PUNITIVE SURVEILLANCE

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Budget constraints, bipartisan desire to address mass incarceration, and the COVID-19 crisis in prisons have triggered state and federal officials to seek alternatives to incarceration. As a result, invasive electronic surveillance—such as GPS-equipped ankle monitors, smartphone tracking, and suspicionless searches of electronic devices—is often touted as a humane substitute for incarceration. This type of monitoring, which I term "punitive surveillance," allows government officials, law enforcement, and for-profit companies to track, record, search, and analyze the location, biometric data, and other meta-data of thousands of people on probation and parole. With virtually no legal oversight or restraint, punitive surveillance deprives people of fundamental rights, including privacy, speech, and liberty.

Building on the critique that punitive surveillance is a form of racialized carceral control, this Article makes three contributions: First, drawing on original empirical research of almost 250 public agency records governing the operation of electronic ankle monitoring, this Article reveals non-obvious ways that punitive surveillance, like incarceration, strips people of basic rights and liberties. In particular, the records show how monitoring restricts movement, limits privacy, undermines family and social relationships, jeopardizes financial security, and results in repeated loss of freedom. Unlike traditional

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probation and parole, punitive surveillance is more intensive, restrictive, and dependent on private surveillance companies. Second, this Article explains how, and why, courts' labeling of such surveillance as a "condition" of punishment or a regulatory measure stems from a misunderstanding of this surveillance and punishment jurisprudence. Third, and most ambitiously, this Article raises the question of whether a fundamental rights analysis, a regulatory response, or an abolitionist approach is the most effective way of limiting—if not outright eliminating—punitive surveillance.

INTRODUCTION

Four months before he was killed by police in Atlanta in June 2020, Rayshard Brooks spoke in an interview about his time on probation and an electronic ankle monitor.[1] Mr. Brooks explained that monitoring and probation made it "impossible" to lead his life and made him feel like an animal.[2] Wearing a monitor was stigmatizing, making it hard for him to get a job and provide for his three children and wife.[3] While his name is now synonymous with the brutality of police killings of unarmed Black men, it might also be a reminder of the burden of living under criminal court control.

Mr. Brooks' experience echoes the reality of hundreds of thousands of people in the American criminal legal system who are ordered to wear GPS- and microphone-equipped ankle monitors that record and broadcast their physical location, provide DNA samples, and submit to suspicionless searches of their electronic devices. This particular type of surveillance—what I term "punitive surveillance"—is a form of incarceration facilitated by invasive technology and for-profit companies. To be sure, many other forms of state surveillance are also punitive and restrictive, but this Article focuses specifically on the ways that the criminal legal system uses technology as a form of incarceration. Drawing on original empirical research of almost 250 state and local policies governing electronic monitoring of people on court supervision, this Article exposes the extent to which punitive surveillance, like physical incarceration, limits—and sometimes outright extinguishes—a person's basic constitutional rights, such as speech, movement, and assembly.[4]

Fueled by the COVID-19 pandemic and increasingly bipartisan support for decarceration efforts, punitive surveillance is often touted as a humane alternative to incarceration and is expanding substantially with little

[1] Sam Hotchkiss, Rayshard Brooks: In His Own Words, Reconnect (June 17, 2020), https://reconnect.io/rayshard-brooks-in-his-own-words [https://perma.cc/8HQS-BR7S].

[2] Randi Kaye, Rayshard Brooks Opened Up About the Struggles of Life After Incarceration in an Interview Before His Death, CNN (June 17, 2020), https://www.cnn.com/2020/06/17/us/rayshard-brooks-interview-reconnect-life-after-incarceration/index.html [https://perma.cc/2JCD-UXN6].

[3] Hotchkiss, supra note 1.

[4] Kate Weisburd, Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System (Geo. Wash. U. L. Sch. 2021) [hereinafter Electronic Prisons], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930296 [https://perma.cc/E469-GMU8].

oversight or regulation.[5] The diminishment of rights that accompanies punitive surveillance is generally seen as the reasonable price someone pays to avoid incarceration, as is true with other forms of court supervision.[6]

Yet there is a limit on the erosion of rights that accompanies punishment. In the United States, citizenship is defined by the "right to have rights[,]" and it is "not a license that expires upon misbehavior."[7] Punitive surveillance, however, reveals a significant but undertheorized gap in punishment jurisprudence: how to define, regulate, and limit punitive and carceral experiences that do not occur behind prison walls. Beyond the Eighth Amendment and the Ex Post Facto Clause, there are

[5] See Cara Tabachnick, Covid-19 Created a Bigger Market for Electronic Ankle Monitors, Bloomberg L. (July 14, 2020), https://www.bloomberg.com/news/articles/2020-07-14/coronavirus-creates-big-market-for-electronic-ankle-monitors [https://perma.cc/6GVY-CXZG] (estimating that there were 25% to 30% more people wearing electronic monitors worldwide in July 2020 than a few months prior); Eli Hager, Where Coronavirus Is Surging—and Electronic Surveillance, Too, Marshall Project (Nov. 22, 2020), https://www.themarshallproject.org/2020/11/22/where-coronavirus-is-surging-and-electronic-surveillance-too [https://perma.cc/7UEX-ZYYX] ("In Chicago, . . . the number of people on electronic monitoring jumped from 2,417 before the pandemic to 3,365 by mid-June . . . ."); Jenifer B. McKim, 'Electronic Shackles': Use of GPS Monitors Skyrockets in Massachusetts Justice System, GBH News (Aug. 10, 2020), https://www.wgbh.org/news/local-news/2020/08/10/electronic-shackles-use-of-gps-monitors-skyrockets-in-massachusetts-justice-system [https://perma.cc/SJE3-3GLS] (quoting a Massachusetts Parole Board official advocating for expanded use of GPS devices as a strategy "balancing the interests of public safety, accountability, and release from incarceration").

[6] This position is advanced by commentators, courts, and scholars alike. See, e.g., Samuel R. Wiseman, Pretrial Detention and the Right to Be Monitored, 123 Yale L.J. 1344, 1398 (2014) (suggesting that monitoring offers "a fairer, more effective, and more efficient alternative to money bail"); United States v. Barnett, 415 F.3d 690, 691–92 (7th Cir. 2005) (finding that "a blanket waiver of Fourth Amendment rights" was valid because "imprisonment is a *greater* invasion of personal privacy than being exposed to searches of one's home on demand"); People v. Nachbar, 3 Cal. App. 5th Supp. 1122, 1129 (Cal. Ct. App. 2016) (upholding electronic search condition on grounds that defendant "accepted probation in lieu of additional punishment"); United States v. Smith, 414 F.2d 630, 636 (5th Cir. 1969) (explaining that defendant "could have rejected probation and elected prison" and that, having "chose[n] to enjoy the benefits of probation," the defendant had to "endure its restrictions"); Schacht v. United States, rev'd on other grounds, 398 U.S. 58 (1970); Editorial Board, Editorial: New App-Based Defendant-Monitoring Program Is a Promising Alternative to Bail, St. Louis Post-Dispatch (Jan. 21, 2020), https://www.stltoday.com/opinion/editorial/editorial-new-app-based-defendant-monitoring-program-is-a-promising-alternative-to-bail/article_7466fc29-ef8e-5875-8567-3372b8a904ff.html [https://perma.cc/TT96-6UN2] (referring to a new electronic monitoring program as an "effective but less intrusive" alternative to money bail that "appears to address more concerns than it creates").

[7] Trop v. Dulles, 356 U.S. 86, 92, 102 (1958).

no obvious backstops on the erosion of fundamental rights and liberties that are part and parcel of punitive surveillance.[8]

The lack of a more robust and coherent jurisprudence may stem from the general perception that people subject to punitive surveillance would otherwise be incarcerated, where the deprivation of fundamental rights is greater. There is no empirical evidence, however, that monitoring is consistently used as an alternative to incarceration.[9] In a world without monitors, perhaps some people would otherwise be incarcerated, but many would (or should) not be.[10] In practice, punitive surveillance is often part of criminal punishment, imposed on top of probation, parole or supervised release.[11] It is almost never a tradeoff between one day of electronic monitoring versus one day in prison—it is most often both for varying amounts of time.[12]

Likewise, even if monitoring were used as a genuine alternative to incarceration, the alternative remains "a form of coded inequity and carceral control."[13] As Professor Michelle Alexander explains, "digital prisons are to mass incarceration what Jim Crow was to slavery."[14] Simply because an enslaved person would choose to live with their families, albeit subject to "whites only signs" and segregation, does not justify Jim Crow.[15] The same can be said about the choice between incarceration and punitive surveillance.

[8] See generally Tonja Jacobi, Song Richardson & Gregory Barr, The Attrition of Rights Under Parole, 87 S. Cal. L. Rev. 887 (2014) (describing the erosion of constitutional rights of people on parole).

[9] See Kate Weisburd, Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring, 98 N.C. L. Rev. 717, 740, 745–46 (2020) [hereinafter Weisburd, Sentenced to Surveillance]; Avlana K. Eisenberg, Mass Monitoring, 90 S. Cal. L. Rev. 123, 157 (2017); Gabriela Kirk, The Limits of Expectations and the Minimization of Collateral Consequences: The Experience of Electronic Home Monitoring, 68 Soc. Probs. 642, 644 (2021).

[10] Maya Schenwar & Victoria Law, Prison by Any Other Name: The Harmful Consequences of Popular Reforms 30 (2020); Christine S. Scott-Hayward & Erin Eife, Correctional and Sentencing Law Commentary: Electronic Monitoring, 57 Crim. L. Bull. (2021).

[11] See Weisburd, Sentenced to Surveillance, supra note 9, at 741; Schenwar & Law, supra note 10, at 30–32; see infra Section I.A.

[12] See Erin Murphy, Paradigms of Restraint, 57 Duke L.J. 1321, 1323 (2008) (critiquing the use of a one-to-one tradeoff to evaluate purported alternatives to physical incarceration).

[13] Ruha Benjamin, Race After Technology: Abolitionist Tools for the New Jim Code 167 (2019).

[14] Michelle Alexander, Opinion, 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 [https://perma.cc/45J8-TZVG].

[15] Id.

Punitive surveillance has become not so much an actual alternative to incarceration, but rather an "alternative *form* of incarceration."[16] As the empirical findings in this Article demonstrate, the carceral experience is no longer defined by physical walls and prison bars. And as incarceration increasingly operates outside of physical prisons, the punishment landscape is shifting.

This Article reveals three growing, but underappreciated, fissures in punishment jurisprudence. First, treating punitive surveillance as a condition of punishment (as compared to punishment itself) that need only be "reasonably related" to a purpose of punishment is inaccurate and relies on circular logic that almost always results in a finding of constitutionality.[17] Second, treating punitive surveillance as a regulatory measure (akin to collateral consequences or civil restraints) is often inapplicable and inappropriately removes it from Eighth Amendment and Ex Post Facto Clause protections.[18] Finally, treating punitive surveillance as punishment (which it is) also does little to limit its scope and impact.[19]

As a result of these fissures, punitive surveillance has escaped meaningful scrutiny. Given the importance of the rights at stake, and that those most impacted—people convicted of crimes—are also the most disenfranchised,[20] closer scrutiny is critical.[21] A small number of judges, community organizers, and scholars, myself included, have critiqued punitive surveillance on privacy and dignity grounds, as well as the ways it reproduces race and class subordination.[22] This Article builds on those

[16] See James Kilgore, Let's Fight for Freedom from Electronic Monitors and E-Carceration, Truthout (Sept. 4, 2019), https://truthout.org/articles/lets-fight-for-freedom-from-electronic-monitors-and-e-carceration [https://perma.cc/YBE2-Y4P7].

[17] See infra Section III.A.

[18] See infra Section III.B.

[19] See infra Section III.C.

[20] See Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (holding that the Equal Protection Clause does not prohibit excluding people convicted of felonies from voting).

[21] See Erwin Chemerinsky, The Constitution in Authoritarian Institutions, 32 Suffolk U. L. Rev. 441, 459–61 (1999) (making the case for closer judicial review of the abridgment of rights for people in prisons and other institutions).

[22] See, e.g., United States v. Polouizzi, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010) ("Required wearing of an electronic bracelet, every minute of every day, with the government capable of tracking a person . . . as if he were a feral animal would be considered a serious limitation on freedom by most liberty-loving Americans."); see also Chaz Arnett, From Decarceration to E-Carceration, 41 Cardozo L. Rev. 641, 675 (2019) (raising the concern that correctional electronic surveillance poses the risk of further social marginalization); Catherine Crump, Tracking the Trackers: An Examination of Electronic Monitoring of Youth in Practice, 53 U.C. Davis L. Rev. 795, 798–99 (2019) (questioning the suitability of electronic

critiques by addressing the range of fundamental rights that are abridged or extinguished by punitive surveillance,[23] and the ways in which it reproduces the prison experience, even if to a lesser degree.

This Article proceeds in four parts. Drawing on the findings of original empirical research, Part I reveals how punitive surveillance operates, characterized by invasive technology, restrictive rules, lack of transparency, and the power of third parties, including government agencies and for-profit companies. Part II details the ways that the privacy, speech, liberty, and due process limitations are similar in kind, if not degree, to prison restrictions. Part III addresses doctrinal infirmities and explains that punitive surveillance is neither a regulatory restraint nor a condition of punishment, but rather, is correctly characterized as punishment itself. Part IV evaluates available constitutional and regulatory limits on punishment that occur outside of prison walls, while also cautioning that reform risks legitimating punitive surveillance and undermining abolition efforts.

I. THE ARCHITECTURE OF PUNITIVE SURVEILLANCE

The use of electronic surveillance in the criminal legal system is in its heyday. This rise may be attributed to several factors: cash bail reform, the COVID-19 pandemic, budget cuts, and growing efforts to find alternatives to incarceration and increase the efficiency of court supervision.[24] To better understand how electronic surveillance functions

monitoring for juveniles); Eisenberg, supra note 9, at 174 (suggesting that monitoring programs may have a disproportionate effect on the poor); Weisburd, Sentenced to Surveillance, supra note 9, at 759–60 (linking electronic monitoring to historical racialized means of control); Ben A. McJunkin & J.J. Prescott, Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders, 21 New Crim. L. Rev. 379, 419 (2018) (rejecting the idea that labeling monitoring as "punishment" reduces a monitored person's privacy interest); Kate Weisburd, Monitoring Youth: The Collision of Rights and Rehabilitation, 101 Iowa L. Rev. 297, 303 (2015) (discussing how monitoring negatively impacts young people); Murphy, supra note 12, at 1323 (addressing the dignity harms imposed by monitoring); James Kilgore & Emmett Sanders, Ankle Monitors Aren't Humane. They're Another Kind of Jail, Wired (Aug. 4, 2018), https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail [https://perma.cc/X3NU-7F7F] (similarly elaborating on the lesser-known ways that electronic monitoring erodes one's rights).

[23] See Jacobi, Richardson & Barr, supra note 8, at 887.

[24] See Schenwar & Law, supra note 10, at 19, 26–27; Jenny E. Carroll, Beyond Bail, 73 Fla. L. Rev. 143, 174–76 (2021) (describing the ways that monetary bail is being replaced with non-monetary conditions of release); James Kilgore, As the U.S. Scrambles to Slow Coronavirus, We Should Be Wary of Increased Surveillance, Appeal (Mar. 23, 2020),

within the criminal legal system, a team of research assistants and I collected local and state policies governing the use of surveillance technology in the context of pretrial release, probation, and parole. After providing a general overview of punitive surveillance, this Part describes our research methodology, as well as our findings.

A. How Punitive Surveillance Operates

All fifty states, the federal government, and the District of Columbia use some form of electronic monitoring to track the movement and activities of people on pretrial release, probation, and parole.[25] According to a Pew Charitable Trust report, there were around 131,000 people on electronic monitors in 2015, which represented a 140% increase over the prior ten years.[26] The number of people on monitors today is likely much higher, as monitoring has proliferated and is used in juvenile court and immigration proceedings.[27] While some individual agencies track the number of people on monitors, there is no comprehensive statistical portrait of how many people are on monitors in the United States today, much less any demographic data.

Current data from a handful of jurisdictions reflect the extent to which monitors are used. For example, in Florida, there were 5,403 people on probation who were on GPS monitors in 2019.[28] In 2018, there were 11,130 people on probation in Marion County, Indiana,[29] and 4,814 people on probation in Colorado that were on monitors.[30] A total of 3,287 people on probation and parole in Michigan were also on monitors in

https://theappeal.org/coronavirus-covid-19-surveillance-electronic-monitoring [https://perma.cc/6UM4-QBLB]; Hager, supra note 5.

[25] See The Pew Charitable Trusts, Use of Electronic Offender-Tracking Devices Expands Sharply 1 (2016), https://www.pewtrusts.org/-/media/assets/2016/10/use_of_electronic_offender_tracking_devices_expands_sharply.pdf [https://perma.cc/Y2UW-W3GU].

