TAKING THE COURT TO THE PEOPLE: REAL-WORLD SOLUTIONS FOR NONAPPEARANCE

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While many still assume that most defendants who fail to appear for court ("FTAs") are willfully evading the law, nonappearance occurs for a variety of reasons, and most FTAs are pre-adjudicated misdemeanants, not convicted felons. This common mischaracterization is dangerous. If FTAs are seen only as criminals, then they deserve retribution, not rehabilitation. This Note attempts to reframe the problem of nonappearance as an access-to-justice issue in order to draw attention to the responsibility of courts to make themselves accessible to local clients. Through this frame, this Note presents data on the composition of FTAs and demonstrates the effectiveness of two strategies recently enacted by Arizona courts to improve court appearance: reminding defendants of their court dates, and extending court access and hours. Ultimately, this Note argues that court inaccessibility contributes to the problem of nonappearance and challenges courts to develop real-world solutions.

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INTRODUCTION

Why do defendants miss court? The legal profession has traditionally assumed this answer to be simple: they are running.[1] And, if the popularity of *Dog the Bounty Hunter* is any indicator, the image of the fleeing fugitive has not fled the American imagination.[2] But perhaps the problem of nonappearance[3] is much more nuanced and less malicious than everyone thought.[4] Perhaps all that

1. When defendants skip court, they have legally "failed to appear" and may be criminally liable for their absence. Some state penal codes are written with the assumption that a failure to appear ("FTA") is an intentional evasion of the court's authority. *See, e.g.*, CAL. PENAL CODE § 1320 (West 2017). Other states require the defendant's knowledge of the court date and the lack of such knowledge is a cognizable legal defense to a FTA. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2506(A)(1) (2010 & Supp. 2016).

2. *See 'Dog the Bounty Hunter' Returns with 2.9 Million Viewers for 8th Season Premiere*, SCREENER (Jan. 5, 2002), http://tvbythenumbers.zap2it.com/network-press-releases/dog-the-bounty-hunter-returns-with-2-9-million-viewers-for-8th-season-premiere/.

3. Although courts typically refer to a nonappearance as a *failure to appear*, this Note refers to failing to appear in court as a *nonappearance* for two reasons. First, *nonappearance* draws attention to the shared nature of the actual problem—that defendants aren't in court—without assuming that nonappearance occurred because of any "failure" of the defendant. Second, this Note seeks to avoid any confusion that might result from using "FTA" to refer to both defendants who fail to appear and the nonappearance itself.

4. BARRY MAHONEY ET AL., NAT'L INST. OF JUSTICE, PRETRIAL SERVICE PROGRAMS: RESPONSIBILITIES AND POTENTIAL 39–40 (2001), http://www.ncjrs.gov/pdffiles1/nij/181939.pdf; *see also* David Rosenbaum et al., *Court Date Reminder Postcards*: *A Benefit-Cost Analysis of Using Reminder Cards to Reduce Failure-to-Appear Rates*, 95 JUDICATURE 177, 178 (2012) ("Many defendants lead disorganized lives, forget, lose the citation and do not know whom to contact to find out when to appear, fear the justice system and/or its consequences, do not understand the seriousness of missing court, have transportation difficulties, language barriers, are scheduled to work, have childcare responsibilities, or other reasons that lead to an FTA."); Alan Tomkins et al., *An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court*, 48 CT. REV. 96, 103 tbl.7 (2012), https://cba.unl.edu/outreach/bureau-of-business-research/academic-research/documents/rosenbaum/experiment-in-law.pdf (finding that court clients ranked scheduling conflicts and forgetfulness higher than threat of punishment as reasons for nonappearance). The evidence that reminders improve FTA rates also seems to cut against the intentional-evasion assumption. *See infra* notes 5–6 and

defendants need is a simple reminder[5] or a court flexible enough to stay open a little later.[6] By presenting data on the composition of clients who miss court and drawing attention to local reforms that have increased appearance, this Note attempts to reframe the problem of nonappearance as an access-to-justice issue. This paradigm shift exposes the reality that court inaccessibility is a factor in nonappearance and challenges courts to develop real-world solutions.

This Note is organized in three parts. Part I looks at the problem of nonappearance through a historical lens, noting costs to courts and communities and drawing attention to the (in)effectiveness and (in)justice of various solutions—from bail to bench warrants. Part II argues that many of these ineffective solutions are rooted in the mischaracterization of FTAs. Contrary to popular opinion, most FTAs are not fugitives fleeing the law, but misdemeanants who miss court for a complex number of reasons and who are statistically more likely to attend when courts make themselves more accessible.[7] This recharacterization of FTAs as mistaken citizens rather than malevolent criminals encourages courts to reframe the problem of nonappearance as an access-to-justice issue—one that disproportionately affects citizens of color. Through this conception, this Note challenges courts to share responsibility in preventing and resolving nonappearance. In Part III, this Note analyzes two real-world solutions that have effectively reduced nonappearance in Arizona—reminding defendants of their court dates and expanding court hours and access. By presenting these strategies as case studies in success, this Note attempts to draw attention to the material effects of this paradigm shift for both courts and communities. The problem of nonappearance will not be solved by retribution and deterrence alone. Courts should also proactively reach out to clients to facilitate court appearance and to offer generous avenues for warrant resolution. Justice is not content to merely encourage citizens to come to court. It also seeks to take the court to citizens.

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accompanying text. Certainly, willfulness plays a role in nonappearance. Many pretrial-services agencies often utilize risk assessment tools to determine which defendants can reasonably be expected to appear for future court dates. Prior research has demonstrated that history of FTA, race, gender, offense type, prior criminal history, living conditions, expecting someone at arraignment, warrant status, employment, and indigence are all relevant factors in this analysis. *See* Haley R. Zettler & Robert G. Morris, *An Exploratory Assessment of Race and Gender-Specific Predictors of Failure to Appear in Court Among Defendants Released via a Pretrial Services Agency*, 40 CRIM. JUST. REV. 417, 418–19 (2015). Some evidence also demonstrates that misdemeanants facing multiple charges are less likely to appear than misdemeanants with only one charge (15.4% vs. 5.4%). This may suggest the role that fear plays in appearing in court. BRIAN H. BORNSTEIN ET AL., REDUCING COURTS' FAILURE TO APPEAR RATE: A PROCEDURAL JUSTICE APPROACH 2 (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf.

5. *See* Rosenbaum et al., *supra* note 4 at 177; *infra* fig.2; *infra* notes 72–74 and accompanying text.

6. *See infra* fig.3.

7. *See infra* notes 32–35 and accompanying text. There is also evidence that offense category (misdemeanor vs. felony) may impact FTA rates. Rebecca Goodman, *Hennepin County Bureau of Community Corrections Pretrial Release Study* 15 (1992), https://www.ncjrs.gov/pdffiles1/Digitization/153608NCJRS.pdf.

I. THE PROBLEM OF NONAPPEARANCE

A. The Importance of Coming to Court

For a judicial system to be effective, citizens must obey it.[8] Defendants must come to court when summoned, if summons are to have any teeth. Regardless, there will always be those who miss their court dates. The best federal data demonstrate that 16% of all federal defendants between 2001 and 2007 had at least one nonappearance on their records.[9] Most of these are for misdemeanors, because many felons don't have the option of bail, and law enforcement actively seeks out FTAs who have been accused of serious crimes. In fact, outstanding warrants for felony nonappearance may be as low as 2%.[10] By contrast, the nonappearance rate among federal misdemeanants is much higher—25 to 30%.[11] In short, nonappearance for minor crimes has become a major problem. And, for a justice system to be effective, it is a problem that must be addressed.

B. The Medieval Invention of Bail

Nonappearance is not new. For as long as criminal-justice systems have existed, defendants have sought to avoid the long arm of justice, and those charged

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8. Brian H. Bornstein et al., *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 19 PSYCHOL. PUB. POL'Y & L. 70, 70 (2013) [hereinafter *Written Reminders*]. Such an axiom was built into the bedrock of our federal case law in *Marbury v. Madison*. *See* 5 U.S. 137 (1803).

9. MARIE VANNOSTRAND & GENA KEEBLER, U.S. DEPT. OF JUSTICE, PRETRIAL RISK ASSESSMENT IN THE FEDERAL COURT 18 (2009), https://www.pretrial.org/download/risk-assessment/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report%20(2009).pdf (finding that of all defendants, 84% had no FTA record, 7% had one FTA, and 9% had two or more FTAs). Nonappearance rates are difficult to track because current estimates come from pretrial risk assessment databases that use current defendant profiles—which note whether they have previous FTAs—as a proxy for the FTA percentage nationwide. Since presumably many individuals may not have another encounter with law enforcement, this number may not adequately reflect reality. We can also look at numbers of outstanding warrants in each jurisdiction to see the impact FTAs have on the community.

10. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-88-6, CRIMINAL BAIL: HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS 36 (1987), http://www.gao.gov/assets/150/145896.pdf (providing, in select district courts, a 2.1% FTA rate under the 1966 Act and a 1.8% FTA rate under the 1984 Act). This figure, however, only looks at felony defendants, which is notable because misdemeanants are a high percentage of the total number of defendants prosecuted in state courts. *See* Caleb Foote et al., *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1036 (1954) ("[M]ost bail jumping was for minor crimes and that there was none for the most serious offenses.").

11. BORNSTEIN ET AL., *supra* note 4, at 5. The enforcement rates of FTA statutes are difficult to obtain, in part, because an FTA can also be prosecuted as a form of contempt. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1454 (2009) (citing United States v. Bernardine, 237 F.3d 1279, 1281, 1283–84 (11th Cir. 2001) (upholding the conviction of a defendant who was tried for contempt under 18 U.S.C. § 401(3) for failing to appear at court-ordered hearing)).

with upholding the law have invented ways to improve compliance.[12] Jailing defendants prior to trial was perhaps the first, most obvious solution.[13] But jails filled, and social and financial costs of incarceration inflated to the point of impracticality, resulting in the medieval invention of bail.[14]

Since then, through the gradual development of the English criminal-justice system,[15] and its subsequent exportation to the American English colonies, governments have legislated ways to ensure court appearance—most often relying on the archaic model of bail. Article IV of the U.S. Constitution notes the reality of a fleeing defendant and takes steps towards facilitating his extradition between states.[16] The Eighth Amendment implicitly assumes the availability of bail and forbids any "excessive" requirements.[17] The Supreme Court has defined the "excessiveness" of bail by its relationship to the intended governmental purpose—whether it is a "figure higher than an amount reasonably calculated" to ensure the defendant's appearance at trial.[18]

Bail remains a common practice in many jurisdictions, but it has lately come under fierce criticism. Numerous studies have shown that the U.S. system of "money for freedom" doesn't improve public safety or deter nonappearance, but does lead to inequitable results.[19] Nearly half of the highest-risk defendants are

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12. For example, after Nebuchadnezzar conquered Jerusalem, Zedekiah and his sons were captured while fleeing in the plains of Jericho and held until he was taken to the King of Babylon at Riblah. 2 *Kings* 25:1–7.

13. *See, e.g.*, Christopher D. Marshall, *Prison, Prisoners, and the Bible*, 3 JUST. REFLECTIONS, No. JR13, 2003, at 3, http://restorativejustice.org/10fulltext/marshall-christopher.-prison-prisoners-and-the-bible.pdf ("But for most of human history, imprisonment has *not* been used as a way of punishing common criminals. Instead, prisons have served principally as holding tanks where offenders could be detained prior to trial or to the carrying out of the sentence of the court . . . ." (emphasis added)).

14. Sean Cook, *The History of Bail in the U.S.*, BAIL.COM (Dec. 15, 2013), http://www.bail.com/bail-history/. Bail has been traced back to ancient Rome, but the modern iteration of bail was most comprehensively developed in medieval England, *see* EVIE LOTZE ET AL., PRETRIAL SERVS. RES. CTR., THE PRETRIAL SERVICES BOOKS 2 n.3 (1999), which is why this Note refers to it as a "medieval invention." From the beginning, bail has been linked to the FTA problem. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *294–95 ("[T]he nature of bail is . . . a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance . . . ."); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 242 (1993) ("Bail was an old institution . . . . The point was to make sure the defendant showed up for trial."). For a more detailed history of bail, see TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE (updated ed. 2010), http://pretrialnola.org/wp-content/uploads/2015/09/09-24-2010-PJI-History-of-Bail.pdf.

15. For example, in 1275, English Parliament passed the Statute of Westminister to codify bailable offenses—effectively introducing the system still in use in many countries. SCHNACKE ET AL., *supra* note 14, at 3.

16. U.S. CONST. art. IV, § 2, cl. 2.

17. U.S. CONST. amend. VIII.

18. Stack v. Boyle, 342 U.S. 1, 3 (1951).

19. For an overview of many of these studies, and to understand the recommendations of the U.S. Department of Justice, see generally U.S. DEP'T OF JUSTICE,

released,[20] while those who are poor—regardless of the risk they pose to the community—remain incarcerated. Other studies show that the system fills U.S. prisons,[21] but does not improve court appearance or public safety.[22] The federal government abolished bail in 1966, and, since then, Washington, D.C., and five states—Illinois, Kentucky, Oregon, Wisconsin, and New Mexico [23] —have abolished or reformed the practice of imprisonment based on inability to pay.

Still, even jurisdictions that rely on bail to ensure court appearance can't use bail to encourage compliance for all defendants. Bail only works if people start out in custody. In exchange for their release, defendants promise to return for their trials and offer some monetary payment as a security for that promise. This strategy, therefore, won't resolve the nonappearance of many misdemeanants—such as civil traffic defendants—who are never taken into custody. In addition, not all defendants who are arrested require bail to be released. In many low-level misdemeanor cases and some felony cases, defendants are permitted to be released on their own recognizance—a written promise to return without posting any bail. Bail may still be the status quo deterrent for felony nonappearance, but many FTAs are misdemeanants that bail reform will not reach.[24] Courts, therefore, need to look to other strategies to reach all cases of nonappearance.

C. The Modern Hammer: Criminalizing Nonappearance

While bail is a promise to return, a bench warrant is a promise to punish. This is the modern way to deter nonappearance: criminalization. When someone fails to appear before the bench—the traditional term for the judge's seat—courts issue a bench warrant and enter the defendant's name into a state or federal database that serves the law enforcement community.[25] In serious felony cases, this bench warrant is likely to become a typical arrest warrant and law enforcement

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CIVIL RIGHTS DIVISION, OFFICE FOR ACCESS TO JUSTICE, *Dear Colleague Letter* (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download.

20. ARIZ. SUP. CT., JUSTICE FOR ALL 27 (2016) [hereinafter JUSTICE FOR ALL], http://www.azcourts.gov/LinkClick.aspx?fileticket=bmEC0PU-FD8%3d&portalid=74 ("Courts, the Department of Justice, and many criminal justice stakeholder groups and foundations throughout the United States are joining in pretrial justice reform efforts with the goal of eliminating a 'money for freedom' system.").

21. Sixty percent of all jail inmates are pretrial offenders who have not been convicted of a crime. *Id.* at 29.

22. *Id.* at 27.

23. N.M. CONST. art. II, § 13 (amended 2016); 725 ILL. COMP. STAT. ANN. 5/110-5 (West 2017); KY. REV. STAT. ANN. § 439.3106 (West 2017); OR. REV. STAT. ANN. § 135.245 (West 2017); WIS. STAT. ANN. § 969.07 (West 2017); *see also* Johnny Osborn, *An Analysis of the Bail-Reform Constitutional Amendment*, NMPOLITICS.NET (Oct. 29, 2016), http://nmpolitics.net/index/2016/10/an-analysis-of-the-bail-reform-constitutional-amendment/.

24. Bail reform will increase access to justice for some misdemeanants. *See, e.g.*, Christine Hauser, *Unable to Pay $100 Bail, Homeless Man Dies in New Hampshire Jail*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/2016/04/02/us/unable-to-pay-100-bail-homeless-man-dies-in-new-hampshire-jail.html?_r=0.

25. John M. Greacen, *Issues in Criminal Case-Flow Measurement*, JUDGES' J., Winter 2006, at 31, 38.

may be recruited to actively seek out the violator. By contrast, bench warrants for nonappearance for less serious offenses—like traffic tickets—are not actively pursued by law enforcement. Instead, these warrants remain, hang indefinitely over the heads of FTAs[26]—often for years—until they have any sort of interaction with the police and are taken into custody. Bench warrants have existed as legal deterrents for several decades; however, in the last few years, as the rate of police interaction with citizens has increased, so has bench-warrant enforcement.

