Unpacking Willful Flight

A call for equity-centered reform around bail hearings and missed court dates

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Raising the Standard

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The issue of what actually constitutes willful flight has been garnering a lot of attention in recent years. As we were going to press, Ideas 42 released its report on nonappearance in Harris County, Texas. The report found that while people facing charges respect the court's authority and the importance of appearing in court, the extreme challenges of managing the logistics of court appearance, as well as the fear and mistrust associated with the legal system, are overwhelming.

This situation is not unique to Texas. For example, a Connecticut woman attended court over 40 times and eventually had her case dismissed. However, she was given a suspended sentence for failure to appear, because she arrived 45 minutes late to a single court date after working the overnight shift. She contested the decision—and an appeals court reversed the conviction. But these types of scenarios, where people are penalized for nonappearance, continue to play out every day in courthouses across the country—despite the fact that most missed court dates do not rise to the standard of willful flight.

There's growing agreement in the field that nonappearance in court (the equivalent of missing an appointment) and willful flight (consciously fleeing prosecution) should be regarded differently, rather than lumped together in the category of failure to appear, or FTA. However, the national conversation has primarily focused on addressing nonappearance *after* someone has been released pending trial.

The purpose of this paper is to move the conversation upstream, and consider how courts can apply a willful fight standard at initial bail hearings. This shift would have broad implications for our field; looking narrowly at the likelihood of willful flight versus failure to appear could mean freedom for many more people and further close the front door to mass incarceration.

Willful Flight is the first of a few key issues PJI will highlight this year, starting with a thought piece like this one—containing the law, data points, and questions—followed by a roundtable discussion and a final brief with suggested next steps.

Our goal is to create a starting point for robust discussion and concrete actions—bringing together justice practitioners, advocates, and community members to identify practices that cultivate and sustain equity, fairness and safety for all.

Together, we can create a new discourse around **Local Antiracist Pretrial Justice**!

To join the conversation on willful flight, visit us at pretrial.org. And watch for our new website coming in August 2023!

> The reality is most people miss court for the same reasons we miss medical appointments—issues getting time off from work, lack of transportation access, difficulty with childcare, or simple mistakes of memory. They should not be subject to unnecessary incarceration and all its attendant harms simply for a single missed appearance. Rather than investing in punishment, we should invest in simple tools like court notifications and travel assistance that we know dramatically improve court appearance.
>
> **— DAVID GASPAR**
> **CHIEF EXECUTIVE OFFICER**
> **OF THE BAIL PROJECT**

