

## COMMENT

### THE USE OF WISCONSIN'S BAIL JUMPING STATUTE: A LEGAL AND QUANTITATIVE ANALYSIS

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Wisconsin passed its bail jumping statute in 1969 as part of a larger overhaul of the State's criminal procedure. Enacted to coincide with other changes which adopted flexible bail provisions, the statute created the crime of bail jumping. This allows for defendants who violate the conditions of bond to also be prosecuted criminally, regardless of whether the violation is a standalone crime or not. However, the statute does not specifically call out the unit of prosecution; that has been left to the Wisconsin courts to decide. The holdings in the cases that have interpreted the statute have created ambiguity regarding the unit of prosecution and raise concerns about double jeopardy.

Wisconsin courts' interpretations of the bail jumping statute defy the plain meaning of the statute and do not pass the two-prong multiplicity test for double jeopardy. The ambiguity created by these interpretations has led to an increase in bail jumping charges, absurd consequences, and potential sentences that are disproportionate to the charged crimes. The result is that defendants are at marked disadvantage when negotiating plea deals. Analysis of the data from the Wisconsin Consolidated Court Automation Programs reveals that bail jumping charges have increased significantly over time. The data also suggests that an underlying purpose for filing bail jumping charges may be to create leverage against defendants to induce them to plead to their original charge rather than to punish them for violating their bond conditions. While not conclusive as to causation, the correlation between bail jumping charge dismissals and pleas to other charges cannot be ignored. The data also reveals that the treatment of bail jumping varies greatly county to county suggesting that a defendant's geographic location within the state can result in significantly different outcomes.

This Comment argues that Wisconsin courts should look to clarify the ambiguity created by its holdings and define a common-sense unit of prosecution that prevents extreme numbers of bail jumping charges. Doing so would reduce the leverage effect that prosecutors have without eliminating it entirely. Wisconsin would also benefit from implementing a more uniform approach to setting bail conditions that continues to meet the goals of public safety and protection while also increasing the likelihood of fair and uniform application statewide.

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\* The author wishes to thank the *Wisconsin Law Review*; Professor Keith Findley, Professor Michelle Lavigne, and Judge Nicholas McNamara for their review and suggestions; District Attorneys John Chisolm and David Lasee for feedback on their county data; and Eric Schulenburg for his support, encouragement, and Looney Tunes ties.

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#### AN INTRODUCTION TO WISCONSIN’S BAIL JUMPING STATUTE

In the summer of 2016, J.E.,<sup>1</sup> a homeless man suffering from alcoholism and living on State Street in Madison, was in a disturbance with a fellow homeless man outside a local establishment. Patrons complained, and the manager of the establishment contacted the police to respond to the incident. Both men were charged with disorderly conduct, a Class B misdemeanor,<sup>2</sup> and admitted to being under the influence of alcohol at the time of the incident. J.E. contended that the other man started the disturbance, and he was defending himself. Statements from several witnesses appeared to corroborate J.E.’s version of events. Other statements were not clear on how the disturbance began.

1. Names have been abbreviated and facts have been altered slightly to protect privacy. This is a composite case based on actual cases worked on by the author during a summer legal internship in 2016.

2. WIS. STAT. § 947.01(1) (2016).

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At his bail hearing, J.E. was granted a signature bond and became subject to several non-monetary conditions, including maintaining complete sobriety and staying away from State Street. Both are difficult conditions for a homeless man suffering from alcoholism to adhere to, and neither condition is a stand-alone crime. A few weeks later, J.E. was found intoxicated on State Street by police officers familiar with his case, and two additional charges of bail jumping, both Class A misdemeanors, were filed.<sup>3</sup> With the additional charges, J.E.'s potential jail exposure increased from a maximum of three months to a maximum of twenty-one months (if served consecutively).<sup>4</sup> Ultimately, J.E. agreed to a plea deal that would dismiss the bail jumping charges if he pled guilty to the disorderly conduct. He did so to avoid the risk of an additional eighteen months of jail time that he would have been exposed to if a jury found him guilty. Even if he was acquitted of the disorderly conduct, he would still have been subject to the bail jumping charges, and the likelihood of conviction resulting from those charges was too great for him not to take the plea.

J.E. and other defendants like him often find themselves charged with crimes and then, as part of a cash or signature bond, agree to adhere to non-monetary bond conditions in order to avoid remaining in jail while their case is adjudicated. While Wisconsin law allows for cash bail only when there is a "reasonable basis to believe that bail is necessary to assure appearance in court,"<sup>5</sup> judges consider other factors such as protecting members of the community from serious bodily harm or preventing intimidation of witnesses when setting non-monetary bond conditions.<sup>6</sup> Further, bond conditions are generally set at the complete discretion of circuit judges,<sup>7</sup> and the types of conditions can vary from county to county and judge to judge.<sup>8</sup> Thus, some defendants merely need to make timely appearances in court and adhere to the statutorily required condition of not committing new crimes.<sup>9</sup> Others are subjected to numerous and specific non-criminal conditions like complete sobriety, staying in or out of certain geographic areas, attending counseling, maintaining employment, staying away from

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3. WIS. STAT. § 946.49(1)(a) (2016).

4. WIS. STAT. § 939.51 (2016).

5. WIS. STAT. § 969.01(1) (2016).

6. § 969.01(4).

7. See *State v. Braun*, 449 N.W.2d 851, 856 (Wis. Ct. App. 1989). Additionally, in some larger counties court commissioners are also responsible (and often primarily responsible) for setting bail conditions. The reference to judges should be read to include court commissioners.

8. See *State v. Anderson*, 580 N.W.2d 329, 338 (Wis. 1998) (Geske, J., dissenting).

9. For misdemeanors, see § 969.02(4). For felonies, see § 969.03(2).

certain people, etc.<sup>10</sup> If bond conditions are violated and reported, defendants are then subject to being charged under Wisconsin's bail jumping statute and being sentenced under the Wisconsin case law that has interpreted it.

In Wisconsin, multiple violations of a bond can result in multiple bail jumping charges despite the language in the bail jumping statute, which states, “[w]hoever, having been released from custody . . . intentionally fails to comply with *the terms of his or her bond* is . . . guilty of [bail jumping].”<sup>11</sup> This language suggests that the unit of prosecution is the bond, not the individual terms of the bond or an individual criminal case. However, the Wisconsin Supreme Court, in *State v. Anderson*,<sup>12</sup> and the Wisconsin Court of Appeals, in *State v. Eaglefeathers*,<sup>13</sup> have held otherwise. The holdings in both cases create ambiguity regarding the unit of prosecution and raise concerns about double jeopardy and, more specifically, multiplicity.

In addition to double jeopardy concerns, Justice Janine Geske, in her dissent in *Anderson*, pointed out that under the majority's holding a defendant could face multiple charges for either the same act or for individual acts (which are often not criminal in and of themselves, like complete sobriety or being in a prohibited area) under the same bond.<sup>14</sup> This can result in a possible sentence for bail jumping charges that far outweighs any possible sentence for the initial crime charged.<sup>15</sup> In turn, this creates a situation where defendants are at a disadvantage in a plea negotiation as prosecutors often offer to dismiss the bail jumping charges to get defendants to plead to the original charge. If they do not agree to do so, they face the possibility of a much more severe sentence than they would have without the bail jumping charges.

This Comment argues that the Wisconsin courts' interpretations of the bail jumping statute defy the plain meaning of the statute and do not pass the two-prong multiplicity test for double jeopardy. Additionally, the ambiguity created by these interpretations has led to an increase in bail jumping charges, absurd consequences, and potential sentences that are disproportionate to the charged crimes.<sup>16</sup> This puts defendants at a marked disadvantage when negotiating plea deals. In fact, analysis of the data from the Wisconsin Consolidated Court Automation Programs

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10. See *Anderson*, 580 N.W.2d at 338 (Geske, J., dissenting).

11. WIS. STAT. § 946.49(1) (2016) (emphasis added).

12. *Anderson*, 580 N.W.2d 329.

13. 762 N.W.2d 690 (Wis. Ct. App. 2008).

14. See *Anderson*, 580 N.W.2d at 337 (Geske, J., dissenting).

15. See *id.* at 338 (Geske, J., dissenting).

16. See *infra* Part II.B.1 for information on the increased use of bail jumping charges; See *infra* Part II.B.4. for information on absurd consequences and potential outcomes.

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(CCAP) suggests that the purpose for charging bail jumping may be to create leverage against defendants to force them to plead to their original charge rather than for punishing them for violating their bond conditions.<sup>17</sup>

Part I of this Comment provides background information on Wisconsin's bail jumping statute, double jeopardy, and Wisconsin's test for multiplicity. It also discusses *State v. Anderson* and *State v. Eaglefeathers*, both of which play key roles in interpreting the statute. Part II analyzes both cases and argues that the bail jumping charges in those cases were multiplicitous. This section also provides the results of a quantitative analysis of seventeen years of data from court records gleaned from CCAP and explains how that data demonstrates that bail jumping charges in Wisconsin continue to rise, that bail jumping charges are increasingly used as leverage to secure pleas to other charges, and that the absurd scenarios Justice Geske described in her dissent in *Anderson* are now a reality in Wisconsin. The Comment concludes that the Wisconsin Supreme Court should look for an opportunity to clarify the ambiguity created by the holdings in *Anderson* and *Eaglefeathers* to provide clearer guidance to lower courts and practitioners on the unit of prosecution for bail jumping. Additional analysis of the CCAP bail jumping data might also reveal other trends involving demographic data. Further, additional analysis should be done regarding how bail conditions are set throughout Wisconsin as well as how and why conditions are being violated (for example, technical violations versus commission of new crimes or non-appearances). This would aid judges in applying bond conditions in an individualized, yet consistent and uniform, manner and help to ensure that violations of bond conditions are prosecuted similarly throughout the state.

#### I. THE STATUTE'S HISTORY AND THE CASES THAT HAVE INTERPRETED IT

Before analyzing how the court has interpreted the bail jumping statute and how those interpretations have impacted the application of the statute in practice, more explanation of the statute and its history is necessary. Understanding the test for multiplicity in Wisconsin will provide the backdrop of the legal framework that the courts have applied. Discussing the facts and holdings of the two important cases at issue will further set the context for the subsequent analysis.

