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THE RIGHT TO COUNSEL BUT NOT THE PRESENCE OF
COUNSEL: A SURVEY OF STATE CRIMINAL PROCEDURES
FOR PRE-TRIAL RELEASE

*John P. Gross**

Abstract

There is a widely-held belief that the state provides counsel to indigent criminal defendants at their initial appearance in state court. However, the majority of states do not provide counsel to indigent defendants at their initial appearance when a judicial officer determines conditions of pretrial release. State criminal procedure codes fail to provide the same procedural protections that defendants have in federal court. Indeed, states systems are characterized by predictive determinations regarding guilt, an overemphasis on the potential dangerousness of defendants, a lack of adequate pretrial services, and continued reliance on financial securities.

The U.S. Supreme Court has done little to protect the constitutional rights of indigent criminal defendants when they initially appear before a judicial officer that has the power to restrict their liberty, despite the fact that the setting of bail implicates an indigent defendant's right to counsel under the Sixth Amendment and the right to due process and equal protection under the Fourteenth Amendment. The Court has never found the setting of bail to be a critical stage of the proceedings that would require the presence of counsel or discussed what procedural safeguards should be in place to protect the rights of indigent defendants. These failures may contribute to rising rates of pretrial incarceration, a trend that the Court should take steps to reverse by finding a right to counsel at an indigent defendant's initial appearance where a judicial officer has the power to place restrictions on their liberty.

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INTRODUCTION

Fifty years ago, the Bail Reform Act of 1966¹ transformed the way in which federal judicial officials made decisions about pretrial release. Instead of requiring financial securities, such as cash or secured bonds, the act required federal judicial officials to release defendants on their

1. Pub. L. No. 89-465, 80 Stat. 214 (1966) (codified as amended at 18 U.S.C. §§ 3141-51 (2012)).

own recognizance or upon the execution of an unsecured appearance bond unless such a release would not reasonably assure the appearance of the defendant. Judicial officers were permitted to consider the weight of the evidence against the defendant but were required to balance it against other factors such as a defendant's ties to the community, reputation, and financial resources. The goal was to create a system where judicial officers made individualized determinations regarding pretrial release and where the wealth of the defendant was not the sole factor that determined whether he would remain at liberty before his trial.

To help accomplish that goal, the Act permitted judicial officers to impose certain conditions on a defendant's release, such as releasing the defendant to the custody of a designated person or organization that would be responsible for the defendant's supervision. This led to the development of pretrial service agencies that both assisted federal judicial officials by making recommendations regarding conditions of pretrial release and supervised defendants after their release. While the Bail Reform Act of 1984² permitted a federal judicial officer to consider the potential danger a defendant's release posed to an individual or the community at large, it also afforded any defendant who was denied bail the right to a prompt hearing where counsel would represent the defendant, defendant has the right to cross examine witnesses, and the prosecution has the burden of proving that the defendant is dangerous by clear and convincing evidence. In federal courts, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."³

The same is not true in state courts. The first Part of this Article discusses the procedures used in federal and state courts at a defendant's initial appearance before a judicial officer who has the power to place restrictions on their liberty, with an emphasis on how those procedures impact indigent defendants.⁴ The majority of states does not provide counsel to indigent defendants at their initial appearance. For indigent defendants, states typically appoint counsel, but counsel is rarely present at indigent defendants' initial appearance when a judicial officer determines conditions of pretrial release.

An aspect of the federal system that states have embraced is that judicial officers set conditions of release based on the likelihood of conviction and the potential threat a defendant poses to public safety. However, states have failed to provide the same procedural protections that defendants have in federal court if they are denied bail.⁵ In sharp

2. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141-450 (2012)).

3. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

4. *See infra* Part I.

5. *See infra* Subsections I.B.2--3.

contrast to the federal system, state judicial officers rely on financial securities to ensure a defendant's return to court as evidenced by the continued use of bail schedules.⁶

While a pretrial service agency assists federal judicial officers in determining appropriate conditions of release and supervises defendants who are released, states have failed to create similar systems.⁷ Even though state judicial officers have the power to set a variety of pretrial release conditions, they typically lack the type of information needed to make an informed decision regarding the least restrictive conditions that would be necessary to ensure a defendant's return to court. In addition, the absence of pretrial services discourages the release of low risk defendants.

While the apathy of state legislatures toward indigent defense is certainly to blame, the Supreme Court has done little to protect the constitutional rights of indigent criminal defendants when they initially appear before a judicial officer that has the power to restrict their liberty. The second Part of this Article discusses how the Supreme Court's interpretation of the right to counsel under the Sixth Amendment supports the argument that the procedures currently in use in state courts for determining conditions of pretrial release make a defendant's initial appearance a "critical stage" of the proceedings that requires the presence of counsel.⁸

Current state practices regarding pretrial release implicate the Sixth Amendment right to counsel in five specific ways. First, since the law requires judicial officers to consider factors such as the weight of the evidence against the defendant, the likely outcome at trial, and any potential defenses the defendant might have, one can view a defendant's initial appearance as a trial-like confrontation that requires the presence of counsel.⁹ Second, while the Court has often tried to limit the right to counsel to proceedings that would have an impact on the outcome at trial, the overwhelming evidence is that pretrial incarceration negatively impacts trial outcomes for defendants.¹⁰ Third, the Court has also linked the right to counsel to actual incarceration, holding that if a court is to impose any amount of incarceration as a sentence, then they must provide counsel to an indigent defendant.¹¹ If even a single day of incarceration following conviction implicates the right to counsel, then it is difficult to imagine that weeks or months of pretrial incarceration does not warrant

6. *See infra* Subsection I.B.4.

7. *See infra* Subsections I.B.4–5.

8. *See infra* Part II.

9. *See infra* Section II.A.

10. *See infra* Section II.C.

11. *See infra* Section II.D.

the same protection.¹² Fourth, the Court has also extended the right to representation beyond the trial to sentencing hearings.¹³ In many ways, a sentencing hearing, where a judicial officer often must decide between a sentence of probation or incarceration, takes into account many of the same factors that judicial officers must consider when making decisions regarding pretrial release.¹⁴ Fifth, the Court has also recognized the importance that pretrial representation, particularly in the context of plea bargaining, plays in the criminal justice system.¹⁵ Since the criminal justice system is now a system of pleas and not trials, defendants need more than just the early appointment of counsel; they need the actual presence of counsel at their initial appearance.

Even if the Supreme Court were to conclude that a defendant's initial appearance before a judicial officer who has the power to restrict the defendant's liberty was not a critical stage of the proceedings, pretrial incarceration implicates the Fourteenth Amendment's Due Process Clause. The third Part of this Article examines the Court's precedents regarding the procedural requirements that must be in place before there can be restrictions placed on someone's liberty in civil proceedings.¹⁶ The procedural due process that the Court requires in the context of parole and probation revocation hearings and civil contempt proceedings calls into question whether current state practices provide adequate procedural safeguards to prevent the unwarranted deprivation of liberty.

The Court has characterized pretrial detention in criminal cases as regulatory, not punitive; therefore, it does not amount to punishment before trial, which would violate the Due Process Clause. Two of the factors that weigh heavily in distinguishing between regulatory and punitive detention are that the nature and extent of the detention not be excessive in light of the harm it is trying to prevent and that the conduct it is trying to prevent is not already considered a crime.¹⁷ The failure of states to adopt less restrictive measures for ensuring a defendant's appearance in court, like those provided by pretrial services agencies, makes the states' continued reliance on pretrial detention excessive in light of the harm they are trying to prevent, specifically the defendant's failure to appear. In addition, the failure of a defendant to appear in court following the defendant's pretrial release is a crime in every state. "Bail Jumping" statutes have criminalized the harm states are trying to prevent through pretrial incarceration. This suggests that pretrial detention for defendants who are not considered to be dangerous and present a low risk

12. *See infra* Section II.D.

13. *See infra* Section II.E.

14. *See infra* Section II.E.

15. *See infra* Section II.F.

16. *See infra* Part III.

17. *See infra* Section III.B.

of flight may no longer be fairly characterized as regulatory but has instead become punitive.

The Supreme Court has made a distinction between when the right to counsel "attaches" and when the law entitles an indigent defendant to have a lawyer present in court. The fourth Part of this Article discusses how this distinction implicates the Fourteenth Amendment's Equal Protection Clause for indigent defendants.¹⁸ The Court has clarified that the right to counsel attaches at a defendant's first appearance before a judicial officer, which means that a defendant has an absolute right to legal representation at the initial appearance, but only if the defendant can afford to hire counsel. While the Equal Protection Clause does not require counsel to be appointed merely because it would be beneficial, it does require that a state ensure that an indigent defendant has a fair opportunity to present his defense.¹⁹ Because the initial appearance is a trial-like confrontation that can impact the ultimate outcome of the case, to permit the wealthy to have counsel but deny that same right to the indigent would amount to a violation of equal protection.

Other state practices regarding pretrial release determinations may also violate the Fourteenth Amendment's Equal Protection Clause. Some judicial officers are required to affix an amount of bail to arrest warrants, and some rely on bail schedules that require the setting of a financial surety based solely on the offense charged.²⁰ The U.S. Department of Justice has taken the position that these practices deny equal protection to indigent defendants. The continued reliance on financial sureties as a condition of pretrial release is especially troubling when the vast majority of criminal defendants in the country are unable to afford their own lawyer.

I. BAIL DETERMINATIONS IN FEDERAL AND STATE COURTS

The procedures that govern a defendant's initial appearance before a judicial officer who has the power to place restriction on the defendant's liberty vary from state to state, but there are more similarities than differences among them. State procedural codes also call for the consideration of many of the same factors that federal courts consider but lack the procedural protections afforded defendants in federal court.

A. Federal Procedures

In February of 1963, the *Report of the Attorney General's Committee on Poverty and the Administration of Justice* described the

18. See *infra* Part IV.

19. See *infra* Sections IV.A–B.

20. See *infra* Section IV.C.

bail hearing as “an obviously crucial stage in the administration of bail” but found that “American bail administration largely fails to provide the bail-setting authority with relevant factual data indispensable to sound bail decisions.”²¹ The report also found that “counsel is never or rarely assigned to the financially incapacitated accused”²² and concluded that “improvement of procedures at this stage is urgently required.”²³ In August of 1964, in his testimony before the Subcommittees on Constitutional Rights and Improvements in Judicial Machinery of the Senate Judiciary Committee, Attorney General Robert F. Kennedy described the bail setting practices then in use as “unrealistic and often arbitrary” and noted the “cruelty and cost” associated with unnecessary pretrial detention.²⁴

Congress responded by passing the Criminal Justice Act of 1964,²⁵ which established a comprehensive system for appointing and compensating lawyers to represent indigent defendants,²⁶ and the Bail Reform Act of 1966, which required the release of a defendant on his personal recognizance or upon the execution of an unsecured appearance bond unless the judicial officer determines that release will not reasonably ensure the appearance of the defendant.²⁷ The Bail Reform Act also allowed the judicial officer to impose conditions of release, such as placing the defendant “in the custody of a designated person or organization”²⁸ and placing restrictions on her “travel, association or place of abode”²⁹ to secure her appearance at trial. It also set out the criteria that judicial officers should consider when imposing conditions of release such as

the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused’s family ties, employment, financial resources, character and

21. REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 63 (1963), [https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Allen%20Committee%20Report%20\(1963\).pdf](https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Allen%20Committee%20Report%20(1963).pdf).

22. *Id.* at 64.

23. *Id.* at 67.

24. *Hearing on Bail Legislation Before the Subcomms. on Constitutional Rights and Improvements in Judicial Machinery of the S. Judiciary Comm.*, 88th Cong. 2, 4 (1964) (statement of Robert F. Kennedy, Att’y Gen. of the United States), <http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf>.

25. Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A (2012)).

26. 18 U.S.C. § 3006A.

27. Pub. L. No. 89-465, 80 Stat. 214, 214–16 (codified as amended at 18 U.S.C. §§ 3141–50 (2012)).

28. 18 U.S.C. § 3146(a)(1).

29. *Id.* § 3146(a)(2).

mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.³⁰

While the Bail Reform Act did not eliminate the use of financial securities such as bail bonds,³¹ the goal was to eliminate a system where defendants, who had yet to be convicted, had to pay for their freedom.

Over the last fifty years, the procedures in federal court for determining the conditions of pretrial release have not remained static. Perhaps the two most significant developments over that time have been the increased reliance on pretrial services, both before and after the judicial officer makes a determination regarding pretrial release,³² and the ability to deny a defendant release based on a predication regarding her future dangerousness.³³ Nevertheless, release without financial conditions remains the norm in federal court. That is not the case in state courts where judges continue to rely on financial securities when making decisions regarding pretrial release.

30. *Id.* § 3146(b).

31. *Id.* § 3146(a)(4).

32. *See* 18 U.S.C. § 3154(1) ("Pretrial services functions shall include the following: . . . Collect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense, including information relating to any danger that the release of such person may pose to any other person or the community, and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release . . ."); *id.* § 3154(4) ("Pretrial services functions shall include the following: . . . Operate or contract for the operation of appropriate facilities for the custody or care of persons released under this chapter including residential halfway houses, addict and alcoholic treatment centers, and counseling services, and contract with any appropriate public or private agency or person, or expend funds, to monitor and provide treatment as well as nontreatment services to any such persons released in the community, including equipment and emergency housing, corrective and preventative guidance and training, and other services reasonably deemed necessary to protect the public and ensure that such persons appear in court as required."); Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 *YALE L.J.* 320, 325-30 (1987). In 1974, Congress passed the Speedy Trial Act, a portion of which authorized the creation of pretrial services programs in ten specified federal judicial districts. *Id.* at 326. These programs interviewed defendants before their initial appearance to provide the judicial officer with information on their background, recommended conditions of release, and pretrial supervision to defendants who were released. *Id.* at 326-27. These programs reduced the rate of pretrial detention and defendants who were under their supervision were less likely to be rearrested or fail to appear in court. *Id.* at 327. The success of these programs led to the enactment of the Pretrial Services Act in 1982, which expanded pretrial services to all federal judicial districts. *Id.* at 329.

33. *See* 18 U.S.C. § 3142(g)(4) (stating that the Bail Reform Act of 1984 permitted the judicial officer making the bail determination to consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release").

