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# Decriminalizing Non-Appearance in Washington State: The Problem and Solutions for Washington’s Bail Jumping Statute and Court Nonappearance

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“The missed court appearance is used to coerce guilty pleas from individuals who otherwise wish to contest the underlying charges.”<sup>1</sup>

## I. INTRODUCTION

Gary Baxter missed one of his many court dates. Upon realizing that he missed this pretrial hearing, Mr. Baxter immediately called his assigned public defender. Like many individuals in this situation, Mr. Baxter and his public defender quickly addressed his failure to appear (FTA) by quashing the FTA warrant and scheduling a new court date. Unfortunately, this was not the first time Mr. Baxter failed to appear at one of his court dates. He missed court once before, due to struggles with his mental illness. Despite his efforts to rectify this mistake, the State gave Mr. Baxter a choice—plead guilty to the charge of felony harassment or go to trial with two additional charges of felony bail jumping—charges the prosecutor could easily prove. Mr. Baxter decided to exercise his constitutional rights and proceeded to trial. The jury found Mr. Baxter not guilty of harassment, but his relief was

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<sup>1</sup> WDA Bail Jump Survey 7 (Oct 19, 2018) (unpublished informal survey) (on file with the Washington Defender Association and author).

immediately shattered when the jury found him guilty of two counts of bail jumping. The judge then sentenced Mr. Baxter to five years in prison for failure to appear to his court hearings. Mr. Baxter's incarceration resulted from the effects of his mental illness, coupled with an unfair prosecutorial tactic used to secure convictions. Had he not struggled with mental illness, Mr. Baxter would be free today.<sup>2</sup>

Criminal prosecution and punishment for failure to appear is a salient feature of the United States criminal legal system. Most people in the United States know that failing to attend criminal court proceedings will result in an arrest warrant and the possibility of bail revocation. Historically, the criminalization of nonappearance first appeared as a subset of contempt of authority.<sup>3</sup> The 1960s invigorated a bail reform movement, finding that there were two systems of justice: one for the rich who could afford to pay bail and one for the poor.<sup>4</sup> The bail reform movement gained steam with the founding of the Manhattan Bail Project, which conducted a study that found that defendants released on their own recognizance had a lower nonappearance rate than defendants being held under the traditional money bail system.<sup>5</sup> By 1966, these studies lead to major revisions to the Federal Bail Reform Act of 1954 that favored personal recognizance release over the previous bail– forfeiture structure.<sup>6</sup>

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<sup>2</sup> See The Real World Impact of Criminalizing Failure to Appear 1-2 (Oct. 30, 2018) (unpublished policy materials) (on file with the Washington Defender Association and author). Author has removed all names and identifying information to ensure privacy. Story based on reported case to the Washington Defender Association. Used with permission from the Washington Defender Association.

<sup>3</sup> Daniel Bernal, *Taking the Court to the People: Real World Solutions for Non-Appearance*, 59 ARIZ. L. REV. 547, 553 (2017); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L. J. 1435, 1455 (2009).

<sup>4</sup> Kurt X. Metzmeier, *Preventative Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada, and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 407 (1996).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 407-408.

Despite these victories, the Federal Bail Reform Act of 1966 also outlined penalties for failure to appear in federal prosecutions, though previously criminal punishment for missing court, or “jumping bail,” was rare and primarily occurred in contempt processes.<sup>7</sup> The revisions to the Bail Reform Act outlined penalties for failure to appear in federal prosecutions.<sup>8</sup> Under those revisions, those convicted of felonies would face a maximum five-year sentence and up to a \$5,000 fine, and those convicted of misdemeanors would face year in jail and a fine equivalent to the underlying charge for failing to appear to court.<sup>9</sup> Before the 1966 revisions, only seven states punished defendants for nonappearance.<sup>10</sup> By the 1984 Federal Bail Act, thirty-three states enacted similar provisions.<sup>11</sup> Now, almost every state criminalizes nonappearance.<sup>12</sup>

Washington State is included in this history. The Washington State legislature first conceptualized the idea of bail jumping in the 1970s when it revised its criminal code.<sup>13</sup> Washington State passed the first rendition of the bail jumping statute in 1975, then amended it in 1983, and again in 2001.<sup>14</sup> Criminally prosecuting people who “jump bail” is widely accepted, but ineffective in accomplishing its goal of deterring court nonappearance. In fact, data shows that while failure to appear convictions have risen, failure to appear rates have remained consistent.<sup>15</sup> The underlying assumption for

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<sup>7</sup> Murphy, *supra* note 3, at 1455-56.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1457; Ethan Corey & Puck Lo, *The ‘Failure to Appear’ Fallacy*, THE APPEAL (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy/?fbclid=IwAR0QarjDh8F8XgoWSB-I5IZC2SSPVeMB8eOEHPjK33LkuH858Z6dNJGYMPU> [<https://perma.cc/2VUW-SYU9>].

<sup>13</sup> LEGIS. COUNCIL’S JUDICIARY COMMITTEE, REV. WASH. CRIM. CODE, 329-331(1970).

<sup>14</sup> WASH. REV. CODE § 9A.76.170 (1975), amended by WASH. REV. CODE § 9A.76.170 (1983); WASH. REV. CODE § 9A.76.170 (1983), amended by WASH. REV. CODE § 9A.76.170 (2001).

<sup>15</sup> Murphy, *supra* note 3, at 1458.

criminalizing the act of nonappearance is that the threat of a criminal penalty will encourage defendants to come to court.<sup>16</sup> Bail jumping, however, is not the only penalty utilized when a defendant misses court. Upon failing to appear to a court proceeding, the judge can issue a FTA bench warrant which can lead to the defendant's arrest.<sup>17</sup> The defendant's failure to appear can lead to many consequences, including jeopardizing a defendant's ability for release on bail in the present case and in future cases, imposing fees such as warrant fees, and placing holds or suspending the defendant's license.<sup>18</sup> Missing from this conversation is why people miss court. People miss court for many reasons, such as lack of transportation, conflicting childcare duties, and the difficult choice between maintaining employment or going to court.<sup>19</sup> Missing court is often unintentional and not a representation of the defendant's view on the court's authority.<sup>20</sup>

While the United States is reconciling its practice of cash bail and its impact on mass incarceration, it must also examine bail jumping statutes that allow further prosecution and criminalization of low-income people and people of color. It is unduly punitive to criminally punish nonappearance with an additional criminal charge when a person's bail conditions are already affected by the failure to appear. The bail jumping charge is not an effective way to deter nonappearance; rather, it unfairly pressures defendants to enter plea bargains.<sup>21</sup> It has been a tool utilized to secure convictions rather than justice.<sup>22</sup> The Washington State legislature must decriminalize nonappearance by eliminating Washington's bail jumping statute.

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<sup>16</sup> LEGIS. COUNCIL'S JUDICIARY COMMITTEE, *supra* note 13, at 331.

<sup>17</sup> WASH. SUPER. CT. CRIM. R. 3.2(1)(1), WASH. SUPER. CT. CRIM. R. 3.4(c).

<sup>18</sup> WASH. REV. CODE 46.20.289 (2012); WASH. SUPER. CT. CRIM. R. 3.2(c); 12 ROYCE A. FERGUSON, JR., WASH. PRAC. & PROC. § 408 (3d ed. 2019).

<sup>19</sup> Alan Tomkins, Brian H. Bornstein, Mitchel Norman Herian, David I. Rosenbaum, & Elizabeth Neeley, *An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court*, 48 J. AM. JUDGES ASS'N. 96, 97 (2012)

<sup>20</sup> *Id.*

<sup>21</sup> *See infra* Section IV.

<sup>22</sup> *Id.*

Defendants already face punitive action for court nonappearance as FTA warrants impact a judge's decisions on bail imposition and revocation in the individual's present and future cases.<sup>23</sup> There are many changes that could reduce the unfair impact the bail jumping charge has on defendants, such as increasing the mental state requirements (*mens rea*) from knowingly to intentionally, reducing the charge to a misdemeanor, and allowing more defenses for defendants to fight the charge. However, eliminating the statute in its entirety best ensures the fair administration of justice, particularly for those most affected by the barriers to court appearance.

In addition to repealing the bail jumping statute, Washington courts should reconsider the practice of mandatory court appearances, outside the necessary stages of arraignment and trial. Judges and defense attorneys can help alleviate the burden of many court appearances on those who often lack the resources to attend court, by inquiring more thoroughly about the defendant's ability to attend court hearings and creating a more robust waiver of appearance practice. In addition, Washington should further invest in technology and community-based resources that are shown to be more effective in improving court appearance rates.<sup>24</sup> Integrating postcard and text-reminder and communication systems to remind defendants of their court dates, improving client-attorney communications, and creating more expansive options to reschedule court dates will help improve the efficiency of court dates and increase trust and confidence in the court system.<sup>25</sup> By utilizing technology shown to dramatically improve court appearance rates, nonappearance based criminal punishment would no longer be necessary. Further investing in community resources, such as Outreach Courts and

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<sup>23</sup> See *infra* Section V.C.1.

<sup>24</sup> See Jason Tashea, *Text-Message Reminders are a Cheap and Effective Way to Reduce Pretrial Detention* (July 17, 2018, 7:10 AM), [http://www.abajournal.com/lawscribbler/article/text\\_messages\\_can\\_keep\\_people\\_out\\_of\\_jail](http://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail) [https://perma.cc/R7WP-VG8Z].

<sup>25</sup> BRIAN H. BORNSTEIN, ALAN J. TOMKINS, & ELIZABETH M. NEELEY, REDUCING COURTS' FAILURE TO APPEAR RATE: A PROCEDURAL JUSTICE APPROACH 28 (2011).

daycare facilities will help dismantle the barriers to court appearance without relying on punishment.<sup>26</sup>

## II. ROADMAP

Section III of this article will first define and distinguish the legal terms of art “bail jumping” and “failure to appear.” This portion of the article will describe how the two terms of art apply to the criminalization of nonappearance. Section IV of this article will examine who is affected by the criminalization of nonappearance and the varying reasons as to why nonappearance occurs. This examination frames the article’s solution—the call to abolish the Washington State bail jumping statute and to encourage court appearance in different, more effective ways. Additionally, this portion of the article will highlight how particular demographics play a role in nonappearance issues.

Section V of this article will discuss the history of the Washington State bail jumping statute and describe how it is applied today. The article will further discuss what happens when a person misses court, how the statute works in practice, and the case law surrounding it. This portion of the article will highlight the implications of the bail jumping charge, including cost implications, the use of bail jumping in plea negotiations, the enhanced sentencing implications of a bail jumping conviction, and the collateral consequences of a bail jumping conviction or its use in coercing a guilty plea.

After describing how the bail jumping statute works, Section VI will propose solutions to the problems described. This article will argue for abolishing Washington’s criminalization of nonappearance, propose a more robust judicial and defense practice of waivers of appearances to court appearances where the defendant’s presence is not actually necessary, and explore how innovative reminder systems and other community-based programs dismantle the barriers to appearing in court. Section VII of this

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<sup>26</sup> See *infra* Section 0.0 and notes 267 & 272.

article will address the criticism's proposals, including arguments for public safety, deterrence, and already-existing rules in place against prosecutorial vindictiveness.

On March 18, 2020, Governor Jay Inslee signed Engrossed Substitute House Bill 2231 which significantly reforms the bail jumping statute. Section IX of this article will discuss the changes to the bail jumping statute. This article will conclude discussing further reforms to the new bail jumping statute and changes to decriminalize nonappearance in Washington State.

### III. DISTINGUISHING BAIL JUMPING AND FAILURE TO APPEAR

The terms "bail jumping" and "failure to appear" are often used interchangeably, but are distinguishable legal terms of art. The term "bail jumping" refers to the criminal charge of failing to appear to court and generally includes that:

[T]he defendant is released from custody or allowed to remain at liberty by court order, either upon bail or upon the defendant's own recognizance, upon the condition that the defendant will subsequently appear personally at a designated date, time and place, which the defendant fails to do, either personally or voluntarily, within a specified period of time after such time.<sup>27</sup>

The term "failure to appear" refers to the defendant's nonappearance, regardless of whether that person fled the jurisdiction to avoid prosecution or incarceration or missed court because of sickness, work conflict, lack of transportation, or other more common reasons.<sup>28</sup>

Failing to appear to court does not always result in the criminal charge of bail jumping for a variety of reasons. Bail jumping or failure to appear statutes vary from jurisdiction to jurisdiction and often limit bail jumping charges to specific underlying crimes. For example, the bail jumping statute might authorize the charge in felony and misdemeanor cases, but not in traffic

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<sup>27</sup> 8 C.J.S. Bail §136 (2018).

<sup>28</sup> Lauryn P. Gouldin, *Defining Flight Risk*, 85 UNIV. OF CHI. L. REV. 677, 720 (2018).

cases.<sup>29</sup> In addition, whether a person is charged often depends on the prosecutor’s discretion, policies, and practices. For example, the King County Prosecuting Attorney’s Office states in its charging manual that “[b]ail jumping should not be ordinarily filed when the defendant turned themselves in within six weeks of missing court AND did not commit any new offenses while on FTA status.”<sup>30</sup>

This article is about the consequences specific to the criminal charge “bail jumping” and criminal penalties related to nonappearance. The efficacy of FTA warrants, bail revocation, and pretrial condition consequences for failure to appear are outside the scope of this article. However, it will reference the issues of failure to appear consequences because of its overlap and the breadth of research on the issue of court nonappearance. There is limited research on failure to appear, and even less data on the charge of bail jumping because of the diversity between statutes and practices from state to state. Because of the overlapping issues and populations involved in court nonappearance, failure to appear research is an important part to understanding the implications of bail jumping charges and helps support solutions to prevent nonappearance, and thus the bail jump charge.<sup>31</sup>

#### IV. WHO MISSES COURT AND WHY

The approach on bail jumping and failure to appear for the last thirty years assumed that nonappearance or “jumping bail” rested purely on the defendant’s choice.<sup>32</sup> But people miss court for a variety of reasons having

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<sup>29</sup> See WASH. REV. CODE § 9A.76.170 (2001); LEGIS. COUNCIL’S JUDICIARY COMMITTEE, *supra* note 13, at 330-31.

<sup>30</sup> KING COUNTY PROSECUTING ATT’Y’S OFF. FILING AND DISPOSITION STANDARDS (2016) <https://www.kingcounty.gov/~media/depts/prosecutor/documents/2016/fads-may-2016.ashx?la=en> [<https://perma.cc/3NQ5-BT8F>].

