Keeping Up Appearances

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Ensuring that defendants released before trial return to court — that they "appear" for future court dates — is one of the primary goals of the pretrial process. Bail reform efforts over the last decade have intended, and sometimes achieved, increased rates of pretrial release. As reformers work to preserve these policies and advocate for still higher rates of pretrial release, understanding pretrial appearance is as important as ever.

This intense reform focus on the pretrial system and the intervening disruption of the COVID-19 pandemic have prompted scholars' and legislators' reconsideration of settled assumptions about pretrial appearance, leading to efforts to better understand what causes defendants to miss court and what interventions may help them return. These interventions include those aiming to support defendants on pretrial release (and shifting away from overreliance on surveillance and penalties), as well as system-focused changes that improve appearance rates across cases.

This Article analyzes these developments and then steps back to examine more fundamental but surprisingly undertheorized questions: (i) whether and why pretrial appearance is important, (ii) how the system evolved to penalize nonappearance, and (iii) whether the relatively severe penalties the system still

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imposes for nonappearance can be justified as an effective strategy to achieve system goals. The Article calls into question rigid expectations for perfect pretrial attendance that are set and enforced in ways that prize defendants' compliance as an end in itself. Particularly when paired with courts' notoriously inflexible scheduling practices, those perfect-appearance expectations lead to defendant failure and obscure the justice goals that justify the use of the criminal process. All of this effort tracking, counting, and punishing failures to appear comes at the expense of addressing more significant underlying criminal justice problems.

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INTRODUCTION

Ensuring that defendants released before trial return to court is one of the primary goals of the pretrial process.[1] Courts describe appearances for hearings or trials in serious terms: as the fulfilment of duties or kept promises.[2] Defendants who "fail to appear" are recorded as FTAs and penalized by judges who may issue bench warrants or impose fines.[3] In some cases, defendants face new criminal charges for failing to appear.[4] All of the effort that goes into "preventing, tracking, and sanctioning defendant FTAs" consumes a great deal of system time,

[1] *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 845-46 (2016) [hereinafter Gouldin, *Disentangling*]. *See generally* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK (2018) [hereinafter BAIL BOOK] (describing the history and modern features of bail and other aspects of the pretrial process in the United States).

[2] *See* State v. Garvin, 699 A.2d 921, 925-26 (Conn. 1997) (describing defendant's failure to appear as a broken "promise"); Lindsay Graef, Sandra G. Mayson, Aurelie Ouss & Megan T. Stevenson, *Systemic Failure to Appear in Court*, 172 U. PA. L. REV. 1, 11 (2023) [hereinafter Graef, Mayson, Ouss & Stevenson] ("[C]ourts, lawyers, policymakers, media, and the public treat the defendant's duty to appear as a serious legal obligation and treat high defendant FTA rates as a significant legal and social problem.").

[3] *See* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 687, 690 (2018) [hereinafter Gouldin, *Defining*]; Tenille Patterson & Meghan Guevara, *Unpacking Willful Flight*, PRETRIAL JUST. INST. 1, 4, 7 (2023).

[4] Brian Nam-Sonenstein, *High Stakes Mistakes: How Courts Respond to "Failure to Appear*," PRISON POL'Y INITIATIVE (Aug. 15, 2023), https://www.prisonpolicy.org/blog/2023/08/15/fta/ [https://perma.cc/R7BR-UXT8] (outlining that forty-nine jurisdictions retain policies that impose criminal penalties, including fines and imprisonment, and four states retain strict liability policies for FTAs).

attention, and money.[5] This approach also imposes significant costs on defendants and their communities.[6]

Bail reform efforts over the last decade have intended, and sometimes achieved, increased rates of pretrial release. They do this both by encouraging judges to release more defendants with fewer conditions[7] and by creating automatic processes that take release decisions away from judges.[8] Many reforms shift away from traditional surveillance and enforcement-oriented pretrial approaches and toward more supportive, non-liberty-infringing investments in improving defendants' pretrial success.[9] New community-based supervision programs reflect these philosophical shifts, as do projects that provide either counsel or advocates at first appearance or make institutional investments in reminder systems.[10] As reformers continue to advocate for preserving these policies and argue for still higher rates of pretrial release,[11] understanding the phenomenon of pretrial appearance is as important as ever.

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[5] Graef, Mayson, Ouss & Stevenson, *supra* note 2, at 11.

[6] Gouldin, *Defining*, *supra* note 3, at 694-96; *see also* Lauryn P. Gouldin, *New Perspectives on Pretrial Nonappearance*, *in* 6 AM. SOC'Y OF CRIMINOLOGY DIV. ON CORR. & SENT'G: HANDBOOK ON PRETRIAL JUSTICE 296, 299 (Christine S. Scott-Hayward, Jennifer E. Copp & Stephen Demuth eds., 2021) [hereinafter *New Perspectives*].

[7] *See, e.g.*, Sara Valdez Hoffer, *Federal Pretrial Release and the Detention Reduction Outreach Program* (*DROP*), 82 FED. PROB. 46, 46-47(2015) (explaining Kansas's Detention Reduction Outreach Program ("DROP")).

[8] *See* Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 887 (2020) [hereinafter Gouldin, *Reforming*] (describing reforms that expand the use of citations or desk appearance tickets or other forms of "stationhouse release").

[9] *See id*. at 905-06; Brook Hopkins, Chiraag Bains & Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 682 (2018); *see, e.g.*, Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2288-89 (2019) (explaining that "the 'least-restrictive-means' principle" requires that a pretrial system offer supportive responses or interventions for mitigating pretrial risk before resorting to "monitoring or detention").

[10] *See infra* Part II.

[11] *See* Shima Baradaran Baughman recently outlined a proposal for the near-total elimination of pretrial detention. *Eliminating Pretrial Detention*, B.U. L. REV. 4, 31-32 (forthcoming 2024) (advocating for state legislatures to set pretrial release targets (with 90% as the proposed release rate)).

Meanwhile, the COVID-19 pandemic demonstrated that courts could make nimble adjustments to pretrial appearance requirements.[12] The rapid shift to virtual court appearances and greater accommodation of defendants' needs revealed that court systems were less ossified than previously assumed.[13] Whether shifts to virtual appearances are good for defendants in individual cases is beyond the scope of this Article,[14] but the pandemic forced consideration of alternatives in ways that will hopefully prompt lasting changes to expectations about pretrial appearance. These two forces — bail reform and the pandemic — have influenced the system in different ways, but both have disrupted settled assumptions about pretrial appearance. As a result, system actors, reformers, and other experts are trying to understand what causes

[12] *See* Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1463-66 (2022) ("In many ways, the shift online allows us to rethink first principles of judicial power through the lens of technological disruption."); *see also* Thea Johnson, *Plea Bargaining in the Virtual Courtroom*, *in* RESEARCH HANDBOOK ON PLEA BARGAINING AND CRIMINAL JUSTICE 379 (Máximo Langer, Mike McConville & Luke Marsh eds., 2024).

[13] *See* Ferguson, *supra* note 12, at 1466 (analyzing "the effect of time — how virtual scheduling shifts power away from judges' convenience to refocus attention on the inconvenience to defendants and other nonprofessionals episodically involved in the criminal legal system" (emphasis omitted)); *see also* Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 198-99 (2021) [hereinafter Turner, *Remote Criminal Justice*].

[14] For discussion of the challenges of incorporating virtual appearances in criminal courts, see, for example, TAYLOR BENNINGER, COURTNEY COLWELL, DEBBIE MUKAMAL, & LEAH PLACHINSKI, VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT 6 (2021); Ferguson, *supra* note 12, at 1501-03; Jenia I. Turner, *The Emerging Constitutional Law of Remote Criminal Justice*, 59 WAKE FOREST L. REV. 101, 113 (2024) [hereinafter Turner, *Emerging*]; Elizabeth Webster, Beth M. Huebner, Alessandra Milagros Early & Luis C. Torres, *"Court Can Happen Anywhere": Courtroom Workgroup Members' Perceptions of the Challenges and Opportunities of a Transformed Workplace*, 50 CRIM. JUST. & BEHAV. 1737, 1738 (2023); NAT'L CTR. FOR STATE CTS., THE USE OF REMOTE HEARINGS IN TEXAS STATE COURTS: THE IMPACT ON JUDICIAL WORKLOAD 12 (2021), https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/remote-and-virtual-hearings/resources-docs/TX-Remote-Hearing-Assessment-Report.pdf [https://perma.cc/B5E8-478F] [hereinafter NAT'L CTR. FOR STATE CTS., THE USE OF REMOTE HEARINGS]; Jason Tashea, *The Legal and Technical Danger in Moving Criminal Courts Online*, BROOKINGS (Aug. 6, 2020), https://www.brookings.edu/articles/the-legal-and-technical-danger-in-moving-criminal-courts-online/ [https://perma.cc/YS7F-22M8] (examining the difficulties presented by virtual court appearances in criminal proceedings).

defendants to miss court and what interventions may help address the problem of pretrial nonappearance.

As the title suggests, this Article focuses on the steps that courts may need to take to help defendants appear for future court dates. This project outlines the state of current knowledge about effective pretrial appearance reforms, including by highlighting data deficits.

The title underscores that pretrial appearance rates, although they have not been defined and measured consistently, have traditionally been high.[15] Most of the time, released defendants return to court as required. A leading study of release data from 2009 for large urban counties across the country showed that eighty-three percent of defendants charged with felonies who were released pretrial appeared for all scheduled court appearances.[16] Most of the seventeen percent who missed at least one court appearance returned to court within a year.[17] Only three percent of the total were still "fugitives" at the end of year.[18] Pretrial appearance rates for defendants accused of violent offenses are even higher (ninety percent overall, ninety-five percent for those charged with murder, for example).[19] Unfortunately, this national

[15] *See* Gouldin, *Defining*, *supra* note 3, at 689. The problems with pretrial appearance data — that I documented in *id.* — persist. Jurisdictions have inconsistent approaches and use imprecise labels. As Lindsay Graef and Michael Zanger-Tishler explain, in many courts, what is labeled and reported as an FTA is actually the issuance of a bench warrant. Lindsay Graef & Michael Zanger-Tishler, *Bench Warrants as an Institutional Response to Failure to Appear*: *The Implications for Pretrial Risk Assessment*, at 3, 23 (draft on file with author) (2024); *see also infra* notes 243–249 and accompanying text.

[16] *Compare* BRIAN A. REAVES, BUREAU OF JUST. STATS., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 21 (2013), https://bjs.ojp.gov/library/publications/felony-defendants-large-urban-counties-2009-statistical-tables [https://perma.cc/U4RC-4WER] [hereinafter REAVES] (showing that across the seventy-five largest counties, for defendants arrested for all categories of felony offenses, eighty-three percent "made all court appearances"), *with* THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUST. STATS., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 - STATISTICAL TABLES 9 (2010), https://bjs.ojp.gov/library/publications/felony-defendants-large-urban-counties-2006 [https://perma.cc/XDZ8-2PHU] (in the prior study of data from 2006, this number was eighty-two percent).

[17] *See* REAVES, *supra* note 16, at 21.

[18] *Id.*

[19] *Id.*

study, which had been repeated every other year from 1990 to 2009, has not been repeated by the Bureau of Justice Statistics since 2009.[20]

More recent studies of specific state and local court systems show similar rates of appearance. A recent statewide study in Massachusetts, for example, found in 2018 that more than eighty-six percent of released defendants appeared for all of their court dates.[21] Data for appearances in New York City Criminal Courts from 2019 through 2022, after bail reforms increased rates of pretrial release, range from eighty-five to ninety-two percent of defendants successfully appearing for their court dates.[22] Appearance rates for courts outside of New York City during the same time period are slightly lower, ranging from eighty-one to eighty-three percent.[23]

Pretrial appearance rates in federal court are very high; only 1.6 percent of federal defendants released before trial in 2014 received a violation for failing to appear.[24] This "near-perfect" federal appearance rate "is seen equally in federal districts with very high release rates and those with very low release rates."[25]

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[20] The final two reports were issued three years apart (in 2006 and 2009). All of the reports are available in PUBLICATIONS LIST FOR SERIES, *Felony Defendants in Large Urban Counties*, BUREAU OF JUST. STATS., https://bjs.ojp.gov/library/publications/list?series_filter=Felony%20Defendants%20in%20Large%20Urban%20Counties (last visited Feb. 4, 2024) [https://perma.cc/XUM4-KWXG].

[21] *See* MASS. SPECIAL LEGISLATURE COMM'N, FINAL REPORT OF THE SPECIAL COMMISSION TO EVALUATE POLICIES AND PROCEDURES RELATED TO THE CURRENT BAIL SYSTEM 9 (2019), https://malegislature.gov/Bills/191/SD2718.pdf [https://perma.cc/3NYW-8FSF] (explaining that the overall failure-to-appear rate was 12.6%).

[22] *See* N.Y. DIV. OF CRIM. JUST. SERVS., SUPPLEMENTAL PRETRIAL RELEASE SUMMARY TABLES 2019-2022 1, 36 (2023) https://www.criminaljustice.ny.gov/crimnet/ojsa/pretrial-release/DCJS_Supplemental_Pretrial_Release_Summary_Tables.pdf [https://perma.cc/35Q8-XA5B].

[23] *See id.*

[24] MARK MOTIVANS, BUREAU OF JUST. STATS. FEDERAL JUSTICE STATISTICS, 2014-STATISTICAL TABLES 15 (2017), https://bjs.ojp.gov/library/publications/federal-justice-statistics-2014-statistical-tables [https://perma.cc/Z6V8-3RGN]. But federal pretrial detention rates have increased significantly in recent decades and are much higher than state detention rates. *See* ALISON SIEGLER, FREEDOM DENIED: HOW THE CULTURE OF DETENTION CREATED A FEDERAL JAILING CRISIS 22-23 (2022).

[25] ALISON SIEGLER & ERICA ZUNKEL, RETHINKING FEDERAL BAIL ADVOCACY TO CHANGE THE CULTURE OF DETENTION 46, 47 (2020).

One of the tasks for appearance-related reform efforts, then, is keeping appearance rates high. This requires preserving and replicating what seems to be working, isolating the causes of nonappearance, and developing effective interventions when pretrial nonappearance is a more significant problem. Maintaining robust appearance data and ensuring mechanisms for comparing data across jurisdictions must also be prioritized.

These mostly high rates of pretrial success can be obscured in the dominant pretrial reform discourse. Two of the labels — "flight risk" and "failure to appear" — that still dominate conversations around pretrial appearance mischaracterize the situation in significant and problematic ways.[26] As noted above, data is limited, but it is also presented in ways that hamper efforts to increase rates of pretrial release.

The expression "keeping up appearances" also refers to putting up a façade of normalcy, papering over problems, and pretending that things are okay, even when they are not.[27] Under this reading, the title reflects the need to evaluate whether rigid expectations for perfect pretrial attendance further legitimate system goals or divert attention from system dysfunction.

On superficial review, these perfect-attendance requirements may seem obvious and necessary for the system to work. But that assumes a well-functioning system, with cases progressing and resolving in reasonable time frames, and with other system players appearing when expected (and showing up prepared to move cases forward). Recent work by Lindsay Graef, Sandy Mayson, Aurelie Ouss, and Megan Stevenson debunks that notion of system efficiency, demonstrating that

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[26] *See generally* Gouldin, *Defining*, *supra* note 3 (discussing problems in defining flight risk); Gouldin, *New Perspectives*, *supra* note 6, at 296 (describing proposals for new categories of pretrial nonappearance, such as "true flight," "local absconding," and "low-cost nonappearances").

[27] *See keep up appearances*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/keep-up-appearances (last visited Feb. 19, 2024) [https://perma.cc/7BF7-RCSR] (explaining that to "keep up appearances" is a synonym for "to act as if something is true when it is not," to "pretend," to "make believe," to "feign," or to "fake."); RICHARD A. SPEARS, *keep up appearances*, MCGRAW-HILL'S DICTIONARY OF AMERICAN IDIOMS AND PHRASAL VERBS 374 (2005) (explaining that to "keep up appearances" is "to make things look all right whether they are or not").

other system actors miss court more consistently than defendants on release.[28]

As this Article highlights, court schedules are set and enforced in ways that seem to prize defendants' compliance as an end in itself, obscuring the justice goals that justify the use of the criminal process.[29] Over time, we have developed a system that severely penalizes imperfect court attendance.[30] And all of this effort counting and punishing failures to appear comes at the expense of addressing more significant underlying criminal justice problems.[31]

This Article is a comprehensive examination of current policies governing pretrial appearance. Part I makes clear that the criminal justice system's response to pretrial nonappearance has become more punitive over time, and that shift has proven counterproductive.[32] In many places, that system is best characterized as one that demands perfect pretrial attendance by imposing overly harsh penalties for any failure to appear. This punitive approach doubles down on many courts' inflexible and unaccommodating approaches to case scheduling.

Reformers are reimagining pretrial appearance, both as a conceptual matter and by developing new strategies to get people back to court. Part II describes and evaluates these efforts, which are organized into five categories: (i) research, advocacy, and legislation that redefines the

[28] *See* Graef, Mayson, Ouss & Stevenson, *supra* note 2, at 5 (concluding that failures to appear are a "systemic phenomenon, one with systemic consequences"). The authors found that even detained defendants miss court at surprisingly high rates. *See id.* at 5, 22.

[29] *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1450-52 (2009) (discussing the obstinacy theory and how the system pursues process violations).

[30] *See* Nam-Sonenstein, *supra* note 4.

[31] *See generally* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 73-74 (2018) (describing the "managerial approach to criminal law administration" and its disconnect from idealized visions of criminal justice); Gouldin, *Defining*, *supra* note 3, at 741 (advocating for "greater judicial and system-wide awareness of the competency, capacity, and resource limitations" that contribute to nonappearance or otherwise "inhibit compliance with court orders"); Patterson & Guevara, *supra* note 3, at 9 (explaining that "unfailing appearance is not as central to the administration of justice as we often assume; instead of being an indicator of the integrity of the court process, it is more a reflection of the resources, stability, and support of the person facing charges").

[32] *See infra* Part I.

categories and examines the causes of nonappearance; (ii) systemic efforts to demand fewer pretrial appearances; (iii) reforms intended to facilitate necessary appearances; (iv) reforms that expand grace periods or offer amnesty for missed appearances; and (v) efforts to measure and predict nonappearance.[33]

Finally, Part III of the Article takes a step back to examine several fundamental but undertheorized questions: (i) why pretrial appearance is important; (ii) how the system evolved to penalize nonappearance; and (iii) whether the relatively severe penalties the system imposes for nonappearance can be justified as an effective strategy to achieve system goals.[34] This Part identifies the sources of a defendant's right and obligation to appear for court proceedings and then analyzes the impacts of pretrial nonappearance on justice goals, administrative efficiency, and concerns about judicial legitimacy. Part III also explores the ways that pretrial appearances are used by courts as some sort of marker of compliance or "governability."[35]

Under current laws and practices across jurisdictions, a defendant's history of FTAs will have a significant impact on their prospects for pretrial liberty in any future case.[36] The government's power to infringe pretrial liberty should hinge on demonstrating a necessity for that infringement.[37] But the limited literature on pretrial appearance mostly assumes the importance of pretrial appearance without considering that it varies from case to case, and within cases, based on the nature of the particular court proceeding. The importance of pretrial appearance is not only contingent on the nature and seriousness of the charged

[33] *See infra* Part II.

[34] *See infra* Part III.

[35] *See, e.g.*, KOHLER-HAUSMANN, *supra* note 31, at 72-73 (arguing that misdemeanor case processing focuses on assessing "governability" as much (or more) than adjudicating guilt or innocence).

[36] *See id.* at 73-74 ("Judges and prosecutors frequently say that one of the most important determinants of case disposition is the record of a defendant's prior criminal justice encounters, such as arrests, bench warrants, compliance with court mandates, and other indications of governability, including steady employment, family, or housing connection."); *see also* Gouldin, *Defining*, *supra* note 3, at 711-12.

[37] *See* Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 783 (2020); Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1106 (2019); *see also* Shima Baradaran Baughman, *Taming Dangerousness*, 112 GEO. L.J. 215, 215 (2023).

offense; it also depends on the possibility for flexibility in timing or mode of appearance. Data gathered about pretrial appearance rarely reflects these particulars, and they are too often absent from policy debates.

