence, DUI and violation of antiharassment conditions.[179] For instance, in King County, Washington, the misdemeanor bail schedule specifies that defendants alleged to have committed the following misdemeanors are to be held without bail pending a court hearing: a domestic violence offense, a DUI offense, fourth degree assault, harassment, a violation of an antiharassment order, stalking, or communication with a minor for immoral purposes.[180] Aside from the listed misdemeanor offenses, it is rare for a court to order detention for a misdemeanor defendant before trial.

Even courts who deny bail for a small category of defendants, still recognize that the purpose of bail is only to ensure that defendant appears for court.[181] For instance, a Connecticut statute states: "court shall, in bailable offenses, promptly order the release of such person upon the first of the following conditions of release found sufficient to reasonably ensure the appearance of the arrested person in court."[182] In rare instances, courts have been reversed for denying bail in misdemeanor cases. In *Hobbs v. Reynolds*,[183] the Supreme Court of Arkansas held that the circuit court's denial of bail for a defendant being charged with a misdemeanor was an abuse of discretion.[184] However, courts are a lot more lenient with "whatever terms and restrictions" courts set that are deemed appropriate, including money bail that is often prohibitively expensive.[185] With the general presumption of release in mind, courts have historically recognized the need for detention before trial to be limited, especially with misdemeanors.[186]

However, there are recently more exceptions in various states. For example, In *People v. Wilboiner*, the Criminal Court in New York City held that courts had the power to hold a defendant without bail, even in a misdemeanor case, if the court

[179] In the Matter of a Uniform Bond Schedule for Maricopa County Limited Jurisdiction Courts, Admin. Order No. 2015-002 (Super. Ct. Ariz. 2015), *available at* https://www.superiorcourt.maricopa.gov/SuperiorCourt/AdministrativeOrders/AdminOrders/Admin%20Order%202015-002.pdf. For example, in Maricopa County, Arizona, "[i]ndividuals charged with a domestic violence offense may not secure release prior to appearing before a judge who will determine appropriate conditions of release." *Id.*

[180] TMCLR 3.2 Bail Schedule, https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=municipal&ruleid=municipalmuntuk103.2&set=muntuk.

[181] Weisheit v. State, 969 N.E.2d 1082, 1086 (Ind. Ct. App. 2012) (citing *Phillips v. State*, 550 N.E.2d 1290, 1294 (Ind.1990)) ("The purpose of bail is to ensure the presence of the accused at trial.").

[182] CONN. GEN. STAT. ANN. § 54-64a(a)(1) (West 2017).

[183] 375 Ark. 313, 316 (2008).

[184] *Id.*

[185] *Id.* (quoting *Reeves v. State*, 261 Ark. 384, 548 S.W.2d 822 (1977)).

[186] *See, e.g.,* Constantino v. Warren, 285 Ga. 851, 853 (2009). In Georgia, a sheriff may also accept a defendant's driver's license in place of bail after the defendant has been incarcerated for five days and if the bail equal to or less than $1,000 § 13:2.Bail considerations, Ga. Magistrate Court Handbook § 13:2 (2016-2017 ed.) O.C.G.A. § 17-6-2(a).

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determined that a defendant may be an incapacitated person who would fail to appear for a competency examination if they were released on recognizance or bail.[187] Wisconsin courts allow additional circumstances where bail can be denied for misdemeanor cases. In Wisconsin, the Preamble to the Forfeiture and Misdemeanor Bail Schedules[188] states that individuals who are arrested for misdemeanors, including misdemeanor traffic offenses, must be released without bail unless "(a) the accused does not have proper identification; (b) the accused appears to represent a danger of harm to him or herself, another person, or property; (c) the accused cannot demonstrate sufficient evidence of ties to the community; (d) the accused has previously failed to appear in court or respond to a citation; or (e) arrest or further detention is necessary to implement legitimate investigative action."[189] There are additional situations in other states where courts are permitted to deny bail to misdemeanor defendants, which look a lot like felony factors.[190] The problem with this approach—as discussed more fully in the next section—is that misdemeanor defendants are lumped together with much more serious and maybe dangerous felony defendants. Overall, in considering briefly the types of release and the release types, it is clear that the virtually automatic release right for misdemeanor defendants is no longer available. The next section will carefully discuss state laws and the reasons why misdemeanor defendants no longer obtain presumptive release. As discussed, this has severe consequences not only for misdemeanor release rates but for national bail reform as a whole.

## III. THE FELONY-CENTRIC NATURE OF BAIL REFORM

Historically and by law in many states, misdemeanor defendants should be released before trial as a matter of right. However, as discussed in the previous section, we know based on the existing national numbers that this is not the case.[191] Many jurisdictions detain misdemeanor defendants for minor crimes. But what we

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[187] People v. Wilboiner, 35 Misc. 3d 193, 199, 936 N.Y.S.2d 873, 877 (Crim. Ct. 2012).

[188] Wisconsin Judicial Conference, *State of Wisconsin Revised Uniform State Traffic Deposit Schedule and Trespass to Land Deposit Schedule*, 2 (2017) (Preamble for Forfeiture and Misdemeanor Bail Schedules).

[189] *§ 12:13.Pretrial release—Uniform misdemeanor bail schedule*, 9 WIS. PRAC., CRIMINAL PRACTICE & PROCEDURE § 12:13 (2d ed.)

[190] FLA. STAT. ANN. § 903.046 (2018) (effective Oct. 1, 2016) (FL legislature has limited the circumstances under which bail may be denied. Included in the list is: the nature and circumstances of the offense; the weight of the evidence; family ties; past and present conduct; the danger posed if defendant is released on the community or victim; and the source of funds used to pay the bail); CAL. PENAL CODE §§ 1270 - 1270.1(a) (individuals charged with misdemeanors are presumptively entitled to release unless the court believes releasing the defendant would jeopardize public safety or there would be a court appearance issue).

[191] *See supra* Part II.5 for discussion. We do not have complete national misdemeanor release numbers.

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do not know is whether there is a cohesive national standard by which to judge misdemeanor bail. Or whether the standards for judging misdemeanor bail are similar to or less strict than those of felony bail. These are the questions this section strives to answer. And what we discover is that while a misdemeanor charge generally signals that the crime at issue is less serious than a felony, misdemeanors are, in many ways, treated similarly to felonies.[192] In other words, many jurisdictions rather than presumptively releasing misdemeanor defendants and considering factors before release of felony defendants, instead rely on the exact same standard for both types of crimes.

Today, the right to release exists by law for defendants in all criminal cases,[193] with an exception for death penalty cases.[194] This is consistent with the common law, which did not guarantee the right to bail in capital cases.[195] And in many jurisdictions the right to release in felony cases is not considered "a matter of right," but one of discretion.[196] By contrast, historically at common law, the right to bail in

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[192] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 870–83 (explaining that historically, misdemeanor defendants were almost always released pretrial, but that in recent years, misdemeanor defendants have been detained at similar levels as felony defendants).

[193] Carlson v. Landon, 342 U.S. 524, 545 (1952) ("Thus in criminal cases bail is not compulsory where the punishment may be death."); *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (explaining that a defendant is entitled to pretrial release until proven guilty as the spirit of bail is to "enable the[] [defendant] to stay out of jail until a trial has found them guilty"); Baradaran, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 776.

[194] *See* State v. Kastanis, 848 P.2d 673, 674 (Utah 1993) (quoting UTAH CONST. art. I, § 8) ("All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong."); *see also State v. Garrett*, 16 Ariz. App. 427, 428 (1972) (quoting Ariz. Const. art. II, § 22); *see also Perez v. State*, 897 S.W.2d 893, 894 (Tex. App. 1995) (citing Tex. Const. art. I, § 11) ("The Texas Constitution recognizes the right to bail by sufficient securities in all criminal offenses except when the probability of assessing the death penalty is strongly indicated."); *see also Fry v. State*, 990 N.E.2d 429, 434 (Ind. 2013) (quoting Ind. Const. art. 1, § 17.2) ("'[o]ffenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.'").

[195] People v. Watson, 35 N.Y.S. 852, 852 (Gen. Sess. 1895) ("[U]under the common law and statute law of England, the right to bail in cases of misdemeanor was held to belong to the accused, but the right to bail in cases of felony was never recognized or conceded."); *see also* Baradaran, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 728–29 (discussing how at common law bail was historically presumed for all criminal charges except murder).

[196] *See* Williams v. State, 228 Ga. App. 289, 290 (1997) ("It is only in misdemeanor cases that one convicted is entitled to bail as a matter of law."); *see also* People ex rel. Devore v. Warden of New York City Prison, 40 Misc. 2d 943, 945, 244 N.Y.S.2d 505, 508 (Sup. Ct. 1963) (quoting *People ex rel. Shapiro v. Keeper of City Prison*, 290 N.Y. 393, 397–398, 49 N.E.2d 498, 500 (1943)) ("admission to bail before conviction is a matter of right in misdemeanor cases and a matter of discretion in all other cases."); *see also* People v. Watson, 14 Misc. 430, 431–32, 35 N.Y.S. 852, 853 (Gen. Sess. 1895) (stating that in New York, "in

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misdemeanor cases was largely presumed.[197] But today misdemeanants are detained pretrial in some jurisdictions at the same rate as felony defendants.[198] Both felony and misdemeanor defendants are detained because they cannot afford small amounts of money bail.[199] Thorough statistics on the pretrial release of felony defendants tell us that between 1990 and 2004, courts released 62 percent of felony defendants prior to trial.[200] Although there are not good national numbers on misdemeanor release, in some jurisdictions, the same number of felony and misdemeanor defendants (up to seventy percent) are not released before trial because they cannot afford bail.[201] And

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cases of misdemeanor the right to bail is absolute, but in cases of felony the right to bail is one of discretion.").

[197] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 128 (discussing how the right to misdemeanor bail was largely associated with the presumption of innocence.)

[198] *Id.* at 135 (citing CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSIGNER, ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 9 (Nov. 2013), http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes-3.pdf.).

[199] *Id.* (citing NATALIE R. ORTIZ, NAT'L ASS'NS COUNTIES FOUND., COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE 8 (2015), http://www.naco.org/sites/default/files/documents/Final%20paper_County%20Jails%20at%20a%20Crossroads_8.10.15.pdf [https://perma.cc/P5W4-TE33]) ("In cases when the defendants cannot pay money bail, they remain in jail. For example, the U.S. Bureau of Justice Statistics reported that more than one-third of felony defendants in large counties were unable to meet their financial conditions for pretrial release and were thus held on bond in jail in 2009. Although there are no national level data on similar rates for misdemeanor cases, pretrial detention rates . . . in misdemeanor cases range from 22 percent on average in Kentucky counties to 48 percent in cases with bail amounts less than $1,000 in New York City."). However, another study found that defendants arrested for felonies are twenty-five percentage points less likely to be released than those arrested for misdemeanors, a forty-six percent decrease. WILL DOBBIE, JACOB GOLDIN & CRYSTAL YANG, NAT'L BUREAU ECON. RES., THE EFFECTS OF PRE-TRIAL DETENTION ON CONVICTION, FUTURE CRIME, AND EMPLOYMENT: EVIDENCE FROM RANDOMLY ASSIGNED JUDGES 17 (2016), http://scholar.harvard.edu/files/cyang/files/dgy_bail_july2016.pdf [https://perma.cc/7ZKV-NU2E].

[200] US DEPT. OF JUSTICE, BUREAU OF STATISTICS, *Pretrial Release of Felony Defendants in State Courts*, Nov. 2007, at 1.

[201] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 135, with AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, FREQUENTLY ASKED QUESTIONS ABOUT PRETRIAL RELEASE DECISION MAKING 3, http://www.ajc.state.ak.us/acjc/bail%20pretrial%20release/faqpretrial.pdf [https://perma.cc/UGS9-L5YB] (last visited Apr. 28, 2018) (misdemeanants in New York City). We do know that money bail is required in about seventy percent of felony cases nationally. COHEN & REAVES, supra note 24, at 3. Of those felony defendants, fifty-three percent remain in jail, mostly because they cannot pay the money bail. *See id.* Of those felony

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in many jurisdictions, at least half of misdemeanor defendants are detained before trial.[202] Another 2018 study that analyzed data from over 400,000 cases in two different states found that 37.5 percent of misdemeanor defendants are detained pretrial.[203] Most states do not release the majority of misdemeanor defendants, as only 14 states have a 10% release rate for misdemeanors.[204]

The historical precedent for treating misdemeanors differently from felonies is clear.[205] Historically, courts would release misdemeanor defendants on bail without a discussion. However, some felony defendants would only be released if they did not pose a flight risk, and later in the 1960s to 1980s if they did not pose a danger or the weight of the evidence against them was not strong.[206] And even though felony defendants still retain the presumption of bail in most cases, some courts have discussed the rationales behind treating felonies differently than misdemeanors in terms of bail. The rational is largely intuitive: felonies are generally more serious crimes than misdemeanors. Despite the differing histories between felony and misdemeanor bail and the differences in crimes, these charges are treated very similarly before trial.

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defendants that remain in jail, eighty-eight percent remain detained throughout the pretrial period solely because they cannot afford their bails. *See* THOMAS COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES (2006) at 7, *available at* https://www.bjs.gov/content/pub/pdf/fdluc06.pdf at 7 (last accessed Jan. 14, 2019). And as the use of money bail increases, the release rates decrease. AM. BAR ASS'N, *supra*. This is also the case with misdemeanors, at least in New York. *Id.* For instance, in 2008, eighty-seven percent of NYC defendants charged with misdemeanors who had money bail amounts of $1000 or less could not post bail and were detained pretrial. *Id.* About 75% of these defendants had nonviolent, nonweapons related offenses and would likely have been safe to release. *See also* Ben Botkin, *Jail stays for low-level misdemeanors differ by county*, ENID NEWS & EAGLE (June 4, 2018), https://www.enidnews.com/news/local_news/jail-stays-for-low-level-misdemeanors-differ-by-county/article_afa901dc-14b6-5ff1-9a4c-a72ca25217f5.html. (discussing that in some counties upwards of 70% of misdemeanor defendants are not released).

[202] *See supra* note 148; *see also supra* note 153.

[203] Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 212 (2018); *see also supra* note 201.

[204] PRETRIAL JUST. INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 11–12 (2017), *available at* https://university.pretrial.org/viewdocument/state-of-pretrial-justice-in-americ (last accessed Jan. 2, 2019)

[205] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 844 (explaining that misdemeanor defendants were guaranteed bail in common law England while felony defendants were not).

[206] *See* Baradaran, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 738–39 (explaining that Congress (1) "unintentionally opened the way for predictions of future guilt and pretrial weighing of evidence in the bail decision" by passing the 1966 Federal Bail Reform Act and (2) departed significantly "from the longstanding tradition that allowed pretrial detention only to assure appearance of the accused at trial" by enacting the Bail Reform Act of 1984).

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In most states, there are not different factors for releasing defendants charged with a misdemeanor and a felony. The process for bail differs from state to state, but many states now endanger a misdemeanant's due process rights by allowing detention based on a balance of factors. Misdemeanor defendants are also denied bail due to bail schedules and risk assessments. These are three important ways that felonies and misdemeanors are improperly connected before trial. This section will address all three in order. First, the factors for felony release have been applied to misdemeanor bail, without any consideration in many states. Second, bail schedules have been applied to misdemeanor cases as with felony cases, forcing misdemeanor defendants to be detained before trial because they cannot afford bail. Third, risk assessments are increasingly being applied as an improvement to money bail but sometimes end up treating misdemeanors like felonies and leading to increased detention for misdemeanor offenses, or failing to reduce detention overall. All three of these problems ignore the history of misdemeanor offenses and the minor nature of such crimes. Misdemeanors are less serious crimes and should be treated as such. In categorizing them with felonies as most states do, we ignore their history and accompanying constitutional rights, allowing for excessive detention of people who are overwhelmingly safe to release. Further the conflation of felony and misdemeanor bail decisions have plagued the current national bail reform movement, leading to reforms that are actually antithetical to improving rights.

### *A. Felony Factors Applied to Misdemeanors Wholesale*

Many states apply felony factors to determine whether to release misdemeanor defendants before trial. Relying on felony factors to evaluate release for non-violent misdemeanants ignores the presumptive release right for misdemeanor defendants.[207] For felony defendants, ensuring that defendant is not a flight risk has been the historic concern and is one that can be accomplished with a variety of non-detention options.[208] Over time, courts have moved from merely analyzing flight risk to a pretrial evaluation of guilt through the analysis of additional

[207] *Id.* at 741–42 (noting that historic presumption-of-innocence principles allow bail to be refused only for flight risk and that consideration of other factors violates those principles); Baughman, *History of Misdemeanor Bail*, *supra* note **ERROR! BOOKMARK NOT DEFINED.**, at 859 ("Though there was no specific *absolute* right to bail in misdemeanor cases, the general rule and practice was that those charged with anything other than a capital crime were released on bail, unless there was strong evidence that the defendant would flee the jurisdiction").

[208] Baradaran & McIntyre, *supra* note 37, at 501 (noting that, "As an unintended consequence, the Bail Reform Act of 1966 opened the door for judges to consider additional factors besides flight risk in determining whether to release defendants pretrial.") *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 894–95 (2016) (citing financial and supervision conditions as well as travel restrictions).

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factors for felony cases.[209] This approach treads on the pretrial presumption of innocence for felony defendants—but is even more offensive when used with misdemeanors.

