# Dividing Bail Reform

*Shima Baradaran Baughman*[*]

*ABSTRACT: 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, constitutions, and factors that judges consider in the bail decision.*

*All of these reforms are fundamentally flawed. This is because nearly all of these bail reform efforts fail to distinguish minor and serious crimes. Instead they consider all crimes as interchangeable. This Article is the first to identify this pervasive shortcoming in bail reform, and it 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 dividing bail*

[*] 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, Eli LeCates, Haden Gobel, Ngozi Okidegbe and Hope Collins for research and editorial assistance on this Article. I am indebted to the editors of the *Iowa Law Review* for their work on this Article, particularly Kameron Dodge, Clint Harris and Bernadette Nelson. A University of Utah faculty research grant made this research possible.

*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.*

## 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 and regulations,[3] and changed factors for considering bail.[4]

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.

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1. *See, e.g.*, ALASKA STAT. § 33.07.010 (2018) (creating a pretrial services program that provides pretrial risk assessment, makes recommendations concerning pretrial release decisions and provides supervision); ARIZ. REV. STAT. ANN. § 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); CAL. PENAL CODE § 1320.10 (West 2019) (effective Oct. 1, 2019) (classifying defendants as low-risk, medium-risk, or high-risk and setting various conditions for release based on these categories); COLO. REV. STAT. § 16-4-105 (2017) (imposing conditions on bond for certain offenses); 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); 725 ILL. COMP. STAT. 5/110-5(a-5) (2018) (creating "a presumption that any conditions of release imposed shall be non-monetary in nature and the court shall impose the least restrictive conditions . . . 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"); N.J. STAT. ANN. § 2A:162-17 (West 2017) (creating categories of pretrial release conditions applicable in certain circumstances); N.Y. CRIM. PROC. LAW § 530.20 (McKinney 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. ANN. art. 17.03–17.033 (West 2017) (creating instances in which eligible defendants may be released on a personal, non-monetary bond at the court's discretion); UTAH CODE. ANN. § 77-20-1 (LexisNexis 2017) (allowing persons eligible for bail to be released with or without money bail based on the court's discretion); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION UPDATE 1 (2018), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialenactments_2017web_v02.pdf [https://perma.cc/P2TY-2V2J]; PRETRIAL JUSTICE INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 13–14 (2017), https://university.pretrial.org/viewdocument/state-of-pretrial-justice-in-americ [https://perma.cc/FK33-H2M2].

2. CAL. PENAL CODE § 1320.10 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 17.03 –17.033 (West 2017); Thompson v. Moss Point, No. 1:15CV182LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); Order at 2, Powell v. City of Saint Antonio, No. 4:15-CV-840 (E.D. Mo. Sept. 3, 2015), ECF No. 13; Pierce v. City of Velda City, No. 4:15-CV-570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015).

3. *See, e.g.*, CAL. PENAL CODE § 1320.10 (West 2019); N.M. CODE R. § 5.408 (LexisNexis 2017); Arizona Code of Judicial Administration § 5-201: Evidence-Based Pretrial Services, No. 2014-12 (2014) ("Arizona Code of Judicial Administration (ACJA) section 5-201 authorizes courts to operate pretrial service programs . . . § 5-201(E)(1) approves use of the validated pretrial risk assessment tools . . . .").

4. SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 1–10 (2018) (discussing changing factors in pretrial release throughout various states).

Misdemeanors are not a small piece. The United States criminal justice system is largely made up of misdemeanors.[5] About 90 percent 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 presumption of pretrial release.[11] In the modern U.S. criminal system,[12] a significant number of those charged with

5. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 2 (2018); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 740 (2017); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 764 (2018).

6. Natapoff, *supra* note 5, at 1315; *see also* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 256–58, 281 (2018) [hereinafter NATAPOFF, PUNISHMENT WITHOUT CRIME] (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 134.

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, 727–28 (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, 861–63 (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 8, at 859 (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.* ("[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."); *see also* Baradaran, *Presumption of Innocence*, *supra* note 8, at 728–29 (explaining that "English bail law presumed that defendants would be released").

11. BAUGHMAN, *supra* note 4, at 4; Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 870–71 (explaining that there is no longer a presumption of pretrial release in misdemeanor cases); *see also* Baradaran, *Presumption of Innocence*, *supra* note 8, at 752.

12. Baradaran, *Presumption of Innocence*, *supra* note 8, at 748; Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 863–64.

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 decrease 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 a bail approach that differentiates between the two. Relying on original hand-collected data from all 50 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 that the underlying problem of bail reform efforts is this fundamentally flawed lack of differentiation. 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

13. *See* BAUGHMAN, *supra* note 4, at 1–17; *see* also ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), https://www.opensocietyfoundations.org/uploads/9b7f8e10-a118-4c23-8e12-1abcc46404ae/misdemeanor_20090401.pdf [https://perma.cc/N8BR-BRGB] (estimating, based on a sample of 12 states, that approximately 2.5 million people in the United States are held on bail they cannot afford for misdemeanor charges every year); Natapoff, *supra* note 5, at 1322 (observing that the majority of defendants in New York City could not pay bail of $1,000 or less); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1525 n.81 (2013) (noting that in New York, "25 percent of nonfelony defendants are held on bail").

14. BAUGHMAN, *supra* note 4, at 84–85 (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 5, at 135 (noting that "[d]efendants 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* BAUGHMAN, *supra* note 4, at 1–17.

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 5, 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."); *see* NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 6, at 281 (providing a helpful national analysis of misdemeanor cases in 2015); *see also infra* notes 199–205 and accompanying text.

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 8, at 871 (noting that misdemeanor defendants are detained at rates similar to those for felony defendants in some areas).

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 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

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 Section II.B.

19. Stevenson & Mayson, *supra* note 5, 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 has not 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." *Id.*

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 [https://perma.cc/UAW6-9A3W] (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 areas of [Minnesota]"); Joe, *supra* note 5, at 740, 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 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"); 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." (footnotes omitted)).

22. Stevenson & Mayson, *supra* note 5, at 734 n.15 (highlighting the work of Malcolm Feeley and Jonathan 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. *See generally* THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T. OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007), https://www.bjs.gov/content/

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 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)

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pub/pdf/prfdsc.pdf [https://perma.cc/D9CU-QHWB] (focusing the analysis on felony defendants).

25. *Id.* at 9.

26. *But see* Stevenson & Mayson, *supra* note 5, at 740; *see also* NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 6.

27. Joe, *supra* note 5, at 753, 758 (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 the 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 5, at 763–66 (explaining that 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 ("[T]here is general acceptance that attorneys can handle more misdemeanors than felonies . . . due in part to the reality of high numbers of misdemeanors in the criminal justice system, combined with the reality of a limited pool of resources.").

30. *See* Baughman, *History of Misdemeanor Bail*, *supra* note 8, 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., Tex., 251 F. Supp. 3d 1052, 1143 (S.D. Tex. 2017) (explaining that evidence shows 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), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *and aff'd as modified sub nom.* 892 F.3d 147 (5th Cir. 2018); Pedersen v. State, No. A-10958, 2014 WL 4536293, at *4 (Alaska Ct. App. Sept. 10, 2014) (detailing that the defendant was arrested on a felony charge and was entitled to

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]

The failure to think carefully about bail reform has produced consequences well beyond the realm of bail itself. 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 and

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a preliminary hearing within ten 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 777–80.

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 8, at 872–81 (noting that consequences of pretrial detention include loss of "their jobs, apartments, and sometimes children and family stability," "future rearrests 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 8, at 844 (noting that misdemeanor charges are much more common than felony charges and flood the criminal justice system); Stevenson & Mayson, *supra* note 5, at 733 (arguing that "[w]e do not know even the most basic facts" about our misdemeanor justice system).

36. *See, e.g.*, NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 6, at 281; 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"); 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); Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 674 (2018) (arguing that misdemeanor injustices are caused by "the institutional design of the adversarial process" which "is not up to

policy makers still have not recognized the importance of distinguishing misdemeanors and felonies and still propose solutions that equate all crimes.[37]

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 traditionally been treated differently from felony bail. Part II also overviews the bail decision (whether a person is released before trial) 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 analysis, that judges overwhelmingly use the same factors to determine misdemeanor release as they do to determine felony release. This analysis is sometimes driven by actual state law, and sometimes just by default. This is an improper application of the constitutional right to bail because misdemeanor

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the task of delivering justice to those charged with misdemeanors"); 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"); 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"); Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 887–88 (2018) (describing the various approaches scholars take in addressing mass misdemeanor convictions); 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"); Roberts, *supra* note 21, at 280–82 (describing the representation crisis in misdemeanor bail defense and the possibly devastating effects on indigent individuals); Stevenson & Mayson, *supra* note 5, at 737 (discussing the "profound racial disparity in the misdemeanor arrest rate for most—but not all—offense types"); *see also* Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 872–73 (noting the "detrimental and often life-altering" effect that misdemeanors have on defendants as disadvantaged defendants "routinely plead guilty to get out of jail because they cannot afford bail or because they do not want to risk trial"). *See generally* KOHLER-HAUSMANN, *supra* note 5 (discussing the prevalence of misdemeanor adjudications that affects hundreds of thousands of individuals beyond those incarcerated in prisons or convicted of felonies).

37. Many scholars, including myself, have failed to distinguish felony and misdemeanor differences in scholarship and have focused primarily on felonies. *See, e.g.*, Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 513–23 (2012); Timothy R. Schnacke, "Model" Bail: Redrawing the Line Between Pretrial Release and Detention 190 (2017) (on file with the Center for Legal and Evidence-Based Practices), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf [https://perma.cc/3XKR-S4J9]. *See generally* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909 (2013) (discussing the right to bail in the context of felonies); 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).

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] Part IV will address how bail systems across America need reform in order to prevent the wholesale stripping of due process rights from 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 including reducing prison overcrowding because the majority of people detained pretrial can be released.[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,

38. Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 863–64 (noting that 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* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–18 (2017) (discussing background evidence on the impacts of pretrial detention on misdemeanor defendants); Natapoff, *supra* note 5, at 1316–17 (discussing the significant harmful consequences that misdemeanor convictions can have on those convicted); Roberts, *supra* note 21, at 286–88 (discussing the many collateral consequences of misdemeanor arrests and records in the lives of defendants); 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 other basic facets of daily life").

40. Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 842 (noting that "[o]ur broken bail system is the '[primary] cause of mass incarceration'" (quoting BAUGHMAN, *supra* note 4, at 2)); *see also* BAUGHMAN, *supra* note 4, at 10.

41. Stevenson & Mayson, *supra* note 5, at 764.

42. *Id.* at 738.

43. *Id.* at 764.

44. Commonwealth v. Flaherty, 25 Pa. Super. 490, 493 (1904) (explaining that "[m]isdemeanors are either [regulated] 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, 515 n.32 (2001). *See generally* Erik

shoplifting, public lewdness, criminal mischief, harassment, some forms of credit card fraud, animal cruelty, criminal trespass, and vandalism.[45] However, the right to bail for misdemeanor crimes has changed today from how it was handled historically.

This Part focuses on several important aspects of misdemeanor bail. Section II.A establishes bail as a historically guaranteed right for misdemeanor crimes. Section 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. Section 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*

Under English Common Law, due process principles prohibited detention before trial for misdemeanor crimes. Bail in misdemeanor cases is (and has been) considered "a matter of right."[46] Indeed, misdemeanor bail

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Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, (2005) (discussing overcriminalization and possible methods of its alleviation); Paul Rosenzweig, *Overcriminalization: An Agenda for Change*, 54 AM. U. L. REV. 809 (2005) (same).

45. *See, e.g.*, ALASKA STAT. ANN. § 11.61.140 (West 2018) (animal cruelty); ALASKA STAT. ANN. § 11.61.118 (West 2010) (first degree harassment); ALASKA STAT. ANN. § 11.46.484 (West 1996) (fourth degree criminal mischief); CAL. PENAL CODE § 490.2 (West 2016) (petty theft); CAL. PENAL CODE § 459.5 (West 2014) (shoplifting); CAL. PENAL CODE § 502.6 (West 2003) (the use of a scanning device to obtain the information from a payment card magnetic strip without permission); CAL. PENAL CODE § 597t (West 1971) (confining an animal and failing to "provide . . . an adequate exercise area"); 720 ILL. COMP. STAT. 5/17-37 (2011) (stating a credit card holder who permits another person to use it with intent to defraud the issuer commits a misdemeanor); KY. REV. STAT. ANN. § 434.640 (West 1978) (the signing of a credit or debit card with intent to defraud the issuer); MINN. STAT. § 609.224 (1979) (assault); N.Y. PENAL LAW § 245.00 (McKinney 2015) (public lewdness); N.Y. PENAL LAW § 140.15 (McKinney 2010) (second degree criminal trespass); N.Y. PENAL LAW § 145.00 (McKinney 2008) (fourth degree criminal mischief); S.C. CODE ANN. § 16-11-770 (2007) (first conviction of graffiti vandalism); Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 854 n.127 (citing ALASKA STAT. ANN. § 11.46.320 (West 2017) (first degree criminal trespass)).

46. Constantino v. Warren, 684 S.E.2d 601, 604 (Ga. 2009); *see* Hobbs v. Reynolds, 289 S.W.3d 917, 920 (Ark. 2008) (quoting ARK. CONST. art. 2, § 8) (stating that, under state law, "[a]ll persons . . . [are] bailable . . . except for [in] capital offenses"); *see also* Williams v. City of Montgomery, 739 So. 2d 515, 518 (Ala. Civ. App. 1999) (quoting ALA. CODE § 15-13-108 (1993)) (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"); People v. Barbarick, 214 Cal. Rptr. 322, 324–26 (Dist. 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 . . . ." (alterations in original) (quoting *In re* Podesto, 15 Cal. 3d 921, 933 (1976))); People v. Arnold, 132 Cal. Rptr. 922, 926 (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 GA. CODE. ANN. § 27-901 (1965))); State v. Langley, 611 P.2d 130,

has historically been treated as such—and remains a right under the law.[47] Defendants charged with noncapital crimes had the right to release.[48] All misdemeanors were noncapital crimes under the common law.[49] And misdemeanor charges came with a guarantee of bail.[50] Eventually, courts gained broad discretion in fixing bail and "sometimes courts did set bail in murder and other felony cases."[51] Bail was provided as a right for misdemeanor cases—not subject to court discretion like felony cases—"even when defendant was considered guilty."[52] Indeed, this guarantee to a reasonable bail has been honored under the common law as far back as the Magna Carta.[53] Misdemeanor defendants were not detained before trial, and were even released when they had missed a few court dates for misdemeanor offenses.[54] 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.[55] As such, misdemeanor defendants were released before trial, without regard to their likelihood to

130 (Haw. 1980) ("A person arrested for a petty misdemeanor or misdemeanor offense possesses not an absolute right to immediate release, but rather a right to release without unnecessary delay upon payment of bail."); State v. Barthold, 110 N.W.2d 493, 494 (Minn. 1961).

47. 1 WILLIAM BLACKSTONE, THE AMERICAN STUDENT'S BLACKSTONE: COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 1001 (George Chase ed., Banks & Brothers 3d ed. 1892) (1877).

48. "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." *Id.* at 1002–03.

49. *See* Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 857 ("Capital crimes under the English common law were significant 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.").

50. *See id.* at 864; *see also* JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE; OR, COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES 154 (Boston, Little, Brown, & Co. 3d ed. 1880).

51. *See* Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 858; *see also* BISHOP, *supra* note 50, at 154–55.

52. *See* Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 858; *see also* BISHOP, *supra* note 50, at 155–57 ("One held to answer for a misdemeanor may give bail equally whether he is guilty or not."); *see also, e.g.*, 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 96 (Springfield, E. Merriam & Co. 2nd ed. 1832) ("[S]mall misdemeanors, or any offense below felony, must be bailed unless they be excluded from it by some special act of parliament." (citation omitted)); JOHN WILDER MAY, THE LAW OF CRIMES 73 (Joseph Henry Beale, Jr. ed., Boston, Little, Brown, & Co. 2d ed. 1881) ("Every prisoner must at common law be allowed bail upon a commitment, unless he is charged with a capital crime.").