I. PENALIZING IMPERFECT COURT ATTENDANCE: EVOLVING APPROACHES

A. Ensuring Court Appearance: Earliest History

Historical evidence dating back to colonial times suggests longstanding formal commitments to liberal pretrial release.[38] The word "bail" was frequently used synonymously with "release" at the founding.[39] The Massachusetts Body of Liberties provided for a right to bail for all but the most serious offenses.[40] Pennsylvania's Frame of Government went further, introducing an absolute right to bail for all non-capital offenses.[41] This right-to-bail provision became the model for several subsequent state constitutions.[42] Despite these strong contemporaneous black-letter commitments to a right to bail, the United States Constitution provides no such explicit right and guards only against the imposition of "excessive bail."[43] As Kellen Funk and

[38] Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 710-11 (2018). Stephanie Didwania traces the history of bail/pretrial release to the thirteenth century. Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1263 (2021).

[39] Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4, 6 (2018); *see also* Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1816, 1822-23 (2024) (explaining that "'bail' referred to a mechanism of release from state custody. That mechanism did not involve any upfront cash deposit or other transfer of collateral. Rather, the accused person promised to appear for trial and pledged that, if he did not appear, he would forfeit a specified sum").

[40] *See* TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, THE HISTORY OF BAIL AND PRETRIAL RELEASE 4 (2010).

[41] *Id.* at 4-5. *See also* Funk & Mayson, *supra* note 39, at 1840-41.

[42] Funk & Mayson, *supra* note 39, at 1842 (describing it as the "consensus text"); *see also* TIMOTHY R. SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 31 (2014).

[43] U.S. CONST. amend. VIII; *see also* SCHNACKE, *supra* note 42, at 59.

Sandy Mayson demonstrate, however, "[F]or those who lived on the margins of society, bail practice bore little resemblance to the law on the books, and pretrial detention was routine."[44]

The Judiciary Act of 1789 included a right-to-bail provision, similar to Pennsylvania's.[45] The Act also established the judicial authority later relied on to justify punishing flight and criminalizing nonappearance.[46] Specifically, the Act gave all courts of the United States the power to "to punish by fine or imprisonment . . . all contempts of authority in any cause or hearing before the same . . . ."[47] The "contempt power" established by this section is broad and has been employed in both civil and criminal contexts.[48]

B. Increasing Inflexibility

The first federal statute concerned with the flight of criminal defendants, also referred to as a "bail-jumping" statute, appeared in 1954.[49] The initial language of the 1954 statute criminalized only "willful" failures to surrender.[50] Even willfully absent defendants, however, were given thirty days to appear following a missed court date to avoid criminal penalties.[51]

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[44] Funk & Mayson, *supra* note 39, at 1822; *see also* Patterson & Guevara, *supra* note 3, at 6.

[45] *See* Funk & Mayson, *supra* note 39, at 1873; *see also* Judiciary Act of 1789, 1 Stat. 73, 91 § 33.

[46] Daniel Bernal, *Taking the Court to the People: Real-World Solutions for Nonappearance*, 59 ARIZ. L. REV. 547, 553 (2017).

[47] Judiciary Act of 1789, 1 Stat. 73, 91 § 17.

[48] *See* CONST. ANNOTATED, *Inherent Powers Over Contempt and Sanctions*, LIBR. CONG., https://constitution.congress.gov/browse/essay/artIII-S1-4-3/ALDE_00013522/ (last visited Dec. 5, 2023). *See generally* Nathan M. Cohen, *The Contempt Power — The Lifeblood of the Judiciary*, 2 LOY. U. CHI. L.J. 69 (1971) (discussing the power of the court to punish for contempt).

[49] *See* DANIEL J. FREED & PATRICIA M. WALD, BAIL IN THE UNITED STATES: 1964, at 82 (1964); Murphy, *supra* note 29, at 1455.

[50] Act of Aug. 20, 1954, Pub. L. No. 603, ch. 772, § 1, 68 Stat. 747-48; *see also* Patterson & Guevara, *supra* note 3, at 6.

[51] *See* Patterson & Guevara, *supra* note 3, at 6. *See generally* Murphy, *supra* note 29 at 1454-55 (discussing the 1954 federal statute and the history of punishing failure to appear).

In the same year, a study of bail administration in Philadelphia published by criminal law reform advocate Caleb Foote drew widespread attention to the inequities arising out of arbitrary and excessive cash bail practices.[52] Foote's study echoed the concerns of earlier studies, leading to the nation's first bail reform movement in the 1960s.[53]

While bail reform efforts represented a step in the right direction for the broader criminal justice system, the movement had the unintended consequence of strengthening statutes that criminalized failure to appear.[54] Proponents of bail reform even acknowledged the importance of criminal bail-jumping statutes in deterring flight.[55] The Bail Reform Act of 1966 shifted to a presumption of release without cash bail but broadened enforcement of the bail-jumping statute by eliminating the thirty-day grace period and replacing "willfully fails to surrender" with "willfully fails to appear."[56] Prior to 1966, few states criminalized failure to appear.[57] In the years following the 1966 Act, however, over thirty states criminalized failure to appeal, many utilizing the language from the 1966 federal statute.[58]

Increases in violent crime in the early 1980s led to criticism of the pretrial release system put in place by the 1966 Act.[59] The Bail Reform Act of 1984 repealed the prior act and reversed many of the provisions intended to promote release.[60] The 1984 Act also broadened the enforcement of the bail-jumping statute by lowering the mens rea requirement from "willfully" to "knowingly."[61] In the 1966 Act, a more stringent nonappearance rule was designed as a compromise to assure

[52] *See* Van Brunt & Bowman *supra* note 38, at 723 (citing Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia,* 102 U. PA. L. REV. 1031 (1954)).

[53] *Id.* at 723-24.

[54] *See* Freed & Wald, *supra* note 49, at 81-83.

[55] *See id.*

[56] Patterson & Guevara, *supra* note 3, at 6.

[57] *See id.*; Murphy, *supra* note 29, at 1455.

[58] Murphy, *supra* note 29, at 1456-57; Patterson & Guevara, *supra* note 3, at 6.

[59] *See* Patterson & Guevara, *supra* note 3, at 6.

[60] *See id.*

[61] *See* Murphy, *supra* note 29, at 1456; Patterson & Guevara, *supra* note 3, at 6; *see also* 18 U.S.C. §3146(a).

that increased pretrial release would not lead to increased flight.[62] By contrast, the 1984 Act decreased the availability of pretrial release and expanded the circumstances under which released criminal defendants could be charged with failure to appear.[63] These new laws were written more broadly to prohibit "any failure to appear" and they have shaped pretrial practice for decades.[64]

II. REIMAGINING PRETRIAL APPEARANCE: THE REFORM LANDSCAPE

Today, after a decade of reform — with significantly increased attention from scholars and policymakers and greater input from community advocates — the dominant approaches to describing, measuring, and addressing pretrial appearance have changed. The following Sections analyze these changes across several broadly defined categories: (i) specific changes to the way pretrial nonappearance is understood both in the academic literature and in changing law and practice; (ii) procedural changes to speed up cases and reduce the overall number of case appearances; (iii) strategies, supports and alternatives that ensure that defendants get to court for their required appearances; (iv) efforts to legislate and advocate for more grace and amnesty for missed appearances; and finally, (v) improvements to data collection and comparison, and to related risk assessment efforts.

A. New Understandings of an Old Phenomenon

This past decade of research and advocacy has changed the way that scholars, legislators, judges, lawyers, and other policy reform advocates define and measure pretrial nonappearances in (i) academic writing, (ii) statutory reforms, (iii) courtroom advocacy and decision-making, and (iv) investments in pretrial research.

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[62] *See* 1966 Bail Reform Act, Pub. L. No. 89–465, 80 Stat. 214, 216 (1966); *see also* Murphy, *supra note* 29, at 1456; Patterson & Guevara, *supra* note 3, at 6.

[63] *See* Patterson & Guevara, *supra* note 3, at 6.

[64] *Id*.

1. Reclassifying Pretrial Nonappearances

In prior work, I have argued that lumping all defendants who do not appear for a court appearance into a broad category of "failures to appear" or, worse still, labeling that broad category as "flight risks," undermines both defendants' liberty rights and the government's policy objectives.[65] The problem of pretrial nonappearance is more nuanced. Only a very small number of defendants might be classified as "true flight risks" with the intention and wherewithal to flee the jurisdiction.[66] There is consensus across the literature that flight is "rare,"[67] and that it would be very difficult as a practical matter to "flee from justice in today's hyper-connected world."[68]

The majority of defendants who do not appear for court are likely still in the jurisdiction, but there are differences within this group that justify further sorting.[69] Some of those people may be actively and

[65] *See* Gouldin, *Defining*, *supra* note 3, at 729; Gouldin, *Reforming*, *supra* note 8, at 893-95.

[66] Gouldin, *Defining*, *supra* note 3, at 725; *see also* Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 464 (2021) ("It is crucial to distinguish between nonappearance and flight in defining the proper grounds for pretrial detention. . . . [Defendants] should not be detained for failure to appear if there is no evidence of flight."); Didwania, *supra* note 38, at 1319 (advocating for federal pretrial detention decisions to refocus on "the risk of intentional flight — the original animating purpose of bail"); Gouldin, *Reforming*, *supra* note 8, at 894 (same).

[67] Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 987 (2020) [hereinafter Baughman, *Dividing Bail*] (citing Gouldin, *Defining*, *supra* note 3); *see also* Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 ALB. L. REV. 1063, 1091-92 (2018) [hereinafter *Accused*] ("The term 'flight risk' conjures up images of a fleeing fugitive 'on the run,' intentionally trying to escape prosecution and punishment for misdeeds. This dire image bears little resemblance to the actual reasons that defendants charged with low-level, nonviolent offenses miss court dates."); Nam-Sonenstein, *supra* note 4; John Raphling, *Efficient Injustice: Too Much Pretrial Incarceration Damages the Integrity of Our Courts*, 57 JUDGES' J. 14, 16 (2018) ("Few people actively flee the jurisdiction to avoid prosecution."); *cf.* Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 538 (2019) (distinguishing nonappearance from flight).

[68] Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494 (2017); *see also* Baughman, *Dividing Bail*, *supra* note 67, at 987 ("In today's world, it is virtually impossible for a typical defendant to leave the country undetected."); Didwania, *supra* note 38, at 1319 ("In the information age, it is difficult for a person to completely abscond . . . ."); Gouldin, *Defining*, *supra* note 3, at 727 ("[T]echnology and improved interjurisdictional coordination have diminished the prospect of successful flight.").

[69] *See* Gouldin, *Defining*, *supra* note 3, at 683-84.

persistently avoiding court — and might be labeled "local absconders"[70] or deemed to be "willful" nonappearances.[71]

The final category of nonappearances is likely the largest, although more empirical data is needed to say with certainty how many defendants would fall into any of these categories. Most defendants who miss court have not fled the jurisdiction, and they are not willfully and persistently trying to avoid their obligations. Instead, as the Pretrial Justice Institute has explained, "[T]he much more likely scenario is that a person has failed to appear due to personal, organizational, or transportation problems."[72] As detailed in *Defining Flight Risk*, these reasons can include:

> [B]eing unaware of or forgetting the date of the court appearance (which might reflect either ineffective notice by the court or poor calendar management by the defendant); illness or other unforeseen personal emergencies; external logistical challenges including employment conflicts, childcare issues, or lack of transportation; confusion or ignorance about the process or a general lack of capacity to navigate the process (this may reflect the complexity of the system and/or the defendant's cognitive limitations); fear of punishment relating to the pending charge; or lacking the funds to pay fines and fees that are owed at the courthouse.[73]

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[70] *Id.*

[71] *See* Patterson & Guevara, *supra* note 3, at 11-12 (describing the willful flight standard in Illinois).

[72] PRETRIAL JUST. INST., SCAN OF PRETRIAL PRACTICES 41 (2019); *see also* Baughman, *Dividing Bail*, *supra* note 67, at 987 (explaining that it is "more common," for defendants to fail to appear in court "due to neglect or error"); Raphling, *supra* note 67, at 16 ("Many who miss court do so because they face obstacles like poverty and homelessness or mental illness, which make it difficult to meet obligations.").

[73] Gouldin, *Defining*, *supra* note 3, at 729-30; *see also The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 116th Cong. 11 (2019) (statement of Alison Siegler, Clinical Professor of Law & Director of the Federal Criminal Justice Clinic, University of Chicago Law School) (advocating amending the Bail Reform Act to reflect distinctions between flight and nonappearance; explaining that many nonappearances are attributable to "poverty, transportation barriers, and lack of resources"); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 338 (2016) (explaining that these are

Many of these reasons are grounded in poverty, mental illness, addiction, housing instability, "or some combination of these challenges."[74] Some defendants simply cannot see the long-term consequences of failing to appear,[75] or they cannot prioritize those consequences over more immediate "daily struggles" and crises.[76]

"familiar" reasons for nonappearance); John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1765 (2018) (asserting that "financial needs play a prominent role for those who do obtain release. People with jobs that have inflexible hours, or that require a significant commute, might find it difficult or impractical to miss work for a court date. A defendant might also fail to appear because they simply forget about an upcoming court appearance. They may be afraid or have insufficient information about how to get to court, what to do once there, and what will happen next."); Barry Mahoney, Bruce D. Beaudin, John A. Carver III, Daniel B. Ryan & Richard B. Hoffman, *Pretrial Services Programs: Responsibilities and Potential*, NAT'L INST. OF JUST. 1, 38 (2001); Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, U. PENN. PUB. L. RSCH. PAPER NO. 17-18 1, 11 (Erik Luna ed., 2017); Joanna Thomas & Abdiaziz Ahmed, *Court Date Notifications: A Summary of the Research and Best Practices for Building Effective Reminder Systems*, N.Y.C. CRIM. JUST. AGENCY 5 (Mar. 2021) https://www.nycja.org/assets/downloads/Court-Notification-Report-DRAFT-NN-3-8-final.pdf [https://perma.cc/TBJ4-JVFF] (explaining that primary reasons individuals fail to appear for their court date include forgetfulness, employment obligations, childcare, or other logistical issues such as transportation).

[74] Jones, *Accused*, *supra* note 67, at 1092 (explaining that "many low-level offenders suffer from a range of social disadvantages, including mental health disorders, drug addiction, alcoholism, unemployment, homelessness, or some combination of these challenges"); *see also* U.S. COMM'N ON CIV. RTS., CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 67 (Jan. 2022) https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf [https://perma.cc/E5QQ-YWS4] (citing Brian Bornstein, Alan Tomkins & Elizabeth Neeley, *Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach*, NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, DEP'T OF JUST. (May 2011) https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf [https://perma.cc/G3VB-H6JX]).

[75] *See* Alissa Fishbane, Aurelie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCI. 658, 661 (2020) (explaining that text-message reminders that included explanation of the consequences of missing court helped to reduce pretrial nonappearance rates, which "suggests that a substantial proportion of defendants miss court because they are unaware of the consequences.").

[76] Jones, *Accused*, *supra* note 67, at 1092; *see also* SHANNON MAGNUSON, AMY DEZEMBER, KEVIN KUEHMEIER, CHERRELL GREEN & DANA GAUTSCHI, UNDERSTANDING COURT ABSENCE AND REFRAMING "FAILURE TO APPEAR": *LAKE COUNTY, IL*, SAFETY + JUSTICE CHALLENGE, JUSTICE SYSTEMS PARTNERS 9 (2023) [hereinafter MAGNUSON, DEZEMBER, KUEHMEIER, GREEN & GAUTSCHI] (detailing barriers to court appearance and dividing them into three major categories, including "life responsibilities and challenges,

Some commentators suggest an intent or willfulness requirement as the dividing line in this category of local nonappearances.[77] In a 2018 request for proposals, for example, Arnold Ventures suggested that "willful nonappearances" would include a "defendant [who] makes a conscious decision not to attend a court hearing for a variety of reasons, such as job or family considerations or avoidance of potential punishment, but is not actively attempting to avoid detection or arrest[.]"[78] Arnold's non-willful nonappearances would include only circumstances where a "defendant is physically prevented from appearing" such as if the defendant is incarcerated or has medical issues.[79] Arnold did propose a "flight" category, but it was not limited to those who leave the jurisdiction. It included defendants who have made "a conscious decision not to attend a court hearing and [are] actively attempting to avoid detection or arrest within a jurisdiction or by leaving a jurisdiction[.]"[80]

I have resisted dividing the world of nonappearances into simply intentional versus unintentional failures to appear.[81] I propose instead a broader category of "low-cost nonappearances":

logistical and technical concerns, and past experiences and emotional reactions."); Hopkins, Bains & Doyle, *supra* note 9, at 693 ("Because defendants miss court for mundane reasons, mundane solutions might be the answer. Phone call reminders, access to public transportation, or public childcare in the courtroom are not only more humane than arrest warrants and jail time — they are also likely to be more effective.").

[77] *See* Daniel J. Flannery & Jeff M. Kretschmar, *Fugitive Safe Surrender Program Description, Initial Findings, and Policy Implications*, 11 CRIMINOLOGY & PUB. POL'Y 437, 439 (2012) (describing fugitives as people who have "decided to avoid capture and responsibility"); John S. Goldkamp, *Fugitive Safe Surrender*: *An Important Beginning*, 11 CRIMINOLOGY & PUB. POL'Y 429, 429-30 (2012); *see also* David M. Bierie, *National Public Registry of Active-Warrants: A Policy Proposal*, 79 FED. PROB. 27, 27-28 (2015).

[78] LAURA & JOHN ARNOLD FOUND., REQUEST FOR PROPOSALS TO CONDUCT RESEARCH ON IMPROVING PRETRIAL COURT APPEARANCE 6 (Dec. 13, 2018), https://craftmediabucket.s3.amazonaws.com/uploads/RFP-to-Conduct-Research-on-Improving-Court-Appearance-QA.pdf [https://perma.cc/7HW7-RAGE] (alteration in original).

[79] *Id.*

[80] *Id.*

[81] Gouldin, *Defining*, *supra* note 3, at 683, 729-31, 735-36; Gouldin, *New Perspectives*, *supra* note 6, at 305; *see also* MAGNUSON, DEZEMBER, KUEHMEIER, GREEN & GAUTSCHI, *supra* note 76, at 7 ("We believe the push for separation between 'willful' and 'non-willful' language is well intended but may inadvertently penalize some of the most disadvantaged individuals.").

> [T]his low-cost nonappearances category includes both accidental and deliberate nonappearances. Focusing on the preventability and costs of defendant nonappearance, in addition to intent or willfulness, will help identify appropriate pretrial supports for released defendants and may suggest more support-oriented systemic changes to reduce obstacles to pretrial appearance.[82]

A final point of consensus emerges from a review of the last decade's bail reform activity and the burgeoning academic literature in this space: pretrial detention, money bail, and traditional pretrial supervision programs are not effective tools for managing pretrial appearance risks.[83] The "bedrock" assumption undergirding decades of pretrial policy in the United States — that cash bail was a necessary incentive to bring people back to court — has been effectively debunked.[84]

2. Specific Statutory Reforms: Models and Suggestions

In some jurisdictions, growing awareness of distinctions between flight and other forms of nonappearance is reflected in new statutory provisions, legislative proposals, and advocacy over the best ways to interpret existing statutes.[85] In its Uniform Pretrial Release and

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[82] Gouldin, *New Perspectives*, *supra* note 6, at 305; *see also* Gouldin, *Defining*, *supra* note 3, at 683 ("Defendants in these subcategories impose distinct system costs and call for different types of supervision and management.").

[83] Aurelie Ouss & Megan T. Stevenson, *Does Cash Bail Deter Misconduct?*, 15 AM. ECON. J.: APPLIED ECONOMICS 150, 180 (2023) (concluding that neither money bail nor Philadelphia's pretrial supervision program increased pretrial appearance rates); *see* Graef, Mayson, Ouss & Stevenson, *supra* note 2, at 55; *see also* Gouldin, *Disentangling*, *supra* note 1, at 856-57; Gold, *supra* note 67, at 538.