Introduction

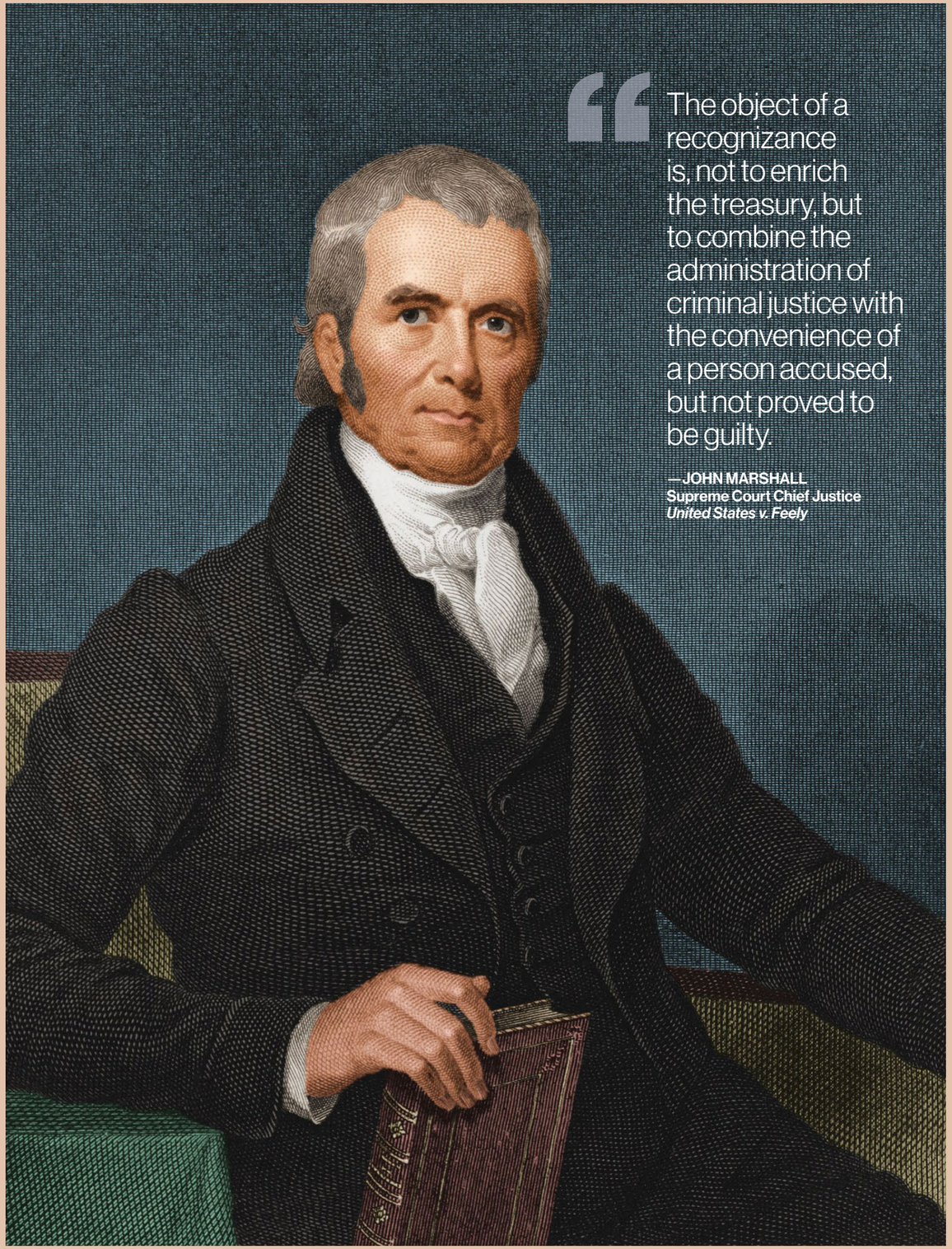
Since the founding of our country, the pretrial process has been in place to safeguard the rights of a person who has not been convicted of a crime, while reasonably assuring that person appears in court[1]. When people do miss court dates, the law recognizes a difference between nonappearance and willful flight. Nonappearance is absence from court without the intention of avoiding prosecution, for reasons such as illness, lack of childcare, employment obligations, transportation challenges or language barriers. Willful flight is the term for a deliberate evasion of prosecution. Yet many jurisdictions treat nonappearance and willful flight as the same behavior, collapsed into the umbrella term of "failure to appear" or FTA.

The difference between nonappearance and willful flight is critical at two points in the pretrial process: 1) when making initial bail determinations, and 2) when responding to instances of FTA—and failing to make this distinction can have a significant impact on the lives of people facing charges. During the initial bail hearing, if a court determines that someone is a flight risk, the result can be a money bond, additional conditions of pretrial release, or preventive detention. When a person is released and subsequently misses a court date, the default response is often a bench warrant, which can result in arrest, a new charge for absconding or "bail jumping," or detention.

Many jurisdictions are changing how they anticipate and respond to nonappearance after someone has been released; however, when it comes to initial bail determinations, the distinction between a risk of willful flight versus nonappearance is rarely acknowledged, either in law, policy, or practice. This has significant consequences for pretrial liberty, and conversely, can result in the likelihood of nonappearance being a driver of mass incarceration.

Policymakers, community members, and practitioners must consider what returning to a willful flight standard means not just in the legal sense, but also how it aligns with an emerging vision of justice that centers equity at every decision point. This paper seeks to provide a framework for these necessary and nuanced conversations, and a launching pad for considering next steps.

[1]Court appearance was the primary concern of the bail process for nearly 200 years; public safety was not formally added as a consideration until the Bail Reform Act of 1984.



How did willful flight become failure to appear?