53. MAGNA CARTA (1215) ("For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly . . . .").

54. 1 BLACKSTONE, *supra* note 47, at 75 (explaining that misdemeanors came with "great importance to the public [of] the preservation of . . . personal liberty").

55. JOHN BEAMES, A TRANSLATION OF GLANVILLE 27–28 (John Byrne & Co. 1900) (explaining that it was only upon missing the third summons that the accused's "body shall be taken, and his Pledges," sureties who would guarantee his appearance, be made to pay a fine).

appear in court. "Overall, misdemeanor bail was respected historically as a constitutional right."[56]

Most states continue to distinguish between misdemeanors and felonies, either by constitution or statute.[57] According to the National Conference of State Legislatures ("NCSL"), 18 states and the District of Columbia require a separate hearing on whether a defendant will be held or released pretrial.[58] 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.[59] However, the states that do require a separate hearing do so only for more serious violent crimes, largely felonies and crimes

56. Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 863.

57. ALA. CONST. art. I, § 16; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 22; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; FLA. CONST. art. I, § 14; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 17; IOWA CONST. art. I, § 12; KAN. CONST. BILL OF RIGHTS, § 9; KY. CONST. § 16; LA. CONST. art. I, § 18; ME. CONST. art. I, § 10; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. II, § 21; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7; N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 13; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OR. CONST. art. I, §§ 14, 43; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. 6, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, §§ 11, 11a, 11c; UTAH CONST. art. I, § 8; VT. CONST. art. II, § 40; WASH. CONST. art. I, § 20; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 14; ALA. CODE § 15-13-108 (2018); ALASKA STAT. ANN. § 12.30.011(d) (West 2018); ARIZ. REV. STAT. ANN. §§ 13-3961(a), 13-3967(a) (2018); ARK. CODE ANN. § 16-84-110 (2018); CAL. PENAL CODE §§ 1270.5, 1271 (West 2018); COLO REV. STAT. ANN. § 16-4-101 (West 2018); DEL. CODE ANN. tit. 11, §§ 2103, 2116 (2018); D.C. CODE ANN. § 23-1322 (West 2018); FLA. STAT. ANN. § 907.041(4) (West 2018); GA. CODE ANN. §§ 17-6-1(e), 17-6-13 (2018); HAW. REV. STAT. ANN. §§ 804-3, 804-4(a) (LexisNexis 2018); IDAHO CODE ANN. § 19-2902 (2018); 725 ILL. COMP. STAT. ANN. 5/110-4 (West 2018); IND. CODE ANN. § 35-33-8-2 (West 2018); IOWA CODE ANN. § 811.1 (West 2018); KAN. STAT. ANN. §§ 22-2802, 59-29a20 (2018); LA. CODE CRIM. PROC. ANN. arts. 330–31 (2018); ME. REV. STAT. ANN. tit. 15, § 1003(3)–(4) (2018); MD. CODE ANN., CRIM. PROC. § 5-202 (LexisNexis 2018); MASS. GEN. LAWS ANN. ch. 276, §§ 58, 58A (West 2018); MICH. COMP. LAWS ANN. §§ 765.5, 765.6(1) (West 2018); MISS. CODE ANN. § 99-5-33 (2018); MO. ANN. STAT. §§ 544.455, 544.470 (West 2018); MONT. CODE ANN. § 46-9-102 (West 2018); NEV. REV. STAT. ANN. § 178.484 (LexisNexis 2018); N.H. REV. STAT. ANN. §§ 597:1, 597:1c, 597:2(III-a) (2018); N.Y. CRIM. PROC. LAW § 510.10 (McKinney 2015); N.C. GEN. STAT. ANN. §§ 15A-533, 15A-534.6 (West 2018); OHIO REV. CODE ANN. § 2937.222 (LexisNexis 2018); OKLA. STAT. ANN. tit. 22, § 1101 (West 2018); OR. REV. STAT. ANN. § 135.240 (West 2018); 42 PA. STAT. AND CONS. STAT. ANN. § 5701 (West 2018); 12 R.I. GEN. LAWS ANN. § 12-13-1 (West 2018); S.C. CODE ANN. § 22-5-510 (2018); TENN. CODE ANN. § 40-11-102 (2018); TEX. CODE CRIM. PROC. ANN. arts. 17.152–.153 (West 2018); UTAH CODE ANN. §§ 77-20-1, 77-36-2.5(1) (LexisNexis 2018); VT. STAT. ANN. tit. 13, §§ 1043, 1044, 1063, 7553, 7553a (2018); VA. CODE ANN. §§ 19.2-120–19.2-120.1 (2018); W. VA. CODE ANN. § 62-1C-1 (LexisNexis 2018); WIS. STAT. ANN. §§ 969.01, 969.035 (West 2018); WYO. STAT. ANN. § 7-10-101 (West 2018); *see also Pretrial Release Eligibility*, NAT'L CONF. ST. LEGISLATURES (Mar. 13, 2013), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx [https://perma.cc/BP7P-YZVD].

58. *Pretrial Detention*, NAT'L CONF. ST. LEGISLATURES. (June 7, 2013), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx [https://perma.cc/57JQ-J639] [hereinafter NCSL, *Pretrial Detention*].

59. *Id.*

involving domestic violence.[60] A separate hearing does not take place for misdemeanor cases.[61] 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.[62]

Most Americans "who encounter the criminal justice system [will] do so through the petty offense[s]" that make up misdemeanor charges; they will not be charged with rape or murder.[63] However, especially when it comes to misdemeanors—bail is among the least visible parts of the criminal process.[64] 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*

The consequences of being held in pretrial detention—even for a misdemeanor—can be significant. Besides the potential dangers of jail,[65] the consequences of even short jail stays can be catastrophic for misdemeanor

60. *See id.* Twelve states and the District of Columbia have provided courts with explicit "time frames for when the hearing must be held." *Id.*

61. The finding of probable cause and a separate preliminary hearing is not required for misdemeanor cases in many jurisdictions. *See, e.g.*, Anjali Pathmanathan, *The Myth of Preliminary Due Process for Misdemeanor Prosecutions in New York*, 42 N.Y.U REV. LAW & SOC. CHANGE: THE HARBINGER 82, 86–87 (2018) (stating that 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); *see also, e.g.*, PAUL BERGMAN & SARA J. BERMAN, THE CRIMINAL LAW HANDBOOK: KNOW YOUR RIGHTS, SURVIVE THE SYSTEM 342 (15th ed. 2018) ("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.").

62. Baughman, *The History of Misdemeanor Bail*, *supra* note 8, 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.").

63. Stevenson & Mayson, *supra* note 5, at 764.

64. Marian R. Williams, *The Effect of Attorney Type on Bail Decisions*, 28(I) CRIM. JUST. POL'Y REV. 3, 5–6 (2017) (discussing how the bail system is particularly unfair for poor defendants for a variety of reasons).

65. *See, e.g.*, Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 HEALTHCARE EPIDEMIOLOGY 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*, 24 FED. SENT'G REP. 36, 47 (2011) (describing conditions in U.S. jails); Jonathan Abel, *Staph Sends Pinellas Jail Inmate into Coma*, TAMPA BAY TIMES (Feb. 27, 2008), http://www.sptimes.com/2008/02/27/Northpinellas/Staph_infection_sends.shtml [https://perma.cc/G3WL-2MMU] (reporting an accident caused by jail sanitary conditions).

defendants—many of whom are poor or members of historically disadvantaged groups.[66] These consequences include effects on employment, earnings, family destabilization, housing and even broader community effects where incarcerated people are concentrated.[67] 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 guilty,[68] causes defendants to be convicted three times as often,[69] receive three times longer sentences,[70]

66. Joshua Page et al., *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 150, 157 (2019) (noting that in 2002, women awaiting trial in local jails earned only $8,052 per year while men earned only $12,732 per year); *see* Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, B.U. L. REV. (forthcoming 2019) (manuscript at 7), https://ssrn.com/abstract=3374571 (showing that of an estimated 13 million misdemeanor cases filed per year, 43 percent of defendants were detained pretrial on bail of only $500); *see also* Peter Hepburn et al., *Cumulative Risks of Multiple Criminal Justice Outcomes in New York City*, 56 DEMOGRAPHY 1161, 1165–69 (2019) (illustrating that minority communities in NYC are more likely to be charged with and convicted of misdemeanors); Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1665 (2019) (reviewing ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018)) (highlighting that 81 percent of misdemeanor arrestees in New York were African Americans or Latinos despite compromising only 53 percent of New York's population); Joshua Page, *I Worked as a Bail Bond Agent. Here's What I Learned*, APPEAL (Apr. 4, 2019), https://theappeal.org/i-worked-as-a-bail-bond-agent-heres-what-i-learned [https://perma.cc/4V82-SVHS] (illustrating how low-income communities are drained of wealth through bail payments).

67. BAUGHMAN, *supra* note 4, at 87; *see also* MICHAEL REMPEL ET AL., CTR. FOR COURT INNOVATION & VERA INST. OF JUSTICE, JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM 6 (January 2017), http://www.courtinnovation.org/sites/default/files/documents/NYC_Path_Analysis_Final%20Report.pdf [https://perma.cc/MNN2-CW9K]; 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); Baughman, *History of Misdemeanor Bail*, *supra* note 8, 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); Heaton et al., *supra* note 39, at 718 ("[P]retrial detainees are more likely than similarly situated releasees to commit future crimes.").

68. *See* State of Iowa 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."); 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."); Heaton et al., *supra* note 39, at 714 ("[A] detained person may plead guilty—even if innocent—simply to get out of jail.").

69. 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.").

70. *See* Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL'Y REV. 59, 70–71 (2014) (explaining that men receive longer sentences than women, defendants who are black get longer sentences than white defendants, and younger individuals receive longer sentences than older individuals, and

higher bail amounts, and even commit more future crime.[71] One study found that defendants that were held for the entire period before trial were 1.3 times more likely to be rearrested than defendants who were not held in jail before trial.[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 21 Florida counties—the researchers there found that in roughly 80 percent of cases, arraignments lasted no longer than three minutes and that 70 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 studies of felony bail arraignments.[77] In a study conducted in New York City, the authors found

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therefore young, black men receive three times longer sentences); *see also* Baughman, *Costs of Pretrial Detention*, *supra* note 67; Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299, 299–301 (2003). 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; *see also* J.C. Oleson et al., *The Effect of Pretrial Detention on Sentencing in Two Federal Districts*, 33 JUST. Q. 1103, 1114–17 (2016) (showing pretrial detention leads to more severe punishment).

71. BAUGHMAN, *supra* note 4, at 81; Heaton et al., *supra* note 39, at 714.

72. LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUSTICE, JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 6 (2019), http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/9Z3R-V9GN]; CHRISTOPHER T. LOWENKAMP ET AL., ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 20–21 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [https://perma.cc/BT7N-H888].

73. ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 16–17 (2011), https://www.nacdl.org/getattachment/eb3f8d52-d844-487c-bbf2-5090f5ca4be3/three-minute-justice-haste-and-waste-in-florida-s-misdemeanor-courts-report-final.pdf [https://perma.cc/T9SF-NUZC]; *see also* Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 841 (discussing how such decisions are often "two-minute decision[s]," 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 . . . tr[ied] to take only those cases that c[ould] be disposed of at arraignment").

75. *Id.*

76. *Id.*

77. Sarah Ottone & Christine S. Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 24, 33–34 (2018). One study conducted by scholars Ottone and Scott-Hayward observed arraignments in California courts. *Id.* at 26. The study focused on Los Angeles County and Orange County. *Id.* at 31. The researchers

that of the misdemeanor cases that were not disposed of at arraignment, 79 percent were released with no conditions.[78] Of the other 21 percent of misdemeanor cases facing the possibility of pretrial detention, three percent posted bail at arraignment, 25 percent were detained on bail, and one percent 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 of 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 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

visited "15 different court locations" to observe arraignments for felonies. *Id.* Bail hearings were consistently "[s]hort and [u]ncontested." *Id.* at 33. And in one court, "[t]he judge did not explicitly invite" argument on bail. *Id.* at 34. Even then, observers found "arguments . . . over the amount of bail set were rare" and requests for lower bail were generally denied. *Id.*

78. REMPEL ET AL., *supra* note 67, at 59.

79. *Id.* at 58. Some individuals detained at arraignment later made bail. *Id.* The authors found that only ten percent of misdemeanants were detained throughout their entire case. *Id.* at 59.

80. Roberts, *supra* note 21, at 307 (internal quotations omitted).

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.*

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

87. RON MALEGA & THOMAS H. COHEN, U.S. DEP'T. OF JUSTICE, STATE COURT ORGANIZATION, 2011, at 5 (2013) (finding that in 2011, 59 percent of limited jurisdiction court judges were required to obtain a legal qualification, most commonly a law degree).

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, Texas*, 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 "define[s] 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 32 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 Court of Appeals of New York has decided that indigents are entitled to counsel at bail hearings, indigent defendants are still not always represented at these hearings.[96]

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

89. Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 213 (2008) (holding that the right to counsel attaches at a "criminal defendant's initial appearance before a judicial officer"); John P. 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. 831, 840 (2017) (discussing how "[t]he 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"); *see also* 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*, 554 U.S. at 212.

91. *Id.* at 212 n.16 (second alteration in original) (citations omitted) (first quoting United States v. Ash, 413 U.S. 300, 312–13 (1973); and then quoting United States v. Wade, 388 U.S. 218, 226 (1967)).

92. Gross, *supra* note 89, at 865–66.

93. *Id.* at 841.

94. *Id.*

95. *Id.* at 841–50 (discussing the lack of a defendant's right to counsel in the following states: Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Illinois, Indiana, Louisiana, Maine, Michigan, Minnesota, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin); *see also* BAUGHMAN, *supra* note 4, at 116 (discussing the major disadvantages defendants face when attending a bail hearing without the benefit of counsel).

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

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 Statistics study, 30 percent of convicted and jailed misdemeanor defendants reported that they did not receive representation.[98] Some are not offered representation, but 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 40 percent since 1999.[102]

Nationally, public defender offices are often overloaded with misdemeanor cases and lack the number of attorneys to meet the demand. Indeed, only 12 percent 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—resulting in defendants often left feeling like they have no other option than taking a plea deal and getting through their case.[104]

It may come as no surprise that "there are no legal or professional standards for effective representation specific to the misdemeanor practice."[105] In *Strickland v. Washington*, the Supreme Court laid out a two-

97. Choy, *supra* note 86, at 82 (citing COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO 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, 1024 (2013) (citing BUREAU OF JUSTICE STATISTICS, SURVEY OF INMATES IN LOCAL JAILS (2002), http://dx.doi.org/10.3886/ICPSR04359.v2 [https://perma.cc/3R94-VXVW]).

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 81–83.

101. *Id.* at 84.

102. Hashimoto, *supra* note 98, at 1029–30.

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

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); *see also* Argersinger v. Hamlin, 407 U.S. 25, 34 (1972) (finding that "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" (footnote omitted)); State v. Young, 863 N.W.2d 249, 253 (Iowa 2015) (discussing how efficiency wins over accuracy in misdemeanor cases).

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

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.

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 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

106. *Id.*; Roberts, *supra* note 21, at 283.

107. *See Argersinger*, 407 U.S. at 37 (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 ten 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. *See* Alabama v. Shelton, 535 U.S. 654, 662 (2002).

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 GEN., STATE OF UTAH, A PERFORMANCE AUDIT OF UTAH'S MONETARY BAIL SYSTEM 15 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ce65ff35-ba9c-77fb-8922-b9417faecd6e [https://perma.cc/SJ6B-LT96].