<sup>31</sup> See Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neeley, Mitchel N Herian, & Joseph A. Hamm, *Reducing Courts’ Failure-to-appear Rate by Written Reminders*, 19 PSYCHOL. PUB. POL’Y & L. 70, 70 (2013).

<sup>32</sup> Samuel L. Myers, Jr., *The Economics of Bail Jumping*, 10 J. LEGAL STUD. 381, 382 (1981).

nothing to do with deliberately disobeying the court. Understanding the make-up of who fails to appear to court and why they fail to appear to court helps innovate solutions for encouraging appearance through means other than criminalization.

It is difficult to determine FTA rates due to varying definitions and measures among researchers.<sup>33</sup> The Bureau of Justice Statistics' report on Pretrial Release of Felony Defendants in State Courts found that state court felony defendants had a failure to appear rate between twenty-one percent and twenty-four percent from 1990 to 2004.<sup>34</sup> Prior research has shown that the national failure to appear rate has hovered around three percent and has stayed stable over time, despite rising conviction rates for failure to appear.<sup>35</sup> State failure to appear rates may be higher than the national failure to appear rate, at times rates up to twenty-four percent.<sup>36</sup> With a rate of pretrial nonappearance up to twenty-four percent, bail jumping has the ability to impact a large number of cases.

Some defendants willfully fail to appear to court, but many fail to appear not only because they fear the consequences of the legal proceedings but also because they are unable to obtain reliable transportation, have other competing responsibilities (such as work, care for child or another person), or are disorganized, including forgetting appointments or losing critical information (e.g., citation, contact, or location).<sup>37</sup> Factors associated with

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<sup>33</sup> Bernal, *supra* note 3 at 554.

<sup>34</sup> Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, NCJ 214994, *Pretrial Release of Felony Defendants in State Courts*, 8 (2007) <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/SB3R-SLK9>].

<sup>35</sup> Murphy, *supra* note 3, at 1459.

<sup>36</sup> *Id.* at 1460–61 (“One multi-city study sets the range as from 21 to 24% of released defendants. Another study of Lake County, Illinois reported that roughly 16% of released defendants under supervision failed to report for a court date, although that number fluctuated wildly – from as low as 5% in 1987 to a peak of 23% in 1995 and then back down to 14% in 2000.”).

<sup>37</sup> Tomkins et al., *supra* note 19, at 97; *see also* David I. Rosenbaum, Nicole Hutsell, Alan J. Tomkins, Brian H. Bornstein, Mitchel N. Herian, and Elizabeth M. Neely, *Court Date Reminder Postcards*, 95 JUDICATURE 177, 178 (2012).

failure to appear include gender, race, offense type, prior criminal history, living conditions, and employment.<sup>38</sup> A study on assessing race and gender-specific predictors of failure to appear found that “indigence had a positive significant impact on [failure to appear] (i.e., indigent defendants were more likely to FTA)” affecting all racial and gender groups’ likelihood of failure to appear.<sup>39</sup> One reason for the high correlation of nonappearance and indigency could be a lack of access to reliable transportation, though general lack of economic resources may account for the behavior of nonappearance.<sup>40</sup> In addition, those arrested for drug offenses had higher failure to appear rates.<sup>41</sup> Those struggling with mental health disorders or addiction could have a higher failure to appear rate because their addiction may impair their decision-making or physical ability to attend their scheduled court hearings.<sup>42</sup>

Research also suggests that people of color tend to have higher failure to appear rates.<sup>43</sup> The Bureau of Justice Statistics found that young male Black and Hispanic defendants are more likely to be charged with failure to appear related criminal charges.<sup>44</sup> The report found that 25% of Black and Hispanic defendants were charged with failure to appear compared to 19% of White defendants.<sup>45</sup> This correlation could be related to structural barriers

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<sup>38</sup> Haley R. Zettler & Robert G. Morris, *An Exploratory Assessment of Race and Gender-Specific Predictors of Failure to Appear in Court Among Defendants Released via a Pretrial Services Agency*, 40 CRIM. JUST. REV. 417, 418-419 (2015).

<sup>39</sup> *Id.* at 426.

<sup>40</sup> *Id.*; see also Elisabeth Winston Lambert, *A Way Out of the “Rotten Social Background” Stalemate: “Scarcity” and Stephen Morse’s Proposed Generic Partial Excuse*, 21 UNIV. OF PA. J. OF L. & SOC. CHANGE 298, 318-323 (2018) (explaining Sendhil Mullainathan and Eldar Shafir’s theory of scarcity and how poverty impacts people’s behavior and cognition).

<sup>41</sup> Brian Johnson, Christopher Kierkus & Christine Yalda, *Who Skips? An Analysis of Bail Bond Failure to Appear*, 9 J. APPLIED SEC. RES. 1, 12 (2014).

<sup>42</sup> *Id.*

<sup>43</sup> Zettler & Morris, *supra* note 38, at 419 (In summarizing the current literature, this article states that previous studies have found that Black and Hispanic defendants were more likely to FTA than their White counterparts and that females may be more likely to FTA than males in particular jurisdictions).

<sup>44</sup> COHEN & REAVES, *supra* note 34, at 8-9.

<sup>45</sup> *Id.*

associated with indigency and lack of trust and confidence in court institutions.<sup>46</sup> Trust and confidence, procedural justice perceptions, and levels of cynicism are significantly correlated with court appearances.<sup>47</sup> This study found that “Whites had more dispositional trust than non-whites, and Blacks had less trust in the courts than Whites and Hispanics.”<sup>48</sup> The various ways that the criminal legal system produces racial and class disparities and the lack of trust in the institution may explain the increased failure to appear charges against people of color.<sup>49</sup>

Stating that people miss court due to choice alone is hardly a convincing argument when many people targeted and affected by the criminal legal system are experiencing the symptoms of poverty, mental illness, addiction, or institutional racism.<sup>50</sup> It is likely that statutes criminalizing failure to appear most affect those who fail to appear struggling with poverty, addiction, and institutional racism as all of these groups are highly represented in the criminal legal system.

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<sup>46</sup> See BORNSTEIN, TOMKINS, & NEELEY, *supra* note 25, at 28.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *See id.*; *See also* Task Force on Race and the Criminal Justice System, *Preliminary Report on Race in Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 636-37 (2012) (“there is substantial evidence to support the notion that racial inequities do permeate the criminal justice system” in Washington State, including in prosecutorial charging and sentencing recommendations).

<sup>50</sup> *See* Task Force on Race and the Criminal Justice System, *supra* note 49, at 636-37 (“... there is substantial evidence to support the notion that racial inequities do permeate the criminal justice system” in Washington state, including in prosecutorial charging and sentencing recommendations.); *See also* Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Disparities in the United States Criminal Justice System, SENTENCING PROJECT (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/5R8D-6JM8>].

## V. BAIL JUMPING IN WASHINGTON STATE

To understand the consequences of the bail jumping statute in Washington State, it is necessary to first understand the statute's legislative history, its policy purposes, and its day-today implementations.

### A. *The History of the Bail Jumping Statute in Washington State*

Washington criminalizes a defendant's nonappearance to court through RCW 9A.76.170.<sup>51</sup> The idea of criminalizing failure to appear in Washington State began in 1970 with two purposes: "(1) to give added legal incentives to defendants not to fail to appear for their trials, and (2) to construct a criminal law framework for wider use of releases on personal recognizance."<sup>52</sup> Originally, the charge required that the failure to appear be intentional and

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<sup>51</sup> WASH. REV. CODE § 9A.76.170 (2001).

<sup>52</sup> LEGIS. COUNCIL'S JUDICIARY COMMITTEE, *supra* note 13, at 330-31. The proposed framework of the bail jumping statute provided a bail jumping in the first degree and in the second degree as follows:

#### 9A.76.140. Bail Jumping in the First Degree

(1) A person is guilty of bail jumping in the first degree if, having been released from custody by court order with or without bail, upon condition that he will subsequently appear at a specified time and place in connection with a charge of having committed any felony, he intentionally fails without lawful excuse to appear at such time and place.

(2) Bail jumping in the first degree is a third-degree felony.

#### 9A.76.150. Bail Jumping in the Second Degree

(1) A person is guilty of bail jumping in the second degree if having been released or excused from custody with or without bail by court order, summons, or citation, upon condition that he will subsequently appear at a specified time and place in connection with a charge of having committed any misdemeanor, or gross misdemeanor, he intentionally fails without lawful excuse to appear at such time and place.

(2) This section 9A.76.150 does not apply to a person released from custody that he will appear in connection with a charge of having committed a misdemeanor in violation of Title 46 of the Revised Code of Washington or in violation of any other traffic code: PROVIDED, that this subsection (2) does not apply to charges of negligent driving as defined by RCW 46.61.525.

(3) Bail jumping in the second degree is:

(a) A gross misdemeanor, if the offense is in connection with which the defendant fails to appear is a gross misdemeanor;

(b) A misdemeanor, if the offense is in connection with which the defendant fails to appear is a misdemeanor.

that the failure to appear be “without lawful excuse” as a catch-all.<sup>53</sup> Those developing the bail jumping framework believed that the bail jumping would provide greater incentives for defendants to appear for their trials than the current bail forfeiture system and saw it as an “adequate substitute for the money-bail system in instances where the court would prefer to use personal recognizance as a basis for release.”<sup>54</sup>

In 1975, the Washington State legislature adopted bail jumping into its criminal code.<sup>55</sup> The legislature adopted a different framework than the original proposal, though presumably with the same general purposes. The 1975 version of the bail jumping statute required that a defendant knowingly fail to appear without lawful excuse, unlike the intentional mental state in the proposed framework.<sup>56</sup> This version shifted the burden of proof of “lawful excuse” on the defense.<sup>57</sup> In contrast to its proposed framework, this rendition of bail jumping created a classification structure of bail jumping.<sup>58</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 331.

<sup>55</sup> WASH. REV. CODE § 9A.76.170 (1975), amended by WASH. REV. CODE § 9A.76.170(1983):

(1) Any person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state, and who knowingly fails without lawful excuse to appear as required is guilty of bail jumping. Unless otherwise established, the failure to appear when required shall be inferred to have been without lawful excuse.

(2) Bail jumping is:

(a) A Class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A Class B felony if the person was held for, charged with, or convicted of a class A felony;

(c) A Class C felony if the person was held for, charged with, or convicted of a Class B felony;

(d) A gross misdemeanor if the person was held for, charged with, or convicted of a Class C felony;

(e) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

In 1983, however, the Washington Supreme Court found the 1975 version of the statute deficient because the legislature did not provide a definition of lawful excuse, thus holding that the statute was unconstitutionally vague.<sup>59</sup> This decision prompted the state legislature to amend the statute. Rather than defining lawful excuse, the legislature omitted the lawful excuse framework entirely, leaving the mental state of knowingly intact.<sup>60</sup> In 2001, the statute effective today, added failure to report to serve a sentence as a qualifying situation for bail jump and added the affirmative defense of uncontrollable circumstances.<sup>61</sup> The 2001 amendment to bail jumping was passed with amendments to criminal statutes related to “escaping from custody,” perhaps indicating that its purpose is to target those who abscond from the administration of justice.<sup>62</sup> Washington courts interpret that the statute’s purpose is “to compel appearances at criminal hearings” and “not intended to add or diminish the punishment associated with the underlying offense.”<sup>63</sup> The meaning and intent of the bail jumping statute has evolved over time from its original intent to substitute a cash bail system and to target only those who intentionally fail to appear to a knowingly mental state and one affirmative defense of uncontrollable circumstances.<sup>64</sup>

### *B. Policy Implications*

As a policy, bail jumping is a process crime.<sup>65</sup> Process crimes are offenses that interfere with the procedures and administration of justice and are generally secondary to an underlying crime.<sup>66</sup> Process offenses combine notions of *malum in se*, or acts that are inherently immoral, and *malum*

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<sup>59</sup> *State v. Hilt*, 662 P.2d 52, 53 (Wash. 1983).

<sup>60</sup> WASH. REV. CODE § 9A.76.170 (1983), amended by WASH. REV. CODE § 9A.76.170 (2001).

<sup>61</sup> 13A SETH A. FINE, WASH. PRAC. § 1806 (3d ed. 2019).

<sup>62</sup> Wash. S. B. Rep., H.B. 1227, 57th Leg., 1st Reg. Session (2001).

<sup>63</sup> *State v. Coucil*, 210 P.3d 1058, 1061 (Wash. Ct. App. 2009).

<sup>64</sup> LEGIS. COUNCIL’S JUDICIARY COMMITTEE, *supra* note 13, at 329-31.

<sup>65</sup> *Murphy*, *supra* note 3, at 1454-55.

<sup>66</sup> *Id.* at 1439-40.

prohibitum, or an act that is a crime only because it is against the law.<sup>67</sup> Thus, process crimes, such as bail jumping, aim to uphold society's "collective interest in the integrity of the system of governance."<sup>68</sup> Though upholding the integrity of the administration of justice is a legitimate goal, the application of pretextual prosecution to punish offenders of process crimes distorts this legitimate goal.<sup>69</sup>

Pretextual prosecution refers to prosecutorial tactics that target defendants based on one crime but prosecute the defendant for another crime and are a direct result of prosecutorial charging discretion.<sup>70</sup> There are a number of reasons why pretextual prosecutions are attached to process offenses, such as bail jumping. First, process offenses carry legitimacy, meaning that the public generally agrees that the process crime conduct should be outlawed.<sup>71</sup> Second, process offenses usually carry significant sanctions, most commonly high sentencing ranges and stigma.<sup>72</sup> Third, the government helps produce the evidence to prove the crime, such as the court record or the court clerk's minutes.<sup>73</sup> Fourth, the process crime is a secondary charge to an underlying crime.<sup>74</sup> Finally and importantly, process crimes are easy to prove and very difficult to defend.<sup>75</sup> One identified motivation for pretextual prosecutions is to secure convictions "against simply defiant or insubordinate individuals — not because their actions actually threaten the integrity of judicial processes, or because they are otherwise difficult to convict, but solely because their acts constitute an affront to the formal dignity or authority of the State."<sup>76</sup>

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<sup>67</sup> *Id.* at 1441; *Malum in se*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Malum prohibitum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>68</sup> Murphy, *supra* note 3, at 1441.

<sup>69</sup> *Id.* at 1441-42.

<sup>70</sup> *Id.* at 1442.

<sup>71</sup> *Id.* at 1443-44.

<sup>72</sup> *Id.* at 1444.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1445.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1446.