The criminalization of nonappearance in the United States can be traced back to the Judiciary Act of 1789.[27] This Act provided punishment for contempt of authority which served as the basis for imposing sanctions or monetary penalties for failure to appear.[28] Congress enacted the first federal bail statute almost 200 years later, in 1954. However, even after this legislation, Professor Caleb Foote noted that independent punishment for "bail-jumping" was relatively uncommon.[29] Foote reported that while eight or nine cases were sent to grand jury for bail jumping in New York County each month, only thirteen bail-jumpers were indicted in a period of six years.[30] The Federal Bail Reform Act of 1966 was the first to outline explicit punishment for felons and misdemeanants who "willfully fail to appear," and the Bail Reform Act of 1984 changed the pleading threshold to "knowingly," upped the penalties, and mandated that the term of imprisonment for FTA be consecutive to the terms for the other offenses.[31] This same trend is paralleled in the states. Currently all but four states—South Carolina, Pennsylvania, Michigan, and Indiana—separately punish FTAs.[32]

D. Increased Convictions Are No Deterrent

It is notoriously difficult to determine nonappearance rates,[33] in part, because failure-to-appear is reported differently in different jurisdictions, and state

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26. Most states have a statute of limitations on prosecuting FTA. When a bench warrant is issued, the action is commenced for statute of limitations purposes. The warrant, therefore, remains on the record. *See, e.g.*, J. Dean Allen, *Recent Developments in California Criminal Law*, ORANGE COUNTY LAW., Sept. 2000, at 38.

27. Chapter 20, section 17 of the Judiciary Act of 1789 provides that courts shall have the authority "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority."

28. *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1472–73 (2009); *see also* James M. Grippando, *Fear of Flying—The Fugitive's Fleeting Right to a Federal Appeal*, 54 FORDHAM L. REV. 661, 678 (1986).

29. *See* Murphy, *supra* note 28, at 1455.

30. Caleb Foote et al., *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1069 (1954).

31. 1966 Bail Reform Act, Pub. L. No. 89–465, 80 Stat. 214, 216 (1966); 1984 Bail Reform Act, Pub. L. No. 98–473, 98 Stat. 1983, 1984 (1984). For a discussion of the rationales behind the 1984 Act, see Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 4–8 (1989).

32. For a detailed cataloging of current state law, see Murphy, *supra* note 28, at 1454 & nn.79–81. In these four states, defendants can be held in contempt of court if absent. *Id.* at 1452.

33. *See* Rosenbaum et al., *supra* note 4, at 177.

and federal systems don't have unified reporting mechanisms.[34] In a 2003 survey, the Department of Justice found that 60% of federal pretrial service agencies defined an FTA as occurring only when a bench warrant was issued, while 35% defined FTA as whenever any court appearance was missed.[35] Other agencies look at arrest data to determine FTA; and still others look at prosecution or conviction of FTA as the correct metric.[36]

Despite the difficulty of creating a comprehensive national view, scholars can determine rates of change in nonappearance by comparing reports that use similar methodologies over a course of years. In general, these studies show that nonappearance rates have remained relatively stable over the past few decades—even with the advent and enforcement of new FTA laws.[37] For example, Bryne and Stowell found that "there were no changes in . . . the percentage of defendants who failed to appear in court (2.3 percent vs. 2.2 percent)" from 1994 to 2003, even though major legislation criminalizing nonappearance passed during that time.[38] What data we have agree: increased criminalization does not improve appearance.

But increased criminalization does increase convictions. The Bureau of Justice Statistics[39] collects data on the appearance history of federal defendants, and differentiates between those with and without a prior arrest history—including

34. *See* Murphy, *supra* note 28, at 1459–60 (noting that the window into the federal system is "cloudy" and that the states' systems are "effectively opaque"). Given that most FTAs are misdemeanants, it is particularly discouraging that the only comprehensive collection of state FTA data focuses only on felony defendants. *Id.* at 1460 & n.101.

35. JOHN CLARK & D. ALAN HENRY, U.S. DEP'T OF JUSTICE, NCJ 199773, PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS viii (2003), https://info.nicic.gov/nicrp/?q=system/files/ncj-199773.pdf.

36. *See* Murphy, *supra* note 28 & n.86.

37. Timothy P. Cadigan, *Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982*, FED. PROBATION, Sept. 2007, at 10, 12 ("The failure to appear rates and re-arrest rates in all four districts were very low under both the former and current bail laws."); Rodney Kingsnorth et al., *Preventive Detention: The Impact of the 1984 Bail Reform Act in the Eastern Federal District of California*, 2 CRIM. JUST. POL'Y REV. 150, 164–65 (1987) (comparing detention and FTA rates from the period 15 months before and 21 months after the implementation of the Bail Reform Act, finding both unaffected by the legislation, and stating that the Eastern Federal District was not "exceptional in this regard"); Murphy, *supra* note 28, at 1458 ("Significantly, all available evidence suggests that the actual rate of failure to appear has remained relatively constant, at least in the federal system . . . ."); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 10.

38. *See* James Byrne & Jacob Stowell, *The Impact of the Federal Pretrial Services Act of 1982 on the Release, Supervision, and Detention of Pretrial Defendants*, FED. PROBATION, Sept. 2007, at 31, 32.

39. Office of Justice Programs, *Publications & Products: Compendium of Federal Justice Statistics*, BUREAU OF JUSTICE STATISTICS (Feb. 17, 2016), https://www.bjs.gov/index.cfm?ty=pbse&sid=4 (providing data for numerous years, including 1992 to 2004). The very fact that data was not even collected between 1984, when the Bail Reform Act was passed, and 1992, underscores the likelihood that prior records for failure to appear were not considered either significant or measurable enough as considerations for bail determinations.

arrest for outstanding bench warrants.[40] Using this data, Erin Murphy observes that in every year since 1992, convictions for FTAs have risen 1–2%.[41] Murphy provides the following example: "[I]n 1992, 15% of all defendants with a prior arrest had a record of prior [FTA]; by 2004, that number had risen to 22.5%."[42] Another study from 1989 to 1999 noted that defendants with records of prior FTA increased 6%.[43] As to state courts, the Bureau of Justice's State Court Processing Statistics ("SCPS") project[44] supports the conclusion that while defendant's FTA rates have remained relatively consistent since 1988, convictions have increased.[45]

Increased convictions may be at least partially related to increased contact with law enforcement. Over the past few decades, there have been several notable changes in police tactics—like "broken windows" policing and "stop-and-frisk." From 2002 to 2016, over 5 million New Yorkers were subject to police stops and interrogations.[46] The logical result of more stops is more arrests.[47] If any of those New Yorkers had outstanding warrants, they would likely have been arrested as a result of that stop. Interestingly, these stops may also increase nonappearance by requiring defendants who feel victimized by the system to appear for non-criminal offenses, like riding a bicycle on the sidewalk.[48] In 2011, the NYPD issued summonses to about 5.9% of all individuals stopped for minor offenses.[49] That same year, more than 170,000 warrants were ordered for the arrest of FTAs originating from a similar type of summons.[50] In short, over the past few decades, state and federal authorities have increased criminalization of FTAs and offered

40. *Id.*

41. *See* Murphy, *supra* note 28, at 1458 & n.85.

42. *Id*. n.87.

43. James R. Marsh, *Reducing Unnecessary Detention: A Goal or Result of Pretrial Services?*, FED. PROBATION, Dec. 2001, at 16–18.

44. PRETRIAL JUSTICE INST., FACT SHEET 2008: UNDERSTANDING THE FINDINGS FROM THE BUREAU OF JUSTICE STATISTICS REPORT, "PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURT" 1 (2008) [hereinafter FACT SHEET 2008], http://www.pretrial.org/download/pji-reports/PJI%20Response%20to%20the%20BJS%20SCPS%20report%202008.pdf ("Every even-numbered year since 1988, SCPS collects data on the processing of felony cases in 40 of the 75 most populous counties in the country.").

45. *See* Murphy, *supra* note 28, at 1460. *But see id.* (noting that this data examined only felony FTAs). Murphy also suggests that a better perspective on the changing nature of state practice could be gleaned by reviewing isolated reports about individual localities. *Id.*; *see also* THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 8 (2007) (setting the range of FTAs between 21–24% of released defendants).

46. *Stop-and-Frisk Data*, NYCLU, http://www.nyclu.org/content/stop-and-frisk-data (last visited Apr. 1, 2017).

47. On the contrary, Schneiderman's study found that only 0.06% of all stop and frisks led to arrests for bail jumping or failure to appear. Eric T. Schneiderman, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 7 (2013), https://ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf.

48. *Id.* at 22.