Though preventative detention—detention of defendants who pose a danger to others—was traditionally only intended for the legitimately dangerous to the public, such as capital offenders, "dangerousness" has been used to detain a much larger swath of individuals, including those who pose an extremely low risk of violence.[210] Many states consider danger to others as a factor in pretrial release. Indeed at least 28 states and the District of Columbia urge courts to consider factors well beyond flight risk in the detention calculation for felonies.[211] Other factors range from employment and financial situation to a history of depression and reputation.[212] States vary as to whether they make any distinction between applying these felony factors to felony defendants only, and whether they remain silent on distinctions between felony and misdemeanor pretrial evaluation.[213]

Most states do not distinguish release factors for misdemeanors and felonies, and apply felony factors for misdemeanor cases. For example, the South Carolina pretrial detention statute makes no distinction between defendants charged with felony or misdemeanor offenses.[214] When making pretrial release decisions, South Carolina judges can look far beyond flight risk and consider factors such as family circumstances, employment status, character, criminal record, and mental condition.[215] Other states follow a slightly different approach which can ultimately lead to the same result. In Arkansas, by statute,[216] the pretrial release inquiry involving the weighing of factors must be conducted in all felony and misdemeanor cases.[217] As a result of this pretrial weighing, many

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[209] Baradaran, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 741–42.

[210] Baradaran & McIntyre, *supra* note 37.

[211] *Id.* at 511. In the context of evaluating danger, many state statutes give judges a lot of leeway, such has utilizing an '"including but not limited to' clause, or permi[ting] judicial officers to consider 'any other factor' relevant to making a determination of dangerousness." *See also infra* note 252 for list of states.

[212] Baradaran & McIntyre, *supra* note 37, at 511.

[213] SCHNACKE, *supra* note 37, at 140–41 (noting that states tend to fall into one of three groups: states that provide no right to bail in their state constitutions, and therefore have rigorous statutory detention provisions; states that have broad right-to-bail provisions, and tend to have obvious stated lines between bailable an non-bailable offenses, and states that have "preventative detention" statutes tend toward preventative detention for many defendants beyond those who are a flight risk (the traditional category for preventative detention.).

[214] S. CAR. CODE. ANN. § 17-15-30; ARK. CODE ANN. § 8.4(a).

[215] S. CAR. CODE. ANN. § 17-15-30.

[216] ARK. CODE ANN. § 8.4(a).

[217] *Id.* This assumes of course that the prosecuting attorney does not stipulate that the defendant may be released on his own recognizance.

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misdemeanor defendants do not obtain release and result in Arkansas jails housing significantly more pretrial defendants than convicted defendants.[218] And in Massachusetts, a very typical state, the judge will consider for both felony and misdemeanor cases the following factors: if the defendant is a flight risk; has a criminal record; has a history of fleeing prosecution; has family ties, financial resources, is employed, has a mental illness, and his reputation in the community. The bail magistrate will also take into consideration whether the defendant's release will harm the community and/or the victim of his crime.[219]

The factors courts consider in determining whether to release felony defendants have now been transferred wholesale to misdemeanor defendants. The following sections consider the most common factors closely. The first of the felony factors courts consider in deciding whether to grant release is defendant's failure to appear in court—which most courts inaccurately equate with flight risk.[220] The second is defendant's dangerousness. Third, courts consider the nature of the charge against defendant and weight of the evidence. Fourth, the criminal history of the defendant. Fifth, community ties and employment status. These factors will be discussed in order.

*1. Defendant Appearance at Trial*

The first and original purpose of bail—and the only justified historic reason to detain an individual—is flight risk, or the worry that defendant would flee the jurisdiction and not appear for trial.[221] At common law, misdemeanor defendants were generally released before trial because it was thought that bail was enough to ensure the defendant would appear given the minor consequences of the lesser crime.[222] In felony capital cases where a death sentence was possible, bail was not

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[218] *Arkansas Profile*, PRISON POLICY INITIATIVE (2014), https://www.prisonpolicy.org/profiles/AR.html.

[219] MASS. ANN. LAWS ch. 276, § 58.

[220] These factors are not one in the same, and flight is much more rare. *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837 (2016) (comparing flight risk and failure to appear and demonstrating that flight is uncommon).

[221] *See* BAUGHMAN, *supra* note 4, at 18 ("Bail determinations historically served the purpose of ensuring that the defendant appeared at trial and there were no decisions about guilt, as guilt was properly determined before trial."); Baradaran, *Presumption of Innocence*, *supra* note 8, at 728 ("[T]he primary purpose of bail was to ensure a defendant's presence at trial . . . ."); Shima Baradaran, *The Presumption of Punishment*, 8 CRIM. L. & PHIL. 391, 401 (2014) [hereinafter Baradaran, *Presumption of Punishment*] ("Bail was primarily used as an incentive to ensure that defendants appeared at trial and it was not denied based on a defendant's presumed guilt or innocence . . . .").

[222] WM. L. CLARK, JR., HAND-BOOK OF CRIMINAL PROCEDURE 86 (Wet Publishing Co., St. Paul, Minn., 1895). The bail for misdemeanor defendants historically was either a surety

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considered sufficient to dissuade the defendant from fleeing.[223] "[T]he only reason to treat capital defendants differently than others was the greater risk they posed of defeating the purposes of bail."[224] In today's world, it is virtually impossible for a typical defendant to leave the country undetected and the risk of flight is rare.[225] What is more common however, are defendants failing to appear in court (even multiple times) due to neglect or error.[226] Historically, a failure to appear or even several, did not prohibit release before trial for misdemeanor crimes.[227] Now, however, many courts deny bail, even for misdemeanor defendants based on previous failures to appear in court. Denial of bail, particularly for misdemeanor crimes is unnecessary because failure to appear in court can so easily be avoided. Many states successfully prevent failure to appear with simple reminder calls, texts or post cards.[228]

Despite these practical considerations, in many states, consideration that a defendant will not appear weighs heavily in a court's decision to grant or deny bail.[229] A defendant's past history of failing to show up to court dates is an indicator

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who would vouch for the defendant or a small amount of money or property left with the court that would be returned to defendant. *See* Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 861. This is far from the commercial bail that misdemeanor defendants have to pay today that is financially prohibitive for most poor defendants and not returned to defendant after appearance in court.

[223] CLARK, JR., *supra* note 222, at 86.

[224] Ariana Lindermayer, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 307 (2009) (discussing how proof of guilt has become "domina[ted]" defendants' liberty interest in the bail decisions).

[225] Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 689 (2018) (providing evidence that vast majority (83 percent) of felony defendants appear for all scheduled court appearances, and that only 3 percent of all released felony defendants remained fugitives after a year).

[226] *Id.* at 729–30 (laying out the range of reasons defendants may fail to appear such as "being unaware of or forgetting the date of the court appearance (which might reflect either ineffective notice by the court or poor calendar management by the defendant); illness or other unforeseen personal emergencies; external logistical challenges including employment conflicts, childcare issues, or lack of transportation; confusion or ignorance about the process or a general lack of capacity to navigate the process (this may reflect the complexity of the system and/or the defendant's cognitive limitations); fear of punishment relating to the pending charge; or lacking the funds to pay fines and fees that are owed at the courthouse").

[227] *See supra* note 55 to 56.

[228] "A simple reminder to defendants by pretrial services is effective in reducing failure to appear rates." BAUGHMAN, *supra* note 4, at 208. A 2010 study of fourteen Nebraska county courts showed that, without any reminder, 12.6 percent of defendants failed to appear in court but "with any postcard the failure to appear rate dropped . . . to 9.7 percent." *Id.* at 209. And a postcard that mentioned possible sanctions for failure to appear reduced the rate to 8.3 percent. *Id.*

[229] *See* CONN. GEN. STAT. § 54-64a(2) (2017) (requiring the court to consider "any prior record of failing to appear"); *see also* ALASKA STAT. § 12.30.011(i)(7) (2018) (requiring the court to consider "the person's record of appearance at court proceedings"); NEB. REV. STAT.

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of whether the defendant will appear to future dates.[230] As many as ten state statutes explicitly state that a past failure to appear is a consideration in the pretrial detention decision.[231] Among those, Colorado—a recently lauded bail reform state,[232]—allows failure to appear as a reason to deny bail.[233] Additionally, both Colorado and Connecticut have made clear that a court can deny ROR for misdemeanor offenses due to past failure to appear.[234] Some courts consider a defendant's failure to appear

§ 29-427 (1974) (authorizing a peace officer to detain an arrestee if "the accused has previously failed to appear in response to a citation"); ARK. R. CRIM. P. Rule 5.2(d)(vi)(E) (2018) (allowing a law enforcement officer to consider "whether the accused previously has failed to appear in response to a citation" in determining whether to continue custody or issue a citation); COLO. REV. STAT. § 16-4-113(1)(e) (2013) (prohibiting personal recognizance if "[t]he arrested person has previously failed to appear for trial for an offense concerning which he or she had given his written promise to appear"); FLA. R. CRIM. P. 3.125 (2012) (allowing the arresting officer or booking officer to issue a notice to appear depending on the accused's "past history of appearance at court proceedings"); IOWA CODE § 805.1(3)(b)(6) (2002) (requiring law enforcement to consider "[w]hether a person has previously failed to appear in response to a citation" in issuing a citation in lieu of arrest); NEB. REV. STAT. § 29-427 (1974) (requiring the arresting officer to consider whether "the accused has previously failed to appear in response to a citation" in deciding whether take the accused into custody); OHIO REV. CODE ANN. § 2935.26(A)(4)(a) (West 1978) (prohibiting an officer from issuing a citation if the accused has previously failed to "[a]ppear at the time and place" stated in a previous citation); VT. R. CRIM. P. 3(c)(5) (2017) (authorizing an officer to arrest the accused instead of issuing a citation if the "person has previously failed to appear in response to a citation, summons, warrant, or other court order"); WASH. REV. CODE. § 2.1(b)(2)(iv) (2017) (requiring law enforcement officers to consider "whether the person previously has failed to appear in response to a citation and notice issued pursuant to this rule or to other lawful process."); WIS. STAT. § 968.085(2)(e) (2017) (allowing law enforcement officer to consider whether "[t]he accused has previously failed to appear or failed to respond to a citation."); *see* ARIZ. REV. STAT. ANN. § 13-3967(B)(13) (West 2015); *see also* ARK. R. CRIM. P. 8.5(b)(vii); *see also* CAL. PENAL CODE § 1270(a) (West through 2017 Regular Session); *see also* COLO. REV. STAT. ANN. § 16-4-103(5)(j) (2014); *see also* DEL. CODE ANN. Tit. 11, § 2105(a) (2013); *see also* FLA. STAT. ANN. §§ 903.046(2)(d), 907.041(1) (2016, 2017); *see also* IND. CODE ANN. § 35-33-8-4 (2017).

[230] Baradaran & McIntyre, *supra* note 37, at 558.

[231] ARK. CODE ANN. § 5.2(d)(vi)(E) (2018); *see also* FLA. STAT. § 3.125 (2013); IOWA CODE § 805.1(3)(b)(6) (2002); NEB. REV. STAT. § 29-427 (1974); OHIO REV. CODE ANN. § 2935.26 (West 1978); Vt. R. CRIM. P. 3(c)(5) (2017); WASH. REV. CODE. § 2.1(b)(2)(iv) (2017); WIS. STAT. § 968.085(2)(e) (2017); COLO. REV. STAT. § 16-4-113(1)(e) (2013); CONN. GEN. STAT. § 54-64a(2) (2017).

[232] MICHAEL R. JONES, PRETRIAL JUSTICE INST., COLORADO: AN EXAMPLE OF PRETRIAL JUSTICE REFORM IN PROGRESS (2014), *available at* https://www.ncsc.org/~/media/Microsites/Files/PJCC/Panel%202%20Reforms%20Jones%202014-06%20CO%20Progress%20Report%20for%20NCSC.ashx.

[233] COLO. REV. STAT. § 16-4-113(1)(e) (2013).

[234] *Id.* (stating the court may deny ROR if the defendant "previously failed to appear"); CONN. GEN. STAT. § 54-64a(a)(2)(iii) (2017) (stating the court may deny ROR where the

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among several other factors in considering release, but not necessarily as the only determinative one.[235]

Some jurisdictions have determined that when a defendant fails to appear for court on the current crime charged, she waives her right to bail.[236] But this approach is harsh and definitely not universal. For instance, in *State v. Blair*, the defendant failed to show for court, but the trial court was found to have abused its discretion for denying him bail, because that failure had not been willful.[237]

Overall, a number of states use failure to appear as a reason to deny bail to misdemeanor defendants. What is troubling is that states who have undergone bail reform are among these states. Failure to appear should not be a reason to detain any defendant—misdemeanor or felony—given that studies repeatedly have shown that it is an easily prevented problem. Despite strong data on this, as indicated in Part III.B, risk assessments often improperly consider failure to appear in denying release to individuals.

### *2. Dangerousness of Defendant*

Dangerousness of defendant was not even a factor that courts could permissibly consider in determining bail until the 1980s,[238] but now it is the number one consideration of courts in determining pretrial release.[239] Many statutes and state

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defendant has a "prior record of failing to appear").

[235] *See* Constantino v. Warren, 684 S.E.2d 601, 604 (Ga. 2009) (citing OCGA § 17-6-1(e)); *see also* FLA. STAT. § 903.046(2)(a)–(m) (2016). Case law shows that state courts consider past failure to appear in denying bail. For example, in *Wilboiner*, a New York case, the defendant was originally arraigned on a trespass charge. The defendant failed to appear for a court hearing, his record indicated that his competency had been questioned before, and at a court hearing he did not appear to understand the charges against him. He was arrested on a warrant days later. Based on these facts, the criminal court determined that the defendant was not likely to show for subsequent court hearings or a court-order examination and, thus, could lawfully be held without bail. People v. Wilboiner, 936 N.Y.S.2d 873, 877 (N.Y. Crim. Ct. 2012) (held pending a competency examination).

[236] *See supra* note 233–34.

[237] State v. Blair, 39 So. 3d 1190, 1191 (Fla. 2010) (holding that the trial court failed to find Blair's failure to appear willful after the case had been refiled as a felony DUI, and given a new court date as opposed to Blair originally being arrested and charged for misdemeanor DUI).

[238] Baradaran, *Presumption of Innocence*, *supra* note **Error! Bookmark not defined.**, at 728, 748 (explaining that judges historically could not "detain defendants because they were likely to commit a crime while released" but that the Bail Reform Act of 1984 added "dangerousness" reversed that precedent); State v. Salerno, 481 U.S. 739, 748 (1987) (upholding the constitutionality of the Bail Reform Act of 1984).

[239] Baradaran & McIntyre, *supra* note 37, at 546 (noting that even though nationally courts consider many factors, when considering release decisions, it is clear that they are most concerned about the dangerousness of the defendant); BAUGHMAN, *supra* note 4, at 60 ("While constitutionally suspect . . . predictions of whether defendants will commit a crime

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cases specifically allow pretrial detention for dangerous defendants. What the meaning of a dangerous defendant is, however, is up for much dispute.[240] For the purposes of this Article, it is important to note that dangerous defendants have historically been felony—categorically not misdemeanor defendants—and those who cannot be stopped from harming witnesses or victims before trial even with reasonable measures.[241] What is clear from this section is that there is no uniform treatment throughout the states of what constitutes dangerousness adequate to detain before trial, and this definition is used too broadly to detain a much larger swath of misdemeanor defendants than is necessary.

Felonies represent generally more violent or serious conduct and such defendants are deemed to be more dangerous, even though many felony defendants are not dangerous.[242] Some courts have appropriately recognized, however, that misdemeanor defendants do not pose the same threat as felony defendants. As one Texas court remarked: "Ordinarily, those charged with misdemeanors do not present the threat to people and property as those charged with felonies. The need for their detention is not so great."[243] Another Texas court reasoned that though some misdemeanors involve violence, felonies tend to "involve serious violence or anti-social conduct."[244] The California Supreme Court remarked on the public policy reasons for treating misdemeanors and felonies differently, stating that society has a stronger interest in "the prosecution of more serious crimes" like felonies because they pose a "heightened threat to society than minor [crimes]."[245] Additionally,

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on release are foremost in pretrial release.").

[240] For an extremely thoughtful exposition of this topic, see Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 499 (2018) ("[F]or purposes of preventive restraint, there is no clear, relevant distinction between defendants and non-defendants who are equally dangerous . . . there is no clear normative basis for subjecting defendants to preventive restraint that we would not tolerate for equally dangerous people not accused of any crime.").

[241] Baradaran, *Presumption of Innocence*, *supra* note 8, at 748–50 (discussing the use of the "dangerousness" inquiry being limited to explicitly capital cases before Bail Reform Act of 1984 and the Supreme Court's decision in *United States v. Salerno*, stating that "a defendant may be detained if he presents a danger to a witness); Baradaran & McIntyre, *supra* note 37, at 503–06 (discussing historical common law practice of guaranteeing defendant's right to bail which was presumed for all but murder defendants and then guaranteeing bail for all noncapital offenses).

[242] Oddly enough, felony defendants of the most dangerous type (three or more violent felony convictions) are still only likely to commit another violent crime less than 10% of the time on pretrial release. *See* Baradaran & McIntyre, *supra* note 37, at 530.

[243] *Ex parte* Smith, 493 S.W.2d 958, 959 (Tex. Crim. App. 1973).

[244] Armon v. Jones, 580 F.Supp. 917, 926 (N.D. Tex. 1983) (stating that it does not violate the constitutional right to equal protection to treat misdemeanor "pretrial detainees" different than felony detainees).

[245] People v. Traylor, 210 P.3d 433, 438–39 (Cal. 2009); *see also* Myers v. The Telegraph, 773 N.E.2d 192, 197–98 (Ill. App. Ct. 2002) (discussing how society views misdemeanors and felonies different, the latter as a more serious crime).

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research shows that dangerousness is not predicted successfully by courts using a typical balance of pretrial release factors. In a 2011 study, Frank McIntyre and I found that "judges often detain the wrong people,"[246] and that important actual predictors of dangerousness are current violent crime charges and a prior convictions of three or more violent crimes.[247] We also found that for even felony defendants with a rap sheet, the average rearrest rates are only about 1%-2% for a pretrial violent crime.[248] Indeed, most felony defendants do not pose a violent crime risk when released on bail—only a small subset of felony defendants do—and misdemeanor defendants are even safer to release pretrial.