Bail jumping, not only in Washington State but across the country, fits under all of the process crimes goals. Society wants defendants to appear in court. Bail jumping often carries significant sentencing ramifications for the defendant.<sup>77</sup> Most often, the prosecution's evidence to prove bail jumping is merely the court record, court clerk, or court documents.<sup>78</sup> The State can only charge bail jumping against a defendant if they are "held for, charged with, or convicted" of a crime and is secondary to an underlying offense.<sup>79</sup> Based on the elements and evidence available, it is very easy for the prosecution to prove that a defendant knowingly failed to appear to court. Additionally, the affirmative defense of uncontrollable circumstances is difficult to prove and, often, unsuccessful in gaining acquittals.<sup>80</sup>

Bail jumping prosecution is wholly inconsistent with the reasons that people actually miss court and produce coercive and unjust results. As noted in Section IV of this article, many individuals miss court because of issues related to poverty, such as lack of transportation or child care, mental illness, or drug addiction.<sup>81</sup> Further punitive measures for failure to appear increases distrust in the courts and does not proactively resolve why people miss court.<sup>82</sup>

### C. *How Bail Jumping Works*

It is important to understand how failure to appear and the bail jumping statute procedurally works in order to understand the implications of a bail jumping charge and conviction. This section will discuss what happens when an individual misses court, the elements of the bail jumping charge, the

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<sup>77</sup> See *infra* Sections 0.0.0, 0.0.0.

<sup>78</sup> See *State v. Hart*, 381 P.3d 142, 147 (Wash. Ct. App. 2016); *State v. Boyd*, 308 P.3d 362, 370–71 (Wash. Ct. App. 2017).

<sup>79</sup> WASH. REV. CODE. § 9A.76.170(3) (2001).

<sup>80</sup> See *infra* Section 0.0.0.

<sup>81</sup> See *supra* Section IV.

<sup>82</sup> Bornstein et al., *supra* note 31, at 76.

affirmative defenses available to those charged, and the sentencing consequences upon conviction.

## 1. What Happens When a Defendant Misses Court

Understanding the procedure when a defendant misses a court date is pivotal in understanding the issues surrounding the bail jumping statute. A defendant's presence is required at the arraignment, at every stage of the trial, at the imposition of sentence, and any other hearing the court deems necessary.<sup>83</sup> At the preliminary appearance, the court will order the defendant's release on personal recognizance, unless the court determines that release will not reasonably assure the defendant's appearance or if it is shown that there is a likely danger that the defendant will pose a risk to commit a subsequent violent crime or intimidate witnesses.<sup>84</sup> If there is a showing that there is a likely risk of failure to appear upon release, the court may place the defendant on pretrial supervision and set bail.<sup>85</sup> The court will consider a number of circumstances when determining conditions of release that will reasonably assure the defendant's appearance.<sup>86</sup>

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<sup>83</sup> WASH. SUPER. CT. CRIM. R. 3.4. It is important to note that a defendant also has the constitutional right, through the Sixth Amendment's Confrontation Clause and Fourteenth Amendment's Due Process Clause, to be present at trial and at any stage of a criminal proceeding that is critical to the outcome if the defendant's presence would contribute to the fairness of the procedure. *See Illinois v. Allen*, 397 U.S. 337, 338 (1970); *see also Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). The author does not advocate that a court can proceed in the defendant's absence at a critical hearing or trial in violation of these constitutional rights, rather, that the numerous pretrial case setting hearings may be onerous on defendants, particularly those with limited means and resources.

<sup>84</sup> WASH. SUPER. CT. CRIM. R. 3.2(a).

<sup>85</sup> WASH. SUPER. CT. CRIM. R. 3.2(b).

<sup>86</sup> WASH. SUPER. CT. CRIM. R. 3.2(c); 12 WASH. PRAC., *Criminal Practice & Procedure* § 408 (3d ed. 2019), (The court considers circumstances including but not limited to: length and character of residence in the community, employment status, history, and financial conditions, family ties and relationships, reputation, character, and mental condition, history with the legal process, including prior instances of nonappearance, and prior criminal record, the nature of the charge, and past record of threatening victims or witnesses or interference with the administration of justice.).

Upon missing a court proceeding where the defendant’s personal appearance is necessary, the court may order the defendant to appear by issuing a bench warrant, otherwise known as an FTA warrant.<sup>87</sup> Once the defendant is apprehended, surrenders to law enforcement authorities, or appears on a quash docket, the court will hold a hearing to review the conditions of release and may revoke the defendant’s release and order forfeiture of the bond.<sup>88</sup> If the failure to appear is proved by clear and convincing evidence, the court may revoke the defendant’s release.<sup>89</sup> Alternatively, the court may decide to impose or maintain bail or amend the defendant’s conditions of release.<sup>90</sup> Additionally, the court may punish a person for willful disobedience to the lawful process of mandate of a court through contempt procedures.<sup>91</sup> Penalties for bail jumping do not dilute the court’s power to exercise contempt sanctions.<sup>92</sup>

## 2. The Elements

In addition to any court-imposed penalties for failure to appear, the State may prosecute the defendant for bail jumping.<sup>93</sup> In order to convict a person of bail jumping, “The State must prove beyond a reasonable doubt that the defendant ‘(1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with the requirement of subsequent personal appearance; and (3) knowingly failed to appear as required.’”<sup>94</sup>

First, the statute requires that a defendant be held for, charged with, or convicted of a particular underlying crime.<sup>95</sup> The Court of Appeals held that

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<sup>87</sup> WASH. SUPER. CT. CRIM. R. 3.2 (l)(1), WASH. SUPER. CT. CRIM. R. 3.4.

<sup>88</sup> WASH. SUPER. CT. CRIM. R. 3.2 (k), WASH. SUPER. CT. CRIM. R. 3.2(j)(2).

<sup>89</sup> WASH. SUPER. CT. CRIM. R. 3.2(k)(2).

<sup>90</sup> WASH. SUPER. CT. CRIM. R. 3.2 (j)(2).

<sup>91</sup> 12 ROYCE A. FERGUSON, JR., WASH. PRAC. § 411 (3d ed. 2019).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Hart*, 381 P.3d at 146 (citing *State v. Williams*, 170 P.3d 30, 33 (Wash. 2007)).

<sup>95</sup> WASH. REV. CODE § 9A.76.170(3) (2001).

a person can be charged with bail jumping “while being simply held for a crime (i.e., prior to arraignment), while charged with a crime (i.e., following arraignment, but prior to trial), or while convicted of a crime (i.e., following trial).”<sup>96</sup> Because of this holding, even if the underlying crime results in a dismissal or acquittal, the defendant can still be charged, prosecuted, and convicted of a bail jumping charge.<sup>97</sup> Further, the classification of the bail jumping charge, in other words the level or class of felony or misdemeanor, is determined when the failure to appear occurs.<sup>98</sup> Even if the underlying crime is reduced from a felony charge to a misdemeanor charge, the bail jumping classification stays the same.<sup>99</sup> In *State v. Williams*, the Washington Supreme Court held that the classification of the bail jumping charge is not an element of the crime and thus does not need to be included in the to-convict jury instruction.<sup>100</sup>

Second, the defendant must have been released either by court order, otherwise referred to as personal recognizance, or by posting bail with a requirement of subsequent personal appearance.<sup>101</sup> Third, the person must knowingly fail to appear.<sup>102</sup> In order to prove that the defendant had knowledge of the court date, the State must prove that the defendant had been given notice of the court date.<sup>103</sup>

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<sup>96</sup> *Coucil*, 210 P.3d at 1060.

<sup>97</sup> WASH. REV. CODE § 9A.76.170(3) (2001); *State v. Downing*, 93 P.3d 900, 903–04 (Wash. Ct. App. 2004) (holding that this issue is sufficiently analogous to charges of escape, thus rejecting the argument that invalidity of the underlying conviction is a defense to the crime of bail jumping); *see also Williams*, 170 P.3d at 34, *State v. Gonzalez-Lopez*, 132 P.3d 1128, 1136 (Wash. Ct. App. 2006) (affirming bail jumping conviction where the defendant was acquitted of the underlying offense).

<sup>98</sup> *Coucil*, 210 P.3d at 1060.

<sup>99</sup> *Id.* (“Under the statute’s plain language, the seriousness of an incident of bail jumping is determined by the status of the underlying offense at the time that the offender jumps bail.”).

<sup>100</sup> *Williams*, 170 P.3d at 35.

<sup>101</sup> *Hart*, 381 P.3d at 146.

<sup>102</sup> *Id.*

<sup>103</sup> *State v. Carver*, 93 P.3d 947, 950 (Wash. Ct. App. 2004).

The prosecution can prove the elements of bail jumping with a few pieces of evidence to show that the defendant knew of the requirement to appear for a court date. The prosecution can show this through a court transcript or through a signed setting slip by the defendant.<sup>104</sup> The prosecution can also call the court clerk to testify to the defendant's nonappearance, admit a clerk's minute regarding the defendant's absence, and the issuance of a bench warrant.<sup>105</sup>

### 3. Affirmative Defenses

The bail jumping statute explicitly mentions the defense "uncontrollable circumstances."<sup>106</sup> The "uncontrollable circumstances" defense is defined as "an act of nature, such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts."<sup>107</sup> The Washington pattern jury instructions describe the defense as follows:

- (1) Uncontrollable circumstances prevented the defendant from [personally appearing in court] [or] [failing to surrender for service of sentence]; and
- (2) The defendant did not contribute to the creation of such circumstance in reckless disregard of the requirement to [appear] [or][surrender]; and
- (3) The defendant [appeared] [or] [surrendered] as soon as such circumstances ceased to exist.<sup>108</sup>

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<sup>104</sup> *Boyd*, 308 P.3d at 371.

<sup>105</sup> *Hart*, 381 P.3d at 145.

<sup>106</sup> WASH. REV. CODE § 9A.76.170(2) (2001).

<sup>107</sup> WASH. REV. CODE § 9A.76.101(4) (2013).

<sup>108</sup> 11 WASH. PRAC., PATTERN JURY INST. CRIM. WPIC 19.17 (4th ed. 2016) (bracketed phrases in original).

The defendant must prove this defense by a preponderance of the evidence.<sup>109</sup> The “uncontrollable circumstances” defense supplements the common law defense of necessity, but is much narrower than the general necessity defense.<sup>110</sup> In general, necessity “is available as a defense when the physical forces of nature or the pressure of circumstances cause the defendant to take unlawful action to avoid harm which social policy deems greater than the harm resulting from a violation of the law.”<sup>111</sup> While courts have not decided whether incarceration is an uncontrollable circumstance,<sup>112</sup> it is possible courts will consider failure to appear due to incarceration as a defendant’s contribution to a creation of a circumstance in reckless disregard for the requirement to appear or surrender.<sup>113</sup>

As such, an “uncontrollable circumstances” defense is difficult to employ against an easily proved charge and does not acknowledge the many reasons why people miss court. For example, courts have rejected this defense when the defendant cannot show proof of hospitalization.<sup>114</sup> Uncontrollable circumstances only contemplates serious events that obstruct a person’s ability to appear in court rather than the usual reasons such as sickness, lack of transportation, or childcare.

Other defenses have been unsuccessful in the courts. For example, in *State v. Carver*, the Court of Appeals held that the defendant’s claim that he forgot about his court appearance was not a defense and the prosecutor did not commit prosecutorial misconduct by telling the jury during closing arguments that forgetfulness was not a defense.<sup>115</sup> In addition, because principles of the necessity defense underlie the “uncontrollable

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; see also *State v. White*, 152 P.3d 354, 366 (Wash. Ct. App. 2007); WASH. REV. CODE § 9A.76.101(4) (2013).

<sup>111</sup> *State v. Diana*, 604 P.2d 1312, 1316 (Wash. Ct. App. 1979).

<sup>112</sup> See *State v. O’Brien*, 267 P.3d 422, 426 (Wash. Ct. App. 2011).

<sup>113</sup> See Wash. S. B. Rep, H.B. 1227, 57th Leg., 1st Reg. Session (2001); See also 11 WASH. PRAC., PATTERN JURY INST. CRIM. WPIC 19.17 (4th ed. 2016).

<sup>114</sup> *State v. Fredrick*, 97 P.3d 47, 49 (Wash. Ct. App. 2004).

<sup>115</sup> *Carver*, 93 P.3d at 950.

circumstances” defense, a defendant is not entitled to the general necessity defense jury instructions.<sup>116</sup> This conclusion is problematic because the courts have been unwilling to accept other defenses that acknowledge the many reasons why people miss court. Thus, the jury is unable to seriously consider evidence or arguments that address the reason the person missed court.

#### 4. Sentencing Consequences

Bail jumping, like other process crimes, has serious sentencing implications.<sup>117</sup> Washington utilizes a determinant sentencing grid for most felony crimes.<sup>118</sup> The relevant portion of the sentencing grid is represented in Table 1.

**Table 1. Bail Jump Classifications with the Relevant Adult Felony Sentencing Grid.**<sup>119</sup>

Bail Jump Classification	SERIOUS LEVEL	OFFENSE SCORE				
		0	1	2	3	4
Class A <sup>120</sup>	VI	13m 12+–14	18m 15–20	2y 21–27	2y 6m 26–34	3y 31–41
Class B <sup>121</sup>	V	9m 6–12	13m 12+–14	15m 13–17	18m 15–20	2y 2m 22–29

<sup>116</sup>White, 152 P.3d at 365.

<sup>117</sup>Murphy, *supra* note 3, at 1444.

<sup>118</sup>DEPT. OF CORRECTIONS WASH. ST. (last visited Nov. 20, 2018), <https://www.doc.wa.gov/corrections/justice/sentencing/default.htm> [<https://perma.cc/2DB3-EG45>].

<sup>119</sup>See WASH. REV. CODE § 9.94A.510 (2018).

<sup>120</sup>WASH. REV. CODE § 9A.76.170(3)(a) (2001), WASH. REV. CODE § 9.94A.515 (2018) (providing that bail jumping is a class A felony when the underlying charge is murder in the first degree).

<sup>121</sup>WASH. REV. CODE § 9A.76.170(3)(b) (2001), WASH. REV. CODE § 9.94A.515 (2018) (providing that bail jumping is a class B felony when the underlying charge is a class A felony that is not murder in the first degree).

