

FROM DECARCERATION TO E-CARCERATION

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Each year, millions of Americans experience criminal justice surveillance through electronic ankle monitors. These devices have fundamentally altered our understanding of incarceration, punishment, and the extent of the carceral state, as they are increasingly offered as moderate penal sanctions and viable solutions to the problem of mass incarceration. They purportedly enable decarceration, albeit with enhanced surveillance in the community as the compromise. Proponents of the devices tout the public safety and cost benefits while stressing the importance of depopulating prisons and returning individuals to their communities. In recent years, an oppositional movement has developed, focused on highlighting the social harms of electronic monitoring as part of a burgeoning e-carceration regime, where digital prisons arise, not as substitutes to brick and mortar buildings, but as net-widening correctional strategy operationalized to work in tandem. This Paper examines this debate on the effectiveness of electronic ankle monitors using a social marginalization framework. It argues that the current scholarly debate on the use of electronic ankle monitors is limited because it fails to consider the potential harm of social

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marginalization, particularly for historically subordinated groups subjected to this form of surveillance. It uses system avoidance theory to elucidate the argument that intensive criminal justice surveillance has the counterproductive effect of causing those subjected to surveillance to avoid institutions necessary for adequate reintegration and reduction in recidivism. It offers a theory of the carceral state as malleable, extending beyond prison walls, expanding our carceral reality, and placing great strains on privacy, liberty, and democratic participation. Ultimately, it stresses that a move from decarceration to e-carceration, or from mass incarceration to mass surveillance, will likely fail to resolve, and may exacerbate, one of the greatest harms of mass incarceration: the maintenance of social stratification. Thus, adequately addressing this challenge will demand a more robust and transformative approach to criminal justice reform that shifts a punitive framework to a rehabilitative one focused on proven methods of increasing defendants' and former offenders' connections to their community and civic life, such as employment assistance programming, technical and entrepreneurial skill development, supportive housing options, and mental health services.

I cannot sleep. There is a device on my leg.

It requires that I wake up an hour early so I can plug it into a charger and stand next to the outlet, like a cell phone charging up for the day. Not the day, actually, but 12 hours. After that, the device runs out of juice. Wherever I am, I have to find an outlet to plug myself into. If I don't, I'm likely to be thrown back onto Rikers Island.

The device is my ankle bracelet, which I've now been wearing for 63 days. I wear it afraid that someone at work will notice the bulge. When I go to school, I worry my friends will spot it and leave me. I push it up into my jeans, hoping they won't see. But the higher up I push it, the more it starts to hurt; most days, my feet go numb. I try wearing bell-bottoms.

....

When I came home, I wasn't the same "I," and "home" wasn't home anymore. . . . I have been alternating three pairs of pants for almost three months now—the only pants that can accommodate the device.

. . . .

The device has me strapped, too, to a mistake I made at the age of 22. The device is, both literally and metaphorically, my greatest source of pain.

But every day I rise, stand by the socket, and charge my ankle

—M.M.¹

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¹ M.M., *Living with an Ankle Bracelet*, MARSHALL PROJECT (July 16, 2015, 12:31 PM), <https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet> [<https://perma.cc/C9LN-RYYD>].

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INTRODUCTION

Imagine a world where you are excluded under law and policy from visiting certain parts of a city, or a neighborhood. That you had to seek specific permission to be out at night. That you were restricted from grocery shopping, attending your child's school play, going to hair salons, using a laundromat, or stopping anywhere headed to and from your preapproved destination. Even more, that you are denied jobs, presumed to be dangerous, with an inherent propensity for criminality, and seen as less than human simply upon the basis of your appearance. Well, you might first think of the Jim Crow Era, or Apartheid in South Africa. But let us say on top of that you were subjected to constant technological surveillance of your location from an eye in the sky, and audio surveillance of any of your conversations, for long periods, perhaps even for the duration of your natural life. That a voice calls out and reminds you that you are in violation when you come too close to a certain location or your time to be out has come to an end. That courts of law have said that this is not punishment, but rather a favor because you consented, even though the only other option was being locked alone in a concrete cage about the size of a parking spot. And that when you complained about it, the first thing anyone ever said was "But, isn't it better than being in a cell?" Now, you might be thinking about a science fiction film from the 80s or 90s, an episode of *Black Mirror*, or a new installation in the *Hunger Games* series.

However, this Orwellian-like dystopia is real. On any given day, hundreds of thousands of citizens are subjected to similar restrictive surveillance schemes through the use of electronic ankle monitors, where they are free, yet seemingly unfree, despite the fact that most have not been convicted of a crime and others have served full sentences. This expanding reliance upon correctional surveillance technology as tools for decarceration at pretrial and post-conviction hearings marks a transformation that is quietly taking place within the criminal justice system with seemingly little fanfare and scant attention. This shift that

will ultimately challenge the way in which we think about and understand incarceration, punishment, and the extent of the carceral state, is the rise of e-carceration. The concept of e-carceration seeks to encapsulate the outsourcing of aspects of prison into communities under the guise of carceral humanism: the repackaging or rebranding of corrections and correctional programming as caring and supportive, while still clinging to punitive culture. These surveillance practices raise a number of important questions about how sincere we are as a society in moving beyond the current hyperpunitive age of over-incarceration, and whether we are willing to commit to the reprioritization of rehabilitation and reintegration not only as legitimate goals but also as a form of transitional justice² for the great harms caused by mass incarceration.

This Paper argues that current forms of electronic correctional surveillance, such as electronic ankle monitors, contribute to social marginalization. This social marginalization finds congruence with the social science literature on “othering,”³ often understood as processes and practices of problematizing the presence of others, and also with the concept of “racializing surveillance,”⁴ which signals those moments when enactments of surveillance reify boundaries, borders, and bodies along racial lines, and where the outcome is often discriminatory treatment of those who are negatively racialized by such surveillance. However, social marginalization in this correctional context is defined by its “sever and tether” effects, where electronic ankle monitoring programs act to sever

² See Matiangai Sirleaf, *Emerging Voices: Making Room for the Distributive in Transitional Justice*, OPINIOJURIS (Aug. 13, 2013), <https://opiniojuris.org/2013/08/27/emerging-voices-making-room-distributive-transitional-justice> [<https://perma.cc/S93R-RRL7>]; Matiangai V.S. Sirleaf, *Beyond Truth and Punishment in Transitional Justice*, 54 VA. J. INT'L L. 223 (2014).

³ See generally Lajos. L. Brons, *Othering, An Analysis*, 6 TRANSCIENCE 69 (2015); Debbie Epstein et al., “Othering” Education: Sexualities, Silences, and Schooling, 25 REV. RES. EDUC. 127 (2000); Matthew B. Ezzell, “Barbie Dolls” on the Pitch: Identity Work, Defensive Othering, and Inequality in Women’s Rugby, 56 SOC. PROBS. 111 (2009); Michael Edward Hess et al., *Localized Othering: Understanding Regionally and Geographically Bound Stereotypes in Appalachia*, 24 J. APPALACHIAN STUD. 8 (2018); Tom Meisenhelder, *African Bodies: “Othering” the African in Precolonial Europe*, 10 RACE, GENDER, & CLASS 100 (2003); David Palfreyman, *Othering in an English Language Program*, 39 TESOL Q. 211 (2005); George Petros et al., *HIV/AIDS and ‘Othering’ in South Africa: The Blame Goes On*, 8 CULTURE, HEALTH & SEXUALITY 67 (2006); Daniel Tope et al., *Othering Obama: Racial Attitudes and Dubious Beliefs About the Nation’s First Black President*, 57 SOC. PERSP. 450 (2014).

⁴ SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* 42 (Duke Univ. Press 2015).

individuals from their communities and families through the erection of significant barriers to reentry, while simultaneously tethering them to a surveillance regime wholly unconcerned with rehabilitation and reintegration. Electronic monitor programs act to push those under surveillance further on the margins of society, divorcing them from the very things that are necessary for reentry, while at the same time failing to make us any safer, nor significantly reducing prison populations.

Mass Incarceration and Decarceration

It is almost surprising to imagine the degree of renown that “mass incarceration” has come to hold in such a short period of time, as a descriptor for what has been labeled one of the biggest problems facing the American criminal justice system in our lifetime.⁵ It has become virtually impossible, and almost treacherous, to discuss the American criminal justice system without referencing mass incarceration as a central theme and problem.⁶ This referential mandate reaches far and wide, from town hall sessions on the issue, to documentaries and books, to news specials.⁷ If one were to conduct a quick online query on “mass incarceration,” the results would include a kaleidoscope of media images, videos, articles, speeches, and even songs on the topic.⁸ Yet, defining mass

⁵ JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 18 (2017).

⁶ Graduate Programs Staff, *5 Challenges Facing Criminal Justice Professionals Right Now*, NE. U. (July 29, 2016), <https://www.northeastern.edu/graduate/blog/5-challenges-facing-criminal-justice-professionals> [<https://perma.cc/3N2N-7AMQ>]; Chris Coons & Thom Tillis, *America’s Criminal Justice System Is Broken*, CNN, <https://www.cnn.com/2017/01/09/opinions/america-needs-criminal-justice-reform-coons-tillis/index.html> [<https://perma.cc/A9H8-P4X6>] (last updated Jan. 9, 2017, 8:50 AM); *Ending Mass Incarceration*, VERA INST. JUST., <https://www.vera.org/ending-mass-incarceration> [<https://perma.cc/J4BC-2X5K>].

⁷ See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); *RELEASE Town Hall on Gender Justice and Mass Incarceration March 25*, BREAD & ROSES COMMUNITY FUND, <http://breadrosesfund.org/release-town-hall-on-gender-justice-and-mass-incarceration-march-25> [<https://perma.cc/6TKW-WSHA>] (plan for town hall to discuss mass incarceration); 13TH (Netflix 2016); Last Week Tonight, *Prison: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (July 20, 2014), https://www.youtube.com/watch?v=_Pz3syET3DY [<https://perma.cc/5DB2-Q96A>].

⁸ See generally vlogbrothers, *Mass Incarceration in the U.S.*, YOUTUBE (Apr. 4, 2014), <https://www.youtube.com/watch?v=NaPBcUUqbew> [<https://perma.cc/9NU5-HXR2>];

incarceration and understanding its roots and sources of perpetuation may not be as easy.

Many scholars describe mass incarceration simply as the prison boom that led to increased numbers of inmates.⁹ Here, the focus of examination rests upon the number of bodies confined within state and federal correction facilities.¹⁰ Indeed, the rapid escalation of the size of prisons and the inmate populations filling them should be of great interest to anyone seeking to understand the criminal justice system. Over the past 50 years the number of individuals incarcerated grew by 700%, from roughly 330,000 to over 2 million today, with an additional 4.5 million under correctional supervision.¹¹ These numbers, while often cited, may not capture the enormity of incarceration. Nearly fifteen million people enter American jails every year.¹² To put this in perspective, it is important to note that around sixty percent of all

KENDRICK LAMAR, *The Blacker the Berry*, on TO PIMP A BUTTERFLY (Interscope Records 2015); COMMON, *Black American Again*, on BLACK AMERICA AGAIN (Def Jam Recordings 2016) (“The new plantation, mass incarceration, instead of educate they’d rather convict the kids, as dirty as the water in Flint, the system is”); KILLER MIKE, *Reagan*, on R.A.P. MUSIC (Williams Street Records 2012) (“[F]ree labor is the cornerstone of U.S. economics . . . you think I am bullshitting, then read the 13th Amendment, involuntary servitude and slavery it prohibits, that’s why they giving drug offenders time in double digits”).

⁹ See Jennifer Roche, *The Policies Behind the Prison Boom*, BECKER FRIEDMAN INST. FOR ECON. U. CHI. (Dec. 31, 2015), <https://bfi.uchicago.edu/news/the-policies-behind-the-prison-boom> [<https://perma.cc/8HZX-DNWH>].

¹⁰ See Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL’Y INITIATIVE (Mar. 14, 2018) <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/F2BD-LZQ8>] (“2.3 million people in 1,719 state prisons, 102 federal prisons, 1,852 juvenile correctional facilities, 3,163 local jails, and 80 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.”).

¹¹ *Overcrowding and Overuse of Imprisonment in the United States: Submission to the Office of the High Commissioner for Human Rights*, AM. CIV. LIBERTIES UNION (May 2015), <http://www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf> [<https://perma.cc/SJX8-N89P>]; see also *The Punishing Decade: Prison and Jail Estimates at the Millennium*, JUST. POL’Y INST. (May 2000), http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf [<https://perma.cc/6N67-US3N>]; *Probation and Parole in the United States, 2016*, BUREAU JUST. STAT. (Apr. 2018), https://www.bjs.gov/content/pub/pdf/ppus16_sum.pdf [<https://perma.cc/6C8M-YNJV>].

¹² See Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017) (discussing the proliferation of misdemeanors).

individuals detained have not been convicted of any crime.¹³ Even more, between 1980 and 2010, the population of adult males who had received a felony conviction rose from 5.25% to 12.81%.¹⁴ For African American men, the number increased from 13.29% to 33.01%.¹⁵ The precise reason for this explosion in the prison population is a constant source of debate.¹⁶

From a deterrence and incapacitation perspective of punishment, the swelling of prison populations may not appear to be problematic, but rather a natural extension of greater needs in crime control. Yet, for those who take issue with the sharp rise in the number of inmates, such frequent use of detention is seen as unnecessary, counterproductive, and costly.¹⁷ Opponents of increased incarceration often highlight the high number of individuals held in pretrial detention simply on the basis of being unable to afford bail, racial disproportionalities, inhumane conditions within prisons, over-criminalization of drug addiction, corruption within law enforcement and prosecutor offices, and the staggering costs of maintaining state and federal prison populations, as just grounds for reconsidering the over-reliance on incarceration. Interestingly, this criticism has come from a wide array of political and social viewpoints, ranging from the Koch brothers, Charles and David Koch of Koch

¹³ Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/7J4Z-H8X6>].

¹⁴ Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1808 (2017). David Trilling, *Number of U.S. Felons Tripled in Three Decades*, JOURNALIST'S RESOURCE (Dec. 1, 2017), <https://journalistsresource.org/studies/government/criminal-justice/felony-triple-prison-conviction-black> [<https://perma.cc/5LLS-CM6L>].

¹⁵ Trilling, *supra* note 14.

¹⁶ See generally COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 14 (Jeremy Travis et al. eds., 2014), <https://www.nap.edu/read/18613/chapter/1> [<https://perma.cc/UP2A-JAKS>] (explaining the causes and repercussions of the prison boom); see also Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/D7WC-E5HM>].

¹⁷ See *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/X4UG-FHMZ>] ("Our prison system costs taxpayers \$80 billion per year."); *The Problem: Recidivism [sic] & Mass Incarceration*, PRISON SCHOLAR FUND, <https://www.prison scholars.org/what-we-do/222-2> [<https://perma.cc/EE4Q-P2KE>].

Industries, to Sherrilyn Ifill, President of the NAACP Legal Defense and Education Fund.¹⁸

The wide concerns over rising prison populations have forced opponents of mass incarceration to contemplate the possibilities for halting or reversing the growth of imprisonment through decarceration.¹⁹ The focus of decarceration is the development and implementation of strategies that reduce prison populations.²⁰ Over the past decade, decarceration has been thought of as increasingly viable and necessary as a means of resolving mass incarceration. Indeed, the wide, bipartisan support that it has received gives it the appearance of a movement. Since 2006, the national rate of imprisonment has decreased seven percent.²¹ This was the result of twenty-eight states significantly reducing their prison populations through intentional strategy and programming.²² Decarceration efforts have even been prompted through court order. In *Brown v. Plata*, the U.S. Supreme Court ruled that the overcrowded prison system in California, which was over 300% capacity, subjected inmates to unquestionably cruel and unusual punishment in violation of the Eighth Amendment, and ordered the state to reduce its prison

¹⁸ Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, ATLANTIC (Mar. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615> [https://perma.cc/U6RS-RVZB]; Sherrilyn Ifill, *LDF Statement on Senate Passage of First Step Act*, LDF (Dec. 19, 2018), <https://www.naacpldf.org/press-release/ldf-statement-senate-passage-first-step-act> [https://perma.cc/E3Z6-RMAA].

¹⁹ Lauren-Brooke Eisen & James Cullen, *Update: Changes in State Imprisonment*, BRENNAN CTR. FOR JUST. (2016), <https://www.brennancenter.org/sites/default/files/analysis/UpdateChangesinStateImprisonment.pdf> [https://perma.cc/Q2KX-24XB].

²⁰ *Decarceration*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/social-sciences/dictionaries-thesauruses-pictures-and-press-releases/decarceration> [https://perma.cc/E7YT-5VCC] (last updated Oct. 23, 2019). The focus of decarceration is generally understood as the development and implementation of strategies that reduce prison populations. However, if you ask Dr. Ernest Drucker, Research Professor in Criminal Justice and Anthropology at John Jay College of Criminal Justice, City University of New York, he would say that decarceration means (and must mean) more than getting individuals out of prison. It means healing trauma, restoring civil rights, and ending the suffering this system has imposed on American families and communities. See Ernest Drucker, *What Is Decarceration?*, MEDIUM (Sept. 20, 2016), <https://medium.com/@Decarceration/what-is-decarceration-e761feb6275f> [https://perma.cc/9KND-5ZFR].

²¹ Eisen & Cullen, *supra* note 19.

²² *Id.*

population.²³ During his last few months in office at the end of 2016, President Obama commuted the sentences of nearly 1,000 inmates, more than any other president.²⁴ Even more, in June 2017, U.S. Senators Cory Booker and Richard Blumenthal introduced the Reverse Mass Incarceration Act, which would incentivize states to reduce their prison populations, through a disbursement of a twenty billion dollar grant over ten years, to states that reduce their prison population by at least seven percent for three years, while not allowing the crime rate to increase more than three percent.²⁵ It is clear that decarceration has been able to generate significant traction in both social and political sectors.

Electronic Surveillance as Decarceration

In this decarceration momentum, questions have been raised about public safety.²⁶ Critics have articulated concerns that reducing prison populations through outright release could jeopardize recent gains made in lowering crime rates.²⁷ The general response from decarceration

²³ *Brown v. Plata*, 563 U.S. 493, 517–22 (2011).

²⁴ Christina Beck, *President Obama's 944 Commutations: Why He's Releasing Prisoners*, CHRISTIAN SCI. MONITOR (Nov. 5, 2016), <https://www.csmonitor.com/USA/Justice/2016/1105/President-Obama-s-944-commutations-Why-he-s-releasing-prisoners> [https://perma.cc/JQY2-WSM2].

²⁵ Reverse Mass Incarceration Act of 2017, S. 1458, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1458/text> [https://perma.cc/E2H3-RWFX]; Glenn E. Martin, *We Must Pass the Reverse Incarceration Act if We Want Prison Reform*, HILL (Oct. 6, 2017), <http://thehill.com/opinion/criminal-justice/354288-we-must-pass-the-reverse-incarceration-act-if-we-want-prison-reform> [https://perma.cc/FR85-H7Z6].

²⁶ See generally Steven Raphael, *How Do We Reduce Incarceration Rates While Maintaining Public Safety?*, 13 CRIMINOLOGY & PUB. POL'Y 579 (2014); Jody Sundt et al., *Is Downsizing Prisons Dangerous? The Effect of California's Realignment Act on Public Safety*, 15 CRIMINOLOGY & PUB. POL'Y 315 (2016); *Nevada Leaders Advance Recommendations to Address Growing Prison Population, Improve Public Safety*, CRIME & JUST. INST. (Jan. 14, 2019), <https://web.archive.org/web/20191003235651/https://www.crj.org/news-article/nevada-leaders-advance-recommendations-address-growing-prison-population-improve-public-safety> [https://perma.cc/WST8-YCNM].

²⁷ See Daniela Altimari, *Critics Again Target Early-Release Prison Program*, HARTFORD COURANT (Mar. 22, 2013), <https://www.courant.com/politics/hc-xpm-2013-03-22-hc-early-release-prisoners-0323-20130322-story.html> [https://perma.cc/L8GS-MXJ3]; The Times Editorial Board, *The Truth About 'Early Release'*, L.A. TIMES (Sept. 1, 2013, 12:00 AM), <https://www.latimes.com/opinion/editorials/la-xpm-2013-sep-01-la-ed-early-release-prisoners-california-20130901-story.html> [https://perma.cc/YQA5-RBV3]; Magnus Lofstrom & Brandon

proponents has centered on the promotion of “smart decarceration.”²⁸ Smart decarceration argues that through proactive, transdisciplinary, and empirically driven strategies, effective decarceration can be achieved while also maximizing public safety.²⁹ This balancing act has shifted the focus of decarceration toward the development and implementation of “innovative” alternatives to incarceration that ensure public safety. Toward this end, electronic surveillance technologies have garnered a lot of attention and emerged as viable solutions that ease mass incarceration and contribute to security.

The surveillance technology deployed by corrections departments across the country at the pretrial, post-conviction, and parole stages vary. However, they all exist along the *electronic surveillance pipeline*.³⁰ This pipeline operates on the front end with the utilization of predictive analytics and algorithmic risk assessments that purport to predict future behaviors of individuals through analyzing data points, such as age, sex, geography, family background, criminal history, and employment status through a numerical formula.³¹ Such assessments are often used to determine the degree of surveillance one should be subjected to if released. On the back end of the pipeline are community manifestations of electronic correctional surveillance, such as probation and parole kiosks, where supervision is automated by check-ins at a computerized kiosk instead of with human agents,³² and electronic ankle monitors, that

Martin, *A Closer Look at Early Jail Releases*, PUB. POL’Y INST. CAL. (Sept. 17, 2014), <https://www.ppic.org/blog/a-closer-look-at-early-jail-releases> [<https://perma.cc/3SP7-NY3N>].