110. Predicating their bail decisions mostly on probable cause statements, judges in most of the state of Utah have "[l]ittle reliable information about a defendant's risk of flight or danger to the community." *Id.*

bail. These case-by-case factors are discussed in detail for felony and misdemeanor cases in Section 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' options, 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" for the criminal violation and a summons to 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.

### 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 refuse to

111. *See, e.g.*, People v. Maynard, No. 2007KN000279, 2007 WL 488914, at *1 (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.*

113. *See Citation in Lieu of Arrest*, NAT'L CONF. ST. LEGISLATURES (Mar. 18, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx [https://perma.cc/9PX3-DDF3].

114. *See* ALA. CODE § 11-45-9.1 (2018) ("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."); ARK. R.

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

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CRIM. P. 5.2 (stating that officer "may issue a citation"); DEL. CODE ANN. tit. 11, § 1907 (1995) (explaining that "the officer may, but need not, give the person a written summons"); FLA. R. CRIM. P. 3.125 (stating that "notice to appear may be issued by the arresting officer"); HAW. REV. STAT. ANN. § 803-6 (LexisNexis 2007) (explaining that "the police officer may, but need not, issue a citation"); IDAHO CODE ANN. § 19-3901 (West 1983) (stating that "the law enforcement officer may" issue a citation); IND. CODE ANN. § 35-33-4-1 (West 2005) (explaining that a court "may" issue a summons, and an officer "may" issue summons); KAN. STAT. ANN. § 22-2408 (2010) (stating that an "officer may" issue notice to appear); LA. CODE CRIM PROC. ANN. art. 209 (1996) ("the magistrate may issue a summons"); LA. CODE CRIM. PROC. ANN. art. 211 (2011) (explaining that an officer "may issue a written summons"); MD. CODE ANN., CRIM. PROC. § 4-101 (LexisNexis 2016) (stating that a police officer "may" issue a citation); MISS. CODE. ANN. § 99-3-18 (1980) (finding that "such person may . . . be released" and given "written notice to appear"); NEV. REV. STAT. ANN. § 178.4851 (LexisNexis 2007) (explaining that a court, sheriff, or chief of police "may release without bail" and "the person shall, in the discretion of the peace officer, either be given a misdemeanor citation"); N.H. REV. STAT. ANN. § 594:14 (2014) (stating that "he or she may" issue written summons); N.M. STAT. ANN. § 31-1-6 (2013) (explaining that a law enforcement officer "may offer" person arrested for petty misdemeanor a citation in lieu of arrest); N.C. GEN. STAT. ANN. § 15A-302 (West 2003) (stating that "[a]n officer may issue a citation" for misdemeanors); OKLA. STAT. ANN. tit. 22, § 209 (West 1967) (explaining that law enforcement "may issue citation" for misdemeanor); OR. REV. STAT. ANN. § 133.055 (West 2012) (explaining that "[a] peace officer may issue a criminal citation" for misdemeanor and felonies subject to misdemeanor treatment); 12 R.I. GEN. LAWS ANN. § 12-7-11 (West 1977) (explaining that a peace officer "may issue a summons" for misdemeanor); TEX. CRIM. PROC. CODE ANN. § 14.06 (West 2015) (explaining that a peace officer "may . . . issue a citation" for some misdemeanors); UTAH CODE ANN. § 77-7-18 (LexisNexis 2012) (explaining that misdemeanor defendants "may be issued" a citation); VT. R. CRIM. P. 3 (stating that an "officer may issue a citation" for non-witnessed misdemeanors); WASH. CRIM. R. CT. LTD. J. 2.1 (explaining that the arresting officer "may serve upon the person a citation" for misdemeanor and gross misdemeanors); W. VA. CODE ANN. § 62-1-5a (West 1982) (stating that an officer "may issue a citation" for any misdemeanor committed in law-enforcements' presence); WIS. STAT. ANN. § 968.085 (West 2017) (stating that an officer "may issue a citation" for misdemeanors); WYO. STAT. ANN. § 7-2-103 (West 2011) (explaining that "[a] citation may issue" for any misdemeanor).

115. ARK. R. CRIM. P. 5.2(d)(vi) (using the language: "other relevant facts such as"); MISS. CODE ANN. § 99-3-18 (1980) (using the language: "other facts relating to the person's arrest which would bear on the question of his release").

116. ALA. CODE § 11-45-9.1 (2018) ("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 (West 1994) (stating that "arresting authority is satisfied that the person arrested will obey"); CONN. GEN. STAT. ANN. § 54-1h (West 1984) (explaining that a misdemeanor defendant "may, in the discretion of the arresting officer" be issued a summons); DEL. CODE ANN. tit. 11, § 1907 (1995) (stating that "the officer may, but need not, give the person a written summons"); IDAHO CODE ANN. § 19-3901 (West 1983) (explaining that "a law enforcement officer may" issue a citation); IND. CODE ANN. § 35-33-4-1 (West 2005) (explaining that a court "may" issue a summons, and an officer "may" issue summons); KAN. STAT. ANN. § 22-2408 (2010) (stating that an "officer may" issue "notice to appear"); MICH. COMP. LAWS ANN. § 257.728 (West 2008) (stating that "the arresting officer shall prepare . . . a written citation"); N.H. REV. STAT. ANN. § 594:14 (2014) (stating that an officer "may" issue summons); N.M. STAT. ANN. § 31-1-6 (2013) (explaining that a law enforcement officer "may offer" citation in lieu of arrest for petty misdemeanors); N.C. GEN. STAT. ANN. § 15A-302 (West 2003) (stating that "[a]n officer may

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-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

issue a citation" for misdemeanors); OKLA. STAT. ANN. tit. 22, § 209 (West 1967) (stating that law enforcement "may issue a citation" for misdemeanors); OR. REV. STAT. ANN. § 133.055 (West 2012) (explaining that "[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 (West 1977) (explaining that a peace officer "may issue a summons" for misdemeanor); S.D. CODIFIED LAWS § 41-15-11 (2005) (explaining that the arresting officer "shall" issue a summons for misdemeanors); UTAH CODE ANN. § 77-7-18 (LexisNexis 2012) (stating that a misdemeanor defendant "may be issued" citation).

117. KY. REV. STAT. ANN. § 431.015 (West 2017) (stating that "a peace officer shall issue a citation"); MICH. COMP. LAWS ANN. § 257.728 (West 2008) (stating that "the arresting officer shall prepare . . . a written citation"); MINN. R. CRIM. P. 6.01 (stating that peace officers "must issue a citation and release the defendant"); OHIO REV. CODE ANN. § 2935.26 (LexisNexis 1978) (explaining that, in case of minor misdemeanor, "the officer shall not arrest the person, but shall issue a citation"); PA. R. CRIM. P. 519 (explaining that "[t]he arresting officer shall promptly release from custody" first and second degree misdemeanor defendants); S.D. CODIFIED LAWS § 41-15-11 (2005) (stating that the arresting officer "shall" issue a summons for misdemeanors); TENN. CODE ANN. § 40-7-118 (2012) (stating that peace officer "shall issue a citation" for misdemeanors); VA. CODE ANN. § 19.2-74 (2014) (stating that "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 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 (2018) ("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."); COLO. REV. STAT. ANN. § 16-3-105 (West 2018) ("When a person has been arrested without a warrant, he may be released by the arresting authority on its own authority if . . . [t]he 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."); DEL. CODE ANN. tit. 11, § 1907 (2018) ("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."); 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

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 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]

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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 . . . ."); HAW. REV. STAT. ANN. § 803-6(b) (LexisNexis 2018) ("In any case in which it is lawful for a police officer to arrest a person without a warrant for a misdemeanor, petty misdemeanor . . . [the officer does not have to arrest the person] if the police officer finds and is reasonably satisfied that the person[] [w]ill appear in court at the time designated."); KY. REV. STAT. ANN. § 431.015 (West 2018) ("[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."); NEV. REV. STAT. ANN. § 171.1771 (LexisNexis 2018) (explaining that 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"); 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."); TENN. CODE ANN. § 40-7-118 (2018) ("No citation shall be issued under this section if . . . [a] reasonable likelihood exists that the arrested person will fail to appear in court.").

120. HAW. REV. STAT. ANN. § 803-6 (Lexis Nexis 2007).

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

122. ARK. R. CRIM. P. 5.2 (allowing officers to consider "whether the accused previously has failed to appear in response to a citation"); FLA. R. CRIM. P. 3.125 (allowing officers to consider whether the accused "previously has failed to respond" and has a "past history of appearance"); IOWA CODE ANN. § 805.1 (West 2002) (allowing consideration of "[w]hether a person has previously failed to appear"); NEB. REV. STAT. ANN. § 29-427 (West 1974) (allowing officers to consider whether "the accused has previously failed to appear"); OHIO REV. CODE ANN. § 2935.26 (LexisNexis 1978) (allowing officers to make an arrest if the accused previously failed to appear); VT. R. CRIM. P. 3 (allowing officers to make an arrest if the accused "previously failed to appear"); WASH. CRIM. R. CT. LTD. J. 2.1 (allowing officers to consider "whether the person previously failed to appear"); WIS. STAT. ANN. § 968.085 (West 2017) (allowing the officer to consider whether "[t]he accused has previously failed to appear or failed to respond to a citation").

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 defendant is unlikely to receive a citation in lieu of arrest if the officer determines that the defendant poses a risk of bodily injury to others or

123. ARK. R. CRIM. P. 5.2 (explaining that the officer should consider "whether detention is necessary to prevent imminent bodily harm to the accused or to another"); FLA. R. CRIM. P. 3.125; IOWA CODE ANN. § 805.1 (West 2002) (explaining that 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"); KY. REV. STAT. ANN. § 431.015 (West 2017) (stating that "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"); 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."); MD. CODE ANN., CRIM. PROC. § 4-101 (LexisNexis 2016) (explaining that "a police officer shall charge by citation for[] . . . any misdemeanor or local ordinance 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"); 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 . . . ."); 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"); 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"); 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"); WASH. CRIM. R. CT. LTD. J. 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."); W. VA. CODE ANN. § 62-1-5a (West 1982) (stating that 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"); WIS. STAT. ANN. § 968.085 (West 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); WYO. STAT. ANN. § 7-2-103 (West 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").

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 13 statutes explicitly name the dangerousness 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

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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 (2018) ("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 (West 1994) (stating that law enforcement may not issue a citation for a domestic violence crime); KY. REV. STAT. ANN. § 431.015 (West 2017) (stating that law enforcement may issue citations on misdemeanor offense except for violations of protective orders); OR. REV. STAT. ANN. § 133.055 (West 2012) (explaining that the police may not issue a citation for assault between family or household members); TENN. CODE ANN. § 40-7-118 (2012) (stating that law enforcement may 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 (West 1982) (stating that law enforcement may not issue citations for misdemeanors involving injury to the person); WIS. STAT. ANN. § 968.085 (West 2017) (stating that law enforcement may not issue citations in domestic abuse cases).

126. *See* ARK. R. CRIM. P. 5.2; FLA. R. CRIM. P. 3.125; IOWA CODE ANN. § 805.1 (West 2002); KY. REV. STAT. ANN. § 431.015 (West 2017); LA. CODE CRIM. PROC. ANN. art. 211 (2011); MD. CODE ANN., CRIM. PROC. § 4-101 (LexisNexis 2016); MINN. R. CRIM. P. 6.01; TENN. CODE ANN. § 40-7-118 (2012); VT. R. CRIM. P. 3; VA. CODE ANN. § 19.2-74 (2014); WASH. CRIM. R. CT. LTD. J. 2.1; W. VA. CODE ANN. § 62-1-5a (1982); WIS. STAT. ANN. § 968.085 (West 2017); WYO. STAT. ANN. § 7-2-103 (West 2011).

127. *See, e.g.*, ALA. CODE § 11-45-9.1 (2018); TENN. CODE ANN. § 40-7-118 (2012); VT. R. CRIM. P. 3; VA. CODE ANN. § 19.2-74 (2014).

misdemeanor arrests nationwide,[128] and may prove to be a welcome reduction in the future of misdemeanor cases nationwide.[129]

### 2. Release on Personal/Own Recognizance

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 23 percent of state felony and misdemeanor defendants receive ROR.[133] However, some jurisdictions have much higher rates for misdemeanors; NYC for instance, releases about 75 percent of misdemeanor defendants on ROR according to

128. Stevenson & Mayson, *supra* note 5, 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.

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

131. *Id.* at 43; *Recognizance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

132. *See* WASH. CRIM. R. CT. LTD. J. 3.2(a) ("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 2017) ("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 . . . ."); CAL. PENAL. CODE § 1270 (West 2017) ("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."); COLO. REV. STAT. ANN. § 16-4-113(1) (West 2017) (requiring ROR for Class 3 misdemeanors); 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 . . . ."); CONN. GEN. STAT. ANN. § 54-64a(a)(2) (West 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 . . . ."); N.H. REV. STAT. ANN. § 597:2 (2016) ("A person charged with a class B misdemeanor shall be released on his personal recognizance . . . ."). *See generally* People *ex rel.* Alvarez v. Warden, Bronx House of Det., 680 N.Y.S.2d 153 (N.Y. 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.

one study.[134] But in recent years more defendants are detained pretrial—even for misdemeanors—as ROR rates have decreased substantially since 1990.[135]

To reverse this trend, 21 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

134. JAMIE FELLNER, HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 1 (Alison Parker et al. eds., 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf [https://perma.cc/M3CQ-6C3L ] ("[I]n [NYC] in 2008[,] . . . [i]n slightly more than three-quarters (90,605) of the cases[,] defendants were released pending trial on their own recognizance . . . .").

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."). The Bail Book describes the effective lobbying efforts of the bail industry that effectively increased the use of money bail vis-a-vis ROR throughout U.S. jurisdictions starting in 1990. *Id.*

136. *See 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 [https://perma.cc/EF9J-GD96] [hereinafter NCSL, *Setting Release Conditions*].

137. *See* ALA. CODE § 15-13-4 (2018) ("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) & cmt. (McKinney 1979) (stating that "the court must order recognizance or bail" for "offenses of less than felony grade only").

138. *See* ALASKA STAT. § 12.30.011(b)(21) (2018) (allowing exceptions for a sex offense "or a crime involving domestic violence"); *see also* CAL. PENAL CODE § 853.6(2) (West 2009) (stating exceptions for crimes specified in Section 1270.1, such as serious and violent felonies); CONN. GEN. STAT. § 54-64a(a)(2)(A) (2017) (stating that a misdemeanor defendant may be ROR unless the crime charged involved "a family violence crime"); N.M. R. CRIM P. DIST. CT. 5-408(B)(2)(a)–(p) (allowing exceptions 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. § 12.30.011(b)(21) (2018); *see also* N.M. R. CRIM. P. DIST. CT. 5-408(B)(2)(a), (f), (g), (h), (i), (j), (k), (l), (m), (o), (p) (stating 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 from 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).

cannot be reasonably assured upon release.[141] More often, courts merely 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 and 2009, ROR dropped dramatically as money bail increased in popularity nationwide.[145] Between 1990 and 2009, the rate of pretrial release with financial conditions crept up from 40 to 62 percent in

141. ALASKA STAT. § 12.30.011(b)(2) (2018).

142. *See* ALA. CODE § 15-13-4 (2018) (stating that the judge has the discretion to release misdemeanor defendant on personal recognizance); 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); DEL. CODE ANN. tit. 11, § 2105(a) (2013) ("The court shall release a defendant accused of a bailable crime on the person's own recognizance or upon the execution of an unsecured personal appearance bond"); KY. REV. STAT. ANN. § 431.520 (West 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"); MO. ANN. STAT. § 544.455(1) (West 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."); NEV. REV. STAT. ANN. § 178.4851(1) (LexisNexis 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 157.