In current state statutes, the "dangerousness" of the crime—or the potential danger the defendant poses to the public—often serves as an exception to the presumption of ROR in a misdemeanor case. Five states have explicitly established by statute that this concern represents an exception to ROR.[249] Unlike the others that seem to combine misdemeanors and felonies, Connecticut's statute makes clear though that only with felony offenses can a court impose financial conditions upon a finding that the defendant "threatens the safety of himself or herself or another person."[250]

Twenty-eight states consider the dangerousness of the crime specifically by statute in both felony and misdemeanor pretrial release decisions.[251] For instance,

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[246] Baradaran & McIntyre, *supra* note 37, at 497.

[247] *Id.* at 557.

[248] *Id.* The highest risk posed was for defendants charged with a violent crime with three violent crime convictions and their chances of committing a violent crime on release were about 10%, high enough to detain in my judgment. *Id.*

[249] ALASKA STAT. § 12.30.011(b)(2) (2018) (stating that ROR may be denied based on a finding that it cannot "reasonably ensure . . . the safety of the victim, other persons, and the community."); *see also* CAL. PENAL CODE § 1270(a) (West 1995) ("A defendant who is in custody and is arraigned on a complaint alleging an offense which is a misdemeanor . . . shall be entitled to an own recognizance release unless the court makes a finding . . . that an own recognizance release will compromise public safety . . . Public safety shall be the primary consideration. If the court makes one of those findings, the court shall then set bail and specify the conditions, if any, whereunder the defendant shall be released."); CONN. GEN. STAT. § 54-64a(2) (2017); N.H. REV. STAT. ANN. § 597:2(II) (2016) (stating that pending a trial, the court will can ether ROR, set bail, or temporarily detain the defendant, dependent upon a number of factors, including whether the defendant "will endanger the safety of the person or of any other person or the community" upon release); COLO. REV. STAT. § 16-4-113(1)(c) (2013).

[250] CONN. GEN. STAT. § 54-64a(2) (2017).

[251] These states seem to apply the dangerousness factor to both misdemeanor and felony cases. *See* ARIZ. REV. STAT. ANN. § 13-3967 (2015); *see also* DEL. CODE ANN. tit. 11, § 2105 (2013); D.C. CODE § 23-1322 (2013); FLA. STAT. § 903.046 (2016); FLA. STAT. § 907.041 (2017); IDAHO CODE § 19-2904 (2009); 725 ILL. COMP. STAT. 5/110-5 (2013); IND. CODE § 35-33-8-4 (2017); IOWA CODE § 811.2 (2013); KAN. STAT. ANN. § 22-2802 (2013); KY. REV. STAT. ANN. § 431.520 (West 2014); LA. CODE CRIM. PROC. ANN. art. 316 (2017); ME. STAT. tit. 15, § 1026 (2016); MINN. R. CRIM. P. 6.02 (2016); MS R RCRP Rule 8.2 (2017); MO.

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under California statute: "In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public . . . . The public safety shall be the primary consideration."[252] State statutes are not always clear on how a court should determine whether the defendant poses a danger. California requires the court to look to "alleged injury to the victim, and alleged threats to the victim or a witness to the crime charged, the alleged use of a firearm or other deadly weapon in the commission of the crime charged, and the alleged use or possession of controlled substances by the defendant."[253] Though not all statutes specifically address the reason, several reflect a purpose to either protect the community at large or specific persons to which the defendant may be a danger.[254] Whether a defendant poses a danger to the public, herself, or a specific person is a consideration that seventeen states have codified in statutes regarding pretrial release, amount and conditions for bail, and citations in lieu of custody.[255] Four states have established by statute that it is a factor to consider in deciding whether to deny bail altogether specifically in reference to misdemeanor cases.[256]

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REV. STAT. § 544.457 (1993); MONT. CODE ANN. § 46-9-109 (2017); NEB. REV. STAT. § 29-901.01 (2017); NEV. REV. STAT. § 178.4853 (1997); N.D. R. CRIM. P. 46 (2006); OR. REV. STAT. § 135.230 (2017); 12 R.I. GEN. LAWS § 12-13-1.3 (1992); S.D. CODIFIED LAWS § 23A-43-4 (2017); TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 1993); VT. STAT. ANN. tit. 13, § 7554 (2016); VA. CODE ANN. § 19.2-120 (2015); WASH. REV. CODE § SUPER CT CR CrR 3.2 (2017); WYO. R. CRIM. P. 46 (2018).

[252] CAL. PENAL CODE § 1275 (West 2015).

[253] *Id.*

[254] *See* 725 ILL. COMP. STAT. 5/110-5(a) (2013) (stating whether to grant pretrial, the court should consider what condition, "if any, which will reasonably assure . . . the safety of any other person or the community."); *see also* IND. CODE § 35-33-8-4(b) (2017) (stating that in setting bail, courts should consider the amount necessary to "assure the physical safety of another person or the community if the court finds by clear and convincing evidence that the defendant poses a risk to the physical safety of another person or the community."); IOWA CODE § 811.2 (2013); KAN. STAT. ANN. § 22-2802(1) (2013); LA. CODE CRIM. PROC. ANN. art. 316 (2017).

[255] *See* ALASKA STAT. § 12.30.011(b)(2) (2018); *see also* ARK. CODE ANN. § 12.30.011 (2018); CAL. PENAL CODE § 1270 (West 1995); CONN. GEN. STAT. § 54-64a(a) (2017); N.H. REV. STAT. ANN. § 597:2(III) (2016); COLO. REV. STAT. § 16-4-113(1)(c) (2013); FLA. R. CRIM. P. 3.125(b)(2) (2013); IOWA CODE § 805.1(b)(3) (2002); KY. REV. STAT. ANN. § 431.015(b)(2) (West 2017); LA. CODE CRIM. PROC. art. 211(A)(1)(b) (2011); MD. CODE ANN., CRIM. PROC. § 4-101(2)(iii) (West 2016); MN. R. CRIM. P. 6.01(a)(1) (2015); VT. R. CRIM. P. 3 (2017); WASH. CRIM. R. 2.1(b)(2)(ii) (2017); W. VA. CODE § 62-1-5a(1) (1982); WIS. STAT. § 968.085(2)(c) (2017); WYO. STAT. ANN. § 7-2-103(b)(i) (2011).

[256] COLO. REV. STAT. § 16-4-113(1)(c) (2013) (stating ROR or bond unless "[t]he continued detention or posting of a surety bond is necessary to prevent imminent bodily harm to the accused or to another."); *see also* MICH. COMP. LAWS § 780.581(1) (1991) (stating that a person arrested for a misdemeanor that is "punishable by imprisonment for not more than 1 year, or by a fine, or both, the officer making the arrest shall take, without unnecessary delay, the person arrested before the most convenient magistrate of the county in which the offense was committed to answer to the complaint[,]" but if a magistrate is not available the

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If the court determines it can ensure the protection of the public and specific individuals with certain bail conditions, then the defendant may be released; however, a few jurisdictions have certain types of offenses which are an exception to the right to bail and the defendant should be held on pretrial detention in those cases when charged with a felony or misdemeanor. The District of Columbia has gone as far as to establish a "rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community if the judicial officer finds by probable cause that the person committed" a range of criminal acts, including "a crime of violence…while armed[,]" or "a robbery in which the victim sustained physical injury"—among others.[257] This DC code specifically applies to misdemeanor defendants as well.[258]

Courts have similarly denied release in cases where otherwise releasable misdemeanor defendants have been deemed dangerous. The Supreme Court of North Dakota upheld a trial court's decision not to grant bail where the defendant had three misdemeanor convictions, all of a violent nature, and a pending robbery charge against him—even though the defendant made a showing that he was likely to show up for future court dates.[259] The basis for the court's decision is that the defendant "would create a danger to the public[]" if released.[260] Similarly, in *State v. Goodie*, the Louisiana court denied the misdemeanor defendant bail because he had violated a protective order on multiple occasions and the court believed his behavior toward the victim had escalated to the point that he had become an

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defendant may be released on bond, unless it is "unsafe to release him or her."); N.H. REV. STAT. ANN. § 597:2(II) (2016) (stating that pending a trial, the court will can ether ROR, set bail, or temporarily detain the defendant, dependent upon a number of factors, including whether the defendant "will endanger the safety of the person or of any other person or the community" upon release) *see also* CAL. PENAL CODE § 1275(a)(1) (West 2014).

[257] D.C. CODE § 23-1322 (2013). Note that all of the crimes of violence are felonies even though the person who is arrested can be arrested on a felony or misdemeanor charge initially. *See* D.C. CODE § 23–1331(3) (2013). The "felony or misdemeanor" language was added as a bail reform amendment. *See Bail Reform*, 2000 D.C. Laws 13-310 (Act 13-567).

[258] D.C. CODE § 23–1322 (2013) ("Detention prior to trial.") Interestingly, the DC code only applied this presumption against crimes committed by felony defendants on release but expanded the statute to misdemeanor defendants in 2000. The code provides:

"(a) The judicial officer shall order the detention of a person charged with an offense for a period of not more than 5 days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation or parole official, or local or state law enforcement official, if the judicial officer determines that the person charged with an offense:

(1) Was at the time the offense was committed, on:

(A) Release pending trial for a felony or misdemeanor under local, state, or federal law…." *Id.*

[259] State v. Azure, 241 N.W.2d 699 (N.D. 1976).

[260] *Id.* at 701.

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"imminent danger" to her.[261] The above examples seem like decent exceptions to the presumptive release right for misdemeanors.

However, in other cases, states are more likely to honor a categorical refusal to detain misdemeanor defendants without substantial threats of physical violence. In such a case, the Supreme Court of Vermont declined to uphold the trial court's decision to hold the defendant without bail.[262] There the misdemeanor defendant had made statements that caused a concern that she may self-harm; however, Vermont had carved out an exception prohibiting detention of non-violent misdemeanor or felony defendants.[263] Further, the Vermont Constitution specifically limits detention for dangerousness to where there is clear and convincing evidence of a "substantial threat of physical violence" by felony defendant where no conditions can reasonably prevent the physical violence.[264] Vermont is a good example of a state that continues to respect the presumptive release right for misdemeanor defendants.

Some courts have established that the government bears the burden of proof for showing that the defendant is a danger, justifying detention. For example, in Massachusetts, the government must prove by "clear and convincing" evidence that the defendant would be a danger if released.[265] Upon such a showing, the court can order preventative pretrial detention.[266] In making a showing that defendant is dangerous, the government is not required to establish a so-called "nexus" between the dangerous crime charged and the parties to whom the defendant may be a danger to.[267] In other states like North Dakota, the Supreme Court has explicitly rejected the requirement that the government bears the burden of proof.[268]

Some of the state statutes specifically identify what constitutes a dangerous crime. However, many states do not specify this by statute. In many of these states, it is unclear and inconsistent what exactly constitutes a dangerous or violent crime.

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[261] State v. Goodie, 2017-693 (La. App. 3 Cir. 8/23/17); 226 So.3d 1130.

[262] State v. Kane, 2016 VT 121, ¶¶ 3–10, 203 Vt. 652,160 A.3d 1020.

[263] *Id.*

[264] State v. Lontine, 2016 VT 26, ¶ 44, 201 Vt. 637, 142 A.3d 1058 (finding that a defendant who was charged with aggravated domestic violence was lawfully denied bail) (quoting Vermont Constitution, ch. II, § 40(2)); *see also* ARK. R. CRIM. P. 8.5 (2018); State v. Houng, 2009-Ohio-2955, ¶¶ 15–16 (stating that the right to bail applies to all offenses except capital and felony offenses where "the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community."(citing Ohio Const. Article I, Section 9)).

[265] Mendonza v. Commonwealth, 673 N.E.2d 22, 34 (Mass. 1996).

[266] Mendonza v. Commonwealth, 673 N.E.2d 22, 34 (Mass. 1996).

[267] *Id.* For instance, the defendant need not actually have harmed the individual for the government to successfully establish that the defendant poses a danger to the individual. *Id.* at 34.

[268] State v. Azure, 241 N.W.2d 699, 701 (N.D. 1976). The Supreme Court of North Dakota stated "The appellant argues that the burden of establishing that the defendant is likely to flee and poses a danger to the community rests with the State. We disagree. The North Dakota rule on release after conviction…is silent … as to the relative burdens of proof carried by the State and the defendant on this issue." *Id.*

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Some states include misdemeanors in such categories and other states stick to the historical understanding and only detain pretrial for dangerous and serious crimes.[269] Hawaii law, for instance, describes a "serious crime" as "murder or attempted murder in the first degree, murder or attempted murder in the second degree, or a class A or B felony, except forgery in the first degree and failing to render aid…"[270] In contrast, Florida's definition consists of numerous forms of crime—both felony and misdemeanor—including but not limited to: "[a]rson; [a]ggravated assault; [c]hild abuse; [k]idnapping; [h]omicide; [m]anslaughter; [s]exual battery" and more.[271] In a Florida case, the appeals court upheld the trial court's decision to release the defendant on bail, even though he had committed three counts of battery on a law enforcement officer, two counts of resisting with violence, one count of criminal mischief, a misdemeanor, and one count misdemeanor DUI[]" because none of these crimes constituted a "dangerous crime" under Florida statute and sufficient bail conditions had been entered to ensure the public safety.[272]

Overall, what is clear is that a dangerous crime or defendant is not clearly defined among the states but yet most states use it as a factor even for misdemeanor offenses. Further, it is also clear that misdemeanor crimes have been improperly tethered to felony offenses and courts have justified pretrial detention for even minor acts of assault. Though some states clearly maintain the historically established right of presumptive release for misdemeanor defendants, and do not limit it except for with serious violent crimes.

### 3. *Nature of the Charge and weight of evidence*

Another factor that is highly influential for courts in determining release is the nature of charge (or circumstances of the crime) and weight of the evidence pertaining to the charge. Here, the court considers how serious the charge is and how much evidence there is to prove the charge. Both of these considerations, especially the latter, are highly problematic for due process and the presumption of innocence.[273] Yet both of these considerations are important in determining both felony and misdemeanor release.

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[269] Almazrouei v. State, 971 So.2d 185, 186 (Fla. Dist. Ct. App. 2007) (reversing the trial court's decision to deny bond because the accused had not been charged with "dangerous crimes"); *see also* Swanson v. Allison, 617 So. 2d 1100, 1100 (Fla. Dist. Ct. App. 1993) (finding that a defendant charged with domestic abuse—misdemeanor battery—was entitled to bail because battery does not constitute a "dangerous crime" under Florida statute); HAW. REV. STAT. § 804-3 (1987) (applying to both misdemeanor and felony offenses).

[270] HAW. REV. STAT. § 804-3 (1987).

[271] FLA. STAT. § 907.041 (2017).

[272] Almazrouei v. State, 971 So.2d 185, 186 (Fla. Dist. Ct. App. 2007).

[273] *See* Baradaran, *Presumption of Punishment*, *supra* note 221, (explaining that weighing of evidence is clearly a duty of jurors not judges); Baradaran, *Presumption of Innocence*, *supra* note 8, at 770–72 (arguing that weighing of evidence against a defendant

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The majority of states have statutes that consider the "nature" of the crime charged in determining bail. Thirty-two states have established that the "nature of the crime" should be considered in the pretrial release decisions.[274] Some jurisdictions identify this factor in considering "dangerousness," directly identify violent crimes, or consider it with the weight of the evidence against defendant.[275]

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is a violation of due process because the presumption of innocence protects defendants and "historically judges were limited to predicting whether the defendant would appear at trial.")); *see also* BAUGHMAN, *supra* note 4, at 200 (explaining that the Due Process Clause is violated when the judge determines "the weight of the evidence against a defendant in a pretrial hearing without counsel" because the Due Process Clause requires "a conviction of guilt by a jury," not a judge).

[274] *See* ARIZ. REV. STAT. ANN. § 13-3967 (West 2015); *see also* Del. Code Ann. tit. 11, § 2105(b) (2013); D.C. Code § 23-1322(e)(4) (2013); Fla. Stat. § 903.046(2)(a) (2016); 725 Ill. Comp. Stat. 5/110-5(a) (2013); Ind. Code § 35-33-8-4(b)(7) (2017); Iowa Code § 811.2(2) (2013); Kan. Stat. Ann. § 22-2802(8) (2013); La. Code Crim. Proc. Ann. ART. 316(5) (2017); Me. Stat. tit. 15, § 1026(4)(A) (2016); Mass. Gen. Laws ch. 276, § 58 (2014); Minn. R. Crim. P. 6.02(2)(a) (2018); Miss. R. Crim. P. 8.2(a)(6) (2017); Mo. REV. Stat. § 544.455(2) (2013); Mont. Code Ann. § 46-9-109(2)(a) (2017); Neb. Rev. Stat. § 29-901.01 (2017); Nev. Rev. Stat. § 178.4853(7) (1997); N.C. Gen. Stat. § 15A-534(c) (2016); N.D. R. Crim. P. 46(a)(3)(A) (2018); Ohio R. Crim. P. 46(C)(1) (2018); Or. Rev. Stat. § 135.230(7)(b) (2017); Pa. R. Crim. P. 523(A)(1) (2016); S.C. Code Ann. § 17-15-30(A) (2015); S.D. Codified Laws § 23A-43-4 (2017); Tenn. Code Ann. § 40-11-115(b)(7) (1978); Tex. CODE Crim. Proc. Ann. § 17.15(3) (West 1993); Va. Code Ann. § 19.2-120(E)(1) (2015); WASH. Crim. R. 3.2(c)(8) (2017); W. Va. Code § 62-1C-3 (1965); Wyo. R. Crim. P. 46.1(d)(2) (2018).