²⁸ Carrie Pettus-Davis & Matthew W. Epperson, *From Mass Incarceration to Smart Decarceration* (Am. Acad. Soc. Work & Soc. Welfare, Working Paper No. 4), <http://aaswsw.org/wp-content/uploads/2015/12/WP4-with-cover.pdf> [<https://perma.cc/3RPB-T5FW>].

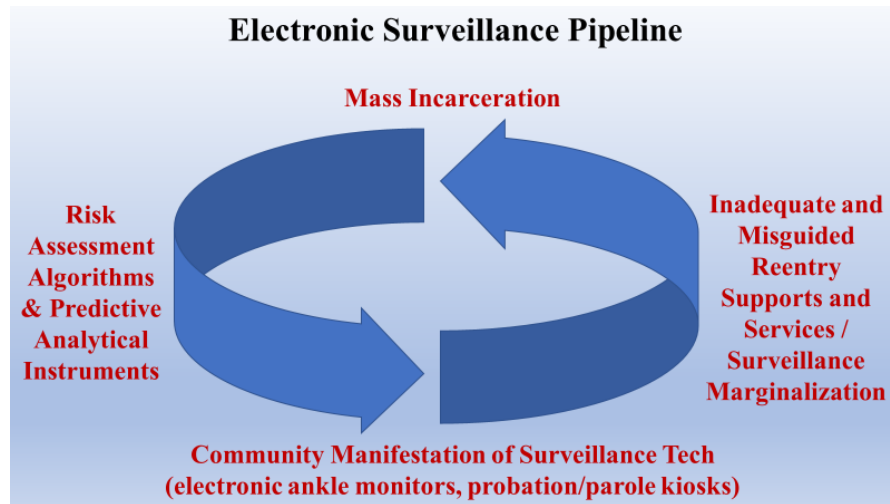
²⁹ *Id.*

³⁰ Author coins this term to describe the various new technological surveillance strategies and devices that comprise the surveillance regime of control primarily promoted in community-corrections models. Offenders enter the continuum through risk assessment instruments and algorithmic formulas that measure worthiness for surveillance, and then are exposed to myriad community-based surveillance technologies that monitor and manage offenders as a net-widened extension of incarceration. Failures to meet the demands of the strict regulations and associated costs of the program pull offenders deeper into the continuum through sanctions that increase surveillance measures until ultimately they end up back in prison. Thus, the pipeline is circular.

³¹ See Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59 (2017).

³² See Michael Thomsen, *The Worrying Rise of Automated Parole*, NEW REPUBLIC (Dec. 31, 2015), <https://newrepublic.com/article/126830/worrying-rise-automated-parole> [<https://perma.cc/AML2-5V9U>].

track the movements and location of those surveilled. Thus, at bail, sentencing, and parole hearings, defendants' and offenders' risk and/or dangerousness is determined by an algorithm, and those whose "risk score"³³ meets the criteria for release, are then assigned to varying levels of surveillance technology. Those subject to electronic surveillance measures often face additional barriers to successful reintegration, placing them at greater risk for reincarceration.



Strategies and devices along this pipeline have become increasingly popular as avenues for facilitating decarceration, not only because they are believed to lower the imprisonment rate and provide a sense of safety, but also because they are seen as more efficient. The prioritization of efficiency is part of a noted shift in corrections from a focus on substantive social ends, such as rehabilitating and reintegrating individuals, to an obsession with risk management of offender populations.³⁴ This "new penology" is credited as a leading contributor to the rise and deepening of mass incarceration.

³³ See Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [https://perma.cc/7BZ4-MLGA].

³⁴ Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 456–60 (1992).

The popularity of electronic surveillance measures has also rested on the assumption that these technological strategies are forward-thinking.³⁵ Such assumptions are based, at least in part, on limited perspectives on mass incarceration. If mass incarceration is simply viewed as problematic because of the high number of incarcerated citizens in comparison to other industrialized western nations, then the solutions proposed will be equally narrow and focus on moving individuals outside of prison walls by any means. However, mass incarceration should not only be understood by the high number of inmates, but also the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison.³⁶ From this understanding, mass incarceration is not the problem itself, but rather a symptom or manifestation of a much larger problem, where criminal justice law and policy targets poor communities and racial minorities before and after entering prisons, limiting chances for life successes and constraining the full realization of the benefits of citizenship. Most states have significant collateral consequences attached to criminal justice contact and involvement, from the loss of voting rights, to the denial of licensing for certain trades, to the ineligibility for public and government-assisted housing.³⁷ Thus, if the harms associated with mass incarceration extend beyond institutional confinement, then the pursuit of decarceration through electronic surveillance only perpetuates the role that the criminal justice system plays in entrenching a marginalized second-class citizenship, as the technology often acts as an additional barrier to successful rehabilitation and reentry.

³⁵ It should be noted that there has been a simultaneous rise of surveillance technology in policing. See ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* (New York University Press 2017); DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* (Cambridge University Press 2017); Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. REV. ONLINE 101 (2017).

³⁶ Fabiola Cristal Macias, *America's New Form of Punishment*, MEDIUM (Mar. 8, 2016), <https://medium.com/your-philosophy-class/america-s-new-form-of-punishment-c6f4d2795dd1> [<https://perma.cc/CN29-UZU9>].

³⁷ See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010).

Electronic Ankle Monitors as a Popular Solution

This Paper focuses on the most popular community manifestation of correctional electronic surveillance, ankle monitors.³⁸ The most recent promotion of the use of these devices is connected to the current move toward “big data” criminal justice.³⁹ The technology consists of a rectangular unit (often referred to as “the box”), often similar in shape and size to the phone pagers that doctors at hospitals rely upon, that fits onto the ankle of the person to be monitored by a rubber or plastic strap. These units communicate the location of the person wearing the device to corrections departments or third-party supervisory affiliates. The rapid escalation in the use of this electronic device and the associated social and economic barriers it presents has led to it being called “The Newest Jim Crow.”⁴⁰ Advocates at the Center for Media Justice have popularized the term “e-carceration” in their “Challenging E-carceration” campaign as a way to describe the expanding power and harm of electronic monitoring

³⁸ All fifty states utilize electronic ankle monitors. See *Use of Electronic Offender-Tracking Devices Expands Sharply*, PEW CHARITABLE TRUSTS (Sept. 2016), http://www.pewtrusts.org/-/media/assets/2016/10/use_of_electronic_offender_tracking_devices_expands_sharply.pdf [https://perma.cc/6MZN-W7VT].

³⁹ This is true particularly because algorithms and predictive analytics are being used to determine who is, and who is not, suitable for release on electronic ankle devices. For more on “big data” movement in criminal justice, see Douglas Parker, *Can Big Data Fix Florida’s Criminal Justice System?*, CRIME REP. (May 21, 2019), <https://thecrimereport.org/2019/05/21/can-big-data-fix-floridas-criminal-justice-system> [https://perma.cc/9KER-CK8W]; Laurel Eckhouse, *Big Data May Be Reinforcing Racial Bias in the Criminal Justice System*, WASH. POST (Feb. 10, 2017), https://www.washingtonpost.com/opinions/big-data-may-be-reinforcing-racial-bias-in-the-criminal-justice-system/2017/02/10/d63de518-ee3a-11e6-9973-c5efb7c9fb0d_story.html?utm_term=.8c4af1115c5b [https://perma.cc/5MTD-5T94]; Andrew Ferguson, *The Rise of Big Data Policing*, TECH CRUNCH (Oct. 22, 2017, 5:30 PM), <https://techcrunch.com/2017/10/22/the-rise-of-big-data-policing> [https://perma.cc/G73L-S5LZ].

⁴⁰ Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html?rref=collection%2Fbyline%2Fmichelle-alexander&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection [https://perma.cc/2NJT-U8LS]. Alexander notes that when an individual is on electronic monitoring, “[y]ou’re effectively sentenced to an open-air digital prison, one that may not extend beyond your house, your block or your neighborhood.” *Id.*

in corrections.⁴¹ They argue that “[w]hile decarceration is a priority, punitive alternatives like electronic monitoring are false solutions that must be challenged,” as surveillance through these devices shifts the site and costs of imprisonment from state facilities to vulnerable communities and households of color.⁴²

However, the potential harm with e-carceration may loom larger. This harm is characterized by the production and entrenchment of a socially, politically, and economically marginalized and subordinated group of surveillees. Where the subordinated group of those under surveillance mirrors the same social hierarchical relationships that shaped mass incarceration. Thus, within this new burgeoning regime of e-carceration, there is already anecdotal evidence that populations disproportionately subjected to electronic surveillance are overwhelmingly Black, Brown, and poor.⁴³ Electronic ankle monitors often act to deepen social stratification by race and class, much like mass incarceration does, through marginalization of defendants and former offenders from the full benefits of citizenship and humanity, while failing to ensure public safety.⁴⁴ As noted above, this marginalization places those under surveillance at great risk of further entanglement within the criminal justice system, negating any presumed benefits as a detention alternative, and reveals the circular structure of the electronic surveillance pipeline.

Sociological theory and data can help the fields of criminal law and procedure understand how using the current electronic monitoring

⁴¹ #NoDigitalPrisons: *Challenging E-Carceration*, MEDIAJUSTICE, <https://mediajustice.org/challengingcarceration> [https://perma.cc/Q9RJ-RUAB].

⁴² *Id.*; Media Justice, *New “No More Shackles” Report Argues Against Pretrial Electronic Monitoring*, MEDIAJUSTICE (Oct. 30, 2019), <https://mediajustice.org/news/new-no-more-shackles-report-argues-against-pretrial-electronic-monitoring> [https://perma.cc/KH58-6VK6].

⁴³ Stephanie Lacambra, *The New Frontier of E-Carceration: Trading Physical for Virtual Prisons*, ELECTRONIC FRONTIER FOUND. (Mar. 22, 2018), <https://www.eff.org/deeplinks/2018/03/new-frontier-e-carceration-trading-physical-virtual-prisons> [https://perma.cc/W7HL-DB8F]; see also James Kilgore, *What Is E-carceration?*, CHALLENGING E-CARCERATION, <https://www.challengingcarceration.org/what-is-e-carceration> [https://perma.cc/PE3V-TEGS]. Illinois is set to become the first state to track this data. See Joseph Darius Jaafari, *Illinois Puts Ankle Monitors on Thousands. Now It Has to Figure Out Who Gets Tracked—And Why*, MARSHALL PROJECT (July 15, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/07/15/illinois-puts-ankle-monitors-on-thousands-of-people-now-it-has-to-figure-out-exactly-who-gets-tracked-and-why> [https://perma.cc/DY6L-TP8F].

⁴⁴ See Thomsen, *supra* note 32.

measures as a solution to mass incarceration is counterproductive to reducing the expansion of the carceral state and prioritizing successful rehabilitation and reintegration. For example, studies on system avoidance theory demonstrate that the use of surveillance measures on released offenders often leads to social marginalization, as those under surveillance seek to avoid social institutions necessary for full reintegration and democratic participation in society. This is important because the legal scholarship on electronic monitoring has only recently developed.⁴⁵

⁴⁵ See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014) (Wiseman argues that the Eighth Amendment's prohibition of excessive bail necessitates the use of widely available technological alternatives to incarceration, such as electronic monitors. He notes that these electronic devices are less restrictive than money bail systems that have led to over-incarceration of those with less means, and could help states fulfill their obligations under the Eighth Amendment. He stresses the harms and dangers of pretrial detention and presents electronic monitoring as a cost-efficient option with greater promise than bail for reducing flight risk. While he notes concerns centered on the effectiveness of the technology, the potential privacy impacts and net-widening, and the inequality between those with more means and those without that may arise due to the costs of participation in electronic monitoring programs, he argues that "it is an evil, but a lesser one."); Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123 (2017) (Eisenberg raises the question of whether the use of electronic ankle monitors should be considered punishment. In analyzing electronic monitoring with dominant theories of punishment, she highlights the punitive aspects of ankle monitors, and answers the question in the affirmative. The Article argues that despite electronic monitoring being a punitive sanction, its use may be justified when it is used solely as a substitute for incarceration, but when it is utilized as an additional sanction, significant constitutional and policy issues are raised.); Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297 (2015) (Weisburd examines the use of electronic ankle monitors on minors within the juvenile justice system. She challenges three key misperceptions about the use of electronic monitors: (1) that incarceration rates are lowered; (2) that monitors have rehabilitative benefits for youth; and (3) that monitors are cost effective. The Article notes that the use of electronic monitoring is particularly concerning in juvenile courts because judges wield great discretion, while there is limited oversight of judicial sentencing. Weisburd ultimately argues that electronic monitoring is a form of punishment.); Kate Weisburd, *Sentenced to Surveillance*, N.C. L. REV. (forthcoming 2020) (Weisburd explores how warrantless electronic surveillance is dramatically transforming community supervision, contributing to a privacy protection gap between those with criminal justice contact and those without, particularly in the use of electronic ankle monitors. She lays blame with Fourth Amendment jurisprudence and identifies two causes of this gap: the courts' willingness to accept: (1) the theory that defendants "choose" surveillance in exchange for avoiding incarceration and (2) "reasonableness" arguments to justify electronic surveillance instead of traditional "special needs" doctrine. Weisburd highlights this jurisprudential shift as undermining the Fourth Amendment and laying the foundation for future erosion of the warrant requirement in the context of electronic surveillance practices.); Catherine Crump, *Tracking the Trackers: An Examination of Electronic Monitoring*

This Paper furthers the scholarly literature on the use of correctional surveillance technology and introduces a critical perspective and framework for consideration. The Paper makes a significant contribution to the literature as it argues that the current scholarly debate on the use of electronic ankle monitors is limited because it fails to consider the potential harm of social marginalization. It is the first Paper to use sociological theory and studies to examine the use of electronic monitoring through the frame of social marginalization. It argues that over reliance on technologies like ankle monitors may have the effect of erecting a corollary e-carceration regime, alongside mass incarceration, which will recycle many individuals back into detention, instead of resolving the problem of over-incarceration. It theorizes the contours of the carceral state as malleable, where advancing forms of surveillance technology push our carceral reality beyond prison walls. The Paper also critiques current trends in the decarceration movement that prioritize

of Youth in Practice, 53 U.C. DAVIS L. REV. (forthcoming 2019) (Crump takes an empirical approach to analyzing electronic monitoring of minors. Relying upon data gathered from across the state of California, through public record requests, she shares three main findings: (1) electronic monitoring programs act to “widen the net,” roping in youth that would have otherwise received less restrictive terms of release; (2) electronic monitoring technology is not used to advance new penological goals but rather to enforce house arrest, which already has burdensome rules; and (3) there are several notable trends that indicate that juvenile corrections departments will adopt even more intrusive forms of electronic monitoring in the near future. Given these findings, she does not call for the end of the use of electronic monitors, but rather policy changes to the alternative detention program, such as requiring local governments to cover the costs of electronic monitoring instead of families, instituting guidelines that help distinguish “serious” violations versus minor violations, and establishing clear policies for the goals of electronic monitoring and the protection of data privacy.); Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399 (2018) (I examine the use of electronic monitoring by juvenile courts as a manifestation of adultification, where juvenile courts adopt a “one size fits all” approach and implement tools and practices from the adult criminal justice system, despite having great discretion to explore alternatives. I examine these concerns and question whether the use of ankle monitors compromise the rehabilitative aim of juvenile justice, particularly given the recent advances in developmental brain science that demonstrate the deep vulnerabilities associated with the period of adolescence. I propose that these concerns may be addressed by the juvenile court developing procedures to ensure that correctional practices, adopted from the adult criminal justice system for implementation with youth, are validated for effectiveness for minors by social science evidence, and by instituting mechanisms that allow for community-informed policymaking. I conclude that this form of accountability is crucial not only for garnering critical support for the discontinuance of the use of ankle monitors on minors, but also for positioning juvenile courts to make better decisions in the future when contemplating adoption of even more advanced and powerful surveillance technologies.).

strategies geared toward quantitative notions of efficiency, at the expense of adequate reintegration of former offenders, rather than the development of guiding goals and principles that will help push criminal justice reform.

Part I provides background on the decarceration movement and describes the transition to a community-corrections model that promotes the use of surveillance technology. Part II describes the relationship between electronic monitoring and social marginalization and explores recent legislative and judicial challenges to criminal justice surveillance measures. Part III suggests that the popular debate on correctional surveillance technology could benefit from an examination of the risks of social marginalization, particularly for vulnerable race and class groups. It examines the leading arguments in favor of electronic surveillance measures through the frame of social marginalization and stresses the potentially regressive nature of the current practice. The Paper ultimately concludes that while electronic surveillance technology may lead to the momentary release of some offenders, it only holds limited promise for the progressive transformation the criminal justice system sorely needs. A move from decarceration to e-carceration will not benefit or change the relative positions of those most burdened by over-incarceration: poor communities of color. Thus, such faith in new technology to resolve this critical problem may not only be premature, but harmful if it reproduces the same concerns as mass incarceration, or worse, creates more.

I. MOVEMENT TOWARD DECARCERATION

A. *Genesis of Decarceration*

As a penal aim, decarceration has been pursued in recent history since at least the mid-twentieth century.⁴⁶ Historically, the push to move people out of state-run facilities included both deinstitutionalization of mental health facilities and correctional institutions.⁴⁷ Understanding what the genesis was for decarceration efforts in the past is an

⁴⁶ Pettus-Davis & Epperson, *supra* note 28, at 9.

⁴⁷ *Id.*

underdeveloped area of scholarship.⁴⁸ However, the growing attention to the expanding carceral state in recent years, and recognition of its untenability, has drawn new interests in producing scholarship on decarceration movements both past and present. Two scholars in particular have devoted significant work to examining and understanding decarceration, Andrew Scull and Marie Gottschalk. Scull, in *Decarceration: Community Treatment and the Deviant—A Radical View*, takes a critical approach on decarceration efforts during the nineteenth century and those occurring during the 1960s and 1970s.⁴⁹ He explores how the first decarceration efforts in America that took place during the nineteenth century ultimately failed. Scull describes two camps on decarceration at the time, those in favor of community management of deviance, who wanted to close dangerous and abusive prisons and mental health institutions, and those who supported institutional management.

The nineteenth century critique of institutional forms of social control focused primarily on deinstitutionalization of asylums. Scull notes that this is where nineteenth century reformers had their strongest arguments for a shift to a community management model. By contrast, institutional control over adult offenders and juvenile delinquents was driven by a widely accepted rational-legal approach, in which offenders were deemed deserving of retribution and punishment, and tough institutions were seen as not only reasonable, but necessary. Thus, Scull notes that during the nineteenth century, decarceration reformers made little progress in implementing the community management model for jails and prisons, beyond the introduction of houses of refuge and reformatories⁵⁰ for juveniles.⁵¹

Yet, attempts to implement a community-based system for serving those with psychiatric disorders during the nineteenth century also failed. Scull argues that this failure happened for several reasons, all of which centered on the inability to generate receptivity amongst elites in society. During the 1960s and 1970s, Scull argues that another decarceration

⁴⁸ Marie Gottschalk, *Chapter 10: The Carceral State and the Politics of Punishment*, in *THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY* 207 (Jonathan Simon & Richard Sparks eds., 2013).

⁴⁹ ANDREW SCULL, *DECARCERATION: COMMUNITY TREATMENT AND THE DEVIANT—A RADICAL VIEW* 123 (2nd ed. 1984).

⁵⁰ Arnett, *supra* note 45, at 448–53.

⁵¹ Scull, *supra* note 49, at 124.

movement began, spurred by the coming of the welfare state and the rising costs of maintaining large segregative modes of social control. In this argument, welfare capitalism becomes a leading form of social control and pacification of “troubled populations.”⁵² The rising fiscal pressures and exigencies in support of the welfare state allowed less costly, noninstitutional techniques to gain traction. Scull feared these decarceration efforts because, as he stressed, their failure to provide effective alternatives to institutional control was a direct result of being driven by efforts to cut costs versus true development of effective and reasonable community-based solutions. He notes that decarceration efforts failed during the nineteenth century for legitimate reasons, and we would be wise to follow those lessons.

It is quite clear, of course, that from the point of view of the early 1980s, Scull’s fears about the potential widespread dangers of decarceration were premature. It was around this same time that the early impact of the current mass incarceration crisis was first being felt. In predicting the explosion of decarceration, Scull underestimated the deep and complicated relationship between race, crime, and politics that were heavily at play during the 1960s and 1970s.⁵³ While decarceration may have gained some ground, it was swiftly abandoned for poor communities of color in the wake of “tough on crime” campaigns that used criminal politicization as a proxy for furthering racial politics. The political weaponization of crime rhetoric was strong enough to keep decarceration efforts at bay until relatively recent.

Thus, a reciprocal relationship exists between decarceration and over-incarceration that turns on fiscal and political expediency. Marie Gottschalk identifies the most recent financial crisis from the Great Recession in 2008, as a leading driver of the current push for decarceration. While financial crisis may provide some opportunity to redirect U.S. penal policy, she cautions against high expectations for a decarceration movement fueled by the need to reduce state correctional costs.⁵⁴ She stresses that framing the harm of a ballooning carceral state

⁵² Scull, *supra* note 49, at 126.

⁵³ See generally JEREMY D. MAYER, *RUNNING ON RACE: RACIAL POLITICS IN PRESIDENTIAL CAMPAIGNS 1960–2000* (2002).