[26] Id. at 3.

[27] Ava Kofman, Digital Jail: How Electronic Monitoring Drives Defendants into Debt, N.Y. Times Mag. (July 3, 2019), https://www.nytimes.com/2019/07/03/magazine/digital-jail-surveillance.html [https://perma.cc/VS7B-4P7Y]; Crump, supra note 22, at 797–98; Tosca Giustini et al., Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles 7 (2021), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/60ec661ec578326ec3032d52/1626105377079/Immigration+Cyber+Prisons+report.pdf [https://perma.cc/9GYC-4EVM].

[28] Electronic Prisons, supra note 4, at 3.

[29] Id.

[30] Id.

2018.[31] In Massachusetts, over 4,100 people were on monitors as of 2020.[32] If these jurisdictions are any indication, the number of people on monitors at any given time is high and increasing.

Some current data, albeit very limited, also reflects who is being monitored. In San Francisco, California, Black people make up roughly 3% of the city's population but almost 50% of the people on electronic monitors.[33] In Cook County, Illinois, 23% of the population is Black, "but over 74% of those on electronic monitoring (and in jail) are Black."[34]

Punitive surveillance takes a few forms:

> (1) Radio frequency monitoring tracks whether a person is at a particular location, most often their home.[35] This technology is binary—the surveillance simply confirms someone's presence at a particular location. It is most often used to verify compliance with house arrest.[36] Radio frequency monitoring is declining in use, whereas GPS-equipped ankle monitors and smartphone applications are on the rise.[37]
>
> (2) GPS-equipped ankle monitoring relies on cellphone towers and satellites to "pinpoint the actual location of the offender and track an offender's movements over time."[38] Some ankle monitors also have audio and listening features.[39]

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[31] Id.

[32] McKim, supra note 5.

[33] James Kilgore, Emmett Sanders & Kate Weisburd, The Case Against E-carceration, Inquest (July 30, 2021), https://inquest.org/the-case-against-e-carceration [https://perma.cc/R5L5-2NH7].

[34] Sarah Staudt, 10 Facts About Pretrial Electronic Monitoring in Cook County, Chi. Appleseed (Sept. 22, 2021), https://www.chicagoappleseed.org/2021/09/22/10-facts-about-pretrial-electronic-monitoring-in-cook-county [https://perma.cc/D2NE-4THC].

[35] The Pew Charitable Trusts, supra note 25, at 2.

[36] See Crump, supra note 22, at 807.

[37] Electronic Prisons, supra note 4, at 4.

[38] See Int'l Ass'n of Chiefs of Police, Tracking Sex Offenders with Electronic Monitoring Technology: Implications and Practical Uses for Law Enforcement 3, 5 (2008).

[39] Kira Lerner, Chicago Is Tracking Kids with GPS Monitors That Can Call and Record Them Without Consent, Appeal (Apr. 8, 2019), https://theappeal.org/chicago-electronic-monitoring-wiretapping-juveniles [https://perma.cc/2G62-RPGW]; Joshua Kaplan, D.C. Defendants Wear Ankle Monitors That Can Record Their Every Word and Motion, Wash. City Paper (Oct. 8, 2019), https://washingtoncitypaper.com/article/178161/dc-agency-purchases-ankle-monitors-that-can-record-defendants-every-word-and-motion [https://perma.cc/5QB6-TVMZ].

(3) Smartphone surveillance applications allow for both location tracking and communication between agents and defendants, but without the use of a GPS-equipped ankle monitor.[40] This version of monitoring sometimes relies on voice verification and facial recognition methods to ensure that the cellphone is connected to the monitored individual.[41] Some jurisdictions are increasingly using applications such as SmartLink, as well as other applications, which records a person's location and uses photos as "check-ins" to verify compliance with house arrest or curfew.[42] Over 50,000 people are currently being monitored by SmartLink.[43]

(4) Electronic search conditions allow for continuous, suspicionless searches of personal electronic devices and electronic data for people on various forms of court supervision.[44] These search conditions, usually imposed by courts at sentencing, "allow law enforcement to monitor supervisees' e-mail, social media activity, texting, location and cellphone usage, and all other information contained on devices, twenty-four hours a day."[45]

[40] Mike Nellis, "Better Than Human"? Smartphones, Artificial Intelligence and Ultra-Punitive Electronic Monitoring 5–6 (2019) https://www.challengingecarceration.org/2019/01/28/meet-mike-nellis-global-expert-on-electronic-monitoring [https://perma.cc/2JLC-ZKF4]; Am. Prob. & Parole Ass'n Submitted by the Tech. Comm., Leveraging the Power of Smartphone Applications to Enhance Community Supervision 3 (2020), https://www.appa-net.org/eweb/docs/APPA/stances/ip-LPSAECS.pdf [https://perma.cc/QJN4-V4GZ]; see also Todd Feathers, 'They Track Every Move': How US Parole Apps Created Digital Prisoners, Guardian (Mar. 4, 2021), https://www.theguardian.com/global-development/2021/mar/04/they-track-every-move-how-us-parole-apps-created-digital-prisoners [https://perma.cc/7HEJ-NG56].

[41] Kofman, supra note 27.

[42] Transcript of Official Electronic Sound Recording of Proceedings at 9, 15, United States v. [name redacted], (S.D. Cal. May 6, 2020); see also BI SmartLINK, Reliant Monitoring Services, http://reliantmonitoring.com/work/bi-smartlink [https://perma.cc/SK44-37D8] (last visited Oct. 28, 2020) (using voice verification options); Mobile Application, Shadowtrack, https://www.shadowtrack.com/mobile-application [https://perma.cc/2RUU-5W8L] (last visited Oct. 28, 2020) (using voice check-ins).

[43] Transcript of Official Electronic Sound Recording of Proceedings at 6–7, United States v. [name redacted], (S.D. Cal. May 6, 2020).

[44] See, e.g., In re Ricardo P., 446 P.3d 747, 749 (Cal. 2019) (invalidating the condition that a juvenile submit to warrantless searches); United States v. Lifshitz, 369 F.3d 173, 177 (2d Cir. 2004) (imposing the limit of reasonable suspicion upon the ability of the probation officer to make unannounced examinations); Weisburd, Sentenced to Surveillance, supra note 9, at 728.

[45] Weisburd, Sentenced to Surveillance, supra note 9, at 728.

The operation of punitive surveillance fits within a broader context of informational and digital privacy belonging primarily to the privileged.[46] Punitive surveillance builds on decades of police surveillance as a mode of control[47] and is a manifestation of what Ruha Benjamin terms "the new Jim Code," which refers to "new technologies that reflect and reproduce existing inequities but that are promoted and perceived as more objective or progressive than the discriminatory systems of a previous era."[48]

The infringement of constitutional rights that accompanies punitive surveillance must be understood within this larger ecosystem of state surveillance as a form of social and racial subordination.[49] In his article, From Decarceration to E-Carceration*,* Chaz Arnett addresses the ways in which electronic monitoring is a form of social marginalization resulting in the maintenance of social stratification.[50] This development has historical roots. From lantern laws, which required enslaved people to carry a lantern if they were out past dark and not in the company of a white person, to FBI surveillance of civil rights leaders,[51] to discriminatory stop-and-frisk practices, "racism and antiblackness undergird and sustain the intersecting surveillances of our present order."[52]

Despite the proliferation of various forms of electronic surveillance, the expansion is relatively invisible to those not directly impacted by the criminal legal system.[53] The imposition of conditions of probation and

[46] See, e.g., Khiara M. Bridges, The Poverty of Privacy Rights 16, 89 (2017) (describing how poor mothers do not "bear privacy rights"); I. Bennett Capers, Race, Policing, and Technology, 95 N.C. L. Rev. 1241, 1285 (2017) (explaining that "privacy has never been distributed equally"); Scott Skinner Thompson, Privacy at the Margins 16 (2021) (describing how marginalized communities experience less privacy).

[47] See Elizabeth E. Joh, Automated Policing, 15 Ohio St. J. Crim. L. 559, 563 (2018) (explaining that "automated policing may exacerbate social inequalities in ways that have to be addressed").

[48] Benjamin, supra note 13, at 5–6.

[49] See Bridges, supra note 46, at 140–43; Benjamin, supra note 13, at 6.

[50] Arnett, supra note 22, at 675.

[51] Alvaro M. Bedoya, The Color of Surveillance, Slate (Jan. 18, 2016), https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html [https://perma.cc/3PF4-PHY6]; James Kilgore, Opinion, The First Step Act Opens the Door to Digital Incarceration, Truthout (Dec. 18, 2018), https://truthout.org/articles/the-first-step-act-opens-the-door-to-digital-incarceration [https://perma.cc/397N-ZY4U].

[52] Simone Browne, Dark Matters: On the Surveillance of Blackness 9 (2015).

[53] There is limited transparency when it comes to criminal surveillance generally. See Ngozi Okidegbe, The Democratizing Potential of Algorithms?, 55 Conn. L. Rev. (forthcoming) (discussing how pretrial algorithmic governance obscures the racial disparities of the pretrial

parole is already a low visibility practice,[54] and the imposition of punitive surveillance is all but invisible. Other than our study, there has been no large-scale study of the policies and practices governing punitive surveillance in the adult criminal legal system.[55] Thanks to the efforts of activists, community organizers, and intrepid reporters, there is now a deeper understanding by the public of what it means to live under punitive surveillance.[56] Institutional and bureaucratic forces, however, shield from view the *specific mechanisms* by which punitive surveillance operates.[57]

Likewise, people on monitors are rarely able to legally challenge—and thereby expose—the use of punitive surveillance. Because punitive surveillance is most often presented as an alternative to incarceration that, in theory, a defendant agrees to, there is no obvious opportunity to object. In the context of supervised release and diversion programs, "defendants will accept nearly any arrangement as long as it provides them the opportunity to avoid going to prison."[58] The specter of prison is so coercive that there is little to "counteract the scope of the concessions that judges and prosecutors have been able to demand from defendants . . . ."[59] A person's agreement to punitive surveillance means that there is little interrogation, much less an external check, of the rights that defendants

system); Hannah Bloch-Webha, Visible Policing: Technology, Transparency, and Democratic Control, 109 Calif. L. Rev. 917, 920–22 (2021); Andrew Ferguson, The Rise of Big Data Policing 136 (2017).

[54] See Joan Petersilia, Probation in the United States, 22 Crime & Just. 149, 153 (1997) (explaining how "[p]robation receives little public scrutiny, not by intent but because the probation system is so complex and the data are scattered among hundreds of loosely connected agencies, each operating with a wide variety of rules and structures"); Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 Geo. L.J. 291, 294, 327 (2016) [hereinafter Doherty, Obey All Laws] (discussing how most standards and obligations determining what it means to be on probation are not publicly accessible and how probation officers' discretion operates "in the shadows").

[55] The only other comparable studies focused on the terms and conditions of electronic monitoring in juvenile court in California and the use of monitoring in immigration proceedings. See Rena Coen et al., Electronic Monitoring of Youth in the California Juvenile Justice System: Complete Appendix (2017), https://berkeley.app.box.com/v/completeappendix [https://perma.cc/4KSL-S6ZS]; Tosca Giustini et al., supra note 27. Both reports very much inspired this project.

[56] The Challenging E-Carceration Project collected and shared video and audio accounts of what life is like on a monitor. See The Voices of the Monitored-Video and Audio Gallery, Challenging E-Carceration, https://www.challengingecarceration.org/watch-videos [https://perma.cc/9CFH-49BK] (last visited Dec. 4, 2020).

[57] See infra Section I.C.

[58] Fiona Doherty, Testing Periods and Outcome Determination in Criminal Cases, 103 Minn. L. Rev. 1699, 1704 (2019).

[59] Id.

are forced to give up in exchange for avoiding prison.[60] The lack of transparency inspired this empirical research project.

B. Research Methodology

A team of research assistants and I attempted to collect the following records from all fifty states:

> (a) The terms and conditions with which people on electronic monitors must comply;
> (b) Internal agency policies governing the use of surveillance technology, including electronic monitors;
> (c) Standard conditions of community supervision; and
> (d) Contracts between government agencies overseeing community supervision and private vendors supplying the surveillance hardware, software, and technology.

To obtain this information, we requested records from the individual agencies that oversee pretrial release, probation, and parole at both the local and state level.[61] To date, we have collected 247 records from 101 separate agencies, and the project is ongoing.[62] We received at least one (and often more) records from forty-four states, including Washington, D.C.[63] Most of the records in this study were obtained through informal requests or formal public record act requests. The records paint a vivid picture of how punitive surveillance functions.[64]

C. Research Findings

By every measure, electronic surveillance of people on community supervision reflects a new type of incarceration that exists outside of traditional brick and mortar prisons. Our analysis of the agency records demonstrates that the surveillance itself is a form of punishment clearly

[60] In prior work, I address the problems with relying on consent to dispense with Fourth Amendment protections. See Weisburd, Sentenced to Surveillance, supra note 9, at 736.

[61] In some states, the same agencies oversee the various forms of community supervision, while in other states, separate agencies oversee pretrial release, probation, and parole. See Electronic Prisons, supra note 4, at 4.

[62] See the Appendix for a breakdown of the types of records in our study as well as a list of all the agencies that we received records from.

[63] Id.

[64] All records collected in our study and relied on in this paper are on file with the author and will be publicly available on a website for use by advocates, researchers, journalists, and others.

meant to take the place of incarceration, even if it is not as harsh as incarceration. What follows are some of the key characteristics of punitive surveillance and the ways in which they implicate fundamental rights.

1. Invasive

a. Audio Functions

At least thirteen agencies use ankle monitors that allow for beeping alerts or are equipped with audio features that facilitate two-way conversations between people on the monitors and the agents monitoring them.[65] The audio features mean that anyone within earshot will be alerted to the monitor.[66] Because these devices are developed and marketed by private companies, it is not entirely clear how the audio features function. News accounts indicate that at least some monitors allow agents to listen to defendants' conversations without their consent.[67]

b. Location Data

None of the records in our study included written limits on the uses of the location data (or for that matter, audio data) collected by the ankle monitors. Many of the contracts between private companies and public agencies provide that the private company track and maintain the location data generated by monitors.[68] In Denver, internal monitoring policies provide that "[a]dult GPS records are open to the public, so anyone, including the DA, can have them regardless of whether the case is open or closed and regardless of the person's reason for wanting the records."[69]

Very few jurisdictions inform people on monitors that their location data is saved and may be shared with law enforcement.[70] For example, agencies in Connecticut, Florida, Idaho, Iowa, Kansas, Michigan, Oklahoma, Wisconsin, and Washington, D.C. inform people that all of their movements will be tracked and stored as an "official record."[71] Those on monitors on pretrial release in Washington, D.C. must agree that

[65] Id. at 9.
[66] Id.
[67] Lerner, supra note 39; Kaplan, supra note 39.
[68] See Electronic Prisons, supra note 4, at 10.
[69] Id.
[70] See id.
[71] See id. at 11, 40 n.85; see also D.C., Ct. Servs. & Offender Supervision Agency, Policy Statement 4008, GPS Tracking of Offenders (2009).

the pretrial services agency can "provide my tracking information to law enforcement for investigative purposes."[72] In Los Angeles, local law enforcement may access the location data.[73] The vast majority of records did not inform people about what happens to their data, or how long it is stored for.[74]

Many records were silent as to data sharing with police. That said, some state statutes allow police, probation officers, and private surveillance companies to share information with each other.[75] For example, in North Carolina, a defendant's location information can be used to "correlate their movements to reported crime incidents."[76] It is likely that data-sharing with law enforcement is common, even if not reflected in agency records.[77]

c. Search Conditions & Sharing Personal Information

Records from six agencies in five different states explicitly require people on electronic monitors to submit to searches of their cell phones and other electronic devices.[78] Only one of those agencies, Sedgwick County Department of Corrections in Kansas, specifies that officers need at least reasonable suspicion before searching an electronic device.[79]

In most places, people on electronic monitors are also subject to the general search conditions that apply to everyone on pretrial release, probation, or parole. People on court supervision (including people who are on monitors) are also often subjected to invasions of their bodily autonomy through random drug tests, blood, and DNA samples, as well as invasions of their homes through mandatory home visits which may

[72] Id. at 10.

[73] See id.

[74] Id. at 11.

[75] See N.C. Gen. Stat. § 14-208.40(c)(2)–(d) (2021); Mass. Gen. Laws ch. 276, § 90 (2018) (allowing police to inspect probation records).

[76] N.C. Gen. Stat. § 14-208.40(c)(2)–(d) (2017).