While the Federal Rules of Criminal Procedure state that a defendant “who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal,”³⁴ the appointment procedure itself is the product of local court rules.³⁵ In addition, the requirement that counsel be made available at a defendant’s initial appearance is undermined by the fact that, during a defendant’s initial appearance before a judicial officer, the defendant must be informed of their “right to retain counsel or to request that counsel be appointed,”³⁶ and the judicial officer “must detain or release the defendant.”³⁷

If the defendant is released from custody, and even if that release comes with certain conditions, it is difficult to argue that the defendant’s Sixth Amendment right to counsel has been violated in any meaningful way. A defendant’s initial appearance as laid out in the Rules of Federal Criminal Procedure is primarily ministerial. However, if the judicial officer decides to detain a defendant, then the detention triggers additional procedural protections. A detention hearing must be held and at that hearing, the defendant has “the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.”³⁸ Defendants in state courts do not have the same procedural protections, despite the fact that state judicial officials can consider the potential dangerousness of a defendant.³⁹

34. FED. R. CRIM. P. 44(a); *see also* United States v. Perez, 776 F.2d 797, 800 (9th Cir. 1985) (finding that there is no constitutional right to counsel at a defendant’s initial appearance and giving the Rule 44(a) requirement that counsel be provided to an indigent defendant’s at the initial appearance “a common sense interpretation” since “[o]ne of the tasks performed at an initial appearance is the appointment of counsel” requiring “counsel be appointed before the judge asks routine questions such as the defendant’s name and financial ability would be self-defeating”), *overruled on other grounds by* United States v. Cabaccang, 332 F.3d 622 (9th Cir. 2003).

35. FED. R. CRIM. P. 44(b).

36. *Id.* 5(d)(1)(B).

37. *Id.* 5(d)(3).

38. 18 U.S.C. § 3142(f).

39. *See* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1330 (2012) (noting that the Federal Bail Reform Act of 1984 “was paralleled on the state level by no fewer than thirty-four states articulating specific statutory provisions allowing detention based on a defendant’s dangerousness, as opposed to a risk of flight”).

B. *State Procedures*

In the majority of states, indigent defendants are not provided with counsel when they first appear before a judicial officer who has the power to place restrictions on their liberty. The Supreme Court has made it clear that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger the attachment of the Sixth Amendment right to counsel.”⁴⁰ As will be discussed in more detail below, there is a difference between the “attachment” of the Sixth Amendment right to counsel and the requirement that counsel actually be present during a specific stage of the criminal proceeding.⁴¹

The 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. That may be, at least in part, because the Court is under the mistaken assumption that counsel is actually present in the vast majority of jurisdictions. Consider the following assertion made by the Court in *McNeil v. Wisconsin*,⁴² a case where the defendant was, in fact, represented at his bail hearing by a public defender: “The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused, and in most States, at least with respect to serious offenses, free counsel is made available at that time and ordinarily requested.”⁴³ The Court offers absolutely no support for this claim. The Court reiterates this claim in *Rothgery v. Gillespie County*⁴⁴ where it references *McNeil* and the Amicus Brief of the National Association of Criminal Defense Lawyers, stating that “[w]e are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel ‘before, at, or just after initial appearance.’”⁴⁵ There is a critical difference, however, between taking the first steps toward the appointment of counsel and the actual presence of counsel at a hearing where a judicial officer places restrictions on a defendant’s liberty.

The fact that local custom and practice often trumps statewide rules of criminal procedure complicates determining the procedures used in the thousands of local courts throughout the country for handling a

40. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008).

41. *See infra* Part II.

42. 501 U.S. 171 (1991).

43. *Id.* at 173, 180–81.

44. 554 U.S. 191 (2008).

45. *Id.* at 203–04.

defendant's first appearance before a judicial officer.⁴⁶ Even when there is a clear statutory requirement that counsel be made available to an indigent defendant, it is often ignored.⁴⁷

In addition, as the Supreme Court has noted, state criminal procedure can vary a great deal from one state to another.⁴⁸ That being said, there is a great deal of consistency regarding the issues determined at a defendant's initial appearance in state courts even if the procedures used to do so vary. Defendants are typically informed of the charges against them, advised of certain rights, including the right to have counsel appointed if they are indigent, conditions of pretrial release are determined, and, if the arrest was made without a warrant, the judicial officer determines if there was probable cause for the arrest.

The reality is that the majority of state court criminal procedural rules assume that counsel will not represent a defendant at her initial appearance before a judicial officer who has the authority to place restrictions on her liberty.

1. The Appointment but Not the Presence of Counsel

An examination of state criminal procedural codes concerning a defendant's initial appearance, including the procedures used to assign counsel for the indigent, reveals that in thirty-two states, counsel for indigent defendants is not physically present at the initial appearance.⁴⁹

In Alabama, at a defendant's "initial appearance," the judge or magistrate informs the defendant of the right to counsel and that if the defendant is indigent and unable to obtain counsel, that counsel will be appointed,⁵⁰ and determines "conditions of release."⁵¹

In Alaska, at the "misdemeanor arraignment or felony first appearance," the judge or magistrate informs the defendant of the defendant's right to counsel⁵² and "right to request the appointment of

46. See, e.g., *Counsel at First Appearance*, N.Y. ST. OFF. INDIGENT LEGAL SERVICES, <https://www.ils.ny.gov/content/counsel-first-appearance> (last visited Feb. 23, 2017).

47. *DeWolfe v. Richmond*, 76 A.3d 962, 977–78 (Md. 2012) (holding that statutory law obligated the Office of the State Public Defender to represent indigent defendants at their initial appearance), *on reconsideration*, 76 A.3d 1019 (Md. 2013).

48. See *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975) (recognizing "that state systems of criminal procedure vary widely" and that "[t]here is no single preferred pretrial procedure").

49. See Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1. *But see* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333 (2011) (reaching a different conclusion regarding the availability of counsel at a defendant's initial appearance based on a survey of public defenders and assigned counsel).

50. ALA. R. CRIM. P. 4.4(a)(3).

51. *Id.* 4.4(a)(4).

52. ALASKA R. CRIM. P. 5(c)(3)(A).

counsel at public expense if the defendant is financially unable to employ counsel”⁵³ and “shall admit the defendant to bail.”⁵⁴

In Arizona, at the suspect’s initial appearance, the magistrate shall “[a]ppoint counsel if the suspect is eligible for and requests appointed counsel”⁵⁵ and “[d]etermine the conditions of release.”⁵⁶

In Arkansas, once a judicial officer has informed a defendant of the charges, the right to remain silent, and the right to counsel, “[n]o further steps in the proceedings other than pretrial release inquiry may be taken until the defendant and his counsel have had an adequate opportunity to confer.”⁵⁷

In Colorado, at the first appearance of the defendant in court, the judge informs the defendant that they have a right to counsel,⁵⁸ that if they are indigent, they can apply for a court-appointed attorney, and “upon payment of the application fee, he or she will be assigned counsel”⁵⁹ and “the amount of bail that has been set by the court.”⁶⁰

In Georgia, at the first appearance, a judicial officer determines “whether or not the accused desires and is in need of an appointed attorney”⁶¹ and also sets the amount of bail.⁶² Indigent defendants in Georgia who have been taken into custody can then wait up to three business days before they are entitled to the services of appointed counsel.⁶³

In Illinois, once arrested, a person is “taken without unnecessary delay before the nearest and most accessible judge”⁶⁴ who then advises “the defendant of his right to counsel and if indigent shall appoint a public defender,”⁶⁵ schedules a preliminary hearing when necessary,⁶⁶ and admits a defendant to bail.⁶⁷

53. *Id.* 5(c)(3)(B).

54. *Id.* 5(c)(5).

55. ARIZ. R. CRIM. P. 4.2(a)(5).

56. *Id.* 4.2(a)(7).

57. ARK. R. CRIM. P. 8.3(b).

58. COLO. REV. STAT. § 16-7-207(1)(b) (2016).

59. *Id.* § 16-7-207(1)(c).

60. *Id.* § 16-7-207(1)(e).

61. GA. UNIF. SUPER. CT. R. 26.1(C).

62. *Id.* 26.1(H).

63. GA. CODE ANN. § 17-12-23(b) (2016) (“[E]ntitlement to the services of counsel begins not more than three business days after the indigent person is taken into custody or service is made upon him or her of the charge, petition, notice, or other initiating process and such person makes an application for counsel to be appointed.”).

64. 725 ILL. COMP. STAT. 5/109-1(a) (2016).

65. *Id.* 5/109-1(b)(2).

66. *Id.* 5/109-1(b)(3).

67. *Id.* 5/109-1(b)(4).

In Indiana, at the “initial hearing,”⁶⁸ the judicial officer informs a defendant “that he has a right to assigned counsel at no expense to him if he is indigent”⁶⁹ and “the amount and conditions of bail.”⁷⁰

In Kentucky, at a defendant’s initial appearance before a judge, “[t]he defendant has the burden of first establishing his or her indigency before counsel may be appointed,”⁷¹ and if the court concludes that the defendant is indigent, “then the appointment shall continue for all future stages of the criminal proceeding.”⁷²

Louisiana requires that someone who has been arrested be brought before a judge within seventy-two hours “for the purpose of appointment of counsel”⁷³ and permits the court to “determine or review a prior determination of the amount of bail.”⁷⁴

In Michigan, an arrestee will be brought to a judge for arraignment where the judge will inform the arrestee “of the right to a lawyer at all subsequent court proceedings,”⁷⁵ and the judge will “determine what form of pretrial release, if any, is appropriate.”⁷⁶ A recent report by the Michigan Indigent Defense Commission found that “[o]nly 6% of district courts require attorneys to be present at both the bail hearing and at arraignment, despite the documented importance of legal guidance in these early stages.”⁷⁷

In Minnesota, “[t]he purpose of the first appearance is for the court to inform the defendant of the: defendant’s rights, including the right to have counsel appointed if eligible”⁷⁸ but the court also “must set bail and other conditions of release.”⁷⁹

In Montana, at a defendant’s initial appearance, if a defendant “desires assigned counsel because of financial inability to retain private

68. IND. CODE § 35-33-7-5 (2016).

69. *Id.* § 35-33-7-5(2).

70. *Id.* § 35-33-7-5(4).

71. KY. R. CRIM. P. 3.05(2).

72. *Id.*

73. LA. CODE CRIM. PROC. ANN. art. 230.1(A) (2016).

74. *Id.* art. 230.1(B); *see also* State v. Carter, 664 So. 2d 367, 370 (La. 1995) (implicitly approving of the setting of bond outside of the presence of appointed counsel).

75. MICH. CT. R. CRIM. P. 6.104(E)(3).

76. *Id.* 6.104(E)(5). *But see* MICH. INDIGENT DEF. COMM’N, PROPOSED MINIMUM STANDARDS SET 1 FOR DISTRIBUTION 7 (2015), <http://michiganidc.gov/wp-content/uploads/2015/04/Proposed-Minimum-Standards-June-22-2015.pdf> (requiring counsel be available to indigent defendants “as soon as the defendant’s liberty is subject to restriction by a magistrate or judge”).

77. JONAH A. SIEGEL, MICH. INDIGENT DEF. COMM’N, SNAPSHOT OF INDIGENT DEFENSE REPRESENTATION IN MICHIGAN’S ADULT CRIMINAL COURTS 1 (2016), <http://michiganidc.gov/wp-content/uploads/2015/04/MIDC-Court-Survey-Report-Feb-16.pdf>.

78. MINN. R. CRIM. P. 5.01(a)(2).

79. *Id.* 5.01(d).

counsel . . . the court shall order the office of state public defender . . . to assign counsel to represent the defendant without unnecessary delay”⁸⁰ and also “admit the defendant to bail as provided by law.”⁸¹

Nebraska permits defendants who are unable to fulfill their conditions of release to request “a review by the judge who imposed the conditions” after they have been in custody for twenty-four hours,⁸² and “[i]f the defendant is indigent and unable to retain legal counsel, the judge shall appoint an attorney to represent the defendant for the purpose of such review.”⁸³

Nevada gives indigent defendants the right to have counsel “at every stage of the proceedings from the defendant’s initial appearance before a magistrate,”⁸⁴ but magistrates only inform indigent defendants of their right to have counsel appointed at their initial appearance while simultaneously setting bail.⁸⁵ However, magistrates must delay holding a preliminary hearing if an indigent defendant has requested that counsel be appointed, since Nevada considers a preliminary hearing a critical stage of the proceedings.⁸⁶

In New Jersey, if the offense charged is indictable, the defendant is informed of her right to appointed counsel and bail is set at the initial appearance.⁸⁷

In New Mexico, the first appearance in court in response to a summons, warrant, or arrest is referred to as an “arraignment,” and the law requires the court to inform indigent defendants of their “right . . . to representation by an attorney at state expense”⁸⁸ and “enter an order prescribing conditions of release.”⁸⁹

North Carolina calls for the representation “as soon as feasible after the indigent is taken into custody or service is made upon him of the

80. MONT. CODE ANN. § 46-8-101(2) (2016); *see also id.* § 46-7-102(1)(c).

81. *Id.* § 46-7-102(2).

82. NEB. REV. STAT. § 29-901.03 (2016).

83. *Id.*

84. NEV. REV. STAT. ANN. § 178.397 (2016).

85. *Id.*; *see also id.* § 173.195.

86. *Id.* § 171.196(4); *see also* Schnepf v. Hocker, 429 F.2d 1096, 1101 (9th Cir. 1970); Sheriff v. Witzenburg, 145 P.3d 1002, 1004 (Nev. 2006) (holding that “[b]ecause of the adversarial nature of the preliminary examination and the risk of substantial prejudice, criminal defendants are entitled to the Sixth Amendment right to counsel during the proceeding”).

87. N.J. R. CT. 3:4-2(c); *see also* State v. Fann, 571 A.2d 1023, 1030–31 (N.J. Super. Ct. Law Div. 1990) (finding “[t]he setting of bail certainly is a ‘critical stage’ in the criminal proceedings” but concluding that “immediate arrangements for representation . . . in connection with the setting of bail, are impossible” and therefore holding that representation must be made available to indigent defendant “at the first bail review held after the first appearance”).

88. N.M. R. CRIM. P. MAGIS. CTS. 6-501(A)(5).

89. *Id.* 6-501(E).

charge”⁹⁰ but only guarantees counsel at “[a] hearing for the reduction of bail, or to fix bail if bail has been earlier denied.”⁹¹

North Dakota gives an indigent defendant the right to counsel “at every stage of the proceeding from initial appearance through appeal,”⁹² but a magistrate merely informs a defendant of this right during his initial appearance⁹³ and also sets bail.⁹⁴

In Ohio, “[w]hen a defendant first appears before a judge or magistrate, the judge or magistrate shall permit the accused or the accused’s counsel to read the complaint” and “shall admit the defendant to bail.”⁹⁵

In Oklahoma, a defendant’s application for counsel “shall state whether or not the indigent has been released on bond,” and if he has been released on bond, “the application shall include a written statement from the applicant that the applicant has contacted three named attorneys, licensed to practice law in this state, and the applicant has been unable to obtain legal counsel.”⁹⁶

In Pennsylvania, counsel is “appointed to represent indigent defendants immediately after they are brought before the issuing authority in all summary cases in which a jail sentence is possible, and immediately after preliminary arraignment in all court cases.”⁹⁷ While the law requires the judicial officer setting bail in Pennsylvania to consider a number of factors when setting bail, including “the nature of the offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty,”⁹⁸ they are explicitly prohibited from questioning the defendant about the offense charged.⁹⁹

At a defendant’s initial appearance in Rhode Island, the judge must inform the defendant of “the defendant’s right to request the assignment of counsel if he or she is unable to obtain counsel . . . and, where

90. N.C. GEN. STAT. ANN. § 7A-451(b) (2016).

91. *Id.* § 7A-451(b)(3).

