

An abstract graphic featuring teal wireframe lines that form a series of overlapping, flowing loops. Scattered throughout the background are small, light-colored numbers (0-9).

6. PRE-TRIAL CRIMINAL

Section 6.1 Pre-Trial Supervision

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6.1.1 Introduction

Predicting human behavior has been a scientific pursuit since the inception of civilization. From weighing down suspected witches with stones, to forecasting the likelihood of criminal conduct by measuring a forehead or classifying physical features, science has sought to provide tools upon which we can reasonably rely in the interest of community safety. While today “scientific” studies such as phrenology¹ are considered absurd, years ago these scientific hypotheses were used to justify many of the policies and practices of our criminal justice system. That being said, science and technology can provide us with tools to assist judicial officers in weighing community interests of safety with those of an individual’s right to be free of restraints. In this section we will explore the pros and cons of monitoring technology in the pre-trial context. We will also discuss the use of predictive technology, such as pre-trial risk assessments, and what courts should consider before using these tools.

Monitoring Technology can generally be classified into two categories--location monitoring and substance use monitoring.

6.1.2 Location Monitoring Technology

Location monitoring technology is used to ensure that an individual stays in a dedicated place, i.e. home, or can ensure someone does not go near a certain person or place.

Electronic Home Monitoring (EHM) or Electronic Home Detention (EHD) may be used both in the pretrial and post-conviction arena.

Pros: Allows an individual to remain in the community where they may work, access support systems, provide support for their families, or attend school, while being monitored through electronic means. Use of this technology may also help address overcrowding issues in local jails saving local jurisdictions money and resources.

Cons: Does not, in and of itself, prohibit individuals from engaging in other criminal conduct within the confines of the permitted

location, nor from ingesting lawful or unlawful substances absent additional monitoring capabilities. Escape is as easy as cutting off the monitoring device. Requires staffing to monitor individuals on release.

Global Positioning Systems (GPS) can provide 24 hour location monitoring for individuals.

Pros - The same as EHM and EHD, but provides a little more freedom of movement. Additionally, GPS may assist in ensuring compliance with distance restrictions from certain locales such as schools, residences or work areas. It is particularly useful in situations involving sex offenders, or in domestic violence cases.

Cons - Same as EHM and EHD. As with all technologies, maintenance and potential malfunctions are always a concern.

6.1.3 Substance Use Monitoring

Substance Use Monitoring is often a way to ensure that an individual is abstaining from using both legal and illicit substances. This type of monitoring is often used in cases of driving while impaired but can also be helpful in other instances where there is a nexus between use of the substances and the underlying criminal conduct.

Transdermal alcohol monitoring systems, breath testing, ignition interlock devices (IID), urinalysis, and hair follicle testing are the least invasive methods to ensure individuals are not using alcohol or non-prescribed mood altering substances. Other more invasive methodologies for measuring substance use, i.e., blood tests, exist, however may not necessarily be appropriate in the pre-trial context.

Transdermal alcohol monitoring allows for continuous monitoring of alcohol consumption and is based upon measuring alcohol secreted through the skin.²

Pros - This type of monitoring is continuous as opposed to a specific point in time. As such, a broader picture of use is developed. This type of monitoring can easily be combined with GPS, IID or EHM

monitoring. The monitors must be worn at all times but can be less obtrusive than other monitors. They may act as an inhibitor when the individual knows that monitoring is constant.

Cons - At this time, only alcohol use is measured. They cannot account for use of other substances and reporting time may lag behind an actual consumption event. They do not, standing alone, prohibit an individual from driving a vehicle or engaging in other criminal conduct. Malfunctioning devices or user error may cause erroneous results. They may require the individual to have a cell phone or land line to download results on a regular basis.

Breath testing allows for random checks for alcohol consumption events.

Pros- Breath testing instruments are ubiquitous and easy to use. They can be used at home and randomized so an individual does not know when they will be required to provide a sample; alternatively they can be used on demand or on a particular schedule. They can be used in conjunction with other monitoring devices such as IID, GPS and EHM. They provide easy access and results are downloaded quickly when the test is completed. They can also be done promptly at a set location pre-determined by the jurisdiction, i.e., probation office.

Cons – They can malfunction, there can be user error, they require individuals to have certain devices available to download information or may require them to travel to and from a facility. They do not prohibit driving or criminal conduct.

IIDs prevent a vehicle from starting if the device detects pre-set levels of alcohol as measured through a breathalyzer or transdermal monitoring.

Pros – IIDs prevent driving of a vehicle if the individual has an alcohol concentration above set standards. They can also be equipped with a camera to show who is blowing into the machine.



Cons – They can malfunction. There is always a danger of circumventing the mechanism by having others blow into machine or disconnecting it altogether. However, tampering should be detected by the device’s monitoring system.

6.1.4 Risk Assessment Tool

The most ubiquitous form of predictive technology used in the criminal pretrial context is the **risk assessment tool**. The risk assessment tool uses demographic data and algorithms to provide information regarding the “risk” (high, low, moderate) associated with releasing an individual charged with a criminal offense.³

Pros – Pre-trial risk assessment tools provide additional information for the court to consider in making release decisions and have been shown to be better predictors of risk than judicial decision making alone. These tools can also lead to better outcomes across varied populations.⁴

Cons – Release decisions need to be individualized, and the PTRAs currently available use aggregated data to provide an analysis of risk. There are significant concerns that bias and disproportionality that have been a part of our justice system are baked in to such a degree, that the data relied upon by these tools is suspect. A tool that works for one jurisdiction may not work for another; a lot of preliminary work should be engaged in before deciding what, if any, PTRAs a jurisdiction will use.⁵

Science and technology are tools in the arsenal of justice that continue to evolve. As artificial intelligence, predictive analytics, and monitoring technologies become more accurate and easier to use, it is tempting to think that judicial discretion will go the way of the dinosaurs. However, we need not hang up our black robes quite yet. As judicial officers, we are still in the best position to ascertain and address the unpredictability of the human element that we see in our courts daily. We are not yet at the point where we ask “Hey Siri, what pretrial conditions should I impose?” Our own humanity continues to be the greatest tool we own.

6.1.5 Endnotes

1. Phrenology is defined as the detailed study of the size and shape of the cranium as an indication of character and mental abilities used to predict criminality of certain individuals.
2. Nancy P. Barnett, et al., *Predictors of Detection of Alcohol Use Episodes Using a Transdermal Alcohol Sensor*, 22 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 1, 86-96 (2014).
3. Phillip Knox & Peter Keifer, *The Risks and Rewards of Risk Assessments*, TRENDS IN ST. CTS., (2017) <https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/The-Risks-and-Rewards-of-Risk-Assessments.aspx>
4. National Institute of Corrections Community Collaborative Network, Series 2, Project number 16C5012, (March 2017), <https://nicic.gov/library/032859>.
5. Intisar Surur & Andrea Valdez, *Washington State Pretrial Reform Task Force: Final Recommendations Report*, (February, 2019), <http://www.courts.wa.gov/subsite/mjc/docs/PretrialReformTaskForceReport.pdf>