[84] Jones, *Accused*, *supra* note 67, at 1084 ("The flawed assumption that money bail is [] needed and effective to prevent failure to appear has been restated and perpetuated as a bedrock principle without any empirical evidence or data. In fact, there is a growing body of empirical evidence which establishes that: (A) money bail is not necessary to manage pretrial release and reappearance; (B) other existing legal consequences that flow [from] the failure to appear provide strong incentive to return to court; and (C) the use of money bail does not incentivize the indigent or address the actual causes of failure to appear among low-level offenders.").

[85] The National Conference of State Legislatures and the Prison Policy Initiative have both developed resources that provide detailed comparisons of state laws and

Detention Act, the Uniform Law Commission adopted an approach similar to the one outlined in the prior subsection.[86] The model Act divides the universe of nonappearances into people who "abscond," defined as those who fail to appear with "intent to avoid or delay adjudication"[87] and other nonappearances (who the comments acknowledge may include people who miss court intentionally but without the "particular purpose" of "evading justice" (noted above)).[88]

Although a number of states have passed legislation over the past decade that has curtailed the use of cash bail,[89] the Pretrial Fairness Act

practices regarding "failures to appear." *See Statutory Responses for Failure to Appear*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/statutory-responses-for-failure-to-appear (last updated Feb. 25, 2022) [https://perma.cc/GT9U-AVKY]; Nam-Sonenstein, *supra* note 4; *Laws Governing Court Responses to "Failure to Appear," by State — Appendix*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/reports/fta_policies_appendix.html (last visited Mar. 1, 2024) [https://perma.cc/ZBM7-C28G]; *see also* Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 748 (2020).

[86] *See* UNIFORM PRETRIAL RELEASE & DETENTION ACT § 102 (UNIF. L. COMM'N 2020) (final act with comments).

[87] *Id.* (defining "abscond").

[88] *Id.* at 11 (citing Gouldin, *Defining*, *supra* note 1) ("The difference between absconding and nonappearance turns on the presence of a particular purpose only. A person who skips a court date because she would otherwise lose her job has intentionally failed to appear, but this failure is an instance of nonappearance rather than absconding. Absconding entails a purpose to avoid or delay adjudication."). *But see* Baughman, Boone & Jackson, *supra* note 66, at 464-65 (criticizing the Uniform Law Commission for failing to specify that detention should be prohibited unless there is proof of absconding).

[89] Baughman, Boone & Jackson, *supra* note 66, at 448-49; Gouldin, *New Perspectives*, *supra* note 6, at 309; *see also, e.g.*, N.J. STAT. ANN. § 2A:162-15 (2017) (requiring liberal construction of the bail chapter "to effectuate the purpose of primarily relying upon pretrial release by non-monetary means" to achieve its goals); MICH. COMP. LAWS § 780.62 (2024); OR. REV. STAT. § 135.245(8) (2022). Many jurisdictions have provisions instructing judicial officers to impose the least restrictive condition or combination of restrictions for pretrial release. *See, e.g.*, ALASKA STAT. § 12.30.011 (2019); HAW. REV. STAT. § 804-4(a) (2020); ME. STAT. tit. 15, § 1002 (2024); MONT. CODE ANN. § 46-9-108(3) (2023); NEB. REV. STAT. § 29-901(3) (2022); NEV. REV. STAT. § 178.4851(1) (2023); N.J. STAT. ANN. § 2A:162-17(b)(2) (2023); N.M. STAT. ANN. § 5-401(B) (2024); OHIO REV. CODE ANN. § 2937.011(A) (2023); OR. REV. STAT. § 135.245(3) (2022); 12 R.I. GEN. LAWS § 12-13-1.3(e) (2024) (designating the instruction as a permissive consideration); TENN. CODE ANN. §§ 40-11-115(a)–116(a) (2024); TEX. CODE OF CRIM PROC. ANN. § 17.028(b) (2022); VT. STAT. ANN. tit. 13, § 7554(1) (2024); W. VA. CODE § 62-1C-1a(a)(2) (2021) (framing the least restrictive conditions as a right to which the arrested person is entitled). Moreover,

enacted in Illinois in 2023 (as part of the Safety, Accountability, Fairness and Equity-Today ("SAFE-T") Act) made Illinois the first state to eradicate cash bail.[90] In July 2023, the Illinois Supreme Court upheld the constitutionality of the Act, rejecting claims brought by plaintiffs (the State's Attorney and the Sheriff of Kankakee County) that the new statute's prohibition on money bail violated the state constitution's bail clause.[91]

In addition to preventing judges from imposing cash bail, the Pretrial Fairness Act sets more clear limits on judges' authority to order defendants to be detained before trial.[92] Although the statute establishes a clear presumption of pretrial release, it also preserves authority for courts to order pretrial detention under limited circumstances.[93] Courts may order pretrial detention for a person charged with a statutorily enumerated offense if he "poses a real and present threat to the safety of any person or persons or the community."[94]

The statute also stands out for its return to willful flight as the governing standard.[95] An Illinois court may order a person (charged with a slightly narrower set of offenses) to be detained on flight grounds if the court determines there is "a high likelihood of willful flight to avoid prosecution."[96] The statute defines "willful flight" narrowly:

> "Willful flight" means intentional conduct with a purpose to thwart the judicial process to avoid prosecution. Isolated

five states have policies instructing courts to avoid "needless" or "unnecessary" pretrial detention, three of which were enacted over the last decade. *See* COLO. REV. STAT. § 16-4-103(4)(c) (2024) (eff. May 11, 2013); KAN. STAT. ANN. § 22-2801 (2024); NEB. REV. STAT. § 29-901(3) (2022) (eff. May 12, 2017); W. VA. CODE § 62-1C-1a(a)(3)(L) (2021) (eff. June 5, 2020); WIS. STAT. § 969.01(4) (2023).

[90] *See* Ill. Pub. Act 101-652, § 10-255 (eff. Jan. 1, 2023) (adding 725 ILL. COMP. STAT. 5/110-1.5) ("[T]he requirement of posting monetary bail is abolished.").

[91] Rowe v. Raoul, 223 N.E.3d 1010, 1023 (Ill. 2023); *id.* at 1086 ("The bail clause does not include the term 'monetary,' so it did not cement the practice of monetary bail, however long-standing and prevalent across Illinois, into our constitution.").

[92] Ill. Pub. Act 102-1104, § 70 (eff. Jan. 1, 2023) (adding 725 ILL. COMP. STAT. 5/110-6.1(a)(8)).

[93] *Id.* (adding 725 ILL. COMP. STAT. 5/110-6.1(e)).

[94] *Id.* (eff. Jan. 1, 2023) (amending 725 ILL. COMP. STAT. 5/110-6.1(a)(1)-(7)).

[95] Patterson & Guevara, *supra* note 3.

[96] 725 ILL. COMP. STAT. 5/110-6.1(a)(8) (2023).

> instances of nonappearance in court alone are not evidence of the risk of willful flight. Reoccurrence and patterns of intentional conduct to evade prosecution, along with any affirmative steps to communicate or remedy any such missed court date, may be considered as factors in assessing future intent to evade prosecution.[97]

The State bears the burden to establish, by clear and convincing evidence, either a safety- or a flight-based case for pretrial detention.[98]

The Vermont legislature amended its bail statute in 2017, shifting from prior requirements that judges "ensure the appearance" of the defendant at future court proceedings to new language that requires judges to "reasonably mitigate the risk of flight from prosecution."[99] The statute reflects some effort to distinguish between "flight to avoid prosecution" and other forms of pretrial nonappearance.[100]

Subsequent Vermont court decisions reflect some disagreement about how to interpret the new "flight" language. One dissenter, in a 2019 decision, described the new statute's "subtle change in focus from 'nonappearance' to 'flight,'" observing that the Legislature seems to have excluded "accidental or unintentional failures to appear in court when required" from its new definition of flight.[101] The judge likewise drew a distinction between "fleeing the jurisdiction, escaping custody, hiding out, or otherwise attempting to evade prosecution (as opposed to simply not coming back to court when required)" but acknowledged that the new legislation does not clearly outline how these differences should influence pretrial decision-making.[102] More recently, in August 2023, the Vermont Supreme Court reversed a trial court's bail determination, in part because the lower court's flight risk determination was inadequate, relying on the prior nonappearances listed on the defendant's criminal history report without indicating how

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[97] 725 ILL. COMP. STAT. 5/110-1(f) (2023).

[98] 725 ILL. COMP. STAT. 5/110-6.1(e) (2023).

[99] VT. STAT. ANN. tit. 13, § 7554(a)(1) (2024) (eff. July 1, 2018); *id.* § 7554 (2017); *see also* State v. Rougeau, 209 A.3d 599, 603-04 (Vt. 2019).

[100] VT. STAT. ANN. tit. 13, § 7554(b)(1)-(2) (2024); *id.* § 7576(9) (2018) (defining "flight from prosecution").

[101] *Rougeau*, 209 A.3d at 611 (Robinson, J., dissenting).

[102] *See id.*

"the nonappearances in his criminal history report make defendant a flight risk."[103]

The Maine Legislature considered but did not adopt a similar change to the state's pretrial release statute that would have replaced language about "reasonably ensur[ing] the appearance of the defendant as required,"[104] with a requirement that judges, instead, determine whether "release would result in an imminent risk of willful flight of the defendant" and whether a defendant's prior nonappearances were willful.[105] Michigan made some significant changes to its pretrial statutes in 2021[106] but declined to adopt a proposal from the Michigan Joint Task Force on Jail and Pretrial Incarceration that recommended amending existing law to require pretrial release unless a defendant "poses a significant articulable risk of nonappearance, [or] absconding."[107]

When she testified before the House Judiciary subcommittee on bail reform in 2019, Professor Alison Siegler advocated amending the Federal Bail Reform Act to draw a stronger distinction between willful flight and nonappearance.[108] Siegler explained that although the statute

[103] State v. Labrie, No. 23-AP-241, 2023 WL 5236503, at *2 (Vt. 2023).

[104] ME. STAT. tit. 15, § 1026(2-A)(A) (2023); H.P. 1034, 129th Leg. Sess. (Me. 2019).

[105] H.P. 1034, 129th Leg. Sess. (Me. 2019).

[106] *See, e.g.*, MICH. COMP. LAWS § 764.3 (2024) (creating a rebuttable presumption that a court must wait forty-eight hours to issue a bench warrant for a defendant's first FTA, with the exception of charges involving an assaultive crime or a domestic abuse offense); *id.* § 764.9e (2021) (creating a rebuttable presumption that a court must issue an order to show cause why the defendant failed to appear instead of a warrant, which may be overcome if the court has a specific articulable reason to suspect that the defendant committed a new crime, that the FTA "is the result of a willful intent to avoid or delay the adjudication of the case," or that declining to issue a warrant would endanger another person or property); *id.* § 257.321a (2021) (limiting the circumstances under which the state may suspend an individual's driver's license for FTA).

[107] MICH. JOINT TASK FORCE ON JAIL AND PRETRIAL INCARCERATION, REPORT AND RECOMMENDATIONS 25 (Jan. 10, 2020). The Joint Task Force defined "absconding" to apply to a defendant who "fail[s] to appear with the intent to avoid or delay adjudication[,]" and "nonappearance" as "failure to appear without" such intent. *Id.* The current law directs judges to make pretrial decisions to "reasonably ensure the appearance of the defendant as required." MICH. CT. R. 6.106 (2022).

[108] *The Administration of Bail by State and Federal Courts: A Call for Reform: Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 116th

only authorizes detention for defendants who pose a "serious risk" of flight, "the government often moves for [and courts often grant] detention on the ground that the person is an ordinary 'risk of flight.'"[109]

Advocates are also focused on changing pretrial review standards to make clear that prosecutors should bear the burden of proving nonappearance risk by a clear and convincing standard (as opposed to the preponderance standard that applies in some jurisdictions).[110] Federal courts interpret the Bail Reform Act to require only a preponderance standard for nonappearance determinations, even while applying the clear and convincing standard of proof to public safety risk.[111] States vary widely in their approaches. Over twenty jurisdictions require a clear and convincing standard for at least some initial pretrial bail determinations,[112] but most of those jurisdictions require the

Cong. 32 (2019) (statement of Alison Siegler, Clinical Professor of Law & Director of the Federal Criminal Justice Clinic, University of Chicago Law School).

[109] *Id.* at 28 ("In fact, the Senate's 1983 report makes clear that detention based on serious risk of flight should only occur only in extreme and unusual cases." (emphasis omitted)).

[110] Marty Berger, *The Constitutional Case for Clear and Convincing Evidence in Bail Hearings*, 75 STAN. L. REV. 469, 498 (2023); Carroll, *supra* note 37, at 783; Jaden M. Lessnick, *Pretrial Detention by a Preponderance: The Constitutional and Interpretive Shortcomings of the Flight-Risk Standard*, 89 U. CHI. L. REV. 1245, 1258 (2022); Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, (2020).

[111] Berger, *supra* note 110, at 481-82; Lessnick, *supra* note 110, at 1247-48.

[112] See, in alphabetical order by state, ALA. CODE § 15-13-3(b)(1) (2024) (amended 2021); ALASKA STAT. § 12.30.027(b)(4) (2024) (amended 2010, 2017); ARIZ. REV. STAT. ANN. § 13-3961(D) (2024) (enacted 1991); CAL. CONST. art. I, § 12(b)-(c) (2024) (enacted 1991); CAL. PENAL CODE § 1319(b) (2024) (enacted 1992); D.C. CODE §§ 23-1322(b)(2), 23-1325(b) (2024) (enacted 1981); Burroughs v. State, 304 A.3d 530, 534 (Del. 2023) ("[T]he determination to set cash bail must be supported by clear and convincing evidence that (i) the defendant is a flight risk or poses a substantial risk to the community, victims, witnesses, or other persons, and (ii) nonmonetary conditions of release will not alleviate that risk."); 725 ILL. COMP. STAT. ANN. 5/110-2(b), (e), /110-6.1(e) (West 2024) (eff. Jan. 1, 2023); IND. CODE § 35-33-8-3.2(a) (2024) (enacted 1998); LA. CODE. CRIM. PROC. ANN. art. 313(A)(4), (B) (2024) (eff. Jan. 1, 2017); ME. STAT. tit. 15, § 1027(3) (2024) (enacted 1991); MASS. GEN. LAWS ch. 276, § 58A(1), (3) (2024) (enacted 1994); MICH. CONST. art. I, § 15(C) (2024) (amended 2000); NEV. REV. STAT. ANN. § 178.4851(2) (2024) (eff. Oct. 1, 2021); N.H. REV. STAT. ANN. §§ 597:2(III)(a)–(c) (2024) (amended 1997); N.J. STAT. ANN. §§ 2A:162-15, :162-18(a)(1), :162-19(e)(3) (West 2024) (eff. Jan. 1, 2017); N.M. CONST. art II, § 13 (2024) (adopted Nov. 8, 2016); N.C. GEN. STAT. ANN. § 15A-534.2(b) (2024) (enacted 1991); N.C. GEN. STAT. ANN. § 15A-534.5 (2024) (enacted 2002); N.C.

standard only for certain offenses.[113] Only eleven jurisdictions explicitly place that higher burden on the prosecution.[114]

3. Advocacy and Discretion: Prosecutors, Defenders and Judges

Reforms are not limited to legislation. Prosecutors in some jurisdictions draw distinctions between flight risk and nonappearance in guidance to line prosecutors. For example, in Suffolk County, Massachusetts, the District Attorney formalized new policies about evaluating appearance risk.[115] The memo advised prosecutors making arguments about a defendant's appearance risk to look for "a clear showing of intent to evade prosecution on the current charge" or a "pattern" of prior FTAs that amount to a "clear showing that an individual attempted to evade any phase of the criminal process."[116]

GEN. STAT. ANN. § 15A-534.6 (2024) (enacted 2005); OHIO REV. CODE ANN. § 2937.222 (2024) (enacted 1999); OKLA. STAT. tit. 22, § 1101(D) (2024) (eff. May 9, 2006), *amended by* 2024 OKLA. Sess. Law Serv. Ch. 54; OKLA. STAT. tit. 22, § 1105(D) (2024) (eff. Nov. 1, 2021); OR. REV. STAT. ANN. § 135.240(4), (5) (2024) (enacted 1997); OR. REV. STAT. § 135.242 (repealed 2022); UTAH CODE ANN. §§ 77-20-201(1)(c)–(g) (2024) (enacted 1998); VT. STAT. ANN. tit. 13, § 7553a (2024) (enacted 1994); WASH. CONST. art. I, § 20 (2023) (amended 2010); WASH. REV. CODE ANN. § 10.21.060(3) (2024) (eff. Jan. 1, 2011); WIS. STAT. § 969.035(6) (2024).

[113] Alabama, Alaska, Arizona, California, District of Columbia, Illinois, Indiana, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Utah, Vermont, Washington, and Wisconsin. *See supra* note 112.

[114] Alabama, Illinois, Indiana, Maine, Massachusetts, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, and Wisconsin. *See supra* note 112.

[115] Memorandum from Rachael Rollins, Suffolk Cnty. Dist. Att'y, The Rachael Rollins Policy Memo at appendix B-3 (Mar. 25, 2019), https://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf [https://perma.cc/5LTP-PEYQ].

[116] *Id.*; *see also* Memorandum from Chesa Boudin, S.F. Dist. Att'y, Policy Directive: Pretrial Release Conditions and Detention Policy 2-3 (Jan. 19, 2022), https://sfdistrictattorney.org/wp-content/uploads/2022/01/1.1_Pretrial-Release-and-Detention-Policy_Updated-1.19.2022.pdf [https://perma.cc/RCV4-P77Y] (requiring "clear and convincing evidence" for prosecutors to advocate for pretrial detention based on flight and suggesting that flight involves a risk that the defendant will leave the jurisdiction).

San Francisco's District Attorney raised the burden on prosecutors in his jurisdiction to permit consideration of pretrial detention only "when the facts are evident and clear and convincing evidence shows a substantial likelihood that the defendant's release

This was likely due, in part, to more robust advocacy from defense counsel about these differences.[117] The same arguments — emphasizing the many innocuous and preventable reasons that people miss court and distinguishing those reasons from willful flight — are employed by civil attorneys bringing class actions to challenge bail systems in jurisdictions across the country.[118]

Advocates also encourage judges to recognize these distinctions between flight and other forms of nonappearance. As noted above, Alison Siegler calls on federal judges to "use their influence to mitigate the culture of detention": "Judges should closely scrutinize prosecutors' requests for detention and ask them to explain why they are moving for temporary detention, particularly if available information suggests that the person poses a low risk of flight or danger."[119]

A recent report suggests that judges in Cuyahoga County have significantly reduced pretrial detention rates by collectively committing to change their court's "culture and practices."[120] After reviewing "nearly 70,000 felony cases filed between 2016 and 2022," the Marshall Project found that county judges were "setting cash bail in felony cases far less frequently."[121]

would lead to the defendant's flight or risk to the victim's or public safety." *Id.* at 2. The Policy Directive suggests that the DA's interpretation of flight involves the defendant leaving the jurisdiction. *Id.*

[117] SIEGLER & ZUNKEL, *supra* note 25, at 47; SIEGLER, *supra* note 24, at 109 (drawing distinctions between federal requirements for cases involving "serious risk of flight" as opposed to "ordinary risk of flight").

[118] *See, e.g.*, *Challenging Pretrial Detention*, C.R. CORPS, https://civilrightscorps.org/our-work/ (last visited Mar. 1, 2024) [https://perma.cc/JX8S-NVMX] (collecting cases); *Ending American Money Bail*, EQUAL JUST. UNDER L., https://equaljusticeunderlaw.org/money-bail-1 (last visited Mar. 2, 2024) [https://perma.cc/J6QJ-TDBX] (collecting cases).

[119] SIEGLER, *supra* note 24, at 109 (emphasis omitted) (internal quotations omitted).

[120] Ilica Mahajan & Rachel Dissell, *Cuyahoga County Judges Vowed to Reform the Bail System. Here's What Happened.*, MARSHALL PROJECT (Sept. 11, 2023, 6:00 AM), https://www.themarshallproject.org/2023/09/11/cuyahoga-county-judges-reform-bail-what-happened [https://perma.cc/4KY7-PFN6].

[121] *Id.*

4. Investing in Pretrial Appearance Research

In addition to developing more refined descriptions of pretrial appearance, researchers began to identify what causes different types of nonappearance and how systems can promote pretrial appearance. This has been a persistent empirical gap.[122] But several significant and ongoing funded studies are focused on these open questions about how best to promote pretrial appearance.