92. N.D. R. CRIM. P. 44(a).

93. *Id.* 5(b)(1)(D).

94. *Id.* 5(b)(1)(F).

95. OHIO R. CRIM. P. 5(A).

96. OKLA. STAT. tit. 22, § 1355A (2016).

97. PA. R. CRIM. P. 122(C).

98. *Id.* 523(A)(1).

99. *Id.* 540(F); *see also* *Flora v. Luzerne Cty.*, 103 A.3d 125, 140 (Pa. Commw. Ct. 2014)

(“At a preliminary arraignment, the defendant is advised of the charges against him, given a copy of the warrant and bail is set. These events do not require the presence of counsel because no rights are affected and there is no impact on the effectiveness of counsel’s representation at trial. Therefore, there is no right to counsel at the preliminary arraignment.”), *aff’d in part and rev’d in part on other grounds sub nom.* *Kuren v. Luzerne Cty.*, 146 A.3d 715, 751–52 (Pa. 2016).

authorized by statute, shall admit the defendant to bail as provided in these rules.”¹⁰⁰

At an initial appearance in South Carolina, indigent defendants can apply to the court for appointed counsel, and if the court grants their application, then an officer of the court “shall immediately notify the Office of the Public Defender . . . and the Public Defender shall immediately thereafter enter upon the representation of the accused.”¹⁰¹ Consider the following excerpt from the South Carolina Judicial Department’s Summary Court Judges Bench Book:

The bail proceeding is frequently the first contact between the accused and a judicial officer, with respect to the particular offense(s). For this reason, the bond proceeding is a very important phase of the criminal process, though it has never been held to be a stage at which the accused has the right to be represented by counsel. The accused may have his attorney present, but he has no absolute right to be represented.¹⁰²

The Tennessee Practice series on Criminal Practice & Procedure contains the following advice:

Because the initial appearance immediately follows the custodial apprehension of the defendant, a lawyer is seldom retained at this early stage. However, if a defense attorney is present at the initial appearance, the defense attorney should inquire as to the validity of the warrant and participate in the bail determination.¹⁰³

In Texas, the bail hearing is conducted without the presence of defense counsel,¹⁰⁴ and when counsel is appointed for an indigent defendant may depend on the population of the county where the defendant is charged with a crime, rather than the Constitution.¹⁰⁵

100. R.I. SUPER. CT. R. CRIM. P. 5(b).

101. S.C. APP. CT. R. 602(c).

102. *South Carolina Bench Book for Summary Court Judges § E(3)*, S.C. JUD. DEP’T, <http://www.judicial.state.sc.us/summaryCourtBenchBook/HTML/CriminalE.htm> (last visited Mar. 15, 2017).

103. 9 DAVID LOUIS RAYBIN, TENNESSEE PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 3:7, Westlaw (database updated Dec. 2015).

104. Lisa Falkenberg, *For Those Accused in Harris County, It’s Time to Right a Legal Wrong*, HOUS. CHRON. (Jan. 9, 2016, 11:32 PM), <http://www.houstonchronicle.com/news/columnists/falkenberg/article/For-those-accused-in-Harris-County-it-s-time-to-6748263.php>.

105. TEX. CODE CRIM. PROC. ANN. art. 1.051(c) (West 2015) (providing that counsel for an indigent defendant shall be appointed “as soon as possible, but not later than: (1) the end of the third working day after the date on which the court or the courts’ designee receives the defendant’s request for appointment of counsel, if the defendant is arrested in a county with a population of

A person arrested in Utah “shall be taken to the nearest available magistrate for setting of bail.”¹⁰⁶ During this initial appearance before a magistrate, the magistrate must also make a determination regarding probable cause, an event that is not considered a critical stage of the proceedings that requires the presence of counsel.¹⁰⁷ If the magistrate does find that there is probable cause, the magistrate must immediately make a bail determination based on “the recommended bail amount in the Uniform Fine/Bail Schedule unless the magistrate finds substantial cause to deviate from the Schedule.”¹⁰⁸

In Vermont, during the initial appearance before a judicial officer, there is a determination of probable cause,¹⁰⁹ the defendant is informed of the charges,¹¹⁰ the right to counsel,¹¹¹ the right to remain silent,¹¹² the general circumstances under which the defendant can secure pretrial release¹¹³ and, if not represented by counsel, “of the nature and approximate schedule of further pretrial proceedings.”¹¹⁴ While no further proceedings shall be had until the judicial officer has assigned counsel and the defendant has had the opportunity to consult with counsel,¹¹⁵ the law requires the judicial officer at that time to “determine whether and on what conditions the defendant shall be released pending trial.”¹¹⁶

A defendant in Washington has a right to a lawyer “as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest.”¹¹⁷ While counsel should be provided to an indigent defendant at a preliminary

less than 250,000; or (2) the end of the first working day after the date on which the court or the courts’ designee receives the defendant’s request for appointment of counsel, if the defendant is arrested in a county with a population of 250,000 or more”).

106. UTAH R. CRIM. P. 7(b).

107. *Gerstein v. Pugh*, 420 U.S. 103, 122, 126 (1975); *Seibold v. Turner*, 435 P.2d 289, 290–91 (Utah 1967).

108. UTAH R. CRIM. P. 7(c)(3)(B).

109. VT. R. CRIM. P. 5(c).

110. *Id.* 5(d)(1).

111. *Id.* 5(d)(2).

112. *Id.* 5(d)(3).

113. *Id.* 5(d)(4).

114. *Id.* 5(d)(5).

115. *Id.* 5(f).

116. *Id.* 5(h).

117. WASH. CRIM. R. CTS. LTD. JURIS. 3.1(b)(1).

appearance where the conditions of pretrial release are determined,¹¹⁸ evidence suggests that this rule is not always followed.¹¹⁹

In West Virginia, judicial officers “shall allow the defendant reasonable time and opportunity to consult with counsel or with at least one relative or other person for the purpose of obtaining counsel or arranging bail.”¹²⁰

In Wisconsin, the judicial officer informs a defendant at the initial appearance of the defendant’s right to counsel and that “an attorney will be appointed to represent him or her if he or she is financially unable to employ counsel,”¹²¹ and the judicial officer “shall admit the defendant to bail.”¹²²

At a defendant’s initial appearance in Wyoming, “the court shall advise any defendant who is a needy person of his right to be represented by an attorney at public expense,”¹²³ and if the defendant wishes to have an attorney, “the court shall notify an available public defender for the judicial district or shall appoint an attorney to represent the needy person if no public defender is available.”¹²⁴ The Wyoming Rules of Criminal Procedure make the determination of financial eligibility for assigned counsel “a judicial function” and state that “[a]n attorney should be appointed at the earliest time after a defendant makes a request, but only after appropriate inquiry into the defendant’s financial circumstances and a determination of eligibility.”¹²⁵

Florida is an exception to the general rule that counsel need not be present at an initial appearance before a judge or magistrate who has the authority to restrict the defendant’s liberty.¹²⁶

118. *Id.* 3.2.1(e)(1) (“At the preliminary appearance, the court shall provide for a lawyer . . . for pretrial release . . .”).

119. 12 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 202, Westlaw (database updated Nov. 2016) (“The notification of the attorney’s appointment is ordinarily made by telephone as soon as is practicable after the appointment.”); *see also* Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1133 (W.D. Wash. 2013) (finding that cities’ public defense system deprived indigent criminal defendants of their Sixth Amendment right to counsel).

120. W. VA. R. CRIM. P. 5(c).

121. WIS. STAT. § 970.02(1)(b) (2016).

122. *Id.* § 970.02(2).

123. WYO. STAT. ANN. § 7-6-105(b) (2016); *see also* Chavez v. State, 604 P.2d 1341, 1347 (Wyo. 1979) (holding that counsel does not need to be present prior to a preliminary hearing).

124. WYO. STAT. ANN. § 7-6-105(b).

125. WYO. R. CRIM. P. 44(b)(1).

126. *See* FLA. R. CRIM. P. 3.111(a) (“A person entitled to appointment of counsel as provided herein shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing judge, whichever occurs earliest.”); *see also id.* 3.130(c)(1) (“If practicable, the judge should determine prior to the first appearance whether the defendant is financially able to afford counsel and

Idaho is another exception; indigent defendants are entitled “[t]o be represented by an attorney to the same extent as a person having his own counsel is so entitled,”¹²⁷ which has led the Court of Appeals of Idaho to require the appointment of counsel “unless a court determines the proceeding is not one that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.”¹²⁸

Maine permits a court to designate “a lawyer for the day” to represent an indigent defendant at their initial appearance but does not require it before setting bail.¹²⁹

The Supreme Judicial Court of Massachusetts has held that, because a defendant’s liberty is at stake in a bail hearing and a preventive detention hearing, that “the principles of procedural due process in . . . the Massachusetts Declaration of Rights” require the presence of counsel for indigent defendants.¹³⁰

New Mexico uses language similar to that found in Idaho to define when an indigent defendant has the right to representation. In New Mexico, an indigent defendant “is entitled to be represented by an attorney to the same extent as a person having his own counsel”¹³¹ and is entitled to be “counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney.”¹³²

The Court of Appeals of New York has held that because indigent defendants have the “right to the aid of counsel at the arraignment and at every subsequent stage of the action,”¹³³ a court cannot proceed to arraign a defendant and set bail without counsel being present.¹³⁴ That being said, the New York State Office of Indigent Legal Services has acknowledged

whether the defendant desires representation. When the judge determines that the defendant is entitled to court-appointed counsel and desires counsel, the judge shall immediately appoint counsel. This determination must be made and, if required, counsel appointed no later than the time of the first appearance and before any other proceedings at the first appearance.”).

127. IDAHO CODE § 19-852(1)(a) (2016).

128. *State v. Wegner*, No. 33960, 2009 WL 32484, at *3 (Idaho Ct. App. Jan. 7, 2009), *aff’d*, 220 P.3d 1089, 1090 (Idaho 2009).

129. ME. R. CRIM. P. 5(e).

130. *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 902–03 (Mass. 2004).

131. N.M. STAT. ANN. § 31-16-3(A) (2016).

132. *Id.* § 31-16-3(B)(1).

133. N.Y. CRIM. PROC. LAW § 180.10(3) (McKinney 2016).

134. *See Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010) (holding that “nothing in the statute may be read to justify the conclusion that the presence of defense counsel at arraignment is ever dispensable, except at a defendant’s informed option, when matters affecting the defendant’s pretrial liberty or ability subsequently to defend against the charges are to be decided”).

that “persons deemed eligible for indigent legal defense services continue to be arraigned without counsel at first appearance.”¹³⁵

Following a recent decision by the Maryland Court of Appeals, the Office of the State Public Defender must now represent indigent defendants at their initial appearance.¹³⁶

If a defendant appears without counsel for arraignment in Oregon, the court must inform the defendant that he has a right to counsel and delay the arraignment if the defendant requests to have counsel appointed.¹³⁷

Virginia also grants a defendant a right to a bail hearing “as soon as practicable but in no event later than three calendar days, excluding Saturdays, Sundays, and legal holidays”¹³⁸ and the right to counsel at that hearing.¹³⁹

2. Considering the Weight of the Evidence and the Likelihood of Conviction

Thirty-one states expect judicial officers to assess the quality of the evidence against a defendant, estimate the likelihood of conviction, and the potential sentence that would be imposed when making a determination regarding bail. These predictive determinations regarding the defendant’s guilt take place at the defendant’s initial appearance where, as previously described, defendants typically do not have the benefit of legal representation.

Nineteen states ask the judicial officer who presides over a defendant’s initial appearance to consider the weight of the evidence:

135. *Counsel at First Appearance*, NYS OFF. INDIGENT LEGAL SERVICES, <https://www.ils.ny.gov/content/counsel-first-appearance> (last visited Feb. 23, 2016).

136. *See DeWolfe v. Richmond*, 76 A.3d 1019, 1031 (Md. 2013) (“At a defendant’s initial appearance before a District Court Commissioner . . . the defendant is in custody and, unless released on his or her personal recognizance or on bail, the defendant will remain incarcerated until a bail review hearing before a judge. Consequently, we hold that, under Article 24 of the Maryland Declaration of Rights, an indigent defendant is entitled to state-furnished counsel at an initial hearing before a District Court Commissioner.” (footnote omitted)).

137. OR. REV. STAT. § 135.040 (2016) (“If the defendant appears for arraignment without counsel, the defendant shall be informed by the court that it is the right of the defendant to have counsel before being arraigned and shall be asked if the defendant desires the aid of counsel.”).

138. VA. CODE ANN. § 19.2-158 (2016).

139. *Id.* (providing that prior to the bail hearing “the accused shall be allowed a reasonable opportunity to employ counsel of his own choice, or, if appropriate, the statement of indigence . . . may be executed”).

Alaska,¹⁴⁰ Arizona,¹⁴¹ Florida,¹⁴² Kansas,¹⁴³ Louisiana,¹⁴⁴ Minnesota,¹⁴⁵ Missouri,¹⁴⁶ Montana,¹⁴⁷ New Mexico,¹⁴⁸ New York,¹⁴⁹ North Carolina,¹⁵⁰ North Dakota,¹⁵¹ Ohio,¹⁵² Rhode Island,¹⁵³ South Dakota,¹⁵⁴

140. ALASKA STAT. § 12.30.011(c)(2) (2016) (“In determining the conditions of release under this chapter, the court shall consider . . . the weight of the evidence against the person . . .”), *repealed and reenacted* by Act of July 11, 2016, ch. 36, sec. 59, § 12.30.011(i)(2), 2016 Alaska Sess. Laws 33 (effective Jan. 1, 2018).

141. ARIZ. REV. STAT. ANN. § 13-3967(B)(6) (2016) (“In determining the method of release or the amount of bail, the judicial officer . . . shall take into account all of the following: [t]he weight of evidence against the accused.”).

142. 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 . . .”).

143. KAN. STAT. ANN. § 22-2802(8) (2016) (“In determining which conditions of release will reasonably assure appearance and the public safety, the magistrate shall . . . take into account . . . the weight of the evidence against the defendant . . .”).

144. LA. CODE CRIM. PROC. ANN. art. 334(2) (2016) (“The amount of bail shall be such that, in the judgment of the court, commissioner, or magistrate, it will insure the presence of the defendant, as required, and the safety of any other person and the community, having regard to: The weight of the evidence against the defendant.”).

145. MINN. R. CRIM. P. 6.02(2)(a)–(b) (“In determining conditions of release the court must consider: the nature and circumstances of the offense charged; the weight of the evidence . . .”).

146. MO. REV. STAT. § 544.455(2) (2013) (“In determining which conditions of release will reasonably assure appearance, the associate circuit judge or judge shall . . . take into account . . . the weight of the evidence against the accused . . .”).

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

148. N.M. R. CRIM. P. 6-401(B)(2) (“[The court considers] the weight of the evidence against the person” when determining “conditions of release.”).