Class C <sup>122</sup>	III	2m 1–3	5m 3–8	8m 4–12	11m 9–12	14m 12 +–16
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Bail Jump Classification	SERIOUS LEVEL	OFFENSE SCORE				
		5	6	7	8	9 or more
Class A	VI	3y 6m 36–48	4y 6m 46–61	5y 5m 57–75	6y 6m 67–89	7y 6m 77–102
Class B	V	3y 2m 33–43	4y 41–54	5y 51–68	6y 62–82	7y 72–96
Class C	III	20m 17–22	2y 2m 22–29	3y 2m 33–43	4y 2m 43–57	5y 51–68

Table 1 shows the relevant part of the Washington felony sentencing grid with the matching bail jumping charge and serious level.

Washington determines sentencing ranges based on the seriousness of the charge, categorized in “Serious Level,” and the defendant’s determined offense score.<sup>123</sup> The judge calculates the defendant’s offense score by designating points for previous adult felonies, certain previous juvenile dispositions, current offenses, the defendant’s status at the time the offense was committed, and other statutory enhancements.<sup>124</sup> The Washington Caseload Forecast Council publishes annual sentencing statistical summaries of adult felonies that reports the number and average sentences associated with all felonies, including bail jumping.<sup>125</sup>

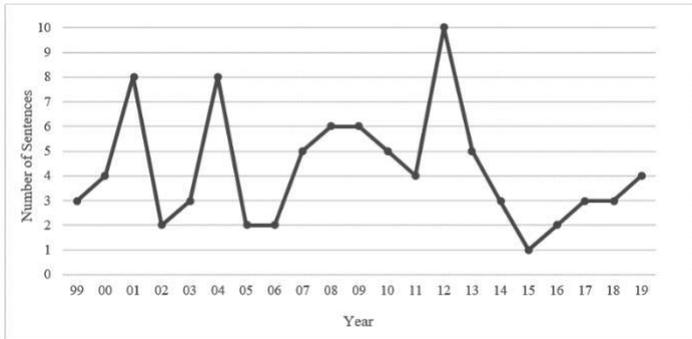
<sup>122</sup>WASH. REV. CODE § 9A.76.170(3)(c) (2001), WASH. REV. CODE § 9.94A.515 (2018) (providing that bail jumping is a class C felony when the underlying charge is a class B or C felony).

<sup>123</sup>See WASH. REV. CODE § 9.94A.520 (2018); WASH. REV. CODE § 9.94A.515 (2018); WASH. REV. CODE § 9.94A.525 (2017).

<sup>124</sup>WASH. REV. CODE § 9.94A.525 (2017); see also WASH. ST. CASELOAD FORECAST COUNCIL, WASH. ST. ADULT SENT’G GUIDELINES MANUAL 293–295 (2017), [https://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult\\_Sentencing\\_Manual\\_2017.pdf](https://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2017.pdf) [<https://perma.cc/UN89-4V3J>].

<sup>125</sup>WASH. ST. SENT’G GUIDELINES COMM’N, <https://sgc.wa.gov/sentencing-guidelines-commission> (last visited Apr. 3, 2019) [<https://perma.cc/S492-6RL5>]; WASH. ST.

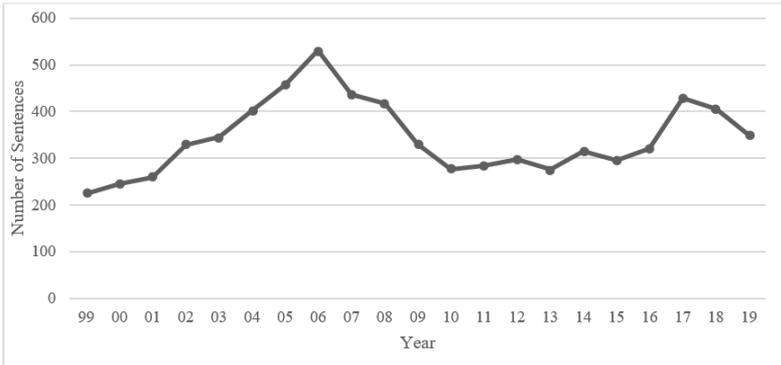
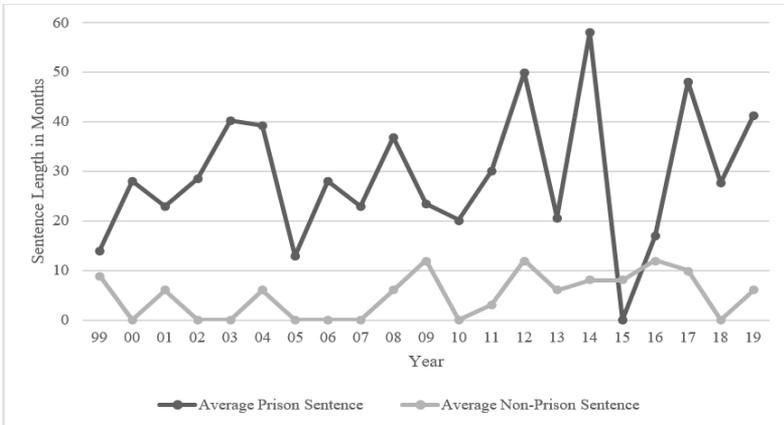
**Chart 1. Annual Number of Class B Felony Bail Jumping Sentences<sup>126</sup>**

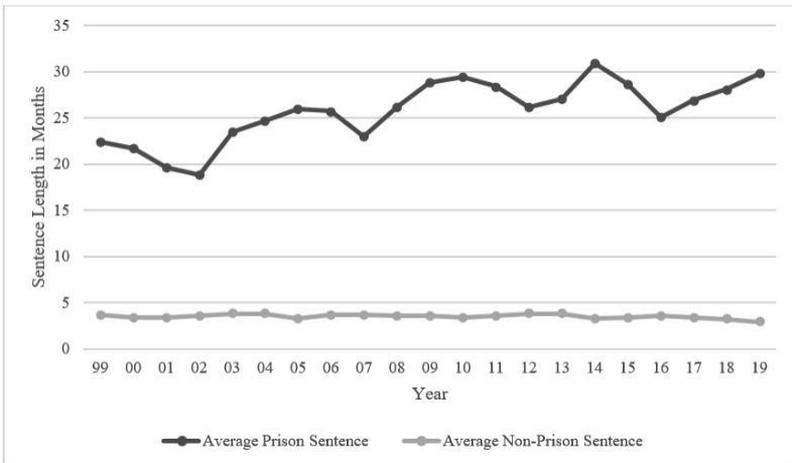


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CASELOAD FORECAST COUNCIL, <https://www.cfc.wa.gov/default.htm> (last visited Apr. 3, 2019) [<https://perma.cc/PAC2-NA85>].

<sup>126</sup>WASH. ST. CASELOAD FORECAST COUNCIL, CRIM. JUST. PUBLICATIONS (last visited Apr. 3, 2018), <https://www.cfc.wa.gov/Publications.htm> [<https://perma.cc/2LSA-P37P>] (this chart is a compilation of all the reports filed under the Criminal Justice Publications); Aleksandra Johnson, Compilation of the Washington State Caseload Forecast Statistical Summary of Adult Felony Sentencing Fiscal Years 1999-2019 Regarding Bail Jumping (Apr. 18, 2020) (unpublished data compilation) (on file with author).

**Chart 2. Annual Number of Class C Felony Bail Jumping Sentences**<sup>127</sup>**Chart 3. Class B Felony Bail Jumping Average Sentence Length**<sup>128</sup><sup>127</sup>WASH. ST. CASELOAD FORECAST COUNCIL, *supra* note 126; Johnson, *supra* note 126, at 1-2.<sup>128</sup>WASH. ST. CASELOAD FORECAST COUNCIL, *supra* note 126; Johnson, *supra* note 126, at 1-2.

**Chart 4. Class C Felony Bail Jumping Average Sentence Length<sup>129</sup>**

Out of the 24,257 felony sentences imposed in the 2019 fiscal year, there were four Class B felony bail jumping sentences imposed and 305 Class C felony bail jumping sentences imposed, as illustrated in Charts 1 and 2.<sup>130</sup> The average sentence for the four class B felonies, as shown in Chart 3, was 41.3 months in prison.<sup>131</sup> Sentences for Class C felony bail jumping, as shown in Chart 4, included 124 prison sentences with an average of 29.8 months and 226 non-prison sentences, including jail sentences, for 2.9 months.<sup>132</sup> A review of all publications shows that there have been no convictions for a class A bail jumping felony.<sup>133</sup> In misdemeanor bail jumping charges, the

<sup>129</sup> WASH. ST. CASELOAD FORECAST COUNCIL, *supra* note 126; Johnson, *supra* note 126, at 1-2.

<sup>130</sup> WASH. ST. CASELOAD FORECAST COUNCIL, STAT. SUMMARY OF ADULT FELONY SENT'G FISCAL YEAR 2019, vii, 14 (2019) [https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult\\_Stat\\_Sum\\_FY\\_2019.pdf](https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY_2019.pdf) [<https://perma.cc/WM4V-8Y8C>].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See WASH. ST. CASELOAD FORECAST COUNCIL, *supra* note 126.

maximum penalty is ninety days in jail and up to a \$1,000 fine.<sup>134</sup> Finally, and importantly, a judge can hold the person charged with bail jumping in jail pretrial as a consequence of their failure to appear.<sup>135</sup>

#### *D. The Implications of a Bail Jumping Charge*

Bail jumping charges have many implications on the criminal legal system and the people charged. This section will discuss the consequences of a bail jumping charge and conviction, the effects on marginalized communities, and the way bail jumping impacts plea bargaining.

### **1. Consequences of a Bail Jumping Charge and Conviction**

Failing to appear to court, and thereby obtaining an outstanding bench warrant, creates collateral consequences alone.<sup>136</sup> In addition to amplifying collateral consequences, a bail jumping charge and conviction can have devastating effects on sentencing, perceptions on a person's criminal history, and trust and confidence in the justice system.<sup>137</sup> First, the defendant can face increased sentencing implications on top of any pretrial sanctions.<sup>138</sup> It is also reasonable to expect that a person could be charged and convicted of bail jumping even if the judge declines to punish the defendant pretrial for their failure to appear.<sup>139</sup> This naturally can lead to confusion and lack of trust in the justice system.<sup>140</sup>

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<sup>134</sup> SNOHOMISH COUNTY PROSECUTING ATT'Y'S OFF., CHARGING AND DISPOSITION STANDARDS 150 (2014) <https://snohomishcountywa.gov/DocumentCenter/View/16794/Charging-and-Disposition-Standards—2014> [<https://perma.cc/8LUH-YUTG>].

<sup>135</sup> See WASH. SUPER. CT. CRIM. R. 3.2(k) (the court may revoke release and may order forfeiture of any bond if a violation to pretrial conditions is proved by clear and convincing evidence).

<sup>136</sup> Gouldin, *supra* note 28, at 694-95 (Defendants with outstanding warrants for failure to appear can cause difficulty in securing legitimate and stable employment, obtaining and maintaining a driver's license, obtaining public benefits, additional fines and fees.).

<sup>137</sup> See *supra* Sections IV & V.C.4; see also *infra* Section V.D.2.

<sup>138</sup> See *supra* Section V.C.1 & Section V.C.4.

<sup>139</sup> See *supra* Section V.C.1.

<sup>140</sup> See *supra* Sections IV & V.D.2.

Further, the additional bail jumping felony or misdemeanor record on a person's criminal history may affect their ability to obtain employment, housing, or other benefits. Bail jumping is often mistakenly perceived as a choice to deliberately disobey the court or avoid prosecution.<sup>141</sup> An employer with this perception could misunderstand that the failure to appear was instead a result of sickness, lack of transportation, or some other legitimate excuse that would not legally excuse the bail jumping charge in court.<sup>142</sup>

In effect, bail jumping doubly punishes a person for failing to appear in court regardless of the reason. Because failure to appear encompasses both people who abscond from prosecution and incarceration and those who miss court due to lack of resources, organization, or competing obligations, a person's record of bail jumping or failure to appear can cause further detention or punishment in future cases. For example, if someone misses their court appearance because they were hospitalized, a judge in a future prosecution will see the FTA on their record and take that into consideration to determine whether someone is a flight risk.<sup>143</sup> Judges report that one of the most important factors in pretrial release consideration is the number of past FTAs.<sup>144</sup> Defendants with even one FTA on their record could be denied release and bail, regardless of the reason why they failed to appear.<sup>145</sup> In Washington, as well as many other states, if a person is charged with bail jumping, the judge will see both a FTA and a bail jumping record.<sup>146</sup> This can lead to pretrial detention, or, if a person is released, more restrictive and expensive pretrial release conditions, such as travel restrictions or electronic monitoring.<sup>147</sup>

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<sup>141</sup> See *infra* Section 0.0.0.

<sup>142</sup> Myers, *supra* note 32, at 382.

<sup>143</sup> WASH. SUPER. CT. CRIM. R. 3.2(c); Corey & Lo, *supra* note 12.

<sup>144</sup> Corey & Lo, *supra* note 12.

<sup>145</sup> *Id.*

<sup>146</sup> WASH. SUPER. CT. CRIM. R. 3.2(c).

<sup>147</sup> WASH. SUPER. CT. CRIM. R. 3.2(b), Corey & Lo, *supra* note 12.

Communities that have higher rates of failure to appear warrants, charges, or convictions, particularly including people who are indigent, those who suffer from mental illness or addiction, or communities of color, are disproportionately affected by these collateral consequences. Because of “the overpolicing of communities of color . . . people from those communities are likelier to have prior convictions or past FTAs, which lead to high scores on pretrial risk algorithms.”<sup>148</sup> A bail jumping conviction coupled with previous FTAs, including the FTA that led to the bail jumping conviction, will be considered by the judge and possibly lead to further detention or pretrial restrictions that could hinder a person’s ability to assist in their own case, maintain employment, or provide for their family and community.<sup>149</sup>

A bail jumping conviction can also compromise a person’s immigration status. Under federal law, offenses relating to failure to appear for service of a sentence and to court is considered an aggravated felony.<sup>150</sup> Aggravated felonies carry the most severe immigration consequences of any category of crime.<sup>151</sup> Convictions of aggravated felonies prevent noncitizens from receiving relief that would spare them from deportation, including asylum, and from being readmitted to the United States in the future.<sup>152</sup> The definition of “aggravated felony” does not require the crime to be “aggravated” or a

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<sup>148</sup>Corey & Lo, *supra* note 12; *see also*, Madeleine Carlisle, *The Bail-Reform Tool that Activists Want Abolished*, ATLANTIC (Sep. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/09/the-bail-reform-tool-that-activists-want-abolished/570913/> [<https://perma.cc/43X3-G84G>] (“The number of times someone has been convicted of a crime, for example, or their failure to appear in court could both be affected by racial bias.”).