Since 2018, Arnold Ventures has been calling for researchers to "develop ways to measure different types of non-appearance and the factors associated with each."[123] These calls for proposals focused on how studies might "distinguish among different types of nonappearance," proposing three potential categories: non-willful, willful, and flight.[124] The foundation also sought proposals for incentivizing and enhancing court appearance.[125] Arnold Ventures has invested in several different appearance-related projects with organizations including Community Resources for Justice, Inc., which is studying the reasons that defendants fail to appear in counties in Utah, Tennessee, and Kentucky, and MDRC in New York, "to evaluate the least burdensome release conditions and supervision practices that improve court appearance." [126]

Research conducted as part of the Harris County Consent Decree is also focused on a range of potential causes of pretrial nonappearance,

[122] Kristin Bechtel, Alexander Holsinger, Christopher Lowenkamp & Madeline Warren, *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. J. CRIM. JUST. 443 (2017); Gouldin, *Defining*, *supra* note 3, at 724 ("We still know far too little about who fails to appear, why they fail to appear, and what can be done to remedy that."); *cf.* Goldkamp, *supra* note 77, at 429-31 (describing the "elusiveness of complete and accurate data relating to fugitives").

[123] LAURA & JOHN ARNOLD FOUND., *supra* note 78, at 6; *see also* Gouldin, *New Perspectives*, *supra* note 6, at 311-12 ("The Arnold Ventures request for proposals is a thorough guide to research needed about pretrial nonappearance.").

[124] LAURA & JOHN ARNOLD FOUND., *supra* note 78, at 6.

[125] *Id.* at 5-11.

[126] LAURA & JOHN ARNOLD FOUND., INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, FORM 990-PF, RETURN OF PRIVATE FOUNDATION 11 (2022), https://irs-efile-renderer.instrumentl.com/render?object_id=202333199349104643 [https://perma.cc/3SW3-RNNW].

including many of the causes cited above.[127] The consent decree requires the county to make annual expenditures to investigate and address the causes of nonappearance, including making some specified "investments in transportation to court, medical and mental health care, safe and affordable shelter, communication, translation and interpretation, drug treatment, and other services."[128]

B. Speedier Cases, Fewer Appearances, Shorter Days

Some pretrial reforms focus on the process, aiming both to shorten the duration of criminal cases and to reduce the number of required court appearances for each case.[129] Both changes are shown to improve appearance rates.[130] Because the system goal is for defendants to return to court for their cases to be resolved efficiently and fairly, these reforms focus on making returns to court less burdensome.

When defendants contest cases as opposed to pleading guilty early in the life of a case, cases can (depending on the jurisdiction) extend over long periods of time — spanning months or even years. Defendants may have multiple required appearances during the life of their case, and each of these appearances creates logistical issues for defendants with

[127] Gouldin, *New Perspectives*, *supra* note 6, at 312 (citing Consent Decree at 31-32, ODonnell v. Harris Cnty., No. 16-cv-01414, 2019 WL 6219933 (S.D. Tex. Nov. 21, 2019)).

[128] Consent Decree at 31-32, ODonnell v. Harris Cnty., No. 16-cv-01414, 2019 WL 6219933 (S.D. Tex. Nov. 21, 2019) (requiring $250,000 per year to study the causes of nonappearance and, later, $850,000 annually to mitigate pretrial nonappearance using evidence-based practices).

[129] CRIM. JUST. INNOVATION LAB., NORTH CAROLINA COURT APPEARANCE PROJECT: FINDINGS AND POLICY SOLUTIONS FROM NEW HANOVER, ORANGE, AND ROBESON COUNTIES 17, 20, 29 (Apr. 22, 2022), https://cjil.sog.unc.edu/wp-content/uploads/sites/19452/2022/04/NC-Court-Appearance-Project-Report-4-22-22.pdf [https://perma.cc/EB3Q-LWV8] [hereinafter NORTH CAROLINA COURT APPEARANCE PROJECT].

[130] *See id.* at 11-12 ("Cases that take longer to resolve have higher nonappearance rates."); *see also* Gouldin, *New Perspectives*, *supra* note 6, at 316 ("FTAs are lower today than they were in previous decades, and the strong association between nonappearance and arrest-to-arraignment time suggests that FTAs can be further reduced by scheduling arraignments quickly after an arrest." (citing MARY T. PHILLIPS, THE PAST, PRESENT, AND POSSIBLE FUTURE OF DESK APPEARANCE TICKETS IN NEW YORK CITY 72 (Mar. 2014), https://www.nycja.org/assets/DATsInNYC14.pdf [https://perma.cc/S9KV-3JLW])); *see also* Harmon, *supra* note 73, at 337-38.

jobs, children, and transportation challenges.[131] Months may pass between appearances, making it hard to track obligations.[132] Defendants may also "spend all day waiting for their cases to be called, only to be told that the proceedings are being put off for another month."[133]

These logistical burdens are best addressed as systemic problems, not defendant problems. In their study of failure-to-appear rates for other criminal justice system actors, Graef, Mayson, Ouss, and Stevenson conducted semi-structured interviews with various court actors.[134] According to the authors:

> [T]he sheer difficulty of attending court is a major driver of [failure to appear] FTA for non-defendants, just as it is for defendants. People don't know when and where to show up, they have trouble accessing transportation or childcare or taking time off work, or prior court hearings (of which there can be many, depending on the case) have been so pointless that they give up. Insofar as these kinds of logistical problems drive systemic FTA, they are amenable to systemic solutions. Clearer communication and more efficient scheduling might go a long way toward improving appearance rates across the board.[135]

A system that expects defendants to maintain perfect attendance records under these circumstances seems set up to fail.[136]

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[131] Ethan Corey & Puck Lo, *The 'Failure to Appear' Fallacy*, THE APPEAL (Jan. 9, 2019), https://theappeal.org/the-failure-to-appear-fallacy/ [https://perma.cc/2RQL-M4XC].

[132] Jones, *Accused*, *supra* note 67, at 1091-94 ("Because the next court date is usually weeks or months after the date of initial release, many low-level offenders simply forget court dates in the interim.").

[133] The Editorial Board, *A Nightmare Court, Worthy of Dickens*, N.Y. TIMES (May 12, 2016) https://www.nytimes.com/2016/05/12/opinion/a-nightmare-court-worthy-of-dickens.html.

[134] Graef, Mayson, Ouss, & Stevenson, *supra* note 2, at 4-5.

[135] *Id.* at 6.

[136] *See* Gouldin, *New Perspectives*, *supra* note 6, at 316 ("In jurisdictions with huge criminal court dockets and lengthy backlogs, like in the Bronx where the average pending age of misdemeanor cases was a staggering 827 days in 2015, high nonappearance rates should not be surprising."); *see also* Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 186-87 (2021) (describing the range of different pretrial "attendance requirements" that are frequently imposed on defendants as conditions of pretrial release).

Striking the right note for case-scheduling reforms is a challenge. Efforts to address criminal case processing delays focus on developing consistent policies for case continuances. As one recent report from the National Center for State Courts explained, courts with "effective" calendaring practices "create the expectation that events will occur as scheduled."[137] But some amount of system dysfunction is required in order to accommodate the challenges facing many defendants.[138] The best path forward will balance efforts to improve case processing with reforms that create more flexibility for scheduling court appearances[139] and some grace for addressing past failures to appear.[140] North Carolina's Court Appearance Project provides a model for pursuing these goals simultaneously.[141]

Some jurisdictions are beginning to acknowledge that there are court dates that do not require the defendant's appearance.[142] Harris County, Texas, for example, distinguishes between "regular" proceedings, where a misdemeanor arrestee's appearance may not be necessary and can be waived upon timely request,[143] and "required" proceedings, such as "trial settings, bond violation hearings, suppression hearings, or plea settings"

[137] BRIAN J. OSTROM, LYDIA E. HAMBLIN, RICHARD Y. SCHAUFFLER & NIAL RAAEN, TIMELY JUSTICE IN CRIMINAL CASES: WHAT THE DATA TELLS US 11 (Aug. 2020) https://www.ncsc.org/__data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf [https://perma.cc/9ZF6-9JZK].

[138] Fishbane, Ouss & Shah, *supra* note 75, at 1 ("[M]any failures to appear may occur not because defendants are intentionally showing contempt of court, but rather because existing policies do not allow enough room for error.").

[139] *See infra* Part II.C.4.

[140] *See infra* Part II.D.

[141] NORTH CAROLINA COURT APPEARANCE PROJECT, *supra* note 129, at 17 (summarizing proposed "policy solutions" that are described in more detail in the full report).

[142] *See* Carroll, *Beyond Bail*, *supra* note 136, at 162; MAGNUSON, DEZEMBER, KUEHMEIER, GREEN & GAUTSCHI, *supra* note 76, at 52 (recommending that courts "minimize the number of required hearings an individual must attend" and that defender offices "consider a global waiver of appearance process for select hearings").

[143] Note, however, that if defendants fail to submit a request or the request is not granted, the defendant then must appear at the court's next "open hours" or face potential consequences (most extreme: arrest warrant).

where misdemeanor arrestees must appear.[144] As Jenny Carroll explains, "[m]otions to continue in which the defendant agrees with the need for a continuance, for example, do not benefit from the defendant's attendance."[145] Some jurisdictions have on-call procedures for witnesses that might be adapted for defendants. Vacation destinations like Las Vegas adapt appearance requirements to process the cases of tourist defendants more efficiently.[146]

The challenge is not only the number of days spent in court but also the hours that may be demanded on each of those days. In his seminal book, *The Process is the Punishment*, Malcolm Feeley detailed the burdens of appearing in court to litigate a criminal charge.[147] Nearly half a century later, too much is the same. Court appearances are still "likely to involve a substantial portion of the defendant's day," and in too many courtrooms, defendants may find it impossible "to get an accurate estimate as to when the case will be called."[148] Some courts are focused on reducing the amount of waiting time. In North Carolina, for example, courts in Orange County are "schedul[ing] hearings in shorter [1.5 hour] blocks rather than having full morning or afternoon sessions with a long list of cases to be called one at a time."[149]

But the long days at the courthouse are not just about the time spent waiting. In many courts, judges and staff enforce arbitrary rules that infuse the experience with what feels to participants like forced

[144] Consent Decree, *supra* note 128, at 14. *But see* Commonwealth v. Brock, 619 Pa. 278, 290, 61 A.3d 1015, 1022 (2013) (claiming that "[t]he impact of the defendant's failure to appear is equally adverse regardless of the stage of the proceedings").

[145] Carroll, *Beyond Bail*, *supra* note 136, at 186 n. 263.

[146] Kyle J. Paine, *Court Designed to Keep Criminals off Las Vegas Strip Sees Record Number of Defendants but Sends Many of Them Home*, 8 NEWS NOW (June 23, 2023, 11:23 PM), https://www.8newsnow.com/investigators/district-attorney-declines-to-prosecute-almost-40-of-criminals-appearing-in-las-vegas-strip-court/ [https://perma.cc/75BK-8VC8]; *Out-of-State Visitors: Las Vegas Out-of-State Criminal Defense Attorney*, PARIENTE L. FIRM P.C., https://www.parientelaw.com/out-of-state-visitors/ (last visited Aug. 22, 2024) [https://perma.cc/XW8F-XSS6].

[147] MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 239 (1979); *see also* Jennifer Earl, *The Process Is the Punishment: Thirty Years Later*, 33 L. & SOC. INQUIRY 737, 739-40 (2008).

[148] FEELEY, *supra* note 147, at 239.

[149] NORTH CAROLINA COURT APPEARANCE PROJECT, *supra* note 129, at 26.

pointlessness.[150] In her description of New York City misdemeanor courts, Issa Kohler-Hausmann describes "legal actors who control access to court services," and who "determine the conditions of waiting and just how nonusable the waiting time will be. The prohibitions on [defendants engaging in] various activities — reading, talking, using text or Internet communication — makes the time lost to waiting feel like a complete forfeiture of productive capacity."[151] As Kohler Hausmann explains, the "inconvenience" of all this "sitting and waiting . . . transmits social meaning about the status of the subjects of misdemeanorland."[152] This research continues to amplify these issues, but it is unclear how much this surfacing of issues has translated into changed courthouse practices.

C. Facilitating Necessary Appearances

While the reforms described in the prior subsection might be viewed as efforts to reduce the number of court appearances or to shorten the life span of cases, the reforms analyzed here are collected into a broad category of strategies, policies, and tools that help defendants appear when required.

1. Providing Attorneys and Other Advocates at Initial Appearance

Numerous studies have demonstrated that providing counsel creates a range of different pretrial outcomes for defendants.[153] Researchers at

[150] KOHLER-HAUSMANN, *supra* note 31, at 216-17.

[151] *Id.* at 217; *see also id.* at 216-17 ("Attorneys are permitted to text and use the Internet on their cell phones, to talk (until the total volume upsets either the judge or court officers), and to read any materials they like while waiting. During court lulls, judges and court officers also regularly read newspapers, books, and other material. But defendants are regularly scold[ed] for engaging in any of these activities being carried out by attorneys and officers just feet away.").

[152] KOHLER-HAUSMANN, *supra* note 29, at 214; *see also id.* at 80 (describing as "[p]rocedural hassle . . . all of the burdens attendant on complying with the demands of legal proceedings — the degradation of arrest and police custody, the stress and frequency of court appearances, and the opportunity costs of lost work and other social responsibilities to make court appearances or to comply with court orders").

[153] Douglas L. Colbert, *"With a Little Help from my Friends:" Counsel at Bail and Enhanced Pretrial Justice Becomes the New Reality*, 55 WAKE FOREST L. REV. 795, 804 n.43 (2020); Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces*

Texas A&M University are currently studying whether providing defense counsel at the initial court appearance affects nonappearance rates.[154]

The Supreme Court has avoided resolving a question that seems critical for defendants: whether the initial bail hearing is a "critical stage" of the criminal justice process where defendants are entitled (under the Sixth Amendment) to have counsel.[155] Lower courts are increasingly adopting the view that this is required as a constitutional matter,[156] but many jurisdictions still do not provide defendants with representation at their first hearing.[157] According to the Pretrial Justice Institute's 2019 survey of counties across the United States, only forty-five percent of counties surveyed stated that a public defender or appointed counsel was typically provided at a defendant's first appearance.[158]

Some studies focus on the role of other advocates, like social workers or community advocates, in the pretrial process. Paul Heaton's study of

Racial Disparities, 96 IND. L. J. 701, 739 (2021); Alissa Pollitz Worden, Kirstin A. Morgan, Reveka V. Shteynberg, & Andrew L. B. Davies, *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 29 CRIM. JUST. POL'Y REV. 710, 724-25 (2018); ALENA YARMOSKY, THE IMPACT OF EARLY REPRESENTATION: AN ANALYSIS OF THE SAN FRANCISCO PUBLIC DEFENDER'S PRE-TRIAL RELEASE UNIT 25-32 (2018), https://public.sfpdr.com/wp-content/uploads/sites/2/2018/05/The-Impact-of-Early-Representation-PRU-Evaluation-Final-Report-5.11.18.pdf [https://perma.cc/X3ZN-LV74].

[154] ARNOLD VENTURES, 2022 FILING 73, 94 (2023) https://assets.arnoldventures.org/uploads/2022-LJAF-FORM-990.pdf?_gl=1*15d424v*_ga*MTY2MDQwMTkxOC4xNzI4NzU3MjY4*_ga_J00GFVDRJS*MTcyODg0NTQ3OS4yLjAuMTcyODg0NTQ5Ny40Mi4wLjA [https://perma.cc/FPJ9-ESPV] (documenting investments in research projects studying "the causal effect of defense counsel at initial court appearance on failure to appear" (Texas A&M project) and a pilot project in Virginia promoting the appointment of counsel at first appearance (NACDL Foundation project)); Rachel Knight, *Criminal Justice Reform Study Receives $500,000 to Expand Evaluation to Travis County*, TEX. A&M U. (Apr. 11, 2022), https://artsci.tamu.edu/news/2022/04/criminal-justice-reform-study-receives-500000-to-expand-evaluation-to-travis-county.html [https://perma.cc/XNP9-VTRF].

[155] Heaton, *supra* note 153, at 705.

[156] *See*, *e.g.*, *Booth v. Galveston Cnty.*, 2019 WL 3714455, at *11-17 (S.D. Tex. Aug. 7, 2019) (analyzing in depth whether an initial bail hearing is a critical stage).

[157] PRETRIAL JUST. INST., *supra* note 72, at 34.

[158] *Id.* at 34-35.

the Philadelphia Public Defender's Bail Advocates Program suggests that providing defendants access to social workers at their first appearances might also improve pretrial appearance rates.[159] In Heaton's view, these outcomes reflect that "bail advocates appear to help clients feel more engaged with the adjudication process, which encourages behaviors that contribute to better case outcomes."[160]

In Santa Clara County, community organizers from Silicon Valley De-Bug participate at arraignments by partnering with defense counsel to provide support.[161] The community members from Silicon Valley De-Bug meet with a defendant's family members and friends during arraignments to develop a support plan for who may be able to help a defendant get to court and to provide helpful context for any prior nonappearances.[162] These efforts have increased rates of pretrial release.[163] "They also help to educate system stakeholders about the costs of pretrial detention and the ways that more supportive interventions can reduce pretrial trauma for defendants, their families, and their communities."[164]

2. Supportive Supervised Release Programs

Many jurisdictions have also developed or expanded more supportive pretrial supervision programs that are shifting away from surveillance models of pretrial supervision that rely heavily on drug testing and electronic monitoring. In New York City's Supervised Release program,

[159] Heaton, *supra* note 153, at 738. Heaton used revocations of release and revocations with forfeiture as proxies for nonappearance because FTA data were not consistent enough. He found that the social worker bail advocates had "a statistically significant and practically large impact on the likelihood of a bail violation, reducing it by 64%." *Id.* at 724.

[160] *Id.* at 740.

[161] Raj Jayadev, *The Future of Pretrial Justice is Not Money Bail or System Supervision — It's Freedom and Community*, DE-BUG (Apr. 4, 2019), https://siliconvalleydebug.org/stories/the-future-of-pretrial-justice-is-not-money-bail-or-system-supervision-it-s-freedom-and-community [https://perma.cc/LD5M-LMJS].

[162] *Id.* ("Someone will say, 'They can stay at my house,' or 'I will give them a ride if they need it,' or explain how the person detained is who is responsible for taking the kids to school.").

[163] *Id.*

[164] Gouldin, *New Perspectives*, *supra* note 6, at 314.

for example, the case managers are social workers employed by independent nonprofits that focus on connecting defendants with community services and supports.[165] This program, which helped to facilitate significant reductions in pretrial detention at the Rikers Island jail, announced early success maintaining an eighty-eight percent pretrial appearance rate.[166] Other jurisdictions have announced similar programs.[167]

Santa Clara County's Community Release program allows defendants to choose a non-profit community organization to help support the defendant.[168] The organization can help defendants with transportation and childcare, reminders about upcoming court dates, and can even help defendants secure employment or access to treatment services.[169]

Santa Clara's formal program grew from powerful advocacy by community organizers who showed up at felony arraignments to work with the public defender to "actively intervene and disrupt [the] machinery of detention."[170] Those organizers met with family and community members present at the arraignment to fill out a form that

[165] Ted Alcorn, *Jail or Bail? There's a New Option*, N.Y. TIMES (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/nyregion/rikers-supervised-release-bail.html; *Supervised Release*, N.Y.C. MAYOR'S OFF. OF CRIM. JUST., https://criminaljustice.cityofnewyork.us/programs/supervised-release/ (last visited Mar. 2, 2024) [https://perma.cc/8JU6-DT9X].

[166] *Supervised Release*, *supra* note 165; *see also* Supervised Release Annual Scorecard 2020, N.Y.C. CRIM. JUST. (2020), https://criminaljustice.cityofnewyork.us/wp-content/uploads/2021/07/Supervised-Release_Annual-2020-Scorecard.pdf. The defendants in this program were perceived to be higher risks for nonappearance, so maintaining an appearance rate that was roughly equivalent to pretrial appearance rates for other released defendants was a significant success. *Id. Cf.* CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, EXPLORING THE IMPACT OF SUPERVISION ON PRETRIAL OUTCOMES 17 (Nov. 2013) https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_Supervision_FNL.pdf [https://perma.cc/CY9U-GVKX] (finding significant increase in appearance rates for higher-risk defendants released with supervision).