[275] *See* Mendonza v. Commonwealth, 673 N.E.2d 22, 26 (Mass. 1996); *see also Knapp v. State*, 477 S.E.2d 621, 623 (Ga. Ct. App. 1996) (finding that after an evidentiary hearing on issue of whether to grant appeal bond in misdemeanor cases, the trial court must determine "whether there is a substantial risk the defendant will pose a danger to others in the community…"); State v. Kane, 2016 VT 121, ¶ 12, 203 Vt. 652,160 A.3d 1020 (providing that under Vermont statute defendants are entitled to bail on misdemeanor violations of probation if the violation was non-violent and did not constitute a new crime); State v. Goodie, 2017-693, p. 12–13 (La. App. 3 Cir. 8/23/17); 226 So.3d 1130, 1137–38. Vermont courts consider the following factors: "the nature and circumstances of the offense, the weight of the evidence against the accused, the accused's family ties, history of employment, financial resources, ties to the community, record of convictions, record of appearance at court proceedings, and the character and mental condition of the accused." State v. Morrison, No. 2007-350, 2007 WL 5313415, at *1 (Vt. Sept. 1, 2007) (citing *State v. Blackmer*, 631 A.2d 1134, 1137 (Vt. 1993)); *see also* ALASKA STAT. § 12.30.011(c)(2) (2018); ARK. R. CRIM. P. 5.2(d)(vi)(C) (2018); CAL. PENAL CODE § 1270 (West 1995); COLO. REV. STAT. § 16-4-113(1)(c) (2013); CONN. GEN. STAT. § 54-64a(2) (2017); FLA. R. CRIM. P. 3.125(b)(3) (2013); IOWA CODE § 805.1(b)(3) (2002); KY. REV. STAT. ANN. § 431.015(b)(2) (West 2017); LA. CODE CRIM. PROC. ANN. art. 211(A)(b) (2011); MD. CODE ANN., CRIM. PROC. § 4-101(c)(2)(iii) (West 2016); MICH. COMP. LAWS § 780.581(3) (1990); MN R. CRIM. P. 6.01(b)(1) (2015); NEB. REV. STAT. § 29-427 (1974); NEV. REV. STAT. § 178.4851(1) (2007); N.H. REV. STAT. ANN. § 597:2(II) (2016); PA. R. CRIM. P. 519(B)(1)(b) (2013); TENN. CODE ANN. § 40-7-118 (2012); VT. R. CRIM. P. 3 (2018); VA. CODE ANN. § 19.2-74 (2014); WASH.

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In a recent New York study, the most important factor in determining whether a defendant would be released before trial was the severity of the charge. Indeed it was the "most powerful driver of current bail decisions."[276] This includes whether a charge is a misdemeanor or felony—which is appropriate, and a welcomed distinction.[277] Some states have made clear that in misdemeanor cases, the weight of the evidence—or how likely a defendant is to be convicted—is an important factor in determining bail.[278] As many as thirty-one states indicate that courts should consider the weight of the evidence in making pretrial release decisions.[279] At least eight of those statutes expressly provide the weight of the evidence as a part of the calculus in deciding whether the defendant should be released at all: Arkansas,[280]

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CRIM. R. 3.2 (2017); W. VA. CODE § 62-1-5A (1982); WIS. STAT. § 968.085 (2017); WYO. STAT. ANN. § 7-2-103(b) (2011) ("A person may be released if, after investigation, it appears that the person: Does not present a danger to himself or others; [or] [w]ill not injure or destroy the property of others").

[276] MICHAEL REMPEL ET AL., VERA INST. OF JUSTICE, JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM viii (2017), *available at* https://storage.googleapis.com/vera-web-assets/downloads/Publications/jail-in-new-york-city/legacy_downloads/NYC_Path_Analysis_Final-Report.pdf.

[277] *Id.* The study also considered whether the charge was violent or nonviolent. All of these were important in terms of charge severity.

[278] FLA. STAT. § 903.046 (2016) (applying to both misdemeanor and felony charges); *see also* ALASKA STAT. § 12.30.011 (2018) (applying to misdemeanors and some class C felonies); ARIZ. REV. STAT. ANN. § 13-3967 (2015) (applying to both misdemeanor and felony charges).

[279] John P. Gross, *The Right to Counsel But Not the Presence of Counsel: A Survey of State Criminal Procedure for Pre-trial Release*, 69 FLA. L. REV. 831, 850–53 (2017). *See* Yording v. Walker, 683 P.2d 788, 792 (Colo. 1984) (concluding that a refusal to permit the introduction of evidence pertinent to whether bail should be granted was erroneous); *see also* Blackwell v. Sessums, 284 So. 2d 38, 39 (Miss. 1973) (affirming denial of bail where the evidence was not clear that proof was evident that defendant was guilty).

[280] ARK. R. CRIM. P. 8.5(b)(vi) (2018) (stating that the court should consider the "likelihood of conviction and the possible penalty" in the pretrial decision).

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Florida,[281] Idaho,[282] Illinois,[283] Maryland,[284] Montana,[285] Pennsylvania,[286] and Tennessee.[287]

Considering the nature of the crime is arguably a relevant factor in considering felony bail, as violent felony defendants with a serious violent history may not be eligible for bail. However, weighing evidence against any defendant—felony or misdemeanor—is inappropriate for a judge in a pretrial hearing.[288] Weighing of evidence is part of the role of the jury and should only be done during trial.[289] Further, the weight of the evidence against an individual shouldn't matter at the misdemeanor stage. Even if there seems to be a mound of evidence that a defendant committed a misdemeanor, she should still be entitled to release before trial. And it should not matter what the nature of a misdemeanor crime is—whether violent or nonviolent—and a defendant should be released before trial except in rare circumstances where a defendant may be incompetent or unable to be restrained from harming a victim or witness with clear and convincing evidence.

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[281] FLA. R. CRIM. P. 3.131(3) (2018) ("In determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court may consider . . . the weight of the evidence against the defendant").

[282] IDAHO CRIM. R. 46(c)(6) (2017) ("The determination of whether a defendant should be released on the defendant's own recognizance or admitted to bail, and the determination of the amount and conditions of bail, if any, may be made after considering any of the following factors: … the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty").

[283] 725 ILL. COMP. STAT. 5/110-5(a) (2016) ("In determining the amount of monetary bail or conditions of release, if any ... the court shall ... take into account such matters as the nature and circumstances of the offense charged . . . the likelihood of conviction, the sentence applicable upon conviction, the weight of the evidence against such defendant…").

[284] MD. CODE ANN., CRIM. PROC. § 4-216(e)(1)(A) (West 2016) ("In determining whether a defendant should be released and the conditions of release, the judicial officer shall take into account the following information, to the extent available: …the nature of the evidence against the defendant, and the potential sentence upon conviction").

[285] MONT. CODE ANN. § 46-9-109(2)(b) (2015) ("In determining whether the defendant should be released or detained, the court shall take into account the available information concerning: …the weight of the evidence against the defendant ...").

[286] PA. R. CRIM. P. 523(A)(1) (2016) ("[T]he bail authority shall consider . . . any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty…").

[287] TENN. CODE ANN. § 40-11-115(b)(7) (2016) ("In determining whether or not a person shall be released as provided in this section…the magistrate shall take into account: … the apparent probability of conviction and the likely sentence . . .").

[288] *See* Baradaran, *Presumption of Punishment*, *supra* note 221; *see also* BAUGHMAN, *supra* note 4, at 200–02 ("[W]eighing facts about a defendant's guilt before trial is both a violation of Due Process and the Sixth Amendment.").

[289] *See* Baradaran, *Presumption of Punishment*, *supra* note 221; *see also* BAUGHMAN, *supra* note 4, at 201 ("On top of violating Due Process, judges are infringing upon the Sixth Amendment right to trial by jury in determining facts at the bail hearing.").

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*3. Criminal Record*

While a defendant's criminal record has been a factor in considering whether to release a felony defendant, it has now also become relevant in determining whether to release a misdemeanor defendant. Historically, a misdemeanor defendant has been released as a matter of course, but now that the release factors have often been combined for both types of crimes, it has also become important for both felonies and misdemeanors.[290] Some judges admit that when they see a record of warrants, they cannot help but set bail, even in a misdemeanor case.[291] Colorado, California and Mississippi have listed criminal history as a specific ground for denying bail in misdemeanor cases.[292] Additionally, if the defendant has a warrant is also a factor that some courts consider, or whether trial has begun.[293] After a defendant has been convicted of a misdemeanor, most courts determine that she is not entitled to bail, even if the conviction is pending appeal.[294] The rationale for this

[290] Yates v. State, 679 S.W.2d 538, 540 (Tex. Ct. App. 1984) (finding that the defendant was not likely to appear in court and could therefore be held without bail where the defendant had committed a DUI while on bond).

[291] In *Misdemeanorland*, Issa Kohler-Hausmann examines how in New York City, criminal history plays a significant role in judges' bail evaluations. She describes one judge who feels that "even if he believes the eventual disposition in a case he sees at arraignments will not involve a prospective jail sentence, he feels obligated to set bail if the person has a record of bench warrants." KOHLER-HAUSMAN, *supra* note 5, at 164–65. In fact, the judge says, "'Record is the first primary thing that you look at. . . . You're pretty sure they're not going to make bail no matter what you set. So now you're torn. . . . But they have a history of bench warranting. How can I not set bail on the case?" *Id*.

[292] COLO REV. STAT. § 16-4-113 (2013) (referring to misdemeanor crimes specifically); *see also* CAL. PENAL CODE § 1275 (West 2015); MISS. CODE ANN. § 99-3-18 (1980) (specifying misdemeanors).

[293] For example, in New York and North Dakota once a trial commences, the trial court has the discretion to hold a misdemeanant without bail. People *ex rel.* Sweeney v. Fallon, 141 N.Y.S. 303 ( N.Y. App. Div. 1913); *see also* N.D. R. CRIM. P. 46 (2006).

[294] Gallie v. Wainwright, 362 So. 2d 936, 941 (Fla. 1978); *see also Ex parte* Caldwell, 125 S.W. 25, 25–26 (Tex. Crim. App. 1910) (holding that the defendant was not entitled to bail pending retrial). Under Florida statute, in some instances after a misdemeanor conviction, the court will be entirely barred from granting bail. *See* Dotson v. State, 764 So.2d 6 (Fla. Dist. Ct. App. 1999). For example, generally where the defendant has been convicted of a felony, he will not be permitted bail pending review, "unless the defendant establishes that the appeal is taken in good faith, on grounds fairly debatable, and not frivolous. However, in no case shall bail be granted if such person has previously been convicted of a felony, the commission of which occurred prior to the commission of the subsequent felony, and the person's civil rights have not been restored or if other felony charges are pending against the person and probable cause has been found that the person has committed the felony or felonies at the time the request for bail is made." FLA. R. CRIM. P. 3.691(a) (2018); *see also* State v. Azure, 241 N.W.2d 699, 700 (N.D. 1976) (stating that defendant may be released on bail after a conviction and pending an appeal "only if it appears (1) that the appeal is not frivolous, (2) that the appeal is not taken for the purpose of delay,

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is that the defendant is no longer presumed innocent "and is not entitled to admission to bail as a matter of right."[295]

Overall, since felony bail has always involved some discretion—especially for serious violent offenses, considering a defendant's criminal history does not offend constitutional rights or historical precedent. However, misdemeanor bail has generally been a presumptive right, so consideration of criminal history is generally not appropriate in this context.

*4. Community Ties, Residential and Employment Circumstances*

Finally, courts sometimes consider a group of catch-all factors often called community ties or residential and employment circumstances.[296] Specifically, some

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(3) there is sufficient reason to believe that the conditions of release will reasonably assure that the defendant will not flee, and (4) there is sufficient reason to believe that the defendant does not pose a danger to any other person or to the community."). Under Oklahoma statute, where the defendant has a pleaded guilty or *nolo contendere* to a misdemeanor charge, if the defendant withdraws the plea, he or she is entitled to bail. Roberts v. Morgan, *ex rel.* Mun. Court of City of Oklahoma City, 1998 OK CR 31, ¶ 5, 965 P.2d 382, 383. But a defendant may be entitled to bail even after conviction if the defendant has been sentenced to probation and proceedings to revoke bail is initiated; pending the revocation of probation the defendant is entitled to reasonable bail. *Ex parte* Smith, 493 S.W.2d 958, 959 (Tex. Crim. App. 1973). *But see* State v. Henley, 363 P.3d 319, 328 (Haw. 2015) ("As this court recently noted in *State v. Kiese*, . . . the right to bail shall continue after conviction of a misdemeanor, and … an accused misdemeanant… is entitled to bail as a matter of right after conviction and pending appellate review." (internal citations omitted)).

[295] Williams v. City of Montgomery, 739 So. 2d 515, 518 (Ala. Civ. App. 1999) (quoting ALA. R. CRIM. P. R. 7.3(b)) (internal citations omitted); *see also* State v. Parker, 220 N.C. 416, 17 S.E.2d 475, 477–78 (1941) (holding that after a conviction has been entered, the defendant is not entitled to bail and the trial court has extensive discretion in assessing bail if it so chooses). In Virginia, a defendant has right to bail when judgement is suspended on a misdemeanor charge. *Ramey v. Commonwealth*, 133 S.E. 755, 756 (Va. 1926); *see also* Cox v. State, 416 So. 2d 511, 512 (Fla. Dist. Ct. App. 1982) (noting that "[w]hether the conviction is misdemeanor or felony, no absolute constitutional right to *post-conviction* bail exists" and that it was within the trial court's discretion to deny the defendant bail based on his having a pending felony charge against him); *But see* State v. Henley, 363 P.3d 319, 328 (Haw. 2015) (noting that Hawaii maintains a right to bail even after the misdemeanant has been convicted); *Ex parte* Spanier, 258 P.2d 1072 (Cal Dist. Ct. App.1953) (holding that the defendant was not entitled to bail because he never appealed the misdemeanor conviction).

[296] *See* ARK. R. CRIM. P. 8.5 (2018); *see also* DEL. CODE ANN. tit. 11, § 2105 (2013) ("In determining whether the accused is likely to appear as required and that there will be no substantial risk to the safety of the community the court shall, on the basis of available information, take into consideration . . . the length of residence in the community…");ARIZ. REV. STAT. ANN. § 13-3967 (2015) (citing "length of residence in the community" as a factor to consider when deciding ROR or amount of bail); ARK. R. CRIM. P. 8.5 (2018) (citing "past and present residence," and "strong ties to the community" as factors); FLA. STAT. § 903.046 (2016) (considering the defendant's "length of residence in the community"); FLA. STAT. §

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state statutes require the court to consider the defendant's residential status and financial status.[297] Arkansas and Colorado require the court to consider the defendant's "past and present residence" and "any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction."[298] Other courts consider whether the defendant is employed and even whether the defendant owns a home or cell phone in considering release.[299] In a

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907.041 (2017) (considering the defendant's "length of residence in the community"); 725 ILL. COMP. STAT. 5/110-5 (2018) (considering "prior residence" and "length of residence in the community" as factors); IND. CODE § 35-33-8-4(b) (2017) (citing "length and character of the defendant's residence in the community" as factors); IOWA CODE § 811.2(2) (2013) (citing "length of the defendant's residence in the community" as a factor); KAN. STAT. ANN. § 22-2802(8) (2013) (citing "length of residence in the community" as a factor); ME. STAT. tit. 15, § 1026(4) (2018) (citing "[t]he defendant's length of residence in the community and the defendant's community ties" as factors); MASS. GEN. LAWS ch. 276, § 58 (2018) (citing the "length of residence in the community" as a factor); MINN. R. CRIM. P. 6.02(Subd. 2) (2016) (citing the "length of residence in the community" as a factor); MS R RCRP Rule 8.2(a) (2017) (noting that the "residence of the defendant, including consideration of real property ownership, and length of residence in the defendant's domicile" are factors); MO. REV. STAT. § 544.455(2) (2013) (citing the "length of his residence in the community" as a factor); MONT. CODE ANN. § 46-9-109(2) (2017) (citing the "length of residence in the community, community ties" as factors); NEB. REV. STAT. § 29-901.01 (2017) (considering the "length of the defendant's residence in the community"); NEV. REV. STAT. § 178.4853 (1997) (citing "length of residence in the community" and "ties to the community" as factors); N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2017) (citing the "length of his residence if any in the community" as a factor); N.C. GEN. STAT. § 15A-534(c) (2017) (considering the "length of his residence in the community"); *see also* N.D. R. CRIM. P. 46(a)(3) (2006) (considering the "the length of the person's residence in the community"); OHIO CRIM. R. 46(C) (2006) (considering the "length of residence in the community"); Pa. R. Crim. P. 523(A) (2016) (considering "the length and nature of the defendant's residence in the community"); 12 R.I. GEN. LAWS § 12-13-1.3 (1992) (considering "[t]ies to this community and to other communities."); S.C. CODE ANN. § 17-15-30(A) (2015) (considering the "length of residence in the community"); S.D. CODIFIED LAWS § 23A-43-4 (2017) (considering the "length of the defendant's residence in the community"); TENN. CODE ANN. § 40-11-115(b) (1978) ( considering the "defendant's length of residence in the community"); VT. STAT. ANN. tit. 13, § 7554(b) (2017) (considering the "length of residence in the community"); VA. CODE ANN. § 19.2-120(E) (2015) (citing "length of residence in the community [and] community ties" as factors); WASH. REV. CODE § SUPER CT CR CrR 3.2(c) (2017) (considering the "length of the accused's residence in the community"); WYO. R. CRIM. P. 46.1(d) (2018) (considering the "length of residence in the community [and] community ties" as factors).