149. N.Y. CRIM. PROC. LAW § 510.30(2)(a)(viii) (McKinney 2016) (“[Judges must consider] the weight of the evidence . . . in the pending criminal action and any other factor indicating probability or improbability of conviction [when making a bail determination].”).

150. N.C. GEN. STAT. § 15A-534(c) (2015) (“In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account . . . the weight of the evidence against the defendant . . .”).

151. N.D. R. CRIM. P. 46(3)(B) (“In determining conditions of release that will reasonably assure appearance of a person, the magistrate . . . must consider: the weight of the evidence against the person . . .”).

152. OHIO R. CRIM. P. 46(C)(2) (“In determining the types, amounts, and conditions of bail, the court shall consider all relevant information, including but not limited to: The weight of the evidence against the defendant . . .”).

153. R. CRIM. P. R.I. SUPER. CT. 46(c) (“If the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the court will insure the presence of the defendant, having regard to . . . the weight of the evidence against the defendant . . .”).

154. S.D. CODIFIED LAWS § 23A-43-4 (2016) (“In determining which conditions of release will reasonably assure appearance, a committing magistrate or court shall . . . take into account . . . the weight of the evidence against the defendant . . .”).

Vermont,¹⁵⁵ Virginia,¹⁵⁶ and Wyoming.¹⁵⁷

Another nine states ask the judicial officer who presides over a defendant's initial appearance to consider the likelihood or probability of conviction and sentence: Alabama,¹⁵⁸ Arkansas,¹⁵⁹ Colorado,¹⁶⁰ Idaho,¹⁶¹ Michigan,¹⁶² Nevada,¹⁶³ New Jersey,¹⁶⁴ Pennsylvania,¹⁶⁵ and Tennessee.¹⁶⁶

155. VT. STAT. ANN. tit. 13, § 7554(b) (2016) (“In determining which conditions of release to impose . . . the judicial officer shall . . . take into account . . . the weight of the evidence against the accused . . .”).

156. VA. CODE ANN. § 19.2-121(iii) (2016) (“The judicial officer shall take into account . . . the weight of the evidence . . .”).

157. WYO. R. CRIM. P. 46.1(d)(2) (“The judicial officer shall . . . take into account the available information concerning: The weight of the evidence against the person . . .”).

158. ALA. R. CRIM. P. 7.2(a)(6) (“The nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance.”).

159. ARK. R. CRIM. P. 8.5(b)(vi) (“The inquiry should take the form of an assessment of factors relevant to the pretrial release decision, such as: the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty.”).

160. COLO. REV. STAT. § 16-4-103(5)(f) (2016) (“The likely sentence, considering the nature and the offense presently charged . . .”).

161. IDAHO R. CRIM. P. 46(c)(6) (“The determination of whether a defendant should be released upon the defendant's own recognizance or admitted to bail, and the determination of the amount and conditions of bail, if any, can 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.”).

162. MICH. R. CRIM. P. 6.106(F)(1)(e) (requiring that when a court is making a decision regarding pretrial release and the appropriate conditions of release, the court “is to consider relevant information, including the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence”).

163. NEV. REV. STAT. § 178.4853(7) (2015) (“[A court shall consider t]he nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing.”).

164. N.J. R. CRIM. P. 3:26-1(a)(1) (“[The court considers] the seriousness of the crime charged against defendant, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature.”), *amended by* N.J. Court Order 0021 (Aug. 30, 2016).

165. PA. R. CRIM. P. 523(1) (“[T]he bail authority shall consider . . . the nature of the offense charged and any mitigating or aggravating factors that may bear upon the likelihood of conviction and possible penalty . . .”).

166. TENN. CODE ANN. § 40-11-115(7) (2016) (“[T]he 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 . . .”).

Judicial officers consider the nature of the evidence against the defendant in Maine¹⁶⁷ and Maryland,¹⁶⁸ the strength and character of the evidence in Wisconsin,¹⁶⁹ and both the weight of the evidence against a defendant or the likelihood of conviction in Illinois.¹⁷⁰

While federal magistrates consider “the weight of the evidence against the accused” when determining conditions of release, there is evidence to suggest that it is given less weight than some other factors.¹⁷¹

3. Considering the Potential Dangerousness of the Defendant

Twenty-eight states permit a judicial officer to deny bail to a defendant who the judicial officer believes poses a threat to an individual or the community at large: Alabama,¹⁷² Alaska,¹⁷³ California,¹⁷⁴

167. ME. STAT. tit. 15, § 1026(4)(B) (2016) (“In setting bail, the judicial officer shall . . . take into account the available information concerning the following: The nature of the evidence against the defendant . . .”).

168. MD. R. CRIM. P. 4-216(e)(1)(A) (“In determining whether a defendant should be released and the conditions of release, the judicial officer shall take into account the following information, to the extent available: the nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction . . .”).

169. WIS. STAT. § 969.01(4) (2016) (“Proper considerations in determining whether to release the defendant without bail, fixing a reasonable amount of bail or imposing other reasonable conditions of release are . . . the character and strength of the evidence which has been presented to the judge . . .”).

170. 725 ILL. COMP. STAT. 5/110-5(a) (2016) (“In determining the amount of monetary bail or conditions of release, if any . . . the court shall . . . take into account such matters as the nature and circumstances of the offense charged . . . the likelihood of conviction, the sentence applicable upon conviction, the weight of the evidence against such defendant . . .”).

171. *United States v. Birges*, 523 F. Supp. 468, 470 (D. Nev. 1981) (“The weight of the evidence against the accused is also an indication that she may flee. However, the weight of the evidence is to be accorded less weight than the other factors.”).

172. ALA. R. CRIM. P. 7.2(a) (“Any defendant charged with an offense bailable as a matter of right may be released . . . unless the court or magistrate determines that such a release will not reasonably assure the defendant’s appearance as required, or that the defendant’s being at large will pose a real and present danger to others or to the public at large.”).

173. ALASKA STAT. § 12.30.011(b) (2016) (“If a judicial officer determines that the release under (a) of this section will not reasonably assure the appearance of the person or will pose a danger to the victim, other persons, or the community, the officer shall impose the least restrictive condition or conditions that will reasonably assure the person’s appearance and protect the victim, other persons, and the community.”), *amended by* Act of July 11, 2016, ch. 36, sec. 59, 2016 Alaska Sess. Laws 34 (effective Jan. 1, 2018).

174. CAL. PENAL CODE § 1275(a)(1) (West 2016) (“In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration.”).

Colorado,¹⁷⁵ Florida,¹⁷⁶ Georgia,¹⁷⁷ Idaho,¹⁷⁸ Iowa,¹⁷⁹ Kentucky,¹⁸⁰
Maine,¹⁸¹ Maryland,¹⁸² Michigan,¹⁸³ Minnesota,¹⁸⁴ Missouri,¹⁸⁵

175. COLO. REV. STAT. § 16-4-103(3)(a) (2016) (“The type of bond and conditions of release shall be sufficient to reasonably ensure the appearance of the person as required and to protect the safety of any person or the community, taking into consideration the individual characteristics of each person in custody, including the person’s financial condition.”).

176. FLA. R. CRIM. P. 3.131(b)(1) (“The judicial officer shall impose the first of the following conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process . . .”).

177. GA. CODE ANN. § 17-6-1(e) (2016) (“A court shall be authorized to release a person on bail if the court finds that the person: (1) Poses no significant risk of fleeing from the jurisdiction of the court or failing to appear in court when required; (2) Poses no significant threat or danger to any person, to the community, or to any property in the community . . .”).

178. IDAHO CODE § 19-2902(2) (2016) (“The purpose of this chapter is to provide a uniform and comprehensive statewide process for the administration of bail in criminal cases in order to: (a) Ensure the appearance of defendants before the courts; (b) Protect the right of defendants to bail, as constitutionally provided; and (c) Ensure the protection and safety of victims, witnesses and the public.”).

179. IOWA CODE § 811.2(1)(a) (2016) (“All bailable defendants shall be ordered released from custody pending judgment or entry of deferred judgment on their personal recognizance, or upon the execution of an unsecured appearance bond in an amount specified by the magistrate unless the magistrate determines in the exercise of the magistrate’s discretion, that such a release will not reasonably assure the appearance of the defendant as required or that release will jeopardize the personal safety of another person or persons.”).

180. KY. R. CRIM. P. 4.16(1) (“The amount of bail shall be sufficient to insure compliance with the conditions of release set by the court. . . . In determining such amount the court shall consider . . . the defendant’s reasonably anticipated conduct if released and the defendant’s financial ability to give bail.”).

181. ME. STAT. tit. 15, § 1002 (2016) (“It is the purpose and intent of this chapter that bail be set for a defendant in order to reasonably ensure the appearance of the defendant as required, to otherwise reasonably ensure the integrity of the judicial process and, when applicable, to reasonably ensure the safety of others in the community.”).

182. MD. CT. R. 4-216(e)(3) (“If the judicial officer determines that the defendant should be released . . . the judicial officer shall impose on the defendant the least onerous condition or combination of conditions of release . . . that will reasonably: (A) ensure the appearance of the defendant as required, (B) protect the safety of the alleged victim by ordering the defendant to have no contact with the alleged victim or the alleged victim’s premises or place of employment or by other appropriate order, and (C) ensure that the defendant will not pose a danger to another person or to the community.”).

183. MICH. CT. R. 6.106(C) (“[T]he court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond . . . unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public.”).

184. MINN. R. CRIM. P. 6.02(1) (“On appearance before the court, a person must be released on personal recognizance or an unsecured appearance bond unless a court determines that release will endanger the public safety or will not reasonably assure the defendant’s appearance.”).

185. MO. REV. STAT. § 544.457.1 (2016) (“[U]pon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may use such information

Montana,¹⁸⁶ Nebraska,¹⁸⁷ Nevada,¹⁸⁸ New Hampshire,¹⁸⁹ North Carolina,¹⁹⁰ Oregon,¹⁹¹ South Carolina,¹⁹² South Dakota,¹⁹³ Texas,¹⁹⁴

in determining the appropriate amount of bail, to increase the amount of bail, to deny bail entirely or impose any special conditions which the defendant and surety shall guarantee.”).

186. MONT. CODE ANN. § 46-9-109(2)(d) (2015) (“In determining whether the defendant should be released or detained, the court shall take into account the available information concerning: the nature and seriousness of the danger to any person or the community that would be posed by the defendant’s release . . .”).

187. NEB. REV. STAT. § 29-901 (2016) (“Any bailable defendant shall be ordered released from custody pending judgment on his or her personal recognizance unless the judge determines in the exercise of his or her discretion that such a release will not reasonably assure the appearance of the defendant as required or that such a release could jeopardize the safety and maintenance of evidence or the safety of victims, witnesses, or other persons in the community.”).

188. NEV. STAT. § 178.4851(1) (2015) (“[A] court may release without bail any person entitled to bail if it appears to the court that it can impose conditions on the person that will adequately protect the health, safety and welfare of the community and ensure that the person will appear at all times and places ordered by the court.”).

189. N.H. REV. STAT. ANN. § 597:2(II) (2016) (requiring that a court shall order the pretrial release of the defendant “unless the court determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of the person or of any other person or the community”).

190. N.C. GEN. STAT. § 15A-534(b) (2016) (stating judge must release a defendant “unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses”).

191. OR. REV. STAT. § 135.245(3) (2016) (“[T]he magistrate shall impose the least onerous condition reasonably likely to ensure the safety of the public and the victim and the person’s later appearance . . .”).

192. S.C. CODE ANN. § 17-15-10(A) (2016) (mandating that a court should release a person charged with a noncapital offense “unless the court determines in its discretion that such a release” will result in “unreasonable danger to the community or an individual”).

193. S.D. CODIFIED LAWS § 23A-43-2 (2016) (stating that a court should release a defendant on “personal recognizance or upon the execution of an unsecured appearance bond . . . unless the magistrate or court determines in the exercise of his discretion, that such a release will not reasonably assure the appearance of the defendant as required or that the defendant may pose a danger to any other person or to the community”).

194. TEX. CODE CRIM. PROC. ANN. art. 17.15(5) (West 2016) (When requiring that a judicial officer sets bail, “[t]he future safety of a victim of the alleged offense and the community shall be considered”).

Utah,¹⁹⁵ Virginia,¹⁹⁶ Washington,¹⁹⁷ and Wyoming.¹⁹⁸

In addition to taking into consideration “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release,”¹⁹⁹ New Mexico takes a more narrow and unique approach to the issue of dangerousness by giving the court the option of refusing to allow the complaining witness or alleged victim to post bond for a defendant.²⁰⁰

Wisconsin permits monetary conditions of release to ensure a defendant’s appearance in court but not to protect members of the community.²⁰¹ If the court finds that a defendant is a threat to the community, then other conditions of release can be imposed.²⁰² Wisconsin also requires that an initial decision to deny release based on allegations “that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent the intimidation of witnesses”²⁰³ be followed by, just as in federal court, a “pretrial detention hearing” where the defendant has “the right of confrontation, right to call witnesses, right to cross-examination and right to representation by counsel.”²⁰⁴

Washington has a similar statutory scheme where defendants are entitled to a hearing “to determine whether any condition or combination of conditions will reasonably assure the safety of any other person and

195. UTAH CODE ANN. § 77-20-1(3)(d) (West 2016) (stating that a magistrate may impose conditions that will reasonably “ensure the safety of the public”).

196. VA. CODE ANN. § 19.2-120(A)(2) (2016) (stating that a person should be admitted to bail unless “[h]is liberty will constitute an unreasonable danger to himself or the public”).

197. WASH. CRIM. R. CTS. LTD. JURIS. 3.2(d) (stating that a court may impose restriction on a defendant’s liberty “[u]pon a showing that there exists a substantial danger that the accused will commit a violent crime or that the accused will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice”).

198. WYO. R. CRIM. P. 46.1(b) (stating that a court should release a defendant on personal recognizance or an unsecured bond “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community”).

199. N.M. R. CRIM. P. 6-401(B)(4).

200. *Id.* 6-401(A) (“If the court finds that the defendant poses a danger to the complaining witness or alleged victim, the court may refuse to allow the complaining witness or alleged victim to post bond for the defendant. This rule does not prevent the use of community funds to post a bond.”).

201. WIS. STAT. § 969.01(4) (2016) (“If bail is imposed, it shall be only in the amount found necessary to assure the appearance of the defendant.”).

202. *Id.* (“Conditions of release, other than monetary conditions, may be imposed for the purpose of protecting members of the community from serious bodily harm or preventing intimidation of witnesses.”).

203. *Id.* § 969.035(3)(c).

204. *Id.* § 969.035(6)(c).

the community,”²⁰⁵ and at that hearing they have “the right to be represented by counsel, and, if financially unable to obtain representation, to have counsel appointed . . . [and] must be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.”²⁰⁶

There are, however, a few states that reject the idea that the potential dangerousness of the defendant should be a factor in setting bail and maintain that the only permissible reason to impose bail is to ensure the return of the defendant to court.²⁰⁷

4. Reliance on Bail Schedules

Bail schedules are procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, without taking into consideration the characteristics of an individual defendant.²⁰⁸ Nineteen states continue to use bail schedules for certain

205. WASH. REV. CODE § 10.21.060(1) (2016).

206. *Id.* § 10.21.060(3).