[167] Gouldin, *New Perspectives*, *supra* note 6, at 313 (reviewing projects in Minneapolis, Santa Clara County).

[168] CNTY. OF SANTA CLARA BAIL & RELEASE WORK GRP., FINAL CONSENSUS REPORT ON OPTIMAL PRETRIAL JUSTICE 64 (Aug. 26, 2016), https://countyexec.sccgov.org/sites/g/files/exjcpb621/files/final-consensus-report-on-optimal-pretrial-justice.pdf [https://perma.cc/QU48-CKRK].

[169] *Id.* at 2.

[170] Jayadev, *supra* note 161.

asks them "more about who their loved one is, the various ways they are part of this community, what's at stake for them and others with another day of confinement, and also what roles they see themselves playing to assist that person in getting to court."[171] Public defenders were able to use those forms to make personalized arguments for their clients to be released (or for their bail to be reduced).[172]

For defendants who do not have family or community members at the arraignment, De-Bug's Community Release Project served the same function by connecting defendants with housing, employment, and other resources to convince a judge that the defendant's participation in the Community Release Project will ensure their appearance.[173] Additionally, "[t]hose supported through the Community Release Project can also get automated text reminders of court and other related appointments (like participatory defense meetings) through Uptrust technology."[174] "In this way, the excuses a judge has to detain, or place on restrictive conditions, is stripped away by the lifting up and replacement of a community centered approach."[175]

In a comparative study, a project that Silicon Valley De-Bug organizers called "Court Doing" proved to be effective.[176] In one hundred cases before De-Bug organizers began "Court Doing," judges imposed set bail schedules at a rate of eighty-five percent.[177] In one hundred cases after De-Bug organizers began "Court Doing", that rate dropped to forty-eight percent and the "non-monetary release rate increased from 9% to 37%."[178]

Community bail fund programs that boast high rates of pretrial appearance also rely on a "community-based infrastructure" of

[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*

resources for clients.[179] Advocates at the Bail Project, for example, work closely with clients to identify specific "obstacles to court return (e.g., transportation, unstable housing, health concerns)" and then develop a "support plan to help overcome these barriers."[180] In 2022, the Bail Project reported a ninety-two percent court appearance rate among the 23,000 people to whom it provided pretrial support and bail assistance.[181]

3. Reminder Systems

Reminder systems may be the most widely studied and adopted method of improving court appearances.[182] These systems trace their roots to the health and service industries where phone calls or text reminders for doctors' appointments and haircuts, for example, are now par for the course.[183] The systems are simple but effective: they function as a behavioral intervention strategy to reduce benign human error by notifying people of upcoming appointments or due dates.[184]

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[179] *See, e.g.*, THE BAIL PROJECT, *After Cash Bail: A Framework for Reimagining Pretrial Justice* (Jan. 14, 2020), https://bailproject.org/learn/after-cash-bail/ [https://perma.cc/DZ55-RJME] (detailing the Bail Project's "Community Release with Support" model).

[180] *Id.*

[181] THE BAIL PROJECT, THE BAIL PROJECT ANNUAL REPORT 2022, at 11 (2022), https://bailproject.org/wp-content/uploads/2023/01/the_bail_project_annual_report_2022_web-1.pdf [https://perma.cc/93SE-57KZ]; *see also* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599-606 (2017) (describing the rise and varied approaches of community bail funds across the country).

[182] SHANNON MCAULIFFE, SAMANTHA HAMMER, ALISSA FISHBANE & ANDREA WILK, IDEAS42, NATIONAL GUIDE TO IMPROVING COURT APPEARANCES 11 (2023), https://www.ideas42.org/wp-content/uploads/2023/05/national-guide-improving-court-appearance.pdf [https://perma.cc/5BYE-ZNHL] [hereinafter MCAULIFFE, HAMMER, FISHBANE & WILK].

[183] Gouldin, *New Perspectives*, *supra* note 6, at 314-15.

[184] *See id.*; MCAULIFFE, HAMMER, FISHBANE & WILK, *supra* note 182, at 1,10 ("People miss doctor appointments at rates that are comparable or even higher than the rates at which people miss court dates. . . . Reminders have become ubiquitous in other areas of daily life (appointments with doctors, dentists, hair salons, etc.), and reminders for court dates should be no different."); Fishbane, Ouss & Shah, *supra* note 75, at 4; Evelyn F. McCoy, Azhar Gulaid, Nkechi Erondu & Janeen Buck Willison, *Removing Barriers to Pretrial Appearance: Lessons Learned from Tulsa County, Oklahoma, and Hennepin County, Minnesota*, URB. INST. 1, 3 (2021) https://www.urban.org/sites/default/files/publication/104177/removing-barriers-to-pretrial-appearance_0_0.pdf [https://perma.cc/NP4C-LVTR]

Jurisdictions nationwide have implemented court reminders ranging from letters and emails to phone calls and text messages.[185] These systems are easy to implement and may cost less than one cent per text message.[186] Some jurisdictions employ automated communication platforms, while others utilize programs specifically designed to facilitate and simplify communications with defendants.[187]

A large body of empirical evidence substantiates the effectiveness of court reminders — most studies have shown that reminder programs significantly reduce FTA rates.[188] A 2023 study by Erin Valentine and

[hereinafter McCoy, Gulaid, Erondu & Willison] ("Failure to appear (that is, the missing of appointments) is not unique to the justice system, and other fields have found ways to address it.").

[185] A 2020 study of pretrial practices reported that 33.38% of jurisdictions have implemented court reminders, 15.95% are planning or have implemented reminders, while 36% are not planning to do so, and 12.6% do not know. Pamela K. Lattimore, Stephen Tueller, Alison Levin-Rector & Amanda Witwer, *The Prevalence of Local Criminal Justice Practices*, 83 FED. PROB. 28, 31 (2020).

[186] Texts or automated calls, emails, and postcards appear to be the most cost-effective methods, requiring most expenditures in the start-up phase of integrating communication platforms with case management systems. *See* MCAULIFFE, HAMMER, FISHBANE & WILK, *supra* note 182, at 11 ("Thereafter, messaging costs are low; for example, in New York City, messages cost less than one cent per message."). Live calls may cost as much as $17,000 annually, and Uptrust offers monthly subscriptions ranging from $500 to $15,000. *Id.*

[187] *See* PRETRIAL JUST. CTR. FOR CTS., USE OF COURT DATE REMINDER NOTICES TO IMPROVE COURT APPEARANCE RATES 3-4 (2017) (exploring the success of various reminder programs implemented by counties, including a live-caller program using volunteers in Coconino, Arizona, and an automated telephone software system called the Court Appearance Notification System implemented in Multnomah County, Oregon); McCoy, Gulaid, Erondu & Willison, *supra* note 184, at 3; *see generally* Thomas & Ahmed, *supra* note 73 (providing guidance for administering court date notifications); *id.* at 45-48 (providing script templates for court date notifications).

[188] *See* MCAULIFFE, HAMMER, FISHBANE & WILK, *supra* note 182, at 10 (reporting a 4–25% reduction in FTA rates where court notifications are used for adult and juvenile populations); MATT NICE, MULTNOMAH CNTY. BUDGET OFF, COURT APPEARANCE NOTIFICATION SYSTEM: PROCESS AND OUTCOME EVALUATION 1 (2006) (reporting an approximately 37% reduction in FTAs after implementing an automated-call reminder system); Brian Bornstein, Alan Tomkins, Elizabeth Neeley, M.N. Herian & J.A. Hamm, *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 19 PSYCH., PUB. POL'Y & L. 70, 73-74 (2013) (reporting a 1.7% FTA reduction with reminder-only postcards, a 4.3% reduction with reminder-sanctions postcards (explaining the "negative consequences of failing to appear"), and a 2.8% reduction with a combination reminder postcard

Sarah Picard examined four levels of pretrial supervision practices and found that lower-intensity supervision methods (court reminders) were as effective as higher-intensity supervision practices (regular check-ins and reminders) in improving appearance rates.[189] One meta-analysis of

(including the same information as reminder-sanctions and emphasizing components of procedural justice, i.e., "voice, dignity, respect, and public interest" that accompany a defendant's appearance in court) in a study of 7,685 misdemeanor defendants between March 2009 and May 2010); David I. Rosenbaum, Nicole Hutsell, Alan J. Tomkins, Brian H. Bornstein, Mitchell N. Herian & Elizabeth M. Neeley, *Court Date Reminder Postcards: A Benefit-Cost Analysis of Using Reminder Cards to Reduce* Failure to Appear *Rates*, 95 JUDICATURE 177, 180 (2012) (explaining that the Nebraska postcard reminder system significantly reduced FTAs, particularly when postcards also included information about consequences of nonappearance); 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, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 CT. REV.: J. AM. JUDGES ASS'N 86, 89 (reporting a 38–43% reduction in FTAs when a live-caller successfully contacted the defendant); Massachusetts Probation Serv., *Pretrial Division Services Study*, MASS.GOV (2023), https://www.mass.gov/info-details/about-the-pretrial-services-division ("In the text reminder group, 11% failed to appear at the pretrial hearing event, compared to 14% for the no text reminder group. The failure to appear rate at pretrial hearing events was consistently lower for the text reminder group regardless of age, race/ethnicity, gender, or offense severity."); *New CJA Research Brief Examines Court Date Notification Programs Nationally*, ARNOLD VENTURES (Mar. 8, 2021), https://www.arnoldventures.org/newsroom/new-cja-research-brief-examines-court-date-notification-programs-nationally [https://perma.cc/H56K-K9N3]; Russell Ferri, *The Benefits of Live Court Date Reminder Phone Calls During Pretrial Case Processing*, 18 J. EXPERIMENTAL CRIMINOLOGY 149, 160 (2020) (reporting a 37% reduction in FTA rates with live-call reminders); BRIAN COOKE, BINTA ZAHRA DIOP, ALISSA FISHBANE, JONATHAN HAYES, AURELIE OUSS & ANUJ SHAH, U. CHI. CRIME LAB, USING BEHAVIOR SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES 16 (2018), https://www.courthousenews.com/wp-content/uploads/2018/01/crim-just-report.pdf [https://perma.cc/VDS2-H7C5] [hereinafter COOKE, DIOP, FISHBANE, HAYES, OUSS & SHAH] (reporting a 21–26% reduction in FTA rates in a study of pre-court text reminders); PRETRIAL JUST. CTR. FOR CTS., *supra* note 187, at 3 (describing that the Arizona reminder system reduced FTAs from 25% in the control group to 6% when court personnel spoke to the defendant; to 15% when court personnel left a message with another person; and to 21% when a voicemail message was left). *See also* Associated Press, *Text Message Reminders Help People Remember Their Court Dates*, L.A. TIMES (May 4, 2019, 5:51 PM), https://www.latimes.com/nation/la-na-court-case-text-reminders-defendants-20190504-story.html (reporting a 51.9% reduction of FTAs during the first three months of a text message reminder program in Scottsdale, Arizona).

[189] *See* ERIN VALENTINE & SARAH PICARD, THE MANPOWER DEMONSTRATION RSCH. CORP. ASSESSING THE EFFECTIVENESS OF VARYING INTENSITIES OF PRETRIAL SUPERVISION 15 (2023)

twelve studies regarding the efficacy of reminder formats (postcards/letters, text messages, phone calls, and multiple formats) reported that none of the delivery methods performed better or worse than the others.[190] More research is needed, however, to maximize the effectiveness of reminders and minimize disparities in enrollment, as some delivery methods may be more effective for certain populations than others.[191]

One study conducted by the Crime Lab at the University of Chicago examined the effectiveness of reminder content, comparing messages emphasizing the consequences of an FTA, messages encouraging defendants to make plans for court appearances (e.g., notifying employers and arranging childcare and transportation), and combination messages with the consequences of an FTA and plan-making statements, all of which included basic information about the time, date, and location of appearance.[192] Pre-court combination

("[T]he analyses find that simply providing more intensive supervision does not increase the probability of compliance with pretrial conditions."). The study used data from January 2017 to June 2019 in one large urban metropolitan area (site 1) and one small rural county in the same region (site 2), both of which employed a risk-assessment tool for decisions about pretrial supervision. *Id.* at 4. The supervision intensity levels were grouped as follows: no supervision (no reminders or check-ins), low intensity (court reminders and check-ins after appearances), medium intensity (court reminders, check-ins after appearances, and at least one in-person check-in per month), and high intensity (court reminders, check-ins after appearances, and at least three in-person check-ins per month). *Id.* at 5. Across all four levels, the intensity of supervision did not significantly affect appearance rates — those with no supervision were as likely to appear as those with low-intensity supervision (site 1 only), those with low-intensity supervision were as likely to appear as those with medium-intensity supervision, and those with medium-intensity supervision were as likely to appear as those with high-intensity supervision "when the analysis is limited to those who were released" (site 2 only). *Id.* at 9-13, 32.

[190] *See* Samantha A. Zottola, William E. Crozier, Deniz Ariturk & Sarah L. Desmarais, *Court Date Reminders Reduce Court Nonappearance: A Meta-analysis*, 22 CRIMINOLOGY & PUB. POL'Y 97, 113-14 (2022).

[191] *See id.* at 115 (discussing how people with unstable housing would be unlikely to benefit from postcard reminders, people without consistent access to a phone or behavioral health clients may not benefit from text message reminders, and hostile interactions with police may deter or eliminate the opportunity to provide a phone number thus inhibiting enrollment in reminder programs).

[192] COOKE, DIOP, FISHBANE, HAYES, OUSS & SHAH, *supra* note 188, at 12-13. Pre-court texts were sent at seven, three, and one day(s) before the recipient's court appearance. *Id.*

messages were most effective, generating a twenty-six percent reduction in FTA rates.[193] Some studies of reminders in other contexts suggest the potential benefits of two-way reminder communications that ask recipients to reply to confirm.[194] Other recent studies of reminder systems report more moderate improvements in appearance rates, demonstrating the need for continued research on which reminders reduce FTAs and what explains their effectiveness as the usage of reminders expands.[195]

4. Flexible Scheduling

Courts focused on improving appearance rates are also endeavoring to give defendants more options for scheduling future appearances,[196] including developing technologies that give defendants and their

[193] *Id.* at 16. (reporting that any type of text reminder generated a 21% reduction in FTAs).

[194] *See, e.g.*, David S. Wald, Shahena Butt & Jonathan P. Bestwick, *One-Way Versus Two-Way Text Messaging on Improving Medication Adherence: Meta-analysis of Randomized Trials*, 128 AM. J. MED. 1139.e1, 1139.e1 (2015) (determining that two-way text messaging (including reminders and replies) "is associated with substantially improved medication adherence" (as compared to one-way text messaging)).

[195] Zottola, Crozier, Ariturk & Desmarais, *supra* note 190, at 113 (finding reminders have a "significant but small effect" on FTA rates and no consistent variances in the effect based on reminder format or frequency). Zottola and others emphasize the need for more research on the content of reminders, what type of reminders are most beneficial for different populations, whether reminders are more or less effective depending on the charge type, the potential cost benefits, and higher quality studies of the overall effectiveness. *Id.* at 114-16. Regarding the content of reminders, Zottola and others suggest that "[r]esearchers or court personnel should investigate the dynamic and specific reasons people fail to appear through surveys or qualitative interviews. This information would allow for the development of court reminders that include tailored information addressing the reported reasons people miss court." *Id.* at 115. A 2017 study by Lowenkamp and others found that "none of the four interventions (Call, Call w/warning, Text, Text w/warning) had an effect on the likelihood that FTA would occur." Christopher T. Lowenkamp, Alexander M. Holsinger & Tim Dierks, *Assessing the Effects of Court Date Notifications within Pretrial Case Processing*, 43 AM. J. CRIM. JUST. 167, 177 (2017).

[196] *See* TASK FORCE ON FAIR JUST. FOR ALL, ARIZ. SUP. CT., REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON FAIR JUSTICE FOR ALL: COURT ORDERED FINES, PENALTIES, FEES AND PRETRIAL RELEASE POLICIES 21 (2016); *see also* MCAULIFFE, HAMMER, FISHBANE & WILK, *supra* note 182, at 21, 31; Bernal, *supra* note 46, at 566-68.

counsel more options for rescheduling court dates,[197] or for resolving low-level offenses without court appearances.[198] For example, courts offering evening and weekend appearances report increases in pretrial appearances.[199] Further, the Salt Lake City Justice Court estimated a ninety-eight percent appearance rate among defendants eligible to schedule their own court date via phone or through a scheduling system called Doodle.[200] Harris County is changing its rules to allow defendants two rescheduled appearances "for any reason with no adverse consequences."[201]

5. Virtual Appearances

The COVID-19 pandemic shutdown forced courts to develop (and make widely available) mechanisms for remote appearances. Post-pandemic, many courts continue to permit some defendants to appear by video or phone.[202] Virtual appearances are interesting, of course, because of their potential to increase appearance rates. Some judges and attorneys report that these virtual appearances have improved pretrial appearance rates among defendants because they eliminate some of the

[197] Consent Decree, *supra* note 128.

[198] Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 249 (2016).

[199] *See* Bernal, *supra* note 46, at 563-66 (2017) (describing Pima County, Arizona scheduling reforms); Alexander Tabarrok, *Fugitives, Outlaws, and the Lessons of Safe Surrender*, 11 CRIMINOLOGY & PUB. POL. 461, 469 (2012) ("A more flexible criminal justice system could better help individuals to reintegrate with civil society."); *see also Squadron Passes 1st Step In Speedy Trial Reform Through Codes Committee,* N.Y. STATE SENATE (June 6, 2017), https://www.nysenate.gov/newsroom/articles/2017/daniel-l-squadron/squadron-passes-1st-step-speedy-trial-reform-through-codes [http://perma.cc/5MPL-S4Q4].

[200] MCAULIFFE, HAMMER, FISHBANE & WILK, *supra* note 182, at 57; *see also* SALT LAKE CITY JUSTICE COURT, https://slc.gov/courts/ (last visited Feb. 29, 2024) [https://perma.cc/84FK-ECD6] (allowing users to make payments, schedule arraignments, join online court, and resolve traffic citations).

[201] Consent Decree, *supra* note 128, at 35.

[202] For information about current state approaches to virtual appearances, see generally NAT'L CTR. FOR STATE CTS., NATIONAL SCAN OF AUTHORITY FOR REMOTE OR VIRTUAL COURT PROCEEDINGS (July 2023), updates available at https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/remote-and-virtual-hearings [https://perma.cc/BU2X-GQUD] (including appendix detailing how the fifty states and the District of Columbia have approached allowing for remote or virtual proceedings).

employment, childcare, and transportation burdens imposed by in-person court appearances.[203] Defendants appreciate having options for virtual court appearances both to ease these logistical challenges and because virtual appearances can be "less threatening" or "intimidating" than in-person appearances in a "regular courtroom."[204]

But these new pandemic-forced workarounds also demonstrate important lessons for system actors about the prospect of designing processes to maximize access. As Andrew Guthrie Ferguson explains, the pandemic "disrupt[ed]" the court system, "reveal[ing] the underlying structural power dynamics that have disadvantaged defendants and empowered courts as engines of carceral control."[205] In his article *Courts without Court*, Ferguson examines "traditional ideas around (1) place, (2) time, (3) accountability, and (4) equality," which he described as "principles that underlie the structure and practice of traditional criminal court."[206] Ferguson argues that "new technologies might allow us to reweight those values differently and reimagine existing practices without the courthouse at the center."[207] But judges are adapting slowly to these new perspectives; they do not always accommodate defendants' requests for virtual proceedings.[208]

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[203] Turner, *Remote Criminal Justice*, *supra* note 13, at 268; Allie Reed & Madison Alder, *Zoom Courts Will Stick Around as Virus Forces Seismic Change*, U.S. L. WK. (July 30, 2020) https://news.bloomberglaw.com/us-law-week/zoom-courts-will-stick-around-as-virus-forces-seismic-change [https://perma.cc/N2NE-FDFQ].

[204] *See* MAGNUSON, DEZEMBER, KUEHMEIER, GREEN & GAUTSCHI, *supra* note 76, at 46.

