

Fall 2018


Principles of Pretrial Release: Reforming Bail Without Repeating its Harms

Brook Hopkins

Chiraag Bains

Colin Doyle

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Brook Hopkins, Chiraag Bains, and Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679 (2018).
<https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/2>

This Article is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

PRINCIPLES OF PRETRIAL RELEASE: REFORMING BAIL WITHOUT REPEATING ITS HARMS

BROOK HOPKINS
CHIRAAG BAINS
COLIN DOYLE*

Bail reform is happening. Across the country, jurisdictions are beginning to recognize that contemporary pretrial systems rooted in money bail are discriminatory, ineffective, and (by and large) unconstitutional. A common and substantial component of contemporary reforms is an increased reliance on conditional release as an alternative to pretrial incarceration. In many ways, conditional release represents an improvement over money bail, but the practice of conditional release has its own pitfalls.

This Article identifies unforeseen and unplanned harms that can result from a system of conditional release and proposes five principles that jurisdictions can follow to eliminate or mitigate these harms. As the options for pretrial conditions continue to expand, judges may impose more conditions than are necessary, including conditions that are burdensome and ineffective. Because pretrial monitoring is inexpensive—especially when subsidized by user fees for pretrial monitoring—there is a risk that courts will impose monitoring and other conditions on people who would previously have been released without conditions. Taken together, these harms can prolong people’s involvement in the criminal justice system, restrict their liberty in profound ways, set them up for pretrial incarceration through technical violations, and saddle them with unaffordable debts.

To responsibly use conditional release without replicating the harms of money bail, jurisdictions should adopt the following five principles. One,

* Brook Hopkins is the Executive Director of the Criminal Justice Policy Program at Harvard Law School. Chiraag Bains is the Director of Legal Strategies at Demos and a former Visiting Senior Fellow at the Criminal Justice Policy Program at Harvard Law School. Colin Doyle is a staff attorney at the Criminal Justice Policy Program at Harvard Law School.

release on recognizance should be the norm and conditional release the exception. Two, the principle of parsimony should guide decisions over what conditions of release to impose—meaning that burdens placed on defendants and restrictions of their liberty should not exceed the legitimate interests of the government. Three, conditions should be minimal, related to the charged conduct, and proportionate to the risk of flight and pretrial criminal activity. Four, jurisdictions should not charge fees for conditional release, pretrial services, or pretrial monitoring. Five, restrictions on pretrial liberty should be evidence-based.

TABLE OF CONTENTS

INTRODUCTION.....	680
I. PRINCIPLE 1: MAXIMIZE RELEASE ON RECOGNIZANCE.....	683
II. PRINCIPLE 2: FOLLOW THE PRINCIPLE OF PARSIMONY	686
III. PRINCIPLE 3: SUPPORT RATHER THAN SUPERVISE.....	691
IV. PRINCIPLE 4: DON'T CHARGE FEES	693
V. PRINCIPLE 5: CONDITIONS OF RELEASE AND RESTRICTIONS ON LIBERTY SHOULD BE EVIDENCE BASED	697
CONCLUSION	700

INTRODUCTION

In most jurisdictions in the United States, someone accused of a crime and awaiting trial is either released from jail or detained indefinitely because they cannot afford to pay money bail. Those who can afford to post bail—however dangerous they are, however high their risk of flight—get released. Those who cannot afford to post bail—even if they pose no danger to the community and are a sure bet to return for court—remain detained.¹ Under this pretrial system, it is better to be guilty, dangerous, and rich than to be innocent, harmless, and poor. America's discriminatory pretrial practices contribute to mass incarceration at great expense. Pretrial detention costs the United States approximately \$14 billion each year,² and

¹ See generally HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (2016), available at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [https://perma.cc/E247-U6GM] [hereinafter CJPP BAIL REFORM PRIMER] (presenting findings that money bail has been shown to unfairly disadvantage people who cannot afford it).

² PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST?, at 2 (2017), available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd> [https://perma.cc/U983-GP GW].

the increase in pretrial detention over the last few decades accounts for all of the net jail growth in the United States during that time.³ On any given day, around half a million people are incarcerated having only been accused—not convicted—of a crime.⁴ Empirical research has also found that “[H]ispanic and black defendants are more likely to be detained [pretrial] than similarly situated white defendants.”⁵

Justice system actors and Americans at large are coming to view the money bail system as unfair and unwise.⁶ To lower jail populations and provide equal treatment under the law, advocates are pushing a variety of reforms: procedural protections for preventive detention, cite-and-release standards, risk assessment tools, and the expansion of pretrial services, to name a few. Jurisdictions are increasingly looking to pretrial monitoring as an alternative to pretrial incarceration. As states and counties expand pretrial services, and as technologies such as GPS tracking and remote alcohol monitoring become more common, many courts now have a broader range of pretrial conditions at their disposal than the familiar options of detention, release on recognizance, or release on money bail.

On ethical, constitutional, and policy grounds, a system of conditional release is better than a system of jailing people on unaffordable bail without due process of law. But the expansion of pretrial release conditions carries its own pitfalls. One danger is that courts will impose conditions not only upon people whom the court would otherwise have detained, but also upon people whom the court would have otherwise released on recognizance. Another danger is that courts will underuse simple, effective conditions like phone call reminders for court dates, while overusing burdensome conditions such as drug testing, drug monitoring, in-person reporting, and

³ Peter Wagner & Wendy Sawyer, *Prison Policy Initiative, Mass Incarceration: The Whole Pie 2018*, at 6 (2018), available at <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/56LY-SNZG>].

⁴ *Id.* at 2.

⁵ Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 222, 222 (2004).

⁶ See, e.g., Editorial Board, *Fixing the Unfair Bail System is Worth the Costs*, WASH. POST (Sept. 9, 2017), https://www.washingtonpost.com/opinions/fixing-the-unfair-bail-system-is-worth-the-costs/2017/09/09/ff3c5c4c-73eb-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.a158e99985d7 [<https://perma.cc/CLH6-ZRKW>]; Editorial Board, *Cash Bail's Lonely Defender*, N.Y. TIMES (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/opinion/cash-bails-lonely-defender.html?_r=0 [<https://perma.cc/6DE3-P4AU>]; Times Editorial Board, *How the Poor Get Locked Up and the Rich Go Free*, L.A. TIMES (Aug. 16, 2017), <http://www.latimes.com/opinion/editorials/la-ed-bail-reform-20170816-story.amp.html> [<https://perma.cc/XSK6-7RKJ>].

GPS bracelets.⁷ Jurisdictions may also seek to pass on the costs of pretrial monitoring to defendants by imposing fees to pay for drug testing, alcohol monitoring, and geolocation tracking. The overuse of conditions of release and the charging of fees can restrict people's liberty, prolong their involvement with the criminal justice system, and lead to technical violations of pretrial release, which in turn can result in revocation of release and imposition of jail time. In short, unnecessary release conditions and fees can set people up to fail and can replicate some of the harms of money bail.