[297] ARK. CODE ANN. § 8.5(b)(i)-(ix) (2018).

[298] ARK. R. CRIM. P. 8.5(b) (2018); COLO. REV. STAT. § 16-4-113(1)(d) (2013) (stating that the misdemeanor defendant must be ROR unless there the defendant has "no ties to the jurisdiction of the court reasonably sufficient to assure his or her appearance").

[299] *See, e.g.*, NEV. REV. STAT. § 178.4853 (1997) ("status and history of employment"); MS R RCRP Rule 8.2(a) (2017) ("consideration of real property ownership").

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recent California study, judges said that a factor that significantly impacted their decision to release a defendant is her community ties, specifically whether the defendant has family present in the courtroom, whether they appear to be a "good family", and whether the defendant has kids or employment.[300] These types of factors have gained even more importance with bail reform in several states.

While we know that bail is often a balancing test in many jurisdictions,[301] there is little data on how judges actually balance these factors and the primary reasons they choose to deny bail or, indeed, how they make pretrial decisions altogether. However, we do know that judges heavily consider dangerousness of the defendant and previous violent crime history in felony cases.[302] In a study specific to felony defendants, California judges discussing ROR specifically named appearance in court as an important factor in the pretrial release consideration.[303] It is unclear given the lack of research what factors are most important for misdemeanor judges. What it important however, is that there should not be factors or a balancing test involved in determining misdemeanor bail. The consideration of any factors—besides that a defendant is charged with a misdemeanor should not be relevant to release before trial—except for in emergency circumstances where the misdemeanor defendant poses an imminent threat. The next section addresses another problematic area in misdemeanor release. In many jurisdictions, bail schedules set money bail for misdemeanants, which limits release for many defendants who are safe to release nationwide.

### *B. Money Bail Schedules Prohibit Misdemeanor Defendants from Release*

Many courts throughout the country rely on money bail for misdemeanor defendants, rather than releasing them on their own recognizance—which should be the default approach. Bail amounts in misdemeanor cases vary vastly throughout the

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[300] Ottone and Scott-Hayward, *supra* note 77, at 28.

[301] People v. Arnold, 132 Cal. Rptr. 922, 926 (Cal. App. Dep't Super. Ct. 1976) (further stating that a decision on such an "important individual interest [as the right to bail] should be accompanied by at least a brief statement of reasons explaining the basis for such decision." (internal citations omitted)). One Texas court states that courts must conduct a "balancing test," essentially weighing the interest of the government to keep the defendant detained against the personal liberty interest of the defendant. *See* ODonnell v. Harris Cty., Texas, 251 F. Supp. 3d 1052, 1143 (S.D. Tex. 2017).

[302] Baradaran & McIntyre, *supra* note 37, at 545–46 (noting the factors judges consider when deciding to deny bail and also discussing the importance of criminal history); *see also* Ottone and Scott-Hayward, *supra* note 77, at 25–26.

[303] Ottone and Scott-Hayward, *supra* note 77, at 27.

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states,[304] and even by county.[305] In setting bail amounts, some courts use "bail schedules."[306] A bail schedule is a scheme that lists—usually in graph form—the standardized money bail amount based on the offense charged and sometimes the defendant's criminal history or other characteristics.[307] Today, twenty states use bail schedules in misdemeanor cases.[308] Some bail schedules are established by statutes

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[304] *See* Bykov v. Rosen, 175 Wash. App. 1072, 2013 WL 4069513, at *1 (Wash. Ct. App. 2013) (noting that the district court set bail at $25,000 for misdemeanor trespass); *see also Ex Parte* Melartin, 464 S.W.3d 789, 795 (Tex. App. 2015) (stating that $500 bail is often set for a first-time DUI misdemeanor offense); Dept. of Liquor Control v. Calvert, 195 Ohio App. 3d 627, 2011-Ohio-4735, 961 N.E.2d 247, at ¶2 (noting that bail was set for $1,250 for two misdemeanor charges: underage under the influence and disorderly conduct).

[305] Nevada is one such state where bail schedules widely vary by county. *See* Nevada Law Journal Staff, *Statewide Rules of Criminal Procedure: A 50 State Review*, 1 NEV. L. J. F. 1, 13 (2017). For instance, some list various offenses, *New River Township Bail Schedule*, CHURCHILL CTY. (Jan. 2013), http://www.churchillcounty.org/DocumentCenter/View/3022, and others address crimes by seriousness—gross misdemeanor versus misdemeanor, *see Standard Bail Schedule*, RURAL JUSTICE COURTS OF CLARK CTY. (May 2015), http://www.clarkcountynv.gov/justicecourt/boulder/Services/Documents/RURAL%20JUSTICE%20COURTS%20-%20STANDARD%20BAIL%20SCHEDULE.pdf.

[306] For example, Utah's former bail schedule can be found at https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule.pdf; *See also Uniform Bail Schedule (Felony and Misdemeanor)*, SUPERIOR COURT OF CAL. CTY. OF ORANGE (2018), https://www.occourts.org/directory/criminal/felonybailsched.pdf.; *Misdemeanor Bail Schedule for the Harris County Criminal Courts at Law*, HARRIS CTY. COURTS (2012), http://www.ccl.hctx.net/criminal/Misdemeanor%20Bail%20Schedule.pdf; HARRIS CTY. CRIMINAL COURTS AT LAW, RULES OF COURT 10, *available at* http://www.ccl.hctx.net/attorneys/rules/rules.pdf; HAWAI'I STATE BAR ASS'N, 2016 CRIMINAL LAW FORUM REPORT 5 (2016), *available at* https://hsba.org/images/hsba/HSBA%20Special%20Events%20and%20Programs/Bench%20Bar/Report%20of%20the%202016%20Criminal%20Law%20Forum%20(12-20-16)%20ver5.pdf.

[307] BAUGHMAN, *supra* note 4, at 47; *see also* Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 13 (2011).

[308] Gross, *supra* note 279, at 857–59 (listing "Alabama, Alaska, California, Colorado, Georgia, Idaho, Iowa, Kentucky, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Tennessee, Utah, Wisconsin, and Wyoming.") Utah and California no longer rely on their bail schedules in most cases. *See* Paighten Harkins & Jessica Miller, *Utah Courts quietly rolled out a new way to set a suspect's bail based on one's risk. Bail bondsmen are not pleased*, SALT LAKE TRIB. (June 7, 2018), https://www.sltrib.com/news/2018/06/06/utah-courts-quietly-rolled-out-a-new-way-to-set-a-suspects-bail-based-on-ones-risk-bail-bondsmen-are-not-pleased/; *see also* Robert Salonga & Alexei Koseff, *Gov. Brown signs Bill Eliminating Money Bail in California*, MERCURY NEWS (Aug. 29, 2018), https://www.mercurynews.com/2018/08/28/gov-brown-signs-bill-eliminating-money-bail-in-california/. Mississippi also provides courts with monetary recommendations on bail. *See* MISS. R. CRIM. P. 8.2 (2017). In Florida, the Thirteenth District Judicial Circuit in Hillsborough has established bail schedule. Thirteenth Judicial Circuit Hillsborough Cty., Fla., Uniform Bail Bond Schedule Admin. Order S-2018-

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and others are implemented informally by local officials.[309] Moreover, while some bail schedules are mandatory, others serve as mere recommendations to the court.[310] Some bail schedules consider factors relating to defendant like personal circumstances, flight risk, or ability to pay,[311] and others are less flexible.[312] Honolulu's misdemeanor bail schedule, for instance, includes whether this is a first offense or whether the individual is in the system already (pending felonies or probation/parole), whether the person is transient or used force or a weapon and the defendant's candor.[313]

Bail schedules are problematic for misdemeanor bail for a number of reasons. Bail schedules remove judicial discretion to determine bail.[314] Even when bail schedules purportedly give judges flexibility, studies demonstrate that they are relied on extensively.[315] Any efficiency that may come from bail schedules is outweighed by the injustice it imposes on poor defendants who often cannot pay the minimum

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022 (2018), http://www.fljud13.org/Portals/0/AO/DOCS/S-2018-022.pdf.

[309] Carlson, *supra* note 307, at 13.

[310] *Id.* In Alaska, only a bail schedule for misdemeanors exists; the state has declined to establish one for felonies. ALASKA R. CRIM. PRO. 41(e) (2018); *see also Presiding Judge Administrative Order Establishing a Statewide Bail Schedule*, ALASKA CT. SYS. (Dec. 2017) https://public.courts.alaska.gov/web/jord/docs/bail-schedule12-17.pdf (establishing a statewide bail schedule for misdemeanors).

[311] Harris County's recent bail schedule includes some additional factors like nature of the offence and aggravating and mitigating factors, ability to pay , future safety of victim and community and employment history and prior criminal record of defendant. HARRIS CTY. CRIMINAL COURTS AT LAW, RULES OF COURT 10, *available at* http://www.ccl.hctx.net/attorneys/rules/rules.pdf.

[312] *See* NATAPOFF, *supra* note 148; *see also* In the Matter of a Uniform Bond Schedule for Maricopa County Limited Jurisdiction Courts, Admin. Order No. 2015-002, 3 (Super. Ct. Ariz. 2015), *available at* https://www.superiorcourt.maricopa.gov/SuperiorCourt/AdministrativeOrders/AdminOrders/Admin%20Order%202015-002.pdf. (setting a presumptive bail amount for defendants except when personal circumstances dictate otherwise).

[313] HAWAI'I STATE BAR ASS'N, REPORT OF THE 2016 CRIMINAL LAW FORUM 5 (2016), *available at* https://hsba.org/images/hsba/HSBA%20Special%20Events%20and%20Programs/Bench%20Bar/Report%20of%20the%202016%20Criminal%20Law%20Forum%20(12-20-16)%20ver5.pdf. Note, however, that research indicates that it is extremely difficult for judges or police to determine whether a defendant is being truthful, without verifying. Paul Ekman et al., *A Few Can Catch a Liar*, 10 PSYCHOL. SCI. 263, 265 (1999) ("Our findings suggest that judgments that someone may be lying will have value only if they are made by certain professionals, and even then not all of these judgments will be accurate. Most of us would do well to entertain some skepticism about our ability to detect deception from demeanor.").

[314] James A. Allen, *"Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & POL'Y 637, 656–58 (2017).

[315] Ottone and Scott-Hayward, *supra* note 77, at 25–26.

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bail amount.[316] Moreover, bail schemes are, in part, responsible for increasing pretrial detention—due to defendants' inability to pay.[317] Indeed, studies show that though bail is set, the majority of defendants granted bail are detained until trial because they cannot afford to make bail.[318]

The U.S. Constitution prohibits excessive bail,[319] as reasonable bail is the standard.[320] "The touchstone for identifying excessive bail under the Eighth Amendment is . . . whether bail is set at "a figure higher than an amount reasonably calculated" to ensure that the defendant appear at trial.[321] "Reasonableness" depends on the individual circumstances of a case.[322] Thus, courts are provided significant discretion in deciding when bail is reasonable,[323] and are allowed to consider a number of factors to determine whether bail is reasonable. Where bail used to be reasonable when it was attainable for defendants—particularly for misdemeanor defendants who were released as a default—now courts consider factors used for felony defendants to determine release.[324] For example, judges commonly consider whether the defendant is likely to appear for court proceedings,[325] the nature of the

[316] Allen, *supra* note 314, at 656–58.

[317] *Id*. at 655.

[318] Ottone and Scott-Hayward, *supra* note 77, at 36.

[319] U.S. CONST. amend. VIII.

[320] Hobbs v. Reynolds, 289 S.W.3d 917, 920 (Ark. 2008). ("A criminal defendant has an absolute right before conviction, except in capital cases, to a reasonable bail.").

[321] Stack v. Boyle, 342 U.S. 1, 4–5 (1951).

[322] Turner v. Fitzsimmons, No. 102881, 2015 WL 3421474 at *1 (Ohio Ct. App. 8th Dist. May 27, 2015); *see also* State v. Norcross, 546 P.2d 840, 841–42 (Ariz. Ct. App. 1976) (quoting *Gusick v. Boies*, 233 P.2d 446, 448 (Ariz. Ct. App. 1951)).

[323] *See* Balltrip v. People, 401 P.2d 259, 262 (Colo. 1965); *see also* A.Z. v. State, 248 So.3d 27, 37 (Ala. Crim. App. 2017) ("[T]he amount of bail is discretionary, to be set by the court.").

[324] Baughman, *History of Misdemeanor Bail*, *supra* note **Error! Bookmark not defined.**, at 859 ("Though there was no specific absolute right to bail in misdemeanor cases, the general rule and practice was that those charged with anything other than a capital crime were released on bail . . . .").

[325] *See* People v. Barbarick, 214 Cal. Rptr. 322, 324–26 (Cal. Ct. App. 1985) (stating that the likelihood of the defendant appearing in further court proceedings was the principal consideration in setting bail); *see also* Mun. Court of Huntsville, Madison Cty. v. Casoli, 740 S.W.2d 614, 616 (Ark. 1987); People v. Arnold, 132 Cal. Rptr. 922, 925 (Cal. App. Dep't Super. Ct. 1976); *In re* Underwood, 508 P.2d 721, 723–24 (Cal. 1973) ("The purpose of bail is to assure the defendant's attendance in court when his presence is required, whether before or after conviction. Bail is not a means for punishing defendants, nor for protecting the public safety . . . [D]etention of persons dangerous to themselves or others is not contemplated within [California's] criminal bail system, and if it becomes necessary to detain such persons, authorization therefor must be found elsewhere, either in existing or future provisions of the law." (internal citations omitted)).

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crime,[326] the seriousness of the crime,[327] the defendant's dangerousness,[328] and the defendant's criminal history.[329] In Arizona, judges are empowered to consider a defendant's "character and reputation" in deciding the amount of bail.[330] Courts have indicated that decisions regarding bail amounts are valid except where it is "clear" that it is excessive.[331] It is important to note that courts have not equated "excessive" with "unaffordable": bail may be reasonable even when the defendant does not have the means to pay it.[332] As a result, bail for even simple crimes like assault can be several thousand dollars and still be lawful.[333] Indeed, reasonable bail under the Constitution for misdemeanor offenses looks just like the calculus for serious felony offenses. It is rarely challenged, and even when challenged, the court has discretion to set high bail for many reasons.[334]

Bail amounts ranging from $1,000 to $20,000 have regularly been set for misdemeanor crimes across the country. Under Mississippi's bail statute, for instance, the recommended bail amounts for misdemeanor offenses are progressive: the more serious the misdemeanor, the higher the range of bail the court may set.[335] For a misdemeanor punishable by a year in jail, the court has the discretion to set

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[326] *See* State v. Norcross, 546 P.2d 840, 841–42 (Ariz. Ct. App. 1976) (quoting *Gusick v. Boies*, 233 P.2d 446, 448 (Ariz. 1951)).

[327] People v. Arnold, 132 Cal. Rptr. 922, 925 (Cal. App. Dep't Super. Ct. 1976).

[328] *See* ALASKA STAT. § 12.30.011(b)(2) (2018); *see also* COLO. REV. STAT. § 16-4-113(1) (2013); N.H. REV. STAT. ANN. § 597:2(II) (2016) (stating that pending a trial, the court can either ROR, set bail, or temporarily detain the defendant, dependent upon a number of factors, including whether the defendant "will endanger the safety of the person or of any other person or the community" upon release).

[329] People v. Arnold, 132 Cal. Rptr. 922, 925 (Cal. App. Dep't Super. Ct. 1976); *see also* State v. Norcross, 546 P.2d 840, 841–42 (Ariz. 1976) (quoting *Gusick v. Boies*, 233 P.2d 446, 448 (Ariz. 1951)).

[330] State v. Norcross, 546 P.2d 840, 841–42 (Ariz. 1976) (quoting *Gusick v. Boies*, 233 P.2d 446, 448 (Ariz. 1951)).

[331] State v. Norcross, 546 P.2d 840, 841–42 (Ariz. 1976) (quoting *Gusick v. Boies*, 233 P.2d 446, 448 (Ariz. 1951)); *see also* Balltrip v. People, 401 P.2d 259, 262 (Colo. 1965).

[332] Brangan v. Commonwealth, 80 N.E.3d 949, 959 (Mass. 2017).

[333] *See* Clarke v. State*,* 491 S.E.2d 450, 451 (Ga. 1997) (discussing how a defendant charged with battery was assessed bail in the amount of $2,500).

[334] For example, in *Turner v. Fitzsimmons*, an Ohio case, the defendant was charged with six misdemeanor offenses and his bail was set at $5,000 for each count in the total amount of $30,000. Turner v. Fitzsimmons, No. 102881, 2015 WL 3421474 at *1 (Ohio Ct. App. 8th Dist. May 27, 2015). The defendant moved to reduce bail, but the trial court refused to do so because of the defendant's extensive criminal history and the danger that he might flee once released. *Id.* On appeal, the court affirmed the trial court's decision determining that while excessive bail is prohibited what is reasonable rests on the individual circumstances of the case. *Id.* at *2. Here, considering the defendant's extensive criminal history, the nature of those crimes (weapon offenses, drug charges, theft), and the defendant's likely propensity to flee, the trial court was within its discretion to assess bail at $5,000 per count. *Id.*

[335] MISS. R. CRIM. P. 8.2(c) (2017).

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bail from the minimum of $500 to $2,000.[336] For misdemeanors punishable by a maximum of six months jailtime, bail may be as low as $250 and as high as $1,000.[337] Other states that have counties either requiring or suggesting misdemeanor bail as high as bail for some felony charges include Alabama,[338] California,[339] Illinois,[340] Utah,[341] and Colorado.[342] As mentioned, this contradicts hundreds of years of common law bail history throughout which pretrial release for felonies was intentionally approached very differently than release for misdemeanors.[343] For instance, in Alabama the misdemeanor bail is higher than felony bail in some instances.[344] In Los Angeles and Orange County,[345] for instance,

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[336] *Id.*

[337] *Id.*

[338] ALA. R. CRIM. P. 7.2(b) (2017).