[205] Ferguson, *supra* note 12, at 1463-66; *cf.* Johnson, *supra* note 12, at 3 (exploring how "a virtual world may be a world in which defendants can claim more autonomy and respect during the plea process.").

[206] Ferguson, *supra* note 12, at 1466.

[207] *Id.*; *see also* Johnson, *supra* note 12, at 15 (explaining that the "virtual courtroom" may have "the potential to change certain long-held cultural norms among criminal lawyers and judges about how and when to evaluate efficiency").

[208] Turner, *Emerging*, *supra* note 14, at 140-43 (analyzing court decisions in nineteen cases involving defense motions for remote proceedings); *id.* at 140 ("There were four general reasons for defense requests to proceed remotely: cost, convenience, health concerns, and expediting the resolution of the case. While defendants can validly waive their constitutional right to appear in person, the court is typically not obligated to accept that waiver. Defendants have no constitutional right to a remote proceeding, and many statutes require more than the defendant's consent for a proceeding to occur via video.").

Defendants participating in virtual appearances may face different challenges that merit further study.[209] Commentators raise questions about technological challenges, reduced access to counsel, or other barriers to defendants' full participation in remote proceedings.[210] A 2021 study from the National Center for State Courts found that remote proceedings take about a third longer than in-person hearings, largely due to technology-related issues and lack of preparation by participants.[211] But that study also found that remote proceedings take longer because they increase access to justice, as litigants can more easily attend and participate in hearings.[212] Weighing all of these considerations, Jenia Turner advocates for allowing more pretrial status conferences and hearings on purely legal issues to be conducted virtually.[213] As she explains:

> Remote status conferences would also have the important benefit of easing access for defendants, who would no longer have to travel to the courtroom and take significant time off child care or work to attend. It would help reduce failure to appear rates and the added punishment that can come with such failures.[214]

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[209] Jenia I. Turner outlines a framework for considering the challenges of conducting remote proceedings in criminal cases. *See id.* at 143; *see also* MAGNUSON, DEZEMBER, KUEHMEIER, GREEN & GAUTSCHI, *supra* note 76, at 46-48 (describing defendants' perceptions of virtual court appearances).

[210] *See* Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211, 260 (2022) (cautioning that "[t]he use of the remote format further reduces the formality of the plea process . . . heighten[ing] the risk that the guilty plea will not be constitutionally sound, that the defendant will plead guilty to a crime he has not committed, or that the process will not be legitimate in the eyes of the defendant or the public"); Tashea, *supra* note 14; *The Known Unknown: Research Needed To Plug Knowledge Gaps on Impact of Court Telepresence Technology*, NAT'L INST. JUST (July 6, 2020), https://nij.ojp.gov/topics/articles/known-unknown-research-needed-plug-knowledge-gaps-impact-court-telepresence [https://perma.cc/AWH6-7VBC] (explaining that the shift to remote appearances "surged ahead of our understanding of its impact on individual rights and the effectiveness of courtroom processes").

[211] NAT'L CTR. FOR STATE CTS., THE USE OF REMOTE HEARINGS, *supra* note 14, at ii.

[212] *Id.*

[213] Turner, *Remote Criminal Justice*, *supra* note 13, at 268.

[214] *Id.*

Some courts are embracing this approach and expanding from using "remote appearances as a public health measure" to using them "as a tool to expand access to court for people [who] have challenges attending court in-person."[215]

6. Transportation and Childcare Programs

Defendants who miss court continue to describe transportation and childcare challenges as barriers to timely court appearance.[216] Numerous survey-based studies suggest these as opportunities for intervention.[217] Some jurisdictions have piloted programs to offer transportation support or to help with providing emergency childcare at courthouses.[218] Although there are ongoing programs, there have not been definitive studies of these types of interventions in the court context.[219]

[215] NORTH CAROLINA COURT APPEARANCE PROJECT, *supra* note 131, at 19; *see also id.* at 19-20, 26-27, 33-34 (describing post-pandemic virtual appearance policies in three North Carolina counties).

[216] *See* Thomas & Ahmed, *supra* note 73; *see also* ROSS HATTON, UNC SCH. GOV'T CRIM. JUST. INNOVATION LAB, RESEARCH ON THE EFFECTIVENESS OF PRETRIAL SUPPORT AND SUPERVISION SERVICES: A GUIDE FOR PRETRIAL SERVICE PROGRAMS 2 (July 2021).

[217] *See* MAGNUSON, DEZEMBER, KUEHMEIER, GREEN & GAUTSCHI, *supra* note 76 at 26-27 (describing defendants' descriptions of their transportation challenges); McCoy, Gulaid, Erondu & Willison, *supra* note 184, at 16 (nearly 94% of Hennepin County public defenders indicated that "their clients needed transportation to their court-related appointments").

[218] In Robeson County, North Carolina, to address transportation challenges, stakeholders have focused on providing clearer information about transportation support to defendants. NORTH CAROLINA COURT APPEARANCE PROJECT, *supra* note 131, at 32-33.

[219] *See* SAFETY & JUST. CHALLENGE, *Hennepin County, MN*, (Sept. 21, 2021), https://safetyandjusticechallenge.org/our-network/hennepin-county-mn/ [https://perma.cc/8H2Y-Y7G2] (explaining that in 2018, the MacArthur Foundation awarded Hennepin County, Minnesota a Safety and Justice Challenge grant to implement a Court Transportation Pilot ("CTP") that will provide "defendants who lack reliable access to transportation with a free ride to and from their court appearances," in addition to text message or email reminders for upcoming court dates); *see also* LAURA & JOHN ARNOLD FOUND., *supra* note 78, at 8 (calling for studies on the impacts of "community-based services (e.g., transportation, childcare, employment, substance or mental health services)" on improving pretrial appearance). The consent decree in the *ODonnell v.*

One transportation project in Minnesota, Court Ride, is modeled after a health care program called "Hitch Health" which provides low-income people with free rides to medical appointments.[220] Using software that integrates with office calendaring systems, Hitch Health has significantly decreased no-shows for medical clinic and hospital appointments.[221] Although the Court Ride program faced some significant implementation challenges, public defenders in Hennepin County perceived reduced FTA and pretrial custody rates among clients who used the service.[222] Prosecutors and defense attorneys interviewed about the program also reported that it raised awareness among justice system stakeholders "that transportation is a barrier to court appearance."[223]

Defendants who cannot arrange childcare in order to attend court hearings must occasionally bring their children to court with them. Issa Kohler-Hausmann details the challenges for defendants in this predicament who must "navigate competing demands of presenting as responsible parents and as responsible court subjects with limited resources to do both."[224] Judges vary in response to this: "Some judges are tolerant and polite, others are short-tempered and rude, but most eventually react to the inevitable noises children make in the courtroom."[225]

Harris County litigation also calls for research on the extent to which a lack of transportation causes pretrial nonappearance. Consent Decree, *supra* note 128, at 30-31.

[220] McCoy, Gulaid, Erondu & Willison, *supra* note 184, at 8-12; Mukhtar M. Ibrahim, *Minneapolis Will Offer Free Rides to Court for Those Charged With Low-Level Offenses*, STAR TRIB. (Jan. 16, 2019, 10:48 PM), https://www.startribune.com/minneapolis-will-offer-free-rides-to-court-for-those-charged-with-low-level-offenses/504458952/ [https://perma.cc/V5ZB-GSEA].

[221] *The Magic that Connects People to Transportation*, HITCH HEALTH, https://hitchhealth.co/ [https://perma.cc/JHN3-H3SW]; SAFETY & JUST. CHALLENGE, *supra* note 219.

[222] McCoy, Gulaid, Erondu & Willison, *supra* note 184, at 16-17.

[223] *Id.* at 17.

[224] KOHLER-HAUSMANN, *supra* note 31, at 232.

[225] *Id.*

D. Grace and Amnesty

Reformers are also focused on persuading courts to develop more flexible responses when defendants miss court. Some judges immediately record a defendant's failure to appear and issue a bench warrant, but others do not.[226]

Some jurisdictions are adopting grace periods before courts may issue a bench warrant. New York's bail reforms, for example, included a forty-eight-hour grace period for defendants who fail to appear for a scheduled court date to be able to return voluntarily.[227] Harris County judges are required to confirm that a defendant had notice and did not have good cause for missing court before issuing a warrant.[228]

Minneapolis courts have adopted a variety of programs to give defendants who miss court a second chance, including "Sign-and-Release warrants, Book-and-Release warrants, eReminders, the annual warrant purge, the Warrant Hotline, and warrant forgiveness days."[229] Courts in Tucson, Austin, and St. Louis also have "amnesty" days when individuals can come to court to clear outstanding warrants.[230] Santa Clara County recently announced new policies to encourage individuals to return to court to resolve an active bench warrant or a new arrest warrant without first having to surrender themselves into custody (the

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[226] Graef & Zanger-Tishler, *supra* note 15, at 7 (explaining that the authors have found "no empirical research that explains why some defendants receive bench warrants while others do not").

[227] MICHAEL REMPEL & KRYSTAL RODRIGUEZ, CTR. FOR CT. INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY 7 (2019).

[228] Consent Decree, *supra* note 128, at 36.

[229] MINN. JUD. BRANCH, EFFORTS TO REDUCE JAIL POPULATION DURING COVID-19, at 5 (April 2020) www.mncourts.gov/mncourtsgov/ media/ fourth_ district/ documents/ Criminal/ HCDCPretrialDetentionReduction.pdf [https://perma.cc/NQD4-RDAS].

[230] Bernal, *supra* note 46, at 566-68 (describing Pima County, Arizona programs for defendants to quash outstanding bench warrants); Alex Huer, *Have an Outstanding Warrant? St. Louis Court Will Offer Amnesty Feb. 24-27* (Feb. 20, 2020), https://www.stlpr.org/show/st-louis-on-the-air/2020-02-20/have-an-outstanding-warrant-st-louis-court-will-offer-amnesty-feb-24-27 [https://perma.cc/X8JF-QLP7]; Joseph Leahy, *Austin Courts' Amnesty Program Allows People with Warrants to Avoid Jails and Fees*, KUT NEWS CRIME & JUST. (Feb. 1, 2019), https://www.kut.org/crime-justice/2019-02-01/austin-courts-amnesty-program-allows-people-with-warrants-to-avoid-jail-and-fees [https://perma.cc/WPT3-GADQ].

prior policy).[231] Some North Carolina courts are working to develop "walk-in hours" for people who have missed a court appearance.[232]

Efforts to shift away from reactive enforcement of failures to appear must also take on the significant issue of outstanding fines and fees.[233] Some defendants specify that they cannot afford to return to court because of outstanding financial penalties.[234]

E. Recording, Measuring and Attempting to Predict Nonappearance

There is one final set of reforms related to pretrial appearance that are worth highlighting: efforts to measure and predict pretrial nonappearance. Pretrial risk assessments have been widely adopted

[231] *See In Response to Lawsuit, Santa Clara Superior Court Takes Step to Change Policy Discriminating Against Poor Defendants*, A.C.L.U. N. CAL. (Nov. 13, 2023), https://www.aclunc.org/news/response-lawsuit-santa-clara-superior-court-takes-step-change-policy-discriminating-against [https://perma.cc/MJ63-63LY] [hereinafter *In Response to Lawsuit*] (describing the litigation that prompted the changes); *Santa Clara County Superior Court Implements New Policies for Bench Warrants and Arrest Warrant Arraignments*, CNTY. OF SANTA CLARA (Dec. 19, 2023), https://justicereforms.santaclaracounty.gov/santa-clara-county-superior-court-implements-new-policies-bench-warrants-and-arrest-warrant [hereinafter *Santa Clara County Superior Court Implements New Policies*].

[232] NORTH CAROLINA COURT APPEARANCE PROJECT, *supra* note 131, at 20-21.

[233] *See* CRIM. JUST. POL'Y PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 33 (2016). (suggesting legislative reform to collect data on the number of warrants issued on a failure to pay or failure to appear at a proceeding related to criminal justice debt, how often individuals are found in contempt for failure to pay or failure to appear at proceedings relating to criminal justice debt, and of these, how many people are incarcerated); Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 284 (2014); *see also* Carroll, *Beyond Bail*, *supra* note 136, at 187-89 (listing some of the fees associated with pretrial release); *cf. In Response to Lawsuit*, *supra* note 231; *Santa Clara County Superior Court Implements New Policies*, *supra* note 231.

[234] *See* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13 (2010) (documenting the ways that "unpaid criminal justice debt puts individuals at risk of imprisonment and can impact everything from their employment and housing opportunities, to their financial stability, to their right to vote"); Goldkamp, *supra* note 77, at 429-30.

across the country over the past ten years.[235] Those tools have been the targets of a range of different critiques.

Before shifting to the tools themselves, it is worth revisiting the definitional problems described earlier. Until recently, jurisdictions tracking nonappearances made little effort to distinguish between flight from the jurisdiction, other forms of willful or persistent nonappearance (sometimes called "absconding"), and more innocuous and preventable types of nonappearance.[236] Although these types of distinctions are (or should be) relevant to judicial decision-making, they are rarely logged in court records. These distinctions are not drawn consistently across jurisdictions, which makes useful comparisons difficult.[237] As a result, developing more consistent definitions and measures of FTA is a reform priority.[238]

Lindsay Graef and Michael Zanger-Tishler highlight a basic and understudied flaw with FTAs as a metric.[239] In most courts, what is labeled and reported as an FTA is actually the issuance of a bench warrant.[240] In other words, not every defendant who misses a court date will be logged as an FTA; only those cases where judges issue bench warrants will bear the formal FTA label. Graef and Zanger-Tishler highlight interesting and unresolved questions about why judges issue bench warrants to some defendants and not others.[241] While too little is understood about the general relationship between missing court and getting a bench warrant, Graef and Zanger-Tishler find that whether a defendant will receive a bench warrant for failing to appear "is

[235] Sandra Mayson provides a detailed description of eight risk assessment instruments used around the country. Mayson, *supra* note 68. Mapping Pretrial Injustice provides a detailed guide to which tools are used in which states and counties.

[236] Gouldin, *Defining*, *supra* note 3, at 687.

[237] Gouldin, *New Perspectives*, *supra* note 6, at 310-12 (detailing inconsistencies in FTA data collection and reporting).

[238] *See* INTISAR SURUR & ANDREA VALDEZ, WASH. STATE CTS., PRETRIAL REFORM TASK FORCE: FINAL RECOMMENDATIONS REPORT 17-18 (Feb. 2019), https://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf [https://perma.cc/86KS-C49T].

[239] *See* Graef & Zanger-Tishler, *supra* note 15, at 25.

[240] *See id.*

[241] *See id.*

associated with their race/ethnicity, past experiences in the criminal legal system, and type of defense attorney."[242]

This existing bench warrant data – generally labeled as FTA data – became the data used to build and train the algorithmic risk assessment instruments (including the widely employed PSA tool) that purport to offer useful information for judges making pretrial decisions.[243] Given this data, most risk assessment tools that claim (through their labeling) to predict future nonappearance in fact only predict the risk of being issued a bench warrant.[244]

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All of these efforts to reduce pretrial detention rates and to improve pretrial appearance rates will be limited if jurisdictions do not also change overly burdensome and inflexible systemic expectations and requirements for pretrial appearance. This is a fundamental shortcoming of existing risk assessments which have been trained to measure and predict perfect pretrial attendance.

III. WHY DO APPEARANCES MATTER?

While the previous Part analyzed the range of different efforts that are focused on improving pretrial appearance outcomes, this Part steps back to examine an undertheorized threshold question: why do pretrial appearances matter? This is a question that seems obvious but is quickly obscured in the way that the criminal justice system has operated over the past few decades.

The following Sections consider a range of different answers to this foundational question and evaluate how the proposed reforms analyzed in Part II map on to these justifications. This Part begins by considering the constitutional requirements and legal rules that create obligations for defendants to appear for their criminal cases to proceed and then considers the justice, efficiency, and legitimacy rationales that are offered to support perfect pretrial attendance requirements. The final

[242] *Id.* at 23.

[243] *See id.* at 23-24; *see also* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 94-98, 102-04 (2017).

[244] Graef & Zanger-Tishler, *supra* note 15, at 22-24.

Section considers whether illegitimate compliance goals have overtaken some of the traditional justifications for punishing failures to appear.

A. A Defendant's Right and Duty to Appear

Criminal defendants generally must appear in person for the trial of charges against them.[245] This is a basic requirement of the U.S. criminal legal system that, as outlined below, functions for defendants both as a right and an obligation.[246]

Defendants' obligations to appear for court proceedings are rooted in their enforceable, constitutional rights to be present during their trials[247] and to confront the state's witnesses.[248] These requirements apply during what the Court has deemed "critical stages" of the criminal process, such as "arraignment, bail, plea, voir dire, trial, and sentencing."[249] Courts do not enforce these constitutional presence requirements as strictly for "certain non-evidentiary or uncontested proceedings" like "status conferences or hearings to determine legal questions."[250]

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[245] *See* Kimberly Kessler Ferzan, *The Trouble With Time Served*, 48 B.Y.U. L. REV. 2001, 2039-42 (2023) (describing defendant's "duty to appear" and "answer for the crime charged"); Graef, Mayson, Ouss & Stevenson, *supra* note 2, at 9 ("When the government lodges criminal charges against someone — presuming it has probable cause and has complied with all procedural requirements — it has the right to compel their appearance at future court proceedings.").

[246] The Supreme Court has acknowledged this link between a defendant's "right" and "obligation to be present." Taylor v. United States, 414 U.S. 17, 20, 20 n.3 (1973) (quoting Cureton v. United States, 396 F.2d 671, 676 (1968)).

[247] *See* U.S. CONST. amend. V ("No person . . . shall . . . be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV (same); Hopt v. Utah, 110 U.S. 574, 579 (1884) (explaining that this personal presence requirement is part of the constitution's due process requirement).

[248] *See* U.S. CONST. amend. VI (providing that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); Illinois v. Allen, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.").

[249] Turner, *Remote Criminal Justice*, *supra* note 13, at 204 (explaining that these events "generally require the defendant's presence unless it is voluntarily, intelligently, and knowingly waived").

[250] *Id.* at 203-04.

Federal Rule of Criminal Procedure 43 codifies the requirements that flow from these rights, outlining that felony defendants "must be present" for initial appearances, arraignments, pleas, all trial stages (including jury selection and verdicts), and sentencing.[251] The rule includes some exceptions that apply for organizational defendants, for hearings focused on questions of law, and for sentencing corrections.[252] In misdemeanor cases, defendants may consent to appear by video teleconference or waive their right to be present altogether.[253] Most states follow similar procedural rules,[254] but some state statutes extend the right to be present to misdemeanor cases, as well as felonies.[255]

The federal rule also permits courts to proceed with trials in absentia in certain cases where felony defendants who are present for the start of their trials subsequently forfeit their rights to be present.[256] These exceptions are only triggered if defendants "choose not to return to court once a trial has started, or . . . persist in disruptive conduct in the courtroom."[257] Federal courts applying these exceptions typically weigh the public interest in moving forward with a trial against the defendant's right to be present.[258] Courts making these determinations consider

[251] FED. R. CRIM. P. 43(a); *see also* FED. R. CRIM. P. 43(b)(2) (excluding misdemeanor defendants). The drafters acknowledged that they were merely "restat[ing] existing law," FED. R. CRIM. P. 43 Advisory Committee's Note to 1944 Adoption (citing Lewis v. United States, 146 U.S. 370 (1892)).

[252] FED. R. CRIM. P. 43(b)(1), (3), (4).

[253] FED. R. CRIM. P. 43(b)(2); *see also* Harmon, *supra* note 73, at 342 (exploring circumstances when courts permit trials in absentia for people charged with misdemeanors).

[254] *See* Kurtis A. Kemper, Annotation, *Sufficiency of Showing Defendant's "Voluntary Absence" From Trial for Purposes of State Criminal Procedure Rules or Statutes Authorizing Continuation of Trial Notwithstanding Such Absence*, 19 A.L.R. 6TH 697, §§2, 25 (2006) (collecting state cases interpreting rules similar to Rule 43).

[255] Turner, *Remote Criminal Justice*, *supra* note 13, at 203-04.