This Article suggests a framework of five principles that jurisdictions should adopt to fairly and responsibly administer pretrial conditional release. First, consistent with the Supreme Court's admonition that "liberty is the norm" pretrial,⁸ judges should maximize the use of release on one's own recognizance, imposing conditions only when truly necessary to prevent or deter flight and criminal activity. Second, the decision of what release conditions to impose should be governed by the principle of parsimony, which holds that punishment and deprivation of liberty should not exceed the legitimate interest of the state. Third, conditions should be the least restrictive possible, related to the charged conduct, and proportionate to the risk of flight and pretrial criminal activity. Conditions of release should be aimed at supporting, rather than supervising, the accused. Very few defendants willfully abscond pretrial; more often, they fail to appear because they lose track of their court date, lack transportation, or have competing work, family, and childcare obligations.⁹ Pretrial services should be centered on positive interventions—such as phone or text reminders of court dates and transportation to court—rather than punitive deterrents—such as unnecessary drug testing and revocation. Fourth, jurisdictions should avoid charging fees for pretrial services, as these can create untenable pressure on poor defendants and their families, result in unnecessary incarceration when they are unable to pay, and exacerbate wealth and racial disparities. Pretrial justice is a public good that should be funded collectively by taxpayers. Fifth, dovetailing with the

⁷ See generally CHICAGO CMTY. BOND FUND, PUNISHMENT IS NOT A "SERVICE": THE INJUSTICE OF PRETRIAL CONDITIONS IN COOK COUNTY (2017), available at <https://chicago.bond.org/docs/pretrialreport.pdf> [<https://perma.cc/BRN8-HGZ7>] (arguing that pretrial release conditions in Cook County have become increasingly punitive as more people are being diverted from jail).

⁸ United States v. Salerno, 481 U.S. 739, 755 (1987).

⁹ See, e.g., CTY. OF SANTA CLARA BAIL & RELEASE WORK GRP., FINAL CONSENSUS REPORT ON OPTIMAL PRETRIAL JUSTICE, at 2 (2016), available at <https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf> [<https://perma.cc/U7PQ-NE8Y>].

principle of parsimony, any restrictions on pretrial liberty should be evidence-based. Too often, jurisdictions routinely impose conditions without studying whether those conditions actually improve pretrial outcomes.¹⁰

I. PRINCIPLE 1: MAXIMIZE RELEASE ON RECOGNIZANCE

In a functioning pretrial system that obeys the constitutional requirement that “liberty is the norm” pretrial,¹¹ judges should maximize the use of release on one’s own recognizance. The default rule should be to release pretrial defendants on recognizance. As jurisdictions move away from money bail, they are likely to adopt risk assessment tools and additional forms of conditional release, including drug testing, electronic monitoring, mental health treatment, and more. Conditional release should be understood as a restriction on pretrial liberty and should only be imposed when the prosecution has proved by clear and convincing evidence that it is necessary to prevent flight and secure public safety. Risk assessment tools should be calibrated to recommend release on recognizance as the default pretrial outcome.

Most jurisdictions have statutes or court rules that require judges to impose “the least restrictive condition[s]” determined to reasonably assure the defendant’s appearance at trial and public safety.¹² This least restrictive condition is usually release on recognizance, which requires that someone accused of a crime promise to return to court and not commit a crime while on release. That is enough of a condition for most people, as the evidence bears out. In jurisdictions that have implemented reforms that result in releasing most people on recognizance, the overwhelming majority of those people have shown up for court dates and have not committed crimes on release.¹³ To impose conditions that restrict liberty beyond release on

¹⁰ Kristin Bechtel et al., *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. J. CRIM. JUST. 443, 461 (2017) (noting general lack of quantitative data regarding interventions from pretrial services).

¹¹ *Salerno*, 481 U.S. at 755.

¹² *E.g.*, N.J. STAT. ANN. § 2a:162-16.

¹³ For example, in Santa Clara County, which has taken steps to rely less on money bail and release more people pretrial, more than 95% of defendants reappear in court. *See* CTY. OF SANTA CLARA BAIL AND RELEASE WORK GRP., *supra* note 9, at 46. Washington, D.C. releases 94% of defendants pretrial, PRETRIAL SERVS. AGENCY FOR D.C., *RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON, DC* (2017), <https://www.psa.gov/sites/default/files/2016%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf> [<https://perma.cc/6STE-TNYQ>], and 90% of them make their court dates, COURT SERVS. & OFFENDER SUPERVISION AGENCY FOR D.C., *FY 2016 AGENCY FINANCIAL REPORT 27* (2016), *available at* <https://www.csosa.gov/about/financial/afir/FY2016-CSOSA-AFR.pdf>

recognizance, the government should have the burden of proving by clear and convincing evidence that a restriction on liberty is necessary.

Jurisdictions should calibrate pretrial processes to accelerate the release of people who are unlikely to flee or harm others. Some jurisdictions have introduced procedures that allow such people to be released from jail on their recognizance without a hearing before a judge.¹⁴ Commonly in these jurisdictions, a pretrial services agency has been granted the authority to identify people who are low-risk and to release them.¹⁵ Other jurisdictions have adopted policies that encourage the police to issue a summons rather than arrest someone who is likely to be released on recognizance.¹⁶

As jurisdictions continue to expand pretrial services as an alternative to jailing people, more conditions of release will become available. Because many conditions of release are relatively inexpensive for the government, there is a risk that judges will impose conditions of release on people whom the judges previously would have released on personal recognizance. On a per-defendant basis, operating pretrial services is much cheaper for local governments than operating jails, especially when jurisdictions require defendants to pay the cost of electronic monitoring or drug testing (a problematic arrangement, as we explain below with respect to Principle 4). To use one example, it costs Los Angeles County less than \$26 per day to monitor someone pretrial, but \$177 per day to incarcerate that person.¹⁷ Thus, if the available budget for incarcerating and monitoring people pretrial were to remain constant, Los Angeles County could afford to monitor up to seven times as many people as the county could afford to incarcerate.

Release on recognizance should remain the default pretrial disposition, even as more release options become available and even if monitoring more

[<https://perma.cc/MJK6-4R4V>]. Data from 2012 through 2016 show that each year between 88% and 90% of people released while awaiting trial remained arrest-free. *Id.* Each year, between 98% and 99% of released defendants were not arrested for violent crimes. *Id.*

¹⁴ See, e.g., B. Scott West, *The Next Step in Pretrial Release Is Here: The Administrative Release Program*, THE ADVOCATE, at 1 (Jan. 2017), [https://dpa.ky.gov/Public_Defender_Resources/The%20Advocate/Advocate%20Newsletter%20Jan%202017%20\(COLOR%20-%20FINAL\).pdf](https://dpa.ky.gov/Public_Defender_Resources/The%20Advocate/Advocate%20Newsletter%20Jan%202017%20(COLOR%20-%20FINAL).pdf) [<https://perma.cc/R2QF-MNU2>] (discussing the Non-Financial Uniform Schedule of Bail Administrative Release Program in Kentucky).