145. This is in large part due to the lobbying effort of the national money bail movement. *See id.* at 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).

felony cases.[146] And by the early 2000s, ROR accounted for only 24 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 one 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 York roughly 25 percent of misdemeanor defendants must pay to be released before trial.[152] In Baltimore, nearly 50 percent must pay.[153] Similarly, in California about 50 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

146. *See id.* at 157–59; s*ee also* Crystal S. Yang, *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." (footnotes omitted)).

147. COHEN & REAVES, *supra* note 24, at 2.

148. MEGAN STEVENSON & SANDRA G. MAYSON, ACAD. FOR JUSTICE, PRETRIAL DETENTION AND BAIL 23 (2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/2_Reforming-Criminal-Justice_Vol_3_Pretrial-Detention-and-Bail.pdf [https://perma.cc/8Q6Z-CTL9].

149. CHRISTINE BLUMAUER ET AL., ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 13 (2018), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6286908b-8228-0970-9c72-e9ee52f91c9b&forceDialog=0 [https://perma.cc/2AMP-U4W4].

150. REMPEL ET AL., *supra* note 67, at 59 (noting that almost 80 percent were released on ROR).

151. *Id.* at 58. The study further found that 18 percent of misdemeanor defendants were detained following arraignment, while only ten percent were detained throughout the case. *Id.* at 59.

152. Natapoff, *supra* note 5, at 1321.

153. *Id.* at 1322.

154. SONYA TAFOYA ET AL., PUB. POLICY INST. OF CAL., PRETRIAL RELEASE IN CALIFORNIA 11, 15 (2017), http://www.ppic.org/content/pubs/report/R_0517STR.pdf [https://perma.cc/2KYQ-YNZ8] ("[O]nly one-half of individuals booked for misdemeanors . . . secure some form of pretrial release.").

percent of misdemeanor defendants are required to pay to be released.[155] Surprisingly, this is down from 92 percent 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 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 16 states, courts must "impose the least

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 [https://perma.cc/JB77-3UZ3] ("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'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 [https://perma.cc/247U-HX4S].

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 147.

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 ST. CTS., https://www.ncsc.org/services-and-experts/areas-of-expertise/caseflow-and-workflow-management/effective-criminal-case-management.aspx [perma.cc/ZC93-YM4B].

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, 343 (Ga. Ct. App. 1998) ("[B]ond pending appeal for misdemeanor offenses

restrictive" conditions to ensure the defendant appears for future court dates.[164] All states except New York, South Carolina, West Virginia, and Utah, permit their courts to apply "any condition [it] . . . determined to be 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 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 factors state courts commonly consider in deciding whether to release a defendant on bail or ROR, but these factors do differ in

. . . does not have to be unconditional, as long the as conditions are reasonable under facts and circumstances of case." (emphasis omitted)); 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 LEGISLATURES, *Pretrial Release Conditions* (Sept. 15, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx [perma.cc/W949-4UR2] [hereinafter NCSL, *Pretrial Release Conditions*].

166. *Dudley*, 496 S.E.2d at 343 (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 on working in law enforcement during the post-trial motion and appeal process, . . . bail bonding, dog training, [or] private investigations; . . . curfew; travel restrictions; and total banishment from [the county in which offenses occurred]").

167. *Clarke*, 491 S.E.2d at 451–52 (holding that "the trial court has inherent authority to place conditions on bail in misdemeanor cases, which will be upheld by [the Court of Appeals] absent an abuse of discretion," that placing such conditions on bail is not the same thing as refusing to set bail, which is forbidden by Code in a misdemeanor case, that the "[t]rial court has inherent discretion to release a misdemeanor defendant on his own recognizance pending trial or to require payment of a bail bond," and ultimately, that "[w]hen a [misdemeanor] defendant is charged with a violent crime against a specific victim, it is within the trial court's inherent powers to require that the defendant avoid any contact with the victim" as condition of bail).

168. *Ex parte* Anderer, 61 S.W.3d 398, 407 (Tex. Crim. App. 2001) (Price, J., dissenting).

169. *Id.*

170. State v. Rose, 191 P.3d 83, 85–87 (Wash. Ct. App. 2008); *see also* WASH. R. CRIM. P. 3.2 (noting as many as nine non-exhaustive factors courts shall consider).

171. *Rose*, 191 P.3d at 85.

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, through partial confinement 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.[179] Common misdemeanor offenses that are denied bail categorically include domestic violence, DUI and violation of antiharassment conditions.[180] 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

172. *Id.*

173. *Id.* at 88 (citing WASH. R. CRIM. P. 3.2(c)(7)).

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. *Rose*, 191 P.3d at 88 (citing WASH. R. CRIM. P. 3.2(b)).

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

179. While bail laws are dictated by the state, many procedures for the bail decision can be determined by counties. County specific bail differences do make for a lot of disparity between various defendants in obtaining release or facing detention before trial.

180. *See, e.g.*, *In re* a Unif. Bond Schedule for Maricopa Cty. Ltd. Jurisdiction Cts., Admin. Order No. 2015-002, at 3 (Super. Ct. Ariz. 2015), https://www.superiorcourt.maricopa.gov/SuperiorCourt/AdministrativeOrders/AdminOrders/Admin%20Order%202015-002.pdf [https://perma.cc/NMT4-LBDH] ("Individuals charged with a domestic violence offense may not secure release prior to appearing before a judge who will determine appropriate conditions of release.").

degree assault, harassment, a violation of an antiharassment order, stalking, or communication with a minor for immoral purposes.[181] Aside from the listed misdemeanor offenses, it is generally 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.[182] For instance, a Connecticut statute states: The "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."[183] In rare instances, courts have been reversed for denying bail in misdemeanor cases. In *Hobbs v. Reynolds*, 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 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:

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181. WASH. MUN. CT. R. 3.2, https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=municipal&ruleid=municipalmuntuk103.2&set=muntuk [https://perma.cc/F22Y-8ZS5].

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

183. CONN. GEN. STAT. § 54-64a(a)(1) (2019).

184. Hobbs v. Reynolds, 289 S.W.3d 917, 920 (Ark. 2008).

185. *Id.* (quoting Reeves v. State, 548 S.W.2d 822, 824 (Ark. 1977)).

186. *See, e.g.*, Constantino v. Warren, 684 S.E.2d 601, 603 (Ga. 2009) ("[D]efendants charged with misdemeanors are entitled to bail as a matter of right."). 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 is equal to or less than $1,000. GA. MAGISTRATE COURT HANDBOOK *Bail Considerations* § 15:2, Westlaw (database updated Dec. 2019); *see also* GA. CODE ANN. § 17-6-2(a) (2019).

187. People v. Wilboiner, 936 N.Y.S.2d 873, 876–77 (Crim. Ct. 2012).

188. WISCONSIN JUDICIAL CONFERENCE, STATE OF WISCONSIN: UNIFORM MISDEMEANOR BAIL SCHEDULE 2 (2017).

> (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 carry out 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 Part—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 Part 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 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 Part 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

189. 9 WIS. PRAC., CRIMINAL PRACTICE & PROCEDURE *Pretrial Release—Uniform Misdemeanor Bail Schedule* § 12:13, Westlaw (database updated June 2019).

190. *See* FLA. STAT. § 903.046 (2018). The Florida legislature has limited the circumstances under which bail may be denied. Included in the list are: "[t]he nature and circumstances of the offense[,] . . .[t]he weight of the evidence against the defendant[,] . . . [t]he defendant's family ties[,] . . . [t]he defendant's past and present conduct[,] . . . [t]he nature and probability of danger which the defendant's release poses to the community[,] and [t]he source of funds used to post bail or procure an appearance bond." *Id.*; *see also* CAL. PENAL CODE § 1270(a) (West 2019) (stating individuals charged with misdemeanors are presumptively "entitled to an own recognizance release unless the court makes a finding on the record, in accordance with Section 1275, that an own recognizance release will compromise public safety or will not reasonably assure the appearance of the defendant as required").

191. *See supra* Section II.C.5 for discussion. We do not have complete national misdemeanor release numbers.

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 almost all criminal cases,[193] with a narrow 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 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

192. Baughman, *History of Misdemeanor Bail*, *supra* note 8, 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. *See* 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").

194. *See* Carlson v. Landon, 342 U.S. 524, 545 (1952) ("Thus in criminal cases bail is not compulsory where the punishment may be death."); Utah v. Kastanis, 848 P.2d 673, 674 (Utah 1993) ("All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong." (quoting UTAH CONST. art. I, § 8 (amended 1988))); *see also* Arizona v. Garrett, 493 P.2d 1232, 1233 (Ariz. Ct. App. 1972) ("All persons charged with crime shall be bailable by sufficient sureties, except for . . . [c]apital offenses when the proof is evident or the presumption great . . . ." (quoting ARIZ. CONST. art. II, § 22 (amended 1982))); Fry v. Indiana, 990 N.E.2d 429, 434 (Ind. 2013) ("[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." (quoting IND. CONST. art. 1, § 17)); Perez v. Texas, 897 S.W.2d 893, 894 (Tex. Ct. App. 1995) ("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." (citing TEX. CONST. art. I, § 11)).

195. New York v. Watson, 35 N.Y.S. 852, 852 (Gen. Term. 1895) ("[U]nder 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 8, at 728–29 (discussing how at common law bail was historically presumed for all criminal charges except murder).

196. *See* New York *ex rel.* Devore v. Warden of N.Y.C. Prison, 244 N.Y.S.2d 505, 508 (Sup. Ct. 1963) ("[A]dmission to bail before conviction is a matter of right in misdemeanor cases and a matter of discretion in all other cases . . . ." (second alteration in original) (quoting New York *ex rel.* Shapiro v. Keeper of City Prison, 49 N.E.2d 498, 500 (N.Y. 1943))); *see also* Williams v. Georgia, 491 S.E.2d 500, 502 (Ga. Ct. App. 1997) ("It is only in misdemeanor cases that one convicted is entitled to bail as a matter of law." (quoting Holcomb v. Georgia, 198 S.E.2d 876, 877 (Ga. Ct. App. 1973))); *Watson*, 35 N.Y.S. at 853 (noting that, in New York, "in 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 8, at 858 (discussing how the right to misdemeanor bail was largely associated with the presumption of innocence).

198. *Id.* at 870–71 (citing CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 9 (November 2013), http://luminosity-solutions.com/site/wp-content/

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 70 percent) are not released before trial because they cannot afford bail.[201] And 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

uploads/2014/02/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes-3.pdf [https://perma.cc/9PEA-BUSU]).

199. *Id.* at 871 (citing NATALIE R. ORTIZ, NAT'L ASS'N OF CTYS., 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, held on bond. 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 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." (footnotes omitted)). However, another study found that "defendants arrested for felonies are 25.4 percentage points less likely to be released than those arrested for misdemeanors, a 46.0 percent decrease." WILL DOBBIE, JACOB GOLDIN & CRYSTAL YANG, 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. COHEN & REAVES, *supra* note 24, at 1.

201. *Compare* Baughman, *The History of Misdemeanor Bail*, *supra* note 8, at 871, *with* A.B.A., 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] (discussing misdemeanants in New York City). We do know that money bail is required in about 70 percent of felony cases nationally. *See* COHEN & REAVES, *supra* note 24, at 3. Of those felony defendants, 53 percent remain in jail, mostly because they cannot pay the money bail. *See id.* Of those felony defendants that remain in jail, 88 percent remain detained throughout the pretrial period solely because they cannot afford their bails. *See* THOMAS COHEN & TRACEY KYCKELHAHN, U.S. DEP'T. OF JUSTICE: BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 7 (2006), https://www.bjs.gov/content/pub/pdf/fdluco6.pdf [https://perma.cc/L95F-T7W6]. And as the use of money bail increases, the release rates decrease. A.B.A., *supra*, at 3. This is also the case with misdemeanors, at least in New York. *Id.* For instance, in 2008, 87 percent of NYC defendants charged with misdemeanors who had money bail amounts of $1,000 or less could not post bail and were detained pretrial. *Id.* About 75 percent of these defendants had nonviolent, nonweapons related offenses and would likely have been safe to release. *Id.*; *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 [https://perma.cc/JB77-3UZ3] (discussing that in some counties upwards of 70 percent of misdemeanor defendants are not released).

202. *See* COHEN & REAVES, *supra* note 24, at 2–3; *see also* Natapoff, *supra* note 5, at 1322.

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 ten percent 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.

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 defendants' rights.

There 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.

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203. Will Dobbie et al., *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* Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 840–43.

204. PRETRIAL JUSTICE INST., *supra* note 1, at 11–12.

205. Baughman, *The History of Misdemeanor Bail*, *supra* note 8, at 845 (explaining that misdemeanor defendants were guaranteed bail in common law England while felony defendants were not).

206. *See* Baradaran, *Restoring the Presumption of Innocence*, *supra* note 8, at 739, 747–48 (explaining that with felony offenses 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).

### 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 nonviolent 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 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 those defendants who were 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, whether they remain silent on distinctions between felony and misdemeanor pretrial evaluation.[213]

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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, *The History of Misdemeanor Bail*, *supra* note 8, 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 504 ("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 [hereinafter Gouldin, *Disentangling Flight Risk from Dangerousness*] (citing financial and supervision conditions as well as travel restrictions).

209. Baradaran, *Presumption of Innocence*, *supra* note 8, at 741.

210. *See* Baradaran & McIntyre, *supra* note 37, at 507.

211. *Id.* at 511–12. In the context of evaluating danger, many state statutes give judges a lot of leeway, such as 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." *Id.*; *see also infra* note 256 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 "hav[e] 'broad' . . . right to bail provisions," and tend to have obvious stated lines between bailable and non-bailable offenses; and states that have "preventative detention" statutes tending toward preventative detention for many defendants beyond those who are a flight risk (the traditional category for preventative detention)).

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 misdemeanor defendants are detained, resulting in Arkansas jails housing significantly more pretrial defendants than convicted defendants.[218] In Massachusetts, a typical state which fails to distinguish between felonies and misdemeanors, the judge will consider for both felony and misdemeanor cases the following factors: flight risk; criminal record; a history of fleeing prosecution; family ties, financial resources, employment, mental illness, reputation in the community; and whether release will harm the community or 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 a defendant's failure to appear in court—which most courts inaccurately equate with flight risk.[220] The second is a defendant's dangerousness. Third, courts consider the nature of the charge against a defendant and the 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 a defendant

214. *Compare* S.C. CODE ANN. § 17-15-30 (2018), *with* ARK. R. CRIM. P. 8.4(a) (2019) (providing different methods for conducting release inquiries when the crime is a felony versus a misdemeanor).

215. S.C. CODE ANN. § 17-15-30 (2018).

216. ARK. R. CRIM. P. 8.4(a) (2019).

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

218. *Arkansas Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/AR.html [https://perma.cc/E5PV-9JT6].

219. MASS. GEN. LAWS ch. 276, § 58 (2019).

220. These factors are not one in the same, and flight is much rarer. *See* Gouldin, *Disentangling Flight Risk from Dangerousness*, *supra* note 208, at 888 (2016) (comparing flight risk and failure to appear and demonstrating that flight is uncommon).

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 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. Consequently, 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]

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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 at 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 . . . ."); *see also* 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 (St. Paul, West Publishing Co. 1895). The bail for misdemeanor defendants historically was either a surety 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 8, at 860–61. 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, *supra* note 222.

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 dominant over the defendant's interest in liberty" in the bail decisions).

225. Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 689 (2018) (providing evidence that the vast majority (83 percent) of felony defendants appear for all scheduled court appearances, while only three percent were still fugitives after a year).

226. *Id.* at 729–30 (enumerating a variety 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* notes 55–56.