1800s

Early in the United States, courts recognized that an absence from the court was not the same as willfully evading prosecution. In 1813, then-Supreme Court Chief Justice John Marshall ruled in a circuit court decision that a single failure to appear did not necessarily equate to bond forfeiture. Instead, it was the responsibility of the court to determine if a person offered a reasonable excuse, and to also consider the rights of a person presumed innocent. (*U.S. v. Feely*, 1813) (Gouldin, 2022)

1950s

A shift in federal law during the McCarthy era offered a time-based standard for differentiating willful flight from nonappearance. (Murphy, 2009) Attorney General Herbert Brownell requested that Congress make "bail jumping" a separate crime in response to Communist Party members who forfeited bail and disappeared. (Bail Jumping, 1955) The resulting 1954 law stated that a person is considered to have jumped bail when "whoever...incurs a forfeiture of the bail and willfully fails to surrender himself within thirty days." (Public Law 603, 1954) The 30-day grace period was borrowed from a New York law and offered a standard for states to follow, but it was soon abandoned at the federal level to make way for new bail reform.

1960s

The Bail Reform Act of 1966, the first significant large-scale reform to federal pretrial law since 1789, created a fundamental shift to a presumption of release without money bond. (Public Law 89-465, 1966) The new law imposed "severe penalties for any failure to appear so that criminal prosecutions supplant bail bond forfeitures as the primary sanction against defendants who flee." (Wald, 1966) The 30-day grace period was removed as a means of determining flight, and the language shifted from "willfully fails to surrender" to "willfully fails to appear."

This is a second significant pivot in the framework. When the Federal courts moved away from money bond, lawmakers were concerned that flight would increase, so they broadened the "net" for the crime of not appearing in court. This federal law also influenced state statutes. Before 1966, seven states had statutes that identified failure to appear as a crime; from 1966 to 1984, at least 33 states enacted similar provisions. (Murphy, 2009) At the same time, though, money bond was not eliminated, meaning that many people accused of crimes now have the dual burden of posting bond and additional penalties for not appearing in court.

1980s

The Bail Reform Act of 1984 reduced the required *mens rea*, or criminal intent, for penalizing failure to appear from "willfully," which requires an intention to transgress the law, to merely an awareness of one's action (or in this case, knowledge of the court date) in "knowingly fails to appear." (18 USC §3146 (a)) This change in language was likely in response to criticisms that "willfully" imposed too heavy a burden on prosecutors to prove instances of bail jumping. (Miller, 1970) Under this new scenario, for example, a person who is told the next date for court appearance, but writes the wrong date in their calendar and misses court, meets the legal standard for "knowing" the correct date, but not "willfully" missing court.

+ algorithms

Pretrial risk assessment algorithms have codified the collapse of willful flight and nonappearance into one category. When these tools were developed and subsequently validated in an attempt to predict the likelihood of court appearance, researchers did not parse the data for distinctions between willful flight and nonappearance. As a result, their scores may lead to courts to overestimate how risky a person is for FTA, and impose more restrictive conditions, higher bond amounts, or even pretrial detention.

The impact of failure to appear today

Data on willful flight is scarce, but the data we do have tells us that true willful flight is a rare event. The Bureau of Justice Statistics found that in the 75 largest counties in the U.S., 83% of people charged with felonies made all court appearances, and another 13% eventually returned to court. (Reaves, 2013) The significant impact of court reminder programs also shows that nonappearance is often inadvertent.

When a person is absent from court for any reason, they can face new criminal charges, warrants, fines, loss of a driver's license, and other court actions. Nationwide, there are 7.8 million open warrants, with a vast majority of them for people whose underlying charges are failure to appear for misdemeanor and other low-level offenses. In some jurisdictions, up to 75% of warrants for FTA are issued to people charged with traffic violations. (Gouldin, 2018)

In 2004, Jefferson County (CO) reported that 25% of its jail population was incarcerated solely for failure to appear on minor offenses. (ACLU, 2020) In 2014, Pima County (AZ) jailed 10,005 people on outstanding FTA warrants; the resulting 216,446 bed days cost county taxpayers an estimated $20 million. (Bernal, 2017)

In places where bail jumping is a separate crime, the consequences can be more severe for missing court than the potential sentence for the underlying charge. Bail jumping charges are also relatively easy charges for prosecutors to bring—merely requiring a showing that the person was absent from a hearing—and studies suggest that the threat of additional charges are often used to coerce plea bargains.

During the pandemic, Baltimore prosecutors and police agreed not to arrest/prosecute low-level offenses to avoid jail crowding, but because warrants do not reference the underlying offense, people were jailed on warrants for offenses that people were otherwise not being arrested or prosecuted for (a warrant elimination process was eventually created).

When it comes to bail decision making, past action is considered predictive of future behavior, usually regardless of context. A person who had a past FTA warrant issued for missing court due to transportation issues could be considered as risky as someone who fled the country prior to trial. As a result, the way that FTA is defined can have long-term implications for people who are impacted by the legal system.