¹⁵ See *id.*

¹⁶ See, e.g., N.J. JUDICIARY, CRIMINAL JUSTICE REFORM: REPORT TO THE GOVERNOR AND LEGISLATURE 7–8 (2016), <http://www.njcourts.gov/courts/assets/criminal/2016cjrannual.pdf> [<https://perma.cc/WG7H-BFWC>].

¹⁷ SHEILA KUHL & HILDA SOLIS, MOTION BY SUPERVISORS SHEILA KUEHL AND HILDA SOLIS ON BAIL REFORM at 3 (Mar. 8, 2017), <http://file.lacounty.gov/SDSInter/bos/supdocs/112060.pdf> [<https://perma.cc/5XHC-VC3G>].

people is not burdensome for the government. The Constitution requires liberty to be the norm pending trial.¹⁸ Conditional release should be understood as a restriction of this pretrial liberty. Pretrial conditions—especially when multiple conditions are imposed—can unnecessarily burden a defendant’s ability to work, care for children, and meet financial obligations. Most pretrial interventions restrict a defendant’s freedom. Electronic monitoring and house arrest are the more obvious examples, but even less restrictive requirements such as weekly in-person check-ins with pretrial services can be difficult for people to meet given their other commitments and resource limitations. Pretrial services are typically located within or adjacent to downtown courthouses, sometimes far from residential neighborhoods.¹⁹ After juggling a job, or multiple jobs, and caring for children and family, a bus trip and meeting every week can strain one’s time and finances. These restrictions on liberty should be imposed only when necessary and when the restrictions have been proven to work. As explored in Principle Five, many pretrial conditions are imposed without any idea of their effectiveness or any plans for measuring their worth.

If pretrial service agencies use tools or assessments to develop release recommendations for judges, these tools should reflect a presumption of unconditional release. Across the country, algorithmic risk assessment tools are becoming a more common feature of pretrial service agencies.²⁰ These tools often provide release recommendations to judges and pretrial staff, encouraging them to detain, release, or impose conditions on a particular person based on his or her level of risk as calculated by the tool.²¹ These recommendations should reflect the presumption in favor of releasing defendants on their own recognizance. Although risk assessment algorithms use historical data to predict someone’s likelihood of missing court dates or being arrested pretrial, these predictions by themselves do not (and cannot) determine whether someone should be released, released conditionally, or detained. Release decisions can be informed by

¹⁸ Salerno, 481 U.S. at 755.

¹⁹ For example, Washington D.C.’s Pretrial Services Agency is located near a courthouse on the National Mall. *Location Directory*, PRETRIAL SERVS. AGENCY FOR D.C., https://www.psa.gov/?q=contact/location_directory [<https://perma.cc/R3K2-NKZF>].

²⁰ PRETRIAL JUSTICE INST., *THE STATE OF PRETRIAL JUSTICE IN AMERICA* at 5–8 (2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f9d452f6-ac5a-b8e7-5d68-0969abd2cc82&forceDialog=0> [<https://perma.cc/M76Z-HCRK>].

²¹ See, e.g., GLENN A. GRANT, *CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE FOR CALENDAR YEAR 2017* 11–13, <https://www.njcourts.gov/courts/assets/criminal/2017cjannual.pdf> [<https://perma.cc/3H6L-DSVT>] (describing Decision Making Framework (DMF) in New Jersey).

quantitative data, but the decision to release or detain someone is a values-based decision. In jurisdictions with risk assessment tools, these values-based decisions are made by policymakers who calibrate how the risk assessment tools translate risk levels into release recommendations. If risk assessment tools are calibrated to tolerate only a low-level of risk, then pretrial services will end up recommending pretrial incarceration or onerous conditions of release for nearly all defendants. Instead, policymakers should calibrate these tools such that they recommend release on recognizance for the overwhelming majority of defendants.

II. PRINCIPLE 2: FOLLOW THE PRINCIPLE OF PARSIMONY

A useful starting point for thinking about the appropriate level of supervision is the principle of parsimony. Parsimony is the idea that penalties should be no more severe than necessary to serve the state's legitimate interests.²² In the sentencing context, the state's legitimate interests are retribution, deterrence, rehabilitation, and incapacitation.²³ Sanctions that exceed these purposes are gratuitous.

The parsimony principle emerges from a recognition that punishment involves harm, whether by the restraint on a person's liberty or the infliction of pain. The utilitarian Jeremy Bentham saw punishment as "itself evil," and therefore defensible only "in as far as it promises to exclude some greater evil."²⁴ Enlightenment philosopher and criminologist Cesare Beccaria insisted that punishment be "the minimum possible in the given circumstances,"²⁵ and William Blackstone likewise argued that "[t]he method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means exceed it."²⁶

The value of parsimony is reflected throughout the law of American punishment. Law professor Norval Morris articulated parsimony as a "utilitarian and humanitarian" constraint on sentencing, and those limits on punishment can be observed at work in state sentencing guidelines.²⁷ In the Sentencing Reform Act of 1984, Congress codified the parsimony principle in the requirement that federal courts "impose a sentence sufficient, but not

²² Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 364 (1997).

²³ *Id.*; *Graham v. Florida*, 560 U.S. 48, 71 (2010).

²⁴ JEREMY BENTHAM, *THE RATIONALE OF PUNISHMENT* 23 (1830).

²⁵ CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 113 (Richard Bellamy ed., 1995).

²⁶ 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 13 (1769).

²⁷ Frase, *supra* note 22, at 373–74 (1997) (quoting NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 61 (1974) and discussing Minnesota's sentencing guidelines).

greater than necessary,” to serve the purposes of punishment.²⁸ The same doctrine underlies the Supreme Court’s Eighth Amendment jurisprudence, under which disproportionate penalties, such as the death penalty for non-homicide crimes against persons²⁹ and life without parole for non-homicides crimes committed by juveniles,³⁰ have been deemed cruel and unusual. It is not surprising, then, that the seminal National Academies report, *The Growth of Incarceration in the United States*, identified parsimony as one of the core principles “that should inform the use of incarceration and the role of prison in U.S. society.”³¹

There is no reason parsimony should be limited to the context of punishment. Indeed, scholars have applied it to regulatory sanctions—sanctions imposed for legitimate state purposes other than punishment³²—such as preventive detention.³³ The application of parsimony to the pretrial context is straightforward. Restrictions on an accused individual’s liberty, whether by detention or release conditions, constitute harms that must be limited to that which is necessary to serve the legitimate pretrial goals of those restrictions: appearance in court and the safety of the community.³⁴

²⁸ 18 U.S.C. § 3553(a).

²⁹ *Kennedy v. Louisiana*, 554 U.S. 407, 446, 437 (2008) (death penalty “not a proportional punishment” for rape of child and “should not be expanded to instances where the victim’s life was not taken”); *Coker v. Georgia*, 433 U.S. 584, 584 (1977) (death penalty is “grossly disproportionate and excessive punishment” for rape of adult).