⁵⁴ Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 565 (2015).

as primarily an economic one will prevent the political momentum needed to significantly reduce the prison population and will have other negative consequences.⁵⁵ Such consequences include strategies not only focused on instituting measures to save costs, but also developing programs to exploit economic opportunities to generate capital even within the decarceration strategies themselves.⁵⁶ Indeed, Marie Gottschalk argues that “[e]conomic crises create enormous societal anxieties and insecurities that could [also] fortify the ‘culture of control.’”⁵⁷

Financial downturns may act not only to generate economic insecurity, but also to increase punitiveness.⁵⁸ This can happen in several ways during times of economic instability, from scapegoating particular people or communities, to seeking political traction through punitive measures for symbolic value.⁵⁹ The most recent immigration zero tolerance policy pushed by the Trump Administration, that led to the separation of parents and children who illegally crossed the border, is a good example of such a scapegoat measure.⁶⁰ At a time in which the country has experienced the greatest wealth and income disparity between the highest and lowest earners, and economic anxiety about the decimation of the domestic manufacturing sector, illegal immigrants from Central and South America are presented as law violators that steal jobs and ruin financial stability. Hence, the logic is that very tough measures are needed in order to restore the economy. Even more, President Trump’s efforts to build a wall along the border between the United States and Mexico, despite the seemingly insurmountable

⁵⁵ *Id.* at 565–66.

⁵⁶ *Id.* at 562 (stating that the prevailing 3-R model “is not up to the task”).

⁵⁷ Marie Gottschalk, *The Great Recession and the Great Confinement: The Economic Crisis and the Future of Penal Reform*, in CONTEMPORARY ISSUES IN CRIMINOLOGICAL THEORY AND RESEARCH: THE ROLE OF SOCIAL INSTITUTIONS 343, 356–60 (Richard Rosenfeld et al. eds., 2012).

⁵⁸ MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 27 (2015).

⁵⁹ *Id.*

⁶⁰ Julia Ainsley, *Thousands More Migrant Kids Separated from Parents Under Trump Than Previously Reported*, NBC NEWS, <https://www.nbcnews.com/politics/immigration/thousands-more-migrant-kids-separated-parents-under-trump-previously-reported-n959791> [https://perma.cc/DDX4-RJS4] (last updated Jan. 17, 2019, 11:26 AM).

challenges presented to bring it to fruition,⁶¹ has symbolic value as a “get tough” measure against those who cross the border illegally.

Gottschalk notes that men, especially White men, who anticipate a decrease in their financial fortunes are considerably more punitive.⁶² Since the recession, despite the swift and lucrative rebound by the banking sector after the bailout, many Americans still fail to make ends meet, devising a new class of “working poor.”⁶³ The election of the first African American president, large protests of law enforcement’s use of deadly force in cities across the country, the removal of confederate shrines, and statistical projections that predict America will be majority minority in the very near future, have also added to the uneasiness of large swaths of White America. This segment of the nation has become quite vocal as they perceive their country and way of life under attack. Thus, incidents such as the “Unite the Right” rally in Charlottesville, Virginia, with overwhelming displays of firearms and aggression, and acts of violence, demonstrate extreme racial and economic anxieties that have critical implications for penal policy.⁶⁴

The historical grounding of this relationship is captured in David Garland’s *The Culture of Control*, where he argues that structural shifts in U.S. culture and economy in the postwar decades generated social angst that promulgated a new culture of control, which rejects older penal philosophy grounded on the “rehabilitative ideal” and instead relies upon extreme punishment and extensive surveillance measures.⁶⁵ Some of

⁶¹ See Gerald S. Dickinson, *Trump’s Militarized Land Seizure for Border Wall Is More Complicated Than ‘I Can Do It if I Want,’* HILL (Jan. 7, 2019, 3:00 PM), <https://thehill.com/opinion/white-house/424195-trumps-militarized-land-seizure-for-border-wall-is-more-complicated-than> [https://perma.cc/TU9N-NFKG].

⁶² GOTTSCHALK, *supra* note 58, at 28.

⁶³ Matthew Desmond, *Americans Want to Believe Jobs Are the Solution to Poverty. They’re Not.*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/magazine/americans-jobs-poverty-homeless.html> [https://perma.cc/8GXG-EBQH].

⁶⁴ See Meghan Keneally, *What To Know About the Violent Charlottesville Protests and Anniversary Rallies*, ABC NEWS (Aug. 8, 2018, 4:44 PM), <https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500> [https://perma.cc/V36V-PC2B].

⁶⁵ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, 27 LAW & SOC. INQUIRY 685 (2002). It is also critical to note that one could question whether racial minorities were ever afforded the attempts at rehabilitation. Even during the time where penal philosophy was geared more toward rehabilitation and individual treatment for change, African Americans were excluded.

these changes came from the civil rights movement, as many Americans viewed the leaders and activists as lawless saboteurs challenging the stability of the nation.⁶⁶ This desire to control particular race and class groups persists today and is important in understanding current decarceration efforts. As the country attempts to fully recover from financial hardship, in the age of mass incarceration and high correctional costs, both the seeds for decarceration and control culture have been planted and fed. Thus, a movement toward decarceration, driven by cost reductions, is not necessarily a movement away from punitiveness or the desire for control of “troubled populations” through deepening of the carceral state. In fact, current decarceration efforts have sought the easing of the burden of correctional costs while readily catering to new methods that do not seek to further rehabilitation, but rather to expand the carceral state. These two goals have been pursued over the past decade through promotion of “community corrections” programs that simultaneously seek to reduce costs and intensify surveillance as a measure of control.

B. *Electronic Surveillance as a Decarcerative Tool*

Community corrections is a program model that seeks to provide intermediate criminal sanctions between incarceration and release from correctional supervision. The most common iterations of correctional programming in the community are probation and parole schemes. However, the U.S. Department of Justice defines intermediate sanctioning as “a punishment option that is considered on a continuum to fall between model traditional probation and traditional incarceration.”⁶⁷ This makes sense given that community corrections programming is used both at pretrial and post-conviction release as detention alternatives. The earliest forms of intermediate sanctions were

⁶⁶ See Peniel E. Joseph, *America’s Nonviolent Civil Rights Movement Was Considered Uncivil by Critics at the Time*, WASH. POST (July 4, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/07/04/the-civil-rights-movement-might-have-been-nonviolent-but-to-critics-it-was-considered-uncivil/?utm_term=.d07a3c6d4c9b [<https://perma.cc/Q3FX-YVQ4>].

⁶⁷ EDWARD J. LATESSA & PAULA SMITH, CORRECTIONS IN THE COMMUNITY 270–71 (6th ed. 2015) (internal quotation marks and citation omitted).

house arrest,⁶⁸ community service,⁶⁹ day-reporting centers,⁷⁰ intensive supervision,⁷¹ drug courts,⁷² and boot camps.⁷³ These programs gained

⁶⁸ House arrest is court-ordered home detention, confining offenders to their households for the duration of their sentence. Introduced in 1984 in Florida, home detention spread rapidly throughout our nation. House arrest can be complete, with an offender unable to leave home at all unless there is a serious emergency. Or house arrest may operate with a daily curfew scheme; for example, an offender may be required to be at home every day between 7:00 PM and 7:00 AM. Michael G. Maxfield & Terry L. Baumer, *Home Detention with Electronic Monitoring: Comparing Pretrial and Postconviction Programs*, 36 CRIME & DELINQ. 521, 521–36 (1990).

⁶⁹ Community service requires that the offender completes some task that helps the community. It is considered a form of restitution, with labor rather than money being supplied. Common jobs include cleaning neighborhoods, working at nursing homes, painting schools, and doing assorted chores for the elderly. Community service can be a sentence in and of itself or can be included with other sanctions, such as probation. LATESSA & SMITH, *supra* note 67, at 282.

⁷⁰ Certain persons on pretrial release, probation, or parole are required to appear at day-reporting centers on a frequent and regular basis in order to participate in services or activities provided by the center or other community agencies. Failure to report or participate is a violation that could cause revocation of conditional release or community supervision. *Id.* at 279.

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[Intensive supervision programs] ISP's are usually classified as prison diversion, enhanced probation, and enhanced parole. Each has a different goal. Diversion is commonly referred to as a "front door" program because its goal is to limit the number of offenders entering prison. Prison diversion programs generally identify incoming, lower-risk inmates to participate in an ISP in the community as a substitute for a prison term. Enhancement programs generally select already sentenced probationers and parolees and subject them to closer supervision in the community than regular probation or parole. People placed in ISP-enhanced probation or enhanced parole programs show evidence of failure under routine supervision or have committed serious offenses deemed too serious for supervision on routine caseloads.

JOAN PETERSILIA & SUSAN TURNER, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EVALUATING INTENSIVE SUPERVISION PROBATION/PAROLE: RESULTS OF A NATIONWIDE EXPERIMENT 1, 7 (1993) (emphasis omitted) ("Treatment and service components in the ISP's [sic] included drug and alcohol counseling, employment, community service, and payment of restitution. On many of these measures, ISP offenders participated more than did control group members []; and participation in such programs was found to be correlated with a reduction in recidivism . . .").

⁷² "Drug courts" refer to a variety of diversionary programs, run through criminal courts, which divert certain drug offenders from standard sentences and instead require participation in drug treatment programs. Regardless of the drug court model chosen, the ultimate goal of drug courts is to provide certain offenders with treatment to cure their drug addiction—the rationale being that successful treatment will stop the cycle of "drug use and associated criminal behavior." The process is nonadversarial; several actors of the criminal justice system work together to identify and assign the offender to treatment as an alternative to incarceration. The judge plays an active and integral role in connecting the offender to a treatment program and monitors the progress of the offender through that treatment regimen. Where the offender is successful in

popularity in the late 90s as heavily punitive criminal sentencing began to receive increasing levels of negative attention. Their purported appeal is in their seemingly more humane treatment of offenders versus detention, and their potential to provide services that can lead to change within offenders.

The benefit of these early intermediate sanctions, however, have been questioned. There are three important aspects of the programs that have been identified as exacerbating the problem of race and class bias within the criminal justice system: “(a) the target population for intermediate sanctions, (b) the control orientation of the specific sanctions, and (c) the failure to integrate appropriate treatment strategies into correctional programs.”⁷⁴ The programs have been criticized for contributing to net-widening of the criminal justice system and extending social control for racial minorities, as they tend to target African American and Latino offenders who were most likely to be released without the need of such programming.⁷⁵ The tendency has been to target “probation-bound, rather than prison-bound offenders.”⁷⁶ Even more, these community corrections programs have been scrutinized for their prioritization of controlling offenders by piling on multiple special conditions and costs of participation, which contribute to frequent

treatment, the court will grant rewards. Completion of the drug court program results in either the dismissal of charges (pre-adjudication model) or a no-time sentence on pleas to lesser charges (post-adjudication model). Where the offender fails to adequately progress in the program, though, the court imposes graduated sanctions. Failure to complete the program ultimately results in a return to the traditional criminal justice system, where offenders may receive longer punishment terms than those offenders who declined to enter drug court at all. See Jessica Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 603–04 (2016) (internal footnotes omitted).

⁷³ Technically, shock incarceration programs, or “boot camps,” as they are commonly known, are institutional correctional programs, not community-based ones. However, they are considered intermediate sanctions and are a distant cousin to shock probation programs. The most recent shock incarceration programs appeared first in Georgia (1983) and Oklahoma (1984). The concept spread quickly and, in 2000, fifty-four boot camp programs had opened in forty-one state correctional jurisdictions and handled more than 21,000 inmates in 2000 (Camp & Camp, 2000) in addition to many programs developed and being considered in cities and counties, and for juveniles (Gover et al. 2000). LATESSA & SMITH, *supra* note 67, at 290–91.

⁷⁴ James M. Byrne & Faye S. Taxman, *Crime Control Policy and Community Corrections Practice: Assessing the Impact of Gender, Race, and Class*, 17 EVALUATION & PROGRAM PLAN. 227, 230 (1994).

⁷⁵ *Id.*

⁷⁶ *Id.* (emphasis omitted).

technical violations, particularly for people suffering from poverty.⁷⁷ Technical violations often lead to increasingly intense conditions until incarceration is ultimately inevitable. The focus on controlling offenders has come at the expense of attempts to integrate treatment in implementation of community correction programming and has received wide criticism.⁷⁸ The biggest failure here is that most of the programs have stated goals for fostering rehabilitation, yet the programs themselves do not involve treatment or therapeutic types of services.⁷⁹

Most recently, the community corrections model has been propelled by a second wave of programming reliant upon technology-driven surveillance strategies and devices to monitor offenders.⁸⁰ These programs vary and are constantly evolving as technology advances. This new wave of community corrections is touted as maximizing effectiveness in determining the best supervision and treatment strategies for offenders, minimizing biases, and reducing overall recidivism.⁸¹ The new wave of programming continues to grow as many states contemplate ending cash bail.⁸² In 2018, California became the first state to fully eliminate the use of cash bail.⁸³ Instead of cash bails, the state intends to turn to new community corrections measures such as surveillance technologies, like electronic ankle monitors.⁸⁴ Several other states are set to follow California in the coming years.

Even more, at the end of 2018, President Trump signed the First Step Act, a bipartisan criminal justice reform bill which received support from

⁷⁷ See Thomsen, *supra* note 32.

⁷⁸ See Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013).

⁷⁹ Byrne & Taxman, *supra* note 74.

⁸⁰ See Thomsen, *supra* note 32.

⁸¹ PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 1 (2011), <https://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx> [<https://perma.cc/VY3M-GEU6>].

⁸² See Stacy M. Brown, *New York May Join Other States in Ending Cash Bails*, N.Y. AMSTERDAM NEWS (Feb. 20, 2019, 6:55 AM), <http://amsterdamnews.com/news/2019/feb/20/new-york-may-join-other-states-ending-cash-bails> [<https://perma.cc/5RU6-EBXF>].

⁸³ Sam Levin, *Imprisoned by Algorithms: The Dark Side of California Ending Cash Bail*, GUARDIAN (Sept. 7, 2018), <https://www.theguardian.com/us-news/2018/sep/07/imprisoned-by-algorithms-the-dark-side-of-california-ending-cash-bail> [<https://perma.cc/7UZW-PSNG>].

⁸⁴ *Id.*

a wide range of lawmakers and advocacy organizations.⁸⁵ As the first major piece of federal legislation to focus on criminal justice reform in quite some time, the Act will lead to the release of thousands of individuals, and perhaps even more in the years to come. At the 2019 State of the Union address, Trump noted that: “The First Step Act gives nonviolent offenders the chance to reenter society as productive, law-abiding citizens. Now, states across the country are following our lead. America is a nation that believes in redemption.”⁸⁶ Electronic monitoring will feature prominently in this road to redemption. As stated in the text of the statute discussing prerelease custody and home confinement, “[a] prisoner placed in prerelease custody pursuant to this subsection who is placed in home confinement shall . . . be subject to 24-hour electronic monitoring that enables the prompt identification of the prisoner, location, and time”⁸⁷ Currently, heralded criminal justice reform efforts, and those in the foreseeable future, are doubling down on electronic surveillance measures.

This new wave of community corrections programming has been criticized for presenting the same problems associated with the first wave: racial discrimination, over-emphasis on control versus rehabilitation, and failure to provide treatment services. Malkia Cyril, race, technology, and media advocate, noted that:

[o]ne of the most terrifying aspects of high-tech surveillance is the invisibility of those it disproportionately impacts. . . . As surveillance technologies are increasingly adopted and integrated by law enforcement agencies today, racial disparities are being made invisible by a media environment that has failed

⁸⁵ Nicholas Fandos & Maggie Haberman, *Trump Embraces a Path to Revise U.S. Sentencing and Prison Laws*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/politics/prison-sentencing-trump.html> [<https://perma.cc/CXP7-U3XR>].

⁸⁶ German Lopez, *The First Step Act, Explained*, VOX, <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform> [<https://perma.cc/65GW-M3CA>] (last updated Feb. 5, 2019, 9:42 PM) (internal quotation marks omitted).

⁸⁷ 18 U.S.C. § 3624 (2018).

to tell the story of surveillance in the context of structural racism.⁸⁸

These anecdotes of racial difference in subjection to, and experienced while on, electronic monitoring are being validated in social science studies. In *Mass Incarceration Through a Different Lens: Race, Subcontext, and Perceptions of Punitiveness of Correctional Alternatives When Compared to Prison*, researchers provide some insight into how electronic monitoring may be experienced across racial groups.⁸⁹ The study reviewed data from over 1,000 Kentucky inmates, who were within twelve months of their release or parole date, to examine the impact of sociodemographic factors on perceptions of the punitiveness of alternatives to incarceration.⁹⁰ Researchers looked at probation, community service, and electronic monitoring as alternatives to incarceration.⁹¹ When participants were prompted with electronic monitoring as a correctional alternative option, they were asked to provide the number of months they would take on monitoring to avoid serving twelve months of actual time in prison.⁹² Researchers determined preference for the alternative as an inmate's willingness to serve more than twelve months of an alternative sanction rather than twelve months in a medium-security prison.⁹³ Thus, any participant who indicated they were willing to serve thirteen or more months of any sanction was defined as having a preference for that alternative over prison.⁹⁴ Most notably, the study found that African American inmates have significantly lower odds of preferring electronic monitoring over prison than White inmates, demonstrating that African American inmates view electronic monitoring as highly punitive, and may in some cases prefer more time

⁸⁸ Malkia Amala Cyril, *Black America's State of Surveillance*, PROGRESSIVE (Mar. 30, 2015), <https://progressive.org/magazine/black-america-s-state-surveillance> [https://perma.cc/2PNF-LVYP].

⁸⁹ Yasmiyn Irizarry et al., *Mass Incarceration Through a Different Lens: Race, Subcontext, and Perceptions of Punitiveness of Correctional Alternatives When Compared to Prison*, 6 RACE & JUST. 236, 236–56 (2016).

⁹⁰ *Id.* at 236.

⁹¹ *Id.*

⁹² *Id.* at 240.

⁹³ *Id.* at 241.

⁹⁴ *Id.*

in prison to avoid being released on long periods of electronic monitoring.⁹⁵

Even more, in 2018 a class action lawsuit was filed against Alameda County, California, and LCA, a private community corrections corporation, arguing that the county allowed a private company to make profit-driven decisions about people's freedoms, denying them due process.⁹⁶ The lawsuit accuses LCA of extorting fees from people through the threat of incarceration, in violation of federal racketeering laws.⁹⁷ Equal Justice Under Law, the civil rights organization that filed the class action on behalf of the plaintiffs, alleges that the company intentionally misleads participants into thinking that they must first come to an agreement with LCA regarding the terms of payment, and that the process is intentionally confusing and cumbersome so that people pay at the highest rate for as long as possible.⁹⁸ At the heart of the claim is the idea that the county government has allowed profit and control to take priority over treatment and rehabilitation.

C. *Electronic Monitoring as a Promoted Strategy of New Wave*

For the purpose of this Paper, I focus on community corrections' adoption of electronic ankle monitors. Electronic monitoring consists of either radio frequency transmission (RF) or global positioning system (GPS) surveillance. While radio frequency transmitters alert authorities to when an individual leaves a designated area, like their home, GPS monitoring uses satellite technology to track everywhere an individual may go. Electronic monitoring operates through ankle units that strap, typically around the leg, to the person monitored.⁹⁹ Like cell phones, these devices run on batteries and need to be charged through bases that

⁹⁵ *Id.* at 245.

⁹⁶ Olivia Solon, 'Digital Shackles': *The Unexpected Cruelty of Ankle Monitors*, GUARDIAN (Aug. 28, 2018), <https://www.theguardian.com/technology/2018/aug/28/digital-shackles-the-unexpected-cruelty-of-ankle-monitors> [<https://perma.cc/UKG5-8WUA>].

⁹⁷ *Id.*

⁹⁸ Scott Morris, *Lawsuit Alleges Ankle Monitoring Practices Are Akin to Extortion*, EAST BAY EXPRESS (Aug. 8, 2018), <https://www.eastbayexpress.com/oakland/lawsuit-alleges-ankle-monitoring-practices-are-akin-to-extortion/Content?oid=18890703> [<https://perma.cc/HA8V-75S2>].

⁹⁹ Solon, *supra* note 96.

connect to electric outlets.¹⁰⁰ When in operation, these devices collect and share information with a central computer and data system, usually maintained by the corrections department or a private corrections affiliate.¹⁰¹

The most recent development in electronic ankle monitoring technology is the leveraging of smartphone capabilities to allow online applications to pair with the devices.¹⁰² Those placed under surveillance with these upgraded capabilities will now have alerts on their phone indicating and providing reminders for when they are not allowed to be out and what locations they may not visit.¹⁰³ Even more, in addition to the phone's GPS location technology providing additional verification of their whereabouts, the paired phone's capacity for bio-identification measures, such as fingerprint scanning, and facial and voice recognition, will be utilized for additional assurances and verification of those being monitored. One of the corporations leading the development of these advances is SuperCom, a company that describes itself as seeking "[t]o provide governments . . . with secure multi-documents and robust e-Identity scalable platforms, while inspiring selected vertical markets with RT Location, Tracking, Monitoring and Verification innovations and solutions"¹⁰⁴ The company notes that "[s]martphone technology has made dramatic improvements in the way people work and talk" and that they channel the "smartphone's capabilities into an unparalleled corrections supervision tool."¹⁰⁵

It should be noted that the basic technology behind these electronic monitors is not new, despite the significant advancements they continue to make.¹⁰⁶ Although the use of these devices has significantly increased in the past fifteen years, they were originally developed and deployed by

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *GPS Offender Tracking*, SUPERCOM, http://www.supercomold.com/?module=category&item_id=170 [<https://perma.cc/79AL-KQ98>].

¹⁰³ *Id.*

¹⁰⁴ *Our Vision*, SUPERCOM, http://www.supercomold.com/?module=category&item_id=20 [<https://perma.cc/WNU6-Q4K4>].

¹⁰⁵ *GPS Offender Tracking*, *supra* note 102.