228. BAUGHMAN, *supra* note 4, at 208 ("A simple reminder to defendants by pretrial services is effective in reducing failure to appear rates."). A 2010 study of 14 county courts in Nebraska

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 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

showed that "[w]ithout any reminder, 12.6 percent of defendants failed to appear in court. However, with any postcard the failure to appear rate dropped . . . to 9.7 percent." *Id.* at 209. 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"); ARIZ. REV. STAT. ANN. § 13-3967(B)(13) (West 2015); ARK. R. CRIM. P. Rule 5.2(d)(vi)(E) (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); ARK. R. CRIM. P. 8.5(b)(vii); CAL. PENAL CODE § 1270(a) (West 2017); COLO. REV. STAT. ANN. § 16-4-103(5)(j) (West 2014); COLO. REV. STAT. § 16-4-113(1)(e) (West 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"); DEL. CODE ANN. tit. 11, § 2105(a) (2013); FLA. STAT. ANN. §§ 903.046(2)(d), 907.041(1) (West 2017); FLA. R. CRIM. P. 3.125 (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"); IND. CODE ANN. § 35-33-8-4 (West 2017); 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 to take the accused into custody); OHIO REV. CODE ANN. § 2935.26(A)(4)(a) (LexisNexis 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) (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").

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

231. ARK. CODE ANN. § 5.2(d)(vi)(E) (2018); *see also* COLO. REV. STAT. § 16-4-113(1)(e) (2013); CONN. GEN. STAT. § 54-64a(2)(C)(iii) (2017); FLA. STAT. § 3.125 (2013); IOWA CODE ANN. § 805.1(3)(b)(6) (West 2002); NEB. REV. STAT. ANN. § 29-427 (West 1974); OHIO REV. CODE ANN. § 2935.26(F) (LexisNexis 1978); 13-1 VT. CODE R. § 3(c)(5) (2017); WASH. REV. CODE § 2.1(b)(2)(iv) (2017); WIS. STAT. § 968.085(2)(e) (2017).

232. Michael R. Jones, *Colorado: An Example of Pretrial Justice Reform in Progress*, PRETRIAL JUST. INST. (June 2014), https://www.ncsc.org/~/media/Microsites/Files/PJCC/Panel%202%20Reforms%20Jones%202014-06%20CO%20Progress%20Report%20for%20NCSC.ashx [https://perma.cc/AQ36-TBF2].

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

appear.[234] Some courts consider a defendant's failure to appear 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 Section III.B, risk assessments often improperly consider failure to appear in denying release to individuals.[238]

### 2. Dangerousness of Defendant

In recent years, the relative danger that a defendant poses has been considered in felony and misdemeanor release. Dangerousness of defendant was not even a factor that courts could permissibly consider in determining bail until the 1980s,[239] but now it is the number one consideration of courts in determining pretrial release.[240] Many statutes and state cases specifically

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

235. *See* Constantino v. Warren, 684 S.E.2d 601, 604 (Ga. 2009) (citing GA. CODE ANN. § 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. People v. Wilboiner, 936 N.Y.S.2d 873, 877 (Crim. Ct. 2012). 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. *Id.* 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. *Id.*

236. *See supra* notes 233–34.

237. State v. Blair, 39 So. 3d 1190, 1194–95 (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. *See infra* Section III.B.

239. Baradaran, *Presumption of Innocence*, *supra* note 8, at 728, 748 (explaining that judges historically could not "detain defendants because they were likely to commit a crime while released" but that when the Bail Reform Act of 1984 added "dangerousness" it reversed that precedent); *see also* State v. Salerno, 481 U.S. 739, 748 (1987) (upholding the constitutionality of the Bail Reform Act of 1984).

240. 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

allow pretrial detention for dangerous defendants. What the meaning of a dangerous defendant is, however, is up for much dispute.[241] For the purposes of this Article, it is important to note that dangerous defendants have historically been felony defendants—categorically not misdemeanor defendants—those who cannot be stopped from harming witnesses or victims before trial even with reasonable measures.[242] This Section of the Article demonstrates that there is no uniform treatment throughout the states of what constitutes dangerousness of a defendant adequate to detain before trial. The definition of dangerous defendant 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.[243] 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."[244] Another Texas court reasoned that though some misdemeanors involve violence, felonies tend "to involve serious violence or anti-social conduct."[245] 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 more of a "heightened threat to society . . . than for minor [crimes]."[246]

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concerned about the dangerousness of the defendant); *see also* BAUGHMAN, *supra* note 4, at 60 ("While constitutionally suspect . . . predictions of whether defendants will commit a crime on release are foremost in pretrial release.").

241. 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." *Id.*

242. Baradaran, *Presumption of Innocence*, *supra* note 8, at 748–50 (discussing the use of the "dangerousness" inquiry being limited to explicitly capital cases before the 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).

243. 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 ten percent of the time on pretrial release. *See* Baradaran & McIntyre, *supra* note 37, at 530.

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

245. 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).

246. People v. Traylor, 210 P.3d 433, 438–39 (Cal. 2009) (quoting Burris v. Superior Court, 103 P.3d 276, 280 (Cal. 2005)); *see also* Myers v. The Telegraph, 773 N.E.2d 192, 197–98 (Ill.

Additionally, 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,"[247] and that important actual predictors of dangerousness are current violent crime charges and a prior convictions of three or more violent crimes.[248] 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."[249] 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 release in a misdemeanor case. In other words, states explicitly prohibit release for defendants charged with "dangerous" misdemeanors. Five states have explicitly established by statute that dangerousness represents an exception to ROR.[250] Unlike the others that seem to combine misdemeanors and felonies, Connecticut's statute makes clear that bail can only be set for *felonies* where defendant poses a danger.[251]

Twenty-eight states consider the dangerousness of the crime specifically by statute in both felony and misdemeanor pretrial release decisions.[252] For

App. Ct. 2002) (discussing how society views misdemeanors and felonies different, the latter as a more serious crime).

247. Baradaran & McIntyre, *supra* note 37, at 497.

248. *Id.* at 557.

249. *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 ten percent, high enough to detain in my judgment. *Id.*

250. ALASKA STAT. § 12.30.011(b)(20) (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."); COLO. REV. STAT. § 16-4-113(1)(c) (2013) (allowing bail to be set where "[t]he continued detention or posting of a surety bond is necessary to prevent imminent bodily harm to the accused or to another"); CONN. GEN. STAT. § 54-64a(2) (2017) (allowing for financial conditions on the release of a person charged with just a misdemeanor if the court thinks it is likely the person "will engage in conduct that threatens the safety of . . . another person"); N.H. REV. STAT. ANN. § 597:2 (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 the public" upon release).

251. CONN. GEN. STAT. § 54-64a(2) (2017) (allowing bail to be set where defendant "threatens the safety of himself or herself or another person").

252. These states seem to apply the dangerousness factor to both misdemeanor and felony cases. *See* ARIZ. REV. STAT. ANN. § 13-3967 (2015); 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

instance, 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."[253] 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 "the 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."[254] 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.[255] Whether a defendant poses a danger to the public, herself, or a specific person is a consideration that 17 states have codified in statutes regarding pretrial release, amount and conditions for bail, and citations in lieu of custody.[256] Four states have established by statute that whether a defendant poses a danger is a factor to consider in deciding whether to deny bail altogether specifically in reference to misdemeanor cases.[257]

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§ 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; MISS. R. CRIM. P. 8.2 (2017); MO. REV. STAT. § 544.457 (1993); MONT. CODE ANN. § 46-9-109 (West 2017); NEB. REV. STAT. § 29-901.01 (2017); NEV. REV. STAT. § 178.4853 (1997); N.D. R. CRIM. P. 46; 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. SUPER. CT. CRIM. R. § 3.2 (2017); WYO. R. CRIM. P. 46.

253. CAL. PENAL CODE § 1275(a)(1) (West 2015).

254. *Id.* § 1275 (a)(2).

255. *See* 725 ILL. COMP. STAT. ANN. 5/110-5(a) (West 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"); IND. CODE § 35-33-8-4(b) (2019) (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 ANN. § 811.2 (West 2013); KAN. STAT. ANN. § 22-2802(1) (2013); LA. CODE CRIM. PROC. ANN. art. 316 (2017).

256. *See* ALASKA STAT. § 12.30.011(b)(2) (2018); ARK. CODE ANN. § 12-30-011 (2012); CAL. PENAL CODE § 1270 (West 2019); COLO. REV. STAT. § 16-4-113(1)(c) (2013); CONN. GEN. STAT. § 54-64a(a) (2017); FLA. R. CRIM. P. 3.125(b)(2); IOWA CODE ANN. § 805.1(3)(b) (West 2019); KY. REV. STAT. ANN. § 431.015(1)(b)(2) (West 2019); LA. CODE CRIM. PROC. ANN. art. 211(A)(1)(b) (2019); MD. CODE ANN., CRIM. PROC. § 4-101(c)(2)(iii) (LexisNexis 2019); MINN. R. CRIM. P. 6.01(a)(1); N.H. REV. STAT. ANN. § 597:2(III) (2019); VT. R. CRIM. P. 3; WASH. CRIM. R. CT. LTD. J. 2.1(b)(2)(ii); W. VA. CODE § 62-1-5A(1) (2017); WIS. STAT. § 968.085(2)(c) (2006); WYO. STAT. ANN. § 7-2-103(b)(i) (West 2019).

257. 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* CAL. PENAL CODE § 1275(a)(1) (West 2014) ("In setting . . . bail, a judge or magistrate shall take into consideration the protection of the public."); 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

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 a physical injury"—among others.[258] This D.C. Code specifically applies to misdemeanor defendants as well.[259]

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.[260] The basis for the court's decision is that "the defendant . . . would create a danger to the public" if released.[261] 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

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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 defendant may be released on bond, unless it is "unsafe to release him or her"); N.H. REV. STAT. ANN. § 597:2(IX) (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).

258. 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. *Id.* The "felony or misdemeanor" language was added as a bail reform amendment. *See* Bail Reform Act of 2000, 48 D.C. Reg. 1648 (June 12, 2001) (codified at D.C. CODE § 23-1322).

259. D.C. CODE § 23-1322 ("Detention prior to trial.") Interestingly, the D.C. Code originally 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) [t]he 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.*

260. State v. Azure, 241 N.W.2d 699, 702 (N.D. 1976).

261. *Id.* at 701.

had escalated to the point that he had become "an imminent danger to" her.[262] 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.[263] 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.[264] 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.[265] 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.[266] Upon such a showing, the court can order preventative pretrial detention.[267] 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.[268] In other states like North Dakota, the Supreme Court has explicitly rejected the requirement that the government bears the burden of proof.[269]

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262. State v. Goodie, 226 So. 3d 1130, 1137 (La. 2017).

263. State v. Kane, 160 A.3d 1020, 1020 (Vt. 2016).

264. *Id.*

265. State v. Lontine, 142 A.3d 1058, 1066 (Vt. 2016) (quoting VT. CONST., ch. II, § 40(2)) (finding that a defendant who was charged with aggravated domestic violence was lawfully denied bail); *see also* ARK. R. CRIM. P. 8.5; State v. Houng, 2009-Ohio-2955, 2009 WL 1743934, ¶¶ 15–16 (Ohio Ct. App. June 19, 2009) (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." (quoting OHIO CONST. art. I, § 9)).

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

267. *Id.*

268. *Id.* at 33–34. 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.

269. 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

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. Some states include misdemeanors in such categories and other states stick to the historical understanding and only detain pretrial for dangerous and serious crimes.[270] 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."[271] 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.[272] 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.[273]

Overall, what is clear is that neither a dangerous crime nor a dangerous defendant are clearly defined among the states, 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

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> 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.*

270. *See, e.g.*, 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"); Swanson v. Allison, 617 So. 2d 1100, 1101 (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); *see also* HAW. REV. STAT. § 804-3 (1987) (applying to both misdemeanor and felony offenses).

271. HAW. REV. STAT. § 804-3(a) (1987).

272. FLA. STAT. § 907.041(4)(a)(1)–(23) (2017).

273. *Almazrouei*, 971 So. 2d at 186.

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.[274] Yet both of these considerations are important in determining both felony and misdemeanor release.

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.[275] Some jurisdictions identify this factor in considering "dangerousness," in directly identifying violent crimes, or consider it with the weight of the evidence against the defendant.[276]

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274. *See* Baradaran, *Presumption of Punishment*, *supra* note 221, at 396 (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 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 is 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).

275. *See* ARIZ. REV. STAT. ANN. § 13-3967 (2015); 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); MISS. R. CRIM. P. 8.2(a)(6); MO. REV. STAT. § 544.455(2) (2013); MONT. CODE ANN. § 46-9-109(2)(a) (West 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); OHIO R. CRIM. P. 46(C)(1); OR. REV. STAT. § 135.230(7)(b) (2017); PA. R. CRIM. P. 523(A)(1); 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. art. 17.15(3) (West 1993); VA. CODE ANN. § 19.2-120(E)(1) (2015); WASH. CRIM. R. CT. LTD. J. 3.2(c)(8); W. VA. CODE § 62-1C-3 (1965); WYO. R. CRIM. P. 46.1(d)(2).

276. *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. Goodie, 2017-693, p. 12–13 (La. App. 3 Cir. 8/23/17); 226 So. 3d 1130, 1137–38; 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). 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); 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); 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) (LexisNexis 2016); MICH. COMP. LAWS § 780.581(3) (1990); MINN. R. CRIM. P. 6.01(b)(1); 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); TENN. CODE ANN. § 40-7-118

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."[277] This includes whether a charge is a misdemeanor or felony—which is appropriate, and a welcomed distinction.[278] 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.[279] As many as 31 states indicate that courts should consider the weight of the evidence in making pretrial release decisions.[280] 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,[281] Florida,[282]

(2012); VT. R. CRIM. P. 3; VA. CODE ANN. § 19.2-74 (2014); WASH. 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; [and] [w]ill not injure or destroy the property of others . . . .").

277. REMPEL ET AL., *supra* note 67, at viii.

278. *Id.* The study also considered whether the charge was violent or nonviolent. *Id.* at 2. All of these were important in terms of charge severity.

279. FLA. STAT. § 903.046 (2019) (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 (2019) (applying to both misdemeanor and felony charges).

280. Gross, *supra* note 89, at 850–53; *see* Yording v. Walker, 683 P.2d 788, 792 (Colo. 1984) (en banc) (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, 39–40 (Miss. 1973) (affirming denial of bail where the evidence was not clear that proof was evident that defendant was guilty).

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

282. FLA. R. CRIM. P. 3.131(3) ("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 . . . .").

Idaho,[283] Illinois,[284] Maryland,[285] Montana,[286] Pennsylvania,[287] and Tennessee.[288]

Considering the nature of the crime is arguably a relevant factor in 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.[289] Weighing of evidence is part of the role of the jury and should only be done during trial.[290] 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. Further, it should not matter what the nature of a misdemeanor crime is—whether violent or nonviolent. A defendant should be released before trial except in rare circumstances. Rare examples include an incompetent defendant or where there is clear and convincing evidence that defendant is unable to be restrained from harming a victim.

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283. IDAHO CRIM. R. 46(c)(6) ("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 . . . .").

284. 725 ILL. COMP. STAT. 5/110-5(a) (2018) ("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 . . . .").

285. MD. CODE ANN., CRIM. PROC. § 4-216(f)(1)–(2)(A) (LexisNexis 2016) ("In determining whether a defendant should be released and the conditions of release . . . the judicial officer shall consider . . . the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction . . . .").

286. MONT. CODE ANN. § 46-9-109(2)(a) (West 2019) ("In determining whether the defendant should be released or detained, the court . . . shall take into account the available information concerning: . . . the nature and circumstances of the offense charged, including whether the offense involved the use of force or violence . . . .").

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

288. TENN. CODE ANN. § 40-11-115(b)(7) (2019) ("In determining whether or not a person shall be released as provided in this section . . . the magistrate shall take into account: . . . the nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance . . . .").

289. *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.").

290. *See* 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.").

### 4. 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, a defendant's record has also become important for both felonies and misdemeanors.[291] Some judges admit that when they see a record of warrants, they cannot help but set bail, even in a misdemeanor case.[292] California, Colorado, and Mississippi have listed criminal history as a specific ground for denying bail in misdemeanor cases.[293] Additionally, whether the defendant has a warrant is also a factor that some courts consider.[294] 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.[295] The rationale for

291. 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 out on bond).