49. *Id.*

50. *Id.* In 2011, over 44% of all these non-criminal cases were thrown out. Still, the FTAs received a criminal warrant for their nonappearance. *Id.*

less leniency.[51] And, while authorities are punishing—and incarcerating—FTAs more than ever before, such punishment has not improved court appearance.

E. The Costs of Criminalizing Nonappearance

Nonappearance not only economically and personally harms defendants; it also depletes county resources.[52] Courts waste resources prepping and staffing hearings that end in default; judges issue bench warrants; law enforcement personnel make arrests; jail officials book and incarcerate defendants.[53] One 2012 study demonstrated that the reduction of one FTA would save up to 108 minutes of paid time for county officials and an estimated $80.[54]

Still, the needless incarceration of nonviolent FTAs[55] is perhaps the largest cost. To take one county as a case study, in 2014, Pima County jailed 10,005 individuals on outstanding FTA warrants, 93% of which related to underlying misdemeanor charges.[56] This led to 216,477 bed days in jail,[57] at an estimated cost of $279 for the first day and $85 for each subsequent day per inmate.[58] Incarcerations from FTA arrests, therefore, cost county taxpayers around

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51. WAYNE H. THOMAS JR., BAIL REFORM IN AMERICA 88 (1976) (attempting to quantify the FTA rate in major cities in 1962 and 1971 and observing that a nonappearance that did not result in prolonged absence simply did not count as much); Foote et al., *supra* note 10, at 260 (citing a 1963 study of bail jumping that reported a low FTA rate, but added that "[m]any such instances presumably involved minor technical defaults. It is thought that comparatively few of them were cases of 'bail jumping' in which the defendant disappeared to avoid trial or punishment").

52. Timothy R. Schnacke et al., *Increasing Court Appearance and Other Benefits of Live-Caller Telephone Court-Date Reminders*, 48 CT. REV. 86, 86 (2012), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1396&context=ajacourtreview; *see also Written Reminders*, *supra* note 8, at 86.

53. In Rosenbaum's study, county officials estimated that the percentage of FTA bench warrants that end in arrest was between 30% and 50%. Rosenbaum et al., *supra* note 4, at 183.

54. *Id.* These are the estimates from one of three counties surveyed. The other two counties calculated that FTAs cost 85 minutes and $50, and 58 minutes and $59, respectively. *Id.* at 183–84. These estimates factored in the cost of a bench warrant, the city prosecutor's office adding the FTA charge, the arrest, booking, bond processing, clearing the warrant from the system, and jail utilization. *Id.*

55. For example, in 2004, the Jefferson County Court realized that roughly 25% of its inmates were incarcerated for FTA. *Written Reminders*, *supra* note 8, at 70.

56. *See* Manny Mejias and Karla Avalos, Community Collaborative Presentation at the Pima County Safety and Justice Challenge (Dec. 5, 2016) (on file with author) [hereinafter Mejias & Avalos]. This figure also considers misdemeanor FTA arrests which do not relate to traffic offenses and therefore would not be represented in the initial 103,000 compiled with the court. As of July 1, 2014, the pending rate for FTAs in Arizona's courts of general jurisdiction was 32,827 for misdemeanors and 83,949 for traffic violations. ARIZ. SUP. CT., JUSTICE OF THE PEACE COURTS NARRATIVE SUMMARY 3 (2015), http://www.azcourts.gov/Portals/39/2015DR/JPIntro.pdf.

57. Mejias & Avalos, *supra* note 56.

58. *See* Bud Foster, *Tucson Looks for* [*Ways to*] *Save Money Housing Jail Inmates*, FOX10 (Dec. 15, 2015, 12:26 PM), http://www.fox10tv.com/story/30757738/tucson-looks-for-save-money-housing-jail-

$20 million in 2014.[59] Nationwide data also reflect the ubiquity of FTA arrests, and the subsequent costs associated with jailing are all the more astronomical for their ineffectiveness. Arresting the noncompliant does not deter nonappearance.[60]

II. REFRAMING NONAPPEARANCE AS AN ACCESS-TO-JUSTICE ISSUE

A. The Problem of FTA Mischaracterization

The nonappearance problem may be perpetuated, in part, by the mischaracterization of the FTAs who haunt our courts. While these defendants were physically absent for their hearings, their chilling presence continues to be felt long after the empty courtroom. And, in their absence, courts ignore the reality of busy defendants with possible defenses and public perception conjures up images of fleeing fugitives deserving of punishment. Even the acronym *FTA* perhaps more accurately describes how courts view these persons—as *failures* to appear.[61] They are not just defendants who have missed court, they embody their offense—they become *failures* to appear. However trivial individuals' initial offenses—like riding a bike on a sidewalk—through nonappearance they become criminals—as the bench warrant eternally proclaims.

But the data do not support this blind condemnation of all FTAs. Most are not felony defendants fleeing the law. Felony FTAs are less likely to occur because felony defendants are more likely to be deemed a risk to the community upon

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inmates (stating that the first-day booking fee at the Pima County jail is $279); Patrick McNamara, *Pima Seeks Grant to Cut Jail Population*, TUCSON.COM (Jan. 31, 2016), http://tucson.com/news/local/crime/pima-seeks-grant-to-cut-jail-population/article_5021ad19-741a-5a8a-92bb-8e3252f8502c.html (providing a per-inmate jailing cost of $85 per day).

59. This calculation is based on the estimated costs in 2014. Bud Foster's article notes that the booking fee increased from $166 in 2007 to $279 at the end of 2015—an average increase of $12.50 per year. *See* Foster, *supra* note 58. The cost of booking was therefore conservatively estimated at $250 per day in 2014. The subsequent $85 per day was estimated to also be $85 in 2014, as others note the cost to also be $85 in 2012. *See* PATRICIA M HERMAN, & BETH L. POINDEXTER, COST-BENEFIT ANALYSIS OF PIMA COUNTY'S DRUG TREATMENT ALTERNATIVE (DTAP) PROGRAM: FINAL REPORT 4 (2012), http://www.pcao.pima.gov/documents/DTAP_CBA_Final_Report%2012%2010%2012.pdf. To reach this total, the Author calculated the booking charge for each of the 10,005 defendants and subtracted 10,005 days from the total number of bed days. Finally, the Author multiplied this number by $85 and added in the booking charge, yielding $20,046,270.

60. *See* COHEN & REAVES, *supra* note 45, at 8 (noting that, among the 75 largest counties, and between 1990 and 2004, there were 59,468 defendants charged with pretrial misconduct and who had prior arrests and a history of FTA).

61. While many use the term *FTAs* to refer to bench warrants, it only takes a subtle shift for the term to apply to the persons for whom the bench warrant was issued. *See, e.g.*, Rosenbaum et al., supra note 4, at 177–78; Tomkins et al., *supra* note 4, at 97 n.7. This Note makes this shift throughout to emphasize the human cost of the current regime of criminalization.

arrest and thus held in jail until trial.[62] In addition, felon FTAs that do flee are actively sought out by law enforcement. By contrast, misdemeanant FTAs are much more likely to have never been arrested in the first place or to have been released on recognizance. They are also much less likely to be the target of a manhunt.[63] In Pima County Superior Court, for example, there are only 1,593 outstanding arrest warrants, the majority for underlying felonies.[64] By comparison, in Pima County Justice Court, there are approximately 19,000 outstanding warrants, the majority of which relate to underlying misdemeanors.[65] Of these 19,000 warrants, 13,400 are for *pre-adjudicated* misdemeanants.[66] Still, while these individuals haven't yet been found guilty by a court of law for their original offenses, for their nonappearance, courts treat them like criminals.

Most FTAs are average citizens. Defendants may miss court for any number of innocuous reasons—e.g., forgetfulness, misunderstanding, or inconvenience.[67] FTAs may be slightly unaccustomed to the court system and their rights and responsibilities, unable to come to court during normal hours or locations, or confused or forgetful as to their court dates. As Malcolm M. Feeley argues in *The Process is the Punishment*, nonappearance often is related to a defendant's need to attend to work, school, family, children, or illness.[68] In addition, most FTAs are self-represented which means that they don't have a lawyer to help them inform the judge or prosecutor why they need to reschedule.[69]

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62. *See Written Reminders*, *supra* note 8, at 70 ("Felony defendants are less likely than misdemeanor defendants to have the opportunity to FTA, because they are often in custody."); Murphy, *supra* note 28, at 1448 & n.47 (comparing COHEN & REAVES, supra note 45, at 1 ("Between 1990 and 2004, 62% of felony defendants in [s]tate courts in the 75 largest counties were released prior to the disposition of their case."), *with* MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL JUSTICE TRENDS 2003, at vii (2006) (noting that 58% of all federal defendants were detained in 1994, while 76% were detained in 2003)).