[77] See, e.g., Catherine Crump & Amisha Gandhi, Electronic Monitoring of Youth in the California Juvenile Justice System (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/11/Samuelson-Electronic-Monitoring-Youth-California-Addl-Data-11_2020.pdf [https://perma.cc/773F-6TPG] (documenting that the majority of counties in California share data collected through electronic monitors in juvenile court with law enforcement).

[78] Electronic Prisons, supra note 4, at 11.

[79] Sedgwick Cnty., Kan., Div. of Corr., No. 2.969.1, Supervision Agreement–Pretrial (2020).

include warrantless searches of the entire home.[80] In Ada County, Idaho, people on pretrial release and probation are also required to share all of their medical and treatment history records with the probation department.[81]

d. User Fees

Of the records we received, agencies in twenty-three states require defendants to pay some kind of electronic monitoring fee, often a weekly or monthly payment in addition to an initial installation fee.[82] Fees vary widely, from $1.50 per day to $47 per day.[83] If a person is on a monitor for a year (which is common) they could pay as much as $2,800 to over $5,000 per year.[84] One-time user fees range from $25 to $300.[85] The fee collection is often left to the private companies. In twenty-three states, the private monitoring companies oversee fee collection.[86]

Of the records we reviewed, the vast majority said nothing about fee waivers or what might happen if someone did not pay. Agency records from fourteen states provide for the ability to pay determinations, but the process for obtaining a fee waiver or reduction was not straightforward.[87] As other scholars have observed, ability to pay determinations are often fraught and difficult to navigate.[88]

The fees for electronic monitoring are often in addition to other probation or parole-related fees, court fees, fines, and victim restitution.[89]

[80] See Electronic Prisons, supra note 4, at 11.
[81] Id.
[82] For a complete list, see Electronic Prisons, supra note 4, at 15.
[83] Id.
[84] Id. at 16.
[85] Id. at 15.
[86] Id. at 17.
[87] Id.
[88] Beth A. Colgan, Beyond Graduation: Economic Sanctions and Structural Reform, 69 Duke L.J. 1529, 1544–45 (2020) (describing how laws ignore or provide little guidance on how to determine a person's ability to pay); Theresa Zhen, (Color)blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt, 43 N.Y.U. Rev. L. & Soc. Change 175, 187–88 (2019) (critiquing ability to pay schemes).
[89] Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, The Steep Costs of Criminal Justice Fees and Fines, Brennan Ctr. for Just. 6–7 (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/55N9-MTNF]; Karin D. Martin, Sandra Susan Smith & Wendy Still, Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-Entry They Create, Nat'l Inst. Just. 8 (Jan. 2017), https://www.ojp.gov/pdffiles1/nij/249976.pdf [https://perma.cc/ZG4L-R8RD]; Anna VanCleave et al., Money and Punishment, Circa 2020,

There are also less obvious costs. Many agencies also require people to have reliable electricity and either a landline, cellphone, or both.[90] These fees add up, especially considering that some people are on monitors for months, if not years.[91]

2. Restrictive

a. Numerous & Ambiguous Rules

People on monitors are subject to anywhere from six to fifty-eight separate rules, as compared to only a dozen or so standard rules for people on parole or probation without a monitor.[92] These rules are usually contained in a sort of "user agreement" or contract that people sign as part of being placed on the monitor. The "agreement" generally contains the terms and conditions and often stipulates that any violation of the contract may result in revocation.[93] It is not clear from the records how someone signing the contract would have the opportunity to negotiate the terms. For the most part, the terms and conditions appear binding and not subject to modification.[94]

Both monitoring terms, as well as general conditions of release, often contain vague and ambiguous rules.[95] In the records collected in our study, many contained rules requiring people to "abandon evil associates and ways," "maintain acceptable behavior," conduct themselves in "an orderly manner at all times" and "in the manner of a responsible citizen," among others.[96]

b. Movement Limitations

The terms and conditions of electronic monitoring are highly restrictive of any unplanned movement outside the home. In most places, people on

at 62 (Arthur Liman Ctr. for Pub. Int. Law et al. eds., 2020), https://law.yale.edu/sites/default/files/area/center/liman/document/money_and_punishment_circa_2020.pdf [https://perma.cc/J2WW-UJM3].

[90] Electronic Prisons, supra note 4, at 17.

[91] Id. at 16.

[92] See, e.g., id. at 18, 44 n.151.

[93] For a complete list see id. at 7–14, 19–21.

[94] See id. at 20–21.

[95] Electronic Prisons, supra note 4, at 20; see also Fiona Doherty, Obey All Laws, supra note 54 (describing the vagueness of probation terms).

[96] Electronic Prisons, supra note 4, at 20.

monitors are subject to house arrest[97] and cannot leave their house without getting pre-approval. For example, people on monitors in Louisville, Kentucky are "required to remain inside of [their] residence at all times . . . . Inside means no decks, patios, porches, taking out the trash, etc."[98]And in Johnson County, Kansas people on monitors must obtain prior approval from their House Arrest Officer in order to leave their home for "employment, school, attorney visits, doctor appointments, dentist appointments, counseling or treatment, . . . meetings with other DOC personnel, church, and other emergency situations."[99] Likewise, in Milwaukee, people on monitors must get authorization to go to the grocery store (for one hour once a week), the laundromat (for two hours once a week), to vote, and to attend church (for four hours once a week).[100]

Of the records we received, the majority did not provide instructions on how people could obtain permission to leave home. Those that do provide some instruction require that permission be obtained at least twenty-four to forty-eight hours in advance.[101] Some jurisdictions also require people on monitors to follow a specific travel route. For example, in Lake County, Illinois people on monitors must "use the most direct route possible" when traveling to an approved location and cannot make "additional stops."[102]

In some places, people on monitors must either stay outside or inside designated "restricted areas" or "exclusion zones" and entering (or leaving) one of these areas may be grounds for a violation.[103]

Finally, there are also limitations on people's ability to drive and use a car. For example, the Indiana Department of Corrections requires people on supervision to obtain permission from their supervising officer before applying for or renewing a driver's license or buying a motor vehicle.[104] And in Oklahoma, people on monitors are prohibited from operating a motor vehicle without the supervising officer's approval and are required

[97] Id. at 6.
[98] Id. at 7.
[99] Id.
[100] Milwaukee Cnty., Wis., Justice Point, Supervision—GPS Policies & Procedures Manual (2016).
[101] Electronic Prisons, supra note 4, at 7.
[102] Id.
[103] Id.
[104] Id. at 8.

to submit proof of ownership, verification of insurance, and a valid driver's license in order to obtain approval.[105]

c. Charging Requirements

The rules are also very specific about how and when to charge the ankle monitors. In most places, people on monitors must charge their devices at regular times every day and for a predetermined and significant number of hours.[106] Many agencies require people to charge their devices anywhere from two to four hours at a time every day.[107] Records from Florida and Virginia require that people charge their monitors for four hours a day.[108] And agency records from Indiana, California, Connecticut, Kansas, Ohio, Virginia, and Wisconsin forbid people from charging their monitoring device while sleeping.[109] In Washington, D.C., the failure to keep an ankle monitor charged is a crime.[110] None of the records addressed potential challenges to regularly charging a device, such as unpredictable work schedules, unreliable access to electricity, and housing insecurity.[111]

d. Constraints on Personal & Family Life

Many of the electronic monitoring policies contain additional restrictions on people's personal and professional lives. For example, monitoring rules in Johnson County, Kansas require that "prior to entering into a marriage, financial or other contract, [the participant] will discuss the matter" with their supervising agent.[112] Likewise, records from Mississippi provide that people on monitors "will marry only after

[105] Id.
[106] Id.
[107] Id. at 8–9.
[108] Id. at 8; Va., Dep't of Corr., GPS Monitoring Rules (2017).
[109] Electronic Prisons, supra note 4, at 8–9; S.F., Cal., LCA Electronic Monitoring Programs, Electronic Monitoring Program Policies—Pretrial 7 (on file with author); Conn., Adult Services Electronic Monitoring, GPS Program Participant Acknowledgment Form—Pretrial (2018); Milwaukee Cnty., Wis., Justice Point, EM Program Participant Agreement (on file with author); Off. of the Sheriff of Fairfax Cnty., Home Incarceration Program Rules and Regulations (2019).
[110] D.C. Code § 22-1211(a)(1)(C) (2017).
[111] Electronic Prisons, supra note 4, at 8–9.
[112] Id. at 13.

approval by" the Department of Corrections and must provide documentation for doctor visits, phone bills, and church attendance.[113]

The person on the monitor is not the only one impacted. Electronic monitoring conditions often impose significant burdens on friends and family. Some agencies forbid people on monitors from having house guests, gatherings, or allowing anyone to move into the house without permission.[114] Search conditions also impact everyone in the home, as agents are permitted to search the entire home of the person on the monitor.[115] In Virginia, people who live with someone on a monitor must provide basic contact information as well as their criminal history, highest education level, and substance abuse history.[116]

In Alaska, people on monitors are prohibited from "babysitting or being a primary caregiver for any person, children, or pets without approval."[117] And in San Diego, everyone who lives with a person on a monitor must sign a "Cohabitation Acknowledgment Form" that contains additional rules.[118] In some places, like Oakland County, Michigan, the rules require "a responsible party of the community" to take on the role of police by taking "custody" of the person and "agree[ing] to monitor the defendant and report any violation of any release conditions to the court."[119]

People on monitors are also restricted with respect to social and familial relationships. Rules in Dane County, Wisconsin expressly prohibit leaving the home for any social, religious, or family function.[120] The majority of policies we reviewed generally restricted (if not forbade) social gatherings for people on monitors.[121]

There are also restrictions on who people on monitors may interact with. In Mississippi, people are prohibited from associating with anyone that has a "bad reputation."[122] In Kanawha County, West Virginia, people on monitors must not allow people of "disreputable character" to visit

[113] Miss., Dep't of Corr., Electronic Monitoring of Offenders ISP Enrollment & Conditions (2015).
[114] For a complete list see Electronic Prisons, supra note 4, at 41 n.95–96, 46.
[115] Id. at 12.
[116] Id. at 13.
[117] Id. at 12.
[118] Id.
[119] Id. at 13.
[120] Dane Cnty., Wis., Sheriff's Office, Jail Diversion Rules and Regulations (2020).
[121] For a complete list see Electronic Prisons, supra note 4, at 12 (describing the different types of social and family restrictions).
[122] Id. at 14.

their home.[123] And in New Mexico, rules forbid people on monitors from interacting with people the parole or probation officer deems "detrimental to [their] Probation supervision."[124] In a few places, people on monitors may not communicate with people who have a criminal record, or of "disreputable character."[125]

Lastly, there are also restrictions on housing and where people may live. Several agencies require that people on court supervision (which includes people on monitors) only live in "approved" housing and in a few places, people on monitors face additional restrictions related to temporary housing, subsidized government housing, or hotels.[126]

e. Employment Restrictions

Most of the policies we reviewed contained strict rules about employment.[127] In many jurisdictions, people on monitors must obtain approval before changing jobs or work schedules, and in some places, they are required to report their earnings.[128] Likewise, people on monitors in Prince George's County, Maryland must submit weekly work schedules, and any changes to the schedule, as well as all overtime must be verified by a supervisor.[129] In St. Louis County, people on monitors also must agree to be "financially responsible," which includes maintaining insurance for their car, paying child support, and remaining current on all household bills.[130] Although the visibility of monitors often makes it hard for people to get or maintain a job,[131] in Washington, D.C. internal agency policies state that defendants should be "placed on a GPS monitor as an incentive to find employment."[132]

[123] Id.
[124] Id.
[125] Id.
[126] Electronic Prisons, supra note 4, at 17.
[127] Id. at 14.
[128] Id.
[129] Prince George's Cnty., Md., Home Detention Program—Conditions of Release (on file with author).
[130] St. Louis Cnty., Mo., Dep't of Just. Servs., Electronic Home Detention Contract/Agreement (on file with author).
[131] See Aaron Cantú, When Innocent Until Proven Guilty Costs $400 a Month–and Your Freedom, VICE (May 28, 2020), https://www.vice.com/en/article/4ayv4d/when-innocent-until-proven-guilty-costs-dollar400-a-monthand-your-freedom [https://perma.cc/4SVA-EWMF].
[132] D.C., Ct. Servs. & Offender Supervision Agency, supra note 71.

Monitoring rules also impose requirements on employers. Five jurisdictions, for example, explicitly require the person on the monitor to inform their employer that they are on supervision.[133] Several agencies permit supervising agents to conduct random checks at places of employment.[134] In Idaho, people on monitors at work must remain in areas of their workplace that receive sufficient GPS signals,[135] and in Arizona, they must bring their charger to their job so that the ankle device remains fully charged.[136]

3. Third-Party Power and Invisibility

Our research also revealed the role, and power, of third parties, such as government agencies and private companies that market and operate various forms of electronic surveillance. Because punitive surveillance is generally controlled by these third parties, there is a general lack of transparency.

a. Public-Private Partnerships

As a threshold matter, the implementation of punitive surveillance is left to the several thousand pretrial, probation, and parole agencies throughout the United States.[137] These agencies vary widely by state, county, and jurisdiction, including which branch of government they sit within.[138] The majority of agencies contract with for-profit companies that sell the hardware, software, and, depending on the contract, staffing and data collection.[139] In the records we reviewed, four main companies held the majority of the contracts: BI Incorporated, Attenti (formerly 3M), Satellite Tracking of People LLC, and Sentinel Offender Services LLC.[140] The contracts often last for several years and involve millions of dollars.[141]

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[133] Electronic Prisons, supra note 4, at 14.

[134] Id.

[135] Id.

[136] Id.

[137] See Petersilia, supra note 54.

[138] Michael P. Jacobson, Vincent Schiraldi, Reagan Daly & Emily Hotez, Less Is More: How Reducing Probation Populations Can Improve Outcomes 2–3 (2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf [https://perma.cc/GPL5-QTSV].

[139] See Electronic Prisons, supra note 4, at 17, 21–23.

[140] Id. at 22.

[141] Id.

Although the relationship between government agencies and private vendors varies tremendously, often within the same jurisdiction, the result appears the same: private industry holds power.[142] Contracts from twenty-two states stipulate that private companies help track the movements of people on electronic monitoring devices by collecting and maintaining a database of location data and other personal data.[143] The private companies then share the data with the state and local agencies that oversee electronic monitoring.[144]

In some jurisdictions, private monitoring companies, or bail bond companies, contract directly with people detained in jail pretrial and condition their services on people agreeing to, and paying for, electronic monitoring.[145] These arrangements cut out government agencies and make it almost impossible to determine the precise ways in which monitoring operates.

Private vendors are increasingly taking on responsibilities that are normally considered governmental functions, ranging from making scheduling changes for people on electronic monitors to providing warrant processing services and communicating with people whose movements or actions trigger monitoring system violation alerts.[146]

b. Identification of Violations

Both government agencies and private companies wield immense power in terms of rule violations. The records we reviewed often

[142] Carl Takei, From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare, 20 U. Pa. J.L. & Soc. Change 125, 154–55 (2017); Malcolm M. Feeley, Private Alternatives to Criminal Courts: The Future Is All Around Us, 119 Colum. L. Rev. 38, 64–66 (2019).

[143] See Electronic Prisons, supra note 4, at 21.

[144] Id. at 10.

[145] See Edwards v. Leaders in Cmty. Alts., Inc., No. C 18-04609, 2018 WL 6591449, at *1 (N.D. Cal. Dec. 14, 2018). In our attempt to collect records, we learned of several jurisdictions, including St. Louis County and Milwaukee County, where private companies contract directly with people in jails and prisons. See Document Request Log with St. Louis Cnty., Mo., Dep't of Just. Servs.—Pretrial Supervision (2020) (on file with author); Email from Edward Gordon, Co-Founder/Chief Operating Officer, JusticePoint, to Sarah Wohlsdorf, Research Assistant to Professor Kate Weisburd, Geo. Wash. Univ. (Mar. 10, 2020, 10:30 AM) (on file with author); Municipal Court Alternatives Program, JusticePoint, https://www.justicepoint.org/wisconsin#city-of-milwaukee [https://perma.cc/HH6H-86NA]; see also GPS Monitoring Services, Mr. Nice Guy Bail Bonds, https://www.mrniceguybailbonds.com/our-services/gps-monitoring [https://perma.cc/25WH-B4BU] (last visited Jan. 23, 2022) (offering GPS as collateral for posting bail).