<sup>149</sup>*See supra* Section V.C.1.

<sup>150</sup>8 USC §1101(a)(43)(Q) (2014); 8 USC § 1101(a)(43)(T) (2014).

<sup>151</sup>*Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL 1 (Dec. 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated\\_felonies.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies.pdf) [<https://perma.cc/7ZTV-RMJU>].

<sup>152</sup>*Id.*; *see also* *Henriquez v. Sessions*, 890 F.3d 70, 74 (2018) (finding that New York’s version of the bail jumping statute constituted an aggravated felony and affirming the immigration judge’s decision that Mr. Henriquez was ineligible for cancellation of removal).

“felony” to qualify.<sup>153</sup> Under immigration law, Congress determines what constitutes an aggravated felony.<sup>154</sup> Today, “aggravated felonies” under immigration law include many nonviolent and minor offenses, such as failure to appear.<sup>155</sup>

The inclusion of bail jumping and failure to appear within the definition of “aggravated felony” in an immigration context poses significant problems for noncitizen individuals entangled in the criminal legal system by making them more vulnerable to the coercive effects of the charge and to removal and deportation proceedings, especially considering undocumented individuals’ fears of encountering Immigration and Customs Enforcement (ICE) agents in courthouses.<sup>156</sup> The threat of a bail jumping charge may thus force a noncitizen to enter into plea negotiations in an effort to avoid immigration consequences. Even worse, if the underlying charge is considered an aggravated felony and the noncitizen wishes to exercise their constitutional right to a trial, the noncitizen may face an additional bail jumping charge that is much more difficult to combat.<sup>157</sup> Immigration consequences for a bail jumping conviction as an aggravated felony include deportation, removal proceedings, detention, and a loss of defenses and waivers to prevent removal.<sup>158</sup>

Bail jumping charges and convictions lead to unduly punitive and duplicative consequences, especially to the most vulnerable and marginalized communities.<sup>159</sup> Despite the harsh consequences of a bail jumping conviction, formal charges and convictions are fairly rare.<sup>160</sup> The much more

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<sup>153</sup> AM. IMMIGR. COUNCIL, *supra* note 151, at 1.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See Ctr. for Hum. Rts., *Justice Compromised: Immigration Arrests at Washington State Courthouses*, UNIV. OF WASH. (Oct. 16, 2019) <https://jsis.washington.edu/humanrights/2019/10/16/ice-cbp-courthouse-arrests/> [<https://perma.cc/ZXT8-7TYN>].

<sup>157</sup> See discussion *supra* Section V.C.2.

<sup>158</sup> AM. IMMIGR. COUNCIL, *supra* note 151, at 2-3.

<sup>159</sup> See discussion *supra* Section IV.

<sup>160</sup> See *supra* text and graphs accompanying notes 117-135.

common and nefarious use of the bail jumping statute is its effects on plea bargaining.

## 2. Coercive Plea Bargaining

Besides the collateral consequences to a bail jumping conviction, the biggest problem with bail jumping is its susceptibility to coercive plea bargaining. Not unlike the rest of the United States, the criminal legal system in Washington State is, for the most part, a system of pleas, not a system of trials.<sup>161</sup> One key prosecutorial power is “the ability to control a defendant’s sentencing exposure by manipulating the charges against him.”<sup>162</sup> Charge bargaining is essentially an agreement to “replace a higher charge with a lower one in exchange for the defendant’s promise to plead guilty, which guarantees the prosecutor a conviction without the expense of a trial.”<sup>163</sup> While this sounds like a mutually beneficial bargain, most observers describe it as a coercive practice that produces involuntary pleas and, at times, to crimes that the defendant did not commit.<sup>164</sup> This system creates two problems: first, prosecutors hope to efficiently obtain their preferred sentence; and second, charge bargaining results in the prosecutor having overwhelming leverage and control over the defendant’s incentive to plead guilty.<sup>165</sup>

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<sup>161</sup> See generally *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”); see also *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (citing Dept. of Justice Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Table 5.22.2009: “Ninety–seven percent of federal convictions and ninety–four percent of state convictions are the result of guilty pleas.”); see also WASH. ST. CASELOAD FORECAST COUNCIL, *supra* note 130, at 32 (finding that in Washington State 95.5% of criminal cases were adjudicated through a guilty plea, 2.4% adjudicated through a jury trial, and 2.1% adjudicated through bench trial).

<sup>162</sup> Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1310 (2018).

<sup>163</sup> *Id.* at 1311.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1312.

Unfortunately, no data set can concretely represent how a statute, such as bail jumping, affects the plea-bargaining practice as all negotiations are behind closed doors. However, public defenders and criminal defense attorneys across the country acknowledge that bail jumping is often filed or threatened to secure convictions.<sup>166</sup> Wisconsin is one state that is contemplating the impacts of bail jumping charges on its residents.<sup>167</sup> Though Wisconsin has a different statutory scheme than Washington, analyzing its effects may be useful in contemplating how to reform the Washington bail jumping statute.<sup>168</sup> One attorney in Wisconsin noted that “[t]here are a lot of bail jumping charges issued in order to get an easy plea or secure a conviction in a case where [the prosecution is] less likely to get it.”<sup>169</sup> Another Wisconsin attorney notes, “prosecutors can use a felony bail charge as a hammer to coerce a defendant to accept a plea deal.”<sup>170</sup>

The Washington bail jumping statute produces the same result. In fact, the Snohomish County Prosecuting Attorney’s 2014 Charging and Disposition Standards state how bail jumping is encouraged to be used as a plea-bargaining tool:

It may be appropriate to decline to file bail jumping charges if the defendant enters a guilty plea to the underlying charge with an increased State’s sentencing recommendation. Likewise, bail jumping charges may be dismissed in return for a plea of guilty to the underlying charge if the defendant has not resisted return to this

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<sup>166</sup> See Murphy, *supra* note 3, at 1495-96; Gretchen Schuldt, *Felony bail jumping — common and unevenly applied*, WIS. JUST. INITIATIVE (last visited Nov. 20, 2018), <https://www.wjiinc.org/blog/felony-bail-jumping-common-and-unevenly-applied> [<https://perma.cc/4Z6V-WTH4>]; See also Amy Johnson, *The Use of Wisconsin’s Bail Jumping Statute: A Legal and Quantitative Analysis*, 2018 WIS. L. REV. 619, 654–55 (2018).

<sup>167</sup> See Johnson, *supra* note 166, at 655.

<sup>168</sup> See WIS. STAT. § 946.49 (2018), Johnson, *supra* note 166, at 654-55.

<sup>169</sup> *Id.* (citing *Plea Bargaining from the Criminal Lawyer’s Perspective: Plea Bargaining in Wisconsin*, 91 MARQ. L. REV. 357, 363 (2007)).

<sup>170</sup> Schuldt, *supra* note 166.

jurisdiction and no major costs have been incurred to obtain the defendant's return.<sup>171</sup>

In the fall of 2019, the Washington Defender Association (WDA) sent out a survey to its membership, the public, and contract defenders across the state of Washington, to get a glimpse of how bail jumping is being used particularly in plea negotiations.<sup>172</sup> There were 52 responses representing 21 out of the 39 counties in Washington State, including King, Skagit, Snohomish, Clark, Whatcom, and Spokane counties.<sup>173</sup> Survey participants indicated that in cases where their clients were formally charged with bail jumping, the case often resulted in a plea bargain.<sup>174</sup> The survey participants also indicated that prosecutors routinely threaten to file bail jumping charges and that the bail jump charge is a key charge that prosecutors use in plea negotiations.<sup>175</sup>

When asked what impact the charge bail jumping has on their clients, defenders indicated that the charge often prevents trials where there are good legal or factual reasons to go trial.<sup>176</sup> They also indicated that bail jump often has worse sentencing consequences for their client than the underlying charge that initially brought them to court.<sup>177</sup> Defenders say that their clients often feel helpless when they missed court for a good reason but are still

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<sup>171</sup> SNOHOMISH COUNTY PROSECUTING ATT'Y'S OFF., *supra* note 134, at 150.

<sup>172</sup> WDA Bail Jump Survey, *supra* note 1, at 1; *See also* WASH. DEFENDER ASS'N (last visited Mar. 31, 2019), <https://defensenet.org/> [<https://perma.cc/T4Y4-6E4M>]. The Washington Defender Association (WDA) is an organization that is a "voice of the public defense community and provides support for zealous and high-quality legal representation by advocating for change, educating defenders, and collaborating with other justice system stakeholders and the broader community to bring about just solutions." *Id.* The results of this survey are shared with the permission of Hillary Behrman, WDA's Director of Legal Services.

<sup>173</sup> WDA Bail Jump Survey, *supra* note 1, at 1.

<sup>174</sup> *Id.* at 2 (When asked how bail jump cases the participants represented were resolved, survey participants reported that 21 percent reported a dismissal, 23 percent reported a guilty plea, 13 percent reported a trial, and 44 percent reported plea bargain.)

<sup>175</sup> *Id.* at 6.

<sup>176</sup> *Id.* at 7–8.

<sup>177</sup> *Id.*

facing additional prosecution.<sup>178</sup> They say that the added charge often diminishes the client's confidence in their attorney and the court institution because it is so difficult to combat the charge, and it reinforces a rigidity that does not account for an individual's life circumstances.<sup>179</sup>

Defenders reported in the survey that the uncontrollable circumstances defense is nearly impossible to combat against a bail jumping charge.<sup>180</sup> For example, the defenders conveyed that the "uncontrollable circumstances" defense failed in circumstances where their client had limited means of transportation, including missing court due to a ferry shutdown, and where there were conflicts between court dates.<sup>181</sup> But despite presenting evidence of these circumstances and barriers, defenders reported that these cases resulted in guilty verdicts at trial.<sup>182</sup> Further, survey participants noted that their clients usually missed court because of issues related to indigency and rarely missed court to prevent the administration of justice.<sup>183</sup>

Another common theme in the survey was that clients often feel pressured to accept a plea agreement.<sup>184</sup> Even if there is a strong case to combat the underlying charge, the defenders reported that clients feel pressured to take a plea because of how easy it is for the State to prove the elements in court.<sup>185</sup> Additionally, the participants say that their clients are often concerned about the number of felony convictions and their devastating effects at sentencing.<sup>186</sup> Instead of one felony or misdemeanor charge, the client will be charged and possibly convicted of the underlying charge as well as the

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 4–6, 7–8.

<sup>181</sup> *Id.* at 4–6.

<sup>182</sup> Of the fifteen defenders who have represented clients charged with bail jumping, twelve reported a guilty verdict on the bail jump charge, one reported a resolution before the verdict, one reported a pending case, and one was dismissed prior to trial for prosecutorial vindictiveness. *Id.*

<sup>183</sup> *Id.* at 4–6, 7–8.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 7–8.

<sup>186</sup> *Id.*

bail jumping charge.<sup>187</sup> One defender noted that this is especially problematic for clients that are undocumented because the number of felony charges may impact an undocumented client's ability to gain legal status or stay in the United States.<sup>188</sup> Each previous felony charge counts in calculating offense scores and can affect present and future sentencing.<sup>189</sup> As such, defenders say that clients feel pressured to choose between a plea agreement that promises only one felony conviction instead of potentially two felony convictions.<sup>190</sup>

Throughout the survey, defenders described different cases where the bail jumping charge was threatened or used against their clients.<sup>191</sup> One client missed court because she had to take her sick child to the doctor.<sup>192</sup> Because the client, herself, was not sick, she faced bail jumping charges.<sup>193</sup> Another defender described a client who had significant challenges due to her physical disability which led to multiple missed court dates.<sup>194</sup> Despite awareness of these challenges due to the client's physical disability, the prosecutor threatened to charge the client with several bail jumping charges until the client felt that she had no other choice than to plead guilty to the underlying charge.<sup>195</sup> Defenders repeatedly reported in the survey that their clients faced transportation and employment issues that lead to the use and threat of bail jumping charges.<sup>196</sup> Often, clients were faced with the choice to appear in court or to maintain their employment.<sup>197</sup> Even though prosecutors have discretion in charging decisions, there is an indication that this specific charge pressures defendants who may want to contest their charges or are

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See WASH. REV. CODE §9.94A.525 (2017).

<sup>190</sup> WDA Bail Jump Survey, *supra* note 1, at 7–8.

<sup>191</sup> *Id.* at 4–8.

<sup>192</sup> The Real World Impact of Criminalizing Failure to Appear, *supra* note 2, at 1.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See *Id.* at 1–2; see also WDA Bail Jump Survey, *supra* note 1, at 4–6.

<sup>197</sup> WDA Bail Jump Survey, *supra* note 1, at 4–6.

factually innocent, increases sentencing implications, and punishes people for missing court under legitimate circumstances.<sup>198</sup>

### 3. Costs Associated with Bail Jumping

Aside from the sentencing and plea implications of bail jumping, there are high costs associated with nonappearance and further incarceration. The Vera Institute of Justice, a national organization committed to criminal legal and prison reform, reported that in 2015, Washington State spent an average of \$37,841 per inmate with a prison population of 16,716 people.<sup>199</sup> In 2016 and 2017, Washington State spent over \$1 billion of its general funds on corrections.<sup>200</sup> This high cost does not include any pretrial costs, such as increased “workloads and expenditures for the courts and law enforcement,” like those caused by nonappearance.<sup>201</sup> In addition to the systematic costs of failure to appear, failure to appear imposes human and economic costs to the defendant, “including pre-trial incarceration and increased fines for what sometimes starts out as a minor offense.”<sup>202</sup> In addition, according to a study of misdemeanants in King County, Washington, defendants that fail to appear have, on average, twice as many hearings than those who appear in court.<sup>203</sup> Criminalizing nonappearance alone increases the costs already associated with the issue of failure to appear. Instead of further punishing defendants who fail to appear, decriminalizing nonappearance will reduce

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<sup>198</sup> *Id.*

<sup>199</sup> Chris Mai & Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010–2015*, VERA INSTIT. OF JUST. (2017), <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> [https://perma.cc/5PY7-HRVA].

<sup>200</sup> *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, ACLU OF WASH. 4, 46 (2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state> [https://perma.cc/YK65-NXWC].

<sup>201</sup> Rosenbaum et al., *supra* note 37, at 177.

<sup>202</sup> *Id.* at 177.

<sup>203</sup> *Id.* at 186.

costs that could be used for programs that do effectively reduce failure to appear rates.