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17. See *infra* Part II.B.3 for data on using bail jumping charges as leverage to induce pleas.

*A. Wisconsin's Bail Jumping Statute*

Wisconsin passed its bail jumping statute, Wis. Stat. § 946.49, in Ch. 255, Laws of 1969, as part of a larger overhaul of the State's criminal procedures.<sup>18</sup> Enacted to coincide with changes to Chapter 969, which adopted flexible bail provisions, the statute creates "the crime of bail jumping so that . . . a person who violates the conditions of his bond may also be prosecuted criminally. The punishments are in accordance with the severity of the crime for which he was originally charged."<sup>19</sup> The current version of the statute reads in pertinent part:

## 946.49 Bail jumping.

(1) Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond is:

(a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.

(b) If the offense with which the person is charged is a felony, guilty of a Class H felony.

(2) A witness for whom bail has been required under s. 969.01 (3) is guilty of a Class I felony for failure to appear as provided.<sup>20</sup>

The statute as enacted in 1969 was very similar to what it is today. It used the word "terms" and provided for a lesser penalty if the defendant is charged with a misdemeanor and a higher penalty if the defendant is charged with a felony.<sup>21</sup> Neither the 1969 version nor the current version explicitly states what the unit of prosecution<sup>22</sup> should be; that question has been left open to the Wisconsin courts to decide.

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18. See *Anderson*, 580 N.W.2d 329, 335.

19. Assemb. B. 603, Prefatory Note, ch. 255, Laws of 1969 (Wis.).

20. WIS. STAT. § 946.49 (2016).

21. *Id.*

22. See Christina M. Copsey, "How Many Is Any: Interpreting Sec. 2252A's Unit of Prosecution for Child Pornography Possession," 62 AM. U. L. REV. 1675, 1675-735 (2013). (defining unit of prosecution as "the unit of conduct, or actus reus, that the legislature intended to punish in the statutory provision defining the crime.").

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The United States Constitution and the Wisconsin Constitution both protect a defendant against double jeopardy,<sup>23</sup> and more specifically against a defendant being “punished multiple times for the same offense,”<sup>24</sup> known as multiplicity. The defendants in both *Anderson* and *Eaglefeathers* challenged their multiple bail jumping charges on the basis that the charges were multiplicitous and therefore violated their protection against double jeopardy.<sup>25</sup>

It is well established that the State of Wisconsin has a two-prong test for determining multiplicity: 1) whether the charged offenses are identical in law and fact; and 2) if the offenses are not identical in law and fact, whether the legislature intended the multiple offenses to be brought as a single count.<sup>26</sup> Both the *Anderson* and *Eaglefeathers* courts applied this two-pronged test in determining that the bail jumping charges in both cases were not multiplicitous.<sup>27</sup>

*C. State v. Anderson*

In *State v. Anderson*, Anderson was charged with substantial battery, a felony contrary to Wis. Stat. § 940.19(2).<sup>28</sup> At Anderson's initial appearance, the court commissioner set a single cash bond, ordered statutory conditions of bond, and ordered as another condition of bond that Anderson have no contact with the victim.<sup>29</sup> While out on bond, Anderson violated the terms of his bond while at a friend's apartment by drinking alcohol and having contact with the victim. He was subsequently charged with three counts of felony bail jumping but ultimately pled guilty to two counts of bail jumping as a result of these violations.<sup>30</sup> The circuit court consolidated the bail jumping charges with the underlying substantial battery charge.<sup>31</sup> Anderson was sentenced to seven years in prison on one count of bail jumping and withheld sentence and imposed six years of probation with conditions, consecutive to the prison term, on the other bail jumping count.<sup>32</sup> The

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23. U.S. CONST. amend. V; WIS. CONST. art. I, § 8.

24. U.S. CONST. amend. V; WIS. CONST. art. I, § 8.

25. See *Anderson*, 580 N.W.2d at 332; *State v. Eaglefeathers*, 762 N.W.2d 690, 692 (Wis. Ct. App. 2008).

26. See *State v. Grayson*, 493 N.W.2d 23, 25 (Wis. 1992).

27. See *Anderson*, 580 N.W.2d at 333; *Eaglefeathers*, 762 N.W.2d at 693.

28. See *State v. Grayson*, 493 N.W.2d 23, 25 (Wis. 1992).

29. *State v. Anderson*, 570 N.W.2d 872 (Wis. Ct. App. 1997).

30. *Id.* at 873.

31. *Id.*

32. See *id.*

circuit court also ordered a withheld sentence and three years of probation for the underlying substantial battery conviction, to run consecutive to the prison term and concurrent with the probation in the bail jumping case.<sup>33</sup>

Anderson then sought post-conviction relief arguing that the bail jumping charges were multiplicitous.<sup>34</sup> The court of appeals reversed the conviction on one count of bail jumping and remanded for resentencing on the other count.<sup>35</sup> The court of appeals concluded that violating the terms of bond is determinative, and Anderson violated the terms once, at the same time and at the same place.<sup>36</sup> Therefore, the court of appeals concluded that the two convictions for violating one bond were multiplicitous.<sup>37</sup> The State petitioned for certiorari and the Wisconsin Supreme Court granted the petition.<sup>38</sup> The Supreme Court reversed the court of appeals, holding that the charges were not multiplicitous.<sup>39</sup> The Supreme Court further held that the Wisconsin legislature clearly intended to punish defendants who violate bail conditions.<sup>40</sup> Justice Geske wrote the dissent, taking issue with both the reasoning of the majority and the potential outcomes that could result from its interpretation.<sup>41</sup>

#### D. State v. Eaglefeathers

In *Eaglefeathers*, the defendant, Dana Eaglefeathers was convicted of crimes in two separate cases.<sup>42</sup> He was released on a single cash bond that covered both cases.<sup>43</sup> One condition of the bond was that Eaglefeathers appear for all court dates.<sup>44</sup> The preliminary hearings for both cases were set for September 4, 2003, at 10:30 a.m. in the same courtroom.<sup>45</sup> Eaglefeathers failed to appear at the preliminary hearings and was charged with two counts of felony bail jumping.<sup>46</sup>

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33. *See id.*

34. *See id.*

35. *See id.* at 875.

36. *Id.*

37. *See id.*

38. *See State v. Anderson*, 580 N.W.2d 329, 332 (Wis. 1998).

39. *Id.* at 331.

40. *See id.* at 337.

41. *See id.* at 337–40 (Geske, J., dissenting).

42. *State v. Eaglefeathers*, 762 N.W.2d 690, 692 (Wis. Ct. App. 2008).

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

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Eaglefeathers pled guilty to both bail jumping counts, and he was sentenced to three years imprisonment for each count.

Eaglefeathers appealed, arguing that his conviction on the two bail jumping counts was multiplicitous because the preliminary hearings were scheduled for the same time, in the same courtroom, and he had signed *only one bond* for the two cases.<sup>47</sup> Applying the two-pronged multiplicity test, the court held that that State needed to prove different facts for each violation of the bail jumping statute.<sup>48</sup> The court held that the State was required to prove that the circuit court had notified Eaglefeathers of the preliminary hearing in each case, and that Eaglefeathers had failed to appear in each case.<sup>49</sup> Because proof of notification and failure to appear in one case would not prove notification and failure to appear in the other, but instead would require proof of notice and failure to appear in each case, the two bail jumping charges were different in fact.<sup>50</sup> The court also found that the legislature did not intend to preclude multiple punishments in those circumstances.<sup>51</sup> Thus, the court held that the counts were not multiplicitous and affirmed the judgment of conviction.<sup>52</sup> Eaglefeathers petitioned the Wisconsin Supreme Court to hear his case, but the court denied his request.

## II. AN ARGUMENT FOR MULTIPLICITY AND A QUANTITATIVE ANALYSIS OF CCAP DATA

This section examines legal arguments that support the contention that the bail jumping charges at issue in both *Anderson* and *Eaglefeathers* were multiplicitous. Additionally, it suggests that the ambiguity created by these varying interpretations may be contributing to overcharging of defendants. Finally, the results of a quantitative analysis of CCAP data from 2000 to 2016 demonstrates that there has been an increase in bail jumping charges; that, increasingly, bail jumping charges are being used as leverage to force pleas to other charges; and that, increasingly, excessive numbers of bail jumping charges are being filed but then, in the vast majority of cases, dismissed.

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47. *See id.*

48. *See id.* at 693–94.

49. *See id.* at 694.

50. *See id.*

51. *See id.* at 695–96.

52. *See id.* at 696.

A. *The Multiplicity Test Should Have Failed in Both Anderson and Eaglefeathers*

As stated previously, both the federal and state constitutions protect a citizen from multiplicity—being punished twice for the same offense.<sup>53</sup> Multiplicity is impermissible because it “violates the double jeopardy provisions of the Wisconsin and United States Constitutions.”<sup>54</sup> In both *Anderson* and *Eaglefeathers* the court held that the bail jumping charges in question passed Wisconsin’s two-pronged multiplicity test.<sup>55</sup> However, there are strong legal arguments that support that the test should have failed in both cases.

1. THE CHARGES IN *ANDERSON* WERE MULTIPLICITOUS

In *Anderson*, the Wisconsin Supreme Court reversed the Court of Appeals and held that Anderson’s bail jumping charges were not multiplicitous.<sup>56</sup> Applying the two-prong test, the court found that the charges did not meet the first prong since the two counts were not identical in fact because they were significantly different in nature.<sup>57</sup> The underlying facts of the two counts—consuming alcohol for one count and having contact with the victim for the other count—were significantly different.<sup>58</sup> Each count required proof of additional facts that the other count did not and each offense also required a different act by Anderson.<sup>59</sup> Because the two charges were different in fact, they did not violate the double jeopardy provisions of the federal and state constitutions.<sup>60</sup>

While the court’s analysis of the first prong was logically correct, the court’s analysis of the second prong—whether the legislature intended the multiple offenses to be brought as a single count—was flawed.<sup>61</sup> Analysis of this prong required examining four factors—statutory language, legislative history and context, the nature of the proscribed conduct, and the appropriateness of multiple punishments.<sup>62</sup> The court held that there was no clear indication to overcome the

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53. See U.S. CONST. amend. V; WIS. CONST. art. I, § 8.