³⁰ *Graham v. Florida*, 560 U.S. 48, 71 (noting that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense” and concluding that “[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate . . . provides an adequate justification”).

³¹ NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 323 (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014), available at <https://doi.org/10.17226/18613> [<https://perma.cc/WNL3-63T5>] (“Punishments for crime, and especially lengths of prison sentences, should never be more severe than is necessary to achieve the retributive or preventive purposes for which they are imposed.”).

³² See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (distinguishing punitive from regulatory sanctions). The Supreme Court has described pretrial detention under the Bail Reform Act aimed at “preventing danger to the community” to be regulatory in nature. *Salerno*, 481 U.S. at 747.

³³ See generally Carol Steiker, *Proportionality as a Limit on Preventive Justice: Promises and Pitfalls*, in *PREVENTION AND THE LIMITS OF THE CRIMINAL LAW* 194 (Andrew Ashworth et al. eds., 2013) (discussing proportionality as a constraint on the use of preventive detention).

³⁴ NAT’L INST. OF CORR., *A FRAMEWORK FOR PRETRIAL JUSTICE: ESSENTIAL ELEMENTS OF AN EFFECTIVE PRETRIAL SYSTEM AND AGENCY* 44 (2017), available at <https://nicic.gov/framework-pretrial-justice-essential-elements-effective-pretrial-system-and-agency> [<https://perma.cc/7TAE-LZDX>].

The federal Bail Reform Act explicitly required that judges release individuals “subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community.”³⁵ Many state statutes include similar language,³⁶ as does the American Bar Association’s standards for pretrial release.³⁷

However, in practice, across the country onerous pretrial conditions are imposed on defendants without sufficient regard to their individual circumstances or whether such conditions will actually serve the government’s legitimate pretrial goals. Many courts require in-person meetings with pretrial services officers, which are often time consuming and inconvenient, even though “no good evidence” exists to show that these meetings make a difference to appearance or rearrest rates.³⁸ The District of Columbia, which has virtually eliminated the use of money bail, routinely requires drug testing of defendants despite repeated research findings that drug testing does not reduce pretrial failure.³⁹ Increasingly, jurisdictions are also turning to electronic monitoring to surveil released defendants.⁴⁰ Such monitoring is expensive, can interfere with personal relationships and employment opportunities, and tends to make individuals feel “unfairly stigmatized.”⁴¹ And yet studies do not show that monitoring

³⁵ 18 U.S.C. § 3142(c)(1)(B).

³⁶ See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1395 n.229 (2014) (collecting state statutes).

³⁷ ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.2 (3d ed. 2007) (“[T]he court should impose the least restrictive of release conditions necessary reasonably to ensure the defendant’s appearance in court, protect the safety of the community or any person, and to safeguard the integrity of the judicial process.”).

³⁸ Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, 3 REFORMING CRIM. JUST. 42 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_3.pdf [<https://perma.cc/PD4W-UK94>] (discussing studies).

³⁹ MARIE VANNOSTRAND ET AL., STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 20–24 (2011), <http://www.ajc.state.ak.us/acjc/bail%20pretrial%20release/sciencepretrial.pdf> [<https://perma.cc/W8JL-UMAW>] (reviewing studies from the 1980s and 1990s in the District of Columbia, Arizona, Maryland, Oregon, and Wisconsin, and summarizing that none of them “found empirical evidence that could be used to demonstrate that when drug testing is applied to defendants as a condition of pretrial release it is effective at deterring or reducing pretrial failure, even when a system of sanctions is imposed”).

⁴⁰ See CJPB BAIL PRIMER, *supra* note 1, at 17 (noting that the use of electronic monitoring increased 32% between 2000 and 2014).

⁴¹ *Id.* (citing NAT’L INST. OF JUSTICE, ELECTRONIC MONITORING REDUCES RECIDIVISM 2 (2011), <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf> [<https://perma.cc/XMR5-TTDF>]).

makes court appearance more likely or rearrest less likely.⁴² In addition to raising Fourth Amendment, Eighth Amendment, and due process concerns,⁴³ these intrusive conditions run afoul of the parsimony principle because they do not appear to serve the state's legitimate pretrial interests.

To be parsimonious, release conditions should be carefully targeted to serve legitimate pretrial interests. Where less restrictive measures are available and effective, they should be used. For example, at least for defendants accused of public-order and otherwise low-level offenses, clearer summons forms and court date reminders by text message can be an effective way of ensuring appearance.⁴⁴ Many people miss court dates not because they are scofflaws, but because they do not understand their summons, they forget about their court date, or they did not arrange for leave from work or childcare in advance.⁴⁵ For these defendants, the imposition of more severe restraints on liberty would be unnecessary and, being un-parsimonious, would constitute an abuse of government authority.

The use of unnecessary conditions can also have unforeseen harmful consequences. Research indicates that over-supervision can make pretrial failure *more likely*. For example, one study found that "lower-risk defendants who were required to participate" in drug testing and treatment "had higher failure rates than their lower-risk counterparts who were not."⁴⁶ In addition, undue restrictions could cause the public to lose faith in the legal system. If people do not view the courts as fair, they may become less

⁴² See, e.g., VANNOSTRAND ET AL., *supra* note 39, at 24–27.

⁴³ See *United States v. Scott*, 450 F.3d 863, 871–72 (9th Cir. 2006) (holding that suspicionless drug testing of pretrial supervisees constituted an unreasonable search where the government failed to make either an individualized showing related to the defendant or empirical support for a pattern of drug use leading to nonappearance); *United States v. Karper*, 847 F. Supp. 2d 350, 363 (N.D.N.Y. 2011) (finding that mandatory imposition of curfew and electronic monitoring conditions on defendants accused of sex offenses violates Due Process and Excessive Bail clauses); *United States v. Polouizzi*, 697 F. Supp. 2d 381, 395 (E.D.N.Y. 2010) (same). *But see* *United States v. Stephens*, 594 F.3d 1033, 1041 (8th Cir. 2010) (holding that such conditions do not facially violate the Due Process Clause).

⁴⁴ See, e.g., BRICE COOKE ET AL., USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES 4 (Jan. 2018) (finding that redesigning New York City's summons form to make the most important information stand out reduced failure to appear by 13% and text message reminders reduced failure to appear by 26%), <https://www.courthousenews.com/wp-content/uploads/2018/01/crim-just-report.pdf> [<https://perma.cc/WFF9-VJFY>].

⁴⁵ *Id.* at 6.

⁴⁶ Kristin Bechtel et al., *supra* note 10, at 449 (citing Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. ARBITRATION 3, 5-6 (2009)). See also COMMISSION TO REFORM MARYLAND'S PRETRIAL SYSTEM, FINAL REPORT 14 (2014) ("over-supervision of low risk defendants produces poorer outcomes and wastes resources"), <http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf> [<https://perma.cc/X94K-UZLX>].

likely to rely on the judicial system to seek redress or even less likely to obey the law.⁴⁷

Another benefit of the parsimony principle is that it can help prevent pretrial services from becoming an arbitrary system of social control. Through conditions of release, the government has the power to regulate a person's physical movement (travel restrictions and curfews), bodily consumption (prohibitions on drug and alcohol use), and employment activity (requirements to seek or maintain a job).⁴⁸ But just because the government can do these things, does not mean it should. Unless tailored to an assessment of an individual's risk of flight or danger to the community, such restrictions look like government acting opportunistically to manipulate the behavior of those who have come within the ambit of the justice system, in service of the government's general social policy goals. Meanwhile, people not charged with crimes will be free to make their own choices in these matters. Without parsimony, restrictions on pretrial liberty will be arbitrary on some level.