¹⁰⁶ See Peter H. Milliken, *Advanced Electronically Monitored House Arrest Now Uses GPS*, VINDICATOR (Apr. 16, 2017, 12:08 AM), <https://web.archive.org/web/20190724063412/https://www.vindy.com/news/2017/apr/16/technology-advances-for-electronic-house> [<https://perma.cc/V9E3-HZXD>].

two doctoral students, who were brothers, Kirkland and Robert Gable, in the psychology department at Harvard University in the 1960s.¹⁰⁷ The radio communicating devices were used by the students to track the movement of offenders and document their timeliness in making appointments and meetings with community programs and city services.¹⁰⁸ The people who showed up and were consistently on time were rewarded with gifts and prizes as a means of positive reinforcement. In the fifty years since the beginning of experimentation with this type of electronic monitoring the aims of its usage have changed dramatically.

The first use of electronic monitoring in the criminal justice system was inspired by a court in New Mexico. In 1979, District Court Judge Jack Love read a comic from the Spiderman series and became intrigued when he saw one of Spiderman's villains, Kingpin, attach an electronic tracking device onto Spiderman, enabling Spiderman to be controlled from afar.¹⁰⁹ Judge Love then began imagining how such a device could be used in real life to track the whereabouts of defendants that he released.¹¹⁰ He contacted an electrical engineer with his idea and proposed the development of a similar monitoring device for use in the criminal justice system.¹¹¹ Several years later, the first electronic monitoring device model, resembling the ones still used today, was created by National Incarceration Monitoring and Control Services.¹¹² Accordingly, Judge Love was the first to develop a judicially sanctioned program and implement use of the technology on adult probation violators during the

¹⁰⁷ Emma Anderson, *The Evolution of Electronic Monitoring Devices*, NPR (May 24, 2014, 5:26 AM), <https://www.npr.org/2014/05/22/314874232/the-history-of-electronic-monitoring-devices> [<https://perma.cc/57DZ-B6Y3>].

¹⁰⁸ *Id.*

¹⁰⁹ Dee Reid, *High-Tech House Arrest: Electronic Bracelets Used to Monitor Prisoners Under Home Detention*, 89 TECH. REV. 12, 12–14 (1986).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² William D. Burrell & Robert S. Gable, *From B. F. Skinner to Spiderman to Martha Stewart: The Past, Present and Future of Electronic Monitoring of Offenders*, 46 J. OFFENDER REHABILITATION 101, 104 (2008).

1980s.¹¹³ However, it would be another two decades before the practice would significantly expand across the country.¹¹⁴

States now utilize electronic monitoring of defendants in the criminal justice system extensively as a condition of release, in both pretrial¹¹⁵ and post-conviction¹¹⁶ phases. For example, some states rely on electronic monitoring to surveil people convicted of sexual offenses, others utilize it on defendants charged with domestic violence or driving while under the influence, and many states depend on it as a mandatory practice for individuals returning to the community on parole or probation.¹¹⁷ States have committed heavily to using the ankle devices, with individuals being monitored for periods ranging from multiple

¹¹³ Robert S. Gable, *Let's Stop Using Ankle Bracelets to Monitor Offenders*, IEEE SPECTRUM (July 20, 2017), <https://spectrum.ieee.org/consumer-electronics/portable-devices/lets-stop-using-ankle-bracelets-to-monitor-offenders> [<https://perma.cc/ZVW2-GA2X>].

¹¹⁴ *Id.*

¹¹⁵ The aim of the use of electronic monitoring at pretrial is limiting the risk of flight and danger to the community.

¹¹⁶ The aim of the use of electronic monitoring post-sentencing and post-conviction is to ensure compliance with correctional supervision and mandates, extending punishment, and community safety.

¹¹⁷ See Edna Erez et al., *Electronic Monitoring of Domestic Violence Cases—A Study of Two Bilateral Programs*, 68 FED. PROB. 1, https://www.uscourts.gov/sites/default/files/68_1_3_0.pdf [<https://perma.cc/5QZY-GKG8>]; Edna Erez & Peter Ibarra, *Does Surveilling Alleged Domestic Abusers Violate Their Rights?*, WASH. POST (Sept. 6, 2018, 2:44 PM), <https://www.washingtonpost.com/news/theworldpost/wp/2018/09/06/domestic-violence> [<https://perma.cc/M939-HUGB>]; Peter R. Ibarra & Edna Erez, *Victim-Centric Diversion? The Electronic Monitoring of Domestic Violence Cases*, 23 BEHAV. SCI. L. 259, 259–76 (2005); Lisa Bishop, *The Challenges of GPS and Sex Offender Management*, 74 FED. PROB. 2 (2010), https://www.uscourts.gov/sites/default/files/74_2_8_0.pdf [<https://perma.cc/8JDC-D6LB>]; John R. Ellement, *Mandatory GPS Monitoring of Some Sex Offenders Violates Privacy Rights*, SJC RULES, BOS. GLOBE (Mar. 26, 2019, 12:11 PM), <https://www.bostonglobe.com/metro/2019/03/26/sjc-rules-judges-must-decide-case-case-basis-whether-convicted-sex-offenders-wear-gps-bracelet/prdaEQlv0uSfDyY5Q8YVSO/story.html> [<https://perma.cc/5K2G-TJCB>]; Stephen V. Gies et al., *Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program*, Final Report (Mar. 31, 2012) (unpublished grant report) (submitted to the Office of Research and Evaluation, National Institute of Justice, U.S. Department of Justice), <https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf> [<https://perma.cc/Q643-ECFU>]; Elaine Pittman, *Ankle Bracelet Tracks Sobriety 24/7, Monitoring Offenders of Alcohol-Related Crimes*, GOV'T TECH (July 9, 2010), <https://www.govtech.com/public-safety/Ankle-Bracelet-Tracks-Sobriety-247-Monitoring.html> [<https://perma.cc/H9CG-RUS5>].

months to several years.¹¹⁸ There are even seven states that allow for lifetime electronic monitoring for conviction on certain offenses.¹¹⁹

It should also be noted that while this Paper focuses on the criminal justice system, electronic monitoring has been widely used within the immigration system, and other noncriminal contexts. For example, in one of the largest immigration raids in a single state, ICE agents used GPS data, from electronic monitors worn by people awaiting immigration proceedings, in their affidavit for a search warrant.¹²⁰ The raid led to the arrest of nearly 700 people working in seven food processing plants in Mississippi.¹²¹

Electronic monitoring devices have gained wide acceptance and significant investments. In a report on the expansion of electronic monitors, the Pew Charitable Trust notes that the use of electronic surveillance devices in the criminal justice system rose 140% between 2005 and 2015.¹²² Their presence has become ubiquitous in America, with all fifty states utilizing electronic monitoring services for offenders. Conservative estimates note that on any given day, there are over 200,000

¹¹⁸ Thomsen, *supra* note 32.

¹¹⁹ Michigan, Ohio, Colorado, Florida, Missouri, Oklahoma, and Wisconsin all allow for lifetime electronic monitoring. See INT'L ASS'N OF CHIEFS OF POLICE, TRACKING SEX OFFENDERS WITH ELECTRONIC MONITORING TECHNOLOGY: IMPLICATIONS AND PRACTICAL USES FOR LAW ENFORCEMENT 1 (2008), <https://www.bja.gov/publications/IACPSexOffenderElecMonitoring.pdf> [<https://perma.cc/R4XA-widening>], and the inequality between those with more means and those without that may arise due to the costs of participation in electronic monitoring programs, he argues that “it is an evil, but a lesser one2PVC]; see also *Lifetime Electronic Monitoring of Sex Offenders*, MICH. DEP'T CORRECTIONS, https://www.michigan.gov/corrections/0,4551,7-119-1435_1498-256501--,00.html [<https://perma.cc/M7TR-A3LK>].

¹²⁰ Jimmie E. Gates & Alissa Zhu, *ICE Used Ankle Monitors, Informants To Plan Immigration Raids Where 680 People Were Arrested*, USA TODAY, <https://www.usatoday.com/story/news/nation/2019/08/10/ice-raids-how-federal-investigation-led-mississippi-poultry-plants/1975583001> [<https://perma.cc/DDZ5-SK5K>] (last updated Aug. 12, 2019, 10:09 AM); see *ICE Affidavit for Search of A&B Inc. Poultry Plant*, WASH. POST, <https://www.washingtonpost.com/context/ice-affidavit-for-search-of-a-b-inc-poultry-plant/9582ac40-f439-411e-9a3d-7a0a34e82e0c> [<https://perma.cc/A5XE-U6QD>] (last updated Aug. 15, 2019, 11:31 AM).

¹²¹ Camilo Montoya-Galvez, *ICE Rounds Up Hundreds of Undocumented Workers in Immigration Sweeps in Mississippi*, CBS NEWS, <https://www.cbsnews.com/news/ice-raids-in-mississippi-officials-tout-largest-single-state-immigration-sweeps-in-us-history-today-2019-08-07> [<https://perma.cc/K2EL-LJ4P>] (last updated Aug. 8, 2019, 1:03 PM).

¹²² PEW CHARITABLE TRUSTS, *supra* note 38.

people on electronic monitors.¹²³ With different people moving in and out of these programs throughout the year, it is likely that millions of people experience electronic correctional surveillance through these monitors every year. This correctional surveillance technology is even used frequently on minors, in ways that compromise the rehabilitative aim of juvenile court.¹²⁴ Even more, this form of surveillance has also been widely used in the immigration system, and until most recently, through programs under innocuous titles such as “Family Case Management.”¹²⁵ During the controversy over the policy of separating migrant parents from their children, such surveillance programming was suggested as a reasonable solution, at a minimal cost.¹²⁶

II. E-CARCERATION AND SOCIAL MARGINALIZATION

Technological advances have led to an American society that is increasingly subjected to, and dependent upon, myriad forms of surveillance.¹²⁷ No longer is surveillance “something external that impinges on ‘our lives,’” but rather “something that everyday citizens

¹²³ Eisenberg, *supra* note 45, at 125.

¹²⁴ See generally Arnett, *supra* note 45.

¹²⁵ John Burnett, ‘Alternatives to Detention’ Are Cheaper Than Jails, but Cases Take Far Longer, NPR (July 18, 2018, 4:24 PM), <https://www.npr.org/2018/07/18/629496174/alternatives-to-detention-are-cheaper-than-jails-but-cases-take-far-longer> [<https://perma.cc/AJS2-9AD3>].

¹²⁶ Jane C. Timm, *This Obama-Era Pilot Program Kept Asylum-Seeking Migrant Families Together. Trump Canceled It.*, NBC NEWS, <https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896> [<https://perma.cc/RZD7-BW2X>] (last updated June 24, 2018, 8:54 AM).

¹²⁷ See A.W. Geiger, *How Americans Have Viewed Government Surveillance and Privacy Since Snowden Leaks*, PEW RES. CTR. (June 4, 2018), <https://www.pewresearch.org/fact-tank/2018/06/04/how-americans-have-viewed-government-surveillance-and-privacy-since-snowden-leaks> [<https://perma.cc/BYA6-BJ6U>]; Charlie Savage, *N.S.A. Triples Collection of Data from U.S. Phone Companies*, N.Y. TIMES (May 4, 2018), <https://www.nytimes.com/2018/05/04/us/politics/nsa-surveillance-2017-annual-report.html> [<https://perma.cc/3TEQ-7N6Y>]; Jason Nurse, *Amazon, Facebook and Google Don’t Need to Spy on Your Conversations to Know What You’re Talking About*, CONVERSATION (Jan. 16, 2019, 7:44 AM), <https://theconversation.com/amazon-facebook-and-google-dont-need-to-spy-on-your-conversations-to-know-what-youre-talking-about-108792> [<https://perma.cc/U4A9-QQVD>]; Chavie Lieber, *Big Tech Has Your Kid’s Data—and You Probably Gave It to Them*, VOX (Dec. 5, 2018, 6:10 PM), <https://www.vox.com/the-goods/2018/12/5/18128066/children-data-surveillance-amazon-facebook-google-apple> [<https://perma.cc/K49U-LXVR>].

comply with—willingly and wittingly or not—negotiate, resist, engage with and, in novel ways, even initiate and desire.”¹²⁸ One could ask, if surveillance is increasingly pervasive in all areas of our daily experience, and inseparable from twenty-first century life, what makes correctional surveillance distinguishable? How are ankle monitors different from Google tracking a person through cell phone location and offering her nearby coffee shop options? Is there a difference between wearing an Apple Watch, or tagging a location on an Instagram or Facebook photo, or Amazon predicting one’s shopping habits, and being surveilled by an ankle monitor?

While there are dangers associated with surveillance generally, such as the diminution of intellectual privacy (free minds are necessary for a free society), and the imbalance of power between watcher and watched,¹²⁹ correctional electronic surveillance may present distinct challenges from some of the aforementioned measures of surveillance exposure by the significant risk for social marginalization, particularly for historically subordinated groups. This Section examines recent scholarship on system avoidance theory and social stratification, and explores potential strategies for responding to electronic monitoring, with social marginalization framework in mind.

A. *Electronic Monitoring Severs and Tethers*

A major concern that is not a part of the debate on electronic monitoring, and certainly has not been discussed in legal scholarship, is how the use of surveillance technology acts to further social stratification and marginalization. That in a move from decarceration to e-carceration, there is the risk of producing a subgroup of surveillees who are increasingly divorced from the civic life of their community, divorced from opportunity for social mobilization, and divorced from political and educational life and opportunities. The relationship between surveillance and marginalization has been demonstrated in some qualitative studies

¹²⁸ DAVID LYONS, *THE CULTURE OF SURVEILLANCE: WATCHING AS A WAY OF LIFE* 9 (2018).

¹²⁹ Neil M. Richards, Symposium, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1953 (2013).

that have shown that increased surveillance has led to a concomitant increase in people's efforts to evade it.¹³⁰

Most recently, scholars have demonstrated this relationship using quantitative measures.¹³¹ In *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, Sarah Brayne details her study in which she examines the connection between criminal justice contact, surveillance, and institutional avoidance.¹³² She introduces the concept of "system avoidance" to describe "the practice of individuals avoiding institutions that keep formal records (i.e., put them 'in the system') and therefore heighten the risk of [additional] surveillance and [re-incarceration] by authorities."¹³³ In the study, Brayne uses data from the National Longitudinal Study of Adolescent Health and the National Longitudinal Study of Youth to test this relationship.¹³⁴ Her central hypothesis, informed by theories of social control and surveillance, and existing qualitative literature, argued that "individuals who have had contact with the criminal justice system" and subjected to surveillance "will have higher odds of not participating in [other] surveilling institutions that keep formal records, such as (1a) hospitals, (1b) banks, and (1c) school or work."¹³⁵ She notes, however, "that a social control or surveillance motive need not be assumed in all organizations that conduct record keeping and data sharing."¹³⁶ But recent research has indicated that "institutions such as hospitals, schools, workplaces, and banks have increasingly been 'drawn into the harder edge of social control' and

¹³⁰ See Rourke O'Brien, *Ineligible to Save? Asset Limits and the Saving Behavior of Welfare Recipients*, 16 J. COMMUNITY PRAC. 183 (2008) (finding that welfare recipients concerns with the monitoring of their formal financial transactions led to an avoidance of using banks); Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339 (2009) (noting that those wary of being apprehended for technical parole violations or court fines avoid institutions, places, and relationships out of legitimate concerns that law enforcement may use them to effect arrests. For example, avoiding hospitals because police officers frequently comb through hospital admission records.).

¹³¹ Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOC. REV. 367 (2014).

¹³² *Id.* at 368.

¹³³ *Id.*

¹³⁴ *Id.* at 373.

¹³⁵ *Id.*

¹³⁶ *Id.* at 371.

oriented toward surveillance.”¹³⁷ Thus, “regardless of the [initial] reason they were kept, . . . data and records are increasingly integrated and deployed by law enforcement agencies for a broad range of surveillance purposes,” legitimating the concerns of those with criminal justice involvement who seek to avoid being pulled deeper into the system.¹³⁸

The results of the study demonstrated the significant impact of criminal justice contact and surveillance on an individual’s likelihood of interacting with medical, financial, employment, and educational institutions.¹³⁹ Among the notable findings were: (1) individuals with criminal justice system involvement “had 31 percent higher odds of not obtaining medical care when they needed it, compared to those who did not have [criminal justice] contact;”¹⁴⁰ (2) those individuals postconviction having continued criminal justice contact had over fifty percent higher odds of not having a bank account;¹⁴¹ (3) those respondents with criminal justice involvement “had 31 percent higher odds of neither working nor being in school compared to those who had no [criminal justice] contact;”¹⁴² and (4) criminal justice involvement had no impact on the relationship of respondents to “non-surveilling” institutions, such as volunteer and religious organizations.¹⁴³

These empirical findings are critical for understanding how criminal justice involvement acts to push individuals to the peripheries of society. They are equally important in identifying who bears the greatest risk and burden of marginalization in this process. These individuals are disproportionately people of color. Brayne concludes that “system avoidance is a . . . mechanism through which the criminal justice system contributes to social stratification: [as] it severs an already marginalized subpopulation from institutions that are pivotal to desistance from crime and their own integration into broader society.”¹⁴⁴ Indeed, system avoidance has negative consequences for racial inequality, given that the burden of criminal justice contact and involvement is already unevenly

¹³⁷ *Id.* (internal citations omitted).

¹³⁸ *Id.*

¹³⁹ *Id.* at 376.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 379.

¹⁴² *Id.*

¹⁴³ *Id.* at 380.

¹⁴⁴ *Id.* at 367.

distributed.¹⁴⁵ Detachment from pivotal institutions such as hospitals, banks, schools, and the labor market leads to marginalization and impedes opportunities for financial security and upward mobility, contributes to poor health outcomes, erects barriers to opportunities for success, and exacerbates preexisting inequalities.¹⁴⁶

Although this study does not specifically examine the use of electronic monitors, its findings generally on criminal justice involvement and surveillance hold great implications for electronic monitoring and its relationship to social marginalization. If criminal justice involvement leads to great degrees of system avoiding behaviors, then these behaviors only intensify with electronic monitoring because such surveillance presents maximum criminal justice contact. Whereas those with criminal justice involvement without electronic monitoring may retreat to their house or spend time at religious institutions in hopes of avoiding criminal justice exposure and surveillance, those on electronic monitoring cannot avoid it anywhere, not even within their homes. In this way, constant electronic surveillance intensifies system avoidance and deepens the resulting marginalization. Brayne argues that “efforts to evade the gaze of different [institutions and] systems involves an [inescapable] trade-off” between avoidance and “full participation in society.”¹⁴⁷ However, the complete surveillance presented by electronic monitoring, with its attendant stigma and interpersonal harms,¹⁴⁸ not only marginalizes individuals from full participation in society, but also from the full benefits of humanity. Thus, a person placed on electronic monitoring who avoids the labor market out of concern about having to discuss their criminal record¹⁴⁹ or faces discrimination because of the

¹⁴⁵ *Id.* at 369.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 385 (internal citation and quotations omitted).

¹⁴⁸ Arnett, *supra* note 45, at 432 (internal citations omitted). Participants also indicated that electronic monitoring often marginalized them from interpersonal relationships. The study notes that thirty-two percent of the offenders said it created distance and negatively impacted their relationships, while fourteen percent said it limited the places they can go with their children. One person interviewed admitted that he felt like family members are in prison too, and another stated, “I’ve got a child who straps a watch on his ankle to be like daddy.” Electronic monitoring was described as taking a toll on friendships as well. One interviewee stated that he tries not to let his friends know about it by attempting to hide the device, while another participant struggled with having no friends, as a result of cutting off ties because he could not go anywhere. *Id.*

¹⁴⁹ See *infra* note 317.

visible monitor,¹⁵⁰ who distrusts medical institutions and suffers poor health outcomes, who is unable to contribute to a household that is also forced to cover the expenses of electronic monitoring, is severed not only from mainstream society, but often from their immediate community and their very own family.

Some would argue that the attendant harms of marginalizing surveillance are not unknown, but are in fact intentional outcomes through which to reify racialized and classed power imbalances.¹⁵¹ Thus, “surveillance practices exert influence and reproduce power relations through technological and non-technological means alike.”¹⁵² In *Regulating Belonging: Surveillance, Inequality, and the Cultural Production of Abjection*, Torin Monahan argues that through disproportionate exposure, surveillance becomes a project of social ordering and world-making, even when its stated goal of public safety or crime control is limited or inconsistent.¹⁵³ He describes marginalizing surveillance as leading to “abjection,” which is a form of social exclusion wherein the existence of the individual is called into question.¹⁵⁴ He concludes that electronic monitoring schemes are utilized with poor people and people of color, despite the disconnect between its stated goals and effectiveness, precisely because they are judged unworthy of full participation in society:

Marginalizing surveillance presupposes, as an initial condition, the untrustworthiness of subjects, which is a form of judgment delegated to (and imposed by) the technological systems in question. The very presence—and coercive acceptance—of electronic-monitoring systems works to legitimate the forms of judgment they tacitly assert. The various systems of monitoring the crimes and debts of the poor are forms of marginalizing surveillance with potentially devastating effects.¹⁵⁵

¹⁵⁰ Arnett, *supra* note 45, at 432.

¹⁵¹ See Torin Monahan, *Regulating Belonging: Surveillance, Inequality, and the Cultural Production of Abjection*, 10 J. CULTURAL ECON. 191 (2017).

¹⁵² *Id.* at 192.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 198.

This conception of intentional marginalization and detachment has been discussed in other areas of criminal justice practice, such as policing.¹⁵⁶ In *Police Reform and the Dismantling of Legal Estrangement*, Monica C. Bell describes the detachment and eventual alienation from the enforcers of law, experienced primarily by African Americans and the poor, as “legal estrangement” and argues that this legal estrangement reflects the intuition among many people in poor communities of color that the law operates to exclude them from society.¹⁵⁷ This process “leaves large swaths of American society to see themselves as anomic, subject only to the brute force of the state while excluded from its protection.”¹⁵⁸ Here, she explains, “[t]he message conveyed in policing jurisprudence is not only one of oppression, but also one of profound estrangement.”¹⁵⁹ Similarly, criminal justice law and policy that authorizes electronic monitoring, aware of the concerns of social marginalization, sends the legislative and “jurisprudential message that poor people of color are ‘subject[s] of a[n] [ever-expanding] carceral state’ or ‘second-class citizens.’”¹⁶⁰ An e-carceration regime only acts to further one of the greatest harms of mass incarceration, the entrenchment of race and class subordination, and abandons genuine attempts at rehabilitation and reintegration.