## VI. ABOLISHING THE CHARGE OF BAIL JUMPING AND IMPROVING COURT APPEARANCE RATES

Washington State should abolish the bail jumping statute and rely on the existing practices of bail and pretrial conditions reconsideration and contempt processes, which address pretrial misconduct. The Washington State bench and defense bar should also create a more robust practice regarding waivers of appearances in court proceedings where the defendant's presence is not necessary. In addition to abolishing the bail jumping statute, Washington State should continue to invest, encourage, and assist counties in establishing court reminder systems and providing additional resources to dismantle the barriers to attending court proceedings.

### A. *Abolishing Bail Jumping*

The Washington State legislature should repeal the bail jumping statute. Abolishing the bail jumping statute is the most effective way to prevent the coercive tactic of securing unfair plea agreements and is a step toward dismantling harsh sentencing penalties. Abolishing the bail jumping statute in no way inhibits the court from issuing a bench warrant to order the defendant to court, reconsidering a defendant's bail conditions upon failure to appear, or using contempt proceedings for willful violations of pretrial conditions. Eliminating the statute does, however, protect the defendant's right and wish to go to trial for the underlying offense, as well as promote the judge's discretion at sentencing for the crime charged.

Currently, there are three states that do not criminalize nonappearance: Maryland, Mississippi, and Wyoming.<sup>204</sup> When a defendant fails to appear to

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<sup>204</sup>Rebecca Piriou, *Pretrial Release Violations & Bail Forfeiture*, NAT'L CONF. OF ST. LEGIS. (June 28, 2018) <http://www.ncsl.org/research/civil-and-criminal-justice/bail-forfeiture-procedures.aspx> [<https://perma.cc/CV2Z-B7AV>].

court, Maryland, Mississippi, and Wyoming all execute similar processes as Washington. The court will issue a bench warrant for a defendant's arrest if they fail to appear to court—a violation of their condition of pretrial release.<sup>205</sup> After the defendant presents before the court, the court will either revoke the defendant's pretrial release or continue the defendant's pretrial release with or without conditions.<sup>206</sup> Maryland code expressly provides that the court must strike a bail forfeiture if the defendant is returned to the jurisdiction of court within ninety days and can show reasonable grounds for the failure to appear.<sup>207</sup> The courts can pursue criminal contempt proceedings when a person obstructs the administration of justice or willfully disobeys the court's lawful order.<sup>208</sup> In fact, in Wyoming, failure to appear is subject to contempt sanctions rather than an additional criminal charge.<sup>209</sup> The sanction may be imposed when a person on pretrial release knowingly fails to appear to court and provides the uncontrollable circumstances affirmative defense.<sup>210</sup> Though the rule sounds similar to Washington's bail jumping statute, it is not a statute that adds an additional felony or misdemeanor charge for failure to appear; and it goes through a separate contempt proceeding from the rest of the underlying charges.<sup>211</sup>

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<sup>205</sup>MD. CODE ANN., CRIM. PROC. § 5–213(a) (West 2001); MISS. CODE ANN. § 99–5–25 (West 2013); 3 MISS. PRAC., ENCYC. MISS. LAW § 24:26 (2nd ed.); WYO. CRIM. PROC. R. 3.1 (West 2018); WASH. SUPER. CT. CRIM. R. 3.2(k); WASH. SUPER. CT. CRIM. R. 3.2(j)(2).

<sup>206</sup>MD. CODE ANN. CRIM. PROC. § 5–213(b) (West 2001); MISS. CODE ANN. § 99–5–25 (West 2013); 3 MISS. PRAC., ENCYC. MISS. LAW § 24:26 (2nd ed.); WYO. CRIM. PROC. R. 3.1 (West 2018); WYO. CRIM. PROC. R. 46 (West 2018).

<sup>207</sup>MD. CODE ANN., CRIM. PROC § 5–208(b)(1) (West 2001); 2A MD. ENCYC. ARREST § 73 (2018) (“‘Reasonable grounds’ means something less stringent than an absolutely compelling reason, and is not restricted to instances in which there was not a willful default.”); 2A MD. ENCYC. ARREST §74 (2018), *Allegheny Mut. Cas. Co. v. State*, 368 A.2d 1032, 1034 (1977) (holding that the 90–day grace period for a surety to bring a defendant to court starts when the defendant fails to appear and the court announces forfeiture).

<sup>208</sup>MISS R. CRIM. PROC. R. 32.1(d) (2018).

<sup>209</sup>WYO. CRIM. PROC. R. 46.4 (West 2018).

<sup>210</sup>*Id.*

<sup>211</sup>WYO. CRIM. PROC. R. 42 (West 2003).

Washington courts could easily address the situation where a person fails to appear to court with the intent to obstruct the administration of justice by addressing the individual's bail conditions or through contempt proceedings—both of which are already existing court practices in response to pretrial misconduct.<sup>212</sup> Judges already take into account a person's prior FTAs in bail considerations and revocations, regardless of whether the individual was previously convicted of bail jumping.<sup>213</sup> In current practice, for example, a judge has the discretion not to punish a person for failure to appear by revoking their bail-bond or instating further pre-trial conditions if they determine that the person's failure to appear is a consequence of conditions such as poverty, caregiver, or employment obligations.<sup>214</sup> Despite the judge's decision not to punish, the prosecution still has the discretion to criminally charge a defendant for missing court, regardless of the defendant's reasons for missing court.<sup>215</sup> Abolishing the statute altogether will help decrease the number of people incarcerated from bail jumping sentences and guilty pleas, protect defendants from the pressure to plead guilty, and challenge the narrative that punishment actually encourages court appearance.

There are surely ways to reduce bail jumping's harsh consequences without completely eliminating the statute. Eliminating the uncontrollable circumstances affirmative defense would allow broader common law defenses, such as necessity. For example, the Washington State Legislature could include the original language of "without lawful excuse" and define "lawful excuse" in the statutory scheme—something the Washington State legislature opted not to do after the Washington Supreme Court found the

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<sup>212</sup> 12 ROYCE A. FERGUSON, JR., WASH. PRAC. & PROC. § 411 (3d ed. 2019).

<sup>213</sup> 12 ROYCE A. FERGUSON, JR., WASH. PRAC. & PROC. § 408 (3d ed. 2019); WASH. SUPER. CT. CRIM. R. 3.2(c); *see supra* Section IV.

<sup>214</sup> *See* WASH. SUPER. CT. CRIM. R. 3.2(k).

<sup>215</sup> *See* discussion *supra* Section V.D.2.

language unconstitutionally vague.<sup>216</sup> This solution may allow the statute to apply the way it was originally intended to apply—to target those who intentionally fail to appear to court.<sup>217</sup> A higher mens rea requirement of intent will also target the statute towards people who are actually absconding from the administration of justice and increase the State’s burden in proving bail jumping.<sup>218</sup> Including specific language in the statute such as “intent to avoid adjudication or service of a sentence” would limit prosecution to those individuals who intend to abscond and obstruct justice. Declassifying the statute to make bail jumping a misdemeanor would decrease the sentencing implications for a bail jumping conviction.<sup>219</sup> Adding a provision to the statute that would prohibit the use of bail jumping where the underlying charge is dismissed is another way to resolve the unfair practices surrounding bail jumping.

Despite these amendments, repealing the statute entirely is the best solution. Even if the statute is reformed to reduce the consequences of a bail jumping conviction, it does not address the major problem with bail jumping—its use to induce guilty pleas. Increasing the mens rea requirement from knowingly to intentionally may not be a viable fix for this problem. The Wisconsin statute provides an intentional mens rea requirement, yet it is still used as a prosecutorial tool to induce guilty pleas.<sup>220</sup> Reforming the statute does not address the additional costs and implications of incarceration, as well as challenges with imposing legal financial obligations against who miss

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<sup>216</sup> See WASH. REV. CODE § 9A.76.170 (1975); *Hilt*, 662 P.2d at 53; see, e.g., MASS. GEN. LAWS ch. 276, § 82A (1994); see also *Commonwealth v. Gomez*, 940 N.E.2d 488, 492 (Mass. App. Ct. 2011) (quoting *Commonwealth v. Love*, 530 N.E.2d 176, 179 (Mass. App. Ct. 1988) (definition of “without sufficient excuse” as “deliberate conduct contrary to that which was required – this in distinction from conduct which the actor did not will, or was unable to control.”)).

<sup>217</sup> See LEGIS. COUNCIL’S JUDICIARY COMM., *supra* note 13, at 329-31.

<sup>218</sup> See WASH. REV. CODE § 9A.04.110(12) (2011), WASH. REV. CODE § 9A.08.010(1)(a) (2009).

<sup>219</sup> Piriou, *supra* note 204.

<sup>220</sup> See WIS. STAT. § 946.49 (2018); see also *Murphy*, *supra* note 3, at 1495-96; *Schuldt*, *supra* note 166; *Johnson*, *supra* note 166, at 654-55.

court for wholly legitimate reasons. The bottom line is that there is already a recourse for failing to appear to court—failure to appear bench warrants and a reconsideration of a person’s bail and pretrial conditions.<sup>221</sup> It is unduly punitive to further punish the defendant with either an additional charge or with coercing a plea agreement when the defendant was likely not deliberately disobeying the court. Instead of further criminalization for failure to appear, the state of Washington should abolish the bail jumping statute and focus on investing in proactive, community-based efforts that are shown to increase court appearance rates.

### *B. Reducing the Burden of Mandatory Court Appearances in Criminal Cases*

In addition to abolishing the bail jumping statute, judges should reconsider their practice in requiring some court appearances. Superior Court rules state a “defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence,”<sup>222</sup> but in practice, defendants are generally required to be at every pretrial court date between arraignment and trial.<sup>223</sup> Washington Superior Court Rule 3.4 requires, when necessary, a defendant’s presence at “arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and the imposition of the sentence” unless otherwise excused or excluded by the court with good cause.<sup>224</sup> When the defendant is not present, but their personal attendance is necessary, the court may issue a bench warrant.<sup>225</sup>

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<sup>221</sup> See WASH. SUPER. CT. CRIM. R. 3.2; WASH. SUPER. CT. CRIM. R. 3.4.

<sup>222</sup> WASH. SUPER. CT. CRIM. R. 3.4(a).

<sup>223</sup> WDA Bail Jump Survey, *supra* note 1 (Survey participants indicate that despite Rule 3.4, judges and the State generally expect defendants to be at every court date even if the defendant’s presence is actually unnecessary).

<sup>224</sup> WASH. SUPER. CT. CRIM. R. 3.4(a).

<sup>225</sup> WASH. SUPER. CT. CRIM. R. 3.4(c).

Though judges are permitted to require the defendant to attend every court date, judges should consider requiring the defendant's attendance only where attendance is actually necessary. Certainly, it is necessary for the defendant to attend their arraignment, trial, and sentencing as dictated by the Superior Court Rule and in adherence with the defendant's constitutional rights.<sup>226</sup> It may also be necessary for the defendant to attend certain pretrial motion hearings.<sup>227</sup> However, there are many hearings that do not necessitate the defendant's presence. For example, the defendant's presence may not be necessary at certain pretrial hearings that have to do with purely legal or scheduling-related issues. A prior study on misdemeanants in King County found that people "who fail to appear for a pretrial hearing have, on average, twice as many hearings as those who appear."<sup>228</sup> Judges should consider the time and resources that it takes for many defendants to appear in court as the number of court appearances required places a heavy burden particularly on people who lack the resources and ability to attend numerous court appearances.

Creating a better practice of waivers of appearances may be helpful in transforming the criminal court's expectations of defendant appearance. Waivers of appearance allow a defendant to waive their right to appear at a particular court date, often done as waivers of arraignment in courts of limited jurisdiction.<sup>229</sup> Defenders could implement a more robust practice in having their clients sign these waivers prior to a hearing to help alleviate the burden of appearance. Creating a more robust practice of waivers of appearance may encourage better communication between defenders and their clients. Defenders can also create a more robust practice of requesting telephonic or video conference proceedings.<sup>230</sup> However, this may also create

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<sup>226</sup>WASH. SUPER. CT. CRIM. R. 3.4; *See also Allen*, 397 U.S. at 338; *Stincer*, 482 U.S. at

<sup>227</sup> *Id.*

<sup>228</sup>Rosenbaum et al, *supra* note 201, at 186.

<sup>229</sup>*See* WASH. CT. LTD. JURISDICTION CRIM. R. 4.1(g).

<sup>230</sup>*See* WASH. SUPER. CT. CRIM. R. 3.4(d).

a heavier burden on public defenders with higher caseloads as it would require a change of practice and more follow-up with clients after they are released from custody. It would also require the prosecutor and the judge to consent to the waiver, which may not always be possible based on the specific charge and jurisdiction. While this is not a robust solution to the structural issues of requiring appearance and charging bail jumping, it is a daily practice that could alleviate the impacts of bail jumping and the burden of attending many court hearings, particularly for indigent defendants.

Aside from allowing the practice of appearance by counsel with a signed waiver, Washington courts should consider the defendant's individual circumstances before setting additional court dates, particularly pretrial case-setting court dates. The court system can establish trust and confidence with defendants and the public by providing more flexibility regarding court appearances. Such may also help defendants long-term in retaining employment, engaging in treatment programs, and meeting other obligations by reducing the burden of attending frequent court hearings where their presence is ultimately unnecessary. Recognizing the defendant's life conditions and solely requiring appearance where it is absolutely necessary help eliminate burdens and barriers to the court.

### *C. Investing in Proactive Efforts to Increase and Encourage Court Appearance*

There is no evidence that punishment effectively encourages court appearance.<sup>231</sup> But there is a breadth of evidence showing that court reminder systems are extremely effective in reducing FTA rates, thus eliminating the risk of criminal punishment for bail jumping.<sup>232</sup> Washington State, counties, and courts should continue to fund, expand, and experiment with reminder systems. In addition to bolstering that practice, Washington State should further its efforts to provide increased flexibility for defendants to appear and

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<sup>231</sup> See Murphy, *supra* note 3, at 1459.

<sup>232</sup> See *infra* Section VI.1.

alleviating the holistic and systemic reasons why people miss court. While these are not all legal solutions, it is important for these changes to coincide with abolishing the bail jumping statute in order to accomplish what the bail jumping statute ultimately fails to do: improve court appearance.

### 1. Court Reminder Systems Effectively Increase Court Appearance Rates

Courts across the country are experimenting with reminder systems, indicating a realization that people primarily miss court for life-related reasons, rather than absconding from justice.<sup>233</sup> Courts utilize three main reminder systems: postcards, reminder phone calls, and text messaging systems.