Where police activity is concentrated in communities of color or the criminal law is enforced disproportionately against racial minorities, the harms of over-supervision are even greater. Racial disparities in the justice system mean that pretrial supervision, if unnecessarily restrictive, may replicate elements of previous forms of racial subordination.⁴⁹ This has an effect at the community level. Many communities of color are subject to greater state involvement and reduced liberty because policing and

⁴⁷ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 25 (1968) (arguing that sentencing disproportionate to the offense creates "a risk of either confusing morality or flouting it and bringing the law to contempt"); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCHOL., PUB. POL'Y & L. 78, 86 (2014) ("People who viewed legal authorities as more legitimate were more likely to report crime and criminals They were also more likely to be willing to cooperate with the legal system in prosecuting criminals"); Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1104–05 (2014) ("Studies indicate that people are both more likely to obey law and to accept decisions when they view the courts as legitimate. This includes ordinary citizens following the laws and accepting decisions related to rule breaking, disputes and misdemeanors, and criminals involved in felony behaviors.").

⁴⁸ See CJPP BAIL PRIMER, *supra* note 1, at 5–6 (2016) (explaining how conditions of release allow the government to control different aspects of an individual's life).

⁴⁹ See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that the modern criminal justice system has replicated the harms of the era of Jim Crow segregation).

prosecution have been concentrated there. Constraining pretrial conditions with parsimony would prevent this effect from being even more severe.

III. PRINCIPLE 3: SUPPORT RATHER THAN SUPERVISE

Pretrial services agencies are tasked with helping defendants make their court appearances and promoting public safety.⁵⁰ A pretrial services agency that focuses solely on monitoring defendants and reporting them for failure to comply with their conditions of release will not be the most effective at accomplishing these goals. Instead, a pretrial services agency should use its various tools and interventions in a way that supports defendants.

One challenge to maintaining a supportive, rather than supervisory, approach is that around 40% of pretrial services agencies are located within probation departments, which have a different mission.⁵¹ Whereas pretrial services agencies work with individuals who are presumptively innocent, probation departments work with adjudicated individuals who have fewer rights and protections.⁵² And while pretrial services agencies have a limited mission of assuring court appearance and protecting public safety, probation departments engage in criminal sanction and offender rehabilitation.⁵³ To avoid conflating the different functions, it is crucial for pretrial services agencies to maintain their independence, even if they work under the umbrella of a probation department.⁵⁴ The best practice is to house pretrial services separately from probation.

Pretrial services agencies should avoid resorting to probationary tactics because they risk setting defendants up for failure. In the probation context, supervision has been shown to increase recidivism among individuals who have an otherwise low risk of reoffending.⁵⁵ This is in large part because “the sheer number of [probation] requirements imposes a nearly impossible burden on many offenders.”⁵⁶ A similar consequence can result in the pretrial context. When a defendant violates a condition of

⁵⁰ See Nat'l Inst. of Corr., *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency* 44 (2017), <https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf> [<https://perma.cc/M3FS-BTAX>].

⁵¹ See *id.* at 33.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Vincent Schiraldi, *The Pennsylvania Community Corrections Story*, COLUM. U. JUST. LAB 6 (Apr. 25, 2018), <http://justicelab.iserp.columbia.edu/img/PACommunityCorrections4.19.18finalv3.pdf>. [<https://perma.cc/4DEH-LZ2J>].

⁵⁶ Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1035 (2013).

release, he or she may be subject to rearrest, detention, and prosecution for contempt of court—even though, in most cases, the conduct would be legal absent the release condition.⁵⁷ To avoid triggering these consequences, pretrial services agencies should attempt to handle violations of conditions of release administratively and invoke revocation proceedings only when the conduct actually interfered with the court’s function or presented a risk to public safety.⁵⁸

One simple service that effectively increases court appearance without overburdening defendants is automated phone-call reminders about upcoming court dates. While automated or manual phone-call reminders are common in other industries that seek to promote appearance rates—like doctors’ and dentists’ offices—these reminders are only beginning to take hold in our courts, despite being a proven, helpful tool. As a pioneer in adopting phone-call reminders, Multnomah County, Oregon (which includes Portland) ran a pilot program nearly a decade ago that placed automatic calls to pretrial defendants to alert them of upcoming court dates.⁵⁹ The program lowered failure-to-appear rates by 37% percent and saved the county over one million dollars in the first eight months, leading Multnomah county to expand the program countywide.⁶⁰ In 2017, a pilot program in New York City found that text message reminders alone improved appearance rates by 26% percent.⁶¹ Two empirical studies have each found that court reminders increase appearance rates.⁶² These reminders can be a simple, cost-effective intervention to improve appearance rates without disrupting peoples’ lives.

The success of these court reminder programs belies the notion that missed court dates are primarily the result of defendants’ flight from justice or willful disobedience of the courts. Rather, a working group on pretrial reform from Santa Clara County, California found “many of those who miss a court appearance do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather

⁵⁷ See, e.g., D.C. Code Ann. § 23-1329(d-1)(1) (2016).

⁵⁸ See STANDARDS ON PRETRIAL RELEASE § 4.3, commentary (NAT’L ASS’N OF PRETRIAL SERVS. AGENCIES 2004), available at <https://perma.cc/TP6H-F98Q>.

⁵⁹ MATT O’KEEFE, COURT APPEARANCE NOTIFICATION SYSTEM: 2007 ANALYSIS HIGHLIGHTS 1–2 (2007), available at <https://multco.us/file/26891/download> [<https://perma.cc/PAH8-RUTL>].

⁶⁰ *Id.*

⁶¹ BRICE COOK ET AL., USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES, UNIV. OF CHICAGO CRIME LAB & IDEAS 42, 4 (2018), <https://www.courthouse.news.com/wp-content/uploads/2018/01/crim-just-report.pdf> [<https://perma.cc/B2RJ-L6AM>].

⁶² Kristin Bechtel et al., *supra* note 10, at 460.

than out of a desire to escape justice.”⁶³ Because defendants miss court for mundane reasons, mundane solutions might be the answer. Phone call reminders, access to public transportation, or public childcare in the courtroom are not only more humane than arrest warrants and jail time—they are also likely to be more effective.