292. 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.* at 65 (second alteration in original).

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

294. 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 (App. Div. 1913); *see also* N.D. R. CRIM. P. 46.

295. *See, e.g.*, 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, where the defendant has been convicted of a felony, generally 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); *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, (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

this is that the defendant is no longer presumed innocent "and is not entitled to admission to bail as a matter of right."[296]

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.

5. 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.[297]

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the defendant has 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, 965 P.2d 382, 384 (Okla. Crim. App. 1998). But a defendant may be entitled to bail even after conviction if the defendant has been sentenced to probation and proceedings to revoke probation 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) ("'[T]he 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.'" (first quoting HAW. REV. STAT. § 804–4 (2014), then quoting State v. Ortiz, 845 P.2d 547, 553 (Haw. 1993))).

296. Williams v. City of Montgomery, 739 So. 2d 515, 518 (Ala. Civ. App. 1999) (quoting ALA. R. CRIM. P. 7.2(b)); *see also* State v. Parker, 17 S.E.2d 475, 477–78 (N.C. 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 the right to bail when judgment is suspended on a misdemeanor charge. Ramey v. Commonwealth, 133 S.E. 755, 756 (Va. 1926); *see also Ex parte* Spanier, 258 P.2d 1072, 1073 (Cal. Dist. Ct. App. 1953) (holding that the defendant was not entitled to bail because he never appealed the misdemeanor conviction); 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* Henley, 363 P.3d at 328 (noting that Hawaii maintains a right to bail even after the misdemeanant has been convicted).

297. *See* ARK. R. CRIM. P. 8.5 (citing "past and present residence," and "strong ties to the community" as factors); *see also* 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); 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 . . ."); FLA. STAT. § 903.046 (2016) (considering the defendant's "length of residence in the community"); FLA. STAT. § 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) (citing the "length of residence in the community" as a factor); MISS R CRIM. P. 8.2(a) (2017) (noting that the "residence of the defendant, including consideration of real property

Specifically, some state statutes require the court to consider the defendant's residential status and financial status.[298] 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."[299] Other courts consider whether the defendant is employed and even whether the defendant owns a home or cell phone in considering release.[300] In a 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.[301] 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,[302] there is little data on how judges actually balance these factors and the

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) (West 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"); N.D. R. CRIM. P. 46(a)(3) (2006) (considering the "the length of the person's residence in the community"); OHIO R. CRIM. P. 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. SUPER CT. CRIM. R. 3.2(c) (considering the "length of the accused's residence in the community"); WYO. R. CRIM. P. 46.1(d) (considering the "length of residence in the community [and] community ties" as factors).

298. ARK. R. CRIM. P. 8.5(b)(i)–(ix).

299. ARK. R. CRIM. P. 8.5(b)(iii), (ix). Colorado has very similar language. *See* COLO. REV. STAT. §§ 16-4-103(5)(c),-103(5)(j),-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").

300. *See, e.g.*, NEV. REV. STAT. § 178.4853 (1997) (requiring consideration of "status and history of [defendant's] employment"); MISS. R. CRIM. P. 8.2(a)(11) (2017) (requiring "consideration of real property ownership").

301. Ottone & Scott-Hayward, *supra* note 77, at 35.

302. People v. Arnold, 132 Cal. Rptr. 922, 926 (App. Dep't Super. Ct. 1976) (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" (quoting *In re* Podesto, 544 P.2d 1297, 1299 (Cal. 1976))). One federal court in Texas stated 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

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.[303] 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.[304] 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 nationwide who are safe to release.

### *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 states,[305] and even by county.[306] In setting bail amounts, some courts use "bail schedules."[307] A bail schedule is a scheme that lists

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Cty., Tex., 251 F. Supp. 3d 1052, 1133–38 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *aff'd as modified sub nom.* ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018).

303. 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 & Scott-Hayward, *supra* note 77, at 25–26 (discussing the consequences of pretrial detention to defendants, their families, and the justice system).

304. Ottone & Scott-Hayward, *supra* note 77, at 27.

305. *See* Bykov v. Rosen, No. 68321-7-1, 2013 WL 4069513, at *1 (Wash. Ct. App. Aug. 12, 2013) (noting that the district court set bail at $25,000 for misdemeanor trespass); *see also* Dep't 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); *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).

306. 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). Some counties list various offenses. CHURCHILL CTY., NEW RIVER TOWNSHIP BAIL SCHEDULE (Jan. 2013), https://nhp.nv.gov/uploadedFiles/nhpnvgov/content/Programs/Churchill%20Bail.pdf [https://perma.cc/A9QP-2N38]. Others address crimes by seriousness—gross misdemeanor versus misdemeanor. RURAL JUSTICE COURTS OF CLARK CTY., STANDARD BAIL SCHEDULE 1 (May 26, 2015), http://www.clarkcountynv.gov/justicecourt/boulder/Services/Documents/RURAL%20JUSTICE%20COURTS%20-%20STANDARD%20BAIL%20SCHEDULE.pdf [https://perma.cc/BJ5R-MY3Y].

307. For example, see generally Utah's bail schedule. ADMIN. OFFICE OF THE COURTS, UNIFORM FINE/BAIL FORFEITURE SCHEDULE (2019), https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule.pdf [https://perma.cc/2A7W-9VHM]

—usually in graph form—the standardized money bail amount based on the offense charged and sometimes the defendant's criminal history or other characteristics.[308] Today, 19 states use bail schedules in misdemeanor cases.[309] Some bail schedules are established by statutes and others are implemented "informally . . . by local officials."[310] Moreover, while some bail schedules are mandatory, others serve as mere recommendations to the court.[311] Some bail schedules consider factors relating to the defendant like personal circumstances, flight risk, or ability to pay,[312] and others are less flexible.[313]

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(describing Utah's bail schedule). For other bail schedules, see SUPERIOR COURT OF CAL. COUNTY OF ORANGE, UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR) 14 (2018), https://www.occourts.org/directory/criminal/felonybailsched.pdf [https://perma.cc/73JS-RNYK]; HAW. STATE BAR ASS'N COMM. ON JUDICIAL ADMIN., 2016 CRIMINAL LAW FORUM 5 (2016), 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 [https://perma.cc/E4HY-VGCE]; HARRIS COUNTY TEX. CRIMINAL COURTS AT LAW, MISDEMEANOR BAIL SCHEDULE FOR THE HARRIS COUNTY CRIMINAL COURTS AT LAW 1–2 (2012), http://www.ccl.hctx.net/criminal/Misdemeanor%20Bail%20Schedule.pdf [https://perma.cc/BNU2-9CUJ]; and HARRIS COUNTY TEX. CRIMINAL COURTS AT LAW, RULES OF COURT 10–11 (2019), http://www.ccl.hctx.net/attorneys/rules/rules.pdf [https://perma.cc/PV6G-5PK7].

308. BAUGHMAN, *supra* note 4, at 47; *see also* Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST., Spring 2011, at 12, 13 (discussing the purpose and use of bail schedules).

309. Gross, *supra* note 89, 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 [https://perma.cc/GL92-Z6JU]; Robert Salonga & Alexei Koseff, *Gov. Brown Signs Bill Eliminating Money Bail in California*, MERCURY NEWS (Aug. 29, 2018, 4:44 AM), https://www.mercurynews.com/2018/08/28/gov-brown-signs-bill-eliminating-money-bail-in-california [https://perma.cc/5UTA-KG8W]. Mississippi also provides courts with monetary recommendations on bail. *See* MISS. R. CRIM. P. 8.2. In Florida, the Thirteenth District Judicial Circuit in Hillsborough County established a bail schedule. Order Uniform Bail Bond Schedule, S-2018-022 (Fla. Cir. Ct. June 27, 2018), http://www.fljud13.org/Portals/0/AO/DOCS/S-2018-022.pdf [https://perma.cc/7YHV-YKSZ].

310. Carlson, *supra* note 308, at 13.

311. *Id.* In Alaska, only a bail schedule for misdemeanors exists; the state has declined to establish one for felonies. ALASKA R. CRIM. P. 41(d)–(e); *see also* Presiding Judge Administrative Order Establishing a Statewide Bail Schedule (Alaska Super. Ct. Dec. 8, 2017), https://public.courts.alaska.gov/web/jord/docs/bail-schedule12-17.pdf [https://perma.cc/9QQM-NN2F] (establishing a statewide bail schedule for misdemeanors).

312. For example, the Harris County, Texas recent bail schedule includes some additional factors like "nature of the offense" and "aggravating and mitigating factors," ability to pay, "future safety of the victim and community" and "employment history" and "prior criminal record" of defendant. HARRIS COUNTY TEX. CRIMINAL COURTS AT LAW, RULES OF COURT 10–11 (2019), http://www.ccl.hctx.net/attorneys/rules/rules.pdf [https://perma.cc/PV6G-5PK7].

313. *See* NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 6, at 79; *see also In re* A Uniform Bond Schedule for Maricopa Cty. Limited Jurisdiction Courts, No. 2015-002 (Ariz. Super. Ct. Jan. 5, 2015), https://www.superiorcourt.maricopa.gov/SuperiorCourt/AdministrativeOrders/

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," used "force or a weapon," and the defendant's candor.[314]

Bail schedules are problematic for misdemeanor bail for a number of reasons. Bail schedules remove judicial discretion to determine bail.[315] Even when bail schedules purportedly give judges flexibility, studies demonstrate that they are relied on extensively.[316] Any efficiency that may come from bail schedules is outweighed by the injustice it imposes on poor defendants who often cannot pay the minimum bail amount.[317] Moreover, bail schemes are, in part, responsible for increasing pretrial detention—due to defendants' inability to pay.[318] 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.[319]

The U.S. Constitution prohibits excessive bail,[320] and reasonable bail is the standard.[321] "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 fulfill' the purpose of 'giving adequate assurance that [the defendant] will stand trial and submit to sentence if found guilty.'"[322] "Reasonableness" depends on the individual circumstances of a

AdminOrders/Admin%20Order%202015-002.pdf [https://perma.cc/CLM7-V3MF] (setting a presumptive bail amount for defendants except when personal circumstances dictate otherwise).

314. HAW. STATE BAR ASS'N COMM. ON JUDICIAL ADMIN., REPORT OF THE 2016 CRIMINAL LAW FORUM 5 (2016), https://hsba.org/images/hsba/HSBA%20Special%20Events%20and%20Programs/Bench%20Bar/Report%20of%20the%202016%20Criminal%20Law%20Forum%20(12-20-16)%20over5.pdf [https://perma.cc/N56Y-QJDH]. 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), https://www.paulekman.com/wp-content/uploads/2013/07/A-Few-Can-Catch-A-Liar.pdf [https://perma.cc/A4BE-RR4F] ("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.").

315. *See* 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).

316. Ottone & Scott-Hayward, *supra* note 77, at 26, 34, 37–38.

317. Allen, *supra* note 315, at 655–58.

318. *Id.* at 655.

319. *See* Ottone & Scott-Hayward, *supra* note 77, at 36.

320. U.S. CONST. amend. VIII.

321. 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.").

322. State v. Pratt, 2017 VT 9, ¶ 15, 204 Vt. 282, 166 A.3d 600 (second alteration in original) (quoting Stack v. Boyle, 342 U.S. 1, 4–5 (1951)).

case.[323] Thus, courts are provided significant discretion in deciding when bail is reasonable,[324] and are allowed to consider a number of factors to determine whether bail is reasonable. Bail used to be reasonable when it was attainable for defendants—particularly for misdemeanor defendants who were released as a default. However, now courts consider factors used for felony defendants to determine release.[325] For example, judges commonly consider whether the defendant is likely to appear for court proceedings,[326] the nature of the crime,[327] the seriousness of the crime,[328] the defendant's dangerousness,[329] and the defendant's criminal history.[330] In Arizona, judges are empowered to consider a defendant's "character and reputation" in deciding the amount of bail.[331] Courts have indicated that decisions regarding bail amounts are valid except where it is *clear* that it is excessive.[332] It is important to note that courts have not equated "excessive" with "unaffordable"—bail may be reasonable

323. Turner v. Fitzsimmons, No. 102881, 2015 WL 3421474, at *2 (Ohio Ct. App. 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. 1951)).

324. *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." (quoting *Ex parte* Colbert, 717 So. 2d 868, 871 (Ala. Crim. App. 1998))).

325. Baughman, *History of Misdemeanor Bail*, *supra* note 8, 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 . . . .").

326. *See* People v. Barbarick, 214 Cal. Rptr. 322, 324–26 (Ct. App. 1985) (stating that the likelihood of the defendant appearing in further court proceedings was the principal consideration in setting bail), *abrogated by In re* York, 892 P.2d 804 (Cal. 1995); *see also* Mun. Court of Huntsville, Madison Cty. v. Casoli, 740 S.W.2d 614, 616 (Ark. 1987); *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." (citations omitted)), *superseded by* CAL. CONST. art.1, § 12, *as recognized in In re* White, 229 Cal.3d 827 (2018); People v. Arnold, 132 Cal. Rptr. 922, 925 (App. Dep't Super. Ct. 1976).

327. *See Norcross*, 546 P.2d at 841–42 (quoting *Gusick*, 233 P.2d at 448).

328. *Arnold*, 132 Cal. Rptr. at 925.

329. *See* ALASKA STAT. ANN. § 12.30.011(b)(2) (West 2019); *see also* COLO. REV. STAT. ANN. § 16-4-113(1) (West 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).

330. *Arnold*, 132 Cal. Rptr. at 925; *see also Norcross*, 546 P.2d at 841–42 (quoting *Gusick*, 233 P.2d at 448).

331. *Norcross*, 546 P.2d at 841–42 (quoting *Gusick*, 233 P.2d at 448).

332. *See id.*; *see also* Balltrip v. People, 401 P.2d 259, 262 (Colo. 1965) (en banc) ("[T]he power of deciding the amount of bail is within the judicial discretion of the trial court; its decision will not be disturbed when the question is properly raised, except in a clear case of abuse of discretion.").

even when the defendant does not have the means to pay it.[333] As a result, bail for even simple crimes like assault can be several thousand dollars and still be lawful.[334] Indeed, reasonable bail under the Constitution for misdemeanor offenses looks just like the calculus for bail for serious felony offenses. It is rarely challenged, and even when challenged, the court has discretion to set high bail for many reasons.[335]

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.[336] For a misdemeanor punishable by a year in jail, the court has the discretion to set bail from the minimum of $500 to $2,000.[337] For misdemeanors punishable by a maximum of six months jailtime, bail may be as low as $250 and as high as $1,000.[338] Other states that have counties either requiring or suggesting misdemeanor bail be as high as bail for some felony

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

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

335. Bail amounts are rarely challenged for unconstitutionality. 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. 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, and 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.* at *1–2.

336. *See* MISS. R. CRIM. P. 8.2(c).

337. *Id.*

338. *Id.*

charges include Alabama,[339] California,[340] Illinois,[341] Utah,[342] and Colorado.[343] As mentioned, these bail rates contradict hundreds of years of common law bail history in which pretrial release for felonies was intentionally approached very differently than release for misdemeanors.[344] For instance, in Alabama the misdemeanor bail is higher than felony bail in some instances.[345] In Los Angeles and Orange County[346] a significant portion of the misdemeanors listed bail is $20,000 or even $25,000, and for many popular misdemeanors the listed bail is $1,000.[347]

Whether a factor in setting bail is the defendant's ability to pay depends on the state. Twenty-six states have established by statute that courts should

339. *See* ALA. R. CRIM. P. 7.2(b).