[146] See Electronic Prisons, supra note 4, at 21–22.

contained little insight into what constitutes a violation. Of the policies we reviewed, the majority did not provide any information about which type of rule violation might result in reincarceration.[147] A small fraction of the records explained how someone on a monitor could challenge or contest a monitoring violation.[148] Likewise, very few of the records provided information on how to address equipment malfunctions.[149]

The records also reflected the large role that private monitoring companies play in identifying and processing violations of the monitoring rules. Many private companies are responsible for identifying violations and bringing them to the attention of the government agencies.[150] And contracts from four states specify that the private company is responsible for notifying the court of violations.[151]

c. Program Evaluation

None of the policies contained provisions about evaluating the effectiveness of monitoring. There were no provisions about collecting data to measure, for example, if increased surveillance led to fewer missed court dates, fewer violations, or fewer arrests for new offenses. None of the policies provide for any type of study, or even data collection, to determine the effectiveness of surveillance, much less who is subject to surveillance. Studies and data collection may be happening, but they are not reflected in documents that we reviewed.

The role of private industry helps explain why so little is known about punitive surveillance.[152] Private companies, unrestrained by public record act requirements or government oversight, are proprietary about their surveillance products, including what happens to the private data that they collect.[153] Like other automated systems, the functioning of punitive

[147] Id. at 20–21.
[148] Id. at 21.
[149] Id. at 27.
[150] See Electronic Prisons, supra note 4, at 21.
[151] Id. at 21.
[152] For a comprehensive accounting of the role of private industry in policing and surveillance, see Elizabeth E. Joh, Policing by Numbers: Big Data and the Fourth Amendment, 89 Wash. L. Rev. 35, 66 (2014); Elizabeth E. Joh, The Undue Influence of Surveillance Technology Companies on Policing, 92 N.Y.U. L. Rev. Online 19, 30–33 (2017), https://www.nyulawreview.org/wp-content/uploads/2017/08/NYULawReviewOnline-92-Joh_0.pdf [https://perma.cc/T7CV-3JE6].
[153] See Jan Whittington & Chris Jay Hoofnagle, Unpacking Privacy's Price, 90 N.C. L. Rev. 1327, 1357 (2012).

surveillance is opaque and "shields [it] from scrutiny."[154] Defendants and their advocates are often in the dark as to issues such as error rates, false alerts, the loss of a signal, or defects in the technology.[155]

Even agencies that are subject to public record laws made it difficult to access basic records related to punitive surveillance, further obscuring how surveillance operates. For the most part, the records obtained in our study are not available online. It has taken almost two years and a team of intrepid research assistants to track down these records. Some agencies refused to share the records, while others charged a fee. Even agencies that ultimately complied with our records requests often required months of follow-up.

D. Research Limitations

To be sure, there are limitations to this research. First, practices in pretrial release, probation, and parole vary tremendously. For example, in some places, probation operates at the county level, and in other places, it operates at the state level. For states with probation overseen at the county level, we collected records from the two most populous counties in the state. Relatedly, different jurisdictions and agencies use different terminology with respect to the type of court supervision and electronic surveillance more generally. Even the term "electronic monitoring" has different meanings depending on the agency. These differences complicated the comparisons across agencies and jurisdictions.

Second, while we attempted to collect records from every state and succeeded in getting at least one record from most states, there was great variation in our ability to get all the records we sought from all jurisdictions. As a result, some jurisdictions are overrepresented in the study and this study does not purport to perfectly reflect monitoring practices in the United States.

Third, written policies do not paint a complete picture. Missing from the records are the voices and experiences of those directly impacted—namely, the people who are subject to punitive surveillance, as well as their families and friends. Much should be learned from those who are the most impacted. Community organizations and grassroots organizers, like

[154] Danielle Keats Citron, Technological Due Process, 85 Wash. U. L. Rev. 1249, 1254 (2008).

[155] See Rebecca Wexler, Privacy Asymmetries: Access to Data in the Criminal Justice System, 68 UCLA L. Rev. 212, 246 (2021).

MediaJustice, community bail funds, Critical Resistance, and Challenging E-Carceration, are exposing the punitive nature of electronic surveillance.[156] Also not captured in our study are the perspectives of key institutional actors, such as defense lawyers, prosecutors, judges, and probation and parole officers. Records do not and cannot capture the way that individual agents deviate from the written policies.

Fourth, rapid changes to prison and jail release practices are underway across the country. Local jurisdictions, either on their own or in response to litigation or efforts of grassroots organizers, have reformed their bail systems.[157] Recent bail reforms in St. Louis, San Francisco, New York, New Jersey, and Ohio resulted in an expansion in the use of electronic monitoring.[158] At the same time, the COVID-19 pandemic accelerated changes with respect to policies governing the release of people in prisons and jails.[159] These suggest that the precise use of electronic surveillance is in flux.[160]

[156] See, e.g., Myaisha Hayes, #NoMoreShackles: Why Electronic Monitoring Devices Are Another Form of Prison, Colorlines (Dec. 5, 2018), https://www.colorlines.com/articles/nomoreshackles-why-electronic-monitoring-devices-are-another-form-prison-op-ed [https://perma.cc/UCP9-46GC]; Chicago Community Bond Fund, Punishment Is Not a "Service": The Injustice of Pretrial Conditions in Cook County 7–8 (2017), https://chicagobond.org/wp-content/uploads/2018/10/pretrialreport.pdf [https://perma.cc/8AYD-QZY7]; No New SF Jail Coalition, https://nonewsfjail.org/about/ [https://perma.cc/623L-5H24] (last visited Feb. 1, 2021); Media Justice, Challenging E-Carceration, https://www.challengingecarceration.org [https://perma.cc/RH9A-7KVX] (last visited Jan. 20, 2021).

[157] Carroll, supra note 24, at 158, 192; Nat'l Conf. of State Legislatures, Trends in Pretrial Release: State Legislation Update (2018) (noting that in 2017, forty-six states, including the District of Columbia, enacted new laws related to pretrial procedures and pretrial release).

[158] See Joshua Sabatini, Number of Inmates Released on Electronic Monitoring Triples Following Bail Ruling, S.F. Examiner (Mar. 20, 2019), https://www.sfexaminer.com/the-city/number-of-inmates-released-on-electronic-monitoring-triples-following-bail-ruling [https://perma.cc/AFH5-FUUF]; Carolina Hidalgo, As St. Louis Tries to Reform Bail System, Advocates Warn About Increase in Ankle Monitoring, St. Louis Pub. Radio (June 27, 2019), https://news.stlpublicradio.org/government-politics-issues/2019-06-27/as-st-louis-tries-to-reform-bail-system-advocates-warn-about-increase-in-ankle-monitoring [https://perma.cc/JK7B-EZL5]; Lauren Kelleher, Out on Bail: What New York Can Learn from D.C. About Solving a Money Bail Problem, 53 Am. Crim. L. Rev. 799, 814 (2016); Glenn G. Grant, 2017 Report to the Governor and the Legislature, N.J. Courts 2, 25–26 (2017).

[159] See, e.g., David Helps, Covid-19 Outbreaks at Jails and Prisons Should Make Us Rethink Incarceration, Wash. Post (June 25, 2020), https://www.washingtonpost.com/outlook/2020/06/25/covid-19-outbreaks-jails-prisons-should-make-us-rethink-incarceration [https://perma.cc/Q7MY-CJEA].

[160] Hager, supra note 5.

II. THE CARCERAL NATURE OF PUNITIVE SURVEILLANCE

Punitive surveillance, like prison, curtails free speech and association, as well as freedom of movement. And the restrictions described in the prior section would be clearly unconstitutional if applied to people not on pretrial release, probation, or parole. Before addressing the constitutionality of punitive surveillance, however, it is important to mark how this surveillance technology facilitates a type of incarceration that occurs outside of prison, further demonstrating that prison is no longer the "state's only means of restricting liberty."[161] The similarities between physical and digital incarceration have led some scholars to refer to punitive surveillance as a form of "e-carceration."[162]

Courts, however, generally take a narrower view of incarceration.[163] Rejecting a challenge to a Sex Offender Registration statute, for example, the Supreme Court concluded that the statute "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint."[164] As discussed further in Part III of this paper, carceral surveillance and control is often not viewed as punishment precisely because it does not involve prison. For example, when the D.C. Court of Appeals evaluated the retroactive application of a DNA collection statute, the court concluded that the "DNA Act 'imposes no physical restraint, and so does not resemble the punishment of imprisonment.'"[165]

Although legal discourse views incarceration as requiring brick-and-mortar buildings, activists and scholars have long urged a broader definition of incarceration to include other forms of carceral control.[166]

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[161] Murphy, supra note 12.

[162] See James Kilgore, Let's Fight for Freedom From Electronic Monitors and E-Carceration, Truthout (Sept. 4, 2019), https://truthout.org/articles/lets-fight-for-freedom-from-electronic-monitors-and-e-carceration [https://perma.cc/N673-7CCN]; see also Arnett, supra note 22.

[163] See infra Part III.

[164] Smith v. Doe, 538 U.S. 84, 99–100 (2003); see also Hudson v. United States, 522 U.S. 93, 104 (1997) (concluding that prohibition from working in a bank is "certainly nothing approaching the 'infamous punishment' of imprisonment" (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960))).

[165] Johnson v. Quander, 440 F.3d 489, 502 (D.C. Cir. 2006) (quoting *Smith*, 538 U.S. at 100).

[166] See, e.g., Dorothy E. Roberts, Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 17 (2019); Loïc Wacquant, Punishing the Poor 108–09 (2009); Monique W. Morris, Pushout: The Criminalization of Black Girls in Schools 135–69 (2016); Dylan Rodríguez, Abolition as Praxis of Human Being: A Foreword, 132 Harv. L. Rev. 1575, 1611 (2019).

As Professor Dylan Rodríguez, a founder of Critical Resistance, explains, "incarceration as a logic and method of dominance is not reducible to the particular institutional form of jails, prisons, detention centers, and other such brick-and-mortar incarcerating facilities."[167] Rather, "carceral logic[]" is embedded in the design and operation of the modern welfare state, public schools, hospitals, and criminal court risk-assessments, to name just a few.[168]

This Part adds to this critique by exposing the specific ways that punitive surveillance operates to further carceral logic. In particular, this Part catalogs how punitive surveillance erodes constitutional rights in ways that are consistent with incarceration, even if to a lesser degree. And while each restriction "may appear de minimis,"[169] taken together they present an expansive constellation of constitutional harms. While there are many ways that punitive surveillance runs afoul of fundamental constitutional rights, this Article attempts to identify the most obvious ones.

A. Privacy Restrictions

Although people on various forms of supervised release have limited privacy interests, the "permissible degree" of state "impingement upon [the] privacy" of individuals under supervision is "not unlimited."[170] The findings from our study reveal, however, that the addition of electronic surveillance to routine supervised release is a significant privacy intrusion. We need to look no further than reactions to the mining of cellphone location data to appreciate the privacy concerns related to surveillance technology. For example, reporters commenting on location data tracking posited that within "America's own representative

[167] Dylan Rodríguez, Abolition as Praxis of Human Being: A Foreword, 132 Harv. L. Rev. 1575, 1587 (2019).

[168] Dorothy E. Roberts, Foreword: Abolition Constitutionalism, 133 Harv. L. Rev. 1, 18 (2019); Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. Rev. 1474, 1478–79, 1490–91 (2012); Ji Seon Song, Policing the Emergency Room, 134 Harv. L. Rev. 2646, 2649 (2021); Jyoti Nanda, The Construction and Criminalization of Disability in School Incarceration, 9 Colum. J. Race & L. 265, 292 (2019); Fanna Gamal, The Miseducation of Carceral Reform, 69 UCLA L. Rev. (forthcoming 2022) (manuscript at 3–4) (on file with author); Kaaryn Gustafson, The Criminalization of Poverty, 99 J. Crim. L. & Criminology 643, 644–45 (2009); Bridges, supra note 46, at 94; Ngozi Okidegbe, Discredited Data, 107 Cornell L. Rev. (forthcoming 2022) (manuscript at 4, 7) (on file with author).

[169] Murphy, supra note 12, at 1377.

[170] Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

democracy, citizens would surely rise up in outrage if the government attempted to mandate that every person above the age of 12 carry a tracking device that revealed their location 24 hours a day."[171] Yet this is precisely the experience of people subject to punitive surveillance.

If we take at face value that, as the Supreme Court observed, cell phone data, including location data, "hold[s] for many Americans the 'privacies of life,'"[172] then it follows that punitive surveillance violates basic notions of privacy. Punitive surveillance allows prosecutors and law enforcement, with the click of a mouse, access to immense amounts of personal, otherwise private, information at any time of day and without notice to the defendant. Electronic surveillance is a "sweeping form of investigatory power" that "extends beyond a search, for it records behavior, social interaction, and everything that a person says and does."[173]

In striking down warrantless electronic searches imposed as a condition of juvenile probation, the California Supreme Court explained the extent of the privacy intrusion implicated by punitive surveillance:

> [The search condition] allows probation officers to remotely access Ricardo's e-mail, text and voicemail messages, photos, and online accounts, including social media like Facebook and Twitter, at any time. It would potentially even allow officers to monitor Ricardo's text, phone, or video communications in real time. Further, the condition lacks any temporal limitations, permitting officers to access digital information that long predated the imposition of Ricardo's probation.[174]

The privacy intrusion is not limited to data. The degree of surveillance imposed means that the "home is opened up as never before."[175] For people returning from prison, the privacy of the home should allow people

[171] Stuart A. Thompson & Charlie Warzel, Twelve Million Phones, One Dataset, Zero Privacy, N.Y. Times (Dec. 19, 2019), https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html [https://perma.cc/9QSV-43JM].

[172] Riley v. California, 573 U.S. 373, 403 (2014).

[173] Daniel J. Solove, Reconstructing Electronic Surveillance Law, 72 Geo. Wash. L. Rev. 1264, 1269 (2004).

[174] In re Ricardo P., 446 P.3d 747, 757 (Cal. 2019).

[175] R. Corbett & Gary T. Marx, Critique: No Soul in the New Machine: Technofallacies in the Electronic Monitoring Movement, 8 Just. Q. 399, 401 (1991).

to rebuild their lives, but instead that space is subjected to surveillance where everyone is watched, and their movements are scrutinized.[176]

Fourth Amendment jurisprudence offers the most developed framework for evaluating the privacy intrusion experienced by people subject to punitive surveillance.[177] The oft-divided Supreme Court has taken a uniform and hard line on location data. In *United States v. Jones*, *Riley v. California*, and *Carpenter v. United States* the Court focused on the ways that location data "provides an all-encompassing record of the holder's whereabouts . . . and provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[178] As Chief Justice Roberts explained in *Carpenter*, police use of historical cell site location information to "secretly monitor and catalogue every single movement"[179] of someone across time violates social expectations about what law enforcement can and should be able to do.[180] In this way, "*Carpenter* signals a new kind of expectation of privacy test, one that focuses on how much the government can learn about a person regardless of the place or thing from which the information came."[181]

And yet, the holdings in *Jones*, *Riley*, and *Carpenter* are rarely extended to people subject to punitive surveillance.[182] To date, only a

[176] James Kilgore, Interview with Simone Browne, A History of Tracking Black Bodies, Policing Boundaries, Medium: #NoDigitalPrisons (June 20, 2018), https://medium.com/nodigitalprisons/a-history-of-tracking-black-bodies-policing-boundaries-862cefb3c0c9 [https://perma.cc/GY22-YT85].

[177] See Weisburd, Sentenced to Surveillance, supra note 9, at 725.

[178] Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

[179] Id.

[180] See Claire Garvie & Laura Moy, America Under Watch: Face Surveillance in the United States, Geo. L. Ctr. on Priv. & Tech. (May 16, 2019).

[181] Orin Kerr, Implementing Carpenter, The Digital Fourth Amendment 6 (Dec. 19, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301257 [https://perma.cc/B3CH-9299].

[182] United States v. Lambus, 897 F.3d 368, 412 (2d Cir. 2018); United States v. Pacheco, 884 F.3d 1031, 1043 (10th Cir. 2018), cert. denied, 139 S. Ct. 278 (2018); United States v. Johnson, 875 F.3d 1265, 1275 (9th Cir. 2017); Belleau v. Wall, 811 F.3d 929, 935 (7th Cir. 2016); United States v. Bare, 806 F.3d 1011, 1018 n.4 (9th Cir. 2015); Jackson v. United States, 214 A.3d 464, 478 (D.C. 2019); Commonwealth v. Johnson, 119 N.E.3d 669, 680 (Mass. 2019); State v. Kane, 169 A.3d 762, 774 (Vt. 2017). But see United States v. Lara, 815 F.3d 605, 612 (9th Cir. 2016) (invalidating suspicionless search of probationer's cell phone as unreasonable where the suspected probation violation was missing a probation appointment);

small number of courts have found electronic monitoring and other forms of punitive surveillance to be an unreasonable search.[183] In prior work, I explored this line of cases and urged a more robust application of the Fourth Amendment to punitive surveillance.[184]

The Fourth Amendment implications of punitive surveillance are perhaps the most obvious, but the right to privacy—and certainly privacy harm—exists outside the Fourth Amendment.[185] Even though "[t]he Constitution does not explicitly mention any right of privacy," the Supreme Court has recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy" is one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.[186] But this liberty-based right to privacy has yet to be recognized as applying to people on court supervision.