63. For example, the Tucson Police Department has a policy that a misdemeanant who does not pose a threat to others can be cited and immediately released. *See* Tucson Police Department General Orders: Vol. 2: General Operating Procedures 2114.1 (Mar. 31, 2015). For a civil traffic violation in Pima County, the Sheriff's Department does not require defendants to sign the citation; however, if the violator refuses to sign, the deputy must inform the violator that failure to appear will result in court-imposed sanctions. *See* PIMA COUNTY SHERIFF'S DEPARTMENT GENERAL ORDER 2010-010 ch. 9, § II(D)(3)(b), at 9-4, https://www.pimasheriff.org/files/9714/7556/6049/Chapter_9_2809231629.pdf.

64. Interview with Colin Oglesbee, Court Operations Analyst, Pima Cty. Consolidated Justice Court, in Tucson, Ariz. (Jan. 3, 2017) (on file with author) [hereinafter Oglesbee Interview].

65. *Id.*

66. *Id.* The remaining warrants are for the post-adjudication failure to comply. *Id.*; *see also infra* note 97 and accompanying text.

67. *See supra* note 4 and accompanying text.

68. *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (JULY 14, 1992).

69. *Id.*

Nonappearance can happen to anyone. Many FTAs result from simple violations—such as civil traffic offenses[70]—which may snowball into compounded legal troubles.[71] What starts as a simple traffic ticket can become a ticket to jail. Table 1 demonstrates the quantity and consequences of Arizona drivers who failed to appear or attend defensive driving school in 2014.

NUMBER	PERCENTAGE	ACTION	CONSEQUENCE
103,000	11% of all civil traffic violators.	Failed to appear in court or attend defensive driving school.	License suspended
54,000	53% of those with suspended license.	Pulled over a second time while driving on suspended license.	Cited for criminal misdemeanor for driving on suspended license
15,200	28% of those cited for criminal misdemeanor.	Failed to appear in court a second time for the criminal traffic violation.	Cited for second FTA misdemeanor
Potentially[72] Thousands	No exact percentage.	Pulled over a third time.	Arrested

Table 1: 2014 Traffic FTAs in Arizona[73]

70. Traffic FTAs are a national pandemic. A recent study of California's traffic courts found that "over 4 million people, or more than 17% of adult Californians, now have suspended licenses for a failure to appear or pay." LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA (LCCR) ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 6 (2015) [hereinafter NOT JUST A FERGUSON PROBLEM], https://wclp.org/wp-content/uploads/2015/04/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California.pdf.

71. JUSTICE FOR ALL, *supra* note 20, at 20 ("Compounded sanctions can devastate lives. In most cases, people—including those with suspended driver's licenses—need to drive to work.").

72. While Arizona courts all fall under the Arizona Supreme Court's administrative authority, ARIZ. CONST. art. 6, § 3, which requires all Arizona courts to collect and share data, county jails do not fall under this requirement, *see* Oglesbee Interview, *supra* note 64. This makes it difficult to calculate the exact number of FTA arrests and incarcerations originally related to traffic offenses, but reasonable estimates are informative. For example, in Pima County, 10,005 individuals were arrested and incarcerated in 2014 for FTA. While this number lumps together all types of FTA offenses, it is reasonable to assume that at least several hundred to a few thousand of these related to traffic offenses. And Pima County is only the second largest of 15 counties in the state. In addition, using the number from the third row in Table 1, if 53% of the 15,200 defendants got pulled over again, then they would be automatically arrested—resulting in an estimated 7,500 defendants incarcerated for nonappearance related to traffic offenses.

73. JUSTICE FOR ALL, *supra* note 20, at 19.

B. A Disparate Impact on Citizens of Color

Under the current FTA regime, courts treat all FTAs like criminals. Instead of offering a hand, they brandish a warrant. But this culture of criminalization does not affect all citizens equally. Citizens of color are far more likely to miss court.[74] And, while all FTAs live under the threat of arrest, citizens of color are far more likely to be pulled over,[75] and therefore, are also disproportionately arrested for nonappearance.[76] For example, in Pima County, African Americans comprise 9% of FTA arrests, but only 4.1% of the population. Similarly, Native Americans comprise 8% of FTA arrests, but only 4.3% of the population.[77] And, as the Department of Justice's ("DOJ") investigation of the Ferguson criminal-justice system recently exposed,[78] such disparate enforcement can have explosive results.

As the DOJ report demonstrated, while the shooting of Michael Brown might have ignited the community, the courts' actions had long stacked fuel on the pyre.[79] In fact, the report found that the courts had a sustained focus on generating revenue at the expense of citizens' constitutional due process and equal protection

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74. *See, e.g.*, Rosenbaum et al., *supra* note 4, at 100 (noting that 16.4% of African-American defendants failed to appear compared to only 9.5% of Caucasians); MATT O'KEEFE, LOCAL PUB. SAFETY COORDINATING COUNCIL, COURT APPEARANCE NOTIFICATION SYSTEM: 2007 ANALYSIS HIGHLIGHTS 1 (2007), https://www.pretrial.org/download/research/Multnomah%20County%20Oregon%20-%20CANS%20Highlights%202007.pdf; FEELEY, *supra* note 68 (noting that FTA defendants in Baltimore have disproportionate numbers of low-income, African American individuals).

75. For example, two surveys of Sacramento neighborhoods found, respectively, that African Americans comprised only 7% and 8.6% of the area's population, but accounted for 22.4% and 27.7% of the drivers stopped. *See* NOT JUST A FERGUSON PROBLEM, *supra* note 70, at 19.

76. For a discussion on the importance of trust, see, for example, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006). For a discussion of procedural fairness, see generally Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007), http://www.proceduralfairness.org/~/media/Microsites/Files/procedural-fairness/Burke_Leben.ashx, and Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 1 (2007), http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2.pdf. Public trust and confidence in the courts are closely related to procedural justice. In fact, Tyler and others treat trust and confidence as a component of procedural justice. *See, e.g.*, David B. Rottman & Alan Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 1 (1999), http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3.pdf.

77. *See* Mejias & Avalos, *supra* note 56; PIMA COUNTY 2016 SAFETY AND JUSTICE CHALLENGE FACT SHEET, http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/04/Pima-County-Safety-Justice-Challenge-Fact-Sheet.pdf. Notably, Hispanics comprise 44.8% of Tucson's population, yet account for only 42% of FTA arrests—better than what statistics would predict. Mejias & Avalos, *supra* note 56.

78. *See* U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015) [hereinafter FERGUSON REPORT], http://www.azcourts.gov/Portals/74/TFFAIR/DOJReportonFerguson.pdf.

79. *Id.* at 42.

rights.[80] Chief among the revenue generators in Ferguson were FTA fines, which, in 2013, the court leveraged to generate $442,901, a quarter of the municipal court's entire revenue that year.[81] And, while we do not have comprehensive national data on the disparate impact FTA arrests have on communities of color, all available evidence suggests that this racial disparity is echoed nationwide.[82]

C. Trading Retribution for Rehabilitation

Most FTAs are normal people who have messed up. And they should be held responsible for their actions—as a deterrent and a way to strengthen our judicial system. But the current retributive approach of criminalization isn't working. Instead, it is disproportionately impacting citizens of color and further alienating entire communities from the court. While the public might demand retribution, the courts are also committed to rehabilitation. The criminalization of FTAs undermines this commitment.

Rehabilitation has long been one of the central aims of sentencing in Arizona and federal law. *State v. O'Neill* held that Arizona courts must consider the extent to which the following four objectives are obtained by the sentence: retribution, restraint, deterrence, and rehabilitation.[83] The court also noted that judges should set the punishment "in accordance with the general character both of the offense and of the party convicted."[84] Using this balance, and knowing that most FTAs are pre-adjudicated misdemeanants, the set punishment of criminalization fails. And, although there are limits to rehabilitation,[85] there are also limits to retribution. As the U.S. Supreme Court noted in *Williams v. New York*, "According to modern legal thought, reformation and rehabilitation of offenders rather than retribution are the important goals of criminal jurisprudence."[86]

When courts treat pre-adjudicated, misdemeanant FTA defendants as criminals, they sacrifice rehabilitation for retribution. As Dean Roscoe Pound notes, "Punishment is to be governed by its social end and is to be fixed with

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80. *Id.* at 2.