54. *State v. Grayson*, 493 N.W.2d 23, 25 (Wis. 1992).

55. See *State v. Anderson*, 580 N.W.2d 329, 337 (Wis. 1998); *Eaglefeathers*, 762 N.W.2d at 696.

56. See *Anderson*, 580 N.W.2d at 337.

57. See *id.* at 337.

58. See *id.* at 334.

59. See *id.*

60. See *id.* at 335.

61. See *id.*

62. See *id.*

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presumption that the legislature intended multiple punishments for violations of different conditions of the same bond.<sup>63</sup> The error in the *Anderson* decision is found in this analysis of the second prong.

Analysis under the second prong of the multiplicity test starts with the statutory language factor.<sup>64</sup> In interpreting statutory language, Wisconsin courts have long held that they first look to the plain meaning of the statute and then apply the statutory language to the facts at hand.<sup>65</sup> In determining the plain meaning, the courts will also “consider its parts in relationship to the whole statute.”<sup>66</sup> Legislative intent and collateral sources are only considered if statutes are ambiguous.<sup>67</sup> Statutory language is considered ambiguous “if reasonably well-informed individuals could differ as to its meaning.”<sup>68</sup> However, when interpreting the bail jumping statute in *Anderson*, the court did not follow its own guidance.

The bail jumping statute reads in pertinent part: “Whoever, having been released from custody under ch. 969, *intentionally fails to comply with the terms of his or her bond* is . . . guilty of [bail jumping].”<sup>69</sup> This is not ambiguous language. As Justice Geske pointed out in her dissent, in order to find it ambiguous, the *Anderson* court “read[s] out the word ‘the’ before the word ‘terms’ and replace[d] it with ‘a term.’”<sup>70</sup> To do so is reading “a construction into the statute which is not present.”<sup>71</sup> If the legislature had that intention, “it simply could have written the statute to read ‘whoever, having been released from custody under chapter 969, intentionally fails to comply with a term of his or her bond,’ is guilty of bail jumping.”<sup>72</sup> The *Anderson* court appears to have assigned ambiguity that did not exist.

Creating that ambiguity then allowed the court to analyze the second factor, legislative intent.<sup>73</sup> The court held that the “[l]egislative history and the context of the bail jumping statute indicate that the

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63. *See id.* at 337.

64. *See id.* at 335.

65. *See In re Peter B.*, 516 N.W.2d 746, 752 (Wis. Ct. App. 1994).

66. *Grafft v. Wis. Dep’t of Nat’l Res.*, 618 N.W.2d 897, 900 (Wis. Ct. App. 2000); *see also Elliott v. Empl’r Mut. Cas. Co.*, 500 N.W.2d 397, 399 (Wis. Ct. App. 1993).

67. *Armor All Prods. v. Amoco Oil Co.*, 533 N.W.2d 720, 725 (Wis. 1995).

68. *State v. Kirch*, 587 N.W.2d 919, 921 (Wis. Ct. App. 1998).

69. WIS. STAT. § 946.69(1) (2017) (emphasis added).

70. *State v. Anderson*, 580 N.W.2d 329, 339 (Wis. 1998) (Geske, J., dissenting).

71. *Id.* (Geske, J., dissenting).

72. *Id.* (Geske, J., dissenting).

73. *See id.* at 335.

legislature intended to protect different [types of] interests.”<sup>74</sup> In this case, the court said that prohibiting alcohol consumption was “aimed at protecting the public”<sup>75</sup> while prohibiting contact with the victim was “aimed at protecting that individual.”<sup>76</sup> The court went on to hold that it could not find any evidence “to overcome the presumption of separate punishments for violations of different conditions of bail.”<sup>77</sup> While protecting separate interests certainly justifies different bail conditions, it is not clear why the punishments would have to be separate as well.

In her dissent, Justice Geske points out a variety of scenarios where a detailed set of bond conditions that are violated could result in punishments that far exceed the initial crime.<sup>78</sup> This seems particularly outrageous when many conceivable conditions, like not drinking or not being in a certain area of town, are not criminal acts in and of themselves. A defendant with one criminal felony count could end up with punishment for violating bail conditions that far exceed the punishment for the crime itself.<sup>79</sup> It seems unlikely that this was the legislature’s intent. The presumption of the legislative intent to have multiple penalties for each charge rather than one penalty per bond should have been overcome by the potential for excessive punishments.

Also, the addition of multiple bail jumping charges creates a situation where the cumulative effect of those charges can be used as leverage to force a defendant to plead to the initial crime in exchange for dismissing the bail jumping charges. It is not far-fetched to imagine a situation like in *Anderson* where pleading to a single felony charge of battery is more palatable to a defendant than the possibility of going to trial and losing on three felony charges. In fact, it was precisely that reasoning that led J.E., whose story is told at the beginning of this Comment, to plead to the disorderly conduct charge.

## 2. THE CHARGES IN *EAGLEFEATHERS* WERE MULTIPLICITOUS

In *State v. Eaglefeathers*, the Court of Appeals found that the defendant’s conviction for two counts of bail jumping did not violate Eaglefeathers’ double jeopardy rights under either the U.S. Constitution or the Wisconsin Constitution.<sup>80</sup> It held that, even though Eaglefeathers only signed one bond and the preliminary hearings he missed were at

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74. *Id.* at 336.

75. *Id.*

76. *Id.* at 336.

77. *Id.* at 755.

78. *See id.* at 337–38 (Geske, J., dissenting).

79. *See id.* at 338 (Geske, J., dissenting).

80. *See State v. Eaglefeathers*, 762 N.W.2d 690, 696 (Wis. Ct. App. 2008).

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the same time and location for both cases, the two offenses were different in nature and therefore were not multiplicitous on constitutional grounds.<sup>81</sup> The court reasoned that each count of bail jumping associated with each case would have required separate proof by the State.<sup>82</sup> The State would have been required to prove that the defendant was notified of the preliminary hearing in each case, and that he failed to appear in each case. Proof of notification and failure to appear in one case would not have proven notification and failure to appear in the other, even though the defendant only signed one bond.<sup>83</sup> Additionally, the court found that Eaglefeathers did not meet his burden under the second prong of the test; he failed to show clear legislative intent to preclude multiple punishments under the circumstances.<sup>84</sup>

In its analysis of the first prong—whether the charges are the same in law and fact—the court held that the two bail jumping offenses were identical in law, but they were not identical in fact.<sup>85</sup> The test for determining if offenses are different in fact is “whether each count requires proof of an additional fact that the other count does not.”<sup>86</sup> The court held that “[e]ach count would require proof of facts for conviction which the other would not require ‘giving rise’ to an ‘individual factual inquiry’ for each count of bail jumping.”<sup>87</sup> This extended the reasoning of an earlier case, *State v. Richter*,<sup>88</sup> where the court had held that violation of three separate bonds, based on a single bond condition violation of contacting the victim, supported three separate charges of bail jumping.<sup>89</sup> What is not clear is how the bail jumping charges in *Eaglefeathers* were different in fact—that is, it is not clear what additional facts would be required for the separate charges. The preliminary hearing for both cases was on the same day, at the same time, and in the same courtroom.<sup>90</sup> While the case numbers were different, the facts regarding his failed court appearance were the same. While the prosecution would have had to prove the elements of each bail jumping charge separately, the facts of each charge were identical.

This holding also appears to imply that the unit of prosecution is not the condition or the bond but instead the case. As in *Anderson* that

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81. *See id.* at 694.

82. *See id.*

83. *See id.*

84. *See id.* at 696.

85. *See id.* at 693–94.

86. *Id.* at 694 (quoting *State v. Anderson*, 580 N.W.2d 329, 334 (Wis. 1998)).

87. *Id.* at 694–95.

88. *State v. Richter*, 525 N.W.2d 168 (Wis. Ct. App. 1994).

89. *See id.* at 170.

90. *See Eaglefeathers*, 762 N.W.2d at 694.

conclusion also seems to fly in the face of the plain meaning of the statute.<sup>91</sup> And it seems to contradict an argument the Wisconsin Supreme Court made in *Richter* as well. In *Richter*, the court distinguished the facts in that case from a Florida case, *McGee*, that had nearly identical facts to those in *Eaglefeathers*.<sup>92</sup> The *Richter* case involved multiple bonds and the court, holding that the charges were not multiplicitous, distinguished it from *McGee* where there was only one bond, just as in *Eaglefeathers*.<sup>93</sup> The *Eaglefeathers* court did not address this contradiction with *Richter*.

The result of the holdings in both *Anderson* and *Eaglefeathers* is that bail jumping charges in Wisconsin can be unpredictable and seem to hinge on judge-made administrative differences (one or more conditions, bonds, or cases) rather than the actual substance of the violation. Additionally, the *Anderson* and *Eaglefeathers* holdings would appear to allow the “piling on” of bail jumping charges such that a defendant could face a much more severe punishment for the bail jumping violations, which might not even be criminal on their own, than the initial crime they were charged with. That, in turn, could create a situation where leverage could be applied to the defendant to plead to the initial criminal charge in exchange for dismissal of the bail jumping charges. In fact, data collected from the CCAP appears to support the contention that bail jumping is being used in some counties as leverage during plea bargaining.

*B. Wisconsin’s Bail Jumping Statute is Increasingly Charged and Leveraged Against Defendants to Induce Pleas*

To assess the impact of the bail jumping statute and the Wisconsin courts’ interpretation of it, I performed a quantitative analysis on CCAP data.<sup>94</sup> Via the University of Wisconsin Law Library’s access to the Wisconsin Circuit Court’s REST (REpresentational State Transfer) interface, a java program was developed that downloaded the data from CCAP by calling the REST interface’s web services.<sup>95</sup> The data were

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91. See *supra* Part II.A.1.