Postcards are a relatively common option shown to reduce failure to appear rates. One study in Nebraska found that postcard reminders significantly reduced FTA rates.<sup>234</sup> There is much debate on the kind of written messages that are most effective in encouraging court appearance.<sup>235</sup> Another study on Nebraska's postcard reminder system found, for instance, that a reminder with more information on the possible sanctions of failing to appear is more effective than a simple reminder.<sup>236</sup> The study indicated that reminders with harsh, negative messaging were the most effective message for reducing FTA rates across the three racial groups studied.<sup>237</sup> In the Nebraska study, researchers found that "a reminder was most effective for defendants relatively low in trust."<sup>238</sup> As mentioned in Section IV of this article, people with low trust and confidence in the courts make up some of the demographic

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<sup>233</sup> See discussion *supra* Section IV.

<sup>234</sup> Tomkins et al., *supra* note 19, at 105.

<sup>235</sup> Bomstein et al., *supra* note 31, at 77-78.

<sup>236</sup> *Id.* at 76.

<sup>237</sup> *Id.* ("The sanctions condition reduced the FTA rate by 3.7% for Whites, 5.2% for Blacks, and 5.8% for Hispanics; these reductions were statistically significant for Whites and Hispanics, but not for Blacks.").

<sup>238</sup> *Id.* at 77.

that fails to appear to court.<sup>239</sup> This finding shows that written reminders have “the potential to equalize appearance rates for defendants who vary in their attitudes toward the criminal justice system.”<sup>240</sup> The implications for these positive findings of written reminders include improvements of system efficiencies, cost-savings through better compliance, improvements in defendants’ perceptions of the courts, and reductions in racial and ethnic disparities in the criminal legal system.<sup>241</sup>

However, there are also some limitations to postcard use. One of the target populations facing the issue of bail jumping and high rates of failure to appear are indigent populations.<sup>242</sup> Some of these people may be homeless without a reliable address to receive reminders through mail. That said, this consideration does not disqualify postcard reminders from being a part of the solution to failure to appear and bail jumping if it is implemented in addition to other systems.

Reminder phone calls are another mechanism shown to reduce failure to appear rates. One program in Jefferson County, Colorado, highlights the effectiveness of pre-FTA and post-FTA phone calls in reducing failure to appear rates.<sup>243</sup> Citing the progress in King County, Washington’s live-caller program results, decreasing failure to appear rates by sixty percent, Jefferson County opted to further test the efficacy of live-call reminder systems.<sup>244</sup> The program also opted to test the efficacy of call-ahead reminders, to reduce failure to appears, and call-after reminders, to notify defendants about how to take care of their FTA warrant.<sup>245</sup> The study found that use of call-ahead, live reminder calls reduced the failure to appear rate by forty-three percent,

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<sup>239</sup> See *supra* Section IV.

<sup>240</sup> Bornstein et al., *supra* note 31, at 77.

<sup>241</sup> *Id.* at 78.

<sup>242</sup> See discussion *supra* Section IV.

<sup>243</sup> Timothy R. Schnacke, Michael R. Jones, & Dorian M. Wilderman, *Increasing Court-appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County*, 48 J. AM. JUDGES ASS’N. 86, 90 (2012).

<sup>244</sup> *Id.* at 88.

<sup>245</sup> *Id.* at 89–90.

increasing the court-appearance rate to eighty-eight percent.<sup>246</sup> The live-call after phone calls lead to an increase of people addressing their FTA warrants from ten to fifteen percent.<sup>247</sup> Besides the court appearance benefits, the study found that the live-call system enhanced the court’s customer service by increasing communication between the court and defendants, and helped answer defendants’ questions about the court and how to contact other related agencies.<sup>248</sup> The calls also helped to “generally allay the fears of defendants who may be intimidated by the criminal justice system.”<sup>249</sup> Employing programs like this may help address one reason why people miss court by improving a defendant’s trust and confidence in the system.<sup>250</sup>

Like the limitations with the postcard system, the live-call-reminder system may be limited in efficacy for those who do not have access to a telephone—though there are programs for low-income people to access cell phones.<sup>251</sup> In addition, lack of language options may limit live phone call options. Further, live caller systems are most often implemented in court clerks’ offices and may impede the attorney-client relationship and communication.<sup>252</sup> Nonetheless, live-call reminder systems result in higher court appearance rates and is a viable option to addressing the reasons why people fail to appear to court.

Text message reminders are another innovative solution to improve court appearance rates. One newly implemented text-messaging reminder service

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<sup>246</sup>*Id.* at 89.

<sup>247</sup>*Id.* at 89–90.

<sup>248</sup>*Id.* at 92.

<sup>249</sup>*Id.*

<sup>250</sup>BORNSTEIN ET AL., *supra* note 25, at 28.

<sup>251</sup>FED. COMM’NS. COMM’N, LIFELINE SUPPORT FOR AFFORDABLE COMM’NS (last visited Apr. 3, 2019) <https://www.fcc.gov/consumers/guides/lifeline-support-affordable-communications> [<https://perma.cc/6QUF-CJ96>].

<sup>252</sup>*See generally* Marla Sandys & Heather Pruss, *Correlates of Satisfaction Among Clients of a Public Defender Agency*, 14 OHIO ST. J. OF CRIM. L. 431, 443–44 (2017) (discussing literature indicating communication between defense attorney and client increasing trust and satisfaction in representation).

is utilized in Spokane County, Washington.<sup>253</sup> The new service was funded as a result of a \$1.75 million grant through the MacArthur Foundation for the purpose of reducing jail populations and addressing racial and ethnic disparities in the criminal legal system.<sup>254</sup> This resulted in a contract with Uptrust, a San Francisco-based company that facilitates text message-based communications to remind defendants about their court dates and mandatory appointments.<sup>255</sup> One of the major benefits of Uptrust is that it connects with the county's public defense system, fostering better communication with defendants and their counsel.<sup>256</sup> To track its effectiveness, Uptrust collects data on failure to appear rates before and after implementing the system.<sup>257</sup> Based on its data, Uptrust has found that its services have "reduced failure-to-appear rates to less than 10% in most counties it works with and has reduced failure-to-appear rates by 50% in some jurisdictions."<sup>258</sup> Uptrust's services also help connect defendants with existing county resources—such as community oriented child care services and transportation.<sup>259</sup> As an additional benefit to the cost-saving advantages of reducing bench warrants and arrests because of increased court appearance, there is no cost to defendants for using this system.<sup>260</sup>

The text message reminder systems face similar limitations as the live-call reminder system. People who are indigent may not have access to a mobile

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<sup>253</sup>LeAnn Bjerken, *New Text Service Aims to Keep Defendants Out of Jail*, SPOKANE J. BUS. (Sept. 27, 2018), <https://www.spokanejournal.com/local-news/new-text-service-aims-to-keep-defendants-out-of-jail/> [<https://perma.cc/29DZ-YWBL>]; Mitch Ryals, *Spokane County Public Defenders to Begin Sending Text Reminders for Court Dates*, INLANDER (Jul. 25, 2018, 4:07 PM), <https://www.inlander.com/spokane/spokane-county-public-defenders-to-begin-sending-text-reminders-for-court-dates/Content?oid=11081301> [<https://perma.cc/9FAA-5TZQ>]; UPTRUST (last visited Mar. 31, 2019), <http://www.uptrust.co/> [<https://perma.cc/X99W-4ATD>].

<sup>254</sup>Bjerken, *supra* note 253; Ryals, *supra* note 253.

<sup>255</sup>UPTRUST, *supra* note 253.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

phone to receive text messages, though there are programs that help pay for mobile phones for low-income people.<sup>261</sup> Language barriers may also be applicable here and is a concern that needs to be addressed in its implementation. The public defender-based system, while helpful in aiding in the attorney-client relationship, may impose a further burden on already busy public defender offices. But like the other proposed systems, the text message-based reminder system shows promising results in improving court appearance rates and should be further explored and invested in.

Of course, there are monetary and human costs for implementing reminder systems. A public defense-centered system is preferred to avoid confidentiality and conflict of interest issues and to promote the attorney-client relationship and communication.<sup>262</sup> A public defense-centered system collaterally promotes a policy interest by encouraging defendants to communicate with their attorneys.<sup>263</sup> Further, a defendant's attorney is likely the best equipped-person to aid their clients when a FTA is an issue. There is a cost to integrate public defender systems with the new technology. As a practical matter, human and financial costs will come from each county that implements these innovative systems and may be supplemented by grants.<sup>264</sup>

However, it is critical that these systems do not meaningfully impact the county's public defense budget to a degree that it impacts defender's abilities to provide effective assistance of counsel. Funding for public defense is already limited and further strapping offices in order to effectively assure communication and appearance would be a disservice to those in need of public defense services.<sup>265</sup> Despite the high costs to implement technological

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<sup>261</sup>FED. COMM'NS. COMM'N, *supra* note 251.

<sup>262</sup>*See* Sandys & Pruss, *supra* note 252.

<sup>263</sup>*Id.*

<sup>264</sup>*See* WASH. REV. CODE. § 10.101.050 (2005); Bjerken, *supra* note 253; Ryals, *supra* note 253 (for example, Spokane County Public Defenders funded its project with Utrust in part with a \$1.75 million grant through the MacArthur Foundation).

<sup>265</sup>*See generally* William L. Downing, *Ample Funding for Public Defenders Makes Justice Work for All*, SEATTLE TIMES (Apr. 20, 2017 3:22 PM)

<https://www.seattletimes.com/opinion/ample-funding-for-public-defenders-makes->

solutions to help increase appearance rates, the savings of less incarceration and issuance of bench warrants will make up for the upfront costs. For example, Uptrust estimates that the cost of each failure to appear incident is about \$1,000, considering issuing and enforcing bench warrants and pre-trial incarceration.<sup>266</sup> Defender-based text message reminder systems also alleviate costs affecting the attorney-client relationship by promoting communication, and costs affecting the defendant as failures to appear can impact their ability to maintain employment and their families.

## 2. Eliminating Barriers to Accessing the Courts

There are many creative, community-driven solutions to break the barriers that prevent people from attending their court dates. One example is Denver, Colorado's Outreach Court.<sup>267</sup> In response to high failure-to-appear rates, the City and County of Denver recognized that the homeless population faced barriers to attending their court appearances for reasons such as lack of bus fare, transportation, mental illness, or substance abuse problems.<sup>268</sup> In response, Denver decided to bring the court to the Denver Rescue Mission to increase the likelihood that people who were homeless could come to court.<sup>269</sup> Clinicians are also available to offer mental health counseling and information on drug treatment, and to help gain access to health care.<sup>270</sup> While Denver's Outreach Court is utilized for municipal cases, and not cases that would qualify for bail jumping as seen in Washington, it is one example

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justice-work-for-all/ [https://perma.cc/73TE-Q9LC]; see generally Derek Young, *State Must Pay Up for Public Defenders, Pronto*, NEWS TRIBUNE (Jan. 7, 2018 12:56 PM), <https://www.thenewstribune.com/opinion/article193233109.html> [https://perma.cc/M2XU-NVZE].

<sup>266</sup> Bierken, *supra* note 253.

<sup>267</sup> Tom McGhee, *New Homeless Outreach Court Meets People Where They Are – at Denver Rescue Mission*, DENVER POST (Apr. 27, 2017 11:30 AM), <https://www.denverpost.com/2017/01/27/homeless-outreach-court-denver-rescue-mission/> [https://perma.cc/42JL-2AW9].

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

of an innovative way for the courts to facilitate proceedings to encourage appearance and dismantle barriers.<sup>271</sup> A program like that in Denver may also help improve confidence in the courts, thus improving appearance rates.

Another example of a community-driven action is providing childcare in or near courthouses, a solution that is now becoming more common across the United States. One example is the Children’s Waiting Room in San Francisco, which is now the standard for all new courthouses.<sup>272</sup> San Francisco’s Children’s Waiting Rooms provides free, quality daycare for all who attend court.<sup>273</sup> One Superior Court Commissioner noted that many who missed hearings in Superior Court reported that it was because no one was available to watch their children and they could not afford childcare.<sup>274</sup> Even though this solution is becoming more common, it should be expanded across all courthouses to dismantle another common barrier for people appearing in court.

There are many other ways that Washington could invest and strategize to increase court appearance rates without punishment. Though the strategies can be costly, “these costs are insignificant in comparison to the financial and social costs associated with nonappearance.”<sup>275</sup> Surely, “locally-developed, compassionate, and responsive to the specific needs of defendants” is a court system that Washington State courts can strive for through investing in such innovative models to address nonappearance rates.<sup>276</sup>

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<sup>271</sup> *Id.*; see also Luis A. Almodovar & Stacy Shor McNally, *Are You Worried About Going to Jail? The Public Defender’s Office Homeless Outreach Program*, 36 STETSON L. REV.

183 (2006) (Unlike Denver’s Outreach court, one program in Florida, that created a model for other programs, assists people who fail to appear for court hearings on misdemeanors, felonies, and violations of probation).

<sup>272</sup> Kathleen Guthrie, *Small Spaces, Big Hearts: Visiting San Francisco Courts’ Children’s Waiting Rooms*, SAN FRANCISCO ATTORNEY 41, 41 (2011), <https://www.sfbar.org/forms/sfam/q42011/childrens-waiting-room.pdf> [https://perma.cc/972P-Q3UM].

<sup>273</sup> *Id.* at 42.

<sup>274</sup> *Id.* at 43-44.

<sup>275</sup> Bernal, *supra* note 3, at 570.

<sup>276</sup> *Id.* at 569.

## VII. RESPONSES TO ARGUMENTS FOR PUBLIC SAFETY, DETERRENCE, AND EXISTING RULES

There are three main arguments against this article's call for bail jumping abolition, including arguments that bail jumping charges contribute to public safety, that bail jumping charges effectively deter FTAs, and that there are already existing rules preventing coercive plea bargaining. Despite these arguments, abolishing the bail jumping statute and investing in practices and structures that encourage court appearance are more just solutions.

### A. *Public Safety*

Some may criticize the call to abolish the bail jumping statute as a threat to public safety. Critics may say that decriminalizing nonappearance will result in more offenders on the street with zero repercussions for missing court. However, the crime of bail jumping offers no effective public safety measure. Because bail jumping is an independent criminal charge that does not impact the process of bench warrants, bail or pretrial condition reconsideration, or contempt processes, those who miss court can still be arrested and brought to court in absence of a bail jumping charge. A bail jumping charge only occurs if the prosecutor decides to bring charges of bail jumping.<sup>277</sup> A repeal of bail jumping does not preclude the judge from reconsidering the defendant's bail or pretrial release conditions.<sup>278</sup> For example, if an individual misses court and is apprehended, the judge can decide to impose more stringent supervision conditions, including jail.<sup>279</sup> Additionally, the judge is still going to consider the defendant's prior conduct, regardless of whether the defendant was actually charged or convicted of prior bail jumping. Those considerations will inform the judge in pretrial detention and release decisions in new criminal cases.