81. *Id.* at 43; *see also* Nathan Robinson, *The Shocking Finding from the DOJ's Ferguson Report that Nobody Has Noticed*, HUFFINGTON POST: BLOG (May 13, 2015), http://www.huffingtonpost.com/nathan-robinson/the-shocking-finding-from-the-doj-ferguson_b_6858388.html.

82. *See, e.g.*, Matthew Kauffman, *Blacks, Hispanics More Likely to be Ticketed After Traffic Stops*, HARTFORD COURANT (May 10, 2015, 8:04 AM), http://www.courant.com/news/connecticut/hc-racial-profiling-ticket-no-ticket-p-20150510-story.html (discussing disparate impact in Connecticut); *see also* NOT JUST A FERGUSON PROBLEM, *supra* note 70, at 19 (discussing a similar disparate impact in California).

83. 572 P.2d 1181, 1183 (Ariz. 1977) (citing State v. Howland, 439 P.2d 821 (Ariz. 1968), *overruled on other grounds by* State v. Burchett, 484 P.2d 181 (Ariz. 1971)).

84. *Id.* (citing State v. Smith, 484 P.2d 1049, 1051 (Ariz. 1971)).

85. *See, e.g.*, State v. Patton, 586 P.2d 635, 639 (Ariz. 1978) (finding that while rehabilitation is a valid objective of sentencing, so are retribution, restraint, and deterrence—and that the trial judge reasonably concluded that rehabilitation had not worked in the past and that the interests of the other three objectives needed now to be served).

86. Williams v. New York, 337 U.S. 241 (1949).

reference to the future rather than the past."[87] Courts must stop defining FTAs by their past failures and look forward to rehabilitation. Criminalization isn't the deterrent it pretends to be. Instead, it further alienates citizens from the courtroom—particularly those of color.

D. The Responsibility of Courts to Provide Access

Nonappearance is only one small part of a much larger problem of access to justice. But it is a problem that can be solved. As William E. Davis and Helga Turku note, judicial procedures affect perceptions of judicial fairness.[88] Access to justice must complement the rule of law by creating venues in which those with economic, social, and cultural disadvantages can benefit from judicial services.[89] Perhaps courts' commitment to creating avenues for access will directly facilitate their ability to rehabilitate the issue of nonappearance.

If Americans are to learn anything from recently erupting racial tensions through protests, shootings, and court verdicts, the United States has a long way to go to provide access to justice for all its citizens. As Danielle Allen has argued, communities must take turns bearing burdens and losses for sustained democracy.[90] This does not mean that defendants should not be held responsible and incur consequences for choosing to skip court. As the Arizona Task Force on Fair Justice for All notes, "Regardless of how many options and reminders the court may provide, [FTAs] must take personal responsibility to avoid consequences that could escalate and include incarceration."[91] Justice requires retribution. But it needs rehabilitation, too. Rather than simply doubling-down on criminalization and consequences, court practices should encourage citizens to comply with the obligations that courts impose.

III. A CASE STUDY IN SUCCESS: TWO REFORM STRATEGIES FROM ARIZONA

A. Steps Towards Improving Accessibility

When courts take steps to improve accessibility, defendants show up to court or take responsibility for their nonappearances. Several innovative courts have been taking these steps over the last few decades, and, during that time, two best practices have emerged. To prevent and resolve nonappearance, courts

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87. State v. Maberry, 380 P.2d 604, 605 (Ariz. 1963) (quoting 1 DEAN ROSCOE POUND, JURISPRUDENCE 134 (1959)).

88. William Davis & Helga Turku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 47, 52, http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1614&context=jdr (providing the work done with Argentinians to change an inefficient court collection practice as a model for changing the U.S. traffic court). For a detailed analysis of the factors that affect the legitimacy of a judicial decision, see Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119, 121 (2003).

89. Davis & Turku, *supra* note 88, at 49.

90. DANIELLE ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION* 48 (2004).

91. JUSTICE FOR ALL, *supra* note 20, at 20.

primarily turn to the strategies of reminding defendants of their court dates, and extending court hours. This Section will analyze as case studies the implementation of these strategies in one Arizona court. Such strategies effectively demonstrate how a changed perspective and shared responsibility of the nonappearance problem can lead to sustainable results and improved relationships.

The Pima County Consolidated Justice Court ("PCCJC") serves as the exemplar court in this Note. The PCCJC was recently named as one of ten core sites of the John D. and Catherine T. MacArthur Foundation's Safety and Justice Challenge—an initiative committed to reducing the jail population nationwide.[92] Over the past few years, the PCCJC has worked with jail leaders, county and city jail staff, law enforcement, former inmates, and community advocacy groups to develop a strategy to reduce the County's jail population to 1,574 by 2019—a reduction of 320 individuals per day and the lowest number of inmates in 20 years.[93] To meet this overall goal, the PCCJC is focusing, in part, on preventing and resolving FTAs, which it hopes will reduce the average daily jail population by 164 defendants—almost half of the total goal of 320—and lead to a total reduction of 59,860 bed-days per year.[94] The PCCJC's commitment to innovation, focus on the problem of nonappearance, and use of these two strategies make it an excellent example for other courts to follow.

B. Strategy 1: Remind the Defendant

Reminding the defendant directly confronts the assumption that FTAs are fleeing fugitives. It gives defendants the benefit of the doubt and assumes that even those who miss court are well-meaning, innocent citizens—albeit misinformed or busy ones. Such a strategy can be used both to prevent nonappearance[95] and to resolve its effects.[96] A study in Nebraska found that when misdemeanants received a postcard reminder of their court date, nonappearance dropped from 12.6% to

92. *Challenge Network*, SAFETY & JUST. CHALLENGE, http://www.safetyandjusticechallenge.org/challenge-site/pima-county/ (last visited Apr. 5, 2017). One of the strategies Pima County will employ to reduce its jail population is implementing "an enhanced automated call, text and email court-date reminder system that is expected to reduce failure to appear rates . . . ." *Pima County, AZ*, SAFETY & JUST. CHALLENGE, http://www.safetyandjusticechallenge.org/challenge-site/pima-county/ (last visited Apr. 5, 2017).

93. Mejias & Avalos, *supra* note 56.

94. *Id.*

95. *Written Reminders*, *supra* note 8, at 70; *see also* BORNSTEIN ET AL., *supra* note 4; JEFFERSON CTY. CRIMINAL JUSTICE PLANNING UNIT, COURT DATE NOTIFICATION PROGRAM: SIX MONTH PROGRAM SUMMARY (2006); MATT NICE, COURT APPEARANCE NOTIFICATION SYSTEM: PROCESS AND OUTCOME EVALUATION, A REPORT FOR THE LOCAL PUBLIC SAFETY COORDINATING COUNCIL AND THE CANS OVERSIGHT COMMITTEE (2006), http://www.thecourtbrothers.com/fta repo/cans-eval_00206_final.pdf; WENDY F. WHITE, COURT HEARING CALL NOTIFICATION PROJECT (2006), http://www.thecourt brothers.com/fta-repo/CoconinoCounty-court-hearing notification-project.pdf.

96. *See supra* note 119 and accompanying text.

9.7%, a reduction of 23%.[97] Another study in Colorado found that telephonic reminders reduced nonappearance from 21% to 12%, a reduction of 43%.[98]

Placing a call or sending a postcard might also increase trust and confidence in the court system. In looking at causal factors related to nonappearance, Brian Bornstein found that defendants who came to court tended to trust it more than defendants who did not.[99] Nevertheless, through a randomized distribution of postcards to defendants, Bornstein found that written reminders greatly decreased nonappearance across all types of defendants, and had the most significant effects for the groups of defendants who originally expressed the lowest trust.[100] Perhaps proactive outreach might actually foster community trust[101]—particularly in those minoritized communities that continue to be disproportionally affected by the criminal-justice system.

PCCJC's initiative to remind defendants of their court dates built upon this strategy's proven record and leveraged a technology that the court already possessed—the Interactive Voice Recording ("IVR") system. PCCJC first transitioned to an IVR system in 2008 to improve customer service. At that time, the system was developed to respond to the 200,000 inbound calls that the court received each year—and which formerly occupied six individuals employed full-time.[102] In 2014, however, the court began making outbound IVR calls to proactively reach out to clients. The PCCJC initially thought that people might be angry to be called by the court, but, so far, the court has received more thanks than anger.[103]

IVR systems can be costly to implement,[104] but they work. PCCJC's IVR system has reduced nonappearance by as much as 24%.[105] This reduction of FTAs

97. Rosenbaum et al., *supra* note 4, at 177.

98. Schnacke et al., *supra* note 52, at 86.

99. *Written Reminders*, *supra* note 8, at 70.