FTA & RACE

Because the opportunity for bias exists at every decision point in the criminal legal system, it is essential to examine how race intersects with decisions made about pretrial detention, release conditions, warrants and other responses to FTA.

Data from Ferguson, Missouri, showed bench warrants for FTA were issued excessively—and disproportionately for Black people. From 2012 to 2014, the charge of failure to appear was by far the most common warrant charge—91,193 FTA charges overall—and 92.7% of those charged were Black people. This number includes charges for actual missed court dates, as well as instances when judicial officers charged people with FTAs for missed court payments. (Jerjian, 2017)

Studies show that Black people are also more likely to be arrested on a bench warrant. In 2019 in St. Louis, for example, four Black people were arrested solely on a bench warrant for every one white person. Remarkably, that is an improvement from 2006, when the ratio was seven to one. In 2019 in Louisville, the ratio of Black-to-white arrest based solely on bench warrants was 3-to-1. (Slocum, 2020)

These problems vary widely by jurisdiction. A study by a collective of activists and artists in Michigan found that Black people in Ypsilanti made up 63% of arrests on FTA bench warrants, even though they made up less than 2% of the county's population; neighboring jurisdictions, by contrast, had no such racial disparities. (RAW, 2016)

As for initial bail hearings, a 16-study review by the Prison Policy Institute (PPI) showed that Black and Hispanic people are more likely to receive higher bond amounts for the putative purpose of reasonably ensuring return to court; when these bonds are unaffordable, they result in detention. In at least one instance, the median bail amount for Black people was double the amount for white people. PPI also found that judges are less likely to order release on recognizance for Black and brown people than white people. (Sawyer, 2019)

Demonstrating racial bias only scratches the surface when exploring this issue through an equity lens, which requires an examination of how and why

25% IN 2004, 25% OF THE JAIL POPULATION IN JEFFERSON COUNTY (CO) WAS INCARCERATED **SOLELY FOR FAILURE TO APPEAR** ON MINOR OFFENSES.

> Disproportionately large numbers of outstanding warrants for low-level offenses clearly reflect systemic dysfunction; what we don't know is whether nonappearance is the problem or the product of other problems, such as overcriminalization, poverty of arrestees, or a cumbersome pretrial process.
>
> **— LAURYN GOULDIN, CRANDALL MELVIN PROFESSOR OF LAW, COLLEGE OF LAW, SYRACUSE UNIVERSITY**

these disparities emerge in a systematic way against a group of people, whether through practice, policy or culture. Legal scholar Erin Murphy posits that "process" crimes like FTA may "constitute an expression of frustration or irritation at a defendant's inability to prioritize attendance, or even at the defendant's perceived disinterest in or disdain for the court's authority." (Murphy, 2009) Murphy characterizes the desire to punish offenses such as failure to appear as being motivated by the perception of "obstinacy," that is, penalizing people for "daring to oppose the state's authority."

In her book "Misdemeanorland," legal scholar Issa Kohler-Hausmann characterizes the requirement of repeated court appearances as a "performance" that accused people must enact to satisfy the court and prosecutor. "Defendants delivering successful performances of self-discipline or personal responsibility are rewarded," she says. "Thus, if a defendant has made all of the court appearances on time, many judges will not require the defendant to attend the final court date if the case is scheduled for speedy-trial dismissal. Conversely, defendants delivering performances demonstrating disregard or merely failing to satisfy the formal demands of the legal process are sanctioned." (Kohler-Hausmann, 2019)

A performance, by its definition, is superficial. This implies 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.

What is an equity lens?

A racial equity lens is an approach to examining an institution or situation—in this instance, the pretrial legal system—at both the systemic and individual level with regard to racialized impact. It involves considering the historical intentions and current systemic operations that have created and perpetuated disparities and harm, as well as acknowledging individual biases and assumptions that operate in those systems.

In examining carceral systems like pretrial justice, it is imperative to assume that inequity exists or will exist, because the criminal legal system in the United States is an outgrowth of intentional and systemic racial oppression. Inequity and control is woven into its being. Even if all individual actors acted without bias, systemic oppression would occur because these systems follow a path of control and punishment.