The social marginalization produced by electronic monitoring can be defined and understood by its “sever and tether” effects. A person’s connection to their community, through employment, family ties, religious practices, and social activities, is one of the strongest protectors against criminal justice contact. The use of electronic monitoring acts to strain and sever these crucial ties necessary for reintegration and desistance in criminal justice contact, and in exchange tethers those monitored to a total surveillance regime unconcerned with rehabilitation. The sad irony of electronic monitoring is that it divorces individuals from the very things they need for success.

¹⁵⁶ See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

¹⁵⁷ *Id.* at 2054.

¹⁵⁸ *Id.* at 2057.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (alteration in original).

B. *Challenging E-carceration Through Legislative and Policy Reform*

1. Community Control Over Surveillance

At the core of the drive for the expansion of electronic monitoring is the desire for social control of the disproportionately poor and minority populations that will be released in efforts to facilitate decarceration. Thus, effective criminal justice reform aimed at addressing the harms of social marginalization may necessitate challenges to the lack of control over decisions to deploy advanced surveillance technologies. This would require the elevation of the voice and influence of those most impacted by these practices. Such a movement to demand community control over correctional decisions to employ electronic surveillance technology has of yet to materialize. However, this model of reform is currently being championed in a similar campaign that centers on ensuring community control over police use of surveillance technologies. This national campaign, called Community Control Over Police Surveillance (CCOPS), is spearheaded by the American Civil Liberties Union (ACLU).¹⁶¹ The campaign's principal objective is to pass CCOPS laws that ensure residents, through local city councils, are empowered to decide if and how surveillance technologies are used through a process that maximizes the public's influence over those decisions.¹⁶² The ACLU provides model CCOPS ordinances from which communities may tailor their legislation.¹⁶³

Since the effort began in 2016, several cities across the country have introduced CCOPS campaigns into their local governance bodies.¹⁶⁴ Some cities, such as Oakland, Seattle, and Nashville, have seen successful

¹⁶¹ *Community Control over Police Surveillance*, ACLU, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance> [https://perma.cc/9GVS-US2H].

¹⁶² *Id.*

¹⁶³ *Community Control over Police Surveillance (CCOPS) Model Bill*, ACLU, <https://www.aclu.org/other/community-control-over-police-surveillance-ccops-model-bill> [https://perma.cc/DL6B-XE82].

¹⁶⁴ Tanvi Misra, *The Local Movement to Curb Big Brother*, CITYLAB (Mar. 1, 2018), <https://www.citylab.com/equity/2018/03/how-cities-are-fighting-secret-surveillance/553892> [https://perma.cc/M997-3TWA].

passing within the last three years of this effort.¹⁶⁵ Cities like Washington, D.C., St. Louis, Cambridge, Milwaukee, Miami Beach, and New York City, are all currently working on drafting and proposing CCOPS legislation.¹⁶⁶ Also, Maine and California are working toward passing statewide CCOPS legislation.¹⁶⁷

It may be too early to fully assess the effectiveness of this campaign, and it is unclear whether a corollary campaign in corrections could provide appreciable benefits to advocates seeking to challenge correctional electronic surveillance. Although, the presumed benefits could be (1) communities most vulnerable to social marginalizing effects having a voice in determining if, when, and how electronic surveillance measures are used by corrections departments; (2) demanding the collection of data and piloting of programs prior to a complete rollout; and/or (3) emphasizing the importance of individual rehabilitation and reintegration versus management of offender populations.

While ideally this type of reform may have some appeal, it would not necessarily lead to an abolition or dismantling of electronic monitoring programs. In fact, such processes could lead to rubber-stamping of current and new surveillance technologies. Even more, the legislative strategy would face several obvious challenges. The first being the fact that “community” is a vague term that may encompass groups, persons, and organizations hostile to the interests of those community members that carry the disproportionate burden of correctional surveillance. There would certainly need to be discussions of what strategies are effective for maintaining safety and also promoting practices that embrace those with criminal justice contact with support, versus pushing them to the margins. These intra-communal battles are to be expected. However, there could be value in bringing community control to decision-making on technologies deployed because often judges, probation departments, and parole boards make these decisions in a vacuum. The concern with criminal justice-related citizen review boards and oversight committees

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

has been the lack of power bestowed to such units. This has especially been problematic in the police review board context.¹⁶⁸

The second challenge would be trying to reverse the inertia of the already widespread and growing use of electronic monitoring. The model CCOPS legislation promotes the idea that surveillance technologies should not be “grandfathered” in after the passing of legislation. However, this could be hard to negotiate in jurisdictions that already have contracts with electronic monitoring companies and have made substantial investments. Although, there may be benefit in community members being able to ease the restrictions governing electronic monitoring programming, and communities could potentially act to ensure that its use is limited, thereby pushing back against net-widening. A third challenge may come in navigating the state and local government dichotomy in corrections jurisdiction and responsibilities. For example, a city council or county board would have governance over the local jail and corrections department but would not likely have much influence over the state parole board or probation department with respect to the state prison within its jurisdiction. However, as noted above, several states are considering statewide CCOPS legislation, which presumably would necessitate statewide public approval for surveillance technology implementation. Even more, overincarceration is not a problem limited to state government, nor can its solutions be conceived and executed solely by state governments.¹⁶⁹ In developing programming and strategies to manage the size of the prison population, states must consider the effect that these changes will have on local jurisdictions and the important role of local policy and support in the success of their efforts.¹⁷⁰ Indeed, judges who make decisions to adopt electronic monitoring for use in

¹⁶⁸ See J.F. Meils, *Civilian Review Board Says It Has Little Power to Police the Police*, CAPITOL NEWS SERV., <https://cnsmaryland.org/baltimore-civilian> [<https://perma.cc/V8LG-3A3U>]; see also Emily Sullivan, *Want to Evaluate Allegations of Police Misconduct? The BPD Is Adding Civilians to Its Hearing Boards*, WYPR (Apr. 24, 2019), <https://www.wypr.org/post/want-evaluate-allegations-police-misconduct-bpd-adding-civilians-its-hearing-boards> [<https://perma.cc/D9LR-4F69>] (despite adding civilians to the hearing board, the Baltimore city government ensures that police officers have the controlling vote numbers).

¹⁶⁹ ELIZABETH DAVIES, THE URBAN INST., *IMPACT & INFLUENCE: THE ROLE OF LOCAL JURISDICTIONS IN MANAGING PRISON POPULATION SIZE 3* (2011), <https://www.urban.org/sites/default/files/publication/26651/412437-Impact-amp-Influence-The-Role-of-Local-Jurisdictions-in-Managing-Prison-Population-Size.PDF> [<https://perma.cc/W46W-PZX3>].

¹⁷⁰ *Id.*

pretrial release and at sentencing hearings increasingly see their roles as beholden to local governments.¹⁷¹ Although, local and state legislative strategies for community control would not affect federal corrections and immigration use of electronic monitoring.

Lastly, a fourth challenge presented by adopting the CCOPS legislative campaign strategy would be in generating support for those with criminal justice involvement. Unlike the CCOPS campaign that focuses on policing tactics that, at least theoretically, impact all citizens, corrections practices only directly impact a particular population. In years past, criminal justice reform efforts did not receive the necessary wide support and promotion.¹⁷² However, most recently, the public appears willing to support a wide range of criminal justice reforms.¹⁷³ In a statewide vote, Louisiana ended the use of non-unanimous juries, which were a legacy of the Reconstruction Era, designed to dilute the vote of freed African American men, and for over a century enabled primarily African Americans to be sentenced to significant jail terms without the full vote of the jury for guilt.¹⁷⁴ In Florida, through a statewide ballot, voters overturned felon disenfranchisement laws, paving the way for those with felony records to once again exercise the right to vote.¹⁷⁵ Texas passed the “Sandra Bland Act” which mandates that “county jails divert people with mental health and substance abuse issues toward treatment and requires that independent law enforcement agencies investigate jail

¹⁷¹ See Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 707 (2015).

¹⁷² See Joseph Goldstein & J. David Goodman, *Criminal Justice Reforms Stall in a Liberal Capital: New York*, N.Y. TIMES (Aug. 21, 2016), <https://www.nytimes.com/2016/08/22/nyregion/criminal-justice-reforms-new-york.html> [https://perma.cc/5LJ4-TYC8]; Carl Hulse, *Why the Senate Couldn’t Pass a Crime Bill Both Parties Backed*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html> [https://perma.cc/W2VG-PLCK].

¹⁷³ Lydia Wheeler, *Poll: 3/4 of Americans Support Criminal Justice Reform*, HILL (Jan. 25, 2018, 11:54 AM), <https://thehill.com/regulation/370692-poll-3-4-of-americans-support-criminal-justice-reform> [https://perma.cc/2NPX-AFFB].

¹⁷⁴ See Julia O’Donoghue, *Louisiana Approves Unanimous Jury Requirement, Scrapping Jim Crow-Era Law*, NOLA.COM (Nov. 7, 2018, 4:03 PM), <https://www.nola.com/crime/2018/11/louisiana-approves-unanimous-jury-requirement-scrapping-jim-crow-era-law.html> [https://perma.cc/Z52W-32S3].

¹⁷⁵ See German Lopez, *Florida Votes to Restore Ex-Felon Voting Rights with Amendment 4*, VOX, <https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results> [https://perma.cc/RF9Q-T722] (last updated Nov. 7, 2018, 1:15 PM).

deaths.”¹⁷⁶ None of these states are known for being progressive leaders in criminal justice reform, leaving one to believe that criminal justice reform in general is receiving greater support across the nation.

2. Change in Criminal Justice Approach

Responding to the marginalizing surveillance of electronic monitoring is ultimately going to take challenging ourselves to move away from a correctional framework unconcerned with rehabilitation. This “new penology,” where the aim of corrections is no longer successful reentry, but rather the management and control of categories and groups of people, must be reconsidered.¹⁷⁷ This approach has not proven to be effective, neither for reintegrating individuals back into the community, nor ensuring public safety. Shifting the framework will require not only a clear articulation of the harms of electronic surveillance but also communication and understanding of what works.

Identification of what works in ensuring effective reintegration and desistance in crime has never been elusive. Numerous studies have continually found that the single greatest predictor of successful reentry and the lowering of recidivism is employment.¹⁷⁸ As noted earlier, most individuals have come in contact with the criminal justice system and

¹⁷⁶ Johnathan Silver, *Texas Gov. Abbott Signs “Sandra Bland Act” into Law*, TEX. TRIBUNE (June 15, 2017, 4:00 PM), <https://www.texastribune.org/2017/06/15/texas-gov-greg-abbott-signs-sandra-bland-act-law> [https://perma.cc/5S6P-G4HW].

¹⁷⁷ Feeley & Simon, *supra* note 34.

¹⁷⁸ See AARON YELOWITZ & CHRISTOPHER BOLLINGER, MANHATTAN INST., PRISON-TO-WORK: THE BENEFITS OF INTENSIVE JOB-SEARCH ASSISTANCE FOR FORMER INMATES (2015), <https://www.manhattan-institute.org/html/prison-work-5876.html> [https://perma.cc/ZWL9-KYCV]; John M. Nally et al., *The Post-Release Employment and Recidivism Among Different Types of Offenders with a Different Level of Education: A 5-Year Follow-Up Study in Indiana*, 9 JUST. POL’Y J. 1 (2012), http://www.cjcj.org/uploads/cjcj/documents/The_Post-Release.pdf [https://perma.cc/9ZEE-VRLB]; LE’ANN DURAN ET AL., COUNCIL OF STATE GOV’TS JUSTICE CTR., INTEGRATED REENTRY AND EMPLOYMENT STRATEGIES: REDUCING RECIDIVISM AND PROMOTING JOB READINESS (2013), http://csgjusticecenter.org/wp-content/uploads/2013/09/Final.Reentry-and-Employment.pp_.pdf [https://perma.cc/64GE-3ZZC]; ROBERT CHERRY & MARY GATTA, MANHATTAN INST., IDENTIFYING EFFECTIVE PRISONER REENTRY STRATEGIES 7 (2017), <https://media4.manhattan-institute.org/sites/default/files/R-RC-0517.pdf> [https://perma.cc/NK73-SHUT].

entered prison as a direct result of unemployment.¹⁷⁹ It should not be a surprise then that employment is the best route for limiting the chances of return.

“Over 600,000 people make the difficult transition from prison to the community each year[,]” navigating many challenges and barriers upon return.¹⁸⁰ The unemployment rate for formerly incarcerated people is nearly five times higher than the unemployment rate for the general population, making it “substantially higher than even the worst years of the Great Depression.”¹⁸¹ Research demonstrates that much of this disparity comes from employment discrimination, of which people of color are especially vulnerable.¹⁸² Many employers will publicly express a willingness to hire individuals with criminal records, however, evidence shows that having a record reduces employer callback rates by fifty percent.¹⁸³ With formerly incarcerated individuals being more likely to be “active” in the labor market than the general public, “[u]nemployment among this population is a matter of public will, policy, and practice, not differences in aspirations.”¹⁸⁴

Employment assists formerly incarcerated individuals in establishing economic stability and decreases the chances that they return to prison, promoting greater public safety to the benefit of everyone.¹⁸⁵ Indeed, reintegration into the workforce can make neighborhoods and families safer and more stable, and helping them succeed can reduce the staggering costs to taxpayers for re-incarceration and increase contributions to the tax base for other vital community services.¹⁸⁶ “Having a job also enables individuals to contribute income to their families, which can generate more personal support, stronger positive

¹⁷⁹ See LOONEY & TURNER, *infra* note 282.

¹⁸⁰ LUCIUS COULOUTE & DANIEL KOPE, PRISON POLICY INITIATIVE, OUT OF PRISON & OUT OF WORK: UNEMPLOYMENT AMONG FORMERLY INCARCERATED PEOPLE (2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/5EAX-FGNV>].

¹⁸¹ *Id.* Among working-age individuals (twenty-five to forty-four in this dataset), the unemployment rate for formerly incarcerated people was 27.3%, compared with just 5.2% unemployment for their general public peers.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ LE’ANN DURAN ET AL., *supra* note 178, at V.

relationships, enhanced self-esteem and dignity, and improved mental health.”¹⁸⁷ “But despite the overwhelming benefits of employment, people who have been to prison are largely shut out of the labor market.”¹⁸⁸

A rehabilitative framework for decarceration necessitates a prioritization of employment assistance and job readiness and training. However, it should be noted that the research does not support the proposition that simply placing an individual in a job is a panacea.¹⁸⁹ Employment most effectively supports successful reintegration when individuals are immediately placed in jobs that are stable, versus temporary positions, and helps reduce the likelihood of recidivism when earnings are decent, especially when above the minimum wage.¹⁹⁰

The Council of State Governments (CSG), a nonprofit organization that fosters the exchange of insights and ideas to help state officials shape public policy, has noted that corrections departments and employment services agencies have for many years failed to effectively coordinate their efforts, despite often serving the same populations.¹⁹¹ Thus in addition to working through some of the practical, cross-systems issues necessary for integrating responses, CSG suggests several policy choices available to lawmakers at each level of government that would help formerly incarcerated people gain employment and increase public safety: (1) issue a temporary basic income upon release; (2) implement automatic record expungement procedures; (3) make bond insurance and tax benefits for employers widely available; (4) ban blanket employer discrimination;¹⁹² and (5) enact occupational licensing reform.¹⁹³

¹⁸⁷ *Id.* at 2.

¹⁸⁸ COULOUTE & KOPF, *supra* note 180.

¹⁸⁹ LE’ANN DURAN ET AL., *supra* note 178, at 2.

¹⁹⁰ *Id.* at 28.

¹⁹¹ *Id.* at 6, 33–34.

¹⁹² On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) updated its guidance on the use of criminal background checks for employment under Title VII of the Civil Rights Act of 1964, clarifying that blanket exclusions for individuals with criminal records violate Title VII because of its disparate racial impact. The guidance urges employers to consider the “nature of the crime, the time elapsed, and the nature of the job” in hiring decisions. *See* U.S. EQUAL EMP’T OPPORTUNITY COMM’N, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [<https://perma.cc/DQ5J-54ZT>].

¹⁹³ LE’ANN DURAN ET AL., *supra* note 178, at 4, 25, 27.

Some of the practical issues stalling cross-system collaboration center on correctional practices that are counterproductive to the goals of employment service agencies. Correctional electronic surveillance programs actively frustrate the aims of furthering employment opportunities.¹⁹⁴ Electronic monitoring does not harness the power of technology to assist individuals with connecting with employers, locating job readiness trainings, or to build professional networks. In fact, electronic monitoring acts to hinder employment efforts through restrictive policies that regulate the types and amounts of jobs one may hold, the location of employment, and the ability to work overtime.¹⁹⁵ Even more, the intense surveillance measures may have the effect of driving individuals away from the formal job market. However, a recent meta-analysis of the literature on best reentry practices noted that reducing the intensity of community supervision led to better outcomes, such that “we could maintain public safety and possibly even improve it with less supervision—that is, fewer rules about how individuals must spend their time and less enforcement of those rules.”¹⁹⁶

C. *Litigation as Strategy to Challenge E-carceration*

Although there have been some recent state cases that limit the length of time one may be monitored and the associated cost shifting burdens, courts generally approve the use of electronic ankle monitors. Even more, the impacts of social marginalization have yet to influence jurisprudence in the area. Given the current case law on electronic monitoring, litigation as a viable strategy seems to hold little promise.

¹⁹⁴ See Arnett, *supra* note 45, at 432.

¹⁹⁵ See YORK CTY. PROB. DEP'T OF ADULT SERVS., *infra* note 315.

¹⁹⁶ Jennifer L. Doleac, *Study After Study Shows Ex-Prisoners Would Be Better Off Without Intense Supervision*, BROOKINGS (July 2, 2018), <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision> [<https://perma.cc/L95K-ZNMC>]; see also JENNIFER L. DOLEAC, STRATEGIES TO PRODUCTIVELY REINCORPORATE THE FORMERLY-INCARCERATED INTO COMMUNITIES: A REVIEW OF THE LITERATURE 8–9 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198112&download=yes [<https://perma.cc/2APC-YDJD>].

1. Fourth Amendment and Electronic Monitoring

In 2018, the U.S. Supreme Court, which has often been criticized for being slow to respond to the impacts on law of advancing technology, heard one of the most important Fourth Amendment issues in quite some time. Privacy advocates and those legitimately concerned with the attendant constraints of Big Brother government have looked to the ruling in *Carpenter v. United States* as a major victory, as it settles several questions about the protections that citizens have when the government seeks to use third parties to access personal information such as location.¹⁹⁷ The case concerned law enforcement's ability to obtain cell site location information (CSLI), which is the location data collected from cell phones connecting to cell towers, from service providers without a search warrant.¹⁹⁸ The Court ruled that a warrant was required, given the great privacy interests that citizens have in their location, which could be used to determine medical conditions, political affiliations, sexual orientation, and much more.¹⁹⁹ While the significance of this case cannot be overstated, there are many Fourth Amendment questions left unanswered by *Carpenter* concerning other methods of state surveillance in both corrections and policing. Interestingly, in articulating the concern in the case, the Court noted that "when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."²⁰⁰ Thus, one of the questions that is not addressed by *Carpenter* is whether this ruling opens the door for new interpretations on how the location data collected by correctional surveillance technology, such as ankle monitors, should be protected.

In *Grady v. North Carolina*, an earlier case involving the use of GPS ankle monitors on sex offenders, the Supreme Court decided that the state "conducts a [Fourth Amendment] search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."²⁰¹ Although at pretrial and post-conviction

¹⁹⁷ See *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹⁹⁸ *Id.* at 2211–12.

¹⁹⁹ *Id.* at 2221.

²⁰⁰ *Id.* at 2218.

²⁰¹ *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015).

release individuals voluntarily consent to be monitored, the Court in *Carpenter* noted that when it comes to the location data that cell phones provide, the “voluntary exposure” rationale does not hold up.²⁰² One could ask whether those on ankle monitors, which are increasingly supervised by private for-profit probation companies, voluntarily expose their location data when the option presented is imprisonment or “near perfect surveillance.”²⁰³ Individuals on ankle monitors, like Timothy Carpenter, risk having their location data used to place them at the scenes of crimes, without the need for a search warrant.²⁰⁴

Many Fourth Amendment concerns remain with the use of ankle monitors, particularly with the massive amounts of data being captured and stored, often by private companies. This will present a number of challenges to ensuring protected privacy interests. Some of these boundaries are already being pushed in corrections in the name of profit. In a January 2019 report by *The Intercept*, it was revealed that prisons across the country are building biometric databases that include voice recordings of incarcerated people.²⁰⁵ The report identifies contracting documents from the State of New York’s prison system with private companies, as well as statements from officials in Texas, Florida, Arkansas, and Arizona confirming that their prisons are actively using voice recognition technology that, through surveillance of phone calls, can extract and digitize voices to create unique and identifiable biometric signatures known as voice prints.²⁰⁶ The newest forms of electronic ankle monitors capture similar voice data, along with fingerprints and facial recognition data.²⁰⁷ These practices are primed for continued Fourth Amendment challenges in the coming years.

²⁰² *Carpenter*, 138 S. Ct. at 2210.

²⁰³ *Id.* at 2210.

²⁰⁴ Anastasiya Bolton, *Ankle Monitor Links Suspect to Crimes*, 9NEWS, <https://www.9news.com/article/news/crime/ankle-monitor-links-suspect-to-crimes/287680530> [<https://perma.cc/H6XD-VQQF>] (last updated Aug. 4, 2016, 3:33 PM).