[339] California has some of the highest bail schedules in the nation—if not the highest. Each county has its own bail schedule and it is not uncommon for the recommended bail to be as high as $10,000 for a misdemeanor. *See Bail Schedule for Infractions and Misdemeanors*, SUPERIOR COURT OF CAL. CTY. OF L.A. (2018), https://www.lacourt.org/division/criminal/pdf/misd.pdf; *see also Uniform Bail Schedule (Felony and Misdemeanor)*, SUPERIOR COURT OF CAL. CTY. OF ORANGE 3–10, 16 (2018), https://www.occourts.org/directory/criminal/felonybailsched.pdf.

[340] *Special Order S06-13: Bond Procedures*, CHI. POLICE DEP'T (Aug. 14, 2018), http://directives.chicagopolice.org/directives/data/a7a57be2-12a9fb0e-d1912-aa0c-91c4eb0600275ea8.html (noting that for a Class A or B misdemeanor, bail is $1,500 and for a Class C misdemeanor, $1,200).

[341] *Uniform Fine/Bail Forfeiture Schedule*, UTAH CTS. (May 9, 2018), https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule.pdf; *see also Changes to the 2018 State of Utah Uniform Fine/Bail Forfeiture Schedule*, UTAH CTS. (2018), https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule-Changes.pdf.

[342] *See Chief Judge Order Regarding Eighteenth Judicial District Bond Schedule*, COLO. CTS. (Apr. 7, 2015), https://www.courts.state.co.us/userfiles/file/Court_Probation/18th_Judicial_District/18th_Courts/Arapahoe/CJO%2015-4%20Bond%20Schedule%20(Final%204-7-15).pdf (suggesting that on Class 1 Misdemeanor charges bail should be set to $5,000—as high as the recommended bail for a Class 6 and Class 5 felony charge).

[343] *See supra* note 51 and accompanying text.

[344] ALA. R. CRIM. P. 7.2(b) (2017). In Alabama, the suggested bail for Class A Misdemeanors is $300 to $6,000. For certain felonies, the bail recommendation is as low as $1,000. *Id.*

[345] *See Uniform Bail Schedule (Felony and Misdemeanor)*, SUPERIOR COURT OF CAL. CTY. OF ORANGE 3–10, 16 (2018), https://www.occourts.org/directory/criminal/felonybailsched.pdf. In Orange County the bail schedule lists significantly large bail amounts for felonies; however, bail for certain misdemeanors is listed as high as $15,000. For unlisted misdemeanors, bail is $500. *Id.* at 16. In Riverside County, California, bail for misdemeanors punishable by roughly over nine months or a year is $5,000. *Felony and Misdemeanor Bail Schedule*, SUPERIOR COURT OF CAL. CTY. OF RIVERSIDE 13 (2018),

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a significant portion of the misdemeanors listed, bail is $20,000, or even $25,000, and for many popular misdemeanors $1,000.[346]

Whether the defendant's ability to pay bail comes into play depends on the state. Twenty-six states have established by statute that courts should consider defendant's ability to pay bail as a factor in setting bail.[347] For example, in Vermont whether the defendant can pay is not alone controlling, but is among the factors courts may consider when setting bail.[348] Illinois's statute states that "[t]he amount

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https://www.riverside.courts.ca.gov/bailschedule.pdf?rev=2018.

[346] *Bail Schedule for Infractions and Misdemeanors*, SUPERIOR COURT OF CAL. CTY. OF L.A. (2018), https://www.lacourt.org/division/criminal/pdf/misd.pdf. Because of recent bail reform legislation passed in California, these schedules will not be in effect for much longer. In August 2018, California Governor Jerry Brown signed Senate Bill 10, which will go into effect in October 2019. Robert Salonga & Alexei Koseff, *Gov. Brown signs Bill Eliminating Money Bail in California*, MERCURY NEWS (Aug. 29, 2018), https://www.mercurynews.com/2018/08/28/gov-brown-signs-bill-eliminating-money-bail-in-california/.

[347] *See* ARIZ. REV. STAT. ANN. § 13-3967(B)(7) (2015); *see also* ARK. R. CRIM. P. 8.5(b)(i) (2018); DEL. CODE ANN. tit. 11, § 2105(b) (2019); FLA. STAT. § 903.046(2)(c) (2016); 725 ILL. COMP. STAT. 5/110-5(a) (2018); IND. CODE § 35-33-8-4(b)(2) (2017); IOWA CODE § 811.2(2) (2013); KAN. STAT. ANN. § 22-2802(8) (2018); LA. CODE CRIM. PROC. ANN. art. 316(4) (2017); ME. STAT. tit. 15, § 1026(4)(C)(4) (2018); MASS. GEN. LAWS ch. 276, § 58 (2018); MINN. R. CRIM. P. 6.02(2)(Subd. 2)(e) (2018); MISS. R. CRIM. P. 8.2(a)(13) (2017); MO. REV. STAT. § 544.455(2) (2013); MONT. CODE ANN. § 46-9-109(2)(b)(i) (2017); NEB. REV. STAT. § 29-901.01 (2017); N.Y. CRIM. PROC. LAW § 510.30(2)(a)(ii) (McKinney 2012); N.C. GEN. STAT. § 15A-534(c) (2017); N.D. R. CRIM. P. Rule 46(a)(3)(C) (2018); OHIO REV. CODE ANN. 2937.222(C)(3)(a) (West 2002); 12 R.I. GEN. LAWS § 12-13-1.3(c)(10) (1992); S.C. CODE ANN. § 17-15-30(A)(3) (2015); S.D. CODIFIED LAWS § 23A-43-4 (2017); TENN. CODE ANN. § 40-11-115(b)(2) (1978); TEX. CODE CRIM. PROC. art. 17.15(4) (1993); VT. STAT. ANN. tit. 13, § 7554(b)(1) (2017); VA. CODE ANN. § 19.2-120(E)(2) (2018); W. VA. CODE § 62-1C-3 (1965); WYO. R. CRIM. P. § 46.1(d)(3)(A) (2018); Brangan v. Commonwealth, 80 N.E.3d 949, 954 (Mass. 2017) (stating that the court "must consider a defendant's financial resources, but is not required to set bail in an amount the defendant can afford if other relevant considerations weigh more heavily than the defendant's ability to provide the necessary security for his appearance at trial."); State v. Norcross, 546 P.2d 840, 841–42 (Ariz. Ct. App. 1976) ("[T]he court should consider . . . the ability of the accused to give bail, which includes his own pecuniary condition as well as the possession of friends able and willing to give bail for him." (quoting *Gusick v. Boies*, 233 P.2d 446, 448 (Ariz. 1951))); State v. Jackson, 384 S.W.3d 208, 216–17 (Mo. 2012) ("The trial judge is required . . . to consider defendant's financial resources in setting bail as well as other relevant conditions . . . ").

[348] W. VA. CODE § 62-1C-3 (1965) (listing "financial ability" as a factor that courts should consider in its pretrial release decision); *see also* State v. Pratt, 2017 VT 9, ¶ 16, 204 Vt. 282, 291–92, 166 A.3d 600, 606 (2017) ("Although 'financial resources' may not be identical to 'ability to pay,' the two concepts are related; a defendant's financial resources may affect the defendant's ability to post bail at a particular level and is among the factors a court should consider in setting bail. But nothing in the statute suggests that financial

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of bail shall be … [n]ot oppressive … [and] [c]onsiderate of the financial ability of the accused."[349] Under Hawaii law, bail "should be so determined as to not suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor[,]" but Hawaiian courts still need only include the defendant's ability to pay in deciding the amount of bail. [350] In Arizona, in considering whether the defendant can pay bail, the court may look to the defendant's own finances as well as whether she has friends willing to pay bail for her.[351] And in Chicago, a defendant who cannot post bail can be released without posting bail if they meet a series of conditions.[352]

Misdemeanor bail amounts of up to $50,000 have been found reasonable and $2,000 unreasonable, and courts have allowed increases in bail amounts to give attorneys more time to prepare—without any regard to the defendant's case. *In State v. Huss*, an Iowa case, the court found a $50,000 bail was not unconstitutional even though it was twenty-five times the scheduled amount for the misdemeanor offense of aggravated drunk driving.[353] The court held that the abnormally high bail amount was justified considering the defendant's criminal history (which included multiple felonies).[354] In contrast, the Hawaii court in *State v. Henley*, found that a trial court abused its discretion in increasing a defendant's bail from $200 to $2,000 on appeal because the facts did not support the trial court's belief that the defendant was a flight risk.[355] The primary reason the trial court gave in raising the defendant's bail was that he was a flight risk because he had only recently moved to the area and, at

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resources was intended to be the controlling factor rather than one of several factors that guide the trial court's evaluation of the least restrictive means of ensuring a defendant's appearance." (citing 13 V.S.A. § 7554(b))).

[349] 725 ILL. COMP. STAT. ANN. 5/110-5(b)(2)–(3) (West 2018).

[350] State v. Henley, 363 P.3d 319, 328 (Haw. 2015) (quoting HAW. REV. STAT. §804-9 (2014)).

[351] State v. Norcross, 546 P.2d 840, 841–42 (Ariz. 1976) (quoting Gusick v. Boies, 233 P.2d 446, 448 (Ariz. 1951)).

[352] *Special Order S06-13: Bond Procedures*, CHI. POLICE DEP'T V (Aug. 14, 2018), http://directives.chicagopolice.org/directives/data/a7a57be2-12a9fb0e-d1912-aa0c-91c4eb0600275ea8.html. An arrestee cannot be released on an individual bond if (1) the individual cannot be identified, (2) the individual is unwilling to be fingerprinted; (3) the misdemeanor involves the unlawful use of weapons; (4) the individual is arrested on a warrant; (5) the individual "has sufficient cash or an approved credit/debit card to post" 10 percent or the full amount of the bond; (6) the individual is a "verified gang member" charged with a jailable offense; (7) the individual is a parolee; (8) the misdemeanor involves the abuse of an animal still in possession of its owner; or (9) the individual has violated the conditions of bail bond.

[353] State v. Huss, No. 09-0574, 2010 WL 200043 at *4 (Iowa Ct. App. Jan. 22, 2010).

[354] State v. Huss, No. 09-0574, 2010 WL 200043 at *1 (Iowa Ct. App. Jan. 22, 2010). The court was also concerned about defendant's mental illness and how that contributed to the crimes. *Id.* at *2.

[355] State v. Henley, 363 P.3d 319, 328–30 (Haw. 2015).

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$200, the defendant's father could pay bail.[356] The Supreme Court of Hawaii found this determination of flight risk insufficient, and remanded the case.[357] Sometimes bail is fixed based on reasons that have nothing to do with the defendant or the charge against him. In an Alaska case, for instance, the defendant's bail was increased from $500 to $1000 simply because the attorneys on the case needed more time to "further prepare in light of the latest developments."[358]

Several courts have recently deemed money bail unconstitutional if defendants cannot afford it. In Chicago, one court issued an order requiring judges to set bail at an amount that defendants can afford if they are not a danger to the community.[359] In San Francisco, the Office of the Treasurer published a report criticizing the cash bail system and recommended that it be abandoned.[360] According to the report, even though misdemeanor defendants were released more often in San Francisco than other counties, eighty-five percent of the county's "jail population is pretrial."[361] Among those, only 40 to 50 percent are eligible for release on bail.[362] But the "median nonrefundable bail fee needed for release is $5,000" and a 2016 Federal Reserve survey shows that forty-six percent of Americans "do not have emergency" savings and could not pay such a fee.[363] Additionally, the report showed that people of color are disproportionately impacted by bail and their bails are set higher than white defendants.[364] The cost of detaining individuals per day on average is

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[356] *Id.* at 329.

[357] *Id.* at 329–30.

[358] Ashepak v. State, No. 6828, 1983 WL 807944, at *1 (Alaska Ct. App. Nov. 23, 1983).

[359] Cir. Ct. of Cook Cty., Gen. Order No. 18.8A ("[It] is intended to ensure no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail, to ensure fairness and the elimination of unjustifiable delay in the administration of justice, to facilitate the just determination of every criminal proceeding, and to preserve the public welfare and secure the fundamental human rights of individuals with interests in criminal court cases . . ."); Press Release, Cir. Ct. of Cook Cty., *Evans changes cash-bail process for more pretrial release* (July 17, 2017), http://www.cookcountycourt.org/MEDIA/ViewPressRelease/tabid/338/ArticleId/2561/Evans-changes-cash-bail-process-for-more-pretrial-release.aspx.

[360] CHRISTA BROWN, OFF. OF THE TREASURER & TAX COLLECTOR OF THE CITY & COUNTY OF S.F., FIN. JUST. PROJECT, DO THE MATH: MONEY BAIL DOESN'T ADD UP FOR SAN FRANCISCO (June 2017), *available at* https://sftreasurer.org/sites/default/files/2017.6.27%20Bail%20Report%20FINAL_2.pdf. This report criticizes the bail system because it creates a "two-tiered system of justice" where people with wealth "may purchase their freedom . . . while those with no resources must wait in jail until their trial." *Id.* The report also detailed the abuses of the commercial bond system and the waste of money. San Francisco spent $3.2 million jailing people whose cases were dismissed or never filed. *Id.*

[361] BROWN, *supra* note 360.

[362] *Id.*

[363] *Id.*

[364] *Id.*

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significantly more ($74.61) than supervising them on release, ($7.17) per day.[365] Based on these defects, San Francisco recommended moving away from money bail to a risk based system.[366] Others have recently moved away from cash bail for misdemeanors. In 2018, the Manhattan District Attorney made a policy to not request money bail for nonviolent misdemeanors.[367] District Attorneys in Brooklyn, Westchester, and Philadelphia have made similar policies.[368]

Recently some jurisdictions have moved away from money bail by prohibiting this practice or by at least eliminating cash-only court systems. Courts in Ohio, Minnesota, Tennessee, Montana, Wyoming and other states have relied on "cash-only" courts—meaning that the only method of release in those courts is full cash payment by defendant all at once in order to obtain release.[369] Recently, with bail reform efforts, a few courts have deemed this practice unconstitutional but many courts still persist with a cash-only bail system.[370] Cash only bail subjects defendants

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[365] *Bail in America: Unsafe, unfair, ineffective*, PRETRIAL JUST. INST., http://www.ma4jr.org/wp-content/uploads/2015/10/Bail-in-America.pdf (last visited Dec. 2018).

[366] BROWN, *supra* note 360.

[367] Anna Maria Barry-Jester, *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend On Your Judge*, FIVETHIRTYEIGHT (June 19, 2018), https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/.

[368] ANDREA Ó SÚILLEABHÁIN & COLLEEN KRISTICH, PARTNERSHIP FOR THE PUB. GOOD, CRUELTY AND COST: MONEY BAIL IN BUFFALO 20 (2018), *available at* https://ppgbuffalo.org/files/documents/criminal-justice/cruelty_and_cost_money_bail_in_buffalo.pdf.

[369] It is difficult for a defendant to obtain that much cash at one time. State v. Rodriguez, 192 Mont. 411, 418, 628 P.2d 280, 284 (Mont. 1981) (noting that "rarely can a defendant obtain the cash" when there is a cash bond requirement).

[370] *See* State v. Hance, 2006 VT 97, ¶17, 180 Vt. 357, 364, 910 A.2d 874, 880 (2006) ("To construe the 'sufficient sureties' clause as permitting cash-only bail would increase government power to engage in pretrial confinement, a result which cannot be reconciled with the history of the 'sufficient sureties' clause or our own cases discussing bail, in which we have recognized the threat to individual liberty inherent in pretrial detention."); *see also* State v. Brooks, 604 N.W.2d 345, 352–54 (Minn. 2000), *as modified* (Mar. 15, 2000) (holding that cash-only bail violates the Minnesota constitution and a district court cannot restrict the form of surety to cash, or real property, or any other specific kind of acceptable surety without nullifying the right); Smith v. Leis, 106 Ohio St. 3d 309, 2005-Ohio-5125, 835 N.E.2d 5, at ¶ 83 (holding that cash-only bail violates the Ohio constitution); Lewis Bail Bond Co. v. Gen. Sessions Court of Madison Cty., No. C-97-62, 1997 WL 711137 at *5 (Tenn. Ct. App. Nov. 12, 1997) (holding that cash-only bail violates the Tennessee constitution). *But see* Saunders v. Hornecker, 2015 WY 34, ¶ 35, 344 P.3d 771, 781 (2015) ("In sum, we hold that the term 'sufficient sureties' refers to a broad range of methods . . . [which] include cash-only bail, as determined in the discretion of the trial court and subject to the constitutional safeguard that bail not be excessive."); State v. Rodriguez, 192 Mont. 411, 418, 628 P.2d 280, 284 (1981) (holding that cash-only bail may not be imposed unless specific factors are satisfied). *But see* Ex parte Singleton, 902 So. 2d 132, 135 (Ala. Crim.

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to *de facto* pretrial detention since a defendant who cannot pay a large amount of bail at once is detained.[371] California has made broad statewide bail reforms by passing Senate Bill 10 in 2018.[372] Senate Bill 10 signed in August 2018 eliminates money bail in California in favor of risk assessments of defendants and nonmonetary release.[373] Unfortunately, this bill, while noteworthy for eliminating money bail has other problems due to the risk assessment replacing it that will be discussed in the next section.