340. 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* SUPERIOR COURT OF CAL. CTY. OF L.A., BAIL SCHEDULE FOR INFRACTIONS AND MISDEMEANORS 11–24 (2019), https://www.lacourt.org/division/criminal/pdf/misd.pdf [https://perma.cc/F9UB-QYD9]; *see also* SUPERIOR COURT OF CAL. COUNTY OF ORANGE, *supra* note 307, at 16.

341. CHI. POLICE DEP'T, SPECIAL ORDER S06-13: BOND PROCEDURES (Aug. 14, 2018), http://directives.chicagopolice.org/directives/data/a7a57be2-12a9fb0e-d1912-aa0c-91c4eb060275ea8.html [https://perma.cc/87KJ-KN2F] (noting that for a Class A or B misdemeanor, bail is $1,500 and for a Class C misdemeanor, bail is $1,200).

342. UTAH COURTS, UNIFORM FINE/BAIL FORFEITURE SCHEDULE 13–91 (May 14, 2019), https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule.pdf [https://perma.cc/Y63U-839E]; *see also* UTAH COURTS, CHANGES TO THE 2019 STATE OF UTAH UNIFORM FINE/BAIL FORFEITURE SCHEDULE (2019), https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule-Changes.pdf [https://perma.cc/893J-V87A].

343. *See* Chief Judge Order Regarding Eighteenth Judicial District Bond Schedule, CJO 15-04, at 1, 4 (Colo. Super. Ct. 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 [https://perma.cc/P6LT-93DU] (suggesting that a Class 1 misdemeanor charge's bail should be set to $5,000—as high as the recommended bail for a Class 5 and Class 6 felony charge).

344. *See supra* note 51 and accompanying text.

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

346. *See* SUPERIOR COURT OF CAL. COUNTY OF ORANGE, *supra* note 307, at 3–10, 16. 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. *Id.* 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. SUPERIOR COURT OF CAL. CTY. OF RIVERSIDE, FELONY AND MISDEMEANOR BAIL SCHEDULE 13 (2018), https://www.riverside.courts.ca.gov/bailschedule.pdf?rev=2018 [https://perma.cc/7MMS-ATG9].

347. SUPERIOR COURT OF CAL. CTY. OF L.A., *supra* note 340, at 12. 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 was scheduled to go into effect in October 2019, but is now on hold due to a voter referendum in November 2020. *See* Salonga & Koseff, *supra* note 309 (describing Governor Brown's sweeping reforms); Jazmine Ulloa, *California's Historic Overhaul of Cash Bail is Now on Hold, Pending a 2020 Referendum,* LA TIMES (Jan 16, 2019, 7:25 PM), https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html [https://perma.cc/ZT68-YV8S].

consider defendant's ability to pay bail as a factor in setting bail.[348] For example, in West Virginia whether the defendant can pay is not alone controlling, but is among the factors courts may consider when setting bail.[349] Illinois's statute states that "[t]he amount of bail shall be . . . [n]ot oppressive . . . [and] [c]onsiderate of the financial ability of the accused."[350] "Under [Hawaii law], '[t]he amount of 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.[351] 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 able and willing to give bail for h[er]."[352] And in Chicago, a defendant who cannot

348. *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) (West 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. 46(a)(3)(C); OHIO REV. CODE ANN. 2937.222(C)(3)(a) (LexisNexis 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. ANN. art. 17.15(4) (West 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); *see also, e.g.*, 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))); 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. 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 . . . .").

349. 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, 166 A.3d 600 ("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 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 VT. STAT. ANN. tit. 13, § 7554(b) (2018))).

350. 725 ILL. COMP. STAT. 5/110-5(b)(2)–(3) (2018).

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

352. *Norcross*, 546 P.2d at 841–42 (quoting *Gusick*, 233 P.2d at 448).

post bail can be released without posting bail if they meet a series of conditions.[353]

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 25 times the scheduled amount for the misdemeanor offense of aggravated drunk driving.[354] The court held that the abnormally high bail amount was justified considering the defendant's criminal history (which included multiple felonies).[355] In contrast, the Hawaii court in *State v. Henley* found that a trial "court abused its discretion in increasing [a defendant's] bail from $200.00 to $2,000.00" on appeal because the facts did not support the trial court's belief that the defendant was a flight risk.[356] 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 $200, the defendant's father could pay bail.[357] The Supreme Court of Hawaii found this determination of flight risk insufficient, and remanded the case.[358] 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 $1,000 simply because the attorneys on the case needed more time "to further prepare in light of the latest developments."[359]

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.[360] In San Francisco, the Office of the Treasurer

353. CHI. POLICE DEP'T, *supra* note 341, at Part V. 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 "[u]nlawful [u]se of [w]eapons"; (4) the individual "is arrested on a warrant"; (5) the individual "has sufficient cash or an approved credit/debit card to post" ten 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." *Id.*

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

355. *Id.* at *1. The court was also concerned about defendant's mental illness and how that contributed to the crimes. *Id.* at *2.

356. *Henley*, 363 P.3d at 321, 328–30.

357. *Id.* at 329.

358. *Id.* at 329–30.

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

360. Cook County, General Order No. 18.8A (Jul. 17, 2017), http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf [https://perma.cc/47ZF-672A]. "[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

published a report criticizing the cash bail system and recommended that it be abandoned.[361] According to the report, even though misdemeanor defendants were released more often in San Francisco than other counties, 85 percent of the county's "jail population is pretrial."[362] Among those, only 40 to 50 percent are eligible for release on bail.[363] However, the "median nonrefundable bail fee needed for release is $5,000," and a 2016 Federal Reserve survey shows that 46 percent of Americans "have no emergency savings, and could not" pay such a fee.[364] Additionally, the report showed that people of color are disproportionately impacted by bail and their bails are set higher than white defendants.[365] The cost of detaining individuals per day on average is significantly more ($74.61) than supervising them on release, ($7.17) per day.[366] Based on these defects, San Francisco recommended moving away from money bail to a risk based system.[367] 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.[368] District Attorneys in Brooklyn, Westchester, and Philadelphia have made similar policies.[369]

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

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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 [https://perma.cc/7PN3-UCSE].

361. 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), https://sftreasurer.org/sites/default/files/2017.6.27%20Bail%20Report%20FINAL_2.pdf [https://perma.cc/3ZC4-QA8Z]. 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 approximately $3.2 million incarcerating individuals whose charges were dismissed or never filed." *Id.* at 12.

362. *Id.* at 4.

363. *Id.*

364. *Id.* at 6.

365. *See id.* at 8.

366. *Bail in America: Unsafe, Unfair, Ineffective*, PRETRIAL JUSTICE INST., http://www.ma4jr.org/wp-content/uploads/2015/10/Bail-in-America.pdf [https://perma.cc/WQ57-5RAM].

367. BROWN, *supra* note 361, at 19.

368. *See* Barry-Jester, *supra* note 158.

369. ANDREA Ó SÚILLEABHÁIN & COLLEEN KRISTICH, P'SHIP FOR THE PUB. GOOD, CRUELTY & COST: MONEY BAIL IN BUFFALO 20 (April 2018), https://ppgbuffalo.org/files/documents/criminal-justice/cruelty_and_cost_money_bail_in_buffalo.pdf [https://perma.cc/4XKD-UUEB].

release.[370] Recently, with bail reform efforts, a few courts have deemed this practice unconstitutional but many courts still persist with a cash-only bail system.[371] Cash only bail subjects defendants to *de facto* pretrial detention since a defendant who cannot pay a large amount of bail at once is detained.[372] California has made broad statewide bail reforms by passing Senate Bill 10 in 2018.[373] Senate Bill 10 signed in August 2018 eliminates money bail in California in favor of risk assessments of defendants and nonmonetary release.[374] 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

370. It is difficult for a defendant to obtain that much cash at one time. *See, e.g.*, State v. Rodriguez, 628 P.2d 280, 284 (Mont. 1981) (noting that "[r]arely can a defendant obtain the cash [when there] is . . . a cash bail requirement").

371. *See, e.g.*, State v. Hance, 2006 VT 97, ¶ 17, 180 Vt. 357, 910 A.2d 874 ("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) (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, 835 N.E.2d 5, 18 (Ohio 2005) (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 Ex parte* Singleton, 902 So. 2d 132, 135 (Ala. Crim. 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, 583–84 (Iowa 2003) (holding that Iowa law does not bar cash-only bail); *Rodriguez*, 628 P.2d at 284 (holding that cash-only bail may not be imposed unless specific factors are satisfied); 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."); Saunders v. Hornecker, 344 P.3d 771, 781 (Wyo. 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.").

372. *Hance*, 2006 VT 97, ¶¶ 9–16 (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'" (alteration in original) (quoting Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329–30 (1982))). 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. *See, e.g.*, *Saunders*, 344 P.3d at 780–81 (finding that, in Wyoming, cash-only bail is a legitimate means the court can use to ensure a defendant shows up to a hearing).

373. Salonga & Koseff, *supra* note 309.

374. *Id.*

presumption of innocence that guarantee a misdemeanor defendant bail.[375] 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.[376] 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.[377] Misdemeanor bail amounts have reached the 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.[378] 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.[379] Risk assessments are lauded by some as a breakthrough in pretrial release,[380] but as with any

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

376. BAUGHMAN, *supra* note 4, at 169–73 (discussing Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978); *see also* State v. Blake, 642 So. 2d 959, 966–67 (Ala. 1994); Cooper v. City of Dothan, No. 1:15-cv-425-WKW, 2015 WL 10013003, at *1–2 (M.D. Ala. June 18, 2015); Walker v. City of Calhoun, Ga., No. 4:15-CV-0170-HLM, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016), *vacated on other grounds*, 682 F. App'x 721 (11th Cir. 2017) (finding language of preliminary injunction created too much uncertainty); Pierce v. City of Velda City, No. 4:15-cv-570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015); Rodriguez v. Providence Cmty. Corr., Inc., 191 F. Supp. 3d 758, 775 (M.D. Tenn. 2016).

377. *See, e.g.*, ODonnell v. Harris Cty., Tex., 251 F. Supp. 3d 1052, 1133–38 (S.D. Tex. 2017) (plaintiffs arguing that individuals 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), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *aff'd as modified sub nom.* ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018); *see also* cases cited *supra* note 376.

378. BAUGHMAN, *supra* note 4, at 44–45 (documenting the third wave of bail reform, the shift to a risk-based system); 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).

379. PRETRIAL JUST. INST., *supra* note 1, at 15.

380. Gouldin, *Disentangling Flight Risk from Dangerousness*, *supra* note 208, at 841 (noting that risk assessment "tools promise to improve judges' pretrial calculations of the likelihood that a released defendant will either fail to appear for trial . . . or commit other crimes"); Megan

decision mechanism, the details are important. There have been a few important criticisms of risk assessments.[381] Scholars criticize risk assessments for exacerbating racial bias,[382] depending inappropriately on family, socioeconomic, and neighborhood variables,[383] and for failing to increase pretrial release rates.[384] These are all important criticisms that should be addressed.

There is another critical but unidentified problem with most risk assessments. Risk assessments do not distinguish between felony and misdemeanor charges. Most risk assessments provide the same increased risk for a prior felony or misdemeanor conviction.[385] 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. It concludes

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Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 305 (2018) [hereinafter Stevenson, *Assessing Risk Assessment in Action*] ("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.").

381. *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") [hereinafter Mayson, *Dangerous Defendants*]; *see also* Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2261–62 (2019) (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); 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); Stevenson, *Assessing Risk Assessment in Action*, *supra* note 380, at 304–10 (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").

382. Mayson, *Dangerous Defendants*, *supra* note 381, at 495–96.

383. Starr, *supra* note 381, at 806.

384. *See* Stevenson, *Assessing Risk Assessment in Action*, *supra* note 380, at 333–41 (discussing failures in pretrial release numbers despite risk assessments). Two common risk assessment tools used, the Public Safety Assessment and the Virginia Pretrial Risk Assessment Instrument, have been billed as tools that do not factor in the race of the defendant, but in practice have not been quite as race neutral as expected. DIGARD & SWAVOLA, *supra* note 72, at 9; Megan Stevenson, *Risk Assessment: The Devil's in the Details*, CRIME REPORT (Aug. 31, 2017), https://thecrimereport.org/2017/08/31/does-risk-assessment-work-theres-no-single-answer [https://perma.cc/5UAY-SE8P] [hereinafter Stevenson, *Devil's in the Details*]; PRETRIAL JUSTICE INST., PRETRIAL RISK ASSESSMENT CAN PRODUCE RACE-NEUTRAL RESULTS 4–6 (2017), https://www.ncsc.org/~/media/Microsites/Files/PJCC/Pretrial%20Risk%20Assessment%20Can%20Produce%20Race-Neutral%20Results%20-%20PJI%202017.ashx [https://perma.cc/9ETP-J3TJ]. One of the reasons that this might be the case is because of the varying options that are available for using risk assessment tools. DIGARD & SWAVOLA, *supra* note 72; Stevenson, *Devil's in the Details*, *supra*.

385. LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 1, 3 (2016), https://www.utcourts.gov/resources/reports/psa/docs/PSA-Risk-Factors-and-Formula.pdf [https://perma.cc/M7DK-BNEL]. 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.

that states should shift their focus to a goal of a particular release rate (like less than ten percent), 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 he or she will commit a new offense or fail to appear [in court]."[386] Risk assessment tools "are informed by data analyses of millions of criminal cases" and aim "to provide judges with more objective information to" assess the relative risk of a defendant to make pretrial release decisions.[387] The leading risk assessment tool is the Public Safety Assessment ("PSA"), designed by the Arnold Foundation.[388] The PSA determines a risk score by considering "whether the 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."[389] The PSA gives a defendant the same additional increased risk score for a prior felony conviction or a misdemeanor conviction.[390] It also gives the same score for a previous violent felony or misdemeanor.[391] The PSA fails to distinguish between misdemeanors and felonies at all, even though felonies are much more serious.[392] 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.[393]

Data from states employing risk assessment tools demonstrates that they do not necessarily lower pretrial release rates. Kentucky—one of the first

386. NCSL, *Setting Release Conditions*, *supra* note 136.

387. BLUMAUER ET AL., *supra* note 149, at 23.

388. *See id.* (As of February 2018, "[t]hirty-eight jurisdictions, including the states of Arizona, Kentucky and New Jersey, and large cities such as Charlotte, Chicago and Houston" used the PSA).

389. *Id.* (quoting LAURA & JOHN ARNOLD FOUND., *supra* note 385). As discussed below, Utah adopted the Arnold Foundation's PSA in May 2018. *Utah Public Safety Assessment Frequently Asked Questions*, UTAH COURTS (June 8, 2018), https://www.utcourts.gov/resources/reports/psa/faq.html [https://perma.cc/4B4M-U4ZV].

390. LAURA & JOHN ARNOLD FOUND., *supra* note 385, at 3.

391. *Id.*

392. For further discussion of this issue, see *supra* note 29.

393. BLUMAUER ET AL., *supra* note 149, at 23. For example, "[i]n Maryland, six out of 24 counties use risk assessment tools, but only two . . . use a tool that has been empirically validated." *Id.* However, even the four counties that use validated tools classify over 27 misdemeanors as high and moderate 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 [https://perma.cc/63QR-Y2XK] (citing and incorporting OFFICE OF THE SHERIFF, ST. MARY'S CTY., MD., ST. MARY'S COUNTY PRE-TRIAL RELEASE RISK ASSESSMENT 3–4 (2015)). In essence, these tools are guaranteeing that many misdemeanor defendants who should have the right to release will be detained before trial.

states to institute a risk assessment-based pretrial release system[394]—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,[395] and requires state-funded supervision and intervention to slowly adopt evidence-based approaches.[396] It specifies that "non-financial release" is "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."[397] The risk assessment algorithm is only a tool, "[h]owever, [and] final decision[s] [are] left up to . . . judges."[398] "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 percentage points" since 2011.[399] Data shows that Kentucky judges do not always follow these recommendations. "[T]he [actual] pretrial release rate for low and moderate risk defendants increased by only four percentage points" over this time period.[400] Similarly, in Virginia, the pretrial "risk assessment tool [aims to] identify[] the 25% lowest-risk non-violent offenders [and] diver[t] [them] from prison or jail."[401] "The median judge [in Virginia] diverts only about . . . 40% of [defendants] who [a]re recommended for diversion by the risk assessment [algorithm]."[402] In short, data from Kentucky and Virginia "show[s] that . . . [pretrial risk assessment tools] . . . had little to no impact on incarceration rates" because "there is [great] variation . . . in [the way judges

394. 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), https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf [https://perma.cc/PS5X-DCGC].