[256] FED. R. CRIM. P. 43(c)(1)(A)–(C).

[257] Harmon, *supra* note 73, at 342.

[258] Eugene L. Shapiro, *Examining an Underdeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant's Right to Be Present*, 96 MARQ. L. REV. 591, 608-13 (2012) (describing federal cases); *see also* United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir. 1972) (explaining that a court's discretion to proceed with a trial in absentia "should be exercised only when the public interest clearly outweighs that of the voluntarily absent defendant").

"the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; [and] the burden on the Government in having to undertake two trials."[259] Most states have similar rules, but many have interpreted those rules more flexibly than the federal courts, focusing almost exclusively on whether the defendant's decision not to return to court was voluntary and rejecting the federal courts' multifactor balancing.[260]

In an 1892 case, the Supreme Court explained that "[a] leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."[261] More recently, the Court explained that Rule 43 captures longstanding views that a defendant's presence is "essential" because a "fair trial" requires jurors to meet a defendant "face-to-face" and to hear witness testimony in the defendant's presence.[262]

Because a defendant's right to appear at trial is so carefully guarded through this near prohibition on trials in absentia, the right also functions as an obligation. Defendants must appear for trials to proceed, for the system to function, and for justice to be served. Courts describe this obligation to show up in clear terms.[263] Two centuries ago, the Virginia Circuit Court explained in *United States v. Feely* that a defendant who fails to appear is perceived as refusing to "submit himself to the

[259] *Tortora*, 464 F.2d at 1210.

[260] Shapiro, *supra* note 258, at 613-14 (explaining that a majority of states that have considered the question have rejected the federal balancing test, instead permitting trial in absentia upon a showing that a defendant was voluntarily absent from trial).

[261] Lewis v. United States, 146 U.S. 370, 372 (1892); *see also* James G. Starkey, *Trial in Absentia*, 53 ST. JOHN'S L. REV. 721, 721-33 (1979) (describing long history of barring trials in absentia).

[262] Crosby v. United States, 506 U.S. 255, 259 (1993) ("It was thought 'contrary to the dictates of humanity to let a prisoner "waive that advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence."'" (citation omitted)).

[263] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 54-55 (1991); United States v. Salerno 481 U.S. 739, 754 (1987); Gerstein v. Pugh, 420 U.S. 103, 114-16 (1975); Stack v. Boyle, 342 U.S. 1, 5 (1951) (explaining that bail should be set to "insure the presence of the defendant").

law."[264] The Supreme Court affirmed this idea — that justice can only be served when defendants submit themselves to the law and appear at trial — in *Bell v. Wolfish* in 1979, noting that "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials."[265] Specifying the nature and degree of that interest is important; it shapes the steps the government may and should take to encourage or compel defendants back to court.[266]

Rachel Harmon seems to be the first scholar to question the inevitability and inflexibility of this arrangement. Harmon's article, *Why Arrest?*, challenges the criminal justice system's overreliance on custodial arrests, which are significant liberty infringements.[267] She proposes an expansion of the use of citations in lieu of arrest, particularly in misdemeanor cases.[268] Of course, as Harmon acknowledges, the increased use of citations or desk appearance tickets will likely increase the numbers of people who will fail to appear for court.[269]

Harmon considers whether courts could proceed with trials in absentia for misdemeanor defendants who fail to appear after being

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[264] United States v. Feely, 25 F.Cas. 1055, 1057 (Va. Cir. 1813); *see also* CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 17-18 (U.C. Press 2019) (analyzing the *Feely* case).

[265] Bell v. Wolfish, 441 U.S. 520, 534 (1979).

[266] Gouldin, *New Perspectives*, *supra* note 6, at 296-97 ("To properly and efficiently administer justice, judges must ensure that criminal defendants return for future court proceedings."); Gouldin, *Defining*, *supra* note 3, at 693 ("Across jurisdictions, the government has a 'substantial interest in ensuring that persons accused of crimes are available for trials.' For more serious crimes, the interest is more compelling."); *see* BAUGHMAN, BAIL BOOK, *supra* note 1, at 21 (describing the primary purpose of bail as providing the incentive for a defendant to return to court); Laura Appleman, *Justice in The Shadowlands: Pretrial Detention, Punishment, & The Sixth Amendment*, 69 WASH. & LEE. L. REV. 1297, 1313 (2012); *see also* Graef, Mayson, Ouss & Stevenson, *supra* note 2, at 11-12 ("Every jurisdiction in the United States dedicates considerable resources to preventing, tracking, and sanctioning defendant FTAs. Money bail, bail bondsmen, FTA risk assessment, pretrial services, and conditions of release geared toward ensuring appearance, capias warrants, prosecutions for "bail jumping" — all of these institutions are dedicated to preventing or sanctioning defendant FTAs.").

[267] Harmon, *supra* note 73, at 342-43.

[268] *Id.*

[269] *Id.*

given notice of their court dates.[270] Harmon is not advocating for trials in absentia, but she uses this thought experiment to highlight an important, too-often-obscured point. As Harmon explains, "[T]hinking about using citations with trials in absentia should focus our attention on just how problematic our system of arrest is: even this unappealing alternative would likely vindicate our interests in criminal justice and our concerns for the defendant better than the current system."[271]

Most of the nonappearances in the criminal justice system are not defendants missing trials, however. They are failures to appear for other pretrial hearings. As such, these debates about the importance of trial appearances have only limited applicability to the run-of-the-mill FTA. The reforms in Part II that focus on reducing the number of required appearances, broadening defendants' ability to waive appearance, and permitting more virtual appearances reflect awareness of this important distinction.

But many courts' continued insistence that defendants must appear in court for justice to be served drives custodial arrest and pretrial detention practices that are incredibly costly (both in terms of the fundamental liberty rights these policies infringe, and the policing and jail dollars spent).[272] Developing more effective strategies to combat nonappearance is the path to protecting both sets of defendant rights (pretrial liberty and due process rights) and the system's justice interests, discussed in the next Section.[273]

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[270] *Id.* (explaining that in light of other Rule 43 exceptions, "it is not much of a stretch to conclude that a defendant also forfeits his right to be present at trial when he receives actual notice of his trial date and he fails to appear. In that case, we might continue in his absence"); *see also id.* at 343 ("[G]iven the high rate of guilty pleas and the weak expressive value of misdemeanor convictions, we might not lose much by permitting defendants to be tried in their absence even for these more serious crimes.").

[271] *Id.* at 343.

[272] *See id.* ("My point is not that trials in absentia are a good idea. Given the traditional role the defendant's presence plays in American due process, they probably aren't.").

[273] *See id.* ("Managing failures to appear in other ways — by setting new hearing dates, by finding defendants, and by dropping some prosecutions, for instance — is likely preferable.").

B. Justice Denied: Impunity and Uncertainty

The most obvious justice problems arise when people who should be convicted[274] of serious crimes *never* appear to answer charges and therefore avoid appropriate conviction and punishment.[275] Judges who describe their collective interest in "safe-guarding the integrity of the adjudication process" are focused on avoiding these sorts of justice failures.[276] Traditional theories of punishment describe the particular harms of this sort of impunity. The community misses the opportunity for retribution.[277] The utilitarian purposes of punishment are frustrated when the community cannot rehabilitate, incapacitate, or otherwise specifically deter defendants who have absconded.[278] General deterrence goals are undermined in these cases, too.[279]

Across these theories, justice costs are higher where defendants are legally guilty of the crimes for which they have been charged, so pretrial appearance matters more in cases where defendants are more likely to be found guilty.[280] This is both obvious and problematic. It raises questions about how to distinguish between concepts of factual guilt

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[274] I would include in this category those defendants (i) who lack reasonable defenses to the charges filed against them and (ii) against whom the state has sufficient evidence to convict. This may be properly characterized as "legal guilt." For thoughtful analysis and critique of this sort of pre-adjudication prediction of guilt, see Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1007-09 (2019) (critiquing risk assessment tools).

[275] *See* KOHLER-HAUSMANN, *supra* note 31, at 71 ("Under the conventional adjudicative model, the animating task organizing the work of criminal justice actors is to determine whether the defendant in fact committed the criminal act of which she is accused. The defining features of this model are twofold: (1) the courts embracing it are primarily engaged in adjudication, and (2) the subject of this adjudication is guilt and punishment premised on a finding of guilt." (emphasis omitted)).

[276] E. Rely Vîlcică & John S. Goldkamp, *Bail Prediction: Exploring the Role of Neighborhood Context in Philadelphia*, 42 CRIM. JUST. & BEHAV. 1159, 1159-61 (2015); *see also* Gouldin, *New Perspectives*, *supra* note 6, at 297-98 (describing the perception that nonappearances impose "justice costs").

[277] Thomas J. Miles, *Estimating the Effect of America's Most Wanted: A Duration Analysis of Wanted Fugitives*, 48 J.L. & ECON 281, 281 (2005).

[278] *See id.*

[279] *See* Gouldin, *New Perspectives*, *supra* note 6, at 298; Crystal Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1433 (2017).

[280] *See* Gouldin, *New Perspectives*, *supra* note 6, at 298; Miles, *supra* note 277, at 281.

and legal guilt.[281] It highlights the challenges of developing pretrial procedures that preserve the opportunity to seek justice without compromising the presumption of innocence.[282] Kim Ferzan recently explained that pretrial detention justified by the weight of the evidence "undermines our procedural morality, even if it does not undermine the presumption of innocence as understood in U.S. law":

> If we have trials for the purpose of determining what negative consequences follow from the defendant's having committed the crime, then we must first determine that the defendant has actually committed the crime. A claim that potential guilt for the commission of the offense itself grounds the right to pre-punish undermines the entire purpose of the criminal process. Simply put, the state may not get a head start on punishment before the defendant is even convicted.[283]

Despite these well-documented concerns, judges have long considered the weight of the evidence against a defendant as part of pretrial decision-making.[284]

There are also justice costs when innocent defendants avoid trial, that is, when there is no opportunity to evaluate the merits of a charge, and the dismissals or acquittals that should follow the charges and trials of innocent defendants do not come to pass. Justice is not simply the production of convictions and punishment.[285] At least in theory, it

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[281] *See* Roberts, *supra* note 274, at 990-97 (discussing debates about the meanings of factual and legal guilt).

[282] Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 718-19 (2022). *See generally* BAUGHMAN, BAIL BOOK, *supra* note 1 (analyzing the relationship between defendants' rights to bail and the presumption of innocence).

[283] Ferzan, *supra* note 245, at 2032-33.

[284] Gouldin, *Defining*, *supra* note 3, at 706; *cf.* United States v. Bustamante-Conchas, 557 F. App'x. 803, 804 (10th Cir. 2014) (affirming the decision to release the defendant when there was "substantial circumstantial evidence, but no direct evidence" that the defendant was guilty); United States v. Berkun, 392 F. App'x. 901, 903 (2d Cir. 2010) ("Because the evidence of guilt is strong it provides [the defendant] with an incentive to flee.").

[285] Ferzan, *supra* note 245, at 2041 ("It is important to show up for your murder trial even if you are not guilty and will be acquitted." (citing ANTONY DUFF, LINDSAY FARMER,

should be the pursuit of accuracy and truth, a process of information gathering and testing.[286] Innocent defendants who never appear prevent those truth-seeking resolutions as well.[287]

But these sorts of justice costs (and the traditional theories of punishment) are notoriously hard to quantify.[288] For both the impunity and uncertainty concerns described above, the costs vary with the seriousness of the underlying crime.[289] Certainly, for more serious, violent crimes, the "justice costs" imposed when defendants never return to court would be high.[290] And the process that governs more serious cases more closely resembles the "conventional adjudicative model."[291] But those crimes are a small part of the criminal justice system.[292]

SANDRA MARSHALL & VICTOR TADROS, 3 THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL LAW 7 (Hart Publ'g 2007))).

[286] *See* KOHLER-HAUSMANN, *supra* note 31, at 72.

[287] For those unfamiliar with the system, it might seem odd to suggest that innocent defendants would avoid court. But, as Malcom Feeley explained decades ago, "In the lower courts, the process itself is the primary punishment." FEELEY, *supra* note 147, at 30-31, 199 ("The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence.").

[288] Michael T. Cahill, *Punishment Pluralism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 27 (Mark D. White ed., 2010); *cf.* United States v. Jackson, 835 F.2d 1195, 1198-1200 (7th Cir. 1987) (Posner, J., concurring) (attempting to quantify incapacitation and deterrence values of life-without-parole sentence for defendant convicted of armed robbery (after three prior convictions)).

[289] Gouldin, *Defining*, *supra* note 3, at 726; *see also* Ferzan, *supra* note 245, at 2041 (acknowledging that "an intent to abscond from a serious offense may justify liberty deprivation when the intent to abscond when charged with a minor offense would not," but concluding that "[w]e should be highly skeptical that even trials for serious crimes can justify putting someone behind bars because of what we think she may choose to do in the future"); Yang, *supra* note 279, at 1431.

[290] Gouldin, *New Perspectives*, *supra* note 6, at 297-98.

[291] KOHLER-HAUSMANN, *supra* note 31, at 71.

[292] *See* ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 151-53 (The New Press, 2019) ("The 'violent' crime that forms the ostensible justification for modern policing tactics is a small problem. . . . Only four percent of all police arrests in the U.S. are for crimes considered 'violent' by the FBI, even though those crimes are offered as the justification for . . . every violent aspect of modern policing. . . . For example, although a large part of the mass incarceration zeitgeist is ostensibly predicated on fighting 'violence' with a significant

Most criminal cases involve lower-level crimes[293] and are not governed by these conventional adjudicative processes. Instead, as Alexandra Natapoff and others explain, the misdemeanor system is more akin to an "assembly line."[294] Issa Kohler-Hausmann describes "misdemeanorland" as governed by a "managerial model."[295] This vision of the criminal justice system — and the role of pretrial appearance as performance or compliance with that model — is analyzed in more detail below.[296]

Justice is only denied in the manner envisioned in this subsection when defendants disappear permanently, that is, when they never appear in court. The limited appearance data that is available makes clear that this is a rare outcome.[297] Justice is rarely denied based on a defendant's failure to appear. A more common (but still uncommon) outcome: defendants who miss a court date but eventually return to court for their case to be adjudicated.[298] As outlined in the next Section, these temporary nonappearances do not deny justice, but they may result in delays, which impose costs of a different order and magnitude.

C. Justice Delayed: System Efficiency

Some defendants may miss some but not all court appearances. In these cases, we might describe justice as delayed, but not denied. It is worth noting that these are not purely divided categories of harm. Lengthy delays or persistent nonappearances may eventually impose the sorts of "justice costs" described in the previous Section. The purposes of punishment described above generally presuppose timely punishment of a guilty defendant. And delays may mean losing

expansion of carceral sentences for 'violent crime,' there is no serious evidence that caging people who have harmed another person reduces 'violent crime,' let alone that it is the best way for a community to do so.").

[293] Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012).

[294] *Id.* at 1374.

[295] KOHLER-HAUSMANN, *supra* note 31, at 71-72 ("Much of the activity of lower criminal court actors in misdemeanorland does not fit this conception of adjudication.").

[296] *See* discussion *infra* Section III.E.

[297] *See supra* notes 14–23 and accompanying text.

[298] *See* REAVES, *supra* note 16, at 21 (presenting Table 18 which shows 17% failed to make all their court appearances, but 13% did return to court).

witnesses or other evidence which may reduce the likelihood of conviction.

For the most part, though, the delays that result when defendants miss a court date (but eventually return to court) impose administrative efficiency costs that are different in kind from the justice failures analyzed above.[299] These hassle and inconvenience costs are also distinct from the institutional legitimacy costs described later. The costs that result from a failure to appear mostly fall into three categories. The first two categories described below are costs that the system bears: the costs of rescheduling court dates and the costs of locating defendants who miss court appearances.[300] The final category of costs discussed in this Section are the types of costs that the system imposes on defendants who fail to appear.

1. Rescheduling Court

Defendants who miss court dates undoubtedly create real administrative costs for courts. Rescheduling court dates imposes costs on judges, attorneys, court personnel, witnesses, and on other defendants whose cases may be delayed as a result of court calendar congestion.[301] As one state court judge recently complained, failures to appear "frustrate the judicial process."[302]

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[299] *See generally* State v. Garvin, 699 A.2d 921, 925-26 (Conn. 1997) (emphasizing the burdens of even a "single failure to appear" on court scheduling practices and administrative efficiency).

[300] *See* U.S. COMM'N ON C.R., CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 194 (Jan. 2022) https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf [https://perma.cc/FBD8-NN85] ("It would also be helpful to know what costs in time and money are incurred by courts, law enforcement, bail bond companies, and others when arrestees fail to appear in court. . . . FTA means lost time to court staff, judges, prosecutors, police officers, attorneys, witnesses, and others who do appear at the court even when a defendant does not. The court and police will also incur time and effort reissuing warrants and apprehending defendants that fail to appear, so there is no such thing as a 'mere FTA.'").

[301] Gouldin, *New Perspectives*, *supra* note 6, at 298; *see also* Graef, Mayson, Ouss & Stevenson, *supra* note 2, at 5.

[302] Commonwealth v. Brock, 61 A.3d 1015, 1022 (Pa. 2013) ("The failure of a defendant to appear at any proceeding to which he was summoned impacts not only the trial judge, attorneys, and jurors, but also other defendants who are awaiting trial.")

These hassles or nuisance costs of rescheduling court dates are difficult to quantify, even in well-functioning systems. But our system is not functioning particularly well. As Lindsay Graef, Sandy Mayson, Aurelie Ouss, and Megan Stevenson have recently highlighted, other system actors regularly forget, confuse, or skip court dates.[303] Or they appear but are unprepared, requiring adjournments. Their project highlights the persistence of the types of problems Malcolm Feeley described in compelling detail decades ago:

> Occasionally a defendant may appear in court only to find that his case is not on the calendar. Or the defense attorney may forget to show up. A court-ordered report such as a laboratory report on drugs may not have been completed, or a defendant's file may simply be lost. Whatever the reasons for delay, it may be two or three hours after the defendant has first taken his seat in the gallery before he is informed that his case will be continued. Rarely is this decision made in consultation with [the defendant] or even with an appreciation of the problems it might involve for him. Unable to comprehend the details of court operations, most defendants are overwhelmed by the details of the processes. Rarely can they distinguish reasonable from unreasonable, careful from careless decisions, and they are left with generalized discontent and haunting suspicions.[304]

But Graef, Mayson, Ouss, and Stevenson's study goes beyond merely putting defendants in good company with everyone else in the system whose failures to appear contribute to delayed justice. Their project makes clear that these other actors' absences are far more common than defendants' failures to appear.[305] Their study of "detailed data for criminal proceedings in Philadelphia between 2010 and 2020" revealed

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[303] Graef, Mayson, Ouss & Stevenson, *supra* note 2, at 5 (concluding that failures to appear are a "systemic phenomenon, one with systemic consequences").

[304] FEELEY, *supra* note 147, at 223.

[305] *See generally* Graef, Mayson, Ouss & Stevenson, *supra* note 2 (presenting a study of failure to appear in Philadelphia and finding that non-defendant failure to appear are more common that defendant failure to appear.)

that "the case-level FTA rate for non-defendants is more than double the rate of defendant FTA: 53% to 19%.[306]

The burdens imposed by all of these other actors' failures to appear, however, are mostly absent from conversations about pretrial efficiency.[307] In a recent article, Andrew Guthrie Ferguson considered the impacts of virtual court appearances (beyond the obvious convenience factor). As he explained, the pandemic forced "decentralization" which pressed people to reconsider why the system deprioritizes the preferences and needs of defendants: "The traditional valuing of courthouse convenience contributes to a professional-centric system where the convenience of the professionals supersedes the convenience of other participants including — e.g., defendants, jurors, and witnesses. But when court does not require physical presence in the same place, a different value system can be explored."[308]

Ethan Corey and Puck Lo offer additional comparisons that put defendants' failures to appear for court in useful context. As they explain, "missed appointments" are not "unique" to criminal cases:

> Multiple studies report no-show rates of 15 to 30 percent for medical appointments, which is about the same as the criminal court FTA rate in most U.S. jurisdictions. Some parts of the civil court system, like small claims court and housing court, have absentee rates as high as 95 percent.[309]

The number of missed court dates clearly matters to any effort to quantify the harm of criminal defendants' failures to appear. Missing numerous dates will be more costly. Efforts to quantify these costs are

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[306] *Id.* at 4-5. ("Police officers fail to appear at least once in 31% of cases for which they are subpoenaed as witnesses. On a per-hearing level, police officers fail to appear on a subpoena more than twice as often as defendants: 13% versus 7%. Victims and other civilian witnesses fail to appear in almost half of cases with which they are associated. Prosecutor and public defender FTA rates are very low; they often work in teams, making it easy to sub in for each other. But private defense attorneys — both court-appointed and privately hired — failed to appear at least once in 36% of their cases.").