²⁰⁵ George Joseph & Debbie Nathan, *Prisons Across the U.S. Are Quietly Building Databases of Incarcerated People’s Voice Prints*, INTERCEPT (Jan. 30, 2019, 11:00 AM), <https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus> [<https://perma.cc/N2KE-S32D>].

²⁰⁶ *Id.*

²⁰⁷ Joshua Kaplan, *D.C. Defendants Wear Ankle Monitors that Can Record Their Every Word and Motion*, WASH. CITY PAPER (Oct. 8, 2019, 4:00 PM), <https://www.washingtoncitypaper.com/news/article/21091206/dc-agency-purchases-ankle-monitors-that-can-record-defendants->

2. Credit for Time Served

In recent years, criminal defendants have argued in court that given the harms associated with electronic monitoring and the attendant constrictions upon freedom of movement, the use of the technology should be considered a form of confinement entitling a defendant to “credit for time served.”²⁰⁸ However, courts in a number of states have uniformly dismissed this legal argument and framing.²⁰⁹ In *People v. Gonzales*, the Appellate Court of Illinois for the Second District, took up this very issue.²¹⁰ The defendant Tony Gonzales, who was charged with conspiracy to sell between 100 and 400 grams of cocaine, petitioned the court to receive credit for time served while under pretrial electronic monitoring for eight months.²¹¹ The court rejected his request, arguing that home detention differs from confinement in a jail or a prison because an offender detained at home is not subject to the regimentation of a penal institution, and noted that the offender enjoys unrestricted

every-word-and-motion [https://perma.cc/6AVD-RNBF]; Stephen Mayhew, *SuperCom Wins \$7M contract for Electronic Monitoring Project in Sweden*, BIOMETRICUPDATE.COM (Jan. 24, 2019), <https://www.biometricupdate.com/201901/supercom-wins-7m-contract-for-electronic-monitoring-project-in-sweden> [https://perma.cc/H76L-3B2D]; Jack Karsten & Darrell M. West, *Decades Later, Electronic Monitoring of Offenders Is Still Prone to Failure*, BROOKINGS (Sept. 21, 2017), <https://www.brookings.edu/blog/techtank/2017/09/21/decades-later-electronic-monitoring-of-offenders-is-still-prone-to-failure> [https://perma.cc/39WU-MM22].

²⁰⁸ “Credit for time served” refers to the judicial/correctional practice of subtracting the time spent in confinement presentencing (pretrial, during trial, and the time between trial and sentencing) from any amount of jail time given at sentencing. Thus, if a defendant spends one year in detention while awaiting trial and sentencing, then is ultimately given two years of confinement at his sentencing hearing, he should only have to serve one year if the court gives him credit for the presentencing period of confinement. Todd Edwards, *Correctional Good-Time Credits in Southern States*, CSG (May 2001), <https://www.csg.org/knowledgecenter/docs/slc-0105-GoodTime.pdf> [https://perma.cc/3RQ4-VK3P].

²⁰⁹ See *Ackerman v. State*, 179 P.3d 951 (Alaska Ct. App. 2008); *People v. Gonzales*, 734 N.E.2d 77 (Ill. App. Ct. 2000); *Trial Order, Commonwealth v. Merced*, No. 2256-02, 2002 WL 34401528 (Pa. Ct. Com. Pl. Dec. 6, 2002). Some states have also clearly noted in statutes that juveniles on electronic monitoring do not qualify for credit for time served. See OHIO REV. CODE ANN. § 2152.19(4)(k) (West 2017) (“Unless ordered by the court, a child shall not receive credit for any time served on house arrest with electronic monitoring . . .”).

²¹⁰ *Gonzales*, 734 N.E.2d at 77.

²¹¹ *Id.* at 79.

freedom of activity, movement, association, and greater privacy than a person who is incarcerated.²¹²

Aurelio Merced made a similar request to receive credit for time served from the Court of Common Pleas of Pennsylvania for the four and a half months' worth of time he spent on electronic monitoring before he was sentenced for possession of cocaine.²¹³ Interestingly, here the court made the distinction between an electronic monitoring home program run by the County Bail Agency and one run by prison authorities in rejecting Merced's petition.²¹⁴ Thus, if the program is not operated by prison authorities, the "participants are not considered prison inmates," and should not be considered confined.²¹⁵ The court also noted that "program participants are allowed to leave the home for work, doctor's appointments and treatment, religious services, attorney visits, and appointments with a bail officer, as well as other activities upon request and consent by a bail officer."²¹⁶ Even more, the court reasoned that the "electronic home monitoring program did not contain sufficient restraints on a participant's liberty as to constitute 'custody,'" because "Defendant Merced was allowed to live in his own home; he was free to watch television, interact with his wife and children, sleep in his own bed, eat whatever and whenever he wanted whether the food was in the refrigerator or he called for delivery"²¹⁷

The Court of Appeals of Alaska denied credit for time served to a defendant who was placed presentencing on an electronic monitoring device that monitored both his geographic location and consumption of alcohol.²¹⁸ The court stressed that electronic monitoring did not alter or add to the restrictions placed on the defendant's whereabouts or activities.²¹⁹ Instead, the court characterized electronic monitoring as simply "a way for the court to find out whether [the defendant] was abiding by those restrictions."²²⁰ The court was not convinced by the

²¹² *Id.* at 80.

²¹³ Trial Order, *Merced*, 2002 WL 34401528 (No. 2256-02).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Ackerman v. State*, 179 P.3d 951 (Alaska Ct. App. 2008).

²¹⁹ *Id.*

²²⁰ *Id.* at 953.

defendant's argument that those on electronic monitoring feel a different psychological pressure when they know that a device is keeping track of their physical movements and their alcohol intake, and ruled that the constraints imposed by electronic monitoring are not the equivalent of incarceration.²²¹

However, in *People v. Moss*, the Appellate Court of Illinois for the Fifth District ruled that electronic monitoring of a defendant committed to the Department of Corrections constituted custody within a "penal institution."²²² Unlike the previous cases, the defendant here argued that electronic monitoring should not be considered confinement because the state had charged and convicted him of "possession of contraband (cocaine) in a penal institution" after being arrested while possessing cocaine in the driveway of his neighbor's home.²²³ In making its ruling the court relied upon the "Electronic Detention Host Agreements," which the defendant had signed to participate in the electronic monitoring program, stipulating "home was an extension of defendant's 'assigned placement in a correctional facility.'"²²⁴ Even more, the court noted that "a penal institution is defined as a place for the custody of parties under sentence for offenses. . . . The term 'place,' as used in the definition of a penal institution, denotes a specific physical location with defined boundaries."²²⁵ Thus, another "place" besides a prison could be considered a "penal institution" if a defendant committed to the Department of Corrections lived there. Yet, it is hard to imagine this court coming to the same conclusion if the defendant lived in a dormitory on a college campus, or on the premises of a religious institution. Apparently, the court was willing to treat electronic monitoring at home as identical to incarceration, not to examine and challenge the potential constraints and harms placed upon the defendant, but rather to enable the state to expand the repertoire of offenses to prosecute defendants.

One of the more interesting arguments made by the court in *People v. Moss* was that the defendant's participation in electronic monitoring constituted custody in a penal institution because the defendant could be

²²¹ *Id.*

²²² *People v. Moss*, 654 N.E.2d 248, 250 (Ill. App. Ct. 1995).

²²³ *Id.* at 249.

²²⁴ *Id.*

²²⁵ *Id.* at 250.

prosecuted for the criminal offense of “escape,” defined as “intentional and unauthorized absence of a committed person from the custody of the Department.”²²⁶ The court concluded that “[h]aving made persons on electronic detention subject to the offense of escape, it logically follows that the legislature intended such persons to fall within the classification of ‘committed persons.’”²²⁷

3. Juvenile Law and Policy

Youth on electronic monitoring are also subject to this subsequent prosecution as a collateral consequence of participation. For example, the Maryland criminal code defines the offense of “[e]scape in the second degree” as escaping from “a place identified in a home detention order or agreement” or “a place identified in a juvenile community detention order.”²²⁸ A juvenile community detention order “includes electronic monitoring.”²²⁹ Youth who violate the terms of electronic monitoring by running away or cutting the device off of their ankle are frequently prosecuted for both escape and malicious destruction of property.²³⁰ Youth are similarly at risk in states like Illinois and Louisiana.²³¹ Even

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ MD. CODE ANN., CRIM. LAW § 9-405(3)(ii)-(iii) (West 2010).

²²⁹ MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-01(h)(2) (West 2014).

²³⁰ Author practiced as a public defender in Maryland from 2012–2015 and represented numerous youths who, after running away from home and cutting off the electronic monitor, were subsequently prosecuted for escape and malicious destruction of property. *See* MD. CODE ANN., CRIM. LAW § 6-301. Although this may not be representative of all jurisdictions across the country, several jurisdictions explicitly state that a juvenile may be charged with escape or tampering.

²³¹ *See* 705 ILL. COMP. STAT. ANN. 405/5-7A-120 (LexisNexis 2017) (“Escape; failure to comply with a condition of the juvenile electronic monitoring or home detention program. A minor charged with or adjudicated delinquent for an act that, if committed by an adult, would constitute a felony or misdemeanor, conditionally released from the supervising authority through a juvenile electronic monitoring or home detention program, who knowingly violates a condition of the juvenile electronic monitoring or home detention program shall be adjudicated a delinquent minor for such act and shall be subject to an additional sentencing order under Section 5-710.”); *see also* LA. STAT. ANN. § 14:110.2 (2003) (“Tampering with electronic monitoring equipment is the intentional alteration, destruction, removal, or disabling of electronic monitoring equipment Whoever commits the crime of tampering with electronic monitoring equipment shall be fined not more than five hundred dollars and shall be imprisoned

more, youth on electronic monitoring risk having the GPS data generated from their monitoring used against them in subsequent prosecutions.²³² Thus, courts' responses to electronic monitoring have primarily consisted of denial of arguments that seek credit for time served on the basis of psychological harms and limited liberty, and a demonstrated willingness to sanction collateral punishments.²³³

Yet, notwithstanding this negative response by courts to defendants' challenges to how electronic monitoring is dismissed as being devoid of significant penal excesses, some juvenile courts have begun to treat electronic monitoring the same as incarceration, albeit narrowly in the context of the Sixth Amendment right to a speedy trial. In Maryland, for example, youth have a right to an adjudication in sixty days after arraignment on the juvenile petition. However, if at the arraignment hearing a juvenile is detained by the judge, the adjudicatory hearing must be expedited and held no later than thirty days after detainment.²³⁴ Youth who are released pre-adjudication on electronic monitoring are treated the same as if they were detained and entitled to an adjudication within thirty days.²³⁵ Section 3-8A-15(6)(i) of the Maryland Courts and Judicial Proceedings Code states that "[a]n adjudicatory or waiver hearing shall be held no later than 30 days after the date a petition for detention or community detention is granted."²³⁶ "Community detention" is defined under section 3-8A-01(h)(2) as including "electronic monitoring."²³⁷ Thus, Maryland recognizes that significant periods on electronic monitoring are not desirable nor appropriate for youth in the same way that it limits incarceration, and demonstrates that the jurisdiction has some understanding of the harms and punitiveness of electronic

for not more than six months. If the offender violates the provisions of this Section while he is involved in the commission of a felony, he shall be fined not more than one thousand dollars and shall be imprisoned for not more than one year.").

²³² David Earl, *Police Have GPS Evidence that Puts Teen Murder Suspects at Crime Scene*, KETV OMAHA, <https://www.ketv.com/article/police-have-gps-evidence-that-puts-teen-murder-suspects-at-crime-scene-1/7657145> [<https://perma.cc/84CF-ADEE>] (last updated Dec. 30, 2015, 5:31 PM).

²³³ See *United States v. Lang*, 78 F. Supp. 3d 830 (N.D. Ill. 2015) (denying defendant's motion to exclude electronic monitoring GPS data as evidence of prior bad acts).

²³⁴ MD. CODE ANN., CTS. & JUD. PROC. §3 -8A-15(d)(6)(i)-(iii) (West 2016).

²³⁵ *Id.*

²³⁶ *Id.* § 3-8A-15(6)(1).

²³⁷ *Id.* § 3-8A-01(h)(2).

monitoring. As electronic monitoring devices become more advanced, powerful forms of social control, with greater invasive and punitive features, more states and jurisdictions may follow Maryland's lead in recognizing the potential harms of its use on youth.²³⁸

4. Lifetime Electronic Monitoring

Two recent cases in Wisconsin presented legal challenges against the state's law allowing lifetime electronic monitoring. In *State v. Muldrow*, the Wisconsin Supreme Court unanimously ruled that DeAnthony Muldrow's due process rights were not violated when he pled guilty to second-degree sexual assault, despite his argument that he was never informed by the court that the conviction would result in lifetime GPS monitoring.²³⁹ Once Muldrow found out he would be subject to electronic monitoring for the duration of his life, he sought to withdraw his guilty plea and the circuit court barred him from doing so.²⁴⁰ In the Wisconsin Supreme Court's affirmation of that denial, it agreed with the circuit court that electronic monitoring did not constitute "punishment," as lifetime GPS tracking was not punitive.²⁴¹ Writing for the court, Justice Michael Gableman noted that "neither the intent nor the effect of lifetime GPS tracking is punitive. Consequently, Muldrow is not entitled to withdraw his plea because the circuit court was not required to inform him that his guilty plea would subject him to lifetime GPS tracking."²⁴²

²³⁸ In 2004, Florida Governor Jeb Bush, recognizing the problems with the use of electronic surveillance of kids, noted that it is not the function of the state to monitor kids who are in the community and ended the funding for the state's program. However, during the subsequent administration under Governor Rick Scott, the state re-implemented the electronic monitoring program for juveniles. See Melissa Harris, *Florida Drops Ankle Bracelets for Juveniles*, ORLANDO SENTINEL (Aug. 8, 2004), http://articles.orlandosentinel.com/2004-08-08/news/0408080294_1_ankle-bracelets-juvenile-programs-monitor-children [https://perma.cc/3TH8-GFPT]; Interoffice Memorandum on Electronic Monitoring (EM) Program from Timothy Neirmann, Assistant Sec'y, Prob. and Cmty. Intervention, State of Fla., Dep't of Juvenile Justice, <http://www.djj.state.fl.us/docs/probation-policy-memos/pci-11-003.pdf?sfvrsn=6> [https://perma.cc/7QEK-NGBE].

²³⁹ *State v. Muldrow*, 912 N.W.2d 74 (Wis. 2018).

²⁴⁰ *Id.* at 76–78.

²⁴¹ *Id.* at 83–84.

²⁴² *Id.* at 77–78.

In *Kaufman v. Walker*, James Kaufman, who pled guilty to child sex, exploitation, and pornography crimes in the late 1990s, challenged the constitutionality of Wisconsin's lifetime GPS monitoring law under the Ex Post Facto Clause.²⁴³ In 2013, Kaufman's parole request was granted, but upon release he was subject to lifetime GPS monitoring. Kaufman appealed the requirement, arguing that it violated the ex post facto clauses of the U.S. and Wisconsin Constitutions because it was not in effect when he was convicted.²⁴⁴ The Ex Post Facto Clause prevents the imposition of new punishments for previous convictions where defendants were already convicted and given assurances of what their sentence would entail. The Wisconsin Court of Appeals used the rationale from *Muldrow* to reason that electronic monitoring is not punishment, thus Kaufman's argument does not hold because "a law can only be an ex post facto law if it imposes punishment."²⁴⁵ Additionally, the court noted that "in light of the State's special need to protect children from sex offenders, the GPS's relatively limited scope, and Kaufman's diminished expectation to privacy, the GPS monitoring program constitutes a reasonable special needs search."²⁴⁶

However, in the most recent state court case to consider a lifetime GPS monitoring statute, *Park v. State*, the Supreme Court of Georgia struck down as unconstitutional a state law that allowed for lifetime GPS monitoring of former offenders labeled as "sexually dangerous predators."²⁴⁷ After acknowledging the U.S. Supreme Court's ruling in *Grady*, that such monitoring constitutes a search under the Fourth Amendment, the court turned to the question of whether the search was reasonable, and examined the state's argument that it was reasonable because (1) "sexually dangerous predators" have a diminished expectation of privacy and (2) that the GPS monitoring of these individuals was a "special needs" search.²⁴⁸ The court reasoned that, unlike a person on parole or probation, who is still serving her sentence, a person like the defendant in the case, who has completed his sentence,

²⁴³ *Kaufman v. Walker*, 915 N.W.2d 193 (Wis. 2018).

²⁴⁴ *Id.* at 195.

²⁴⁵ *Id.* at 199.

²⁴⁶ *Id.* at 204 ("Special need" searches are searches that do not have crime control as their primary purpose or immediate objective).

²⁴⁷ *Park v. State*, 825 S.E.2d 147, 150 (Ga. 2019).

²⁴⁸ *Id.* at 154.

does not have a diminished expectation of privacy. The statute ruled unconstitutional made no distinction between parole/probation periods and monitoring beyond the completion of a sentence. The court noted that “in order for the special needs exception to apply, the purpose advanced to justify the warrantless search must be ‘divorced from the State’s general interest in law enforcement.’”²⁴⁹ Here the court argued that the plain language of the statute revealed that the monitoring requirements were not divorced from general crime control interests, in that it specified that the monitors would document when those devices are near or within a crime scene and that location information was immediately reported to law enforcement.²⁵⁰ Finally, the court dismissed the argument and stated that:

the stark and unique fact that characterizes this case [as one that does not meet the “special needs” exception] is that [the GPS monitoring device is] designed to obtain evidence of criminal conduct by [a person designated as a sexually dangerous predator] that would be turned over to the police and that could be admissible in subsequent criminal prosecutions.²⁵¹

5. Paying to be Monitored

Recently, the Arizona Court of Appeals ruled that a defendant at pretrial could not be forced to pay for mandatory electronic monitoring.²⁵² The case involved a man who at pretrial bail hearing told a judge that he could not afford to pay the \$400 per month fee for electronic monitoring to a private company.²⁵³ The judge denied him release and set his bail at \$100,000.²⁵⁴ The appellate court reasoned that if the state is required to pay for DNA testing in post-conviction appeals,

²⁴⁹ *Id.* at 155.

²⁵⁰ *Id.*

²⁵¹ *Id.* (alteration in original).

²⁵² Lauren Castle, *Criminal Suspects Can’t Be Forced to Pay for Their Own GPS Monitoring, Court Rules*, AZCENTRAL., <https://www.azcentral.com/story/news/local/arizona/2019/10/01/arizona-suspects-cant-forced-pay-gps-monitoring-appeals-court-rules/2034335001> [https://perma.cc/Z7MQ-UKB6] (last updated Oct. 1, 2019, 5:37 PM).

²⁵³ *Id.*

²⁵⁴ *Id.*

then certainly the state should cover the expense when the person has not been convicted and the law is silent on who bears the cost.²⁵⁵

Perhaps as more research is conducted into electronic monitoring, and other technology-enhanced correctional surveillance measures, in addition to a nationwide movement exposing and elevating the harms, the norms on punishment and liberty deprivation undergirding many of these court decisions may shift in ways that allow for more successful legal challenges. The state court rulings against lifetime monitoring and shifting cost burdens are jurisprudential steps in the right direction. Much of this change in the legal landscape will ultimately depend upon how courts generally wrestle with new forms of surveillance used in the criminal justice system, like facial recognition software, that currently present perplexing problems for traditional Fourth Amendment privacy protections developed at a time when this level of powerful search could not have been imagined.

III. APPLYING SOCIAL MARGINALIZATION FRAME TO PURPORTED BENEFITS OF ELECTRONIC MONITORING

There have been many arguments made in favor of the use of electronic ankle monitors as a tool for decarceration. This Part highlights three of the most popular arguments made by proponents and raises overlooked concerns with social marginalization with each argument.

A. *Public Safety Advantage*

In the years of growth and expansion of the use of electronic ankle monitors in the criminal justice system, proponents of the devices have continually pointed to the public safety benefits as a primary reason to support programming that relies upon the technology. The benefit argument here is that because electronic monitors follow individuals at all hours, not only will law enforcement know where they are at all times,

²⁵⁵ *Hiskett v. Lambert*, No. 1 CA-SA 19-0119, 2019 Ariz. App. LEXIS 894 (Ariz. Ct. App. Oct. 1, 2019). “If the superior court in *Reyes* could not order a convicted felon to pay for mandatory DNA testing where the statute was silent about cost shifting, the same reasoning applies here—and with greater force—where Petitioner is accused of certain crimes but has not yet been tried, much less convicted.” *Id.* at *9.

but the devices will also act as a deterrent, like Jeremy Bentham's Panopticon,²⁵⁶ because the person knows that they are always being watched, and this reduces criminal behaviors. Thus, the logic is that less state surveillance nurtures the propensity for criminality, particularly for former offenders. This public safety benefit is often measured on the basis of electronic monitoring's relationship to recidivism. Recidivism is defined as "[a] measurement of the rate at which offenders commit other crimes, either by arrest or conviction baselines, after being released from incarceration."²⁵⁷

There are several notable domestic and international studies that tout the positive impact that electronic monitoring has on recidivism.²⁵⁸ However, a frequently cited report is a 2010 study conducted in Florida by researchers at Florida State University's College of Criminology and Criminal Justice Center for Criminology and Public Policy Research, with the support of the Department of Justice's National Institute of Justice.²⁵⁹ Researchers compared the experiences of more than 5,000 medium and high-risk offenders who were monitored electronically to more than 266,000 offenders not placed on monitoring over a six-year period.²⁶⁰ The analysis conducted demonstrated significant decreases in the failure rate for all groups of offenders electronically monitored, and the decreases

²⁵⁶ See Jacques-Alain Miller, *Jeremy Bentham's Panoptic Device*, 41 OCTOBER 3 (1987), https://www.jstor.org/stable/778327?seq=1#page_scan_tab_contents [https://perma.cc/ZZ2N-K92K].