92. See *Richter*, 525 N.W.2d 170; *McGee v. State*, 438 So.2d 127, 131 (Fla. Dist. Ct. App. 1983); *Eaglefeathers*, 762 N.W.2d at 690. For a similar analysis, see *One Act Supports Multiple Bail Jumping Charges*, Wisc. L.J. (Dec. 22, 2008, 1:00 AM), [<https://perma.cc/U22T-WP8V>].

93. See *Richter*, 525 N.W.2d 170.

94. The author would like to thank technical architect, Mark Johnson, for his assistance with analyzing the CCAP data. Without the generous donation of his time and skills, this analysis would not have been possible.

95. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The supporting documentation posted on the website explains the technical processes used to analyze the CCAP data.

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then loaded into a Microsoft SQL (Structure Query Language) Server database so that SQL queries could be run and the data summarized and analyzed.<sup>96</sup> It is important to note that as part of the analysis no personally identifying information was stored, and the identities of those involved in the cases are not apparent from the data that was extracted.<sup>97</sup> Case numbers have been stored in order to verify that the queries worked properly and test that the data summarizations are correct.<sup>98</sup>

Wisconsin counties implemented CCAP on a staggered basis from the late 1990s to 2008. A number of counties also converted historical data from previous electronic sources so information is available in CCAP that pre-dates their CCAP implementation date. I downloaded all of the Wisconsin misdemeanor and felony cases<sup>99</sup> present in CCAP from 2000 to 2016 over the course of three days in September 2017. This consisted of over 1.62 million cases and 3.28 million charges. The focus of the quantitative analysis was on fully adjudicated cases,<sup>100</sup> starting in the year 2000. The year 2000 was chosen as the start year because this was the first year that all 72 Wisconsin counties had consistent data in CCAP.

The analysis is broken into five subsections. Subsection 1 contains the results of the statewide analysis of bail jumping charge trends from 2000 to 2016. From there, I selected seven counties for review of bail jumping trends from 2000 to 2016. Subsection 2 contains the results of the county analysis. Subsection 3 contains the results of the detailed analysis on each of the seven counties to determine whether bail jumping was being used as leverage to get defendants to plead to the other charges associated with their case. Subsection 4 provides the

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WCCA information is only a snapshot of the information accessible in the CCAP case management system on the date the information is downloaded by the subscriber.

96. *Id.*

97. Although personally identifying information is not disclosed, we are required by the access agreement to include the following statement:

Notice to employers: It may be a violation of state law to discriminate against a job applicant because of an arrest or conviction record. Generally speaking, an employer may refuse to hire an applicant on the basis of a conviction only if the circumstances of the conviction substantially relate to the particular job. For more information, see Wisconsin Statute 111.335 and the Department of Workforce Development's Arrest and Conviction Records under the Law publication.

98. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). Case numbers are included in the spreadsheets provided in the Summarized Data section.

99. This is designated in CCAP by either a CM or a CF in the case number. Criminal Traffic (CT) cases were not included in the analysis.

100. Cases with a status of "Closed" were considered fully adjudicated.

results of the analysis regarding the occurrence of cases with large numbers of bail jumping charges.

### 1. STATEWIDE BAIL JUMPING CHARGES AND THE PERCENTAGE OF BAIL JUMPING CHARGES DISMISSED HAS GROWN SIGNIFICANTLY

In 2000, bail jumping charges represented 6.83% of all misdemeanor and felony charges statewide (11,567 of the 169,354 charges).<sup>101</sup> In 2016, that number grew to 17.14% (27,042 of 157,755),<sup>102</sup> a 151% increase.<sup>103</sup> The chart below shows how the bail jumping charge percentage has increased statewide from 2000 to 2016.<sup>104</sup>

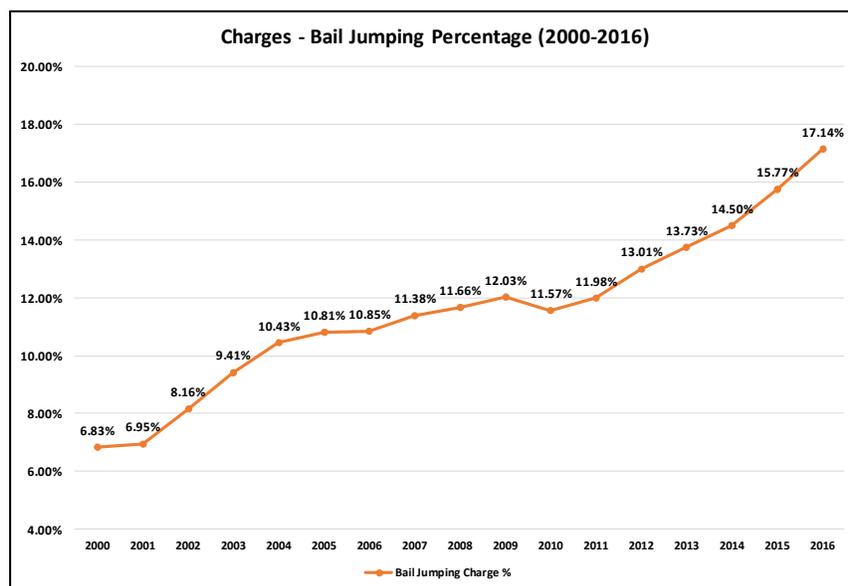


Figure 1: Statewide Charges of Bail Jumping Per Total Charges

The reasons for the increase in bail jumping charges cannot be determined from the data itself. It is possible that defendants are violating conditions more frequently than in previous years but why that may be occurring is unclear. It is also possible, in a time when resources are spread very thin, that the prosecutors are charging bail

101. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The statewide analysis data is found under Summarized Data, Section B.1.

102. See *id.*

103. See *id.*

104. See *id.*

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jumping more frequently to increase case counts<sup>105</sup> or to induce pleas to avoid costly trials.

The data also reveal that 63.85% of all bail jumping charges that were fully adjudicated in 2000 were dismissed (7,385 of the 11,567 charges), thereby suggesting that many of the charges were likely filed for reasons other than a prosecutor's reasoned judgment that punishment for the offenses was warranted.<sup>106</sup> In 2016, the percentage of dismissed bail jumping charges had grown to 73.76% (19,946 of the 27,042 charges). That is an increase of over 15.5%. The 73.76% (all bail jumping charges dismissed across the state) is particularly informative considering that for all other fully adjudicated charges in 2016 the percentage dismissed was a significantly lower 47.32% (61,852 of 130,713 charges).<sup>107</sup> The chart below shows the dismissal rate for bail jumping and non-bail jumping charges from 2000 to 2016.<sup>108</sup>

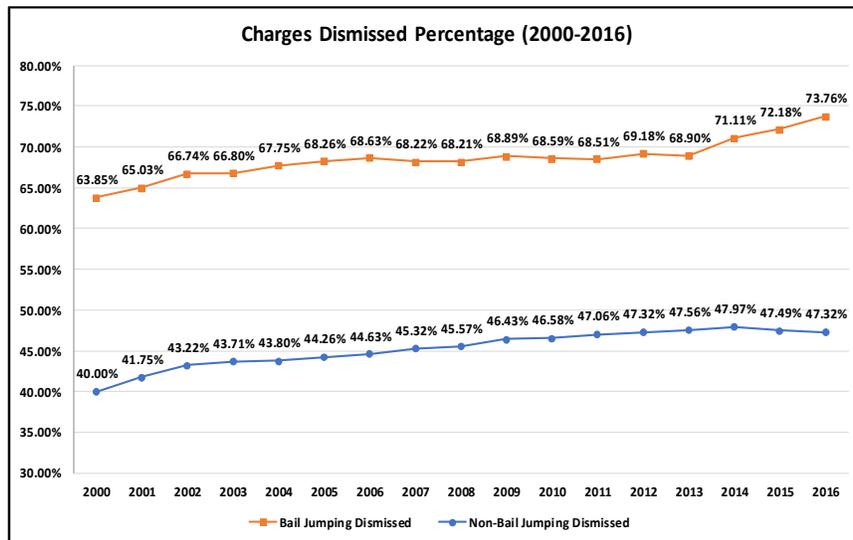


Figure 2: Statewide Comparison of Number of Dismissed Charges

While the reasons for the increase in bail jumping charges and the increase in the percentage of bail jumping charges dismissed is not

105. See DEP'T OF ADMIN., AN EVALUATION: ALLOCATION OF PROSECUTOR POSITIONS, REP. 07-9, (Wis. 2007), [<https://perma.cc/FM6Q-L9UJ>] (explaining that the State Prosecutors Office in the Department of Administration (DOA) calculates prosecutorial staffing needs in each county using, in part, a weighted caseload formula).

106. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The statewide analysis data is found under Summarized Data, Section B.1.

107. See *id.*

108. See *id.*

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known, the data clearly shows that Wisconsin continues to charge and dismiss bail jumping more than it did in 2000. Bail jumping charges are dismissed at a 55.87% higher rate than other charges across the state in the year 2016.

I also examined the data to identify the top ten most frequent charges in Wisconsin in both 2000 and 2016 based on the statute violated. Table II-1 below shows the top ten charged offenses in 2000 and 2016.