207. See ARIZ. R. CRIM. P. 7.2(a) (“Any person charged with an offense bailable as a matter of right shall be released pending or during trial on the person’s own recognizance, unless the court determines, in its discretion, that such a release will not reasonably assure the person’s appearance as required.”); ARK. R. CRIM. P. 9.2(a) (“The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.”); CONN. GEN. STAT. § 54-63b(b) (2016) (“The Court Support Services Division shall establish written uniform weighted release criteria based upon the premise that the least restrictive condition or conditions of release necessary to ensure the appearance in court of the defendant and sufficient to reasonably ensure the safety of any other person will not be endangered is the pretrial release alternative of choice.”); 725 ILL. COMP. STAT. 185/7(b)(1)–(2) (2016) (requiring that pretrial service agencies take into consideration “the need for financial security to assure the defendant’s appearance at later proceedings; and appropriate conditions which shall be imposed to protect against the risks of nonappearance and commission of new offenses or other interference with the orderly administration of justice before trial”); MASS. GEN. LAWS ch. 276, § 58 (2016) (“A justice or a clerk or assistant clerk of the district court, a bail commissioner . . . shall . . . hold a hearing in which the defendant and his counsel, if any, may participate and inquire into the case and shall admit such person to bail on his personal recognizance without surety unless said justice, clerk or assistant clerk, bail commissioner or master in chancery determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person before the court.”); MASS R. GOVERNING PERSONS AUTHORIZED TO ADMIT TO BAIL OUT OF CT. 3 (“The purpose of setting terms for any pre-trial release is to assure the presence at court of the person released.”); *Royalty v. State*, 235 So. 2d 718, 720 (Miss. 1970) (holding that “[s]ince the purpose of allowing bail is to secure the presence of the accused at trial, the amount of bail to be required is governed largely by the character of the offense committed and the financial ability of the accused”); *State v. Steele*, 61 A.3d 174, 181 (N.J. Super. Ct. App. Div. 2013) (holding that “[m]oney bail may not be used to protect the community by preventing release”).

208. Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, A.B.A. CRIM. JUST., Spring 2011, at 12, 13.

offenses: Alabama,²⁰⁹ Alaska,²¹⁰ California,²¹¹ Colorado,²¹² Georgia,²¹³
Idaho,²¹⁴ Iowa,²¹⁵ Kentucky,²¹⁶ Montana,²¹⁷ Nebraska,²¹⁸ Nevada,²¹⁹

209. ALA. R. CRIM. P. 7.2(b) (establishing a “general guide for circuit, district, and municipal courts in setting bail”).

210. ALASKA R. CRIM. P. 41.

211. CAL. PENAL CODE § 1269b(c) (West 2016).

212. COLO. REV. STAT. ANN. § 16-4-103(4)(b) (2016) (“To the extent a court uses a bond schedule, the court shall incorporate into the bond schedule conditions of release and factors that consider the individualized risk and circumstances of a person in custody and all other relevant criteria and not solely the level of offense . . .”).

213. GA. CODE ANN. § 17-6-1(f)(1) (2016) (“[T]he judge of any court of inquiry may by written order establish a schedule of bails and unless otherwise ordered by the judge of any court, a person charged with committing any offense shall be released from custody upon posting bail as fixed in the schedule.”).

214. IDAHO MISD. CRIM. R. 13(a) (“The amount of bail for misdemeanor traffic offenses and other criminal offenses shall be as set forth herein. Such bail schedules shall not govern when a person charged appears before a judge or magistrate, or the defendant’s case is reviewed by a judge or magistrate, in which case such bail schedules are advisory only and bail may be raised, lowered or eliminated at the magistrate’s discretion based upon the circumstances of that particular case. Any judge may also designate a bond schedule for offenses not listed below.”).

215. IOWA CODE § 804.21(5)(a) (West 2016) (“The judicial council shall promulgate rules and bond levels to be contained within a bond schedule for the release of an arrested person.”).

216. KY. R. CRIM. P. 4.20(1) (“The defendant may execute a bail bond in accordance with the uniform schedule of bail . . . for designated nonviolent Class D felonies, misdemeanors and violations without appearing before a judge.”).

217. MONT. CODE ANN. § 49-9-302(1) (2015) (“A judge may establish and post a schedule of bail for offenses over which the judge has original jurisdiction.”).

218. NEB. REV. STAT. § 29-901.05(1) (2016) (“It shall be the duty of the judges of the county court in each county to prepare and adopt, by a majority vote, a schedule of bail for all misdemeanor offenses and such other offenses as the judges deem necessary. It shall contain a list of such offenses and the amounts of bail applicable thereto as the judges determine to be appropriate.”).

219. NEV. REV. STAT. § 178.484(7) (2016) (mandating the amount of bail, at least three thousand and up to fifteen thousand dollars, for certain domestic violence offenses if a defendant does not personally appear before a judicial officer).

New Jersey,²²⁰ New Mexico,²²¹ Ohio,²²² Oklahoma,²²³ Tennessee,²²⁴ Utah,²²⁵ Wisconsin,²²⁶ and Wyoming.²²⁷

In addition to the continued use of bail schedules, some jurisdictions authorize judicial officers to predetermine the amount of bail when issuing an arrest warrant. In these states, bail can be set at the time a judicial officer determines there is probable cause for an arrest, outside of the defendant's presence. Twenty states permit the amount of bail to

220. N.J. STAT. ANN. § 2A:162-12 (West 2016) (setting out “[c]rimes with bail restrictions”); *State v. Steele*, 61 A.3d 174, 182 (N.J. Super. Ct. App. Div. 2013). New Jersey courts “are guided by bail schedules to promote uniformity” that “suggest ranges of bail for specific offenses.” *Steele*, 61 A.3d at 182.

221. *In re Rodella*, 190 P.3d 338, 348 (N.M. 2008) (mentioning the use of bond schedules and finding that deviation from a set schedule did not amount to willful misconduct).

222. OHIO R. CRIM. P. 46(G). In Ohio, the law requires each court to “establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification.” *Id.*

223. OKLA. STAT. tit. 22, § 1105.2(B) (2016). “Every judicial district may, upon the order of the presiding judge for the district, establish a pretrial bail schedule for felony or misdemeanor offenses . . .” *Id.*

224. Tenn. Att’y Gen. Op. No. 05-018 (Feb. 4, 2005) (stating that “a defendant is entitled to an individual determination of bond,” regardless of the manner of the arrest, but a jailer may not release a defendant by using a preset bond schedule published by the judges of the jurisdiction when a judge or clerk is not readily available).

225. UTAH R. CRIM. P. 7(c)(3)(B) (“The bail determination shall coincide with the recommended bail amount in the Uniform Fine/Bail Schedule unless the magistrate finds substantial cause to deviate from the Schedule.”).

226. WIS. STAT. § 969.065 (2016) (requiring the Wisconsin Judicial Conference to “develop guidelines for cash bail for persons accused of misdemeanors,” and those guidelines “shall relate primarily to individuals,” as opposed to the charge); STATE OF WIS., UNIFORM MISDEMEANOR BAIL SCHEDULE 77-78 (2016), <https://www.wicourts.gov/publications/fecs/docs/bondsched16.pdf> (stating if a defendant lacks proper identification, has insufficient ties to the community, or has previously failed to appear, then the Wisconsin Uniform Misdemeanor Bail Schedule lists the amount of cash bail that should be imposed without taking into consideration the defendant’s financial resources); see also *Demmith v. Wis. Judicial Conference*, 480 N.W.2d 502, 507-08, 511-12 (Wis. 1992) (finding that the statutory requirement does not violate the separation of powers doctrine, but that the schedule failed to comply with the statute because it did “not consider factors which are directly related to an individual’s likelihood to appear in court”).

227. WYO. R. CRIM. P. 3.1 app. 1. “To ensure uniformity throughout the state,” Wyoming uses a bail schedule established by the Wyoming Supreme Court “for misdemeanor offenses for which bond may be posted and forfeited.” *Id.*

be affixed to an arrest warrant: Alabama,²²⁸ California,²²⁹ Colorado,²³⁰ Idaho,²³¹ Iowa,²³² Kansas,²³³ Kentucky,²³⁴ Louisiana,²³⁵ Maine,²³⁶ Michigan,²³⁷ Minnesota,²³⁸ Montana,²³⁹ North Dakota,²⁴⁰ Ohio,²⁴¹

228. ALA. R. CRIM. P. 3.2(a) (“If the defendant is bailable as a matter of right, the arrest warrant may state the conditions of the defendant’s release on his or her own recognizance . . . or an amount of an appearance bond or a secured appearance bond predetermined by the court.”).

229. CAL. PENAL CODE § 1269(b) (West 2016) (“If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall be in the amount fixed by the judge at the time of the appearance. If that appearance has not been made, the bail shall be in the amount fixed in the warrant of arrest . . .”).

230. COLO. REV. STAT. § 16-4-103(2) (2016) (“If an indictment, information, or complaint has been filed and the type of bond and conditions of release have been fixed upon return of the indictment or filing of the information or complaint, the court shall review the propriety of the type of bond and conditions of release upon first appearance of a person in custody.”).

231. IDAHO R. CRIM. P. 5(e) (“Upon advising the defendant of the above rights, the magistrate shall set bail for the defendant, and in the event the arrest is pursuant to a warrant, said bail shall be in the amount endorsed upon the warrant unless the magistrate finds good cause to alter the amount of the bail.”).

232. IOWA CODE § 804.3 (2016) (“If the offense stated in the warrant be bailable, the magistrate issuing it must make an endorsement thereon as follows: Let the defendant, when arrested, be (admitted to bail in the sum of dollars) or (stating other conditions of release).”).

233. KAN. STAT. ANN. § 22-2304(a) (2015) (“The amount of the appearance bond to be required shall be stated in the warrant.”).

234. KY. R. CRIM. P. 2.06(3) (“If the offense charged is bailable, the judge issuing a warrant of arrest shall fix the amount of bail and type of security, if any, and endorse it on the warrant.”).

235. LA. CODE CRIM. PROC. ANN. art. 203 (2016) (“The warrant of arrest may specify the amount of bail in noncapital cases when the magistrate has authority to fix bail.”).

236. ME. R. CRIM. P. 4(d)(1) (“The amount of bail may be fixed by the court and physically or electronically endorsed on the warrant.”).

237. MICH. R. CRIM. P. 6.102(D) (“[T]he court may specify on the warrant the bail that an accused may post to obtain release before arraignment on the warrant . . .”).

238. MINN. R. CRIM. P. 3.02(1) (requiring that when issuing a warrant, “[f]or all offenses, the amount of bail must be set, and other conditions of release may be set, by a judge and stated on the warrant”).

239. MONT. CODE ANN. § 46-6-214(2) (2015) (“The arrest warrant may specify the amount of bail.”).

240. N.D. R. CRIM. P. 4(b)(1) (“The warrant may also have endorsed upon it the recommended or acceptable amount of bail if the offense is bailable.”).

241. OHIO R. CRIM. P. 4(C)(1)(a). If “the defendant has [already] made an initial appearance or has failed to appear at an initial appearance,” the warrant must indicate the amount of cash or secured bail bond. *Id.*

Oklahoma,²⁴² Oregon,²⁴³ Rhode Island,²⁴⁴ South Dakota,²⁴⁵ Utah,²⁴⁶ and Wisconsin.²⁴⁷

5. Additional Conditions of Release and the Lack of Pretrial Services

To assist the judge or magistrate in making a bail determination, some jurisdictions have created pretrial service agencies to interview defendants prior to their initial appearance.²⁴⁸ These interviews typically

242. OKLA. STAT. tit. 22, § 173 (2016) (“The warrant must . . . state an offense . . . and if the offense charged is bailable, shall fix the amount of bail and an endorsement shall be made on the warrant, to the following effect: ‘The defendant is to be admitted to bail in the sum of \$ _____.’ and be signed by the magistrate with his name of office.”).

243. OR. REV. STAT. § 133.140(8) (2015) (“A warrant of arrest shall: Specify the amount of security for release.”).

244. R.I. SUPER. CT. R. CRIM. P. 4(b)(1) (“The judge or other officer issuing a warrant may endorse upon it the amount of bail if the offense is bailable by that judge or officer.”).

245. S.D. CODIFIED LAWS § 23A-2-4 (2016) (“The committing magistrate who signs the warrant shall also endorse the amount of bail on it.”).

246. UTAH R. CRIM. P. 6(e)(2) (“When a warrant of arrest is issued, the judge shall state on the warrant: The conditions of pretrial release the court requires of the defendant, including monetary bail.”).

247. WIS. STAT. ANN. § 969.05(1)–(2) (2015) (“In misdemeanor actions, the judge who issues a warrant may endorse upon the warrant the amount of bail. The amount and method of posting bail may be endorsed upon felony warrants.”).

248. See CAL. PENAL CODE § 1318.1(a) (West 2016) (“A court, with the concurrence of the board of supervisors, may employ an investigative staff for the purpose of recommending whether a defendant should be released on his or her own recognizance.”); COLO. REV. STAT. § 16-4-106(1) (2016) (“The chief judge of any judicial district may order a person who is eligible for bond or other pretrial release to be evaluated by a pretrial services program established pursuant to this section, which program may advise the court if the person is bond eligible, may provide information that enables the court to make an appropriate decision on bond and conditions of release, and may recommend conditions of release consistent with this section.”); CONN. GEN. STAT. § 54-63b(a)(1) (2016) (“The duties of the Court Support Services Division shall include: To promptly interview, prior to arraignment, any person referred by the police . . . or by a judge. Such interview shall include, but not be limited to, information concerning the accused person, his or her family, community ties, prior criminal record and physical and mental condition.”); 725 ILL. COMP. STAT. 185/1 (West 2016) (“Each circuit court shall establish a pretrial services agency to provide the court with accurate background data regarding the pretrial release of persons charged with felonies and effective supervision of compliance with the terms and conditions imposed on release.”); NEB. REV. STAT. § 29-909 (2016) (“The district courts of this state are authorized to designate an official pretrial release agency for a district, or for any county within a district, whenever the court is satisfied that such agency can render competent and effective assistance to the court in making its determination of the terms and conditions under which any court should release a prisoner from jail prior to trial.”); OR. REV. STAT. § 135.235(2)–(3) (2016) (“The release assistance officer shall, except when impracticable, interview every person detained pursuant to law and charged with an offense [and] shall verify release criteria information”); VA. CODE ANN. § 19.2-152.4:3(A)(2) (2016); KY. R. CRIM. P. 4.06 (“The duties of a pretrial services agency authorized by the Administrative Office of the Courts to serve the trial court shall include interviewing defendants eligible for pretrial release, verifying information obtained from

focus on the defendant's work history, financial resources, ties to the community, and criminal record.