[307] *See id.* at 5 (concluding from study of practices in Philadelphia that "nonappearance is a major feature of the system" but nonappearance by attorneys and witnesses "has escaped sustained attention from academics or policymakers.")

[308] Ferguson, *supra* note 12, at 1472.

[309] Corey & Lo, *supra* note 131.

limited but in a 2007 study, David Bierie estimated the cost of scheduling a minor court hearing at approximately $560.[310] As noted above, the data make clear that defendants who miss a court date typically return for the next one.[311]

While the administrative costs that courts bear are important, they are not more important than other costs outlined in this Part. Researchers sometimes prioritize these sorts of efficiency costs (focusing on whether defendants appear for *all* court dates, for example) over others, perhaps because they are easier to count or quantify.

But a zero-tolerance, perfect-attendance approach for pretrial nonappearance is unnecessarily burdensome (reflecting ignorance of many defendants' circumstances) and frequently counterproductive. A single missed court appearance may inconvenience the court and impose modest administrative costs, but it does not affect the court's institutional legitimacy or impose justice costs.

In an 1813 federal appeals court decision, then-Supreme Court Chief Justice John Marshall, sitting by designation as a circuit judge, cautioned against overreacting to a single missed court appearance. Justice Marshall explained that bail is intended to bring defendants back to court.[312] As Christine Scott-Hayward and Hank Fradella explain, Marshall rejected the idea that a single failure to appear meant that a defendant's bond was forfeited and became the property of the United States.[313] In Marshall's view:

> If the accused has, under circumstances which show that there was no design to evade the justice of his country . . . repairs the default . . . by appearing at the succeeding term, and submitting himself to the law, the real intention and object of the recognizance are effected, and no injury is done.[314]

[310] David M. Bierie, Cost Matters Application and the Advancement of Economic Methods to Inform Policy Choice in Criminology 156 (2007) (Ph.D. dissertation, University of Maryland).

[311] REAVES, *supra* note 16, at 21.

[312] *See* United States v. Feely, 25 F. Cas. 1055, 1057 (Va. Cir. 1813).

[313] *See* SCOTT-HAYWARD & FRADELLA, *supra* note 264, at 18 (quoting *Feely*).

[314] *Feely*, 25 F. Cas. at 1057.

This centuries-old bail decision supports the view that a nonappearance that is later corrected does not frustrate the purposes of justice.

2. Locating Non-Appearing Defendants

There are also potential costs involved in locating defendants who miss court, but research to quantify these costs is limited.[315] When defendants fail to appear, judges may issue bench warrants.[316] Whether police decide to execute those warrants and go looking for missing defendants will vary depending on the resources and practices of the particular department but also, likely, on the seriousness of the offense. For many nonappearances, a bench warrant may issue, but it will be dormant, waiting for the defendant's next interaction with law enforcement and a criminal history search to activate it.

In her work to quantify the costs and benefits of pretrial detention, Crystal Yang relies on data from Abrams and Rohlfs to "[m]onetiz[e] the costs" of tracking down and "apprehending a defendant who fails to appear in court."[317] Yang estimated this cost at approximately $1,185 which included both the costs of "re-apprehending a defendant who" failed to appear (estimated at "roughly five percent of the bail amount, or approximately $625 in the context of the study") and the cost of an additional bail hearing (estimated at $560).[318]

These questions and comparisons require further study.[319] Existing studies are limited by their failure to differentiate between types of nonappearance.[320] It will be more costly to locate and apprehend a defendant who actively and willfully avoids court, or who leaves the

[315] *See* Gouldin, *Defining*, *supra* note 3, at 734; Yang, *supra* note 279, at 1431.

[316] *See* Gouldin, *Defining*, *supra* note 3, at 690; Patterson & Guevara, *supra* note 3, at 4.

[317] Yang, *supra* note 279, at 1436. *See generally* David S. Abrams & Chris Rohlfs, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 ECON. INQUIRY 750, 767 (2011) (estimating "optimal bail levels" by quantifying and balancing range of system costs, community costs, and costs to defendants).

[318] Yang, *supra* note 279, at 1436, 1436 n. 152; *see also* Abrams & Rohlfs, *supra* note 317, at 767; Bierie, *supra* note 310, at 156; *cf.* John F. Duffy & Richard M. Hynes *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285, 1325 (2021) (estimating that it costs the Government $10,000 to apprehend and process a defendant who fails to appear, based on median bail prices).

[319] *See* Gouldin, *Defining*, *supra* note 3, at 724.

[320] *See id.* at 724-25.

jurisdiction to avoid court, than a defendant who has unintentionally failed to appear and remains in the jurisdiction.[321]

3. Punishing Imperfect Attendance

The system's mostly inflexible insistence on perfect pretrial attendance imposes significant costs on defendants.[322] Within the criminal justice process, a missed appearance can produce various sorts of consequences: bench warrants, additional charges, and even detention. These costs can cause an "initially inadvertent nonappearance" to quickly become a persistent phenomenon.[323]

A defendant's nonappearance can result in a bench warrant that, in turn, poses barriers to employment, access to public benefits and services, and the ability to obtain or keep a driver's license.[324] Defendants who fear being arrested for an outstanding warrant are also less likely to seek medical aid or to report victimization.[325] The burdens also accumulate in the form of fines, fees, or other court sanctions — some defendants "simply cannot afford financially to turn themselves in."[326]

The stresses of defendants' "dipping and dodging" to avoid police are borne by families and friends, too.[327] The financial and emotional burdens fall disproportionately on women of color who are frequent co-

[321] *See id.* at 737.

[322] *See id.* at 694-96; Gouldin, *New Perspectives*, *supra* note 6, at 299.

[323] Gouldin, *Defining*, *supra* note 3, at 695.

[324] *See* ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY 36-62 (2014); CRIM. JUST. INNOVATION LAB, *supra* note 129, at 12-14 ("Failure to appear alone prevents 1 in 10 driving-age North Carolinians from driving."); Megan Cahill, *Focusing on the Individual in Warrant-Clearing Efforts*, 11 CRIMINOLOGY & PUB. POL'Y 473, 476 (2012); *see also* Flannery & Kretschmar, *supra* note 77, at 449 (describing defendants' responses to survey conducted as part of Fugitive Safe Surrender project); Nam-Sonenstein, *supra* note 4.

[325] *See* GOFFMAN, *supra* note 324, at 41, 45-46; *see also* Cahill, *supra* note 324, at 476; Flannery & Kretschmar, *supra* note 77, at 452; Gouldin, *Defining*, *supra* note 3, at 694.

[326] Goldkamp, *supra* note 77, at 430; *see also* BANNON, NAGRECHA & DILLER, *supra* note 234, at 13.

[327] GOFFMAN, *supra* note 324, at 36-62 (documenting the individual and family stress that arises from defendants' constant efforts to avoid police).

signers when a partner, son, or another relative is released on commercial bail.[328]

Many of these costs are also borne by the low-income communities where these defendants most often disappear. While evading law enforcement with an outstanding warrant, defendants may be unable to find legitimate work because of their status, which potentially pushes them toward criminal income sources.[329] As a result, defendants' "already tenuous attachments to family, work, and community" are strained.[330] Goldkamp described this phenomenon as "deterrence backfire."[331]

These downstream problems are a reminder that giving too much weight to courtroom efficiency may have unintended consequences. More research is needed to determine the extent to which courts' strict nonappearance policies may have these sorts of criminogenic effects.

D. Institutional Legitimacy

Courts' insistence on perfect attendance is also grounded in a fear that defendants' failures to appear — and especially chronic nonappearances — undermine the judiciary as an institution.[332] These potential costs are related to the administrative efficiency concerns discussed in the prior Section but are more closely focused on potential threats to judges' power and authority. These costs are difficult to distill and measure.

What weight should be given to institutional legitimacy in this analysis? When courts and commentators express concern about institutional legitimacy, it is frequently with a view toward preserving traditional system hierarchies and the corresponding power, respect,

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[328] *See* Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIS. 150, 159 (2019).

[329] *See* Tabarrok, *supra* note 199, at 464.

[330] Flannery & Kretschmar, *supra* note 77, at 439; *see also* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS A PERMANENT PUNISHMENT FOR THE POOR 72-73 (2016).

[331] Goldkamp, *supra* note 77, at 430.

[332] *See* Gouldin, *Defining*, *supra* note 3, at 692-93; Miles, *supra* note 277, at 281; Yang, *supra* note 279, at 1429-30.

and status asymmetries that define those arrangements.[333] Institutional legitimacy arguments frequently presume the legitimacy of the institution before proceeding to analyze how to protect it.[334]

But when communities question the legitimacy of the system, their focus is on whether the purpose of the enterprise justifies its methods. In a moment when confidence in the legitimacy of the criminal justice system is perhaps at an all-time low, it is important to acknowledge that for some, the system is beyond repair.[335] Courts' fair treatment of defendants may influence community perceptions of judicial legitimacy. Courts (judges and court staff) who recognize that the many hardships that may contribute to missed appearances require some accommodation and grace will likely be viewed as more fair or legitimate. It may be necessary to preserve some of the deference and hierarchy that defines our court system for the system to function.[336] But our current arrangements and asymmetries contribute to system inefficiency and dysfunction in ways that merit closer examination.[337]

[333] *See* Ferguson, *supra* note 12, at 1468 (describing "traditional hierarchies of power considered necessary to justify the authority of law" and their close connection to the physical structure of the courthouse).

[334] DUFF, FARMER, MARSHALL & TADROS, *supra* note 288, at 209 (describing "moral obligation" to "participate" in a process to resolve disputes but predicating this on the existence of a "legitimate" demand from one person to another).

[335] *See* Lessnick, *supra* note 110, at 1270 (explaining that "[p]retrial detention 'damages the credibility of the entire system. Our communities come to see courts not as places of justice, where evidence is carefully weighed.' Instead, pretrial detention hearings become 'places where poor people are abused'" (citing Raphling, *supra* note 67, at 17)); *see also* Marbre Stahly-Butts & Amna Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1550 (2022) (describing the abolitionist view of the criminal justice system).

[336] *See* Ferzan, *supra* note 245, at 2041 ("Even if the defendant will commit a wrong in failing to appear, putting that person in a cage to guarantee their appearance at trial is disproportionate to the duty they threaten to ignore. It is true that all failures to appear threaten the state's authority to run its criminal justice system, but not all 'callings to account' are alike.").

[337] *See* Ferguson, *supra* note 12, at 1466 (Ferguson's analysis of the pandemic shift to virtual appearances considers the potential for reducing "reliance on court-centered social control.").

E. Compliance, Performance, Keeping Promises

While the efficiency and institutional legitimacy justifications discussed in the previous Section focused on the system's needs, this final Section shifts to examine what perfect attendance requirements look like in practice. Particularly in cases involving lower-level offenses, scholars and practitioners describe processes that are not aimed at justice and do not look like the idealized, adjudicative model described above.[338] Issa Kohler-Hausmann describes "misdemeanorland" prosecutors and judges who spend time evaluating a defendant's pretrial appearance records (among other sorts of performance and compliance indicators) as part of efforts to determine a defendant's "governability."[339] Pretrial appearance is a performance, demanded by the criminal justice system.[340] In this way, a defendant's appearance at required court proceedings demonstrates compliance with system demands and becomes an end in itself.[341]

Some courts frame the importance of defendants' appearance in court throughout the pretrial and trial process in contractual terms. In *State v. Garvin*, for example, the Connecticut Supreme Court described a defendant who failed to appear for court as having broken a "promise."[342] In the *Garvin* court's view, a defendant's failure to appear

[338] *See generally* KARAKATSANIS, *supra* note 292 (describing the criminal system's fundamental failures); KOHLER-HAUSMANN, *supra* note 31 (discussing the rise in misdemeanors and the flaws in the system); Natapoff, *supra* note 293 (describing the lack of due process and rule of law when dealing with misdemeanors).

[339] KOHLER-HAUSMANN, *supra* note 31, at 73 ("It is not necessarily a determination of guilt or innocence, but rather a notion of governability and responsibility applied to an administratively generated assessment of a person.").

[340] *See id.* at 224 ("One of the most common performances in misdemeanorland is the simple requirement to show up.").

[341] *See id.* at 230 ("Whether intentionally imposed or not, the demands to come to court and conform to its customs offers an opportunity to observe and judge an unfolding performance by the defendant. Court actors react to how defendants perform under procedural hassle not only because that performance might proxy general law-abiding character, but also because they interpret the performance as a meaningful demonstration of who the defendant is and therefore what he deserves.").

[342] *See* State v. Garvin, 699 A.2d 921, 925-26 (Conn. 1997) (as defined by the state legislature in Conn. Gen. Stat. § 53a-172, which provides that "'[a] person is guilty of failure to appear . . . when, while charged with the commission of a felony and while out on bail or released under other procedure of law, he wilfully [sic] fails to appear when

is not a "mere absence" from the court, but a breach of a contract between the state and the defendant in which the defendant has promised to appear.[343] Similarly, in *State v. Taylor*, the Oregon Court of Appeals noted that the "gravamen of second-degree failure to appear," is the violation of an agreement with the court,[344] and this understanding of statutory failure-to-appear offenses is reflected in state court decisions throughout the country.

Kimberly Ferzan explains that a court's call for a defendant to appear is a "demand" for the defendant to answer the charges. Whether a defendant has a moral obligation to "participate" in the process and to answer the demand depends in part on the legitimacy of the demand.[345] When pretrial appearances look more like performance or compliance tests, it is difficult to claim that they are rationally related to legitimate system goals.

When courts impose harsh sanctions for failures to appear, Erin Murphy explains that this may reflect judges' "frustration and irritation at a defendant's inability to prioritize court attendance, or even at the defendant's perceived disinterest in or disdain for the court's authority."[346] In these cases, judges shift to punishing defendants for their perceived "obstinacy" and for "daring to oppose the state's authority."[347]

As Kohler-Hausmann explains, although these compliance tests may be viewed as a proxy for future law-abidingness, this assumed correlation is not proven:

> The performances they evaluate bear some rational relation to what might be imagined as propensities for law abiding in general. To be clear, no actor in the system has any idea if a person who can successfully complete one day of community

legally called *according to the terms of his bail bond or promise to appear*" (emphasis added)).

[343] *Id.*

[344] *State v. Taylor*, 311 P.3d 953, 959 (Or. Ct. App. 2013) (internal quotations omitted).

[345] *See* Ferzan, *supra* note 245, at 2040 (quoting A. Duff, *Pre-Trial Detention and the Presumption of Innocence*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 115, 119 (Andrew Ashworth, Lucia Zedner & Patrick Tomlin, eds. 2013)).

[346] Murphy, *supra* note 29, at 13.

[347] *Id.* at 13; *see also* Patterson & Guevara, *supra* note 3, at 9.

> service, show up to a compliance court date, and then avoid arrest for six months is a good predictor of future risk of using a knife to stab someone, or even of getting arrested for some other low-level nonviolent offense.[348]

There is clearly some consensus among scholars and practitioners that these social control motivations shape much of what is happening in low-level policing, prosecution, and adjudication.[349]

But there is too little explicit examination of these as policy objectives.[350] If measuring or training people's ability to comply with community expectations or obligations are the goals, then we should begin by explicitly evaluating the reasonableness of those goals. We should also question whether criminal courtrooms are the best venue for this sort of skill-building enterprise and examine whether using penalties or supports will be more effective means of accomplishing those goals.[351] If the aim is for defendants to build capacity to meet societal expectations for law abidingness or to meet other sorts of expectations or obligations (to employers or families, for example),

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[348] KOHLER-HAUSMANN, *supra* note 31, at 229.

[349] *See generally* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2002) (describing the social control function of the modern criminal justice system); FEELEY, *supra* note 147 (describing the social control that is embedded in the modern criminal justice system); KOHLER-HAUSMANN, *supra* note 31 (describing misdemeanor courts as sites where criminal defendants are marked and managed by judges and other system actors); Murphy, *supra* note 29, at 13 (arguing that process crimes seek to punish people for simply opposing social control); Natapoff, *supra* note 293 (arguing that misdemeanor prosecutions are used to criminalize and control people of color).

[350] KOHLER-HAUSMANN, *supra* note 31, at 230 ("A set of background understandings shared by legal actors in misdemeanorland make such utterances about performance intelligible, even if prosecutors and judges reject the logic in specific instances. One such belief is that legal actors have actually achieved or learned something by way of the performances generated by monitoring, testing, and imposing costly inconveniences on the defendant.").

[351] These sorts of evaluations are not foreign to the system: they are baked into many problem-solving or community court models. *See* Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 825–26 (2019); Erin Collins, *The Problem of Problem-Solving Courts*, 54 UC DAVIS L. REV. 1573, 1584-86 (2021); Ferguson, *supra* note 12, at 1469 (describing courts as "social service centers for clients with mental health, addiction, or other needs that require social services interventions").

then a system of inflexible expectations and overly harsh sanctions seems counterproductive.[352]

CONCLUSION

Over the last decade, growing community support for reform and significant investments in research have transformed the pretrial landscape. Scholars have developed more nuanced visions of the problem of pretrial nonappearance. Reformers and policymakers are focused on new strategies and solutions to mitigate and manage pretrial nonappearance risk without resorting to detention or onerous, surveillance-oriented conditions of release.

Evolving understandings of nonappearance suggest that punitive measures are unlikely to improve appearance rates, given that many nonappearances are unintentional or the byproduct of a complex and intimidating system.[353] Our persistent obsession with perfect pretrial attendance overstates the harms associated with nonappearance and focuses attention on defendants as individual sources of failure when systems also bear responsibility. Instead, supportive pretrial frameworks that help people understand court information and navigate the criminal justice system are more likely to ensure that defendants return to court.[354] More promising approaches treat

[352] And yet, these approaches are widely employed. As Andrew Guthrie Ferguson explains, courts' "social service role remains intertwined with the pretrial detention role because the primary method of 'encouraging' court-assisted social services involves the threat of pretrial detention." Ferguson, *supra* note 12, at 1471.

[353] *See* COOKE, DIOP, FISHBANE, HAYES, OUSS & SHAH, *supra* note 188, at 6; Gouldin, *New Perspectives*, *supra* note 6, at 297; MCAULIFFE, HAMMER, FISHBANE & WILK, *supra* note 182, at 1 ("The fact that nonappearance rates can remain high even with [sanctions and deterrence-based] systems in place tells us that this approach does not address the real reasons that many people miss court."); Fishbane, Ouss & Shah, *supra* note 75, at 8; Nam-Sonenstein, *supra* note 4.

[354] *See* MCAULIFFE, HAMMER, FISHBANE & WILK, *supra* note 182, at 2 ("Rather than relying on sanctions like warrants, jail, or fines to deter nonappearance, courts should be working to actively support appearance."); Hopkins, Bains & Doyle, *supra* note 9, at 692-93 ("The success of these court reminder programs belies the notion that missed court dates are primarily the result of defendants' flight from justice or willful disobedience of the courts."); Zottola, *supra* note 190, at 100 ("None of the reasons for missing court described above are likely to be addressed by penalties assigned after the court date has already been missed. Instead, courts may see more success in reducing

defendants as people whose time limitations and other needs are worthy of accommodation and not simply as potential failures who inconvenience, hassle, and burden the court. A system-focused reform approach would identify obstacles to timely reappearance and reduce the burdens of the pretrial process, for example, by requiring fewer, shorter appearances.

Pretrial practices should be reoriented toward proactive and supportive services and away from reactive, punitive measures that have time and again proven ineffective. In response to strong pressure for pretrial decarceration, jurisdictions are beginning to research and adopt these types of reforms.

failures to appear with proactive support efforts, such as reminders to prevent missing or forgetting the information.").