**Table II-1 – Top Ten Charges Statewide**

<b>2000</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	25,131
2	940.19(1)	Battery	11,895
3	946.41(1)	Resisting or Obstructing an Officer	9,083
4	943.24(1)	Issue of Worthless Check < \$2500	8,660
5	<b>946.49(1)(a)</b>	<b>Misdemeanor Bail Jumping</b>	<b>8,414</b>
6	943.20(1)(a)	Theft	8,027
7	961.573(1)	Possession of Drug Paraphernalia	7,513
8	961.41(3g)(e)	Possession of THC	7,476
9	943.01(1)	Criminal Damage to Property	6,219
10	<b>946.49(1)(b)</b>	<b>Felony Bail Jumping</b>	<b>3,153</b>
<b>2016</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	19,524
2	<b>946.49(1)(a)</b>	<b>Misdemeanor Bail Jumping</b>	<b>15,539</b>
3	<b>946.49(1)(b)</b>	<b>Felony Bail Jumping</b>	<b>11,503</b>
4	961.573(1)	Possession of Drug Paraphernalia	8,842
5	940.19(1)	Battery	8,084
6	946.41(1)	Resisting or Obstructing an Officer	7,702
7	961.41(3g)(e)	Possession of THC	6,268
8	943.20(1)(a)	Theft	5,673
9	943.01(1)	Criminal Damage to Property	4,480
10	943.50(1m)(b)	Retail Theft	4,123

In 2000, disorderly conduct was the most frequently charged offense. Because there are two types of bail jumping that differ solely based on the severity of the underlying charge, there are two statute

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subsections that constitute bail jumping.<sup>109</sup> In 2000, misdemeanor bail jumping was the fifth most charged offense and felony bail jumping was the tenth most common. Combined, bail jumping was third overall but the number of bail jumping charges was less than half of the number of disorderly conduct charges. In 2016, disorderly conduct was first. Misdemeanor and felony bail jumping were second and third, respectively. However, combined, bail jumping was the number one charge in Wisconsin, ahead of disorderly conduct by over 5,000 charges. That is a significant increase from 2000.

## 2. A COUNTY-LEVEL BAIL JUMPING CHARGE ANALYSIS

After looking at the statewide data, I selected seven counties for detailed analysis to examine bail jumping charge trends. The counties selected were Brown, Chippewa, Dane, Eau Claire, Iowa, Milwaukee, and Racine.<sup>110</sup> Milwaukee, Dane, and Racine counties were selected because they are the three counties with the highest numbers of all charges.<sup>111</sup> Brown county was selected because it is the county with the fourth highest number of charges, and its percentage of bail jumping charges dismissed is significantly lower than that of its peers.<sup>112</sup> Chippewa has a low-to-moderate number of charges; however, its percentage of bail jumping charges dismissed is among the highest at 90.20%.<sup>113</sup> Eau Claire stood out because it has over 7,000 charges but it has a higher than average percentage of bail jumping charges at over 23%.<sup>114</sup> Finally, Iowa was selected because it has a lower than typical total number of charges but a very high percentage of bail jumping charges and a very high percentage of bail jumping charges that are dismissed.<sup>115</sup> Table II.2 below provides 2016 charge information for each of the seven counties selected.<sup>116</sup>

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109. Bail jumping, where the underlying charge is a misdemeanor, is charged under Wis. Stat. § 946.49(1)(a). Bail jumping, where the underlying charge is a felony, is charged under Wis. Stat. § 946.49(1)(b).

110. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The statewide analysis data is found under Summarized Data, Section B.1.

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.*

**Table II.2 – 2016 Selected County Charge Information**<sup>117</sup>

County	Total Charges	Total Bail Jump Charges	% Bail Jump Charges	Closed Bail Jump Charges	Closed & Dismissed Bail Jump Charges	% Closed & Dismissed Bail Jump Charges
Brown	9,228	1,148	12.44%	893	432	48.38%
Chippewa	3,050	575	18.85%	459	414	90.20%
Dane	12,155	1,951	16.05%	1,698	1,404	82.69%
Eau Claire	7,607	1,779	23.39%	1,662	1,355	81.53%
Iowa	1,332	334	25.08%	254	230	90.55%
Milwaukee	18,174	1,146	6.31%	920	570	61.96%
Racine	11,516	2,234	19.40%	1,817	1,281	70.50%

The following graph shows the bail jumping charges dismissed percentage from 2000 to 2016 for the seven selected counties, as well as the statewide percentage.<sup>118</sup> While the statewide percentage has gradually increased from 2000 to 2016 (from 63.85% to 73.76%), county-by-county changes are varied.<sup>119</sup> Milwaukee County increased significantly from 19.84% to 61.96%, while Brown County decreased from 50.14% to 48.38%.<sup>120</sup> It is not clear why there is such variation between counties. Perhaps the counties differ in how bond conditions are set, which then affects the number of bail violations that occur. It could be any number of differences, but additional research is needed.

117. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The selected county bail jumping analysis data is found under Summarized Data, Section B.2.

118. See *id.*

119. See *id.*

120. See *id.*

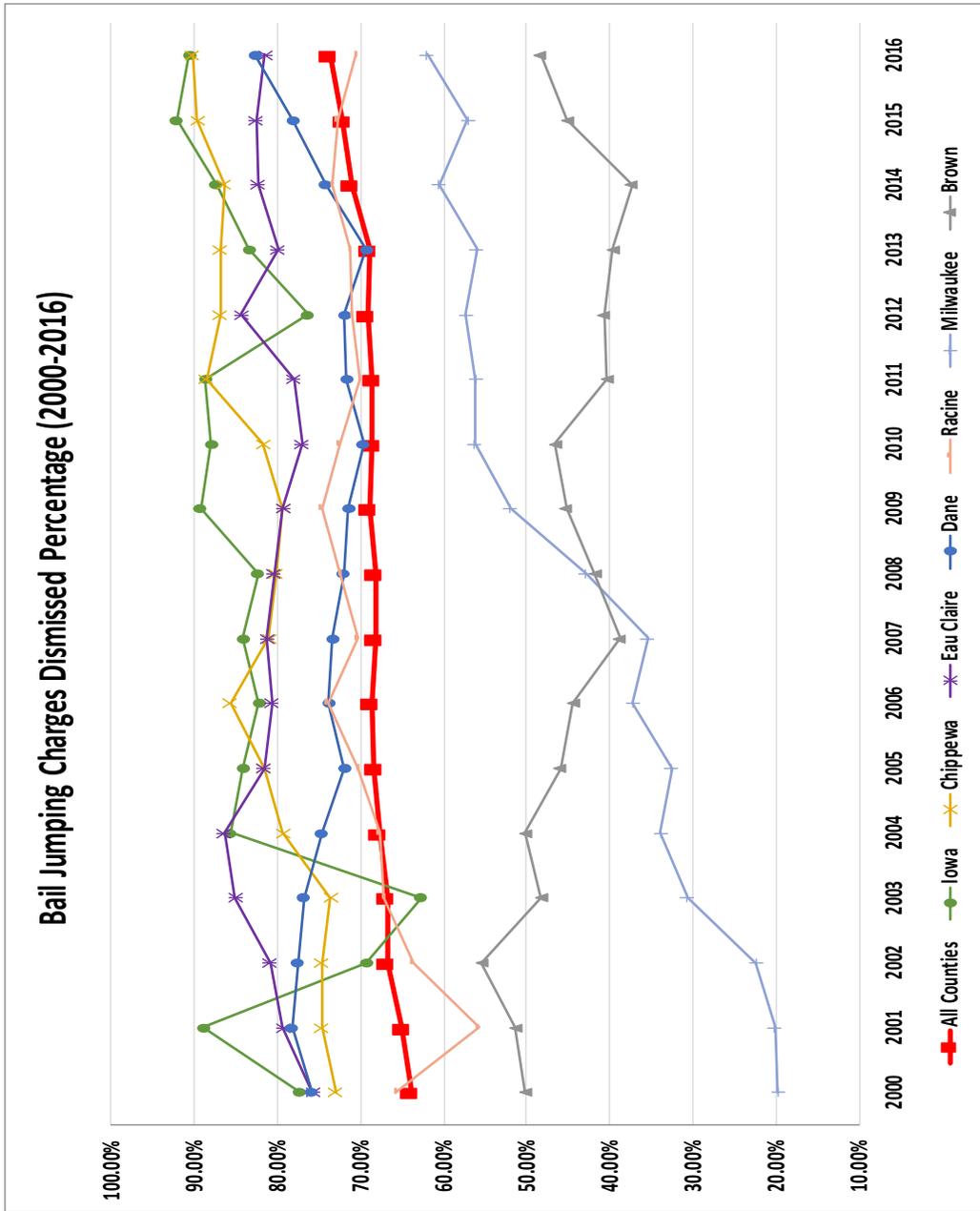


Figure 3: County Comparison of Percentage of Dismissed Bail Jumping Charges

Just as I did with the statewide data, I also analyzed the county data to identify the top ten charges in each of the seven counties as illustrated in the tables below.

In Brown County in 2000, misdemeanor bail jumping ranked sixth and felony bail jumping did not make the top ten list.<sup>121</sup> Combined, the bail jumping charges would have ranked fourth overall. In 2016, misdemeanor and felony bail jumping ranked second and seventh respectively. Combined, bail jumping ranked first overall.

**Table II.3 – Top Ten Charges – Brown County**

<b>BROWN COUNTY</b>			
<b>2000</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	912
2	31.12()	County/Municipality Worthless Check	477
3	940.19(1)	Battery	416
4	943.20(1)(a)	Theft	310
5	943.01(1)	Damage to Property	259
<b>6</b>	<b>946.49(1)(a)</b>	<b>Bail Jumping - Misdemeanor</b>	<b>251</b>
7	961.41(3g)(e)	Possession of THC	227
8	961.573(1)	Possession of Drug Paraphernalia	222
9	946.41(1)	Resisting or Obstructing Officer	211
10	943.24(1)	Issue of Worthless Check	196
<b>2016</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	860
2	<b>946.49(1)(a)</b>	<b>Bail Jumping - Misdemeanor</b>	<b>608</b>
3	961.573(1)	Possession of Drug Paraphernalia	484
4	940.19(1)	Battery	408
5	946.41(1)	Resisting or Obstructing Officer	380
6	961.41(3g)(e)	Possession of THC	352
7	<b>946.49(1)(b)</b>	<b>Bail Jumping - Felony</b>	<b>285</b>
8	943.20(1)(a)	Theft	219
9	943.01(1)	Damage to Property	208
10	943.50(1m)(b)	Retail Theft	204

121. *See id.* In Brown County, felony bail jumping was 11th in 2000 with 108 charges.

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In Chippewa County in 2000, misdemeanor bail jumping ranked seventh and felony bail jumping did not make the top ten list.<sup>122</sup> Combined, the bail jumping charges would have ranked sixth overall. In 2016, misdemeanor and felony bail jumping ranked second and first, respectively. Combined, bail jumping had more than three times the charges compared to the next highest ranked charge of disorderly conduct.