Despite the fact that the American Bar Association has taken the position that "[e]very jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, present risk assessments, and, consistent with court policy, make release recommendations required by the judicial officer in making release decisions,"²⁴⁹ states do not always require local jurisdictions to have pretrial release programs.²⁵⁰

Electronic home monitoring is one increasingly popular condition of release, although states typically require defendants to pay the costs associated with it, often directly to the private agency responsible for providing the service.²⁵¹

defendants, making recommendations to the court as to whether defendants interviewed should be released on personal recognizance, identifying veterans, and any other duties ordered by the Supreme Court."); MASS. R. CRIM. P. 7(a)(3) ("On the day of the arraignment, the probation department shall interview the defendant; the probation department shall report to the court the pertinent information reasonably necessary to determine the issues of bail and indigency."); MINN. R. CRIM. P. 6.02(3) ("To determine conditions of release, the court may investigate the defendant's background before or at the defendant's court appearance. The investigation may be conducted by probation services or by any other qualified agency as directed by the court."). Local pretrial services officers shall "[p]resent a pretrial investigation report with recommendations to assist courts in discharging their duties related to granting or reconsidering bail." VA. CODE ANN. § 19.2-152.4:3(A)(2).

249. *Criminal Justice Section Standards: Pretrial Release*, A.B.A., http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html (last visited Feb. 28, 2017).

250. See N.C. GEN. STAT. § 15A-535(b) (2016) ("In any county in which there is a pretrial release program, the senior resident superior court judge may, after consultation with the chief district court judge, order that defendants accepted by such program for supervision shall, with their consent, be released by judicial officials to supervision of such programs"); OKLA. STAT. tit. 22, § 1105.3(A) (2016), *amended by* 2016 Okla. Sess. Laws 3 ("Any county pursuant to the provisions of this act may establish and fund a pretrial program to be utilized by the district court in that jurisdiction.").

251. See GA. CODE ANN. § 17-6-1.1(a), (h)(1) (2016) (authorizing the use of an "electronic pretrial release and monitoring program" and requiring a defendant in such a program to "pay a reasonable, nonrefundable fee for program enrollment, equipment use, and monitoring to the provider of such program"); MD. CODE ANN., CRIM. PROC. § 5-201(b)(1)-(2) (West 2016) (permitting the court, as a condition of pretrial release, to require monitoring of the defendant by a private home detention monitoring agency and requiring the defendant to pay the agency's monitoring fee); MO. REV. STAT. § 544.455(1)(6) (2016) (permitting a judge to "[p]lace the person on house arrest with electronic monitoring; except that all costs associated with the electronic monitoring shall be charged to the person on house arrest"); N.C. GEN. STAT. § 15A-534(a)(5) (2016) ("In determining conditions of pretrial release a judicial official must impose at least one of the following conditions: House arrest with electronic monitoring."); OHIO CRIM. R. 46(B)(3) ("The court may . . . [p]lace the person under a house arrest, electronic monitoring, or work release program."); OKLA. STAT. ANN. tit. 22, § 1105.2(F)-(G) (West 2016), *amended by* 2016 Okla. Sess.

6. The Use of Evidence Based Risk Assessment Tools

Some courts have also started using an evidence based risk assessment tool as part of the bail determination.²⁵² Evidence based pretrial risk assessment tools measure the risk that a defendant, if released pending trial, will fail to appear for a court date or will commit a new crime.

It is estimated that only about 10% of judicial officers across the country use pretrial risk assessment tools to make release decisions, in part because they require costly and time-consuming interviews with defendants.²⁵³ Only three states, Kentucky, Ohio, and Virginia, have created and validated a state-specific risk assessment instrument for use by pretrial services agencies across the entire state.²⁵⁴

Laws ch. 59 (“The court may require the person to be placed on an electronic monitoring device as a condition of pretrial release [and] may impose payment of a supervision fee [which] shall be a condition of pretrial release”); *see also* Erik Markowitz, *Chain Gang 2.0: If You Can’t Afford This GPS Ankle Bracelet, You Get Thrown in Jail*, INT’L BUS. TIMES (Sept. 21, 2015), <http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283> (finding that Arkansas, Colorado, Georgia, Pennsylvania, and Washington all contract with private, for-profit companies requiring individuals to pay for their own tracking).

252. COLO. REV. STAT. § 16-4-103(3)(b) (2016) (“In determining the type of bond and conditions of release, if practicable and available in the jurisdiction, the court shall use an empirically developed risk assessment instrument designed to improve pretrial release decisions by providing to the court information that classifies a person in custody based upon predicted level of risk of pretrial failure.”); CONN. GEN. STAT. § 54-63b(b) (2016) (“The Court Support Services Division shall establish written uniform weighted release criteria”); DEL. CODE ANN. tit. 11, § 2104(d) (2016) (“In making a release determination, or imposing conditions set forth in § 2108 of this title, the court shall employ an objective risk assessment instrument to gauge the person’s risk of flight and re-arrest and the safety of the victim and the community.”); 725 ILL. COMP. STAT. 185/20 (2016) (“In preparing and presenting its written reports . . . pretrial services agencies shall in appropriate cases include specific recommendations for the setting, increase, or decrease of bail; the release of the interviewee on his own recognizance in sums certain; and the imposition of pretrial conditions to bail or recognizance In establishing objective internal criteria of any such recommendation policies, the agency may utilize so-called ‘point scales’ for evaluating the aforementioned risks, but no interviewee shall be considered as ineligible for particular agency recommendations by sole reference to such procedures.”); UTAH ADMIN. OFFICE OF THE COURTS, UNIFORM FINE/BAIL FORFEITURE SCHEDULE 4 (2016), https://www.utcourts.gov/resources/rules/ucja/append/c_fineba/FineBail_Schedule.pdf (utilizing a “criminal history assessment” based on prior convictions and previous levels of supervision in determining the amount of bail to be set).

253. MARIE VANNOSTRAND & CHRISTOPHER T. LOWENKAMP, LAURA & JOHN ARNOLD FOUND., *ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW 3* (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_no-interview_FNL.pdf.

254. CYNTHIA A. MAMALIAN, PRETRIAL JUSTICE INST., *STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 19* (2011), [http://www.pretrial.org/download/risk-assessment/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20\(2011\).pdf](http://www.pretrial.org/download/risk-assessment/PJI%20State%20of%20the%20Science%20Pretrial%20Risk%20Assessment%20(2011).pdf).

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Supreme Court has made it very clear that “[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused.”²⁵⁵ What is less clear is when counsel must actually be present.²⁵⁶

In *Coleman v. Alabama*,²⁵⁷ the Supreme Court found that an indigent defendant had a right to counsel at a preliminary hearing.²⁵⁸ The Court found that a number of factors made the presence of counsel necessary:

First, the lawyer’s skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State’s case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State’s witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.²⁵⁹

The Court’s reference to the ability of counsel to make an “effective argument” regarding bail supports the argument that where an initial appearance includes a bail determination, it would require the actual presence of counsel to assist the defendant.

However, the Court’s holding in *Gerstein v. Pugh*²⁶⁰ undermines that argument. In *Gerstein*, the Court held that a judicial officer must make a prompt determination regarding probable cause for a warrantless arrest but “[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a ‘critical stage’ in the prosecution that would require appointed counsel.”²⁶¹ It is important to note that

255. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 203 (2008) (alteration in original) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 180–81 (1991)).

256. *Id.* at 213–14 (Alito, J., concurring) (“As I interpret our precedents, the term ‘attachment’ signifies nothing more than the beginning of the defendant’s prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel.”).

257. 399 U.S. 1 (1970).

258. *Id.* at 9–10.

259. *Id.* at 9.

260. 420 U.S. 103 (1975).

261. *Id.* at 122, 125.

Gerstein involved only a determination regarding probable cause, a determination identical to the one that takes place when a judicial officer issues an arrest warrant, a process that occurs outside of the presence of the defendant. The factors involved in making decisions regarding conditions of pretrial release are far more complex and focus on the characteristics of the defendant and, to a lesser extent, the allegations against the defendant.

A. Trial-Like Confrontations

The Supreme Court has recognized that the “core purpose” of the Sixth Amendment right to counsel is to ensure that a defendant has the assistance of counsel at trial.²⁶² At the same time, the Court has recognized that there are certain pretrial proceedings where a defendant may be “confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.”²⁶³ The Court has also recognized that there are situations where the results of a pretrial confrontation “might well settle the accused’s fate and reduce the trial itself to a mere formality.”²⁶⁴

This has led the Court to conclude that indigent defendants are entitled to the presence of appointed counsel during any “critical stage” of the proceedings.²⁶⁵ The Court defines “critical stages” as “proceedings between an individual and agents of the State (whether ‘formal or informal, in court or out’) that amount to ‘trial-like confrontations,’ at which counsel would help the accused ‘in coping with legal problems or . . . meeting his adversary.’”²⁶⁶

In states where the judicial officer must consider the weight of the evidence against the accused or the likelihood of conviction when determining conditions of pretrial release, the initial appearance is clearly a trial-like confrontation. If a prosecutor happens to be present, or is able to communicate to the judicial officer the prosecutor’s position regarding

262. *United States v. Ash*, 413 U.S. 300, 309 (1973) (finding that “the core purpose of the counsel guarantee was to assure ‘Assistance’ at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor”).

263. *Id.* at 310.

264. *United States v. Wade*, 388 U.S. 218, 224 (1967) (finding that defendants have a right to counsel at a pretrial lineup).

265. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 212 (2008) (“Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the post-attachment proceedings; what makes a stage critical is what shows the need for counsel’s presence. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.” (footnotes omitted)).

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

appropriate conditions of pretrial release, then it would seem equally clear that the accused would be entitled to the assistance of counsel.

B. *The Threat to Public Safety*

In *United States v. Salerno*,²⁶⁷ the Supreme Court upheld the constitutionality of the Bail Reform Act of 1984. At issue in *Salerno* was whether the Due Process Clause prohibits pretrial detention on the ground that a defendant is a danger to the community.²⁶⁸ The Court found that the “[g]overnment’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.”²⁶⁹

While scholars have criticized the Court’s decision in *Salerno* for failing to appreciate the significance of the presumption of innocence,²⁷⁰ the Bail Reform Act of 1984 outlined specific procedures that needed to be followed before a defendant could be denied bail because the defendant was a threat to the safety of the community.²⁷¹ As the Court noted, the Act was not “a scattershot attempt to incapacitate” defendants accused of serious crimes.²⁷² The Court relied on the fact that following a judicial determination of probable cause, the defendant is entitled to “a full-blown adversary hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”²⁷³

While states have embraced the idea of preventative detention based on the perceived dangerousness of a defendant, state statutes that permit judicial officers to take the potential dangerousness of a defendant into consideration when determining conditions of pretrial release do not contain the same procedural protections as the Bail Reform Act of 1984. They are the type of “scattershot attempts” to incapacitate defendants solely based on the nature of the charge that the Supreme Court did not have to address in *Salerno*. Under the Bail Reform Act of 1984, defendants who are denied bail are entitled to a prompt hearing where they have a right to counsel.²⁷⁴ State statutes that permit a judicial officer to deny bail based on the perceived dangerousness of the defendant do

267. 481 U.S. 739 (1987).

268. *Id.* at 755.

269. *Id.* at 748.

270. See Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 750 (2011); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 351–54 (1990).

271. *Salerno*, 481 U.S. at 755.

272. *Id.* at 750.

273. *Id.*

274. 18 U.S.C. § 3142(f) (2012).

not typically afford the defendant the right to a hearing or the right to counsel.

C. Pretrial Events that Impact the Trial

Even if bail hearings in state court did not resemble trial-like confrontations, it is clear that pretrial incarceration adversely impacts the ultimate outcome for defendants. The Supreme Court has observed that the “traditional right to freedom before conviction permits the unhampered preparation of a defense.”²⁷⁵ The Court has acknowledged that “if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”²⁷⁶ The Court has also recognized that the time between a defendant’s arraignment and the beginning of trial is a “critical period of the proceedings . . . when consultation, thoroughgoing investigation and preparation” are of vital importance.²⁷⁷

Recent empirical studies demonstrate the adverse impacts of pretrial incarceration. One study found that defendants characterized as low-risk who were detained pretrial were over five times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial.²⁷⁸ The same study also found that defendants characterized as moderate or high risk who were not released before trial or disposition were three times more likely to be sentenced to jail or prison than defendants who were released and all defendants who were detained pretrial, regardless of classification as low or high risk, received longer jail and prison sentences than defendants who were released.²⁷⁹

Even if the Court views the Sixth Amendment right to counsel as a right designed to ensure that the defendant receives a fair trial, the obstacles that defendants who are incarcerated face when attempting to prepare a defense arguably impacts the fairness of their trial and, in some cases, may exert pressure on them to waive their right to trial and plead guilty. The fact that defendants who are incarcerated have worse case outcomes suggests that pretrial incarceration impacts the fairness of the adjudication process.

275. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

276. *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 (2004) (noting that “[d]etained defendants find it harder to meet and strategize with their lawyers and to track down witnesses”).

277. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

278. CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 4 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

279. *Id.*

D. Actual Incarceration

In *Gideon v. Wainwright*,²⁸⁰ the Supreme Court recognized the “obvious truth” that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”²⁸¹ While the Court’s decision in *Gideon* overturned a felony conviction, the language the Court used suggested that indigent defendants had a right to counsel in any criminal prosecution.²⁸²

In *Argersinger v. Hamlin*,²⁸³ the Court extended the right to counsel to indigent defendants charged with misdemeanors who were sentenced to incarceration.²⁸⁴ The Court would later clarify the *Argersinger* holding in *Scott v. Illinois*,²⁸⁵ “[W]e believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.”²⁸⁶

While the Supreme Court does not regard pretrial incarceration as punitive, it is clear from *Argersinger* and *Scott* that the law requires counsel when a judge wishes to impose any amount of incarceration following a conviction. While the Court’s distinction between post-adjudicative incarceration and pre-adjudicative incarceration is reasonable because of the collateral consequences of conviction,²⁸⁷ it becomes less reasonable as the length of pretrial incarceration increases. One study estimates that the average length of pretrial confinement in 2013 was twenty-three days, an increase from fourteen days in 1983.²⁸⁸

280. 372 U.S. 335 (1963).

281. *Id.* at 344.

282. *Id.* (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”).

283. 407 U.S. 25 (1972).

284. *Id.* at 37.

285. 440 U.S. 367 (1979).

286. *Id.* at 373.

287. See John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 55 (2013).

288. RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 10 (2015), <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

E. Sentencing Hearings

Prior to the Court's decision in *Gideon*, the Court had relied on the Due Process Clause of either the Fifth or Fourteenth Amendments when ruling that indigent defendants were entitled to the assistance of counsel.²⁸⁹ Following the *Gideon* decision, the Court clarified that these earlier cases "stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."²⁹⁰ This includes the right to counsel at sentencing, even if the judge has very limited discretion in sentencing.²⁹¹ The Court has recognized "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence."²⁹²

Bail hearings, like sentencing hearings, offer the opportunity to present the same type of mitigating circumstances that may influence a judge's ultimate decision regarding the terms and conditions of confinement. Consider a sentencing hearing where a judge had the option of imposing a sentence of probation with various conditions or a sentence of incarceration. In many ways, such a hearing mirrors the type of decisions made by a judge during a bail hearing, especially in jurisdictions where a judge must weigh any potential threat a defendant poses to the community or to an individual.