The privacy restrictions associated with monitoring, while not as invasive as prison, reflect a similar kind of deprivation, even if not to the same degree. People in prison, like those on ankle monitors, have limited privacy: their location is tracked and their communication read. Though as discussed in Part III, the diminishment of privacy for people in prison is justified not on punitive grounds, but because allowing too much privacy would undermine prison security.[187]

B. Speech Restrictions

There are two general ways that punitive surveillance erodes First Amendment rights. First, the surveillance of people's location as well as their communication inevitably regulates, chills, and restricts speech. In *Riley v. California*, Chief Justice Roberts did not mince words in describing the privacy interests in cellphones: "American adults who own a cell phone keep on their person a digital record of nearly every aspect

Ricardo P., 446 P.3d at 754 (invoking *Riley* as part of the basis to strike down an electronic search condition).

[183] Commonwealth v. Norman, 142 N.E.3d 1, 10 (Mass. 2020); Commonwealth v. Feliz, 119 N.E.3d 700, 717 (Mass. 2019); State v. Grady, 831 S.E.2d 542, 571 (N.C. 2019); State v. Gordon, 820 S.E.2d 339, 347 (N.C. Ct. App. 2018).

[184] See Weisburd, Sentenced to Surveillance, supra note 9.

[185] See Danielle Keats Citron & Daniel J. Solove, Privacy Harms, 102 B.U. L. Rev. (forthcoming 2022) (manuscript at 33–64), https://scholarship.law.gwu.edu/faculty_publications/1534/ [https://perma.cc/YV72-X7SK] (providing typography of the types of privacy harms).

[186] Roe v. Wade, 410 U.S. 113, 152 (1973).

[187] See infra Section III.A.

of their lives—from the mundane to the intimate."[188] GPS ankle monitors raise parallel concerns. As Justice Sotomayor pointed out in her concurrence in *United States v. Jones*, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[189]

Second, the terms and conditions governing punitive surveillance also limit the ability to speak freely and assemble. Not only is speech monitored but most monitoring rules also prohibit people on ankle monitors from being near certain people (like other people convicted of crimes) and places or attending events (like protests) without prior approval. For people subject to punitive surveillance, attending a political rally without prior approval would be a violation of the monitoring rules.

The negative effects of chilling speech risk stunting self-actualization, as "privacy is closely connected with the emergence of a modern sense of self."[190] Those being watched cannot meaningfully participate in the "vast democratic forums of the internet,"[191] or really any form of democracy.[192] In this way, "[t]echnology alters—rather than just mechanizes—the relationship between the individual and the state."[193] The restrictions on attending political or social gatherings is similar in kind to the restrictions placed on people in prison—who by virtue of their physical incarceration cannot attend.

The disenfranchising effect of surveillance is hardly a coincidence or unintended consequence but rather a reflection of surveillance as a tool of racial subjugation.[194] As Khiara M. Bridges observes in the context of the surveillance of poor mothers of color, a zone of privacy is essential for

[188] 573 U.S. 373, 395 (2014).

[189] 565 U.S. 400, 415 (2012).

[190] Peter Galison & Martha Minow, Our Privacy, Ourselves in the Age of Technological Intrusions, *in* Human Rights in the 'War on Terror' 258–94, 258 (Richard Ashby Wilson ed., 2005); see also Christopher Slobogin, Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity, 72 Miss. L.J. 213, 217 (2002) (arguing that continuous government surveillance violates individuals' "right to anonymity").

[191] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 868 (1997)).

[192] Amy Lerman & Vesla M. Weaver, Arresting Citizenship: The Democratic Consequences of American Crime Control 6 (2014).

[193] Murphy, supra note 12, at 1366.

[194] See Benjamin, supra note 13, at 5–6 (noting that the use of zip codes and racially coded names in the development of the California gang database led to the inclusion of many babies under the age of one); Browne, supra note 52, at 10 ("Surveillance is nothing new to black folks. It is the fact of antiblackness.").

purposes of dignity, autonomy, and capacity for self-governance.[195] Punitive surveillance eliminates that zone of privacy.[196]

Even though people within the criminal legal system maintain some limited First Amendment rights,[197] surveillance is generally not viewed as a First Amendment problem. More often, questions about surveillance are framed as Fourth Amendment problems, and courts focus on whether the surveillance is a reasonable search. Yet, perhaps there is an independent First Amendment basis to regulate the ways that surveillance, including punitive surveillance, implicates free speech.[198]

C. Liberty Restrictions

Punitive surveillance also limits liberty interests in ways that would otherwise be considered unconstitutional for people outside of the criminal legal system. In reference to location data tracking, one reporter hypothesized that "Americans would never consent to a government directive that all citizens carry a device that broadcast, in real time, their physical location and archived that information in repositories that could be shared among powerful, faceless institutions."[199] This sentiment makes sense. As the Supreme Court noted in *Shapiro v. Thompson*, "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[200]

Yet, as previously noted, in most places, people subject to punitive surveillance cannot leave their homes, change their schedules, or take a different route home without permission. Still, other terms limit where people can go and with whom they can interact.[201] Although not as

[195] Bridges, supra note 46, at 5.

[196] See Capers, supra note 46, at 676.

[197] See Pell v. Procunier, 417 U.S. 817, 822 (1974); Cruz v. Beto, 405 U.S. 319, 322 (1972); Cooper v. Pate, 378 U.S. 546 (1964); Sobell v. Reed, 327 F. Supp. 1294, 1304 (S.D.N.Y. 1971).

[198] See Alex Abdo, Why Rely on the Fourth Amendment to Do the Work of the First?, 127 Yale L.J.F. 444, 451 (2017) ("[T]he Supreme Court has recognized the overlapping concerns of the First and Fourth Amendments.").

[199] Stuart Thompson & Charlie Warzel, Where Even the Children Are Being Tracked, N.Y. Times (Dec. 21, 2019), https://www.nytimes.com/interactive/2019/12/21/opinion/pasadena-smartphone-spying.html?fbclid=IwAR0Z93xoaDDIC1KtHhsry72XdFKbLi2vobvq-VF54bi9PCtaXY0kM4UAEmg [https://perma.cc/8L62-MUQS].

[200] Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

[201] See supra Section I.C.

restrictive as prison, the liberty limitations are like those in prison—the difference is a matter of degree, not of kind.

As a descriptive matter, people on probation and parole retain some—albeit limited—liberty interests.[202] A minority of courts have found that electronic surveillance improperly infringes on these liberty interests. As Federal District Court Judge Jack Weinstein explained in the context of pretrial release, electronic monitoring that inhibits "straying beyond spatial home property limits, like those used to restrain pet dogs, are intrusive."[203] Indeed, he reasoned, the "right to travel from one place to another free of hindrances is a well-established aspect of constitutionally protected private freedom."[204] As another court explained, a person on a monitor "may have to leave his or her location in search of a signal or may be required to travel to a location where the device can be charged. These frequent interruptions can endanger an individual's livelihood."[205] The New Jersey Supreme Court described in detail the liberty constraints that accompany electronic monitoring:

> Riley is tethered to an electronic device that must be recharged every sixteen hours, and therefore he cannot travel to places where there are no electrical outlets. In addition to the requirement that he tell his parole officer before he leaves the State, Riley cannot travel to places without GPS reception because his tracker will be rendered inoperable and his parole officer will be unable to monitor his whereabouts.[206]

Although these courts recognize the liberty intrusions caused by punitive surveillance, most courts do not. The rhetoric of rehabilitation and benevolence masks the way that "alternatives" to incarceration, such

[202] Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

[203] United States v. Polouizzi, 697 F. Supp. 2d 381, 391 (E.D.N.Y. 2010).

[204] Id. at 390.

[205] Commonwealth v. Norman, 142 N.E.3d 1, 9–10 (Mass. 2020); see also Commonwealth v. Cory, 911 N.E. 2d 187, 196–97 (Mass. 2009) (internal citation omitted) (finding that mandatory imposition of GPS ankle monitoring as a condition of probation raised liberty concerns); United States v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) (holding that imposing home detention with electronic monitoring as condition of release impinged on liberty interest); United States v. Merritt, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009) (stating that in the context of pretrial release "[a] curfew with electronic monitoring restricts the defendant's ability to move about at will and implicates a liberty interest protected under the Due Process Clause"); State v. Stines, 683 S.E.2d 411, 418 (N.C. Ct. App. 2009) (holding that requiring enrollment in satellite-based monitoring program deprives an offender of a significant liberty interest).

[206] Riley v. New Jersey Parole Bd., 98 A.3d 544, 559 (N.J. 2014).

as electronic monitoring, can "inflict larger deprivations of liberty and volition" than more explicitly punitive programs.[207] Punitive surveillance also makes rule violations easy to detect, and when reincarcerated for technical violations, people lose jobs, miss out on educational opportunities, and endure strain on their family relationships.[208]

Accounts from people who have been subjected to punitive surveillance bring into sharp focus the liberty interests at stake. Some describe an ankle monitor as the equivalent of a modern-day slave shackle, and others describe the feeling of being caged, or on a leash like an animal.[209] This view, however, is not reflected in current law. Most courts conclude that electronic monitoring does not overly burden liberty interests,[210] and no court has concluded that monitoring is a form of incarceration. That said, in some places, electronic monitoring counts as custody time for purposes of calculating sentences,[211] and removing a GPS device, or leaving homes without permission is unlawful and may often be prosecuted as escape.[212] This suggests that there is at least some

[207] Francis A. Allen, The Decline of the Rehabilitative Ideal 49 (1981); Doherty, Testing Periods, supra note 58, at 1788.

[208] Kirk, supra note 9, at 643.

[209] The Voices of the Monitored-Video and Audio Gallery, Challenging E-Carceration (Mar. 24, 2018), https://www.challengingecarceration.org/watch-videos [https://perma.cc/HKT3-HB3V].

[210] See, e.g., Jackson v. United States, 214 A.3d 464, 474 (D.C. 2019) (noting that the Supreme Court has found that people on probation do not enjoy the same liberty to which all citizens are entitled); State v. Muldrow, 900 N.W.2d 859, 869–70 (Wis. 2017) (finding that the intent and effect of GPS tracking are not punitive); Belleau v. Wall, 811 F.3d 929, 936 (7th Cir. 2016) (finding that GPS tracking simply "identifies locations" and does not reveal what the person is doing at any location).

[211] See People v. Raygoza, 2 Cal. App. 5th 593, 601 (2016); State v. Byam, 172 A.3d 171, ¶ 18 (Vt. 2017) (explaining that a "defendant is entitled to credit when the court orders the defendant released pursuant to the statutory home detention program . . . or the electronic monitoring program"); Johnson v. State, 180 A.3d 260 (Md. Ct. Spec. App. 2018) (holding that home detention qualifies as custody); U.S. Sent'g Guidelines Manual § 5C1.1(e)(3) (U.S. Sent'g Comm'n 2018) (stating that one day under home confinement is equivalent to one day of imprisonment).

[212] See Brown v. State, 723 S.E.2d 112, 114–15 (Ga. Ct. App. 2012); Commonwealth. v. Wegley, 791 A.2d 1223, 1226 (Pa. Super. Ct. 2002); State v. Chinn, 91 So. 3d 420, 423 (5th Cir. 2012) (holding that a defendant under home incarceration could be prosecuted for escape); Alaska Stat. § 11.56.320(a)(3)–(4) (2019); Interference with Monitoring Devices, 2006 Ariz. Sess. Laws 1530, § 13-3725; Absconding, 1999 Ark. Acts 2846–47, § 5-54-131; Colo. Rev. Stat. § 17-1-102 (2014); Conn. Gen. Stat. C.G.S. § 53a-115 (2005); D.C. Code. § 22-1211 (2009); Fla. Stat. § 843.23 (2016); Ga. Code Ann., § 16-7-29 (2016); 730 Ill. Comp. Stat. 5/5-8A-4.1 (2008); Ind. Code § 35-44.1-3-4(b) (2018) ("[V]iolates a home detention order or intentionally removes an electronic monitoring device or GPS tracking device commits escape, a Level 6 felony."); La. Stat. Ann. § 14:79.2 (2003); Mass. Gen. Laws ch. 268 § 16

recognition that monitoring is a form of punitive custody that restricts liberty. The disconnect in the law between the deprivation of liberty interests not recognized as a form of incarceration on the one hand, and monitoring counting as custody for purposes of term sentencing is discussed in greater depth in Part III.

D. Due Process Restrictions

The role of third parties and the general opacity of punitive surveillance raise several procedural due process concerns. On the front end, punitive surveillance is often imposed with little opportunity for defendants or their advocates to challenge the decision. In some jurisdictions, electronic monitoring is mandatory for people convicted of certain serious offenses.[213] But even in jurisdictions where the imposition is discretionary, there are rarely guidelines or regulations about who is placed on a monitor, for how long, and under what conditions. The decisions are ad hoc, either by a judge, probation officer, or parole officer.[214]

There are also due process concerns with respect to determining the terms and conditions of punitive surveillance, as well as the user fees. As noted previously, punitive surveillance is imposed in the shadows; the contours of a person's punishment are defined not by a judge and with the benefit of an adversarial process, but by public and private administrators.[215] These agency actors and private vendors act as a sort of

(2018); Mo. Rev. Stat. § 575.205 (2021); N.M. Stat. Ann. § 30-22-8.1 (1999); N.C. Gen. Stat. § 14-226.3 (2009); S.C. Code Ann. § 23-3-540 (1976); Tenn. Code Ann. § 40-39-304 (1994); Va. Code Ann. § 53.1-131.2 (2020); Wash. Rev. Code § 9A.76.130 (2015).

[213] Eisenberg, supra note 9, at 125 (cataloging states with mandatory GPS monitoring for certain sex offense cases).

[214] See State v. Mendoza, 258 P.3d 383, 385 (Kan. 2011) (parole board has authority to impose electronic monitoring); State v. F.W., 129 A.3d 359, 368 (N.J. Super. Ct. App. Div. 2016) (same); Randall v. Cockrell, No. 3-02-CV-0648-G, 2002 WL 31156704, at *2 (N.D. Tex. Sept. 25, 2002) (same); 730 Ill. Comp. Stat. Ann. 5/3-3-7 (same); Jackson v. United States, 214 A.3d 464, 480 (D.C. 2019) (sanctioning the practice of probation officers, not judges, deciding if and when to place people on electronic monitors).

[215] See Feeley, supra note 142, at 39, 83–84 (detailing the influence of private contractors in expanding the use of electronic monitoring).

entrepreneur, defining how surveillance operates,[216] and further shielding it from public, or even judicial, scrutiny.[217]

There are additional due process considerations on the back end. People on probation and parole already have limited due process protections in revocation hearings[218] and these limitations are exacerbated when viewed in the context of punitive surveillance. Challenging probation and parole violations is difficult not just because of the limited procedural protections, but because electronic evidence itself is not easy to confront. Take, for example, an alleged probation violation based on a text message or an image found on the defendant's phone. An unrepresented defendant facing revocation must attempt to challenge the authenticity and reliability of the evidence, which is not easy to confront given the nature of digital evidence.[219] It is equally difficult, if not impossible, for an unrepresented defendant to "confront" GPS cellphone data that shows that the defendant was, for example, out past curfew or in a prohibited geographical area. The problems of understanding, challenging, and confronting digital evidence echo the due process concerns identified by privacy scholars in the context of Big Data analytics; the only difference is the status of the person subject to surveillance.[220]

For the most part, courts are reluctant to find due process problems with punitive surveillance. The only due process concern to gain any legal traction is with respect to mandatory GPS tracking for people either charged with or convicted of certain sex offenses. While a few federal district courts found that mandatory GPS monitoring laws violated due

[216] See Andrea Roth, "Spit and Acquit": Prosecutors as Surveillance Entrepreneurs, 107 Calif. L. Rev. 405, 436 (2019).

[217] See Citron, supra note 154, at 1254 (describing how the opacity of automated systems "shields them from scrutiny").

[218] Gagnon v. Scarpelli, 411 U.S. 1756, 1763 (1973) (setting forth due process rights for people on probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (setting forth due process rights for people on parole).

[219] See Andrea Roth, Machine Testimony, 126 Yale L.J. 1972, 1988 (2017) (addressing the challenge of confronting evidence that is not from a live witness).