**Table II.4 – Top Ten Charges – Chippewa County**

<b>CHIPPEWA COUNTY</b>			
<b>2000</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	295
2	943.24(1)	Issue of Worthless Check < 2500	274
3	946.41(1)	Resisting or Obstructing Officer	151
4	940.19(1)	Battery	126
5	943.01(1)	Damage to Property	104
6	943.20(1)(a)	Theft	98
7	<b>946.49(1)(a)</b>	<b>Bail Jumping - Misdemeanor</b>	<b>65</b>
8	961.573(1)	Possession of Drug Paraphernalia	61
9	5.10()	County Disorderly Conduct	59
10	961.41(3g)(e)	Possession of THC	59

<b>2016</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	<b>946.49(1)(a)</b>	<b>Bail Jumping - Felony</b>	<b>251</b>
2	<b>946.49(1)(b)</b>	<b>Bail Jumping - Misdemeanor</b>	<b>208</b>
3	947.01(1)	Disorderly Conduct	163
4	961.573(1)	Possession of Drug Paraphernalia	153
5	946.41(1)	Resisting or Obstructing Officer	124
6	343.44(1)(b)	Operating While Revoked	99
7	961.41(3g)(e)	Possession of THC	92
8	46-1	Disorderly Conduct	91
9	940.19(1)	Battery	74
10	943.20(1)(a)	Theft	74

122. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The selected county bail jumping analysis data is found under Summarized Data, Section B.2. In Chippewa county, felony bail jumping was 16th in 2000 with 35 charges. Note that in Chippewa County, as well as most of the other counties, CCAP data also contains some municipal statutes, such as 5.10(1) and 46-1 above.

In Dane County in 2000, misdemeanor bail jumping ranked second and felony bail jumping ranked fifth. Combined, the bail jumping charges would have ranked second overall. In 2016, misdemeanor and felony bail jumping ranked second and third respectively. Combined, bail jumping would have ranked first overall with four hundred more charges than the number-two-ranked disorderly conduct.

**Table II.5 – Top Ten Charges – Dane County**

<b>DANE COUNTY</b>			
<b>2000</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly conduct	2,506
2	<b>946.49(1)(a)</b>	<b>Bail jumping - misdemeanor</b>	<b>1,514</b>
3	946.41(1)	Resisting or obstructing officer	1,096
4	940.19(1)	Battery	1,093
5	<b>946.49(1)(b)</b>	<b>Bail jumping - felony</b>	<b>601</b>
6	943.01(1)	Damage to property	557
7	943.20(1)(a)	Theft	505
8	943.50(1m)(b)	Retail theft	500
9	943.38(2)	Forgery - uttering	448
10	961.573(1)	Possession of drug paraphernalia	443

<b>2016</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	1,206
2	<b>946.49(1)(a)</b>	<b>Bail Jumping - Felony</b>	<b>864</b>
3	<b>946.49(1)(b)</b>	<b>Bail Jumping - Misdemeanor</b>	<b>834</b>
4	940.19(1)	Battery	657
5	943.50(1m)(b)	Retail Theft	370
6	943.20(1)(a)	Theft	367
7	946.41(1)	Resisting or Obstructing Officer	355
8	32.03	Disorderly Conduct	339
9	961.573(1)	Possession of Drug Paraphernalia	332
10	943.01(1)	Damage to Property	331

In Eau Claire County in 2000, misdemeanor bail jumping ranked ninth and felony bail jumping did not make the top ten list.<sup>123</sup> Combined, the bail jumping charges would have ranked sixth. In 2016, misdemeanor and felony bail jumping ranked second and first

123. *See id.* In Eau Claire county, felony bail jumping was 19th in 2000 with 70 charges.

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respectively. Combined, bail jumping had more than twice the charges compared to the next highest ranked charge of disorderly conduct.

**Table II.6 – Top Ten Charges – Eau Claire County**

<b>EAU CLAIRE COUNTY</b>			
<b>2000</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	580
2	9.44.010	Municipal Disorderly Conduct	445
3	943.24(1)	Issue of Worthless Check	326
4	943.20(1)(a)	Theft	324
5	9.47.010	County Worthless Check	313
6	946.41(1)	Resisting or Obstructing Officer	295
7	940.19(1)	Battery	230
8	961.573(1)	Possession of Drug Paraphernalia	203
<b>9</b>	<b>946.49(1)(a)</b>	<b>Bail Jumping - Misdemeanor</b>	<b>181</b>
10	961.41(3g)(e)	Possession of THC	168

<b>2016</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	<b>946.49(1)(b)</b>	<b>Bail Jumping - Felony</b>	<b>839</b>
2	<b>946.49(1)(a)</b>	<b>Bail Jumping - Misdemeanor</b>	<b>823</b>
3	947.01(1)	Disorderly Conduct	690
4	961.573(1)	Possession of Drug Paraphernalia	413
5	946.41(1)	Resisting or Obstructing Officer	378
6	940.19(1)	Battery	266
7	961.41(3g)(e)	Possession of THC	264
8	943.20(1)(a)	Theft	201
9	961.41(3g)(g)	Possession of Meth	194
10	943.50(1m)(b)	Retail Theft	177

In Iowa County in 2000, both misdemeanor bail jumping and felony bail jumping did not make the top ten list.<sup>124</sup> Combined, bail jumping charges would have ranked tenth overall. In 2016, misdemeanor and felony bail jumping ranked first and third, respectively. Combined, bail jumping had more than twice the number of charges of the next highest ranked charge of disorderly conduct.

124. *See id.* In Iowa county, misdemeanor bail jumping ranked 18th in 2000 with 5 charges. Felony bail jumping was 12th in 2000 with 17 charges.

**Table II.7 – Top Ten Charges – Iowa County**

<b>IOWA COUNTY</b>			
<b>2000</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	148
2	961.41(3g)(e)	Possession of THC	42
3	943.24(1)	Issue of Worthless Check	40
4	961.573(1)	Possession of Drug Paraphernalia	39
5	943.38(1)	Forgery - Written	36
6	943.20(1)(a)	Theft	34
7	940.19(1)	Battery	32
8	946.41(1)	Resisting or Obstructing Officer	26
9	943.38(2)	Forgery - Uttering	23
10	948.22(2)	Failure to Support Child (120 Days+)	19

<b>2016</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	<b>946.49(1)(a)</b>	<b>Bail Jumping - Misdemeanor</b>	<b>155</b>
2	947.01(1)	Disorderly Conduct	103
3	<b>946.49(1)(b)</b>	<b>Bail Jumping - Felony</b>	<b>99</b>
4	600.01	Disorderly Conduct	75
5	943.20(1)(a)	Theft.	48
6	961.573(1)	Possession of Drug Paraphernalia	47
7	961.41(3g)(e)	Possession of THC	44
8	940.19(1)	Battery	29
9	943.01(1)	Damage to Property	26
10	946.41(1)	Resisting or Obstructing Officer.	24

In Milwaukee County in 2000, both misdemeanor bail jumping and felony bail jumping did not make the top ten lists.<sup>125</sup> Combined, the bail jumping charges would have ranked ninth overall. In 2016, misdemeanor and felony bail jumping ranked fourth and seventh, respectively. Combined, the bail jumping charges would have ranked third, behind disorderly conduct and battery.

125. *See id.* In Milwaukee County, misdemeanor bail jumping ranked 12th in 2000 with 381 charges. Felony bail jumping was 41st in 2000 with 108 charges.

2018:619 *The Use of Wisconsin's Bail Jumping Statute* 645**Table II.8 – Top Ten Charges – Milwaukee County**

<b>MILWAUKEE COUNTY</b>			
<b>2000</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	940.19(1)	Battery	2,712
2	947.01(1)	Disorderly conduct	2,204
3	946.41(1)	Resisting or obstructing officer	1,026
4	943.50(1m)(b)	Retail theft	987
5	943.20(1)(a)	Theft	906
6	961.41(3g)(e)	Possession of THC	826
7	943.01(1)	Criminal Damage to property	759
8	961.573(1)	Possession of drug paraphernalia	694
9	63.01()	Municipal Disorderly Conduct	513
10	961.41(1)(cm)1	Manuf/Deliver Cocaine (< =5g)	483

<b>2016</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly conduct	1,967
2	940.19(1)	Battery	1,299
3	946.41(1)	Resisting or obstructing officer	599
4	<b>946.49(1)(a)</b>	<b>Bail jumping - misdemeanor</b>	<b>490</b>
5	943.01(1)	Damage to property	456
6	943.50(1m)(b)	Retail theft	452
7	<b>946.49(1)(b)</b>	<b>Bail jumping - felony</b>	<b>430</b>
8	941.23(2)	Carry Concealed Weapon	411
9	941.29(1m)(a)	Possesses a firearm - convicted felon	403
10	943.32(2)	Armed Robbery	399

In Racine County in 2000, misdemeanor bail jumping ranked sixth and felony bail jumping did not make the top ten list.<sup>126</sup> Combined, the bail jumping charges would have ranked fifth overall. In 2016, misdemeanor and felony bail jumping ranked second and third, respectively. Combined, bail jumping would have ranked first with 500 more than disorderly conduct charges, the than next highest ranked charge.

126. *See id.* In Racine County, felony bail jumping was 15th in 2000 with 80 charges.