Requiring money bail, particularly using bail schedules, is not only bad policy for misdemeanors but violates constitutional and historic practice. Money bail that prohibits release violates rights of due process and the presumption of innocence that guarantee a misdemeanor defendant bail.[374] Not only that, but money bail has been found by several courts to violate the due process and equal protection clauses of the Fourteenth Amendment as well.[375] For a defendant to be prohibited from release before trial simply because they cannot afford to pay their bail amount violates their constitutional right to an individualized hearing and the right to be treated the same as wealthier peers.[376] Misdemeanor bail amounts have reached the

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App. 2004) ("Based on the wording of the Alabama Constitution of 1901, our statutes, and our rules we cannot say that Art. I, § 16, Ala. Const.1901, prohibits a judge from setting a 'cash only' pretrial bail."); Fragoso v. Fell, 111 P.3d 1027, 1031 (Ariz. Ct. App. 2005) (holding that Arizona law does not prohibit cash-only bail*)*; State v. Briggs, 666 N.W.2d 573, 584 (Iowa 2003) (holding that Iowa law does not bar cash-only bail); State v. Jackson, 384 S.W.3d 208, 217 (Mo. 2012) ("Considering these purposes and the history of bail as well as the numerous understandings of the word 'sufficient surety,' imposing cash-only bail does not violate . . . the Missouri Constitution.").

[371] State v. Hance, 2006 VT 97, ¶¶ 1–17, 180 Vt. 357, 358–64, 910 A.2d 874, 876–81 (2006) (discussing the historical development of bail: "This history demonstrates that '[b]ail acts as a reconciling mechanism to accommodate both the defendant's interest in pretrial liberty and society's interest in ensuring the defendant's presence at trial.'"). The argument for cash-only bail is that the purpose of bail is to ensure the defendant appears for court dates, and trial courts must be equipped with myriad means to do this, including imposing cash-only bail. Saunders v. Hornecker, 344 P.3d 771, 780–81 (2015).

[372] Salonga & Koseff, *supra* note 346.

[373] *Id.*

[374] *See* Baradaran, *Presumption of Innocence*, *supra* note 8, at 776; *see also* Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 845–46; Baradaran, *Presumption of Punishment*, *supra* note 221, at 401–02.

[375] BAUGHMAN, *supra* note 4, at 169–73 (discussing Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978); Pierce v. City of Velda City, No. 4-15-CV-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); Cooper v. City of Dothan, No. 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); Rodriguez v. Providence Community Corrections, Inc., 191 F. Supp. 3d 758 (M.D. Tenn. 2016); Walker v. City of Calhoun, Georgia, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016); State v. Blake, 642 So. 2d 959 (Ala. 1994)).

[376] *See, e.g.*, ODonnell v. Harris Cty., Texas, 251 F. Supp. 3d 1052, 1133–34 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), and *aff'd as modified sub nom*. ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018) (plaintiffs arguing that individuals

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level of felony crimes in too many situations. And defendants are forced to remain behind bars because they cannot afford to pay even small amounts of bail. Most misdemeanor cases are dismissed so the cost of detaining so many defendants is also not worth any gain to the public. Overwhelmingly, misdemeanor defendants are safe to release before trial and do not ever need to be subject to money bail.

The next section discusses the problem that risk assessments pose in bail reform movements nationwide, and how they often contribute to the felony-centric nature of misdemeanor bail.

### *C. The Danger of Risk Assessments*

Jurisdictions across the country are becoming inundated with pretrial risk assessments as the preferred tool for the third wave of national bail reform.[377] Many states have adopted risk assessments with an eye towards improving pretrial detention rates, mitigating the fiscal impact of bail and encouraging better outcomes for pretrial defendants.[378] Risk assessments are lauded by some as a breakthrough in pretrial release,[379] but as with any decision mechanism, the details are important. There have been a few important criticisms of risk assessments.[380] Scholars criticize

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arrested for misdemeanor offenses who were unable to pay their bail spent a longer time detained than those who were able to pay, violating DPC and EPC rights); Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978); Pierce v. City of Velda City, No. 4-15-CV-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); Cooper v. City of Dothan, No. 1:15-CV-425-WKW, 2015 WL 10013003 (M.D. Ala. June 18, 2015); Rodriguez v. Providence Community Corrections, Inc., 191 F. Supp. 3d 758 (M.D. Tenn. 2016); Walker v. City of Calhoun, Georgia, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016); State v. Blake, 642 So. 2d 959 (Ala. 1994).

[377] BAUGHMAN, *supra* note 4, at 44–45 (documenting the third wave of bail reform); Sonja B. Starr, *The Risk Assessment Era: An Overdue Debate*, 27 FED. SENT'G REP. 205, 205 (2015) (describing an "era" of risk assessments due to their pervasiveness nationally).

[378] PRETRIAL JUST. INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 15 (2017), *available at* https://university.pretrial.org/viewdocument/state-of-pretrial-justice-in-americ (last accessed Jan. 2, 2019).

[379] Gouldin, *supra* note 220, at 841 (noting that risk assessment tools "promise to improve judges' pretrial calculations of the likelihood that a released defendant will either failure to appear for trial . . . or commit other crimes"); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 304, 305 (2018) ("Proponents of risk assessment argue that by replacing the subjective, error-prone, and ad-hoc assessments of judges with scientifically validated prediction tools it is possible to dramatically reduce incarceration rates without affecting public safety.").

[380] *See* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 495–96, 562 (2018) (discussing the potential for pretrial risk assessment tools to "exacerbate race and class inequalities"); *see also* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. ___, ___ (forthcoming 2019) [hereinafter Mayson, *Bias In, Bias Out*] (discussing the inherent problems with attempting to predict future crime and noting that some kinds of risk may be beyond the ability of risk assessment tools to measure without racial distortion); Megan

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risk assessments for exacerbating racial bias,[381] depending inappropriately on family, socioeconomic, and neighborhood variables,[382] and for failing to increase pretrial release rates.[383] These are all important criticisms that should be addressed. However, there is another critical but unidentified problem with most risk assessments. Risk assessments do not distinguish between felony and misdemeanor charges. Most risk assessments, including, for instance, the leading Arnold foundation pretrial risk assessment tool, provides the same increased risk for a prior felony or misdemeanor conviction.[384] Due to this major oversight, many misdemeanor defendants can be categorized as high risk and detained for a pretrial misdemeanor crime—in violation of the clear historic right to misdemeanor release. This section provides several examples of this particular problem in prominent risk assessment instruments, and concludes that states should shift their focus to a goal of a less than 10% release rate, rather than relying exclusively on a risk assessment in bail reform.

Risk assessments are used to determine the risk posed by an individual defendant and the likelihood that she will pose a danger of harm, commit a new offense, or fail to appear in court.[385] Many states and counties are implementing risk assessment tools to set bail. Risk assessment tools are "informed by data analyses of millions of criminal cases" and aim to provide judges with objective information to assess the relative risk of a defendant to make pretrial release decisions.[386] The leading risk assessment tool is the Public Safety Assessment (PSA), designed by the Arnold Foundation.[387] The PSA determines a risk score by considering "whether the

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Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 304–10 (2018) (stating that risk assessment is not a "magic bullet that will increase the number of people released pretrial with no concomitant costs in terms of the crime or appearance rate."); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 806 (2014) (arguing that tools dependent on "demographic, socioeconomic, family, and neighborhood variables" are imprudent and inaccurate).

[381] Mayson, *supra* note 380, at 495–96.

[382] Starr, *supra* note 380, at 806.

[383] *See* Stevenson, *supra* note 380, at 304 (discussing failures in pretrial release numbers despite risk assessments).

[384] *Public Safety Assessment: Risk Factors and Formula*, LAURA & JOHN ARNOLD FOUND. 3 (2016), https://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf. While I have not done a comprehensive review of all state risk assessments, I have examined most of the leading ones and they do not distinguish between felony and misdemeanor convictions or charges.

[385] Amber Widgery, *Guidance for Setting Release Conditions*, NAT'L CONF. OF ST. LEGISLATURES (May 13, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx.

[386] CHRISTINE BLUMAUER ET AL., PRETRIAL JUST. INST., ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 23 (2018), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6286908b-8228-0970-9c72-e9ee52f91c9b&forceDialog=0.

[387] *See supra* note 384 (As of February 2018, "[t]hirty-eight jurisdictions, including the

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current offense is violent; whether the person has a prior misdemeanor or felony charge; the person's age at the time of the arrest; and how many times the person failed to appear at a pretrial hearing in the last two years."[388] The PSA gives a defendant the same additional increased risk score for a prior felony conviction or a misdemeanor conviction.[389] It also gives the same score for a previous violent felony or misdemeanor.[390] The PSA fails to distinguish between misdemeanors and felonies at all, even though felonies are much more serious.[391] The use of the PSA in these states highlights some of the benefits and problems associated with pretrial risk assessments, including the lack of differentiation between misdemeanors and felonies. Some states that do not use the PSA also face similar challenges.[392]

Kentucky—one of the first states to institute a risk assessment based pretrial release system[393]—has legislation that aims to be aggressive in releasing individuals and reducing the number of individuals in custody, but unfortunately falls short. The Kentucky bill establishes an empirical research-based approach to pretrial risk assessment,[394] and requires state-funded supervision and intervention to slowly adopt evidence-based approaches.[395] It specifies that non-financial release is

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states of Arizona, Kentucky and New Jersey, and large cities such as Charlotte, Chicago and Houston" used the PSA).

[388] *Id.* As discussed below, Utah adopted the Arnold Foundation's PSA in May 2018. *Utah Public Safety Assessment Frequently Asked Questions*, UTAH CTS. (June 8, 2018), https://www.utcourts.gov/resources/reports/psa/faq.html.

[389] *Public Safety Assessment, supra* note 384, at 3.

[390] *Id.*

[391] For further discussion of this issue, see *supra* note 29.

[392] BLUMAUER ET AL., *supra* note 386, at 23. For example, in Maryland, six of twenty-four counties "use risk assessment tools, but only two . . . use a tool that has been empirically validated." *Id.* Even the four counties however who use validated tools, classify over 27 misdemeanors as high and medium risk offense categories. Angela Roberts & Nora Eckert, *As Maryland courts meld artificial intelligence into bail decisions, concerns follow*, CAPITAL NEWS SERV. (Dec. 21, 2018), https://cnsmaryland.org/interactives/spring-2018/plea-bargain/pretrial-riskscore.html; *see, e.g.*, *St. Mary's County Pre-Trial Release Risk Assessment*, CAPITAL NEWS SERV., https://assets.documentcloud.org/documents/5662874/SMC-Pretrial-Worksheet.pdf (last accessed Jan. 2, 2019) (classifying over 27 misdemeanors as high and medium risk offense categories). In essence, these tools are guaranteeing that many misdemeanor defendants who should have the right to release will be detained before trial.

[393] Kentucky and Virginia have both used algorithmic risk assessment tools in criminal justice decision-making for decades. MEGAN T. STEVENSON & JENNIFER L. DOLEAC, AM. CONST. SOC'Y, THE ROADBLOCK TO REFORM 5 (2018), *available at* https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf.

[394] Fifteen other states use similar data-driven approaches. Amber Widgery, *Guidance for Setting Release Conditions*, NAT'L CONF. OF ST. LEGISLATURES (May 13, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx.

[395] MARK HEYERLY, KY. PRETRIAL SERVICES, PRETRIAL REFORM IN KENTUCKY 13 (2013), *available at* https://www.acluga.org/sites/default/files/pretrial-reform-in-kentucky-

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"presumptive" for low and moderate risk defendants and indicates that financial release should be the exception if the defendant is a flight risk or danger to the community.[396] The risk assessment algorithm is only a tool, however, and final decisions are left up to judges.[397] If Kentucky judges had followed the risk assessment recommendations in all cases, the pretrial release rate for low and moderate risk defendants would have increased by 37% since 2011.[398] Data shows that Kentucky judges do not always follow these recommendations. The actual pretrial release rate for low and moderate risk defendants increased by only 4% over this time period.[399] Similarly, in Virginia, the pretrial risk assessment tool aims to identify the 25% lowest-risk non-violent offenders and divert them from prison or jail.[400] The median judge in Virginia diverts only 40% of defendants who are recommended for diversion by the risk assessment algorithm.[401] In short, data from Kentucky and Virginia shows that pretrial risk assessment tools "had little to no impact on incarceration rates" because there is great variation in the way judges use them.[402] And unfortunately, California's new proposed risk instrument is largely borrowed from the Kentucky/PSA model.[403]

Even when Kentucky judges follow the risk assessment recommendation, however, the release decisions for misdemeanor defendants can be unfair and unnecessarily harsh when compared to felony defendants. For example, under Kentucky's PSA and with all other factors being the same, a defendant with a prior conviction of misdemeanor battery involving a push and another defendant with a felony conviction for an attack with a knife would receive the same PSA score.[404]

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kentucky-pretrial-services-2013.pdf; *see also* H.R. 463, 2011 Leg., Reg. Sess. (Ky. 2011).

[396] *Id.* The bill also empowers the court to credit as much as $100 for each day the defendant serves in jail before trial, including up to the full amount of bail. *Id.* at 14.

[397] STEVENSON & DOLEAC, *supra* note 393, at 5.

[398] *Id.*

[399] *Id. But see Uniform Crime Report January–September 2017*, N.J. ST. POLICE (Oct. 13, 2017, 7:52 AM), http://www.njsp.org/ucr/pdf/current/20171013_crimetrend.pdf (detailing that New Jersey's bail reform efforts have allowed drops in jail numbers of 15% in the first six months and the number of unconvicted people held in jail dropped by more than a third (34.1%) between mid-2015 and mid-2017).

[400] STEVENSON & DOLEAC, *supra* note 393, at 6.

[401] *Id.* at 7.

[402] *Id.* at 2.

[403] Samantha Young, *Kentucky Eyed as a Model for Reforming California's Costly Bail System*, TIMES OF SAN DIEGO (Aug. 12, 2017), https://timesofsandiego.com/politics/2017/08/12/kentucky-eyed-as-model-for-reforming-californias-costly-bail-system/.

[404] *Q & A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions*, HUMAN RIGHTS WATCH (June 1, 2018, 7:00 AM), https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions#_ftnref1. *See also Public Safety Assessment*, *supra* note 384, at 3. Kentucky is one of forty jurisdictions that have adopted the LJAF PSA. *Pretrial Justice*, LAURA & JOHN ARNOLD FOUND. (2018)

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The absurdity of this result is clear. The defendant with the prior violent felony is clearly more dangerous to society, yet under the Kentucky system and others like it, administrators and judges would see the same PSA score when evaluating the defendants, potentially resulting in an identical release decision for both.

These same mistakes appear in the most recently proposed bail reform risk assessments. In May 2018, Utah rolled out a pretrial risk assessment program to improve release decisions and better inform judges.[405] The Utah Public Safety Assessment uses nine factors that are designed to predict "whether a defendant will commit new criminal activity, commit new violent criminal activity, or fail to appear in court if released before trial."[406] The nine factors are: age at current arrest, current violent offense, pending charge at the time of the offense, prior misdemeanor conviction, prior felony conviction, prior violent conviction, prior failure to appear in the past two years, prior failure to appear older than two years, and prior sentence to incarceration.[407] Taking these factors, the risk assessment program software uses an algorithm to calculate two scores representing the likelihood that a defendant will commit a violent crime if released or will fail to appear in court.[408] This system has been lauded as an improvement over the old system where judges only knew the charged offense and what was in a probable cause statement.[409] However, this Utah tool is flawed—like the others—in failing to distinguish between misdemeanors and felonies in important ways. For instance, under the new Utah risk assessment, an individual who is charged with a nonviolent crime (possession of a controlled substance) who has a previous conviction for a misdemeanor and no violent crime history but five failures to appear, is ordered to be detained.[410] The research has made clear that a failure to appear is not cause for pretrial detention, and that simple

http://www.arnoldfoundation.org/initiative/criminal-justice/pretrial-justice/.

[405] Gillian Friedman, *Poor People are Trapped Behind Bars. How Utah is Using an Algorithm to get some of them out*, DESERET NEWS (June 17, 2018, 5:15 AM), https://www.deseretnews.com/article/900021826/poor-people-are-stuck-behind-bars-how-utah-is-using-an-algorithm-to-get-some-of-them-out.html.

[406] *Public Safety Assessment: Risk Factors and Formula*, UTAH CTS. 2 (Aug. 23, 2016), https://www.utcourts.gov/resources/reports/psa/docs/PSA-Risk-Factors-and-Formula.pdf.

[407] *Id.*

[408] *Id.* at 3.

[409] Friedman, *supra* note 405. Utah Third District Judge Kara Petitt has commented that the new system allows her to "make better-informed decisions—whether that was to release the individual with appropriate conditions, or to hold the individual in jail . . . ." Paighten Harkins & Jessica Miller, *Utah Courts quietly rolled out a new way to set a suspect's bail based on one's risk. Bail bondsmen are not pleased*, SALT LAKE TRIB. (June 7, 2018), https://www.sltrib.com/news/2018/06/06/utah-courts-quietly-rolled-out-a-new-way-to-set-a-suspects-bail-based-on-ones-risk-bail-bondsmen-are-not-pleased/.

[410] *Public Safety Assessment, supra* note 406*; A Guide to Manually Calculating a Public Safety Assessment (PSA) – Utah May 2018*, UTAH CTS. (May 23, 2018), https://www.utcourts.gov/resources/reports/psa/docs/PSA%20Manual%20Calculation%20Guide.pdf.

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reminders can dramatically reduce failure to appear.[411] Failure to appear is often an indication that follow up should be made and appearances increase dramatically when postcards or reminder calls and emails are made to the defendant.[412] In addition, the Utah risk assessment treats a previous conviction for a misdemeanor the same as a conviction for a felony. Individuals without a violent crime history charged with nonviolent crimes are not a danger to society and should not be detained before trial.