100. Rosenbaum et al., *supra* note 4, at 177; *see also* O'KEEFE, *supra* note 74 at 1 ("Persons of Color who successfully received a reminder call had a 41% lower incidence of FTA than Persons of Color who did not receive calls.").

101. Interview with Douglas E. Kooi, Court Administrator, and Micci Tilton, Deputy Court Administrator, Pima County Consolidated Justice Court, in Tucson, Ariz. (Dec. 12, 2016) [hereinafter Kooi & Tilton Interview].

102. *Id.*

103. *Id.*

104. Such systems tend to range between $50,000 to $75,000. NAT'L CTR. FOR STATE COURTS, JURY MANAGERS' TOOLBOX: BEST PRACTICES FOR IMPLEMENTATION OF IVR AND ONLINE CAPABILITIES IN JURY AUTOMATION 3 (2009), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/Toolbox/Best%20Practices%20for%20Online-IVR%20Technologies%20text%20wrap%20small%20table.ashx. Most IVR systems can field inbound calls and may be able to offset some of the personnel and time costs. *See id.*; Rosenbaum et al., *supra* note 4, at 178 (noting that implementing a call-reminder system can be cost prohibitive).

105. Oglesbee Interview, *supra* note 64; *see also infra* tbl.2.

offers great benefits to the court and community—only some of which can be quantified monetarily.[106] Table 2 shows the results of the PCCJC IVR system.

Description	Time Period	Successful[107] vs. Total Calls	Success Rate	FTA vs. Total Hearings	FTA Rate	FTA Reduction
No IVR Reminders	02/2014 to 08/2014	No calls placed	—	4,216 / 29,983	14.06%	—
IVR Reminders	09/2014 to 11/2015	36,671 / 46,980	78%	8,113 / 70,650	11.78%	16.20%
IVR with Sanction[108]	12/2015 to 03/2016	12,700 / 17,705	72%	1,926 / 17,930	10.74%	23.6%

Table 2: PCCJC IVR Data[109]

As technology changes, courts must consider changing their communication strategies. Here, PCCJC is again at the cutting edge. The court recently began an outbound texting system which has already sent over 1,000 text-reminders in the first four days of implementation. So far, outbound texting has had a success rate of 85%, compared to an outbound voice success rate of 70%.[110]

106. Rosenbaum found that each reduction in an FTA saved the county between $49.91 and $80.10. Rosenbaum et al., *supra* note 4, at 185 (noting also that when the mailing process was automated, the process was cost-effective in all three counties). Other benefits include improved client trust, and decreased use of judicial, penal, and police resources. One potential cost, however, is that the IVR system could notify third parties of the warrants if the phone number is outdated. Still, the transcript PCCJC uses is general enough and the benefit large enough to override any concern for privacy rights. Oglesbee Interview, *supra* note 64.

107. A successful call is determined by whether the call was completed as dialed, which indicates that someone either picked up the phone or the IVR system left a message. Oglesbee Interview, *supra* note 64.

108. A *Reminder with Sanctions* is a reminder with teeth. Instead of just reminding the defendant of his or her court date, this reminder adds the language: "If you do not appear in court, a warrant will be issued for your arrest." Oglesbee Interview, *supra* note 64.

109. For the original compilation of data, see JUSTICE FOR ALL, *supra* note 20, at app. C. For the most recent data, see Oglesbee Interview, *supra* note 64.

110. Email from Colin Oglesbee, Court Operations Analyst, Pima County Consolidated Justice Court, to Author (Feb. 18, 2017, 4:12 MST) [hereinafter "Oglesbee Email"] (on file with author). Currently, the text-messaging system is sending out two pre-adjudication notifications, one 11 days before the hearing and another the day before the hearing, and post-adjudication notifications the day after the warrant has been issued and then every month thereafter until the warrant is satisfied or resolved. *Id.*; *see also* Vanessa Barchfield, *Have a Pima County Court Date? You'll Get a Text,* ARIZ. PUB. MEDIA (Mar. 1, 2017, 7:52 PM), https://news.azpm.org/p/news-splash/2017/2/28/106809-have-a-pima-county-court-date-youll-get-a-text/; *Pima County Launches Text Notification System for Court Matters*, ARIZ. BUS. DAILY REP. (Mar. 7, 2017), http://azbusinessdaily.com/stories/511087210-pima-county-launches-text-notification-system-for-court-matters.

While the court originally assumed text success rates would be lower—because landlines can't receive texts—there have been a substantial volume of defendants who did not successfully receive a voicemail message, but did receive the text.[111] If this trend continues, thousands of additional defendants will receive reminders this year via this new technology. And, as the data show, increased reminders are likely to lead to increased appearance.

C. Strategy 2: Increase Court Hours

Because of the popularity of the 1980s sitcom, *Night Court*,[112] or the inclusion of New York City's Night Court as a tourist attraction in city guidebooks,[113] citizens might be tempted to dismiss the effectiveness of a court opened late. Nevertheless, for defendants who have difficulty getting time off work, finding transportation, or securing child support, opening the court at times outside of normal business hours is a great way to increase access,[114] and, presumably, to improve clients' view of the justice system. Such a strategy accommodates the busy lives of defendants rather than punishing FTAs for noncompliance.

The PCCJC started weekend and evening warrant resolution courts ("WRCs") in June 2016. And so far, they have been quite successful. During just two Saturday and three evening WRCs, the court served over 1,300 community members, quashed 470 warrants, and reinstated over 460 driver's licenses. Table 3 displays these results.

111. *Pima County Launches Text Notification System for Court Matters*, *supra* note 110.

112. *Night Court* (NBC television broadcast Jan. 4, 1984 to May 31, 1992).

113. *See, e.g.*, Callum McCulloch, *New York's Night Court is the Weirdest Tourist Attraction in the World*, TAB (Sept. 2016), http://thetab.com/us/2016/07/21/new-yorks-night-court-weirdest-tourist-attraction-world-38740; Laura Reilly, *I Spent the Night Inside the Weird World of NYC Night Court*, THRILLIST (Dec. 30, 2015), https://www.thrillist.com/lifestyle/new-york/i-was-a-tourist-at-new-york-city-night-court.

114. *See* James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217 (1993) (mentioning increased hours as one way to increase access); Tomkins, *supra* note 4, at 103 (showing the most common reasons defendants give for not coming to court).

Performance Measures	Sat. June 11	Sat. Oct. 1	Eve. Oct. 11	Eve. Nov. 8	Eve. Dec. 6	Total
Warrants Quashed	158	156	32	49	75	470
Driver's License Suspensions Lifted	109	156	80	75	41	461
Warrant Hearings	108	246	104	53	58	569
Customers Served at Window	351	420	224	241	155	1,391
Individuals	634	962	304	458	362	2,720

Table 3: PCCJC's Warrant Resolution Court[115]

While many in the community originally thought that these WRCs were a sting,[116] no one has been arrested during the events, and court officials have observed defendants calling friends and family to spread the good news.[117] The court hopes to conduct more weekend and evening WRCs in 2017 and expects an even greater turnout.[118] With over 19,000 active warrants in the county, there is still much more work to be done. But, so far, it seems like defendants view the WRCs as a second—or perhaps first practical—chance. The average time from warrant issuance to quash for all WRC cases is 505.78 days.[119] By contrast, the

115. For the original data, see Mejias & Avalos, *supra* note 56. For the most recent data, see Oglesbee Interview, *supra* note 64.

116. Kooi & Tilton Interview, *supra* note 101.

117. *Id.* When surveyors from the Pima County Administration Office asked attendees of a Saturday WRC if they were likely to share their experience with someone else, they all said "yes" (surveyors noted enthusiasm). One said that he had already shared it, and two others said that they were waiting to see if the outcome was positive (because they would be likely to share a positive experience). Oglesbee Interview, *supra* note 64. In addition, most surveyed defendants indicated that they heard about this through friends and family (ten) followed by media (four) and flyers (three). *Id.* When asked for more information about the friend and family member, nine defendants said that the family member or friend called or intentionally brought up the topic. *Id.*

118. Oglesbee Interview, *supra* note 64.

119. *Id.* (noting a standard deviation of 830.53 and that $n = 470$).

average time from warrant issuance to warrant quash for cases not at WRC is 1,992.84 days.[120] Court outreach encourages clients to come in sooner.