**Table II.9 – Top Ten Charges – Racine County**

<b>RACINE COUNTY</b>			
<b>2000</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly conduct	994
2	946.41(1)	Resisting or obstructing officer	682
3	118.15()	Fail/Cause Child to Attend School	677
4	943.24(1)	Issue of worthless check	566
5	940.19(1)	Battery	502
<b>6</b>	<b>946.49(1)(a)</b>	<b>Bail jumping - misdemeanor</b>	<b>471</b>
7	961.573(1)	Possession of drug paraphernalia	324
8	961.41(3g)(e)	Possession of THC	257
9	943.01(1)	Criminal Damage to property	216
10	943.20(1)(a)	Theft	213

<b>2016</b>			
<b>Rank</b>	<b>Statute</b>	<b>Description</b>	<b># of Charges</b>
1	947.01(1)	Disorderly Conduct	1,225
2	<b>946.49(1)(a)</b>	<b>Bail jumping - Misdemeanor</b>	<b>1,113</b>
3	<b>946.49(1)(b)</b>	<b>Bail jumping - Felony</b>	<b>704</b>
4	946.41(1)	Resisting or Obstructing Officer	608
5	961.41(3g)(e)	Possession of THC	494
6	940.19(1)	Battery	475
7	118.15()	Fail/Cause Child to Attend School	439
8	961.573(1)	Possession of Drug Paraphernalia	375
9	11-6(a)	Disorderly Conduct	252
10	943.01(1)	Damage to Property	223

There is a wide variance in the data between counties. For example, in Iowa County in 2016, the combined bail jumping charges were the top offenses charged in the county. The number of bail jumping charges were more than double of the number of disorderly conduct charges. However, in the much larger county of Milwaukee, the combined charges in 2016 ranked third and had nearly half the number of charges compared to disorderly conduct. Milwaukee County has recently implemented a pre-trial services assessment that assists judges in making bail and bond condition determinations, which process perhaps impacts the downstream number of bail jumping charges in the county. Much more analysis needs to be done in order to determine why these variances exist. The analysis does suggest that similarly situated defendants may be treated differently based on the charging county. What is consistent across all counties is that bail jumping

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moved up in the ranking of charges, in some cases dramatically, from 2000 to 2016.

### 3. A COUNTY-LEVEL CASE ANALYSIS OF BAIL JUMPING LEVERAGE

Next, I performed detailed analysis on each county to see if bail jumping was being used as leverage to get defendants to plead to the other charges associated with their cases. For this analysis, all fully adjudicated (closed) cases in each county that had at least one bail jumping charge and at least one other charge were examined. Cases where all charges (both bail jumping and other charges) were dismissed were excluded as the potential for leverage in such cases would be less certain and more difficult to assert. While some cases that exclusively consist of bail jumping charges could be used as leverage for other pending cases that a defendant may have, that relationship is much less clear and harder to verify through CCAP data.

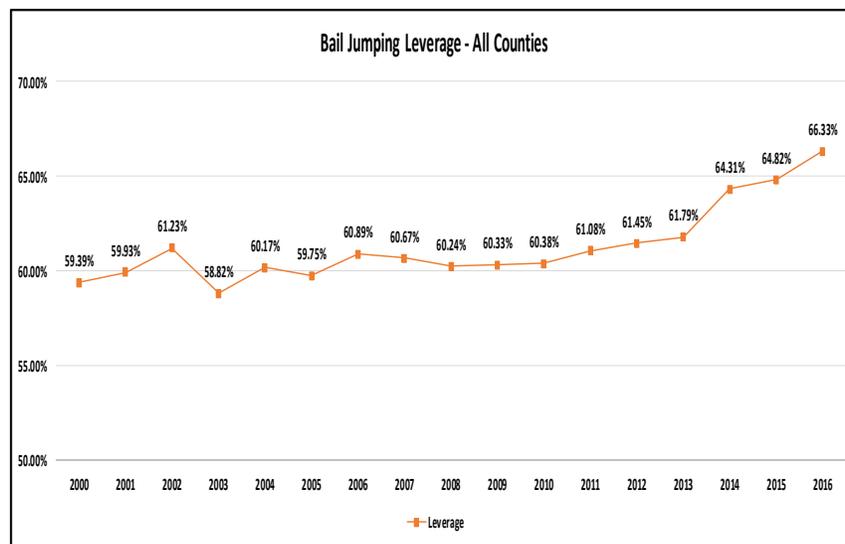


Figure 4: Statewide Comparison of Bail Jumping Charges as Leverage

For the cases that remain, I performed analysis on the relationship between the disposition of the bail jumping charges and the disposition of the other charges. I recorded it as a leveraged situation if at least one of the bail jumping charges was dismissed and at least one of the other non-bail jumping charges was pleaded to.<sup>127</sup> The following chart shows

127. Dismissals include the following dispositions: dismissed on prosecutor's motion; dismissed on court's own motion; dismissed before initial appearance; charge

the bail jumping leverage percentage for all counties from 2000 to 2016.<sup>128</sup> The leverage percentage increased from 59.39% in 2000 to 66.33% in the year 2016.<sup>129</sup> This is an 11.69% increase.

Next, I performed the same leverage percentage analysis for each county. The table below provides that data for each of the seven counties selected for both 2000 and 2016.

**Table II.10 – County Leverage Analysis<sup>130</sup>**

<b>County/Data Point</b>		<b>2000</b>	<b>2016</b>
Brown	# of cases with bail jumping leverage potential	103	368
	# of cases bail jumping leverage may have been exercised	43	164
	% of cases bail jumping leverage may have been exercised	41.75%	44.57%
Chippewa	# of cases with bail jumping leverage potential	35	185
	# of cases bail jumping leverage may have been exercised	19	154
	% of cases bail jumping leverage may have been exercised	54.29%	83.24%
Dane	# of cases with bail jumping leverage potential	933	590
	# of cases bail jumping leverage may have been exercised	715	463
	% of cases bail jumping leverage may have been exercised	76.63%	78.47%
Eau Claire	# of cases with bail jumping leverage potential	128	524
	# of cases bail jumping leverage may have been exercised	77	419
	% of cases bail jumping leverage may have been exercised	60.16%	79.96%
Iowa	# of cases with bail jumping	10	55

dismissed but read in; and dismissed. Cases that were considered pled included: guilty due to guilty plea; guilty due to Alford plea; and guilty due to no contest plea.

128. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The leverage analysis data is found under Summarized Data, Section B.3.

129. See *id.*

130. See *id.*

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County/Data Point		2000	2016
	leverage potential		
	# of cases bail jumping leverage may have been exercised	8	47
	% of cases bail jumping leverage may have been exercised	80.00%	85.45%
<b>Milwaukee</b>			
	# of cases with bail jumping leverage potential	249	491
	# of cases bail jumping leverage may have been exercised	37	268
	% of cases bail jumping leverage may have been exercised	14.86%	54.58%
<b>Racine</b>			
	# of cases with bail jumping leverage potential	165	457
	# of cases bail jumping leverage may have been exercised	98	293
	% of cases bail jumping leverage may have been exercised	59.39%	64.11%
<b>All Counties</b>			
	# of cases with bail jumping leverage potential	4,120	8,841
	# of cases bail jumping leverage may have been exercised	2,447	5,864
	% of cases bail jumping leverage may have been exercised	59.39%	66.33%

The following graph shows the bail jumping leverage percentage from 2000 to 2016 for the seven selected counties, as well as the statewide percentage.<sup>131</sup> While the statewide percentage has gradually increased from 2000 to 2016 (from 59.39% to 66.33%), we see that again county-by-county changes are varied.<sup>132</sup> As noted, Milwaukee County increased significantly from 14.86% to 54.58%, while Dane County increased slightly from 76.63% to 78.47%.<sup>133</sup>