[220] Kate Crawford & Jason Schultz, Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms, 55 B.C. L. Rev. 93, 93 (2014) (arguing that Big Data has created poorly secured and readily available personal profiles for many); Citron, supra note 154, at 1254 (stating that data is opaque and difficult for citizens to challenge).

process,[221] most federal circuits have found no due process problems with mandatory GPS monitoring.[222]

III. INCOHERENCIES IN PUNISHMENT JURISPRUDENCE

As Parts I and II demonstrate, punitive surveillance abridges, if not outright extinguishes, a host of constitutional rights. This Part examines the legal justifications for the diminishment of rights that accompany punitive surveillance. In doing so, it reveals how the current doctrinal regime has thus far failed to recognize the carceral nature of punitive surveillance. Part of the problem is definitional, as the line between incarceration and punishment is slippery: sometimes incarceration (including e-carceration) does not involve what the law views as punishment (like in the pretrial setting or civil commitment) and sometimes punishment does not involve incarceration (like probation and parole). These blurred lines help explain the challenge of regulating and limiting the use of punitive surveillance.

Two interwoven strands of punishment jurisprudence guide the inquiry into how the law treats punitive surveillance. On the one hand, people in the criminal legal system do not "forfeit all constitutional protections,"[223] and just as "there is no iron curtain drawn between the Constitution and the prisons of this country,"[224] there is no curtain between the Constitution and people sentenced to punishment outside of prison. But on the other hand, as punitive surveillance demonstrates, people in the criminal legal system do forfeit some rights: so long as the deprivation of a fundamental

[221] United States v. Polouizzi, 697 F. Supp. 2d 381, 383 (E.D.N.Y. 2010); United States v. Karper, 847 F. Supp. 2d 350, 352 (N.D.N.Y. 2011); United States v. Stephens, 669 F. Supp. 2d 960 (N.D. Iowa 2009); United States v. Blaser, 390 F. Supp. 3d 1306, 1317 (D. Kan. 2019).

[222] United States v. Gardner, 523 F. Supp. 2d 1025, 1034 (N.D. Cal. 2007); United States v. Stephens, 594 F.3d 1033 (8th Cir. 2010); United States v. Cossey, 637 F. Supp. 2d 881 (D. Mont. 2009); United States v. Campbell, 309 F. Supp. 3d 738, 738–39 (D.S.D. 2018).

[223] Bell v. Wolfish, 441 U.S. 520, 545 (1979); see also *Morrissey*, 408 U.S. at 482 ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty."); Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) ("[The] degree of impingement upon [a probationer's] privacy . . . is not unlimited . . . ."); United States v. Knights, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'"); State v. Jackson, 917 P.2d 34 (1996) (finding where fundamental rights are involved, sentencing court has less discretion to impose probation conditions which are in conflict therewith); Commonwealth v. Feliz, 119 N.E.3d 700, 711 (Mass. 2019) ("[T]he government does not have an 'unlimited' ability to infringe upon a probationer's still-existing, albeit diminished, expectations of privacy.").

[224] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

right is related to a purpose of punishment, it passes constitutional muster.[225] As a result, punitive surveillance is currently immune from substantive limits on the deprivation of rights.

In this Part, I challenge this result and explain how punitive surveillance exposes critical gaps in punishment jurisprudence. These incoherencies explain why punitive surveillance has not been correctly recognized as punishment and, even when correctly labeled, why existing law offers little guidance as to its constitutional limits.[226]

A. Punitive Surveillance as a Condition of Punishment

An underappreciated reason that punitive surveillance has escaped close constitutional scrutiny is because it is often misclassified as a condition of punishment (not punishment itself) that need only be justified as related to a purpose of punishment. This circular logic almost always results in punitive surveillance—as well as other forms of punishment—being upheld as constitutional. Classifying punitive surveillance as a condition of punishment raises four specific concerns.

First, the surveillance inherent in punitive surveillance is in fact the punishment, and not a *condition* of punishment. This is distinct from surveillance in prisons, where surveillance, in theory, facilitates and allows for the operation of safe prisons.[227] For example, limits on communication between people in prison is not imposed as "punishment,"

[225] See, e.g., United States v. Hughes, 964 F.2d 536, 542 (6th Cir. 1992) (rejecting First Amendment challenge to a probation condition because the condition was "designed to meet the ends of rehabilitation and protect the public" (quoting United States v. Peete, 919 F.2d 1168, 1181 (6th Cir. 1990))); United States v. Bolinger, 940 F.2d 478, 480–81 (9th Cir. 1991) (finding that a probation condition prohibiting membership in a motorcycle club did not infringe on freedom of association because the condition was related to rehabilitation and public safety); Rizzo v. Terenzi, 619 F. Supp. 1186, 1190 (E.D.N.Y. 1985) (upholding parole prohibition on travel on the basis that it relates to supervision and rehabilitation).

[226] Other scholars have pointed out a similar lack of coherence in parole and probation jurisprudence. See Jacob Hutt, Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses, 43 N.Y.U. Rev. L. & Soc. Change 663, 674 (2019); Doherty, Obey All Laws, supra note 54, at 328; Phaedra Athena O'Hara Kelly, The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions, 77 N.C. L. Rev. 783, 838 (1999).

[227] See, e.g., Pell v. Procunier, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."); Overton v. Bazzetta, 539 U.S. 126, 133 (2003) (rejecting First Amendment challenge because the regulation in question "bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes").

but rather as a necessary condition that, in theory, helps preserve safety.[228] Punitive surveillance, on the other hand, is imposed as punishment, in part because it is meant to be a substitute for incarceration.[229] Punitive surveillance, probation, and parole, like a prison sentence, are imposed by courts and, like prison, have their own rules and conditions, but it is the *surveillance* that is punitive. The surveillance is not ancillary. The surveillance is the punishment.[230] This is consistent with the Seventh Circuit's conclusion that for people on parole, "the 'conditions' *are* the confinement."[231]

Second, viewing punitive surveillance as a condition of punishment (as opposed to punishment itself) removes it from close constitutional scrutiny. Generally speaking, courts review conditions of prison, probation, and parole under a similar standard: so long as the condition reasonably relates to a goal of punishment or supervision (such as rehabilitation, punishment, or public or prison safety) the condition is upheld.[232] When conditions of probation and parole are struck down, it is usually on reasonableness grounds,[233] but those cases are far and few between.

[228] Turner v. Safley, 482 U.S. 78, 91 (1987) ("[I]nmate-to-inmate correspondence . . . reasonably relate[s] to legitimate security interests" in prison administration.").

[229] See, e.g., Michelle S. Phelps, The Paradox of Probation: Community Supervision in the Age of Mass Incarceration, 35 Law & Pol'y 51, 52 (2013) (describing probation as both a net widener and an alternative to traditional incarceration); Cecelia Klingele, Rethinking the Use of Community Supervision, 103 J. Crim. L. & Criminology 1015, 1018 (2013) (addressing how community supervision is intended as an alternative to incarceration, despite not operating as such).

[230] See infra Section II.C for further discussion of punitive surveillance as punishment.

[231] Williams v. Wisconsin, 336 F.3d 576, 579 (7th Cir. 2003).

[232] See, e.g., Porth v. Templar, 453 F.2d 330, 334 (10th Cir. 1971) (finding a person on probation "forfeits much of his freedom of action and even freedom of expression to the extent necessary to successful rehabilitation and protection of the public programs"); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975) (en banc) ("Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety.").

[233] See, e.g., United States v. Harris, 794 F.3d 885, 889 (8th Cir. 2015) (striking down a safe sex provision); Trammell v. State, 751 N.E.2d 283, 291 (Ind. Ct. App. 2001) (striking down a no procreation condition of probation); State v. Evans, 796 P.2d 178, 178 (Kan. Ct. App. 1990) (striking down compulsory church attendance as violation of free exercise clause); Sweeney v. United States, 353 F.2d 10, 11 (7th Cir. 1965) (invalidating as unreasonable a probation condition prohibiting an alcoholic from drinking).

For the most part, courts deploy the reasonably-related justification to uphold various forms of punitive surveillance.[234] For example, in upholding electronic monitoring, the Supreme Judicial Court of Massachusetts focused on the fact that GPS monitoring in the context of probation was "imposed on the defendant for the legitimate probationary purposes" of "deterring the probationer from engaging in criminal activity and detecting such criminal activity if it occurs."[235] In this way, any condition of release is potentially justified so long as it "reasonably relates" to rehabilitation, public safety, or punishment.[236]

Likewise, in *United States v. Jackson*, the D.C. Court of Appeals upheld the practice of probation officers sharing GPS location data with police on the grounds that a "primary objective of probationary supervision is the 'protection of society from future criminal violations'" and "[c]ooperation with and enlistment of the police are means of accomplishing that objective."[237] By this logic, almost any type of surveillance could be justified as related to "protection of society."

The reasonably-related approach is akin to the general Fourth Amendment reasonableness test relied on in *Samson v. California* to uphold suspicionless searches of people on parole.[238] Courts sometimes deploy these two approaches together and interchangeably when addressing surveillance of people on court supervision.[239] In prior work, I challenge the reasonableness of punitive surveillance,[240] but to date, only a few courts have struck down punitive surveillance on Fourth Amendment reasonableness grounds.[241]

[234] See United States v. Jackson, 214 A.3d 464, 484 (D.C. 2019) (finding probation officers can share information with police even if it would not have been lawful for police to gather it, because their aims are related); Commonwealth v. Johnson, 119 N.E.3d 669, 680 (Mass. 2019), cert. denied sub nom. Johnson v. Massachusetts, 140 S. Ct. 247 (2019) (finding GPS monitoring reasonable due to its legitimate probationary purposes); United States v. Lambus, 897 F.3d 368, 408 (2d Cir. 2018).

[235] *Johnson*, 119 N.E.3d at 680.

[236] Commonwealth v. Pike, 701 N.E.2d 951, 959 (Mass. 1998); United States v. Tonry, 605 F.2d 144, 148 (5th Cir. 1979); United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977).

[237] *Jackson*, 214 A.3d at 484 (quoting Washington v. United States, 8 A.3d 1234, 1235 (D.C. 2010)).

[238] See Samson v. California, 547 U.S. 843, 844 (2006).

[239] See *Jackson*, 214 A.3d at 484; *Johnson*, 119 N.E.3d at 680.

[240] See Weisburd, Sentenced to Surveillance, supra note 9.

[241] See Commonwealth v. Norman, 142 N.E.3d 1, 10 (Mass. 2020) (finding that the use of GPS monitoring for a defendant's pretrial release did not prove reasonable under the Fourth Amendment); Commonwealth v. Feliz, 119 N.E.3d 700, 704–05 (Mass. 2019) (finding that state concerns did not outweigh privacy intrusion for GPS monitoring of parolee); State v.

For the most part, the reasonably-related standard is relatively amorphous[242] and is often applied in a circular way "such that the government almost always wins."[243] As Justice Stevens noted in the context of challenges to prison conditions, if the "reasonably-related" standard can be satisfied by "nothing more than a 'logical connection' between the regulation and any legitimate penological concern perceived by a cautious warden, . . . it is virtually meaningless" and would allow for the extinguishment of constitutional rights "whenever the imagination of the warden produces a plausible security concern."[244] Although a few courts have struck down punitive surveillance as unreasonable, they are currently in the minority.[245] This is hardly surprising, given that in the context of prisons and other institutions the Supreme Court "proceeds from the assumption of a need for almost complete judicial deference to the governing authority."[246]

Third, classifying punitive surveillance as a condition assumes that consent is a sufficient checkpoint on the degree to which the government may strip people of rights.[247] Either explicitly or implicitly, the erasure of rights that accompany punitive surveillance is premised on the idea that the person *consented* to such erasure in exchange for avoiding incarceration.[248] But consent is a convenient way for courts to avoid

Grady, 831 S.E.2d 542, 556 (N.C. 2019) (finding that the State "never actually identifie[d] any special need" that would justify an intrusion on defendant's privacy); State v. Gordon, 820 S.E.2d 339, 339 (N.C. Ct. App. 2018) (finding the "[s]tate failed to meet its burden of showing that implementation of [defendant's] satellite-based monitoring" was reasonable under the Fourth Amendment).

[242] See Cynthia Lee, Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis, 81 Miss. L.J. 1133, 1136 (2012).

[243] Barry Friedman & Cynthia Benin Stein, Redefining What's "Reasonable": The Protections for Policing, 84 Geo. Wash. L. Rev. 281, 297 (2016).

[244] Turner v. Safley, 482 U.S. 78, 100–01 (1987) (Stevens, J., dissenting) (emphasis omitted).

[245] A small minority of courts have struck down surveillance conditions on Fourth Amendment grounds. See *Norman*, 142 N.E.3d at 10; *Feliz*, 119 N.E.3d at 692–93; *Grady*, 831 S.E.2d at 556; *Gordon*, 380 S.E.2d at 339.

[246] Chemerinsky, supra note 21, at 441.

[247] In prior work, I address consent as a possible justification that avoids Fourth Amendment scrutiny. See Weisburd, Sentenced to Surveillance, supra note 9, at 736.

[248] See, e.g., United States v. McCoy, 847 F.3d 601, 605 (8th Cir. 2017) (upholding electronic search clause because defendant agreed to it as a condition of release); People v. Nachbar, 3 Cal. App. 5th Supp. 1122, 1129 (Cal. Ct. App. 2016) (upholding electronic search condition on grounds that defendant "accepted probation in lieu of additional punishment"); People v. Thornburg, 895 N.E.2d 13, 23–24 (Ill. App. Ct. 2008) (upholding computer search term based on defendant's consent to the terms); State v. Gonzalez, 862 N.W.2d 535, 542

difficult constitutional questions. If consent were removed from the calculation—if bargaining over conditions were impossible—it is likely that prosecutors would ask for, and judges would impose, punitive surveillance as part of an actual sentence. And in fact, punitive surveillance is often imposed without an option for the defendant to "opt out."[249]

Fourth and finally, designating surveillance as a condition (and not punishment) also removes it from Eighth Amendment scrutiny. Harsh conditions of punishment are often not governed by the Eighth Amendment because they are "part of the penalty that criminal offenders" must pay.[250] In other words, under current doctrine, some conditions of punishment are meant to be extremely unpleasant (as a part of the punishment) and unless they rise to the level of being unusual or cruel, the Eighth Amendment is inapplicable.

At the same time, harsh conditions related to punishment are also not often afforded Eighth Amendment protections because the deprivations are "not punishment," but merely unpleasant ancillary conditions.[251] As Justice Scalia opined, the Eighth Amendment may be inapplicable if "the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge . . . ."[252] In the context of challenges to prison conditions, the "Eighth Amendment permits some harsh conditions because they are part of the intended penalty, and the Eighth Amendment permits other harsh conditions because they are *not* part of the intended penalty."[253] Just as this doctrinal scheme is arguably unsound and results

(N.D. 2015) (upholding computer search condition on the grounds that "the probationer consents to warrantless searches . . . when he accepts the conditions of probation").

[249] See Weisburd, Sentenced to Surveillance, supra note 9, at 741 (describing circumstances when defendants are not given the opportunity to "opt out" of supervision conditions).

[250] Rhodes v. Chapman, 452 U.S. 347 (1981).

[251] See Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945) ("The conditions of probation are not punitive in character and the question of whether or not the terms are cruel and unusual and thus violative of the Constitution of the United States does not arise for the reason that the Constitution applies only to punishment."); State v. Macy, 403 N.W.2d 743, 745 (S.D. 1987) (holding that because probation is not a sentence but a sentence alternative, the Eighth Amendment does not apply); State v. Muldoon, 767 P.2d 16, 19 (Ariz. 1988) ("Probation is not a sentence."); United States v. Balogun, 146 F.3d 141, 146 (2d Cir. 1998) (asserting that supervised-release term not used to punish defendant, but rather to ease defendant's transition from prison life to community life); Farmer v. Brennan, 511 U.S. 825, 859 (1994) (Thomas, J., concurring) ("Conditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence.").

[252] Wilson v. Seiter, 501 U.S. 294, 300 (1991).

[253] Alice Ristroph, Sexual Punishments, 15 Colum. J. Gender & L. 139, 163 (2006).

in little protection for incarcerated people,[254] labeling punitive surveillance as an ancillary condition—as compared to the actual punishment—is both inaccurate and effectively removes it from meaningful scrutiny.

B. Punitive Surveillance as Regulatory

Punitive surveillance is also sometimes viewed as a type of non-punitive restriction or collateral consequence, such as losing the right to own a gun, serve on a jury, or becoming subject to deportation, to name a few.[255] There are two reasons why this classification is both inaccurate and results in less constitutional scrutiny.

First, electronic monitoring is sometimes, but not always, imposed as a regulatory measure,[256] which may explain some of the confusion. When imposed in the context of pretrial release, electronic monitoring, like pretrial detention, is a form of preventative detention, not punishment—at least as a legal matter. In *United States v. Salerno*, the Supreme Court concluded that pretrial detention is permissible regulation and not "impermissible punishment."[257] Presumably, the same reasoning applies to pretrial surveillance.