F. Plea Bargaining

The idea that the purpose of the Sixth Amendment is to ensure the reliability of a conviction following trial is undermined by the fact that 97% of federal convictions and 94% of state convictions are the result of guilty pleas.²⁹³ The Supreme Court has recognized that the current

289. See *Hamilton v. Alabama*, 368 U.S. 52, 52 (1961) (holding that the failure to appoint counsel at a defendant's arraignment was a denial of due process since Alabama law required certain defense to be plead at arraignment); *Moore v. Michigan*, 355 U.S. 155, 161, 165 (1957) (finding a denial of due process when the defendant did not knowingly and intelligently waive counsel before entering a guilty plea); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (holding that the absence of counsel at sentencing coupled with inaccurate assumptions about the defendant's criminal record deprived the defendant of due process).

290. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

291. See *id.* at 135 (stating that the law requires counsel at sentencing even though judge was required to sentence the defendant to the maximum term provided by law and only makes a recommendation to the Board of Prison Terms and Paroles); see also *Glover v. United States*, 531 U.S. 198, 204 (2001) (holding that defense counsel could be found to have provided ineffective assistance for failing to object to an error of law affecting the sentencing calculation even if the error did not result in a significant increase in the sentence).

292. *Mempa*, 389 U.S. at 135.

293. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

criminal justice system “is for the most part a system of pleas, not a system of trials.”²⁹⁴ The Court has described plea bargains as “central to the administration of the criminal justice system.”²⁹⁵ The Court also recognized the practical effect of a criminal justice system that relies almost exclusively on plea bargaining: “In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”²⁹⁶

Pretrial incarceration plays a large role in plea bargaining, especially for defendants who are charged with misdemeanors and may be able to receive a sentence of time already served.²⁹⁷ In ruling that indigent defendants charged with misdemeanors have a right to counsel under the Sixth Amendment, the Supreme Court expressed concern over the prejudice that results from “assembly line justice.”²⁹⁸ In a criminal justice system where guilt is primarily adjudicated pretrial and where judicial officers are called upon to make predictive determinations regarding guilt at a defendant’s initial appearance, it makes sense to require the presence of counsel at that initial appearance.

III. FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

The Supreme Court recognized that indigent defendants have a right to counsel under the Fourteenth Amendment’s Due Process clause in *Powell v. Alabama*,²⁹⁹ more than thirty years before the Court’s landmark decision in *Gideon v. Wainwright*, which granted indigent defendants the right to counsel under the Sixth Amendment.³⁰⁰ In *Powell*, the Court stated:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with

294. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

295. *Frye*, 132 S. Ct. at 1407. “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.” *Id.* (alteration in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

296. *Id.*

297. See Alexandra Natapoff, *Misdemeanors*, 85 *S. CAL. L. REV.* 1313, 1316 (2012) (describing the mechanics of the petty offense process and its disregard for the evidentiary checking mechanism of standard criminal practice).

298. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

299. 287 U.S. 45, 73 (1932).

300. *Gideon v. Wainwright*, 372 U.S. 335, 348 (1963).

the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.³⁰¹

While an indigent defendant does not face the possibility of conviction at his initial appearance, the defendant still faces the possibility of pretrial incarceration. If the judicial officer charged with making the pretrial release decision must take into consideration the likelihood of conviction and the weight of the evidence against the defendant, the danger is that an indigent defendant who “lacks both the skill and knowledge adequately to prepare his defense, even though he ha[s] a perfect one” will be subjected to pretrial incarceration.³⁰² As the Court has said, it is an “obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. . . . That which is simple, orderly, and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.”³⁰³

A. *The Need for Adequate Procedural Safeguards*

Assuming that a defendant’s initial appearance before a judicial officer who has the power to restrict the defendant’s liberty is not a “critical stage” of the proceedings under the Sixth Amendment, the question remains what procedural protections are required under the Due Process Clause. When evaluating what procedures are required to ensure due process of law, the Supreme Court considers three distinct factors:

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

301. *Powell*, 287 U.S. at 68–69.

302. *See id.* at 69.

303. *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

additional or substitute procedural requirement would entail.³⁰⁴

The Court has recognized that when evaluating the “private interest that will be affected,” an indigent defendant’s loss of personal liberty through imprisonment lies “at the core of the liberty protected by the Due Process Clause.”³⁰⁵ At the same time, the Court has said that the concept of due process of law “is not a technical conception with a fixed content unrelated to time, place and circumstances.”³⁰⁶ The court has said that applying the Due Process Clause is “an uncertain enterprise” that requires discovering “what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.”³⁰⁷ With that in mind, the Court has ruled on which specific procedural protections are required before an indigent defendant can be deprived of her liberty during parole revocation hearings, probation revocation hearings, and civil contempt proceedings.

1. Parole Revocation Hearings

In *Morrissey v. Brewer*,³⁰⁸ the Supreme Court considered what type of procedural protections parolees are entitled to at a parole revocation hearing.³⁰⁹ Since the revocation of parole is not part of a criminal prosecution, the Court ruled that “the full panoply of rights due a defendant in such a proceeding does not apply.”³¹⁰ Nevertheless, the Court found that a parolee has a liberty interest that “must be seen as within the protection of the Fourteenth Amendment.”³¹¹ The court also noted that a parolee “is not the only one who has a stake in in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law.”³¹²

In determining what process is due to a parolee facing revocation, the Court found that the typical process of parole revocation involved two important stages: the arrest of the parolee and the preliminary hearing

304. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

305. *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

306. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring)).

307. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24–25 (1981).

308. 408 U.S. 471 (1972).

309. *Id.* at 472.

310. *Id.* at 480.

311. *Id.* at 482.

312. *Id.* at 484.

followed by the revocation hearing.³¹³ In terms of the arrest and preliminary hearing, the Court required that the parolee be given notice of the alleged violation; the opportunity to speak on his own behalf; the right to bring letters, documents, or individuals to testify before the hearing officer; and the right to question the person who gave the information on which the parole revocation is based.³¹⁴ In addition, the law requires the hearing officer to make a summary or digest of what occurs at the hearing.³¹⁵

2. Probation Revocation Hearings

In *Gagnon v. Scarpelli*,³¹⁶ the Supreme Court found that a “[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty.”³¹⁷ Consequently, the Court found that a probationer “is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*.”³¹⁸ The Court of Appeals had held that a probationer was entitled to counsel at a revocation hearing, but the Supreme Court declined to adopt a rule requiring counsel in all such cases.³¹⁹ Instead, the Court adopted a “case-by-case approach to the right to counsel” in probation and parole revocation hearings.³²⁰

The Court noted that “[b]oth the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion.” Specifically, these interests include the interests of “the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.”³²¹ The Court also noted that the procedural protections set forth in *Morrissey* “serve as substantial protection against ill-considered revocation.”³²² That being said, the Court was not convinced that probationers or parolees could always rely upon those procedural protections to guarantee their due process at a revocation hearing:

313. *Id.* at 485–87.

314. *Id.* at 486–87.

315. *Id.* at 487.

316. 411 U.S. 778 (1973).

317. *Id.* at 782.

318. *Id.* The Court found “that the Court of Appeals erred in accepting respondent’s contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases.” *Id.* at 787.

319. *Id.*

320. *Id.* at 788.

321. *Id.* at 785.

322. *Id.* at 786.

[T]he effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.³²³

The question of whether a parolee or probationer should be provided with counsel is therefore left up to the discretion of the judicial officer responsible for conducting a revocation hearing. At least in some cases, due process requires that a parolee or probationer be provided with counsel.

Currently, the procedural protections afforded to parolees and probationers at revocation hearings by the Supreme Court appear to be greater than those available to defendants during an initial appearance in state courts where judicial officers determine conditions of pretrial release.

3. Civil Contempt Proceedings

In *Turner v. Rogers*,³²⁴ the Supreme Court held that “the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration.”³²⁵ In deciding that due process did not require counsel, the Court relied on three factors.³²⁶

First, “the critical question likely at issue in these cases concerns . . . the defendant’s ability to pay,” which “is often closely related to the question of the defendant’s indigence.”³²⁷ Second, counsel is unlikely to represent the opposing party.³²⁸ Third, there are “substitute procedural safeguards” that “can significantly reduce the risk of an erroneous deprivation of liberty.”³²⁹

323. *Id.* at 786–87.

324. 564 U.S. 431 (2011).

325. *Id.* at 448.

326. *Id.* at 446.

327. *Id.*

328. *Id.*

329. *Id.* at 447 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Those safeguards include (1) notice to the defendant that his ‘ability to pay’ is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.³³⁰

There are aspects of the Court’s holding in *Turner* that are applicable to bail hearings. First, the court’s conclusion that a determination of an individual’s financial resources, of their ability to pay, can be accomplished without the aid of counsel supports the argument that due process does not require counsel in order to determine if a defendant in a criminal case is indigent. Second, since the Court relied, at least in part, on the absence of opposing counsel when holding that due process does not require counsel in *Turner*, the presence of a prosecutor at a defendant’s initial appearance would seem to necessitate the presence of defense counsel. Third, assuming counsel is not required at a defendant’s initial appearance, due process requires alternative procedural safeguards similar to those the Court identified in *Turner*.

4. Objective Pretrial Risk Assessments

One question that arises is whether objective pretrial risk assessments can be the kind of “alternative procedural safeguards” called for in *Turner*. Pretrial risk assessment is an attempt to identify factors that are predictive of pretrial misconduct including a defendant’s prior failures to appear, arrest record, and other factors that indicate a likelihood that the defendant will reoffend.³³¹ When evaluating these factors, a point scale assigns a certain number of points for specific factors that have some correlation to pretrial misconduct.³³² The resulting score is then used to categorize a defendant as a low, moderate, or high risk for failure to appear or to commit another offense.³³³

While some states have adopted evidence based pretrial risk assessments,³³⁴ it is important to understand what factors those instruments take into consideration. A survey of existing studies identified six validated pretrial risk factors: (1) prior failure to appear; (2) prior convictions; (3) present charge a felony; (4) being unemployed; (5)

330. *Id.* at 447–48.

331. *See* MAMALIAN, *supra* note 254, at 7.

332. *Id.* at 7–8.

333. *Id.* at 18.

334. *See supra* note 252 and accompanying text.

history of drug abuse; and (6) having a pending case.³³⁵ None of these factors take into account the likelihood of conviction, the weight of the evidence against a defendant, or potential defense. Four of the factors—prior failures to appear, prior convictions, the fact that the present charge is a felony, and the existence of a pending case—all deal with a defendant's prior criminal record. The use of employment status as a risk factor may increase the likelihood of bail being set for an indigent defendant since defendants classified as indigent are more likely to be unemployed. Without consideration of additional factors, pretrial risk assessments can resemble bail schedules.³³⁶

Another concern is the extent to which a pretrial risk assessment has been validated. A survey by the Pretrial Justice Institute found that of those pretrial programs that do risk assessment, only 42% report having developed their risk assessment procedures based on research done in their own jurisdictions.³³⁷ The same survey found that 48% of pretrial programs have never validated their pretrial risk assessment instruments and also found that there is no standard method pretrial programs use for validation.³³⁸ So while there is certainly evidence that objective, validated pretrial risk assessment instruments can assist judicial officers in making pretrial release decisions, they cannot replace the procedural safeguards called for in cases like *Morrissey*, *Gagnon*, and *Turner*.

5. The Role of an Advocate

It is possible for a judge or magistrate to conduct a bail hearing in such a way as to minimize the disadvantages an indigent defendant suffers because the defendant is unrepresented. If a pretrial services agency provided the hearing officer with detailed information about the defendant, and the hearing officer thoroughly reviewed the allegations against the defendant, with an eye toward identifying potential defenses and potential weaknesses in the prosecution's case, it might minimize the prejudice to an indigent defendant. However, this type of examination without advocacy is not an adequate substitute for counsel.

The Supreme Court's holding in *Douglas v. California*³³⁹ illustrates this point. In *Douglas*, the Court found that indigent appellants have a right to counsel despite the fact that the law required appellate court

335. MAMALIAN, *supra* note 254, at 9.

336. See VANNOSTRAND & LOWENKAMP, *supra* note 253, at 20 (concluding that one can conduct accurate pretrial risk assessments without interviewing defendants).

337. PRETRIAL JUSTICE INST., 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 37 (2009), <http://www.pretrial.org/download/pji-reports/new-PJI%202009%20Survey%20of%20Pretrial%20Services%20Programs.pdf>.

338. *Id.* at 63.

339. 372 U.S. 353 (1963).

judges to make an independent investigation of the record to determine if the appointment of counsel would be to the advantage of the appellant or the court and should deny the appointment of counsel only if such appointment would be of no value to the appellant or the court.³⁴⁰ The Court found that despite the opportunity for judicial review, “the type of an appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel.”³⁴¹

The ability of the appellant to hire counsel would result in judicial review “after having the full benefit of written briefs and oral argument by counsel,” but “only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal.”³⁴² The Court found that there was enough of a difference between an “ex parte examination of the record”³⁴³ by a judge and the advocacy that counsel could provide that the failure to appoint counsel was a violation of the Fourteenth Amendment’s Equal Protection Clause.

The Supreme Court came to a similar conclusion regarding a judge’s ability to be an advocate for a defendant during trial in *Powell v. Alabama*.³⁴⁴ The Court noted that a judge “can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly,” but a judge “cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.”³⁴⁵ The Court reached the same conclusion in *Carnley v. Cochran*³⁴⁶ when it ruled that “the trial judge could not effectively discharge the roles of both judge and defense counsel.”³⁴⁷

The criminal defense bar also recognizes the critical role that counsel plays at the initial appearance where a judicial officer sets bail.³⁴⁸ The National Association of Criminal Defense Lawyers has adopted a resolution calling for “counsel at the first appearance before a judicial officer at which liberty is at stake or at which a plea of guilty to any

340. *Id.* at 355.

341. *Id.* at 355–56.

342. *Id.* at 356.

343. *Id.* (emphasis omitted).

344. 287 U.S. 45, 61 (1932).

345. *Id.*

346. 369 U.S. 506 (1962).

347. *Id.* at 510.