Merely identifying disparities is not the same as utilizing a racial equity lens. While data is an important component of creating transparency and a baseline understanding of the extent of disparities, a racial equity lens requires a much deeper level of inquiry. Here are some examples of questions you might ask when reviewing a pretrial policy or practice through a racial equity lens:

- What is the racialized history of this locale, these residents, and this institution?
- Where can we anticipate inequities based on this history?
- What are the comprehensive identities of the population? In what other systems (particularly ones that feed the criminal legal system) are these identities marginalized or oppressed?
- Who needs the most support?
- Who is more likely to benefit or be burdened? Can this outcome be influenced by access, application, or both?
- What are the unintended consequences? What could go right/wrong?
- Who was present when decisions were made? Who wasn't?
- What assumptions exist? What other approaches could reach the goals of the system?

In order to use a racial equity lens properly, the integrity of the inquiry process is critical. This process—and any resulting policies or practices—must include, recognize and value the perspectives and experiences of impacted people; share power and decision-making with communities of color; and require solutions that explicitly name and address systemic deprivations.

The long, difficult history of attempts at pretrial reforms has shown what happens when changes are made that are not mindful of racial equity. Electronic monitoring has resulted in overwhelming numbers of Black and brown people in modern-day shackles. Onerous conditions of pretrial release, and penalties for failing to adhere to all of the conditions, has helped swell the number of Americans under some form of court supervision to over 5 million people. Pretrial risk assessments have provided a scientific veneer to the pretrial process, while overstating risk, particularly among Black men.

The common thread among all of these reforms is a failure to orient solutions toward the freedom and well-being of marginalized people and their communities, but rather to extend and exert control. Much of what is said here can also be applied to forms of oppression and harm of other identities, including ability, gender identity, class, and sexual orientation, to name a few. A racial equity lens is our opportunity to get at real, long-lasting reductions of harm, and move toward solutions that keep all people safe.

The Path Forward

Moving to a willful flight standard at both initial bail determinations and responses to court absences will require a two-pronged approach—addressing technical issues, such as clear policies that distinguish instances of nonappearance from willful flight, and a concurrent shift in system culture that acknowledges the rights and realities of a presumptively innocent individual.

Some jurisdictions have recognized the problems inherent in conflating willful flight and nonappearance for people who have been released, and have taken steps to remove barriers to appearance or minimizing consequences for non-appearance. (See sidebar for examples.)

While these changes may lessen the frequency and burden of non-appearance, they sidestep the larger issue of defining willful flight and its role in bail decision making. The field must rigorously interrogate the distinction between willful flight and nonappearance at the initial bail determination in order to eliminate unnecessary conditions or preventive detention, and to prevent past nonappearance from having future repercussions.

PROGRESS IN ILLINOIS

Illinois has taken the most significant step in returning to a willful flight standard. In 2020, the Illinois Supreme Court Commission on Pretrial Practices stated that limited detention based on risk to public safety or risk of flight established by clear and convincing evidence in a due process hearing, was a guiding principle in an effective pretrial system. The statewide Illinois Network for Pretrial Justice made this principle a component of their advocacy for the Pretrial Fairness Act. Passed as a component of the comprehensive SAFE-T Act 2021, the new law specifically identifies a "high likelihood of willful flight" as a permissible factor to consider in pretrial detention, distinguishing willful flight from nonappearance.

The final language passed in a 2022 trailer bill (Public Law 102-1104) states that willful flight is: "[i]ntentional conduct with a purpose to thwart the judicial process to avoid prosecution. Isolated 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." (See, 725 ILCS 5/110-1)

Under the new law, risk of willful fight may only be considered when the charge is one that could result in detention based on "a real and present threat to the safety of any person or persons or the community," or is higher than a class 4 felony.

The law also lays out a grace period for nonappearance; a person who appears in court on the day assigned or within 48 hours of receiving a summons for failure to appear shall not be recorded as having failed to appear for the initial court date. For the purposes of assessing risk via a risk assessment instrument or other types of evaluation, however, appearance in response to a summons is not counted as evidence of future likelihood of appearance in court. (See, 725 ILCS 5/110-3)

Ensuring court appearance is still a permissible basis for imposing conditions of release. 725 ILCS 5/110-5 directs the court to determine "which conditions of pretrial release, if any, will reasonably ensure the appearance of a defendant as required," as well as ensuring the safety of the community. This allows judges to consider and respond to past histories of non-appearance without resorting to no-bail detention.