Similarly, restraints that are imposed on people who have completed a criminal sentence (such as involuntary civil commitment and sex offender registries) are, as a legal matter, civil regulations and not punishment.[258] Several courts have extended this reasoning to the use of electronic surveillance for people who have completed their sentence. For example, in the context of lifetime GPS monitoring for people convicted of certain sex offenses, the U.S. Court of Appeals for the Seventh Circuit

[254] See Margo Schlanger, The Constitutional Law of Incarceration, Reconfigured, 103 Cornell L. Rev. 357, 385 (2018); Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 909 (2009).

[255] See Margaret Colgate Love, Jenny Roberts & Wayne A. Logan, Collateral Consequences of Criminal Conviction: Law Policy & Practice 251–306 (2018–19 ed.); Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L. Rev. 1789, 1806 (2012); Eisenberg, supra note 9, at 160.

[256] Avlana K. Eisenberg, Discontinuities in Criminal Law, 22 Theoretical Inquiries L. 137, 148 (2021).

[257] United States v. Salerno, 481 U.S. 739, 745–46 (1987) ("[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment" because the detention "would be permissible [if it] . . . serve[d] the basic objective of a criminal system.").

[258] Kansas v. Hendricks, 521 U.S. 346, 368–69 (1997); Smith v. Doe, 538 U.S. 84, 95–96 (2003).

determined that the state's monitoring law was "not punishment; [but] prevention."[259] The court explained that "[h]aving to wear the monitor is a bother, an inconvenience, an annoyance, but no more is punishment than being stopped by a police officer on the highway and asked to show your driver's license is punishment."[260] The court reasoned that "if civil commitment is not punishment, as the Supreme Court has ruled, then *a fortiori* neither is having to wear an anklet monitor."[261] The Seventh Circuit is hardly an outlier. Most lower courts have concluded that ankle monitoring applied in the context of pretrial release or post-sentence supervision is a form of civil restraint.[262]

In contrast, punitive surveillance imposed as part of probation or parole is decidedly not regulatory. Punitive surveillance imposed by a court as part of a sentence or as part of punishment is legally distinct from punitive surveillance imposed in the context of pretrial release or post-sentence restraints.[263]

That said, the line between regulatory restraints and punishment may be shifting.[264] A growing number of courts have found that lifetime GPS monitoring is, in fact, a form of punishment.[265] In Michigan, the state appellate court found the imposition of lifetime GPS monitoring for people convicted of certain sex offenses was considered to be *part of the actual sentence*.[266] Similarly, the New Jersey State Supreme Court accepted that the state law requiring lifetime monitoring was created as a

[259] Belleau v. Wall, 811 F.3d 929, 937 (7th Cir. 2016).

[260] Id.

[261] Id.

[262] See Doe v. Bredesen, 507 F.3d 998, 1004 (6th Cir. 2007); State v. Bowditch, 700 S.E.2d 1, 13 (N.C. 2010); State v. Muldrow, 900 N.W.2d 859, 870 (Wis. Ct. App. 2017); Doe v. Coupe, 143 A.3d 1266, 1281 (Del. Ch. 2016); In re Justin B., 747 S.E.2d 774, 783 (S.C. 2013); State v. Trosclair, 89 So. 3d 340, 357 (La. 2012).

[263] See supra Section II.C.

[264] See Jenny Roberts, Gundy and the Civil-Criminal Divide, 17 Ohio St. J. Crim. L. 207, 210–11 (2019) (claiming "[the] dividing line is far from clear" between "[t]he division of consequences into 'civil' and 'criminal' categories"); Joshua Kaiser, We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences," 59 How. L.J. 341, 366 (2016) ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." (quoting United States v. Halper, 490 U.S. 435, 447–48 (1989))).

[265] See Riley v. New Jersey Parole Bd., 98 A.3d 544, 560 (N.J. 2014); Commonwealth v. Cory, 911 N.E.2d 187, 196–97 (Mass. 2009) ; People v. Cole, 491 Mich. 325, 336 (Mich. 2012); Doe v. Rausch, 382 F. Supp. 3d 783, 799 (E.D. Tenn. 2019).

[266] People v. Hallak, 873 N.W.2d 811, 820–21 (Mich. Ct. App. 2015), rev'd in part on other grounds, 499 Mich. 879 (2016).

"civil regulatory scheme" but concluded that, in practice, it was an "indefinite form[] of parole."[267]

As other scholars have pointed out, there are compelling reasons to reject classifying pretrial detention, registries, and other so-called "collateral consequences" as non-punitive.[268] And the same critique applies to punitive surveillance: the experience of being on a GPS ankle monitor is equally punitive whether someone is on pretrial release or probation.

Second, the implications of classifying punitive surveillance as regulatory are significant.[269] In some ways, regulatory measures have greater protections and in other ways fewer, but the protections afforded to regulatory measures are distinct from those afforded to punishment.[270] On the one hand, regulatory measures are subject to substantive due process challenges and are afforded greater First and Fourth Amendment protections. For example, in evaluating the First Amendment rights of people on sex-offender registries (a civil restraint), the Court's reasoning rested on the premise that the defendants "already . . . served their sentence and are no longer subject to the supervision of the criminal justice system."[271] Lower courts followed suit, reaffirming the view that restrictions on both First and Fourth Amendment rights are more troubling when they are "extended beyond the completion of [the

[267] *Riley*, 98 A.3d at 554–55.

[268] Chin, supra note 254, at 1832; Eisha Jain, Prosecuting Collateral Consequences, 104 Geo. L.J. 1197, 1199 (2016).

[269] Murphy, supra note 12, at 1351.

[270] See Sandra G. Mayson, Collateral Consequences and the Preventive State, 91 Notre Dame L. Rev. 301, 340 (2015) (making the case that classifying collateral consequences as punishment comes with significant costs and affords fewer avenues to challenge the restrictions).

[271] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (striking down on First Amendment grounds an internet ban for people convicted of certain sex offenses).

defendant's] sentence"[272] and that those still subject to state punishment are not afforded the same protections.[273]

On the other hand, regulatory measures are not subject to Eighth Amendment and Ex Post Facto Clause limitations precisely because they are not considered punishment as a matter of law. In short, it is inaccurate to characterize all punitive surveillance as regulatory, as it is just as often—if not more often—imposed as a form of punishment.

C. Punitive Surveillance as Punishment

Several scholars, myself included, have highlighted the ways that punitive surveillance is a form of punishment,[274] but current doctrine is not so definitive. As Erin Murphy observes, "technological restraints—which impose harm in predominantly nonphysical forms—are rarely found to constitute punitive restraints."[275] It is also the case that judicial attempts "to identify 'punishment' . . . [have] been conceptually muddled, to say the least."[276] Although the Supreme Court generally views probation and parole as forms of criminal punishment,[277] as noted in the prior sections, many lower courts do not regard punitive

[272] United States v. Browder, 866 F.3d 504, 511 n.26 (2d Cir. 2017); see also State v. Grady, 831 S.E.2d 542, 559–60 (N.C. 2019) (noting that Fourth Amendment concerns are heightened with "respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the 'continuum of possible [criminal] punishments' and have no ongoing relationship with the State"); Friedman v. Boucher, 580 F.3d 847, 858 (9th Cir. 2009) (finding that nonconsensual DNA collection was an unreasonable because "Friedman was not on parole. He had completed his term of supervised release successfully and was no longer the supervision of [sic] any authority").

[273] See *Browder*, 866 F.3d at 511 n.26; see also United States v. Halverson, 897 F.3d 645, 658 (5th Cir. 2018) (finding that "*Packingham* does not—certainly not ''plainly''—apply to the supervised-release context"); United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017) (noting that *Packingham* does not apply to a supervised-release condition, because such a condition "is not a post-custodial restriction of the sort imposed on *Packingham*").

[274] See Weisburd, Sentenced to Surveillance, supra note 9, at 753–61 (describing how electronic surveillance results in significant privacy intrusions); Eisenberg, supra note 9, at 136–45 (arguing that current use of electronic monitoring in the criminal justice context is consistent with the goals of dominant punishment theories); Arnett, supra note 22, at 674–80 (arguing that electronic monitoring contributes to social marginalization).

[275] See Murphy, supra note 12, at 1351.

[276] Carol S. Steiker, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 Geo. L.J. 775, 781 (1997).

[277] See Griffin v. Wisconsin, 483 U.S. 868, 874 (1987); Sanford H. Kadish, Stephen J. Schulhofer & Rachel E. Barkow, Criminal Law and Its Processes 141 (10th ed. 2017) ("Sentences may also include other mandates, including conditions of supervised release and probation.").

surveillance as punishment, choosing instead to view it as a condition of punishment or as a civil restraint.[278] Yet for the reasons herein, punitive surveillance should be properly recognized as punishment.

The most accurate way to view punitive surveillance is an extension of probation and parole, both of which are primarily viewed as punishment, even if less restrictive and oppressive than prison.[279] The historical development of both probation and parole during the Progressive Era reveal their origins as penal institutions aimed at reformation and obedience.[280] And certainly punitive surveillance reflects Jeremy Bentham's panopticon vision of punishment that focuses on people being watched at all times.[281] Today, the benevolent and rehabilitative rhetoric of both probation and parole obscure the punitive nature of the institutions.[282] Contemporary probation and parole reflect what Malcolm M. Feeley and Jonathan Simon call "the new penology," which emphasizes "correctional programs in terms of aggregate control and system management rather than individual success and failure."[283]

As a legal matter, determining if a measure is considered punishment or regulatory is most often governed by the multifactor test first outlined in *Kennedy v. Mendoza-Martinez*. Under that test, courts look to several factors:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected

[278] See supra Sections II.A–B.

[279] See Doherty, Obey All Laws, supra note 54, at 328–34 (describing development of probation systems in context of progressive worldview focused on benevolence and rehabilitation); United States v. Gementera, 379 F.3d 596, 600–01 (9th Cir. 2004) (observing that punishment is a recognized goal of federal supervised release); see also Commonwealth v. Pike, 701 N.E.2d 951, 959 (Mass. 1998) ("Other goals of probation include punishment, deterrence, and retribution.").

[280] See Klingele, supra note 229, at 1023–27 (describing the history of both probation and parole).

[281] Jeremy Bentham, Panopticon: Or, The Inspection-House (1791), *reprinted in* The Panopticon Writings 29, 33–34 (Miran Božovič ed., 1995).

[282] See Doherty, Obey All Laws, supra note 54, at 333–34.

[283] Malcolm M. Feeley & Jonathan Simon, The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 Criminology 449, 455 (1992).

> is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .[284]

The very few courts to apply this test to punitive surveillance concluded that it was properly classified as punishment. For example, the Massachusetts Supreme Court recently applied the *Mendoza-Martinez* test in determining that mandatory GPS monitoring for people on probation and parole was "punitive in effect."[285] The court found that "[t]he GPS device burden[ed] liberty . . . by its permanent, physical attachment" and "its continuous surveillance," and found that the device was "dramatically more intrusive and burdensome" than a yearly registration requirement or the standard conditions of probation and parole.[286] The Alaska Supreme Court similarly recognized electronic monitoring for people on probation as a form of incarceration.[287] This shift is consistent with the growing number of states[288] and the federal government[289] that now consider various forms of supervised release a sentence and not an alternative to a sentence. Counting time on an ankle monitor as custody credit for purposes of term of years sentence calculations is also consistent with the view that punitive surveillance is a form of punishment.

A small, but arguably growing, number of courts to address the Sex Offender Registry Acts ("SORA"), which impose restrictions similar to punitive surveillance, have also expanded the definition of punishment.[290] As the Sixth Circuit observed of Michigan's SORA, the blanket restrictions on "where people can live, work, and 'loiter,' . . . without any individualized assessment," and the "time-consuming and cumbersome in-person reporting," is punitive and "exceed[s] even a generous assessment of their statutory effects."[291] The same could be said of punitive surveillance. As with SORA restrictions, there is "scant evidence

[284] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (footnotes omitted).
[285] See Commonwealth v. Cory, 911 N.E.2d 187, 197 (Mass. 2009).
[286] Id. at 196; Doe v. Mass. Parole Bd., 979 N.E.2d 226, 232–33 (Mass. App. Ct. 2012).
[287] See Diaz v. State, Dep't of Corr., 239 P.3d 723, 728 (Alaska 2010).
[288] See, e.g., Del. Code Ann. tit. 11, § 4302 (2021); N.J. Stat. Ann. § 2C:43-2 (2021); N.H. Rev. Stat. Ann. § 651:2 (2021).
[289] See 18 U.S.C. § 3561 (1994) (calling probation a "sentence").
[290] See, e.g., Does #1–5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016) (holding that Michigan's SORA acts as a punishment and therefore cannot be a valid civil regulation); Evenstad v. City of W. St. Paul, 306 F. Supp. 3d 1086, 1102 (D. Minn. 2018); Doe v. Miami-Dade Cnty., 846 F.3d 1180, 1186 (11th Cir. 2017).
[291] *Does #1-5*, 834 F.3d at 705.

that such restrictions serve the professed purpose of keeping . . . communities safe."[292]

Some may ask why it is beneficial to classify punitive surveillance as punishment, as compared to regulation or as a condition of punishment. Certainly, one implication of classifying punitive surveillance as punishment is that more people could be sentenced to prison instead of placed on GPS ankle monitors. There are two responses to this concern. First, labeling punitive surveillance as punishment is an accurate reflection of the law and is more reason to closely limit it—through closer constitutional scrutiny, legislative limits, or abolition, all addressed in Part IV of this Article. Courts have immense discretion in sentencing, but legislative responses that limit the use of punitive surveillance could curb especially abusive practices. Second, the belief that more people will be incarcerated assumes that punitive surveillance is being used as an alternative for incarceration, but it is far from clear that people who are on ankle monitors today would otherwise be incarcerated.[293]

IV. LIMITS ON PUNITIVE SURVEILLANCE

As detailed in Part III, punitive surveillance reveals significant incoherencies in punishment jurisprudence that cause this type of carceral surveillance to escape meaningful constitutional scrutiny. But in the era of the Decarceration movement, a national reckoning with racial injustice, and an increased reliance on purported alternatives to incarceration, the question of unwarranted diminishment of rights has become increasingly pressing. In this Part, I identify the viability of potential limits on punitive surveillance.

A. Fortified Eighth Amendment Limits

The Eighth Amendment is the primary and most obvious source of limitations on punitive surveillance. There are a few reasons why the Eighth Amendment, as currently interpreted, may be a weak source of protection, though the doctrinal landscape is shifting.

First, Eighth Amendment jurisprudence is deferential when it comes to sentencing generally. If a sentence of life without parole for the crime of drug possession does not violate the Eighth Amendment, it is hard to

[292] Id.

[293] See supra notes 9–10 and accompanying text.

make the case that anything less than that is cruel and unusual.[294] As other scholars have pointed out, the Eighth Amendment's proportionality limitation, like the reasonableness test discussed above, is circular: any punishment is proportional so long as it "satisfies an accepted purpose" of punishment.[295]

Second, although there is some jurisprudential support for the proposition that non-prison sentences could violate the Eighth Amendment, the cases are few and far between. Perhaps not surprisingly, courts are generally quick to reject Eighth Amendment challenges to probation and parole conditions.[296] For example, banning a defendant from getting married was found to not violate the Eighth Amendment, [297] as was requiring a defendant to wear a fluorescent pink plastic bracelet bearing the words "DUI CONVICT."[298] It follows that most Eighth Amendment (as well as Ex Post Facto Clause) challenges to punitive surveillance fail.[299]

But the doctrine is in flux. There are two ways that Eighth Amendment jurisprudence could be construed to limit punitive surveillance. First, the fact that more severe punishment, such as the death penalty, has survived Eighth Amendment challenges, does not provide "a license to the Government to devise any punishment short of death within the limit of its imagination."[300] Punishment less than death may still be "cruel and unusual." In *Trop v. Dulles*, the Court held that the use of

[294] Harmelin v. Michigan, 501 U.S. 957, 995–96 (1991) (refusing to extend Eighth Amendment protection to a sentence of life in prison without the possibility of parole).

[295] Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677, 683 (2005).

[296] See, e.g., United States v. Gementera, 379 F.3d 596, 608–09 (9th Cir. 2004) (rejecting Eighth Amendment challenge to a shaming condition); Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. 591, 646 n.226 (1996) (explaining that doctrine reflects that shaming penalties are not viewed as "cruel and unusual" in regard to the Eighth Amendment).

[297] Johnson v. Rockefeller, 365 F. Supp. 377, 380–81 (S.D.N.Y. 1973).

[298] Ballenger v. State, 436 S.E.2d 793, 794–95 (Ga. Ct. App. 1993).