Not surprisingly, this strategy pairs well with the first strategy and is yet another example of the responsiveness of FTAs to court outreach. One week in advance of the WRC event on Saturday, October 1, PCCJC contacted all defendants with active warrants through the IVR system and encouraged them to come to the event. Of all warrants quashed that Saturday, 49% involved defendants who received a reminder.[121] Instead of assuming FTAs want to flee, courts should reach out and contact defendants who miss court to offer them opportunities to quash their warrant. And, creating these opportunities outside of normal business hours seems to be working even better.

As to costs, PCCJC estimates that Saturday WRCs cost approximately $5,000 and evening courts $2,000—at an estimated total of $16,000 expended last year.[122] In contrast, using Rosenbaum's most conservative calculation of $50 as the estimated benefit of one resolved FTA, 470 quashed warrants save the county $23,500—an estimated net benefit of over $7,000.[123] And, more important is the inestimable benefit to the 470 defendants who, as a result of Pima County's outreach, no longer have a warrant hanging over their heads.

D. Takeaways from the Task Force

Innovative courts often become the model for larger systemic change. The PCCJC's success has now become a recommended best practice in Arizona. In 2016, the Arizona Task Force on Fair Justice for All (the "Task Force"), created by Chief Justice Scott Bales,[124] identified nonappearance as a major problem for the state and issued 11 recommendations designed to reduce the number of FTAs.[125] These recommendations relied, in part, on innovations already in place in several local courts, chief among them the PCCJC. Because of the successes of the

120. For all PCCJC cases with warrants quashed in 2016, the average time from warrant issuance to warrant quash is 1992.84 days, with a standard deviation of 2673.173 and where *n* equals 13642. *Id.*

121. Reminding defendants of court dates and increasing court hours can work together powerfully. Mejias & Avalos, *supra* note 56.

122. *Id.* Saturday costs are largely due to overtime labor costs, extra security costs, and opening the parking garage on a day it would normally be closed. There were 38 total staff on Saturday, October 1, 2016, including three criminal judicial officers and one Civil Traffic judicial officer. Kooi & Tilton Interview, *supra* note 101. Evening courts are cheaper because, although there are extra security costs, overtime can often be avoided by shifting normal weekday operations to later in the day. These estimates, however, do not include the additional services provided by the executive branch, such as facilities maintenance, prosecutors, and public defense attorneys. *Id.*

123. *See infra* note 42 and accompanying text.

124. Establishing the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies and Appointment of Members (Ariz. 2016), http://www.azcourts.gov/Portals/22/admorder/Orders16/2016-16.pdf.

125. JUSTICE FOR ALL, *supra* note 20, at 20–22.

PCCJC, the Task Force recommends that all Arizona courts implement English and Spanish IVR systems,[126] and increase and diversify court hours.[127]

The innovative community collaboration coordinated by the PCCJC and the reform recommendations of the Arizona Supreme Court are effective because they are locally informed and proactive. Instead of leaving the problem of nonappearance squarely in the hands of FTAs, Arizona investigated its own judicial practices in order to make courts more accessible. By understanding the needs of local clients, Arizona courts are leveraging nationally-proven and locally informed solutions to reduce nonappearance. Now, more defendants are appearing in court. And bench warrants are being quashed.

E. Taking the Court to the People

What worked for Arizona is likely to work for other states. Strategies matter. But perhaps perception matters more. Courts must view nonappearance, at least in part, as an access-to-justice issue. Through this lens, the problem of nonappearance becomes a shared, and therefore lighter, burden. Reminders work. So do increased hours. But the most effective remedies are perhaps still to come—locally-developed, compassionate, and responsive to the specific needs of defendants. Courts can't just wait for citizens to come to them, they must continually re-imagine ways they can step towards citizens. Below are two new innovative directions courts are starting to take.

To further prevent nonappearance, courts are reimagining *how* defendants can appear. One simple way to do this is to allow defendants to email compliance with the law rather than require them to physically come to court. The PCCJC recently added this feature to its website for proof of vehicle registration, proof of valid driver's license, and proof of insurance.[128] From June 2016 to November 2016, 554 traffic defendants submitted online proof of compliance—a number that the court expects to grow into the thousands over the course of 2017.[129] Because of these successes, the Task Force has also recommended that all Arizona courts implement the ability to email proof of compliance with the law.[130] It has also recommended that courts look for ways to bring the court system to people in remote areas, or to allow remote video and telephonic appearances.[131]

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126. The Task Force noted that nearly 27% of Arizona's population speaks a language other than English at home—predominantly Spanish—and reasoned that providing these resources in Spanish would remove barriers to understanding the judicial system for many Arizonans. JUSTICE FOR ALL, *supra* note 20, at 21.

127. *See* JUSTICE FOR ALL, *supra* note 20, at 21 ("Consider increasing access to the court (e.g., offering hours at night, on weekends, or extending regular hours, taking the court to people in remote areas, and allowing remote video and telephonic appearances through applications such as FaceTime or Skype).").

128. Oglesbee Interview, *supra* note 64.

129. *Id.*

130. JUSTICE FOR ALL, *supra* note 20, at 21.

131. *Id.* However, PCCJC court officials have noted the difficulty of implementing some of these measures. Oglesbee Interview, *supra* note 64.

To further resolve nonappearance, courts are *themselves* appearing in local communities. Courts are looking for ways to hold hours at local community centers, churches, and schools.[132] Certainly courthouse architecture can affect client perception,[133] and the willingness to hold court in different spaces may help to improve community participation and trust. For instance, 7,431 FTAs came to have their warrants resolved at one Fugitive Safe Surrender event in 2010 at Mt. Zion Baptist Church in Oakwood Village, Ohio.[134] While security and access to case records and court resources are formidable obstacles, the PCCJC is currently considering holding WRCs in local libraries.[135] Courts belong in the communities that fear the long arm of the law—not as symbols of retribution, but as sites of rehabilitation.

Following the guidance of the PCCJC, the Task Force, and other sites of innovation,[136] advocates nationwide must continue to look for creative, low-cost ways to bring court to citizens and to help citizens come to court. While such strategies may be costly to implement, these costs are insignificant in comparison to the financial and social costs associated with nonappearance. Certainly, for the law to be effective, people must obey it.[137] But, perhaps more important, for the courts to be effective, people must trust them. The problem of nonappearance won't be solved by retribution alone. Rehabilitation starts with a paradigm shift.

132. FRANZETTA D. TURNER, INST. FOR COURT MGMT., REDUCING FAILURE TO APPEARS THROUGH COMMUNITY OUTREACH 56 (2015) ("Given the option of a church, community center or local school, most people preferred the church. Conveniences like parking, evening or weekend hours, and a location closer to home are also factors to entice people to come.").

133. Anne Maass et al., *Intimidating Buildings: Can Courthouse Architecture Affect Perceived Likelihood of Conviction?*, 35 ENV'T & BEHAV. 674, 680 (2000).

134. TURNER, *supra* note 132, at 16. This event served nonviolent felony and misdemeanor warrants by encouraging those with nonviolent felony or misdemeanor warrants to voluntarily "surrender" at events without the threat of arrest. *Id.*

135. Kooi & Tilton Interview, *supra* note 101. During the Saturday WRC survey, when asked about the possibility of holding court in their community, most respondents indicated a preference for court to be held in a "community center" (nine respondents), followed by "anywhere" in their community (eight respondents), followed by a public library (five respondents). Oglesbee Interview, *supra* note 64.

136. *See supra* notes 3–4 and accompanying text.

137. Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986), http://epstein.wustl.edu/research/courses.changecaldeira2.pdf; Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215 (2001).

CONCLUSION

Nonappearance is a national problem that increased criminalization is not solving. U.S. jails are filling with nonviolent, presumed-innocent, pre-adjudicated FTAs—who overwhelmingly come from minoritized groups. Courts are wasting resources preparing for hearings that result in default. Law enforcement personnel continue to make needless arrests. And communities live in fear and distrust. But not all FTAs are fleeing fugitives. Courts must change the assumptions they make about defendants if defendants are ever to change the assumptions they make about the courts. Sometimes all it takes is a simple reminder or flexible hours. But, perhaps the best innovations are yet to come. Courts must work together with their communities to develop local solutions to the problem of nonappearance. FTAs respond to outreach. It's time for more courts to meet them halfway.