Community engagement and support is another untapped resource for pretrial service agencies. Santa Clara County is in the process of implementing a new pretrial program called Community Release.⁶⁴ In this program, defendants are released pretrial and choose a non-profit partner organization in the community, such as a church or community group.⁶⁵ This organization in turn promises to help support the person on release through methods such as providing transportation to court, reminding the person of upcoming court dates, and helping the person find a job or get the treatment and services they need.⁶⁶ Time will tell how the program fares, but it could lead to greater community engagement with the criminal justice system, improved pretrial outcomes, and improved community life and public safety.

IV. PRINCIPLE 4: DON'T CHARGE FEES

The criminal justice system is a public good. Like highways, public schools, and sanitation departments, its benefits redound to the entire community and therefore the entire community should pay for it. All aspects of the criminal justice system—police, prosecutors, public defenders, judges, courts, pretrial services, probation, prisons and jails—should be collectively funded through tax dollars. In many jurisdictions, however, criminal justice “user fees” charged to defendants, inmates and probationers have increased in number and size.⁶⁷ These “user fees” are common in the pretrial context.

⁶³ CTY. OF SANTA CLARA BAIL AND RELEASE WORK GRP., *supra* note 9, at 2, <http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=153959&MeetingID=7200>.

⁶⁴ *Silicon Valley De-Bug Leads the Charge on Criminal Justice Reform*, ROSENBERG FOUND.: NEWS (Feb. 17, 2018), <https://rosenbergfound.org/silicon-valley-de-bug-leads-the-charge-on-criminal-justice-reform/> [<https://perma.cc/95NK-ZU7B>]; CTY. OF SANTA CLARA BAIL AND RELEASE WORK GRP., *supra* note 9, at 63–64.

⁶⁵ CTY. OF SANTA CLARA BAIL AND RELEASE WORK GRP., *supra* note 9, at 64.

⁶⁶ *Silicon Valley De-Bug Leads the Charge on Criminal Justice Reform*, ROSENBERG FOUND.: NEWS (Feb. 17, 2018), <https://rosenbergfound.org/silicon-valley-de-bug-leads-the-charge-on-criminal-justice-reform/>; *see also* CTY. OF SANTA CLARA BAIL AND RELEASE WORK GRP., *supra* note 9, at 63.

⁶⁷ *See* ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<https://perma.cc/S9HJ-FNJE>].

For example, judges in some jurisdictions condition pretrial release on the defendant's submission to regular drug testing.⁶⁸ Defendants in many jurisdictions are charged fees between \$15 and \$20 per test.⁶⁹ Some jurisdictions charge defendants a fee for pretrial supervision.⁷⁰ For example, in Indiana, a defendant may be charged an initial pretrial service fee of \$100, a monthly fee of \$30, and an additional administrative fee of \$100.⁷¹ Almost every state⁷² charges defendants fees for electronic monitoring, which can run as high as \$900 per month.⁷³

Some states permit or even require judges to consider a defendant's financial circumstances when setting conditions of release and to waive or reduce fees for indigent defendants.⁷⁴ But those provisions are rare.⁷⁵ If an individual fails to pay fees associated with pretrial conditions of release, that individual may be subject to rearrest and detention for violating her conditions of release.⁷⁶ Thus, just as with the money bail system,

⁶⁸ See, e.g., COURT SERVS. AND OFFENDER SUPERVISION AGENCY FOR D.C., FY 2016 AGENCY FINANCIAL REPORT 20 (2016).

⁶⁹ See, e.g., *Frequently Asked Questions*, TARRANT COUNTY, TEXAS, <https://www.tarrantcounty.com/en/pretrial-services/frequently-asked-questions.html> (last visited Oct. 2, 2018) [<https://perma.cc/ZR5Q-7MYE>] (\$16 fee for each pretrial drug test); *Pretrial Reform in Kentucky*, Admin. Office of the Courts, Kentucky Court of Justice at 6 (Jan. 2013) (source on file with author) (Kentucky imposes "costly" fees on defendants for pretrial drug testing); Santa Clara County Office of Pretrial Services, *Instructions for Random Drug Testing*, <https://www.sccgov.org/sites/pretrial/Services/Forms/Documents/Female%20Drug%20Test%20Instructions.pdf> [<https://perma.cc/2LL8-NAZG>] (\$15 fee for drug testing).

⁷⁰ E.g. Ind. Code § 35-33-8-3.3 (2018). See also Wash. Rev. Code Ann. § 10.01.160(2) (2018) (defendant may be charged supervision fees); Fla. Stat. § 948.09 (2018) (imposing fees for pretrial supervision). But see *Court Guidelines*, MASS.GOV (Nov, 2016), <http://www.mass.gov/courts/docs/trial-court/pre-trial-release-guidelines.pdf> [<https://perma.cc/N85S-V5JT>] (Massachusetts does not charge fees for supervision as a condition of pretrial release).

⁷¹ Ind. Code § 35-33-8-3.3.

⁷² *State-By-State Court Fees*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees> [<https://perma.cc/S5G3-K8B4>].

⁷³ Eric Markowitz, *Chain Gang 2.0: If You Can't Afford This GPS Ankle Bracelet, You Get Thrown in Jail*, INT'L BUS. TIMES (Sept. 21, 2015, 7:55 AM), <http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283> [<https://perma.cc/2XCP-MUJN>]; Sukey Lewis, *Electronic Monitoring of Defendants is Increasing, But at What Price?*, KQED NEWS (Aug. 2, 2017), <https://www.kqed.org/news/2017/08/02/electronic-monitoring-of-defendants-is-increasing-but-at-what-price/> [<https://perma.cc/Z4KJ-R6KF>].

⁷⁴ See, e.g., W. Va. Code § 62-11C-7(a) (requiring judge to consider a defendant's ability to pay before setting a pretrial supervision fee).

⁷⁵ See generally CRIMINAL JUSTICE POLICY PROGRAM AT HARVARD LAW SCH., STATE CRIMINAL JUSTICE DEBT REFORM BUILDER, <https://cjdebtreform.org/> [<https://perma.cc/QBN4-Q28L>].

⁷⁶ Markowitz, *supra* note 73; see also, e.g., D.C. Code Ann. § 23-1329.

conditions of pretrial release can render an individual's pretrial liberty contingent on her financial circumstances.

The Supreme Court held in *Bearden v. Georgia* that the Fourteenth Amendment prohibits the revocation of probation for failure to pay a fine absent a showing that the failure was willful: "If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment."⁷⁷ The Court acknowledged the government's "fundamental interest in appropriately punishing persons," but concluded that it would be "fundamentally unfair" to imprison a probationer who failed to pay a fine "through no fault of his own" and despite "all reasonable efforts."⁷⁸ This reasoning applies with even greater force in the pretrial context when the defendant's liberty interest is stronger because she has not yet been convicted of a crime and when the government's countervailing interest in punishment is therefore absent.⁷⁹

Fee-based conditions of confinement may also induce defendants to plead guilty to avoid continued financial obligations. Researchers have observed this phenomenon in the bail context, where defendants agree to plead guilty for time served to get out of jail⁸⁰—one study found that misdemeanor defendants who are detained pretrial are 25% more likely than similarly situated released defendants to plead guilty.⁸¹ Releasees who owe fees for pretrial services may feel inclined to plead guilty in order to stop the charges from accumulating.⁸² In some cases it may be cheaper and therefore preferable to be on probation after having pled guilty than on electronic monitoring.⁸³ Although this phenomenon has been noted anecdotally in the press,⁸⁴ more rigorous study is needed to fully understand the scope and magnitude of the problem.