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131. *See id.*

132. *See id.*

133. *See id.*

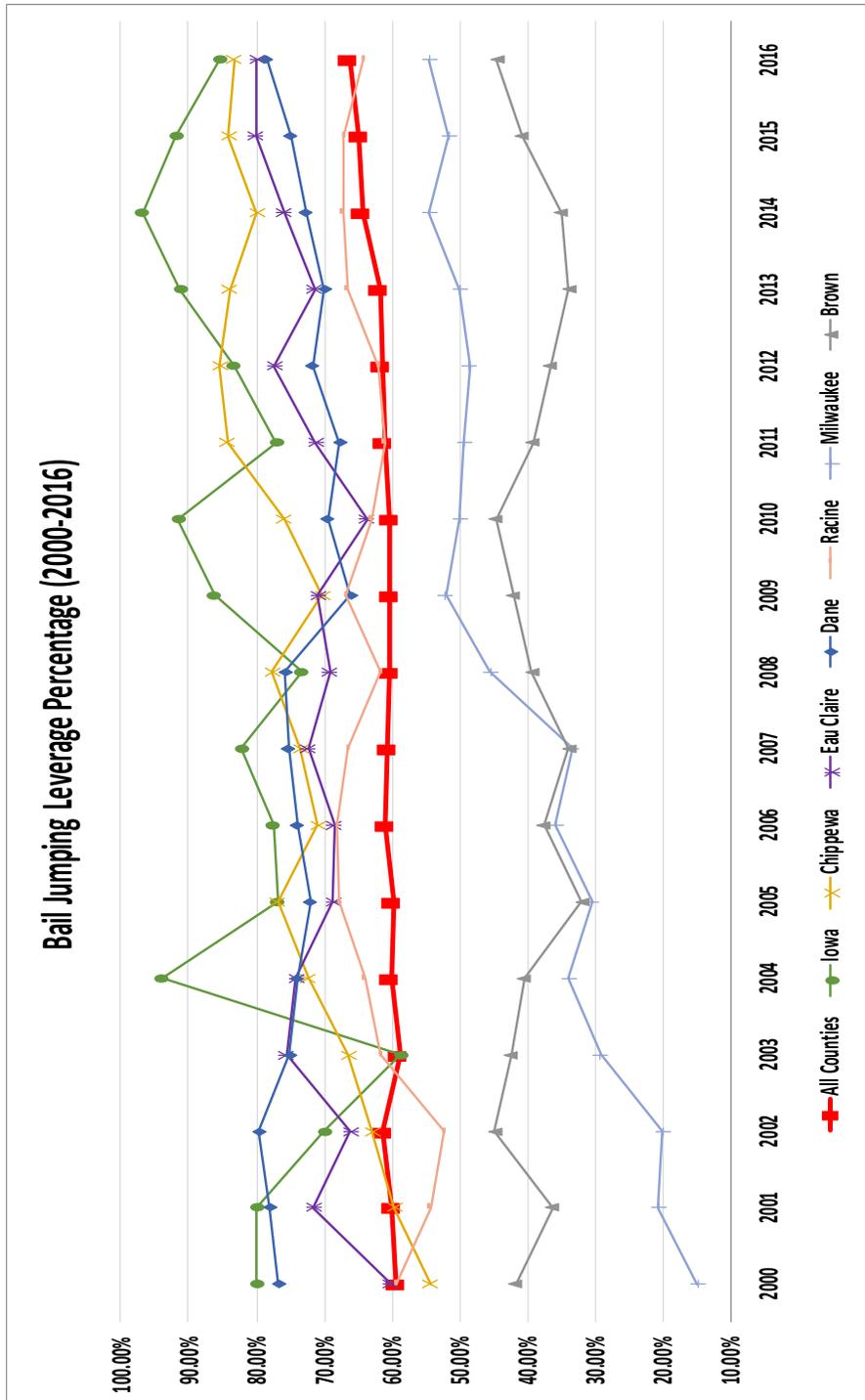


Figure 5: County Comparison of Using Bail Jumping Charges as Leverage

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The fact that a case has one or more bail jumping charges dismissed and one or more other charges pled to is not conclusive evidence that the bail jumping charge was leveraged to force a plea on the other charge. There are many reasons that charges are dismissed: witnesses disappear, additional information is obtained, etc. In a justice system where probable cause is needed to charge and proof beyond a reasonable doubt is needed to convict, dismissal of charges will inevitably occur. Additionally, it is also possible that, in cases with multiple underlying charges, one of the other underlying charge(s) influenced the decision to plea, not just the bail jumping charge(s). However, when the percentage of bail jumping charges dismissed in cases where the defendant pled to other charges reaches 70, 80, or nearly 90% the correlation between the dismissal of bail jumping to the plea to other charge becomes hard to ignore, particularly when dismissal rates of other charges are significantly lower.<sup>134</sup>

Another data point that appears to support the inference that bail jumping is used as leverage, is the fact that, in the cases where the potential for bail jumping leverage exists, very few situations exist where all the bail jumping charges were dismissed and none of the other charges were pled.<sup>135</sup> In fact, of the seven counties, only Dane, Milwaukee, and Brown had any cases that met these criteria in the years 2000 and 2016, and the numbers were extremely low.<sup>136</sup> In 2016 only twenty-five cases across the state met this condition.<sup>137</sup> This suggests that the likelihood that a defendant would get his bail jumping charges dismissed without pleading to another charge is almost non-existent. Table II.11 below shows the number of these situations in 2000 and 2016.<sup>138</sup>

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134. *See supra* Part II.B.1.

135. *See* [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The leverage analysis data is found under Summarized Data, Section B.3.

136. *See id.*

137. *See id.*

138. *See id.*

**Table II.11 – # of Cases All Bail jumping Charges Dismissed and Other Charge(s) Not Pled<sup>139</sup>**

County	2000	2016
Brown	0	2
Chippewa	0	0
Dane	3	0
Eau Claire	0	0
Iowa	0	0
Milwaukee	1	3
Racine	0	0
Statewide	18	25

The following chart shows this condition for all counties from 2000 to 2016.<sup>140</sup>

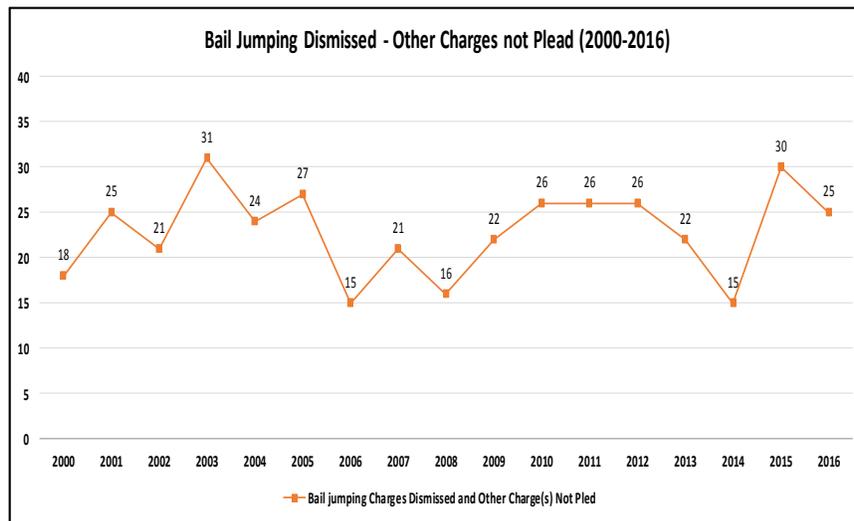


Figure 6: Statewide Number of Cases with Dismissed Bail Jumping and No Other Pled Charges

#### 4. THE NUMBER OF CASES WITH VERY HIGH NUMBERS OF BAIL JUMPING CHARGES HAVE INCREASED

Were Justice Geske's assertions in her dissent in *Anderson* correct? Has the bail jumping statute and its interpretations resulted in a large number of bail jumping charges and an excessive exposure to penalties? The CCAP data suggests that she was indeed correct. In 2000, 22.78%

139. *See id.*

140. *See id.*

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of closed bail jumping cases<sup>141</sup> had more than one bail jumping charge.<sup>142</sup> In 2016, that number was 34.56%.<sup>143</sup> Additionally, the percentage of cases with five or more bail jumping charges has also increased 117% over time.<sup>144</sup> Table II.12 below shows the percentage of bail jumping cases with five or more bail jumping charges for 2000 and 2016.<sup>145</sup>

**Table II.12 – Statewide Bail Jumping Cases With 5 or More Bail Jumping Charges<sup>146</sup>**

	2000	2016
Total # of Closed Bail Jumping Cases	8,360	16,216
Total # of Bail Jumping Cases with Five or more Bail Jumping Charges	133	559
Bail Jumping Cases with 5 or more Bail Jumping Charges as a % of all Bail Jumping Cases	1.59%	3.45%

In addition to the growing number of total bail jumping charges over the years, there are also individual cases with very high numbers of bail jumping charges.<sup>147</sup> Even in these extreme cases, a clear majority of the bail jumping charges are being dismissed, which also suggests they are being used as leverage only.<sup>148</sup> Table II.6 below provides a sample of the individual closed cases with excessive bail jumping charges in 2016.<sup>149</sup>

141. A closed bail jumping case is a closed case with at least one bail jumping charge associated with it.

142. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The high number analysis is found under Summarized Data, Section B.4.

143. See *id.*

144. See *id.*

145. See *id.*

146. See *id.*

147. See *id.*

148. See [www.ajohnsonbailresearch.com](http://www.ajohnsonbailresearch.com). The leverage analysis data is found under Summarized Data, Section B.3.

149. See *id.*

**Table II.13 – 2016 Examples of Excessive Bail Jumping Charges**<sup>150</sup>

County	Total # of Bail Jumping Charges in One Case	Total # Bail Jumping Charges Dismissed in the Same Case
Kenosha	44	42
Monroe	31	25
Kenosha	24	24
Outagamie	25	24
Iowa	23	23
Monroe	23	21
Columbia	21	21
Columbia	21	20
Waupaca	20	20
Polk	18	18

The CCAP data does not contain easily reportable fields that describe the reasons for the bail jumping charges so conclusions about why these charges are being filed cannot be drawn. Manual analysis of the cases and their associated complaints would be needed to determine if there were one or more bonds that were violated, one or more terms of a bond violated, or some combination thereof. However, the numbers alone suggest that multiple bail jumping charges per case are increasing and very high numbers of bail jumping charges in a single case, while a minority, still occur regularly and have increased significantly over time.<sup>151</sup>

#### THE FUTURE OF WISCONSIN'S BAIL JUMPING STATUTE

At a time when more than 95% of criminal cases in the United States are resolved via guilty pleas,<sup>152</sup> it seems Wisconsin's bail jumping statute and its interpretation by the Wisconsin courts work to provide leverage that prosecutors can use to induce pleas. While not conclusive as to causation, the correlation between bail jumping charge dismissals and pleas to other charges cannot be ignored. Additionally, the scenarios that Justice Geske addressed in her dissent in *Anderson* are borne out by the data. There are defendants, like J.E., who are clearly facing sentences that are disproportionate to their original

150. *See id.*

151. *See id.*

152. *See* INNOCENCE PROJECT, *America's Guilty Plea Problem Under Scrutiny* (Jan. 23, 2017), [<https://perma.cc/DDF7-UGUF>].

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crimes and often for acts that are not criminal. If, as the majority in *Anderson* held, the legislative intent of the statute is to punish criminals who violate bail conditions,<sup>153</sup> then the statute has failed its objective. CCAP data show that statewide nearly three-quarters of all bail jumping charges are dismissed.<sup>154</sup> Detailed case analysis points to even higher rates of dismissal in cases where leverage opportunities exist.<sup>155</sup>

In light of the data, Wisconsin courts should look to clarify the ambiguity created by the holdings in *Anderson* and *Eaglefeathers* and define a common-sense unit of prosecution that prevents extreme numbers of bail jumping charges. Doing so would reduce the leverage effect that prosecutors have without eliminating it entirely and would work to prevent the extreme situations that the CCAP data reveals.

Additional research utilizing the CCAP bail jumping data would also be beneficial to help us understand more about how Wisconsin's bail jumping statute is being used. Specifically, analysis around race and age might be revealing. More information on why there are significant differences in the bail jumping charge dismissals and leverage situations between counties should also be explored. This should include information on how and why bond conditions are being violated. Are non-criminal conditions the issue or are defendants committing new crimes or failing to make required court appearances? Finally, Wisconsin would benefit from implementing a more uniform approach to setting bail conditions that continues to meet the goals of public safety and protection while also increasing the likelihood of fair and uniform application statewide. In many ways, the data create more questions than answers, and additional research is needed in order to have a clear understanding of the use and impact of Wisconsin's bail jumping statute.

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153. See *State v. Anderson*, 580 N.W.2d 329 (Wis. 1998) (Geske, J., dissenting).

154. See *supra* Part II.B.1.

155. See *supra* Part II.B.3.