348. See Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys’ Perspectives*, 32 PACE L. REV. 800, 801 (2012).

criminal charge may be entered.”³⁴⁹ The Oregon Office of Public Defense Services recommends that defense providers “should ensure that an attorney is present at the first appearance in court of any person who may be entitled to representation by appointed counsel at state expense, including the initial arraignment in criminal cases.”³⁵⁰

The Kentucky Department of Public Advocacy produced a ninety-four-page *Pretrial Release Manual*³⁵¹ to assist assigned counsel in litigating issues surrounding pretrial release. The Colorado State Public Defender also publishes a seventy-eight-page *Bail Book*³⁵² for identical reasons. In addition, empirical data also shows that representation at a bail hearing makes a substantial difference in judicial outcomes.³⁵³

349. *Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers on Right to Counsel at Initial Appearance Before a Judicial Officer at Which Liberty Is at Stake or at Which a Plea of Guilty to Any Criminal Charge May Be Entered*, NAT’L ASS’N CRIM. DEF. LAWS (Feb. 19, 2012), <http://www.nacdl.org/resolutions/2012mm1/>. *But see Criminal Justice Section Standards: Pretrial Release*, *supra* note 249 (stating at the first appearance, the judicial officer should inform a defendant that the defendant “has a right to counsel in future proceedings, and that if the defendant cannot afford a lawyer, one will be appointed”).

350. STATE OF OR., OFFICE OF PUB. DEF. SERVS., BEST PRACTICES FOR OREGON PUBLIC DEFENSE PROVIDERS 12 (2010), <https://www.oregon.gov/OPDS/docs/Reports/BestPracticesMarch2010Revision.pdf>. *But see* N.C. COMM’N ON INDIGENT DEF. SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL 4 (2004), <http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf> (advising attorneys that “[a]s soon as possible after appointment, where the client has not been able to obtain pretrial release, counsel should consider filing a motion to reduce bond or otherwise modify any pretrial release conditions that were set by the magistrate or other judicial official at the client’s initial appearance”); N.D. COMM’N ON LEGAL COUNSEL FOR INDIGENTS, MINIMUM ATTORNEY PERFORMANCE STANDARDS: CRIMINAL MATTERS § 6.1 (2004), <http://www.nd.gov/indigents/docs/performanceStandardsCriminal.pdf> (stating that “counsel should meet with incarcerated clients within 24 hours after assignment to the case”); STATE BAR OF TEX., PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION 3 (2011), <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=29497> (stating that “if the client is in custody, the initial interview should take place within three business days after counsel receives notice of assignment to the client’s case”).

351. KY. DEP’T OF PUB. ADVOCACY, KENTUCKY PRETRIAL RELEASE MANUAL (2013), <https://www.pretrial.org/download/advocacy/Kentucky%20Pretrial%20Release%20Manual%20-%20Kentucky%20Dept.%20of%20Public%20Advocacy%202013.pdf>.

352. COLO. CRIM. DEF. INST. ET AL., THE COLORADO BAIL BOOK: A DEFENSE PRACTITIONER’S GUIDE TO ADULT PRETRIAL RELEASE (2015), https://www.bja.gov/Publications/Colorado_Bail_Book_Pretrial_Release.pdf.

353. THE CONST. PROJECT NAT’L RIGHT TO COUNSEL COMM., DON’T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 32–36 (2015), http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf (discussing studies done by the Manhattan Bail Project in New York City, the National Institute of Justice in Passaic, New Jersey, Shelby County, Tennessee, and Palm Beach, Florida, and the Baltimore City Lawyers at Bail Project in Baltimore Maryland).

B. *The Nature of Pretrial Detention*

The Supreme Court recognizes “a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.”³⁵⁴ The Court has regarded pretrial detention as regulatory and not penal.³⁵⁵ In reaching that conclusion, the Court has looked at the legislative intent behind statutes that authorize pretrial detention and concluded that pretrial detention is designed to ensure a defendant’s appearance in court, safeguard the judicial process, and ensure community safety.³⁵⁶

That being said, the Court has also warned that “the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment.”³⁵⁷ Even assuming that pretrial restrictions on a defendant’s liberty serve legitimate regulatory purposes, it is still necessary to determine whether those restrictions are reasonably tailored to achieve those purposes.³⁵⁸

When making a determination whether a statute is penal or regulatory, in addition to looking at legislative intent, the Court has also identified a number of factors that should be considered:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned³⁵⁹

Two factors justify a reevaluation of the character of pretrial detention at the state level: the effectiveness of alternative forms of monitoring to ensure a defendant’s return to court and the widespread passage of bail jumping statutes.

354. *Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

355. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

356. *Id.* at 747.

357. *Schall v. Martin*, 467 U.S. 253, 269 (1984).

358. *Id.* (“Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement . . . are in fact compatible with those purposes.”).

359. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (footnotes omitted).

1. Prohibition on Excessiveness

Prior to the development of pretrial service programs, the pretrial detention of a defendant to ensure the defendant's return to court may have been the only reliable option available. However, there are now a wide range of options that could be used to ensure that the defendant returns to court.³⁶⁰ Pretrial service organizations can actively monitor defendants who are high risk and can use home confinement or GPS to monitor lower risk defendants.³⁶¹ Not all jurisdictions have invested in pretrial services or alternatives to incarceration, but that does not change the fact that they are available to them and are actually less costly than relying on pretrial incarceration.³⁶²

One of the factors to consider when evaluating whether restrictions on liberty are penal or regulatory is whether it appears excessive in light of the other options available. Considering the successful implementation of pretrial services programs and alternatives to incarceration at the federal level, the continued reliance on pretrial detention to ensure appearance in court at the state level seems excessive and therefore punitive.

2. Administrative Detention for Something That Is a Crime

Bail jumping statutes make the failure to appear in court a separate offense.³⁶³ A defendant who fails to appear runs the risk of being charged with a separate offense, one which she is very likely to be convicted of, even if she is acquitted of the underlying offense that gave rise to the charge of bail jumping. Bail jumping statutes have proliferated over the last fifty years and their existence raises questions about the nature of pretrial detention.³⁶⁴ If pretrial detention is seen as a means of ensuring a

360. SUBRAMANIAN ET AL., *supra* note 289, at 34 (“There are other options for the safe release of many more defendants either on their own recognizance or with the aid of special conditions and supervision. These options, deployed under the umbrella term of pretrial services, require jurisdictions to develop the capacity to conduct formal risk assessments, to speed the time from arrest to initial bail hearing, and to invest in pretrial supervision resources to enable the non-financial release of those deemed too high a risk for ROR.”).

361. See, e.g., *Pretrial Services*, ALACHUA CTY. [http://www.alachuacounty.us/Depts/Court Services/Pages/PretrialServices.aspx](http://www.alachuacounty.us/Depts/Court%20Services/Pages/PretrialServices.aspx) (last visited Mar. 16, 2017).

362. *Supervision Costs Significantly Less Than Incarceration in Federal System*, U.S. CTS. (July 18, 2013), <http://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system> (“Pretrial detention for a defendant was nearly 10 times more expensive than the cost of supervision of a defendant by a pretrial services officer in the federal system.”).

363. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1455–56 (2009).

364. *Id.* at 1457 (“Today, only four states do not separately penalize failure to appear: South Carolina, Pennsylvania, Michigan, and Indiana. Moreover, almost every jurisdiction has actively

defendant's appearance in court, the fact that failing to appear is itself a crime suggests that pretrial detention is penal since "the behavior to which it applies is already a crime."³⁶⁵

IV. FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE

In *Gideon v. Wainwright*, the Supreme Court noted that "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses."³⁶⁶ The fact that the wealthy have an absolute right to have counsel present at their initial appearance and the poor do not raises equal protection concerns. In addition, the continued reliance on financial securities when making pretrial release decisions means that the wealthy go free while the poor remain in jail.

A. Attachment and Appearance

The Court held in *Rothgery* that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."³⁶⁷ The Court explicitly did not rule on the issue of when a court had to appoint counsel for an indigent defendant.³⁶⁸ The Court has historically made a distinction between when the Sixth Amendment right to counsel "attaches" and when a court must actually provide counsel to a defendant.³⁶⁹ The statement by the Court that the Sixth Amendment right to counsel has "attached" is simply another way of saying that a criminal prosecution has begun.

The distinction the Court makes between the availability of counsel and the need for counsel is troubling. In effect, the Court is saying that a defendant has an absolute right to have an attorney appear at his initial appearance, if the defendant can afford to do so, since the Sixth

tinkered with their bail jumping provisions—thirty-five statutes were substantially amended within the past fifteen years, many multiple times." (footnote omitted).

365. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

366. 372 U.S. 335, 344 (1963).

367. *Rothgery v. Gillespie*, 554 U.S. 191, 213 (2008).

368. *Id.* ("Our holding is narrow. We do not decide whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this."); *see also id.* at 213–14 (Alito, J., concurring) ("I join the Court's opinion because I do not understand it to hold that a defendant is entitled to the assistance of appointed counsel as soon as his Sixth Amendment right attaches. As I interpret our precedents, the term 'attachment' signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel.").

369. *See supra* notes 255–56 and accompanying text.

Amendment right to counsel has "attached" once formal charges have been filed and his liberty is subject to restriction. At the same time, even though the right to counsel has "attached," the State is under no obligation to provide counsel to an indigent defendant at his initial appearance when his liberty is subject to restriction. In effect, the Court is sanctioning two justice systems: one for the wealthy and one for the poor.

B. *Fair Opportunity to Present a Defense*

The Supreme Court "has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."³⁷⁰ However, the equal protection afforded to indigent defendants under the Fourteenth Amendment is not without limits. In finding that indigent defendants have no right to counsel for a discretionary appeal, the Court observed "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant"³⁷¹ The Court has acknowledged the fact that an indigent defendant is "somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding."³⁷² The mere fact that the appointment of counsel for an indigent defendant would be beneficial does not mean that the Equal Protection Clause requires it.

There can be no doubt that the presence of counsel would be a benefit to indigent defendants during a bail hearing, but the question is whether the absence of counsel deprives an indigent defendant of a "fair opportunity to present his defense."³⁷³ The Court has held that "the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."³⁷⁴

370. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

371. *Ross v. Moffitt*, 417 U.S. 600, 616 (1974); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (stating that the Fourteenth Amendment "does not require absolute equality or precisely equal advantages"); *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) ("[The State is not required to] equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion.").

372. *Ross*, 417 U.S. at 616.

373. *Ake*, 470 U.S. at 76.

374. *Id.*; *see also Griffin*, 351 U.S. at 19 ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

The inability of indigent defendants to meaningfully participate in a bail hearing, a judicial proceeding where their liberty is at stake, renders counsel not just beneficial, but essential.³⁷⁵ Without counsel, from the perspective of most indigent defendants, the bail hearing is reduced to a “meaningless ritual.”³⁷⁶

C. Bail Schedules

Over fifty years ago the Supreme Court made it clear that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”³⁷⁷ The Court has also said that “the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale” and has held “that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.”³⁷⁸

When considering cases involving indigent defendants who were imprisoned because of their inability to pay a fine, the Court has found that it is a violation of the Equal Protection Clause to imprison an indigent defendant beyond the statutory maximum fixed by statute who is financially unable to pay a fine.³⁷⁹ The Equal Protection Clause also “prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.”³⁸⁰ Similarly, the Court has found that an indigent defendant’s probation may not be summarily terminated for a failure to pay a fine since “[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.”³⁸¹

The Supreme Court has not directly addressed the constitutionality of fixed-sum bail schedules. However, in *Stack v. Boyle*,³⁸² the Court required an individualized determination regarding appropriate conditions of pretrial release.³⁸³ With that in mind, the U.S. Court of

375. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.”).

376. *Douglas v. California*, 372 U.S. 353, 358 (1963).

377. *Griffin*, 351 U.S. at 19.

378. *Smith v. Bennett*, 365 U.S. 708, 709, 714 (1961).

379. *Williams v. Illinois*, 399 U.S. 235, 244 (1970).

380. *Tate v. Short*, 401 U.S. 395, 398 (1971) (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970)).

381. *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983).

382. 342 U.S. 1 (1951).

383. *Id.* at 5.

Appeals for the Fifth Circuit has noted that while the “[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meetings its requirements . . . incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.”³⁸⁴

The Department of Justice has taken the position that “any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the Fourteenth Amendment’s Equal Protection clause, but also constitutes bad public policy.”³⁸⁵ The American Bar Association has adopted the same position:

Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant’s ability to meet the financial conditions and the defendant’s flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge.³⁸⁶

The setting of bail on an arrest warrant raises the same concerns associated with the use of bail schedules. A judicial officer who affixes an amount of bail to an arrest warrant does so upon a finding that there is probable cause to arrest but without any specific information regarding the defendant.³⁸⁷ In effect, the judicial officer is setting bail based solely on the offense charged without regard to the financial resources of the defendant.

CONCLUSION

Over the past three decades, the number of annual admissions to local jails nearly doubled, from 6 million in 1983 to 11.7 million in 2013.³⁸⁸ The Bureau of Justice Statistics estimates that 744,600 people were confined in county and city jails at midyear 2014, and 62% of those confined, 467,500 people, were not convicted.³⁸⁹ The costs associated with pretrial incarceration are enormous; one estimate is that states spent

384. *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (footnote omitted).

385. Statement of Interest of the United States at 1, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015) (No. 26), <http://www.justice.gov/crt/file/761266/download>.

386. *Criminal Justice Section Standards: Pretrial Release*, *supra* note 249.

387. *See supra* Subsection I.B.4.

388. SUBRAMANIAN ET AL., *supra* note 288, at 7.

389. TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014, at 1, 3 (2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf>.

\$17 billion on pretrial detention in 2012.³⁹⁰ The impact that pretrial incarceration has on a defendant is obvious: “The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.”³⁹¹

Despite the enormous costs associated with pretrial detention, states have failed to adopt the reforms instituted fifty years ago at the federal level. Predictive determinations regarding guilt, an overemphasis on the potential dangerousness of defendants, a lack of adequate pretrial services, and continued reliance on financial securities still characterize state systems.

During that same time, the Supreme Court has done little to ensure that the constitutional rights of indigent criminal defendants are protected when they appear for the first time before a judicial officer that has the power to restrict their liberty, despite the fact that the setting of bail implicates an indigent defendant’s right to counsel under the Sixth Amendment and the right to due process and equal protection under the Fourteenth Amendment. The Court has never found the setting of bail to be a critical stage of the proceedings that would require the presence of counsel or discussed what procedural safeguards should be in place to protect the rights of indigent defendants. These failures may have contributed to the rising rates of pretrial incarceration.

It should come as no surprise that the constitutionality of state systems for setting bail have gone unchallenged for so long since the systems are designed to delay the appointment of counsel. As the Supreme Court has said, “[N]ew cases expose old infirmities which apathy or absence of challenge has permitted to stand.”³⁹²

The Court has acknowledged that the “extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself.”³⁹³ It is time for the Court to recognize that changing patterns of criminal procedure have made a defendant’s initial appearance a critical stage of the proceeding.

390. Christopher Ingraham, *Why We Spend Billions to Keep Half a Million Unconvicted People Behind Bars*, WASH. POST (June 11, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/06/11/why-we-spend-billions-to-keep-half-a-million-unconvicted-people-behind-bars/>.

391. *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972) (footnote omitted).

392. *Williams v. Illinois*, 399 U.S. 235, 245 (1970).

393. *United States v. Ash*, 413 U.S. 300, 310 (1973).