²⁵⁷ 13 WEST'S ENCYCLOPEDIA OF AM. L. 170 (2d ed. 2005).

²⁵⁸ See Anaïs Henneguelle, Benjamin Monnery & Annie Kensey, *Better at Home Than In Prison? The Effects of Electronic Monitoring on Recidivism in France* 4 (GATE Lyon St-Étienne, Université de Lyon, Working Paper No. 1603, 2016); Synove N. Andersen & Kjetil Telle, *Electronic Monitoring and Recidivism: Quasi-Experimental Evidence from Norway* 6 (Statistics Norway, Research Dep't, Discussion Paper No. 844, 2016); Randy R. Gainey, Brian K. Payne & Mike O'Toole, *The Relationships Between Time in Jail, Time on Electronic Monitoring, and Recidivism: An Event History Analysis of a Jail-Based Program*, 17 JUST. Q. 733, 733 (2000); Rafael Di Tella & Ernesto Schargrodsky, *Criminal Recidivism After Prison and Electronic Monitoring*, 121 J. POL'Y ECON. 28, 30 (2013).

²⁵⁹ William Bales et al., *A Quantitative and Qualitative Assessment of Electronic Monitoring* (Jan. 2010) (unpublished grant report) (submitted to the Office of Justice Program, National Institute of Justice, U.S. Department of Justice), <http://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf> [https://perma.cc/H9RN-MMS6].

²⁶⁰ NAT'L INST. OF JUST., *ELECTRONIC MONITORING REDUCES RECIDIVISM* 1 (2011), <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf> [https://perma.cc/K334-H38M].

were similar for all age groups.²⁶¹ Three other main findings from the study noted: (1) electronic monitoring reduces offenders' risk of failure by thirty-one percent; (2) electronic monitoring based on GPS typically had more of an effect on reducing failure to comply than radio frequency systems; and (3) electronic monitoring had less of an impact on violent offenders than on sex, property, drug and other types of offenders.²⁶² However, they argue, the effect remains statistically significant.²⁶³

Similar findings on the positive effects on recidivism were found in a study conducted in Argentina.²⁶⁴ Researchers measured recidivism through rearrest rates of offenders surveilled with electronic monitoring from the late 1990s, when the program began, through 2007.²⁶⁵ The data were compiled from two sources within the administrative records of the Penitentiary Service of the Province of Buenos Aires, for a total database of 1,526 individuals (1,140 formerly in prison and 386 formerly under electronic monitoring). The results of the study note that the general prison recidivism rate was twenty-three percent, while the rate for the offenders that spent time on electronic monitoring was thirteen percent, demonstrating a difference of nine percentage points.

However, there are just as many studies that have demonstrated that electric monitoring has no impact on recidivism. In a recent study conducted in Indiana, using data from the Vigo County Community Corrections Office and the State of Indiana criminal history information system, researchers aimed to investigate the impact of electronic monitoring on post-program recidivism.²⁶⁶ The study examined 293 offenders who participated in the electronic monitoring program, both successfully and unsuccessfully, from January 2006 through December 2009.²⁶⁷ The results of the study indicated that offenders who successfully completed the program were two times more likely to recidivate after completing the program, compared to those who did not successfully

²⁶¹ *Id.* at 2.

²⁶² *Id.*

²⁶³ *Id.* at 64.

²⁶⁴ Di Tella & Schargrodsky, *supra* note 258, at 30.

²⁶⁵ *Id.* at 30.

²⁶⁶ Avdi S. Avdija & JiHee Lee, *Does Electronic Monitoring Home Detention Program Work? Evaluating Program Suitability Based on Offenders' Post-Program Recidivism Status*, 11 JUST. POL'Y J. 4-5 (2014).

²⁶⁷ *Id.* at 6.

complete the program. The report notes that “[o]verall, the results of this study show that Electronic Monitoring Home Detention program does not reduce recidivism” and “[i]n fact, this research indicates that the likelihood of re-offending for those who have successfully completed the program increases compared to those who have not successfully completed it.”²⁶⁸ Thus, quite the opposite effect of contributing to public safety.

A weak relationship between electronic monitoring and recidivism has been demonstrated in international studies as well. In Germany, researchers tested the hypothesis that electronic monitoring contributes to a reduction in recidivism after the program ends.²⁶⁹ Two groups were compared, individuals who had to complete their full prison sentence, and those who were released early and participated in an electronic monitoring program as a precondition before being released from correctional surveillance. When the two groups were compared, there was no statistically significant difference between those who were released on electronic monitors and those who remained behind prison walls before ultimately being released. The results showed that electronic monitoring did not have a recidivism-reducing impact.²⁷⁰ A similar study conducted in Canada concluded that “if the desired outcome is reduced recidivism, [electronic monitoring] has questionable merit.”²⁷¹

Most recently, in *A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders*, a meta-analysis of electronic monitoring literature was conducted with the aim of (1) establishing whether there is a relationship between electronic monitoring and reduction in reoffending; (2) investigating how the electronic monitoring of offenders is found to be effective, ineffective, and/or produce unintended effects; and (3) summarizing information on the implementation and costs of electronically monitoring offenders.²⁷² The

²⁶⁸ *Id.* at 11–12.

²⁶⁹ Katharina Meuer & Gunda Woessner, *Does Electronic Monitoring as a Means of Release Preparation Reduce Subsequent Recidivism? A Randomized Controlled Trial in Germany*, EUR. J. CRIMINOLOGY 2–3 (2018).

²⁷⁰ *Id.* at 15.

²⁷¹ James Bonta et al., *Can Electronic Monitoring Make a Difference? An Evaluation of Three Canadian Programs*, 46 CRIME & DELINQ. 61, 73 (2000).

²⁷² JYOTI BELUR ET AL., A SYSTEMATIC REVIEW OF THE EFFECTIVENESS OF THE ELECTRONIC MONITORING OF OFFENDERS, WHAT WORKS CRIME REDUCTION SYSTEMATIC REVIEW SERIES,

researchers searched through electronic databases and other sources to identify 4,774 publications that mentioned electronic monitoring from 1999 through 2016. Those 4,774 publications were further screened by title and abstract to ensure a greater focus of the studies of electronic monitoring, leaving 373 studies. After a full read of the reports, these 373 publications were again screened furthered to ensure that electronic monitoring evaluation was the primary aim of the study. This led to seventeen studies that were used for the meta-analysis.²⁷³ The results of the meta-analysis revealed that “those with [electronic monitoring] did not show differences from the control groups” and that overall “there was no evidence of a statistically significant effect of [electronic monitoring].”²⁷⁴ The study further concludes that future research should focus on understanding and measuring the impact of “stand-alone [electronic monitoring] programmes compared to [electronic monitoring] programmes that combine other treatments and interventions,” as there is not enough evidence to demonstrate a benefit to recidivism with just the use of electronic ankle monitors alone.²⁷⁵ Thus, the evidentiary support for the public safety benefits of electronic monitoring is at best mixed or inconclusive, and at worse demonstrative of ineffectiveness or a contribution to recidivism.

Despite the inconclusive benefits to recidivism, the public safety argument has led electronic monitoring programs to frequently incorporate exclusion zones for those monitored. These exclusion zones are dedicated areas within a jurisdiction where a person under surveillance may not travel to, with the ankle monitor prepared to alert authorities when that person comes within a specified distance. Some exclusion zones are related to the location of an alleged or convicted offense, or known location of a purported witness/victim, but not necessarily. Courts have very wide discretion in determining the exclusion zones.²⁷⁶ Often these exclusion zones are tied to an area where a friend or relative lives that the court has deemed as “a bad influence,”

NO. 13, 5 (2017), https://whatworks.college.police.uk/Research/Systematic_Review_Series/Documents/Electronic_monitoring_SR.pdf [<https://perma.cc/2FN2-X8AA>].

²⁷³ *Id.* at 21.

²⁷⁴ *Id.* at 32.

²⁷⁵ *Id.* at 62.

²⁷⁶ See Arnett, *supra* note 45, at 444 (Author discusses the great discretionary power of juvenile court judges in determining the attendant restrictions with electronic monitoring and the corresponding accountability gap it creates.).

the presumed “turf” of alleged rival groups, shopping districts, schools, grocery stores, and even libraries. Here electronic monitoring programs leverage the power of surveillance as a means to segregate people monitored within cities, towns, and even within their own neighborhoods. These practices have deep marginalizing effects as they limit employment and educational opportunities, socializing, civic engagement, family bonding, and parenting.

B. *Cost Savings Benefit*

Perhaps one of the most salient and least controversial arguments in favor of the use of electronic monitoring is that the technology is cheaper to utilize than the cost to incarcerate. Indeed, substantial savings could be derived from releasing individuals on electronic monitoring instead of detaining them. In 2015, the Vera Institute of Justice calculated the yearly “average cost per inmate,” among forty-five states that provided data (representing 1.29 million of the 1.33 million total people incarcerated in all fifty state prisons systems), as \$33,274.²⁷⁷ New York had the highest average cost per inmate at \$69,355.²⁷⁸ In comparison, the American Bar Association estimates that electronic monitoring costs \$3,650 per year.²⁷⁹ In a study on the cost savings benefits of electronic monitors in Washington, D.C., the District of Columbia Crime Policy Institute highlighted several financial benefits, including an average net benefit per participant of \$4,600.²⁸⁰ Such savings are not insignificant, given the thousands of pretrial defendants and individuals set to be released in the coming years, as the country moves away from the overuse of cash bail

²⁷⁷ VERA INST. OF JUST., PRISON SPENDING IN 2015 (2015), <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> [https://perma.cc/3RNL-HWN4].

²⁷⁸ *Id.*

²⁷⁹ Kim Soffen, *The Price of Electronic Prison*, HARV. POL. REV. (2014), <http://harvardpolitics.com/united-states/price-electronic-prison> [https://perma.cc/ZPP7-A3KN].

²⁸⁰ JOHN K. ROMAN ET AL., D.C. CRIME POL. INST., THE COSTS AND BENEFITS OF ELECTRONIC MONITORING FOR WASHINGTON, D.C. 7 (2012), <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/412678-The-Costs-and-Benefits-of-Electronic-Monitoring-for-Washington-D-C-.PDF> [https://perma.cc/J474-XB4T].

and commits further to decarceration efforts. Proponents argue that monies saved on incarceration could be used for the public benefit in the areas of education, health, and employment assistance.

Unfortunately, however, this is usually where the conversation on the costs related to electronic monitoring ends. This limited focus on the expense of electronic monitoring versus incarceration leaves out other generated costs. For example, the costs passed on to families. Electronic monitoring programs charge offenders for their own correctional surveillance, ranging anywhere from ten dollars to forty dollars a day, not including initial startup and installation costs, and require those under surveillance to have landline telephone services, and electricity bills paid on time.²⁸¹ Not only does this make it more likely that those with means will only be able to participate, but those of lesser means who are able to do so, to the detriment of other areas of their financial lives, are bearing significant costs. The attendant financial demands put incredible strains on families and intrafamilial relationships for those returning home, often creating pressure to reengage in activities that lead to criminal justice contact. Those monitored become financial burdens with diminished means of contributing to the household, often leading to marginalization even within their own homes.

In a recent economic studies report, researchers at the Brookings Institution highlight that only forty-nine percent of prime-age men were employed three full calendar years prior to incarceration.²⁸² Specifically,

²⁸¹ See Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/magazine/digital-jail-surveillance.html> [<https://perma.cc/N7BT-6W4Y>]; Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NPR (May 24, 2014, 4:48 PM), <https://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor> [<https://perma.cc/VG6G-EB8B>]; Anne Jungen, *GPS Ankle Bracelet Monitoring of Low-Risk Offenders Costs More Than Anticipated*, GOV'T TECH. (May 3, 2016), <http://www.govtech.com/public-safety/GPS-Ankle-Bracelet-Monitoring-of-Low-Risk-Offenders-Costs-More-than-Anticipated.html#> [<https://perma.cc/BLQ3-92ZL>]; see also YORK CTY. DUI TREATMENT COURT PROGRAM, ELECTRONIC MONITORING PROGRAM AGREEMENT, <https://yorkcountypa.gov/forms/send/89-electronic-monitoring/246-electronic-monitoring-program-agreement.html> [<https://perma.cc/K4Z7-6WY4>].

²⁸² ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 1, 5–9 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [<https://perma.cc/TDE6-5ZY4>]; Adam Looney, *5 Facts About Prisoners and Work, Before and After Incarceration*, BROOKINGS INSTITUTION (Mar. 14, 2018), <https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration> [<https://perma.cc/XF4U-UQE8>].

two years prior to the year they enter prison, fifty-six percent of individuals have essentially no annual earnings (less than \$500).²⁸³ Those who were employed had median earnings of \$6,250 annually, with only thirteen percent earning more than \$15,000.²⁸⁴ These employment challenges only deepen after incarceration and the weight of a criminal conviction. In a year after release from prison, only fifty-five percent were able to report any earnings, with the median earnings being \$10,090.²⁸⁵ Of those with earnings, forty-nine percent earned less than \$500, thirty-two percent earned between \$500 and \$15,000, and only twenty percent earned more than \$15,000.²⁸⁶

Managing the additional daily costs of electronic monitoring, given these statistics, is not only extremely difficult, but also an unshakable set up for failure. This reality has been exacerbated in recent years as community corrections programming has become increasingly privatized. In an extensive report, *Set Up to Fail*, Human Rights Watch examined the harms of privatized probation; most notably, the pursuit of profit “or the imposition of a probation sentence simply to supervise the payment of costs, rather than as an alternative to a jail sentence.”²⁸⁷ The report finds that private community corrections “companies exert significant control over the lives of people on probation” as cash-strapped jurisdictions willingly outsource these programs.²⁸⁸ It further highlights the attractiveness of the private companies to jurisdictions looking to cut costs because they frequently do not charge the government for their services, instead raising all their revenue from the fees charged to probationers.²⁸⁹ Due to this direct financial interest, the companies have

²⁸³ LOONEY & TURNER, *supra* note 282, at 8.

²⁸⁴ *Id.* at 1.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 7.

²⁸⁷ HUMAN RIGHTS WATCH, SET UP TO FAIL 2 (2018), <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor> [<https://perma.cc/HFZ9-JCT3>].

²⁸⁸ *Id.* at 3.

²⁸⁹ See Kofman, *supra* note 281. Kofman reports:

But states and cities, which incur around 90 percent of the expenditures for jails and prisons, are increasingly passing the financial burden of the devices onto those who wear them. It costs St. Louis roughly \$90 a day to detain a person awaiting trial in the Workhouse, where in 2017 the average stay was 291 days. When individuals pay Emass \$10 a day for their own supervision, it costs the city nothing.

Id.

a negative incentive to keep people on community corrections programming, like electronic monitoring, for as long as possible, and use threats of imprisonment as a method to urge payment of fees.²⁹⁰ Probationers interviewed in the report noted that “probation officers made threatening or coercing statements when they did not have enough money to pay for their supervision and other conditions.”²⁹¹

These growing costs associated with criminal justice involvement and programming have been likened to a revival of debtor prisons.²⁹² Several recent lawsuits have challenged these policies and practices. In

²⁹⁰ See *id.* Describing the relationship between the private monitoring company Emass and the criminal court in St. Louis, the author notes:

The alliance with the courts gives the company not just a steady stream of business but a reliable means of recouping debts: Unlike, say, a credit-card company, which must file a civil suit to collect from overdue customers, Emass can initiate criminal-court proceedings, threatening defendants with another stay in the Workhouse [local jail].

Id. Even when the requirement ends there may still be pressure used for payment. The author describes the story of Daehaun White after a court ordered the end to his electronic ankle monitoring supervision:

When White showed up to Emass a few days later to have the ankle bracelet removed, he said, one of the company’s employees told him that he couldn’t take off his monitor until he paid his debt. White offered him the \$35 in his wallet—all the money he had. It wasn’t enough. The employee explained that he needed to pay at least half of the \$700 he owed. Somewhere in the contract he had signed months earlier, White had agreed to pay his full balance ‘at the time of removal. But as White saw it, the court that had ordered the monitor’s installation was now ordering its removal. Didn’t that count?

Id.

²⁹¹ HUMAN RIGHTS WATCH, *supra* note 287, at 3.

²⁹² See Lily Gleicher & Caitlin Delong, *The Cost of Justice: The Impact of Criminal Justice Financial Obligations on Individuals and Families*, ICJIA (Aug. 1, 2018), <http://www.icjia.state.il.us/articles/the-cost-of-justice-the-impact-of-criminal-justice-financial-obligations-on-individuals-and-families> [<https://perma.cc/4QEZ-JQV2>]; see also The Twenty-First Annual Liman Colloquium, *Who Pays? Fines, Fees, Bail, and the Cost of Courts*, https://law.yale.edu/sites/default/files/area/center/liman/document/full_liman_05.02.18.pdf [<https://perma.cc/U2X6-SDHV>]; Whitney Benns & Blake Strode, *Debtors’ Prison in 21st-Century America*, ATLANTIC (Feb. 23, 2016), <https://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378> [<https://perma.cc/E9JF-9DN3>]; Eli Hager, *Debtors’ Prisons, Then and Now: FAQ*, MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq> [<https://perma.cc/R8GW-AUBH>].

Louisiana, a class-action lawsuit was filed against the Orleans Parish Criminal District Court, arguing that thousands of people had been threatened over years with arrest for nonpayment of court debts.²⁹³ Federal District Court Judge Sarah Vance declared that “the Judges’ policy or practice of not inquiring into the ability to pay of such persons before they are imprisoned for nonpayment of court debts is unconstitutional.”²⁹⁴ In *Timbs v. Indiana*, the U.S. Supreme Court stressed that the Eighth Amendment’s prohibition against excessive fines limited state and local governments’ ability to impose financial penalties and seize property.²⁹⁵ Writing for the majority, Justice Ginsburg noted that “[e]xorbitant tolls undermine other constitutional liberties . . . [as] fines may be employed ‘in a measure out of accord with the penal goals of retribution and deterrence,’ for ‘fines are a source of revenue,’ while other forms of punishment ‘cost a State money.’”²⁹⁶

During the years of great growth in mass incarceration, private prison corporations have been identified as significant contributors to the culture of carceral expansion, motivated by profit.²⁹⁷ However, as over-incarceration has become generally accepted by Americans as problematic, there have been efforts to move away from the use of private prisons. “Between 2000 and 2016, eight states—Arkansas, Kentucky, Maine, Michigan, Nevada, North Dakota, Utah and Wisconsin—eliminated their use of private prisons due to concerns about safety and cost cutting.”²⁹⁸ In 2016, under the Obama Administration, the Department of Justice announced that it would begin to phase out the use

²⁹³ ‘Debtors Prison’ Lawsuit in New Orleans Pressed by Civil Rights Lawyers, ASSOCIATED PRESS, <http://web.archive.org/web/20190302215737/https://www.nola.com/crime/2019/03/debtors-prison-lawsuit-in-new-orleans-pressed-by-civil-rights-lawyers.html> [https://perma.cc/6QXC-PPJH] (last updated Mar. 2, 2019, 11:26 AM).

²⁹⁴ Declaratory Judgment at 2, *Cain v. City of New Orleans*, No. 2:15-cv-04479-SSV-JCW (E.D. La. Aug. 3, 2018), <http://www.abajournal.com/files/VanceJudgmentforPlaintiffs.pdf> [https://perma.cc/HLL5-UXVU].

²⁹⁵ *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

²⁹⁶ *Id.* at 689.

²⁹⁷ See Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, SENTENCING PROJECT (Aug. 2, 2018), <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons> [https://perma.cc/4VBX-EAFD].

²⁹⁸ *Id.* at 5.

of private prisons, citing a critical report by the department's independent inspector general about safety and security issues in private prisons.²⁹⁹

However, private prison companies have proven adept at adapting to the changing political climate, as they have increasingly sought to make up for lost profits through capitalizing on the current push for decarceration. GEO Group and CoreCivic (formerly Corrections Corporation of America), the two biggest private prison corporations, invested billions of dollars in acquiring companies that specialize in ankle monitor technology.³⁰⁰ From 2011 to 2015, GEO Group invested more than \$450 million in electronic monitoring and alcohol monitoring-related businesses.³⁰¹ As a senior vice president of GEO Group explained in a company's earnings call, "the company is 'enthusiastic' about expanding its offender rehabilitation services, which they believe is 'in line with current criminal justice reform discussions.'"³⁰² She further stated, "[w]e view these efforts as positive . . . and we believe that the emphasis on offender rehabilitation and community re-entry programs as part of criminal justice reform will create growth opportunities for our company."³⁰³

So what is also often left out of the conversation on the costs of electronic monitoring is the social costs inherent in having private profit interests drive the direction of reform. Not only is profit motive, which relies on cutting back on costs and rehabilitative services, often at odds with best practices in the field, but it "threatens to undermine the good intentions of the national movement to end mass incarceration."³⁰⁴ Given

²⁹⁹ Charlie Savage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html> [<https://perma.cc/5HGB-M4AS>].

³⁰⁰ See *Fact Sheet: GEO Group and Corrections Corporation of America Spend Billions of Taxpayer Dollars Purchasing Smaller Companies*, ITPI (Sept. 1, 2016), <https://www.inthepublicinterest.org/fact-sheet-geo-group-and-corrections-corporation-of-america-spend-billions-of-taxpayer-dollars-purchasing-smaller-companies> [<https://perma.cc/FWU8-Y8RA>].