⁷⁷ *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

⁷⁸ *Id.* at 668–69.

⁷⁹ *Salerno*, 481 U.S. at 755.

⁸⁰ Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* 69 STAN. L. REV. 711, 714–15 (2017).

⁸¹ *Id.*

⁸² Lewis, *supra* note 73; Derek Gilna, *Electronic Monitoring Becomes More Widespread, but Problems Persist*, PRISON LEGAL NEWS (Oct. 9, 2017), [https://www.prisonlegalnews.org/news/2017/oct/9/electronic-monitoring-becomes-more-widespread-problems-persist/\[https://perma.cc/MWR8-UA4S\]](https://www.prisonlegalnews.org/news/2017/oct/9/electronic-monitoring-becomes-more-widespread-problems-persist/[https://perma.cc/MWR8-UA4S])

⁸³ Markowitz, *supra* note 73.

⁸⁴ Eric Markowitz, *Electronic Monitoring Has Become the New Debtors Prison*, NEWSWEEK (Nov. 23, 2015), <http://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html> [<https://perma.cc/Q93J-RHNM>]; Gilna, *supra* note 82.

The practice of charging defendants to fulfill the conditions of their release may be distorting sound policy decision-making. By externalizing the expense of pretrial services onto defendants, system actors do not have to find money in their budget to impose burdensome pretrial conditions. Private companies that contract with jurisdictions to provide services such as electronic monitoring boast that their services come at no cost to the jurisdiction.⁸⁵ Because pretrial programs are funded through user fees rather than local budgets, policymakers are never forced to weigh the expense of pretrial conditions against the public safety benefits they provide, or to create policies that narrowly tailor the imposition of the most expensive and burdensome conditions. They have neither the incentive to evaluate the effectiveness of those services nor a fiscal reason to constrain their application. In some cases, governments may actually profit from charging fees for pretrial services.⁸⁶ This creates an impermissible conflict of interest and a perverse incentive to maximize both the number of defendants who receive fee-based conditions and the number of fee-based conditions a defendant receives.

It is not just governments that profit from pretrial services: across the country, jurisdictions contract with for-profit companies to provide electronic monitoring, drug testing, and other services. These companies make their money from charging fees to pretrial defendants, indeed many of them have defendant payment portals on their websites.⁸⁷ Private vendors have an incentive to expand the use of their services as broadly as possible,⁸⁸ and they have lobbying arms that protect and expand their

⁸⁵ See, e.g., OFFENDER MANAGEMENT SERVICES, *About Us*, OFFENDER MANAGEMENT SERVICES, <http://offender-management.com/about-us/> [<https://perma.cc/P8EW-QMH6>] (last visited Jul. 30, 2018).

⁸⁶ Markowitz, *supra* note 84.

⁸⁷ See, e.g., OFFENDER MANAGEMENT SERVICES, *About Us*, OFFENDER MANAGEMENT SERVICES, <http://offender-management.com/payments/> [<https://perma.cc/PQW5-TTSL>] (last visited Jul. 30, 2018); SCRAM NORTH CAROLINA, <http://www.scramnorthcarolina.com/gov-pay-net> [<https://perma.cc/E6WQ-XC55>] (last visited Jul. 30, 2018). The website of a prominent vendor of alcohol monitoring technology, Scram Systems, explains in its profile of one jurisdiction that the county charges user fees that must be paid in advance in cash to cover daily monitoring costs. “Offenders are required to pay 1 to 2 weeks in advance, in cash, and are not allowed to fall behind in their payments. Nonpayment is considered a violation of the offender’s release and managed accordingly.” SCRAM SYSTEMS, *Case Studies: Burleigh County Sheriff Uses Continuous Monitoring for an Effect 24/7 Sobriety Program*, SCRAM SYSTEMS, <https://www.scramsystems.com/case-studies/burleigh-county-sheriff-uses-continuous-alcohol-monitoring-for-an-effective/> [<https://perma.cc/BV8S-U8VS>] (last visited Jul. 30, 2018).

⁸⁸ See Avalana K. Eisenberg, *Mass Monitoring*, 124 S. CAL. L. REV. 123, 174 (2017).

business model.⁸⁹ The rising political influence of private pretrial services vendors calls to mind the powerful influence that bail bond industry lobbyists have on policymaking, which implicates money bail.⁹⁰ Indeed, as bail reform gains momentum, bail bond companies recognize that their business model may be short-lived, and some are turning to pretrial services as an alternative.⁹¹ Eliminating fees for pretrial services would remove some of the profit motive and could help mitigate the distortion in policymaking that it brings.

V. PRINCIPLE 5: CONDITIONS OF RELEASE AND RESTRICTIONS ON LIBERTY SHOULD BE EVIDENCE BASED

Policy reform should always be informed by data and research. This is especially true in the pretrial context, where public safety and the liberty of presumptively innocent individuals are at stake. Troublingly, many conditions of release and forms of pretrial supervision currently in use have not been proven to be effective, or, in some cases, subject to methodologically sound study.⁹² Policymakers should closely consider the research, or lack thereof, before implementing pretrial release conditions. And courts and pretrial services agencies should implement robust data collection protocols that will enable them to internally track the success of certain release conditions and that will enable independent researchers to analyze their effectiveness.

Pretrial drug testing has not been shown to increase appearance rates or decrease pretrial arrest.⁹³ Randomized control trials have shown that

⁸⁹ Eric Markowitz, *Electronic Monitoring Has Become the New Debtors Prison*, NEWSWEEK (Nov. 23, 2015), <http://www.newsweek.com/2015/12/04/electronic-monitoring-has-become-new-debtors-prison-397225.html> [<https://perma.cc/UJ9H-JNUB>].

⁹⁰ Gillian B. White, *Who Really Makes Money Off Bail Bonds?*, THE ATLANTIC (May 12, 2017), <https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/> [<https://perma.cc/RSW5-H7PR>].

⁹¹ Dave Flessner, *Tennessee Recovery and Monitoring Offers Jail Alternative*, TIMES FREE PRESS (Sept. 24, 2017), <http://www.timesfreepress.com/news/business/aroundregion/story/2017/sep/24/jail-alternativecompany-monitors-pre-trial-or/450332/>

[<https://perma.cc/52ZK-2KPR>]; Renee K. Gadoua, *Tennessee County Uses CPS Technology, But Skepticism Surrounds Effectiveness*, BIG MOUNTAIN DATA (Aug. 18, 2015), <http://www.bigmountaindata.com/tennessee-county-uses-gps-technology-but-skepticism-surrounds-effectiveness/> [<https://perma.cc/JZ3F-85CP>].