IN CONCLUSION

The pretrial reforms in Illinois offer a standard and process that aligns with historical precedent for what courts should consider when making bail determinations. Importantly, these reforms also include data collection to identify where disparate impacts remain.

Mass incarceration, particularly of Black and brown people, persists because reforms have failed to address the structural racism that is woven into the fabric of criminal legal practice. People who seek to end mass incarceration must explicitly acknowledge the presence of systemic harm, intentionally anticipate and address bias, and identify outcomes that align with increased equity. Wrestling with these issues and identifying a path forward has the potential to expand pretrial liberty and significantly shrink the footprint of the criminal legal system.

> Acknowledging the difference between nonappearance and evading prosecution in policy is an important first step; now we have to figure out how to uphold the law in practice.
>
> — KAREEM BUTLER, PRETRIAL JUSTICE FELLOW, CHICAGO APPLESEED CENTER FOR FAIR COURTS, AND THE ILLINOIS NETWORK FOR PRETRIAL JUSTICE

Field Notes

Pima County, Arizona, offers an evening and Saturday warrant resolution court to quash warrants and reinstate driver's licenses. (Bernal, 2017)

Washington State has changed its court rules to permit remote court appearance by telephone or video platform in certain circumstances. (RCW 7.105.205) A study from the Stanford Criminal Justice Center on virtual hearings found that while most defenders agreed that contested, substantive hearings should be in-person, they also agreed that "minor, nonsubstantive hearings could use virtual platforms in the future, reflecting efficiency benefits such as savings in time and money for working-class defendants or those with children." (Benninger, 2021)

In response to COVID-19, the **Baltimore City** State's Attorney office took steps to avoid having people held without bond due to failure to appear, such as asking for bench warrants only for felony offenses, ensuring people had received proper notification of their court date, and verifying that the individual was not already incarcerated.

Inner dome of the Illinois State Capitol building

Discussion Guide

A Call to Reflection and Action Around Willful Flight

Beyond the legal question of whether willful flight is the appropriate standard for bail decision making, discerning and measuring willful flight in local courts will require several steps of implementation and culture change. There are many questions that need to be answered in order to make an equitable transition, and we invite people from across the pretrial justice spectrum to engage in this conversation.

What does your statute and state constitution say regarding willful flight?
Are you operating within a legal framework that distinguishes between willful flight and nonappearance? What factors are judicial officers required to consider when making bail determinations? Are those factors linked to willful flight? Critically exploring your current framework provides parameters for local practice change or may indicate a need for policy change.

How do you practically define absconding or willful flight?
Considering willful flight in bail determinations requires a definition of the term and a standard for applying it. The field currently lacks a clear definition of what constitutes willful flight at the time of a missed court obligation, as well as a clear standard and how the likelihood of that behavior should be considered by judicial officers who are making bail determinations. There are few identified risk factors—other than access to resources and connections abroad, which are not well researched—that can point to a likelihood of willful flight. Setting these standards requires thoughtful, collaborative discussion at the local and national levels.

How can you collect qualitative and quantitative data on who flees, and why?
Once willful flight is defined, the next step is developing a fuller view of the landscape of willful flight, as well as creating a system to track history of absconding. It is also essential to collect demographic data on people who are characterized as a "flight risk" when a bail determination is made, as well as those later found to have fled prosecution, in order to identify racial disparities. In order to do this, you must consider what information is documented on the record during court proceedings, the capacity of your data systems to capture this information, and how you will analyze and use this data to understand and improve your process.

How do issues such as requiring multiple appearances in court and slow case processing affect FTA rates?
What's often missing from the conversation is an understanding of the "denominator" of FTA—how often and over what period of time should a person be required to appear in court before their case is resolved? What racial, gender, ability or other differences occur along this dimension and why?

How does the willful flight standard change efforts to predict behavior and set release conditions?
Pretrial risk assessments do not differentiate between willful flight and nonappearance. Returning to the willful flight standard raises questions about the instrument and its ability to predict extremely rare events. Likewise, the willful flight standard would raise issues about what are the appropriate measures to address this concern.

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725 ILCS 5/110-1, 5/110-5.

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PJI informs, inspires and mobilizes pretrial changemakers working to end mass incarceration.

Our theory of change is Local Antiracist Pretrial Justice where community members and public officials partner to implement decarceral solutions rooted in equity, safety and well-being for all.

Join us at pretrial.org.

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