395. Fourteen other states use similar data-driven approaches. NCSL, *Setting Release Conditions*, *supra* note 136.

396. MARK HEYERLY, KY. PRETRIAL SERVS., PRETRIAL REFORM IN KENTUCKY 13 (2013), https://www.acluga.org/sites/default/files/pretrial-reform-in-kentucky-kentucky-pretrial-services-2013.pdf [https://perma.cc/SG4N-QNVJ]; *see* H.B. 463, 2011 Leg., Reg. Sess. (Ky. 2011).

397. HEYERLY, *supra* note 396, at 13. 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.

398. STEVENSON & DOLEAC, *supra* note 394, at 5.

399. *Id.*

400. *Id. But see Uniform Crime Report January–September 2017*, N.J. ST. POLICE (Oct. 13, 2017, 7:52 AM), https://www.njsp.org/ucr/pdf/current/20171013_crimetrend.pdf [https://perma.cc/UD4J-5ZF6] (detailing that New Jersey's bail reform efforts have allowed drops in jail numbers of 15 percent in the first six months and the number of unconvicted people held in jail dropped by more than a third (34.1 percent) between September 2016 and September 2017).

401. STEVENSON & DOLEAC, *supra* note 394, at 6.

402. *Id.* at 7.

use them]."[403] And unfortunately, California's new proposed risk instrument is largely borrowed from the Kentucky/PSA model.[404]

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. In other words, risk assessments are failing to distinguish felony and misdemeanor crimes. 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.[405] 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.

A similar failure to distinguish felony and misdemeanor crimes appears in the most recently proposed bail reform risk assessments, including Utah and New Jersey. In May 2018, Utah rolled out a pretrial risk assessment program to improve release decisions and better inform judges.[406] The Utah Public Safety Assessment uses "nine factors that [are designed to] predict whether a defendant will commit new criminal activity ("NCA"), commit new violent criminal activity ("NVCA"), or fail to appear ("FTA") in court if released before trial."[407] The nine factors are: "[a]ge at current arrest," "[c]urrent violent offense," "[p]ending charge at the time of the offense," "[p]rior misdemeanor conviction," "[p]rior felony conviction," "[p]rior violent conviction," "[p]rior failure to appear in the past two years," "[p]rior failure to appear older than two years," and "[p]rior sentence to

403. *Id.* at 2.

404. *See generally* Samantha Young, *Kentucky Eyed as 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 [https://perma.cc/86EH-TCNR] (discussing how Senator Hertzberg of California "is convinced California ought to take notice" of "how Kentucky gets its defendants awaiting trial to show up for court dates and keep them from committing crimes—all without locking them up").

405. *See 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 [https://perma.cc/83F5-P3HK] (discussing how "risk assessment tools currently in use do not make sufficient contextual distinctions between gradations of offenses or other conduct"); *see also* LAURA & JOHN ARNOLD FOUND., *supra* note 385, at 3 (discussing how PSA scores are calculated). Kentucky is one of 39 jurisdictions that have adopted the LJAF PSA. *Bail Reform*, ARNOLD VENTURES, https://www.arnoldventures.org/work/release-decision-making [https://perma.cc/LJ5C-6VDX].

406. *See* 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 [https://perma.cc/YEF5-CUAB] (discussing Utah's PSA).

407. LAURA & JOHN ARNOLD FOUND., *supra* note 385, at 2.

incarceration."[408] 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.[409] 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.[410] 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.[411] The research has made clear that a failure to appear is not cause for pretrial detention, and that simple reminders can dramatically reduce failure to appear.[412] 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.[413] 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 pose a very low risk to society and should not be detained before trial.[414]

New Jersey began using the same nine factors and algorithm that Utah has now adopted in 2017.[415] New Jersey's assessment results in many defendants being released pretrial subject to a range of conditions.[416] For low-

408. *Id.*

409. *Id.* at 3.

410. Friedman, *supra* note 406. Utah Third District Judge Kara Pettit 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 . . . ." Harkins & Miller, *supra* note 309.

411. *See* LAURA & JOHN ARNOLD FOUND., *supra* note 385, at 3–4 (adopting the PSA tool developed by the Arnold Foundation); *see also* UTAH CTS., A GUIDE TO MANUALLY CALCULATING A PUBLIC SAFETY ASSESSMENT (PSA)—UTAH 1–3 (May 2018), https://www.utcourts.gov/resources/reports/psa/docs/PSA%20Manual%20Calculation%20Guide.pdf [https://perma.cc/DP9Z-9HUD].

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

413. *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."). Research has shown that defendants that receive reminders when they need to be in court can cause as much as a 43 percent reduction in the amount of defendants who do not show up for their court dates. *See* DIGARD & SWAVOLA, *supra* note 72, at 8; Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Court Date Notification Program*, 48 CT. REV. 86, 86-95, 89 (2012).

414. *See* Baradaran & McIntyre, *supra* note 37, at 499.

415. *See* Stuart Rabner, *Bail Reform in New Jersey*, *in* TRENDS IN STATE COURTS 27, 28 (Deborah W. Smith et al. eds., 2017), https://www.ncsc.org/~/media/Microsites/Files/Trends%202017/Trends-2017-Final-small.ashx [https://perma.cc/A6X6-2WW7].

416. *See id.*

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.[417] 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.[418] This critical failure to distinguish between felonies and misdemeanors is a flaw shared by almost every risk assessment instrument. However, one thing New Jersey does do is that it limits the number of violent crimes that are listed as higher risk.[419] 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.[420] This is an improvement and could be why New Jersey has improved release rates overall—though it is still detaining more than ten percent 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.[421] The Colorado law, passed in 2013, requires that pretrial services programs "make all reasonable efforts to implement an empirically developed pretrial risk assessment tool."[422] The Colorado assessment uses a point system outlined in the figure below:

417. *See id.*

418. N.J. CTS., PUBLIC SAFETY ASSESSMENT: NEW JERSEY RISK FACTOR DEFINITIONS —DECEMBER 2018, at 2–3 (2018), https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf [https://perma.cc/PNQ5-7KPK].

419. *Id.* at 1. 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.* 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.

420. *Compare* Utah Violent Offenses, Utah Courts (unpublished manuscript) (on file with Author), *with* N.J. CTS., *supra* note 418, at 1.

421. CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 15 (2016), http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf [https://perma.cc/KT9B-3N7D].

422. COLO. REV. STAT. § 16-4-106(4)(c) (2013) (amended 2017).

| 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 decision-making.[423] Despite being lauded as a

423. *See* COLO. ASS'N OF PRETRIAL SERVS., THE COLORADO PRETRIAL ASSESSMENT TOOL (CPAT): ADMINISTRATION, SCORING, AND REPORTING MANUAL VERSION 2 3, 9 (2015), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=47e978bb-3945-9591-74f-77755959c5f5 [https://perma.cc/K499-UUVU] [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* Greg Mauro, PowerPoint Presentation at National Conference of State Legislatures Risk-based Pretrial Release Site Visit Sept. 9-10, 2014, Denver Pretrial Services (Sept. 10, 2014), http://www.ncsl.org/Documents/CJ/GregMauroPresentation.pdf [https://perma.cc/4MU6-BD9V]. Whether these are good public policy is a different question. *See* Starr, *supra* note 381, at 806; *see also* Mayson, *Dangerous Defendants*, *supra* note 381, at 562.

success, Colorado's system is flawed in the same way as the Arnold PSA and many other risk assessment tools. 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)."[424] Item 10 (other pending cases) similarly does not make a distinction between whether those cases are on misdemeanor or felony charges.[425] 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.[426] 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. One of the factors considered in the Colorado risk assessment tools is age of first arrest. This factor does not distinguish between an arrest for a misdemeanor offense (where the police officer chose not to exercise their discretion to issue a citation) and an arrest for a felony offense. 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.

Like Colorado's risk instrument, California's newly proposed instrument fails to distinguish between felony and misdemeanor offenses. California's new risk assessment—set to potentially take effect in 2020—is similarly flawed.[427] 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.[428] 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.[429] 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.[430] High-risk individuals must remain in custody until their arraignment.[431] Though Senate Bill 10 eliminates money bail, some commentators have argued that it gives judges too much discretion to detain

424. CPAT, *supra* note 423, at 6.

425. *Id.* at 7.

426. *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.*

427. S.B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2018). The bail law is on hold pending the November 3, 2020 referendum; but if approved by voters, it will be codified as CAL. PENAL CODE § 1320.10. *See* Ulloa, *supra* note 347.

428. S.B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

429. *See id.* (adding CAL. PENAL CODE § 1320.10(b)).

430. *See id.* (adding CAL. PENAL CODE § 1320.10(c)).

431. *See id.* (adding CAL. PENAL CODE § 1320.10(e)(1)).

defendants pending trial.[432] Under the proposed bill, prosecutors can file a motion for "preventive detention" based on public safety and other concerns.[433] 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,"[434] 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."[435] 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" or jeopardizing public safety.[436] 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.[437] 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. However, 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. Related to this problem, and illustrated above with the examples from varying states, is the problem that there is no uniformity in what states should consider high risk and low risk factors in the assessments.[438] 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.[439] Minor criminal histories

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432. Salonga & Koseff, *supra* note 309.

433. S.B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (adding CAL. PENAL CODE § 1320.18(d)).

434. *See id.* (adding CAL. PENAL CODE § 1320.7(k)).

435. *Id.*

436. *See id.*

437. 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 [https://perma.cc/6GFL-F6TA] (quoting the California bill).

438. DIGARD & SWAVOLA, *supra* note 72, at 9; Stevenson, *Assessing Risk Assessment in Action*, *supra* note 380.

439. Natapoff, *supra* note 5, at 1322.

should not be treated the same as serious criminal histories when it comes to release before trial.

## IV. THE NEED FOR REFORM

In recent years, misdemeanors and bail reform have attracted significant attention from scholars and policymakers.[440] In the last three years, states have passed hundreds of new pretrial release laws.[441] There are over 200 bills related to pretrial release pending in 39 state legislatures across the country.[442] 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, and today they make up the bulk of cases in criminal court.[443] Release on bail is a time-honored historical right for nonserious crimes. Consequently, the weighing of

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440. *See, e.g.*, KOHLER-HAUSMANN, *supra* note 5, at 3–9; Stevenson & Mayson, *supra* note 5, at 768; Joe, *supra* note 5, at 793; Heaton et al., *supra* note 39, at 718.

441. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 1; *see also* CAL. PENAL CODE § 1320.10 (West 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) (2019) (barring cash-only bail for certain crimes and restricting the use of financial considerations for release in misdemeanor crimes); COLO. REV. STAT. § 16-4-105 (2017) (imposing conditions on bond for certain offenses); 725 ILL. COMP. STAT. ANN. 5/110-5(a-5) (West 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 (2019) (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); N.J. STAT. ANN. § 2A:162-17 (West 2017) (creating categories of pretrial release conditions applicable in certain circumstances); UTAH CODE. ANN. § 77-20-1 (LexisNexis 2017) (allowing persons eligible for bail to be released with or without money bail based on the court's discretion).

442. *See State Pretrial Policy: Bill Tracking Database*, NAT'L CONF. ST. LEGISLATURES (Oct. 18, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/state-pretrial-policy-bills-tracking-database.aspx [https://perma.cc/8BXY-TSYT] (providing a searchable database that a user can filter using topic, state, keyword, status, bill number, year, and author). Between 2015 and 2016, 14 states passed laws either expanding or restricting eligibility for pretrial release. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 1.

443. 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.").

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 of guilt or innocence, or of dangerousness except in very rare circumstances. Judges are not especially skilled in predicting dangerousness anyway.[444] Defendants who pose a threat of violence while released are extremely rare—even felony defendants, but especially misdemeanor defendants.[445] 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.[446] Misdemeanor defendants had a right to bail, unlike defendants charged with capital crimes and some felony defendants.[447] 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.[448] 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.[449] 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.[450] 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.[451] The liberty interest for misdemeanor cases is much stronger, yet the harm for defendants is as serious. Evidence demonstrates that detention

444. *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").

445. For instance, an average felony defendant has a 1.9 percent chance of being "rearrested for a violent felony" while on pretrial release. Even defendants "who have four prior convictions . . . were only arrested for pretrial violent crime in about 1 in 30 instances." Baradaran & McIntyre, *supra* note 37, at 527, 530.

446. 1 BLACKSTONE, *supra* note 47, at 1003.

447. *Id.*

448. *The Law Respecting Bail*, 7 IRISH L. TIMES & SOLIC. J. 404, 404 (1873); *see also supra* notes 28–31 and accompanying text.

449. *See supra* notes 371–75 and accompanying text.

450. *See supra* Part III.

451. *See, e.g.*, ODonnell v. Harris Cty., Tex., 251 F. Supp. 3d 1052, 1133–38 (S.D. Tex. 2017) (applying the balancing test articulated by the Supreme Court in Matthews v. Eldridge, 424 U.S. 319, 335 (1976)), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *aff'd as modified sub nom.* ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018).

before trial leads to three-times higher conviction rates, higher rates of pleading guilty, sentences that are twice as long,[452] and even higher recidivism rates even after a few days behind bars.[453]

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. States need to revise 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 ten percent pretrial detention rate.[454] Only 14 states currently meet this goal, including states who have made bail reform a priority.[455] 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.

## V. CONCLUSION

The majority of individuals in our nation's jails are unconvicted people.[456] One-third of them are serving short misdemeanor sentences and 85 percent are in for nonviolent and minor offenses—with 80 percent of them having their charges dropped during their stay.[457] What these numbers indicate is that many incarcerated individuals can safely be released and never serve in jail. What this Article has demonstrated is that felony and misdemeanor crimes are considered similarly in state statutes, cases, and in bail determination nationwide. Almost every risk assessment formulated to improve pretrial release numbers is flawed in failing to make clear that misdemeanor convictions are not nearly as serious as felony convictions. As a result, risk assessments are generally not working to reduce pretrial detention rates. Instead, jurisdictions need to presumptively release defendants charged with misdemeanor crimes. By returning to a once-obvious bifurcation between misdemeanor and felony bail, we would not only solve prison

452. *Id.* at 1143–44.

453. Baughman, *History of Misdemeanor Bail*, *supra* note 8, at 874; Heaton et al., *supra* note 39, at 717–18 (finding that pretrial detainees are more likely to commit future crimes than similarly situated defendants who have been released). Another study shows that people held pretrial who were part of a low-risk group for recidivism became significantly more inclined towards rearrest after spending time in jail pretrial. *See supra* note 74.

454. PRETRIAL JUSTICE INST., *supra* note 1, at 11–12 (noting that the states of Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Ohio, Oregon, Rhode Island, Utah, Vermont, and Washington had less than ten percent pretrial detention rates as of 2017).

455. *Id.*

456. BAUGHMAN, *supra* note 4, at 4.

457. *Id.* at 83.

overcrowding, but lay the foundation for clarifying wider due process protections that have been lost for many pretrial defendants.

Additionally, U.S. jurisdictions should shift their bail reform goals to include guidelines for release that aim to detain ten percent or fewer misdemeanants. While ten percent is certainly an arbitrary number—it is probably close to the 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 of reducing incarceration rates. Without a focus on important constitutional rights and a goal to actually increase numbers of defendants released before trial, we will continue to fail at reducing incarceration rates and improving defendant rights.