³⁰¹ George Joseph, *The Private Prison Industry's New Criminal Justice Ventures*, CITYLAB (Sept. 14, 2016), <https://www.citylab.com/equity/2016/09/the-private-prison-industrys-new-criminal-justice-ventures/499964> [<https://perma.cc/47VE-F95A>].

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Caroline Isaacs, *Private Prison Corporations Must Not Be Allowed to Hijack Move to End Mass Incarceration*, HILL (Aug. 25, 2016, 9:14 AM), <https://thehill.com/blogs/congress-blog/>

their track record as two of the main players in perpetuating mass incarceration and violation of the rights of those detained, GEO Group and CoreCivic should neither be at the helm, nor purse, of reform policy and practices.

Even more, as escalating numbers of individuals are placed on monitoring, data storage services and systems are needed which will be additional costs that companies could potentially seek profit from. However, such consistent attempts to capitalize off of these new tech and data-driven criminal justice efforts should not be surprising. Mike Nellis, a renowned expert on electronic monitoring, accurately captures this sentiment in his recent work as he states that:

Connectivity, and its corollary, the ceaseless real-time extraction and algorithmic management of people's data, are now so integral to the structure, culture and governance of societies across the world, so normalised, so embedded in everyday life, that its penal possibilities, for better or worse, were never likely to go unexploited by commercial actors or unresisted by efficiency-conscious governments.³⁰⁵

C. *Returning Home*

Probably the most touted and heartfelt benefit of the use of the ankle monitors is that it allows people to return home and escape the horrors of prison, to be with family and loved ones. The purported benefit of electronic monitoring here is that offenders may return to the community, resume normal activities, yet at the same time provide assurances to the state that there is no public safety risk by allowing their movements to be tracked, gathered, and monitored. For example, Alaska's Department of Corrections notes that its electronic monitoring program enables "inmates who meet certain requirements to serve time at home," so that they may "maintain employment, access community-

judicial/292546-private-prison-corporations-must-not-be-allowed-to-hijack [https://perma.cc/48BC-RZ2Q].

³⁰⁵ MIKE NELLIS, "BETTER THAN HUMAN"? SMARTPHONES, ARTIFICIAL INTELLIGENCE AND ULTRA-PUNITIVE ELECTRONIC MONITORING, CHALLENGING E-CARCERATION 1 (2019), <https://www.challengingecarceration.org/wp-content/uploads/2019/01/TI-and-Smart-EM-Final-.pdf> [https://perma.cc/BSW7-JTE2].

based treatment, perform community work service, address medical issues, and attend religious functions.”³⁰⁶

The argument relies in large part on a strict diametric comparison between jail and release with electronic monitoring, which stresses that being home is better than being in a cell. Indeed, it is reasonable to argue that being released from prison, even under surveillance, is better than being locked away. “However, such comparisons leave little room for critical reflection into how electronic surveillance may create its own penal excesses”³⁰⁷ This point is poignantly made by Michelle Alexander in her assessment of e-carceration as an alternative to mass incarceration:

If you asked slaves if they would rather live with their families and raise their own children, albeit subject to “whites only signs,” legal discrimination and Jim Crow segregation, they’d almost certainly say: I’ll take Jim Crow. By the same token, if you ask prisoners whether they’d rather live with their families and raise their children, albeit with nearly constant digital surveillance and monitoring, they’d almost certainly say: I’ll take the electronic monitor. I would too. But hopefully we can now see that Jim Crow was a less restrictive form of racial and social control, not a real alternative to racial caste systems. Similarly, if the goal is to end mass incarceration and mass criminalization, digital prisons are not an answer. They’re just another way of posing the question.³⁰⁸

The potential for depopulation of prisons, whether in small or large numbers, given the damage that mass incarceration has wrought, should always be welcomed. However, this should not compromise a commitment to critique and push for the criminal justice system to continue to improve. Such critique must constantly examine whether the alternatives to prison that are deployed further or compromise the goals of rehabilitation and reintegration for those returning home postconviction, and justice and fairness for those subjected to electronic

³⁰⁶ *Sentenced Electronic Monitoring*, ALASKA DEP’T CORRECTIONS, PRETRIAL ENFORCEMENT DIVISION, <http://www.correct.state.ak.us/pretrial/sentenced-electronic-monitoring> [https://perma.cc/8VC6-BDJD].

³⁰⁷ Arnett, *supra* note 45, at 406–07.

³⁰⁸ Alexander, *supra* note 7.

monitoring during pretrial proceedings while still presumed to be innocent.

Even more, the “better than jail” dichotomy is often misleading. It presumes that those who are released on electronic monitoring programs are always able to meet the demands. Anecdotal evidence demonstrates otherwise and reveals electronic monitoring programs as so restrictive that many people are set up to fail.³⁰⁹ As noted earlier, the economic costs of program participation frequently act, when those who can no longer afford the associated fees miss a payment, to cause violations and failures. In addition, the rules and regulations governing electronic monitoring also make it difficult to successfully comply. In a report produced by the University of California Berkeley Law School’s Samuelson Law, Technology, and Public Policy Clinic, and East Bay Community Law Center, the authors examined the electronic monitoring policies for juveniles across all fifty-eight California counties.³¹⁰ Although the policy analysis revealed alarming inconsistency in policies between jurisdictions, what remained consistent was that “[s]ome terms and conditions may be too strict or inflexible, making it difficult for youth to comply with the rules, while at the same time failing to provide any clear benefit to the youth or to the public.”³¹¹ The report identified frequent technical violations as an obvious outcome when rules are too stringent.³¹² Rules governing where one can go, the types of activities one can participate in, the ability to visit family, and the requirement to confirm approval days or weeks in advance, were specifically highlighted as overly restrictive, cumbersome, and counterproductive.³¹³ Such rules often lead to those under monitoring being excluded from family and community events and other gatherings that are necessary for strengthening community bonds and ties critical for successful reentry.³¹⁴

³⁰⁹ See *The Voices of the Monitored-Video and Audio Gallery*, CHALLENGING E-CARCERATION, <https://www.challengingecarceration.org/watch-videos> [<https://perma.cc/E9CV-CALX>].

³¹⁰ U.C. BERKELEY SCH. OF LAW, ELECTRONIC MONITORING OF YOUTH IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM (2017), https://www.law.berkeley.edu/wp-content/uploads/2017/04/Report_Final_Electronic_Monitoring.pdf [<https://perma.cc/8DAV-EXJV>].

³¹¹ *Id.* at 10.

³¹² *Id.* at 2–3, 10.

³¹³ *Id.* at 2–3.

³¹⁴ *Id.*

Similar restrictions can be found in adult electronic monitoring programs. In York, Pennsylvania, correctional authorities note in their instructions that:

When you are wondering whether or not you will be permitted to go somewhere, ask yourself the following question: If I were in jail, would I be able to do this? If the answer is NO, then chances are that you will not be able to do it on House Arrest/Electronic Monitoring either.³¹⁵

Their guidelines for what a person placed on electronic monitoring is not permitted to do include such restrictions as:

- To stop anywhere on your way to and from your destination
- To work in excess of 60 hours per week
- To work more than 6 days per week or more than 12 hours in one day
- To work more than one job when employed full-time . . .
- To visit friends or family in the hospital
- To go grocery shopping or any kind of shopping (unless the only legal guardian)
- To use laundromat (unless the only adult in the home)
- To get haircuts at a salon or barber (buy clippers or have hairdresser come to your house)
- To attend your children's in-school or after-school activities or sports events . . .³¹⁶

³¹⁵ YORK CTY. PROB. DEP'T OF ADULT SERVS., OFFENDER GUIDE TO "WINDOW" REQUESTS WHILE UNDER ELECTRONIC MONITORING/SCRAMX, <https://yorkcountypa.gov/forms/send/89-electronic-monitoring/265-offender-guide-to-window-requests-while-under-electronic-monitoring-scramx.html> [<https://perma.cc/ME8W-WCMT>].

³¹⁶ *Id.*

The guidelines also state that “[e]very employer will be contacted and will be aware of the fact that you are on Electronic Monitoring and/or SCRAMx and the offense for which you were convicted.”³¹⁷

The takeaway here is that it is almost too easy to fail. So, the idea that home is better than prison is, in reality, often only a temporary reprieve before that person ends up back in prison due to a technical violation. Even when prison is not the immediate response to violations, more requirements and restrictions are added, raising the depths of marginalization and odds of repeated failure and ultimate incarceration.³¹⁸ Also, leaving the home, even when seemingly necessary, could lead to a violation. In Los Angeles, Dustin Tirado cut his hand, and after the wound bled profusely, headed to the nearest hospital while calling his parole officer to let him know.³¹⁹ When Mr. Tirado arrived at the hospital, officers were there to place him under arrest, where he remained for ten days before being released.³²⁰

In a recent Illinois House Judiciary Committee hearing on electronic monitoring programs around the state, several people testified about the barriers erected as a result of participation.³²¹ Colette Payne told the story of her son who was on electronic monitoring while suffering from a severe injury.³²² She explained that, when her son needed medical attention, and they were unable to get permission to leave, they had to make the decision between tending to his health and violating the program.³²³ They chose to see his doctor and he was subsequently jailed for the violation.³²⁴ Nicole Davis testified about her uncle who she cared for before he passed away from cancer.³²⁵ She noted that her uncle

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ James Kilgore & Emmett Sanders, *Ankle Monitors Aren't Humane. They're Another Kind of Jail*, WIRED (Aug. 4, 2018, 8:00 AM), <https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail> [<https://perma.cc/33UF-USJ7>].

³²⁰ *Id.*

³²¹ James Kilgore, *IL EM Hearing: First in the U.S.*, CHALLENGING E-CARCERATION (Mar. 2019), <https://www.challengingecarceration.org/2019/02/26/il-em-hearing-first-in-the-us> [<https://perma.cc/6SQK-YQZY>].

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ Lee V. Gaines, *Why Even Illinois's Department of Corrections Wants to Fix the Way the State Does Electronic Monitor*, NPR (Feb. 26, 2019), <http://www.nprillinois.org/post/why-even->

developed cancer shortly after being released from prison on electronic monitoring, but missed many doctor appointments because parole officers would not answer her calls when seeking permission to take her uncle out of the home.³²⁶ Ms. Davis stated that her uncle deteriorated quickly after that, and when he died, he still had the ankle monitor attached to his leg.³²⁷ Her family sought to have him cremated, but was unable to, as he sat in the morgue for weeks before any representative from the corrections department came to remove the device from his body.³²⁸

It is also important to note that the current, widely used electronic monitoring technology is not failproof.³²⁹ In fact, the devices frequently experience weak battery charges that lead to the units shutting off prematurely, insufficient satellite coverage and signal disconnections, and false positives where the device inaccurately flags a person as being in a location that they are restricted from or indicates tampering with the device.³³⁰ In 2011, California conducted tests on the GPS ankle monitors that the state was using with 4,000 individuals and discovered widespread inaccuracies, such as monitors indicating that a person was three miles away from their actual location, and consistent battery failures.³³¹ In 2013, the Wisconsin Center for Investigative Journalism published an extensive report which uncovered statewide problems with Wisconsin's GPS monitoring program, including false alerts and system inaccuracies.³³² Five years later, the Center reviewed state and county records and

illinois-s-department-corrections-wants-fix-way-state-does-electronic-monitor#stream/0
[https://perma.cc/XVC3-8Y2C].

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Jack Karsten & Darrell M. West, *Decades Later, Electronic Monitoring of Offenders Is Still Prone to Failure*, BROOKINGS (Sept. 21, 2017), <https://www.brookings.edu/blog/techtank/2017/09/21/decades-later-electronic-monitoring-of-offenders-is-still-prone-to-failure> [https://perma.cc/V4BK-6TTH].

³³⁰ *Id.*

³³¹ Paige St. John, *Parolee GPS Ankle Monitors: Major Flaws Found in Vendor's System*, L.A. TIMES (Mar. 31, 2013, 12:00 AM), <http://articles.latimes.com/2013/mar/31/local/la-me-ln-major-flaws-found-in-parolee-gps-monitoring-devices-20130331> [https://perma.cc/TY38-ZUGY].

³³² Riley Vetterkind, *Bad Cell Signal? If You Wear a GPS Ankle Bracelet, It Can Send You Back to Jail*, CRIME REPORT (Mar. 8, 2018), <https://thecrimereport.org/2018/03/09/254851> [https://perma.cc/B9DM-Z55L].

interviewed individuals participating in the electronic monitoring program, and noted that inefficiencies and inaccuracies with the system remain, as the state failed to institute recommended changes to address the identified concerns.³³³ A review of a single month, May, in 2017, of Wisconsin's electronic monitoring program revealed that: (1) Wisconsin offenders generated more than 260,000 GPS alerts, 81,000 of which corrections officials sorted through manually; (2) the state monitoring center lost cell connection 56,853 times with 895 offenders, an average of about sixty-four times per offender; and (3) Department of Corrections employees submitted 135 formal requests related to technical problems with GPS monitoring devices—ninety three for charging or battery issues with ankle bracelets, twelve for signals lost, and fourteen for false tamper alerts.³³⁴

The burden of these faults in the technology fall on those being monitored because they often trigger program violations and jail time.³³⁵ Take for example, Cody McCormick who was placed on electronic monitoring in early 2017 in Wisconsin.³³⁶ Shortly after being placed on electronic monitoring, his ankle device experienced poor satellite reception at his home.³³⁷ When police officers arrived and found him exactly where he was required to be, he was still placed under arrest and held for three days, losing his job in the process.³³⁸ Ten months later McCormick was arrested again and jailed for five days when his ankle monitor placed him at a location for an hour, when in fact he had only driven by the location.³³⁹ These nationwide concerns with faulty electronic monitoring technology have led the Department of Justice to

³³³ *Id.*

³³⁴ *Id.*

³³⁵ See YORK CTY. PROB. DEP'T OF ADULT SERVS., *supra* note 315; see also Mario Koran, *Lost Signals, Disconnected Lives*, WIS. WATCH (Mar. 24, 2013), <https://www.wisconsinwatch.org/2013/03/lost-signals-disconnected-lives> [<https://perma.cc/BRD3-8ELY>]; Sarah Lustbader & Vaidya Gullapalli, *How Electronic Monitoring Sets People on Parole Up to Fail*, APPEAL (Mar. 4, 2019), <https://theappeal.org/how-electronic-monitoring-sets-people-on-parole-up-to-fail> [<https://perma.cc/FD2K-YCF6>].

³³⁶ Vetterkind, *supra* note 332.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

issue national standards for offender monitoring systems.³⁴⁰ However, these standards are only recommended.³⁴¹

The narrow comparison between jail and electronic monitoring often fails to provide a complete picture. A fuller image reveals that electronic monitoring programs are more cyclical than linear, where violations are almost unavoidable, increasing the likelihood of re-incarceration and leading to offenders cycling in and out between the program and jail. This understanding provides greater context for the results of the Kentucky study cited earlier in Part I, where significant numbers of inmates noted that they would choose to spend more time in prison before release, in order to avoid any time on electronic monitoring.³⁴² Unfortunately, there is scant data on how many people are returning to prison as the result of program violations because the current focus of data collection is on recidivism—which does not capture those who violate while on electronic monitoring, and are jailed, but have not committed new offenses.³⁴³ Collection and analysis of these data must be a focal point of future research. Illinois recently passed legislation which will make it the first state to mandate the organized collection and analysis of data of who (race, age, sex, offense, etc.) is subjected to electronic monitoring programs and why they are subjected.³⁴⁴ Hopefully, more states will follow its lead in the coming years.

³⁴⁰ See NAT'L INST. OF JUSTICE, OFFENDER TRACKING SYSTEMS NIJ STANDARD 1004.00 (2016), <https://www.ncjrs.gov/pdffiles1/nij/249810.pdf> [<https://perma.cc/5JMC-UH7E>] (for the standards developed).

³⁴¹ *Id.*

³⁴² See Irizarry, *supra* note 89.

³⁴³ James Kilgore, *A Critical Look at Electronic Monitoring Under the Illinois Department of Corrections*, CTR. FOR MEDIA JUST., <https://www.challengingecarceration.org/2019/01/02/a-critical-look-at-electronic-monitoring-under-the-illinois-department-of-corrections> [<https://perma.cc/5E62-NXCB>].

³⁴⁴ See Joseph Darius Jaafari, *Illinois Puts Ankle Monitors on Thousands. Now It Has to Figure Out Who Gets Tracked and Why*, MARSHALL PROJECT (July 15, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/07/15/illinois-puts-ankle-monitors-on-thousands-of-people-now-it-has-to-figure-out-exactly-who-gets-tracked-and-why> [<https://perma.cc/FD2P-GZS5>].

CONCLUSION

While many people placed on electronic monitoring pose no flight or public safety risk, falling within the grasp of its vast net-widening effects, and would fare well with no or little state controlled intervention or supports, there are those who come in contact with the criminal justice system for reasons related to the absence of adequate social supports. The carceral state has in many ways become a warehouse for individuals with neglected mental health and behavioral needs,³⁴⁵ drug addiction, and challenges born from unstable housing and chronic unemployment in economically strangled communities. Moving away from electronic correctional surveillance as the “go-to alternative” may help create the space for more programming aimed at the support of the needs of individuals versus the management of risks, reorienting criminal justice toward rehabilitation. Effective programs that do not rely on intensive electronic surveillance have been developed and piloted in recent years with success.³⁴⁶ For example, in Chicago, the Lawndale Christian Legal Center has developed an alternative to incarceration that mobilizes community resources in evening programming. Young adults in the program are engaged in mentoring, tutoring, and community projects. The program helps them with vocational training, resume writing, cover letter writing, job searching, academic tutoring, and community engagement through hands-on work.³⁴⁷ In New York, the South Bronx Community Connections is a detention alternative program run by local grassroots faith and neighborhood organizations. With its restorative justice model, a network of faith and community organizations in a given police precinct form a network to engage participants who have been arrested in mentoring and positive leadership development activities. The program’s approach is built on three principles: (1) a community-driven grassroots neighborhood approach instead of a top-down system-led

³⁴⁵ Matt Ford, *America’s Largest Mental Hospital Is a Jail*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012> [<https://perma.cc/9432-W646>]; see also Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Feb. 25, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis> [<https://perma.cc/WRT2-UTJZ>].

³⁴⁶ Arnett, *supra* note 45, at 427.

³⁴⁷ See *Community Restorative Justice Hub*, LAWDALE CHRISTIAN LEGAL CTR., <http://lclc.net/programs/rjhub> [<https://perma.cc/U4HA-XT5S>].

approach; (2) a positive leadership development approach to participants that focuses on strengths and assets, instead of risk and needs; and (3) the importance of connecting participants to their communities through civic engagement projects with mentors who are “credible messengers.”³⁴⁸

Yet there is more that could be done. Many of these alternatives have come through the advocacy, leadership, and governance of community-based organizations. However there are significant challenges that have limited the expansion of effective community-driven alternatives to detention, including: (1) the willingness to provide funding for such programming based on negative perceptions of organizations created and led by impacted communities; (2) lack of data, both on how electronic monitoring is being used, in order to highlight its disproportionate impacts and overall ineffectiveness, and on programs that do not rely upon intensive surveillance, in order to demonstrate their worth; (3) some jurisdictions allow community-led alternative programming while still continuing to use electronic surveillance measures, jeopardizing the programs’ efficacy; and (4) the tendency of some community-based organizations to be co-opted when their programs are directly supervised or governed by state or privatized corrections departments.

As jurisdictions work through these challenges toward developing more alternatives, they could benefit from guiding goals and principles that could help shield against the implementation of programs furthering social marginalization. The ultimate goals of reentry programming and pretrial services must center on rehabilitation and reintegration, and not simply court compliance and narrow definitions of public safety. Model principles to guide this process should include: (1) the elevation of individual/family strengths and needs assessment versus risk assessment when determining program participation; (2) the prioritization of public benefit over private profit;³⁴⁹ (3) the adherence to strict requirements for data gathering and transparency, including qualitative feedback from impacted communities; and (4) the utilization of a reparative framework,

³⁴⁸ See *South Bronx Community Connections*, COMMUNITY CONNECTIONS FOR YOUTH, <https://cc-fy.org/project/south-bronx-community-connections> (internal quotation marks omitted).

³⁴⁹ Such priorities necessitate programming that is both impacted community-driven, versus corrections controlled, and committed to the “4 C’s” of effective rehabilitative and restorative engagement: *Caring, Competent, Consistent, Connection*.

which recognizes the need to repair the harms of decades of over-incarceration.

The American populous is slowly coming to the realization that mass incarceration is not only a blemish on the country in the eyes of the international community, but also a system that has wreaked untold pain and damage on countless communities. The collective responsibility for correcting the wrongs of mass incarceration is obvious.³⁵⁰ Perhaps the biggest harm of mass incarceration is that it reifies and deepens America's racial caste system by locking those who have criminal justice contact out of meaningful opportunities for social advancement.³⁵¹ If part of righting the wrongs of mass incarceration, and its numerous contributors, such as mass prosecution and over-policing, involves seriously committing to decarceration efforts, then those strategies used to enable decarceration must be shrewdly examined and critiqued to ensure that we are not repeating the same mistakes. Turning to electronic ankle monitors has, at its best, not shown to be effective strategy, and, at its worse, appeared to contribute to a social marginalization that only acts to entrench the same harms of criminal justice contact seen with mass incarceration. More research will be needed to further demonstrate the relationship between new forms of advancing correctional surveillance technology and social marginalization. In these efforts, a guiding question that must remain at the forefront of our minds is whether the rise of an e-carceration regime presents a solution to, or an expansion of, the harms of mass incarceration.

³⁵⁰ See Matiangai Sirleaf, *Responsibility for Epidemics*, 97 TEX. L. REV. 285 (2018) (providing creative framework for attributing responsibility in addressing past wrongs.).

³⁵¹ See Alexander, *supra* note 7; Loic Wacquant, *The New 'Peculiar Institution': On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377 (2000).