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<sup>277</sup> See discussion *supra* Section III.

<sup>278</sup> See discussion *supra* Section V.D.

<sup>279</sup> See discussion *supra* Section V.D.1.

Those most likely effected by the bail jumping charge are those with misdemeanors or low-level felonies, which usually do not include allegations of violence.<sup>280</sup> In general, “felony defendants are less likely than misdemeanor defendants to have the opportunity to FTA, because they are often in custody.”<sup>281</sup> In fact, out of the 24,257 felony sentences imposed by Washington courts in the 2019 fiscal year, there were only four cases that involved the charge “Bail Jumping with a class A felony.”<sup>282</sup> In addition, the policy objectives of the statute had less to do with public safety and more to do with encouraging defendants to appear at their scheduled court dates.<sup>283</sup>

### B. *Deterrence*

Some critics against abolishing the bail jumping statute may say that the charge is actually deterring absconders and improving appearance rates. The reality is, however, that criminalizing nonappearance does not serve as effective deterrence. Studies on nonappearance have shown that nonappearance rates have remained stable over the last few decades even with the enforcement of new laws criminalizing nonappearance.<sup>284</sup> Furthermore, research on the theory of deterrence shows a “limited disputed link between the length of sentences and an increased deterrent effect—on either the individual or community level” in part because of the inconsistency of sanctions, arbitrariness, and bias in the criminal legal system.<sup>285</sup> Washington judges, prosecutors, and the United States generally need to move away from the narrative that further punitive action for those who miss court due to symptoms related to poverty, mental illness, addiction, or lack

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<sup>280</sup> See Bornstein, *supra* note 31, at 78.

<sup>281</sup> *Id.*

<sup>282</sup> WASH. ST. CASELOAD FORECAST COUNCIL, *supra* note 130, at 34.

<sup>283</sup> See *Council*, 210 P.3d at 1061.

<sup>284</sup> Bernal, *supra* note 3, at 544 (“For example, Bryne and Stowell found that ‘there were no changes in... the percentage of defendants who failed to appear in court (2.3 percent vs. 2.2 percent)’ from 1994 to 2003, even though major legislation criminalizing nonappearance passed during that time.”).

<sup>285</sup> DANIELLE SERED, UNTIL WE RECKON 60-64 (2019).

of trust, will encourage them to attend court. The data does not support the belief “as research shows that sanctions alone are not a very powerful means to get people to obey the law.”<sup>286</sup> Rather, we must be more creative with our tax dollars and enact policies that actually address the barriers to attending court.

### C. *Rules Against Prosecutorial Vindictiveness*

Prosecutors may argue that the use of charging or threatening to charge bail jumping is within their discretion and not itself coercive. Further, prosecutors may argue that there are already rules against prosecutorial misconduct and vindictiveness that curb unfair and coercive charging, and those rules are effectively reducing situations in which where bail jumping may be charged. Prosecutorial vindictiveness, prohibited by constitutional due process principles, happens when the State acts against a defendant in response to the defendant exercising their constitutional or statutory rights.<sup>287</sup> But the Washington Supreme Court ruled that adding additional charges after failed plea negotiations does not constitute prosecutorial vindictiveness.<sup>288</sup> The United States Supreme Court previously held that a defendant’s due process rights are not violated where a prosecutor makes explicit threats during plea negotiations if a defendant refuses to plead guilty to an original charge.<sup>289</sup> The Court reasoned that the defendant is free to accept or reject the prosecution’s offer and the prosecution has the discretion to charge if they have probable cause to believe that the defendant committed the offense.<sup>290</sup>

The Washington Court of Appeals has also rejected arguments that adding bail jumping charges after failed plea negotiations amounts to prosecutorial

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<sup>286</sup> Bornstein et al., *supra* note 31, at 76.

<sup>287</sup> *State v. Korum*, 141 P.3d 13, 21 (Wash. 2006) (citing *U.S. v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987)).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* (citing *Bordenkircher v. Hayes* 434 US 357, 360–56 (1978)).

<sup>290</sup> *Id.*

vindictiveness.<sup>291</sup> In *State v. Aguilar*, for instance, Mr. Aguilar was arrested for failing to maintain contact with his attorney during the pretrial process.<sup>292</sup> After Mr. Aguilar was unsuccessful in negotiating a plea agreement with the State, his case proceeded to jury trial.<sup>293</sup> The prosecution then amended the information to charge Mr. Aguilar with bail jumping.<sup>294</sup> Since the bail jumping charge was supported by substantial evidence, the Court of Appeals found that the prosecution's action was fully justified as a legitimate response to perceived criminal conduct.<sup>295</sup> The prosecution plainly has the discretion to leverage additional charges against a defendant in plea negotiations.<sup>296</sup>

Although the courts do not consider prosecutorial practices, such as what is occurring with the bail jumping statute in Washington State, as prosecutorial misconduct or vindictiveness, the bail jumping charge certainly results in the leveraging of plea deals, and defendants choosing to plead guilty rather than go to trial. Thus, the issue with bail jumping is whether, in the interest of the fair administration of justice, it is right and ethical to give the prosecution the tools to induce guilty pleas, or otherwise give them the power to charge a defendant with an offense that they are almost certain to win at trial, instead of proactively addressing the issues underlying nonappearance. The issue with bail jumping is whether the charge serves the policy objectives that it was enacted to accomplish. It clearly does not.

There is further evidence that the use of bail jumping as a prosecutorial plea-bargaining tool is not what the statute intended. The use of the bail

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<sup>291</sup> See *State v. Aguilar*, 223 P.3d 1158, 1164 (Wash. Ct. App. 2009).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> See *Bordenkircher*, 434 U.S. at 364-65 (“In our system, so long as the prosecutor has probable cause to believe that the defendant committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.... To hold that the prosecutor's desire to induce a guilty plea is an ‘unjustifiable standard,’ which, like race or religion, may play no part in his charging decision would contradict the very premises that underlie the concept of plea bargaining itself.”).

jumping statute is “not intended to add or diminish the punishment associated with the underlying offense.”<sup>297</sup> Where bail jumping is utilized as a plea-bargaining tool, it adds an additional punishment associated to the underlying offense. It impacts a defendant’s decision on whether to continue fighting the underlying charge or to agree to a plea bargain that does not include the sentencing implications of the bail jumping charge. It makes the defendant choose between one felony charge with a possible successful defense or two felonies where the bail jumping charge is extremely likely to result in a conviction. While the use of the bail jumping statute may not rise to the level prosecutorial vindictiveness, it is certainly misused to induce pleas. The prosecution has the power to do this, but the practice does not effectively address the objective of meaningfully encouraging court appearance and the fair administration of justice, and thus should no longer be a prosecutorial tool.

## VIII. CONCLUSION

Criminalizing nonappearance will never fulfill the promise of encouraging court appearance. Rather, bail jumping only serves as a prosecutorial tool to leverage plea agreements over those most affected by access barriers, including people who are indigent; people who lack access to transportation or safe, affordable day care; and people with mental illness, addiction, or disabilities. Eliminating the bail jumping statute will reduce the impact of coercive plea tactics and convictions for nonappearance, which largely affect people facing symptoms of poverty. Repealing bail jumping is also a step towards reducing incarceration and its associated costs. Another step in reducing costs and alleviating the burden on the state, courts, and people accused of crime would manifest in the implementation of a more robust practice by the Washington bench and defense bar of limiting mandatory court appearances to only those proceedings where a defendant’s presence is

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<sup>297</sup> *Coucil*, 210 P.3d at 1061.

actually necessary. At the same time, greater investments in community resources that are shown to improve court appearance rates and trust in court institutions, like reminder systems, should be effectuated to accomplish what the bail jumping charge failed to do for the last forty years. Until we eliminate the barriers people face in their attempts to appear to court and recognize the complexities of failure to appear, we will not see improved appearance rates in court. In the end, we must strive for a more compassionate and, consequently, a more just court system that addresses the reasons why people fail to appear rather than punish them for simply being human.

#### IX. 2020 UPDATE REGARDING E.S.H.B. 2231

On March 18, 2020, Governor Jay Inslee signed Engrossed Substitute House Bill 2231—significantly reforming the charge of bail jumping to address some of the issues discussed in this article.<sup>298</sup> While E.S.H.B. 2231 does not abolish the charge of bail jumping as this article proposes, it has the potential to significantly reduce the coercive impact the charge has in plea bargaining situations.<sup>299</sup> It gives advocates and courts reasonable, workable tools to address the missed court hearing without the threat of another criminal charge.<sup>300</sup> This update addresses the various changes to the bail jumping statute and areas for further reform.

First, E.S.H.B. 2231 breaks the current bail jumping statute into two separate charges—bail jumping and failure to appear.<sup>301</sup> The State may charge an individual with bail jumping or failure to appear depending on the underlying criminal charge.<sup>302</sup> Besides eligibility based on the underlying

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<sup>298</sup> See E.S.H.B. 2231, 66th Legis., Reg. Sess. (Wash. 2020); Gov. Jay Inslee, *Bill Action*, WASH. GOV. JAY INSLEE (Mar. 18, 2020, 12:51 PM), <https://www.governor.wa.gov/office-governor/official-actions/bill-action> [<https://perma.cc/TXA9-FALK>].

<sup>299</sup> S. REP. E.S.H.B. 2231, at 3–4 (Wash. 2020).

<sup>300</sup> E.S.H.B. 2231, 66th Legis., Reg. Sess. (Wash. 2020).

<sup>301</sup> *Id.*

<sup>302</sup> See *id.*

crime, the statutes are quite similar in scheme.<sup>303</sup> The State may charge an individual who has missed with “bail jump” if they are “held for, charged with, or convicted of a violent offense sex offense” as defined by statute, or fails to appear for their trial.<sup>304</sup> The bail jumping charge retains the same felony classification scheme as discussed in this article.<sup>305</sup> The State may charge an individual who misses court with the misdemeanor of “failure to appear” if they are charged with any crime not designated as a violent or sex offense under the statute.<sup>306</sup> Both statutes state that an individual must receive written notice of the requirement to appear at the person’s next court date in order to be charged with bail jumping or failure to appear.<sup>307</sup> The statutes change the uncontrollable circumstances affirmative defense from “in reckless disregard of the requirement to appear” to “by negligently disregarding the requirement to appear.”<sup>308</sup>

The most significant reform to the bail jumping/FTA charge is the institution of a thirty-day window to allow for the quashing of any warrant issued and the rescheduling of the missed hearing.<sup>309</sup> If an individual who misses court quashes their failure to appear warrant within thirty days, the State cannot charge the individual with bail jumping or FTA.<sup>310</sup> This is a significant step forward in reducing the coercive effect and harsh sentencing implications of the previous statute for individuals charged with crimes across the state. It takes a step toward restoring the original legislative intent of only focusing on individuals who are absconding from justice.

While this bill is an improvement to the prior construction of the bail jumping statute, there are still additional reforms that Washington State must

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.*; see also WASH. REV. CODE 9.94A.030 (2019).

<sup>305</sup> E.S.H.B. 2231, 66th Legis., Reg. Sess. (Wash. 2020); see also discussion *supra* Sections V.A, V.C.2.

<sup>306</sup> E.S.H.B. 2231, 66th Legis., Reg. Sess. (Wash. 2020).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> See *Id.*

consider to truly resolve the problem of the criminalization of failure to appear and remove the barriers preventing access to the courts. One such needed reform is removing the felony classification structure in the bail jumping statute. Individuals who would be eligible for the bail jumping charge are less likely to miss court than those charged with lower level felonies or misdemeanors.<sup>311</sup> Continuing a felony charging scheme inherently preserves the harsh sentencing and immigration consequences for failure to appear.<sup>312</sup> Another step towards reform of the new bail jumping and FTA statutes would be to remove the uncontrollable circumstances defense. It is unclear whether the change from reckless disregard to negligent disregard will change the usefulness of the affirmative defense.<sup>313</sup> In fact, it is possible that the negligence standard makes the uncontrollable affirmative defense more unworkable because it lowers the standard of analyzing whether the person's actions contributed to the failure to appear.<sup>314</sup> Eliminating the affirmative defense entirely will enable individuals to utilize the broader necessity defense.<sup>315</sup>

Washington State must also continue to reduce the number of required court appearances for justice-involved individuals across the state. Even with these changes to the bail jumping statute, many individuals will continue to choose between attending their many court appearances and going to work.<sup>316</sup> WDA is proposing changes to court rules regarding the defendant's presence at court hearings that "would allow defendants to appear through their

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<sup>311</sup> See Bornstein, *supra* note 26, at 78.

<sup>312</sup> See discussion *supra* Sections V.C.4, V.D.1.

<sup>313</sup> See discussion *supra* Sections V.C.3, V.D.2.

<sup>314</sup> E.S.H.B. 2231, 66th Legis., Reg. Sess. (Wash. 2020); WASH. REV. CODE § 9A.08.010(1)(d) (2009) ("A person is criminal negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation."); See discussion *supra* Section V.C.3.

<sup>315</sup> See discussion *supra* Section VI.A.

<sup>316</sup> See discussion *supra* Section V.D.2.

attorneys for some of the hearings that they are currently required to attend in person.”<sup>317</sup> The Washington Supreme Court is considering these changes and are accepting comments until September 30, 2020.<sup>318</sup> There are still many structural barriers between justice-involved individuals and accessing the courts, and Washington courts should continue to explore changes to court rules and cost-effective reminder systems.<sup>319</sup>

E.S.H.B. 2231 is an important reform for justice-involved individuals across Washington State—especially for low-income individuals, individuals with mental health or addiction disorders, and people of color. This bill happened in large part due to the work and research of this article, WDA working groups on decriminalizing FTA, and the many public defenders who advocated for their clients and shared their stories. There is hope that E.S.H.B. 2231 is just the first step towards a more just court system. The work continues.

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<sup>317</sup> See WASH. COURTS, *Suggested Changes to CrR 3.4 and CrRLJ 3.4* (last visited Apr. 18, 2020), [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplay&ruleId=4753](http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=4753) [<https://perma.cc/7ZMG-9JSU>].

<sup>318</sup> *Id.*

<sup>319</sup> See discussion *supra* Sections VI.B, VI.C.