⁹² Kristin Bechtel, et al., *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. CRIM. JUST. 443, 448–50, 460–61 (2017).

⁹³ See MARIE VANNOSTRAND, KENNETH R. ROSE & KIMBERLY WEIBRECHT, STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 20–24 (2011).

pretrial drug testing made no difference in either metric.⁹⁴ Indeed, one study actually found that for high risk defendants, drug testing made no difference in pretrial success rates, but for lower risk defendants, pretrial drug testing actually *lowered* pretrial success.⁹⁵ Another study found drug testing to be effective in reducing reincarceration of people on *probation*,⁹⁶ but subsequent studies have not been able to replicate those findings.⁹⁷ In any event, research in the probation context does not address one of the primary indicators of success in the pretrial context: improvement in defendant appearance rates.

Pretrial supervision practices involving meetings with a pretrial officer vary widely across jurisdictions and there is a dearth of systematic research demonstrating the effectiveness of particular supervision models.⁹⁸ Two small experimental studies showed that pretrial supervision had no effect on appearance or rearrest rates.⁹⁹ Although one study found some improvement in pretrial appearance rates from pretrial supervision, that study covered multiple jurisdictions with different pretrial supervision practices and was correlational, which is much weaker than a randomized control trial.¹⁰⁰ There are some strong studies of supervision in the

⁹⁴ John S. Goldkamp & Peter R. Jones, *Pretrial Drug-Testing Experiments in Milwaukee and Prince George's County: The Context of Implementation*, 29 J. RES. CRIME DELINQ. 430, 457–59 (1992); Mary A. Toborg et al., *Assessment of Pretrial Urine Testing in the District of Columbia* 14 (1989), available at <https://www.ncjrs.gov/pdffiles1/Digitization/119968N CJRS.pdf> [<https://perma.cc/H4AU-D4ZD>]. See also Stefan Kapsch & Louis Sweeny, Multnomah County DMDA Project: Evaluation Final Report (1990).

⁹⁵ Marie VanNostrand & Gina Keebler, *Pretrial Risk Assessment in the Federal Court*, 31 Washington, Office of Federal Detention Trustee (2009).

⁹⁶ Angela Hawken & Mark Kleiman, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE 4* (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> [<https://perma.cc/5SN5-XSS7>].

⁹⁷ Pamela K. Lattimore et al., *Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?*, 15 CRIM. & PUB. POL'Y 1103, 1104 (2016); Daniel J. O'Connell et al., *Decide Your Time: A Randomized Trial of Drug Testing and Graduated Sanctions Program for Probationers*, 15 CRIM. & PUB. POL'Y 1–73, 1086 (2016).

⁹⁸ See Marie VanNostrand, Kenneth R. Rose & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision*, 32 (2011); Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, REFORMING CRIMINAL JUSTICE 42–44 (2017).

⁹⁹ James Austin, Barry Krisberg & Paul Litsky, *The Effectiveness of Supervised Pretrial Release*, 31 CRIME AND DELINQ. 519, 523–35 (1985); John S. Goldkamp & Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, 2 J. EXPERIMENTAL CRIMINOLOGY 143, 154 (2006).

¹⁰⁰ CHRISTOPHER T. LOWENKAMP & MARIE VANNOSTRAND, *EXPLORING THE IMPACT OF PRETRIAL SUPERVISION ON PRETRIAL OUTCOMES*, 15–16 (2013); see also Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, REFORMING CRIMINAL JUSTICE 43 (2017).

probation and parole context that show that required meetings have no effect on new criminal activity, but do tend to increase technical violations.¹⁰¹

There is a lack of sound research about the effectiveness of electronic monitoring in the pretrial context.¹⁰² The research that does exist has not found that electronic monitoring improves pretrial outcomes.¹⁰³ One jurisdiction found that defendants released pretrial with electronic monitoring had similar failure to appear and new arrest rates as those released without electronic monitoring, and those on electronic monitoring actually experienced more technical violations than those without electronic monitoring.¹⁰⁴ One problem with the existing research is that there have been no randomized control trials. Moreover, observational research suffers from the problem that individuals who are put on electronic monitoring are usually considered higher risk than those individuals who are released without electronic monitoring.¹⁰⁵

Notably, text message court reminders are the one pretrial intervention with a proven track record of success.¹⁰⁶ One study found through a randomized control trial that text message court reminders reduced failure to appear rates by 26%.¹⁰⁷ Hypothesizing that people did not make a deliberate decision to miss court dates, researchers decided to test a behavioral intervention (text message reminders) rather than an

¹⁰¹ See Geoffrey C. Barnes et al., *Low-Intensity Community Supervision for Low-Risk Offenders*, 6 J. EXPERIMENTAL CRIMINOLOGY 159, 181–82 (2010); Susan Turner et al., *Evaluating Intensive Supervision Probation/Parole (ISP) For Drug Offenders*, 38 CRIME AND DELINQ. 539 (1992).

¹⁰² Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, REFORMING CRIMINAL JUSTICE 45–46 (2017).

¹⁰³ Kristin Bechtel et al., *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. J. CRIM. JUST. 443, 460 (2017); Marie VanNostrand & Gina Keebler, *Pretrial Risk Assessment in the Federal Court*, 27 Washington, Office of Federal Detention Trustee (2009).

¹⁰⁴ VanNostrand, *supra* note 103, at 25–26.

¹⁰⁵ *Id.* at 27. In the probation and parole context, electronic monitoring has been shown to reduce recidivism for gang members and sex offenders. Stephen V. Gies et al., *Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program, Final Report* vii (Apr. 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf> [<https://perma.cc/2TAZ-E49Y>]; Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 CRIMINOLOGY & PUB. POL'Y 61 (2006). It is unclear how those results translate to the larger population of pretrial defendants, and they do not speak to the pretrial concern of failure to appear rates, which are not relevant in the probation and parole context.

¹⁰⁶ Bechtel, *supra* note 103, at 460; Cook et al., *supra* note 44, at 4.

¹⁰⁷ Cook et al., *supra* note 44, at 4.

enforcement intervention (increasing the penalty for failing to appear).¹⁰⁸ The results of the study confirmed that simply reminding people of their court date can lead to significantly higher appearance rates.¹⁰⁹

Courts and policymakers should prioritize conditions of release that have been proven effective through rigorous study. But they should also take steps to understand the effectiveness of their own policies. Jurisdictions should adopt thorough data collection practices that allow them to track and analyze case outcomes in which various conditions of release are imposed. They should also make this data available to independent researchers to improve our collective understanding of the effectiveness of release conditions.

CONCLUSION

The current momentum behind money bail reform holds much promise for a more just and effective pretrial system. But there is a risk that imposing excessive conditions of release will reproduce some of the harms of money bail. The five principles of pretrial release outlined above offer a roadmap to lasting pretrial reform that avoids replicating some of the injustices of money bail.

¹⁰⁸ *Id.* at 5–7.

¹⁰⁹ *Id.* Two other empirical studies have also found that court date reminders increase appearance rates. Bechtel, *supra* note 103, at 460–61.