New Jersey began using the same nine factors and algorithm that Utah has now adopted in 2017.[413] New Jersey's assessment results in many defendants being released pretrial subject to a range of conditions.[414] For low-risk individuals, a judge may just direct a police officer to text or call defendants to remind them of court dates; higher-risk defendants can be given electronic monitoring bracelets.[415] Unfortunately, because it is based on the same Arnold PSA as the Kentucky and Utah systems, New Jersey's tool also fails to distinguish between misdemeanors and felonies by giving criminal defendants a set point value for *any* prior conviction without differentiating between misdemeanors and felonies.[416] However, one thing New Jersey does do is that it limits the number of violent crimes that are listed as higher risk.[417] As a comparison, Utah lists over 220 crimes as violent (misdemeanors and felonies) and New Jersey only lists about half that number as violent crimes.[418]

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[411] *See* Gouldin, *supra* note 225, at 731–32 (noting that studies have shown that alternatives to detention are effective in reducing FTA rates).

[412] *Id.* at 732 ("Pretrial detention … [is] unnecessary for defendants who could be nudged back to court on the appointed day with a simple and inexpensive reminder.").

[413] *See* Stuart Rabner, *Bail Reform in New Jersey*, TRENDS IN ST. CTS. 28 (2017), https://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Bail-Reform-New-Jersey-Trends-2017.ashx.

[414] *See id.*

[415] *See id.*

[416] *Public Safety Assessment: New Jersey Risk Factor Definitions*, N.J. CTS. (March 2018), https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf?cacheID=RmwcVxz.

[417] *Public Safety Assessment: New Jersey Risk Factor Definitions*, N.J. CTS. (Mar. 2018), https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf?cacheID=RmwcVxz. The New Jersey risk assessment specifically limits violent crimes in the following way: "An offense is not categorized as violent when the crime involves recklessness or negligence, unless it is charged at the level of manslaughter or homicide. In addition, an offense involving threats, intimidation, harassment, and similar behavior is not categorized as violent, with the exception of stalking, which is categorized as violent." *Id.* at 1. The types and quantity of low-level violent crimes listed are limited, which help increase the number of misdemeanants who can obtain release before trial. *Id.* at 1, 5–7.

[418] *Compare Utah Violent Offenses*, Utah Courts, (unpublished manuscript on file with author), *with Public Safety Assessment: New Jersey Risk Factor Definitions*, N.J. CTS. (Mar. 2018), https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf?cacheID=RmwcVxz.

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This is an improvement and could be why New Jersey has improved release rates overall—though it is still detaining more than 10% of defendants pretrial.

Colorado's pretrial risk assessment strategy, which has been held up as a "national model" of bail reform, makes the same mistake of conflating misdemeanors and felonies.[419] The Colorado law, passed in 2013, requires that pretrial services programs "make all reasonable efforts to implement an empirically developed pretrial risk assessment tool."[420] The Colorado assessment uses a point system outlined in the figure below:

[419] CRIM. JUSTICE POL'Y PROGRAM, HARV. L. SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 15 (2016), *available at* http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf.

[420] COLO. REV. STAT. § 16-4-106(4)(c) (2013) (amended 2017).

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| CPAT Item | Scoring | Points |
| --- | --- | --- |
| 1. Having a Home or Cell Phone | Yes | 0 |
| | No, or Unknown | 5 |
| 2. Owning or Renting One's Residence | Own | 0 |
| | Rent, or Unknown | 4 |
| 3. Contributing to Residential Payments | Yes | 0 |
| | No, or Unknown | 9 |
| 4. Past or Current Problems with Alcohol | No | 0 |
| | Yes, or Unknown | 4 |
| 5. Past or Current Mental Health Treatment | No | 0 |
| | Yes, or Unknown | 4 |
| 6. Age at First Arrest | This is first arrest | 0 |
| | 35 years or older, or Unknown | 0 |
| | 25-34 years | 10 |
| | 20-24 years | 12 |
| | 19 years or younger | 15 |
| 7. Past Jail Sentence | No, or Unknown | 0 |
| | Yes | 4 |
| 8. Past Prison Sentence | No, or Unknown | 0 |
| | Yes | 10 |
| 9. Having Active Warrants | No | 0 |
| | Yes, or Unknown | 5 |
| 10. Having Other Pending Cases | No | 0 |
| | Yes, or Unknown | 13 |
| 11. Currently on Supervision | No | 0 |
| | Yes, or Unknown | 5 |
| 12. History of Revoked Bond or Supervision | No | 0 |
| | Yes, or Unknown | 4 |

Using these scores, judges can sort defendants into risk categories and set bail or release conditions accordingly. The Colorado system allows risk scores, public safety rates, and court appearance rates to be compared among defendants to inform judicial decisionmaking.[421] Despite being lauded as a success, Colorado's system is flawed in the same way as the Arnold PSA and many other risk assessment tools.

[421] *See The Colorado Pretrial Assessment Tool (CPAT)*, COLO. ASS'N OF PRETRIAL SERVICES 9 (June 2015), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=47e978bb-3945-9591-7a4f-77755959c5f5 [hereinafter *CPAT*]. Data shows a direct correlation between risk category and appearance rates, indicating that the factors used in Colorado's system are good predictors. The same correlation appears with respect to public safety rates. *See Risk-based Pretrial Site Visit: Denver Pretrial Services*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 10, 2014), http://www.ncsl.org/Documents/CJ/GregMauroPresentation.pdf. Whether these are good public policy is a different question. *See* Starr, *supra* note 380, at 806; *see also* Mayson, *supra* note 380, at 562.

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For items 7 and 8 ("past jail sentence" and "past prison sentence"), the Scoring Tips state that a "yes" should be recorded "regardless of the level of offense (e.g., felony or misdemeanor)."[422] Item 10 ("other pending cases") similarly does not make a distinction between whether those cases are on misdemeanor or felony charges.[423] A "yes" answer on all three of these items would put any criminal defendant into at least the second risk category under the Colorado system even if all three "yes" answers were related to misdemeanor charges or convictions.[424] Under the Colorado system, past jail sentences or pending cases could even be for misdemeanor driving related offenses, and an individual could be classified as high risk given the point structure. Again Colorado fails to account for the misdemeanor right to release and the concomitant recognition that misdemeanors are by nature much less serious crimes than felonies.

California's newly proposed risk assessment—set to take effect in 2019—is similarly flawed. Regarding risk to public safety and risk of failure to appear, Senate Bill 10 classifies defendants as low-risk, medium-risk or high-risk and sets various conditions for release based on these categories.[425] Under the new law, low-risk defendants must be released on recognizance, "prior to arraignment," and "with the least restrictive nonmonetary condition" that will reasonably protect the public and ensure that the person returns to court.[426] Medium-risk defendants must be released or detained based on local standards, but if they are released, it must be subject to the same standards as with low-risk individuals.[427] High-risk individuals must remain in custody until their arraignment.[428] Though Senate Bill 10 eliminates money bail, some commentators have argued that it gives judges too much discretion to detain defendants pending trial.[429] Under the proposed bill, prosecutors can file a motion for "preventive detention" based on public safety and other concerns.[430] This could potentially allow judges to detain even low-risk defendants.

When classifying defendants as low, medium, or high risk, the California bill requires that Pretrial Assessment Services use a "validated risk assessment tool,"[431] which is defined by the bill as a risk assessment tool "selected and approved by the court . . . from the list of approved pretrial risk assessment tools maintained by the Judicial Council."[432] Whatever tool is chosen to be part of this list must be "accurate and reliable in assessing the risk" of criminal defendants failing to appear in court

[422] *CPAT*, *supra* note 421, at 6
[423] *Id.* at 7.
[424] *See id.* at 6–9. It is also disturbing that this risk assessment considers charges and convictions similarly, blatantly ignoring the presumption of innocence. *Id.*
[425] CAL. PENAL CODE § 1320.10 (West) (effective Oct. 1, 2019).
[426] *See id.*
[427] *See id.*
[428] *See id.* § 1320.10(e)(1), (h).
[429] Salonga & Koseff, *supra* note 346.
[430] CAL. PENAL CODE §§ 1320.17–18 (West) (effective Oct. 1, 2019).
[431] CAL. PENAL CODE § 1320.10(e)(1) (West) (effective Oct. 1, 2019).
[432] CAL. PENAL CODE § 1320.7(k) (West) (effective Oct. 1, 2019).

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or jeopardizing public safety.[433] In short, even when the new bill goes into effect, California will not have a standard risk assessment tool that will be used statewide, instead leaving courts to decide which tools they will use.[434] It remains to be seen whether risk assessment tools like the Arnold PSA or others that do not distinguish between misdemeanors and felonies will be placed on California's approved tool list by the Judicial Council, but with a loophole in the proposed bill that allows even low-risk defendants to be detained pretrial, the developments from California thus far are not promising.

States have recognized that money bail is not good policy and have begun replacing it with risk assessments. While this data-driven approach is commendable and a step in the right direction, the risk assessments used by states fail in one significant way. States universally have (like with their statutes) treated misdemeanor and felony convictions as one in the same in assessing defendant risk. A defendant is treated as equally risky if he has a former misdemeanor assault and a felony assault, and in some jurisdictions there is no distinction made between violent or nonviolent misdemeanors. This type of loophole has allowed many individuals with misdemeanor driving violations to be detained unnecessarily before trial.[435] States need to rethink these risk assessments and at a minimum distinguish between misdemeanors and felonies in considering current charges and conviction records. As an additional way to create meaningful reform, states should also make a goal of a less than 10% pretrial detention rate.[436] Only fourteen states currently meet this goal, including states who have made bail reform a priority.[437] A goal such as this may help guide judicial discretion in applying risk assessments and serve as an important reminder of the presumptive right of misdemeanor release. Without such a goal, the first two waves of bail reform have failed, and the current third wave of bail reform is doomed to face a similar outcome.

## IV. CONCLUSION

In recent years, misdemeanors and bail reform have attracted significant attention from scholars and policymakers.[438] In the last three years, states have

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[433] *See id.*

[434] Colin Wood, *California is ditching bail, and now courts must choose a risk assessment tool*, STATESCOOP (Sept. 5, 2018), https://statescoop.com/california-is-ditching-bail-now-courts-have-to-choose-a-risk-assessment-tool/.

[435] NATAPOFF, *supra* note 5, at 1–18.

[436] PRETRIAL JUST. INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 11–12 (2017), *available at* https://university.pretrial.org/viewdocument/state-of-pretrial-justice-in-americ (last accessed Jan. 2, 2019) (noting that the states of Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Oregon, Rhode Island, Utah, Vermont, and Washington had less than 10% pretrial detention rates as of 2017).

[437] *Id.*

[438] *See, e.g.*, KOHLER-HAUSMANN, *supra* note 5; Stevenson & Mayson, *supra* note 5; Joe, *supra* note 5; Heaton et al., *supra* note 39, at 713–18.

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passed hundreds of new pretrial release laws.[439] There are over 200 bills related to pretrial release pending in thirty-nine state legislatures across the country.[440] While attention to the issue of bail is certainly important and necessary to reform, most of these efforts are destined to fail. These reform efforts all conflate misdemeanors and felonies, resigning many defendants to detention or money bail who should be released pretrial. Many recommend risk assessments that do not treat minor misdemeanor crimes separately from major felony offenses. And many states rely on money bail for both misdemeanors and felonies—making it nearly impossible for most poor defendants to obtain release. Most state schemes recommend the same exact factors for felony and misdemeanor release without realizing that misdemeanor release is a pretty-near absolute right and requires no balancing test.

Misdemeanors are less serious crimes than felonies. Today misdemeanors make up the bulk of cases in criminal court.[441] Release on bail is a time-honored historical right for nonserious crimes. Consequently, the weighing of misdemeanants' right to pretrial release against the same factors felons face is a violation of that historic right. Indeed, in assessing misdemeanants for pretrial release, courts should be concerned with finding the least restrictive means by which to ensure the defendant will appear for court. They should not be weighing factors

[439] *Trends in Pretrial Release: State Legislation Update*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 2018), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialenactments_2017web_v02.pdf; 725 ILL. COMP. STAT. 5/110-5(a-5) (2018) (creating a presumption that any conditions of release imposed shall be nonmonetary in nature and that courts shall impose the least restrictive means necessary); IND. CODE § 35-33-8-3.8 (2017) (mandating that courts consider releasing a defendant without money bail if the results of a pretrial risk assessment show that the defendant does not present a substantial risk of flight or danger); CAL. PENAL CODE § 1320.10 (West) (effective Oct. 1, 2019) (classifying defendants as low-risk, medium-risk, or high-risk and setting various conditions for release based on these categories); CONN. GEN. STAT. § 54-64a(a)(2) (2017) (barring cash-only bail for certain crimes and restricting the use of financial considerations for release in misdemeanor crimes); N.J. STAT. ANN § 2A:162-17 (West 2017) (creating categories of pretrial release conditions applicable in certain circumstances); COLO. REV. STAT. § 16-4-105 (2017) (imposing conditions on bond for certain offenses); UTAH CODE. ANN. § 77-20-1 (West 2017) (allowing persons eligible for bail to be released with or without money bail based on the court's discretion).

[440] *See State Pretrial Policy: Bill Tracking Database*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 18, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/state-pretrial-policy-bills-tracking-database.aspx. Between 2015 and 2016, 14 states passed laws either expanding or restricting eligibility for pretrial release. *Trends in Pretrial Release: State Legislation Update*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 2018), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialenactments_2017web_v02.pdf.

[441] Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057 (2015) ("[T]he ten million misdemeanor cases filed annually comprise around eighty percent of state dockets.").

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of guilt or innocence, or of dangerousness except in very rare circumstances. Judges are not especially skilled in predicting dangerousness anyway.[442] Defendants who pose a threat of violence while released are extremely rare—even felony defendants, but especially misdemeanor defendants.[443] On the other hand, even a few days of pretrial detention almost certainly causes serious harm to the lives of defendants.

At common law, misdemeanor defendants were usually granted pretrial release as there was a presumption of release in such cases.[444] Misdemeanor defendants had a right to bail, unlike defendants charged with capital crimes and some felony defendants.[445] The idea was (and, in many respects, still is) that misdemeanors are less serious crimes and as less serious crimes, defendants in such cases do not pose the same threat to society as defendants charged with violent felonies.[446] Misdemeanor bail looks drastically different today. Indeed several states today set misdemeanor bail rates as high as felony rates and up to $20,000 in some cases.

Detaining an individual based on their ability to pay bail has been found to be a constitutional violation of the Due Process and Equal Protection Clauses.[447] Denial of a misdemeanor defendants' right to release is also a violation of the longstanding presumption of innocence. And most states even have their own statutory and constitutional rights guaranteeing release for misdemeanor defendants, except in unusual cases.[448] Often rather than guaranteeing release, courts leave these important rights to the mercy of balancing tests that determine if the government interest outweighs personal liberties.[449] Instead, U.S. jurisdictions should abandon bail laws and reform efforts, money bail schemes and risk assessments that conflate misdemeanors and felony crimes. Minor crimes should always be dealt with separately. The liberty interest for misdemeanor cases is much stronger, yet the harm for defendants is as serious. Evidence demonstrates that detention before trial leads to three-times higher conviction rates, higher rates of pleading guilty, sentences that

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[442] *See* Baradaran & McIntyre, *supra* note 37, at 558 (concluding that "if the goal is to prevent crime, judges are often releasing and detaining the wrong groups.").

[443] For instance, an average felony defendant has a 1.9% chance of committing a violent crime on pretrial release. Even the most dangerous felony defendant who is charged with a violent crime and has four convictions for previous violent crimes (who should be detained) only commits a violent crime once in every thirty instances. Baradaran & McIntyre, *supra* note 37, at 527, 530.

[444] WILLIAM BLACKSTONE, THE AMERICAN STUDENTS' BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND; IN FOUR BOOKS 1002 (George Chase ed., Banks & Brothers 3d ed. 1890) (1877).

[445] *Id.*

[446] *The Law Respecting Bail*, 7 IRISH L. TIMES & SOLIC. J. 404, 404 (1873). *See also supra* notes 29–31 and accompanying text.

[447] *See supra* note 375 and accompanying text.

[448] *See supra* Part III.

[449] *See, e.g.*, ODonnell v. Harris Cty., Texas, 251 F. Supp. 3d 1052, 1143 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), and *aff'd as modified sub nom*. ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018) (applying the balancing test articulated by the Supreme Court in Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).

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are twice as long,[450] and even higher recidivism rates even after a few days behind bars.[451]

The majority of individuals in our nations jails are unconvicted people.[452] One-third of them are serving short misdemeanor sentences and 85% are in for nonviolent and minor offenses—with 80% of them having their charges dropped during their stay.[453] What these numbers indicate is that many incarcerated individuals can safely be released and never serve in jail. U.S. jurisdictions should shift their bail reform goals to include guidelines for release that aim to detain ten percent or fewer misdemeanants. While 10% is certainly an arbitrary number—it is probably close to maximum number of misdemeanor defendants that should be detained for emergency reasons. This goal combined with a revised data-driven risk assessment that avoids the flaws of all of the current instruments will actually divide bail reform. Without goals for reduced detention, bail reform efforts will continue to change factors and methods but fail in the ultimate goal. Without a focus on important constitutional rights and a goal to actually increase actual numbers of release, we will continue to fail at reducing incarceration rates and improving defendant rights. By returning to a once-obvious bifurcation between misdemeanor and felony bail, we would not only solve prison overcrowding, but lay the foundation for clarifying wider due process protections that have been lost for many pretrial defendants.

[450] ODonnell v. Harris Cty., Texas, 251 F. Supp. 3d 1052, 1143–44 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), and *aff'd as modified sub nom*. ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018).

[451] Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 874; Heaton et al., *supra* note 39, at 718 (finding that pretrial detainees are more likely to commit future crimes than similarly situated defendants who have been released).

[452] BAUGHMAN, *supra* note 4, at 1–17.

[453] *Id.*

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