[299] See People v. Hallak, 873 N.W.2d 811, 824 (Mich. Ct. App. 2015); Noonan v. Burton, No. 17-2458, 2018 WL 6584905, at *3 (6th Cir. 2018); United States v. Gardner, 523 F. Supp. 2d 1025, 1031 (N.D. Cal. 2007); United States v. Campbell, 309 F. Supp. 3d 738, 750 (D.S.D. 2018). But see Riley v. N.J. State Parole Bd., 98 A.3d 544, 560 (N.J. 2014) (invaliding life time GPS monitoring under Ex Post Facto Clause); United States v. Polouizzi, 697 F. Supp. 2d 381, 395 (E.D.N.Y. 2010) (finding that mandatory electronic monitoring under Adam Walsh Act violates excessive bail clause); United States v. Torres, 566 F. Supp. 2d 591, 602 (W.D. Tex. 2008) (same).

[300] Trop v. Dulles, 356 U.S. 86, 99 (1958).

denationalization as punishment is prohibited by the Eighth Amendment.[301] And in *Weems v. United States*, the Court struck down a sentence of twelve years of "hard and painful labor," with "a chain at the ankle and wrist" and a permanent loss of all civil rights.[302] These cases "make clear that profound impairment of legal personality is constitutionally significant."[303]

Although successful Eighth Amendment challenges to probation are rare, and at this point somewhat dated, conditions such as forced castration,[304] departing from the United States,[305] and a prohibition from visiting a specific national park[306] were found to violate the Eighth Amendment. As the Court in *Trop* explained, physical incarceration is not a prerequisite for an Eighth Amendment challenge:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community.[307]

In *Weems*, the Court noted the dynamic nature of the Eighth Amendment and the need to reconceptualize punishment "as public opinion becomes enlightened by a humane justice."[308] The same logic, by analogy, could be applied to punitive surveillance. Given increasing concerns about privacy and digital surveillance, perhaps having no privacy should constitute the sort of "civil death" found to be unconstitutional in *Weems* and *Trop*.

Interestingly, some of these non-carceral Eighth Amendment cases could have also been decided on First Amendment or Fourth Amendment grounds, but they were not. At the time these cases were decided, the Eighth Amendment did the work that the First or Fourth could have done. And certainly, if decided today, perhaps these punishments would have

[301] Id. at 103.
[302] Weems v. United States, 217 U.S. 349, 366, 382 (1910).
[303] Chin, supra note 255, at 1821.
[304] State v. Brown, 326 S.E.2d 410, 412 (S.C. 1985) (finding castration to be "cruel and unusual" under South Carolina's constitution).
[305] Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962).
[306] United States v. Armstrong, 186 F.3d 1055, 1064 (8th Cir. 1999).
[307] Trop v. Dulles, 356 U.S. 86, 101 (1958).
[308] Weems v. United States, 217 U.S. 349, 378 (1910).

been upheld as reasonable *conditions* of punishment or as a regulatory measure.

But the Court's more recent decisions in *United States v. Bajakajain* and *Timbs v. Indiana* also lend support to the proposition that non-carceral punishment may violate the Eighth Amendment. Although these cases concerned forfeiture and excessive fines, they stand for the proposition that some forms of non-carceral punishment violate the Eighth Amendment.[309] In *Timbs* in particular, the Court focused on the Excessive Fines Clause as a way of preventing the government from using its "punishment powers to exploit and undermine individuals . . . to 'retaliate or chill' speech, or otherwise to abuse people."[310] This suggests that states cannot use *punishment* in an abusive fashion that burdens basic constitutional rights.

Of course, what counts as appropriate punishment as compared to abusive punishment remains somewhat elusive. But the *Timbs* decision supports what Judith Resnik has coined, an "anti-ruination principle," which is the idea that "state punishment has to preserve (rather than diminish) people's capacities to function physically, mentally, and socially, even as governments may also aim to deter, incapacitate, be retributivist, rehabilitative, protect institutional safety, and minimize costs."[311] Perhaps an anti-ruination argument can be made with respect to punitive surveillance: ruination cannot be the aim of punishment and punitive surveillance (with its abridgment of fundamental rights) does precisely that.

Second, punitive surveillance undermines basic notions of dignity, a hallmark of the Court's Eighth Amendment jurisprudence.[312] The Court has found that the inability to meet basic human needs is a feature of punishments that undermine dignity and thus violate the Eighth Amendment.[313] As the empirical research shows, the invasive and restrictive nature of punitive surveillance creates a "subgroup of

[309] Timbs v. Indiana, 139 S. Ct. 682, 698 (2019) (holding that the Eighth Amendment's prohibition on excessive fines is an incorporated protection applicable to the States); United States v. Bajakajian, 524 U.S. 321, 324 (1998) (holding that the full forfeiture of respondent's currency violates the Eighth Amendment).

[310] Judith Resnik, (Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin," 129 Yale L.J.F. 365, 367–68 (2020).

[311] Id. at 408.

[312] *Trop*, 356 U.S. at 100 (plurality opinion).

[313] See Hope v. Pelzer, 536 U.S. 730, 738 (2002) (holding that chaining a person to a hitching post undermined dignity in part because of defendant's inability to use the bathroom).

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."[314] As the Supreme Judicial Court of Massachusetts recently observed, "[w]hen a judge orders GPS tracking, a 'modern-day "scarlet letter"' is physically tethered to the individual, reminding the public that the person has been charged with or convicted of a crime."[315] Some people on monitors describe losing jobs because they had to keep leaving their job to charge their device or walk outside to get a GPS signal.[316] Still other people report hardships involving not being able to visit loved ones in the hospital before they passed away,[317] not getting permission to attend a doctor's appointment,[318] not obtaining permission to attend family reunions,[319] or to go to a pharmacy.[320] A 76-year-old grandmother in Baltimore was reincarcerated for "escape" when her GPS ankle monitor detected her away from her home for a few hours, while she was at a computer class.[321] And a woman in Texas lost her job and was reincarcerated when the halfway house failed to properly record her location.[322] She returned to prison shortly before giving birth to her second child.[323] Thanks to multi-year efforts of community organizers and journalists, the dignity harms have been revealed.

[314] Arnett, supra note 22, at 675.

[315] Commonwealth v. Norman, 142 N.E.3d 1, 9 (Mass. 2020).

[316] Cantú, supra note 131; The Bail Project, After Cash Bail (2020), https://bailproject.org/wp-content/uploads/2020/02/the_bail_project_policy_framework_2020.pdf [https://perma.cc/6FZL-L4KZ].

[317] Cantú, supra note 131.

[318] Kilgore, supra note 33.

[319] Cantú, supra note 131.

[320] Kilgore, supra note 33.

[321] Neena Satija & Justin WM. Moyer, A Grandmother Didn't Answer Her Phone During a Class in Baltimore. She Was Sent Back to Prison., Wash. Post (July 1, 2021), https://www.baltimoresun.com/news/crime/bs-wp-md-cr-federal-prisoners-home-confinement-20210701-hoqdc5y7pna6jkrevr6pvak2vq-story.html [https://perma.cc/M3A8-U25L].

[322] Jamie Roth, COVID Allowed Raquel Esquivel and 4,500 Others to Be Released from Overcrowded Federal Prisons. So Why Is She Back Behind Bars?, Business Insider (Aug. 13, 2021), https://www.businessinsider.com/do-these-4000-federal-inmates-belong-behind-bars-2021-8 [https://perma.cc/XYY8-4D4U].

[323] Id.

B. Fundamental Rights Limits

It is perhaps intuitive to conclude that if punitive surveillance is correctly recognized as a form of punishment, it follows that it is always constitutional, so long as it is not cruel or unusual. But as a new category of punishment, punitive surveillance raises a critical question: Can the deprivation of fundamental rights be imposed as direct punishment for a crime and in lieu of prison? Obviously, a prison sentence involves the deprivation of liberty, and people in prison generally lose rights that are "inconsistent with incarceration." And still other rights, such as the right to bear arms or serve on a jury, are lost as collateral consequences of a criminal conviction. Likewise, incarceration and house arrest are also Fourth Amendment seizures, and punitive surveillance is a Fourth Amendment search. Courts, however, never explicitly impose the deprivation of Fourth Amendment rights as direct punishment itself. Is this because the Fourth Amendment search and seizure is deemed "reasonable" or because the deprivation of rights can be imposed as direct punishment itself? In short: is there a "punishment exception" to the Constitution that exempts criminal punishment from traditional fundamental rights review?

The answer is not obvious. Justice Stevens, in his dissent in *Samson v. California*, in which the majority upheld suspicionless searches of people on parole, cautioned that the Court has never "sanctioned the use of any search as a *punitive* measure."[324] On the other hand, Justice Thomas has taken the position that states should be afforded deference "to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations"[325] and that people convicted of crimes cannot claim "a general fundamental right to 'freedom from bodily restraint.'"[326] Lower courts generally assume that punishment is not subject to heightened constitutional review.[327]

While an intrepid group of scholars have suggested that prison sentences, certain extreme probation conditions and collateral

[324] Samson v. California, 547 U.S. 843, 864 (2006) (Stevens, J., dissenting) (emphasis added).

[325] Overton v. Bazzetta, 539 U.S. 126, 139 (2003) (Thomas, J., concurring).

[326] Foucha v. Louisiana, 504 U.S. 71, 118 (1992) (Thomas, J., dissenting).

[327] See, e.g., State v. Oakley, 629 N.W.2d 200, 207 n.23, 208 (Wis. 2001) (refusing to apply strict scrutiny to an anti-procreation condition of probation); Commonwealth v. Power, 650 N.E.2d 87, 91 (Mass. 1995) (refusing to apply strict scrutiny to a First Amendment challenge to a probation condition); Allen v. State, 141 A.3d 194, 201 (Md. 2016) (same).

consequences should be subject to additional constitutional limits, including strict scrutiny, none have yet to influence doctrine.[328] This Article raises, but does not resolve, the question of whether there is a punishment exception to the Constitution—though the question is an important one. In related forthcoming work, I address this question in more depth and the context of other purported alternatives to incarceration, including diversion programs, restorative justice, and work release programs, to name a few.[329]

To be sure, there may be strong constitutional arguments for additional protections, but it is unlikely that doctrine will change anytime soon. And as discussed in the next two sections, more rights and legal protections will not necessarily address the underlying conditions of racialized carceral control that gave rise to punitive surveillance in the first place.

C. Regulatory Limits

As is true with other forms of law enforcement surveillance, the answers to the problems with punitive surveillance may lay outside the Constitution and courts generally.[330] Just as there has been a legislative response, albeit limited, to the unregulated use of police surveillance technology, there could be parallel legislative responses to the use of punitive surveillance of people in the criminal legal system. As other scholars have pointed out, there is currently insufficient "democratic

[328] See Jane Bambauer & Andrea Roth, From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing, 101 B.U. L. Rev. 1667, 1676 (2021); Salil Dudani, Note, Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences, 129 Yale L.J. 2112, 2132 (2020); Alec Karakatsanis, The Punishment Bureaucracy: How to Think About "Criminal Justice Reform," 128 Yale L.J.F. 848, 869–70 (2019); Sherry F. Colb, Freedom from Incarceration: Why Is This Right Different from All Other Rights?, 69 N.Y.U. L. Rev. 781, 783 (1994); Alec Karakatsanis, Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System 59, 78 (2019); Sandra G. Mayson, Collateral Consequences and the Preventive State, 91 Notre Dame L. Rev. 301, 340 (2015); Phaedra Athena O'Hara Kelly, Comment, The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet Letter Probation Conditions, 77 N.C. L. Rev. 783, 786 (1999); Jaimy M. Levine, Comment, "Join the Sierra Club!": Imposition of Ideology as a Condition of Probation, 142 U. Pa. L. Rev. 1841, 1848 (1994); Alexis Karteron, Family Separation Conditions, at 3–5 (Dec. 3, 2021) (unpublished manuscript) (on file with author).

[329] See Kate Weisburd, Punishment Exceptionalism and the Future of Decarceration 7 (Jan. 24, 2022) (unpublished manuscript) (on file with author).

[330] See Barry Friedman & Maria Ponomarenko, Democratic Policing, 90 N.Y.U. L. Rev. 1827, 1834 (2015).

authorization" of policing,[331] and the same can be said of punitive surveillance.[332]

Legislation could set important limits in terms of privacy, data sharing, and reliance on private vendors. Legislation could limit the ability of law enforcement to access data from the various forms of punitive surveillance. Legislation could also regulate the type of technology used—for example, banning ankle monitors with audio functions. Additionally, legislation could dictate how the technology is used—for example, allowing for smartphone applications that provide notifications of court dates but prohibiting more invasive tracking software. Legislation could also address procedural due process concerns, including mandated discovery obligations and access to how the technology functions, including error rates. Finally, legislation could help to regulate the private surveillance industry. With respect to facial recognition software, "[w]e've relied on industry efforts to self-police and not embrace such a risky technology, but now those dams are breaking because there is so much money on the table."[333] The same concerns apply to the private companies pedaling the various forms of punitive surveillance.

Recently passed legislation governing police surveillance offers a useful roadmap. In places like New York City, San Francisco, and Cambridge, Massachusetts, newly enacted legislation requires some version of a surveillance technology impact report that includes factors such as how the surveillance technology operates, the location where it will be deployed, the impact on marginalized groups, fiscal costs, and mandated public comment periods before the adoption of any new surveillance technology.[334] Similar impact reports could be required of punitive surveillance.

Likewise, in the context of prisoners' rights, Congress passed the Religious Land Use and Institutionalized Person Act ("RLUIPA") to curb infringement on religious practices in prison. Under the Act, prison regulations cannot substantially burden a prisoner's religious exercise

[331] Id.

[332] Arnett, supra note 22, at 682.

[333] Kashmir Hill, The Secretive Company that Might End Privacy as We Know It, N.Y. Times (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [https://perma.cc/X8MS-5LAJ] (quoting Woodrow Hartzog, Northeastern University professor of law and computer science).

[334] See N.Y.C., Admin. Code tit. 14, § 14-188 (2020); S.F., Cal., Admin. Code § 19B.2 (2019); Cambridge, Mass., Code of Ordinances Ch. 2.128.010 (2018).

unless the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest."[335] Legislation focused on the privacy rights of people under court control could likewise subject punitive surveillance to some form of heightened scrutiny.[336]

Of course, regulating surveillance need not only come from lawmakers. Prosecutors can also shift policies and practices. Given the surge in prosecutors elected on criminal justice reform platforms, there are increasing opportunities for policy reform initiated by local prosecutors. Although many recently elected prosecutors have taken firm stances on limiting or outright eliminating money bail,[337] for example, none have enacted policies aimed at limiting the use of punitive surveillance as an alternative to bail.

To date, community organizers and activists have led efforts to limit the use of punitive surveillance. For example, in 2020, activists convinced the Illinois Prisoner Review Board (the state equivalent of the parole board) to allow people on monitors (and thus also on house arrest) to have twelve hours per day of movement, seven days a week. This was a victory for people who previously were often denied permission to leave the house, or were only granted permission occasionally.[338] The Illinois Legislature also recently passed bail reform legislation that prevents electronic monitoring from being used in non-detainable cases and allows its use only if "no less restrictive condition of release . . . would reasonably ensure the appearance of the defendant for later hearings or protect an identifiable person . . . from imminent threat of serious physical harm."[339] Similarly, two advocacy organizations, MediaJustice and the Challenging E-Carceration project recently published ten

[335] 42 U.S.C. § 2000cc(a)(1)(A), (B) (2000).

[336] See David M. Shapiro, Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny, 84 Geo. Wash. L. Rev. 972, 1024–25 (2016) (arguing that the RLUIPA standard governs speech clause claims raised by people in prison).

[337] See Colin Doyle, Chesa Boudin's New Bail Policy Is Nation's Most Progressive. It Also Reveals Persistence of Tough-on-Crime Norms, Appeal (Jan. 30, 2020), https://theappeal.org/politicalreport/chesa-boudin-cash-bail-predictions/ [https://perma.cc/776H-4JSM].

[338] Kira Lerner, Illinois Loosened Ankle-Monitor Restrictions, but Advocates Say It's Too Soon to Celebrate, Appeal (Oct. 18, 2019), https://theappeal.org/illinois-loosened-ankle-monitor-restrictions-but-advocates-say-its-too-soon-to-celebrate/ [https://perma.cc/ND37-RF3C].

[339] H.B. 3653, 101st Gen. Assemb., Reg. Sess. § 110-5(g) (Ill. 2021), https://www.ilga.gov/legislation/101/HB/10100HB3653sam002.htm [https://perma.cc/RWC2-CD44].

arguments against the use of electronic monitoring, as well as other resources for policy reform.[340] Activists in California successfully lobbied for the elimination of user fees for GPS ankle monitors,[341] and Critical Resistance SF has mounted a robust campaign to stop the expanded use of GPS monitors in San Francisco.[342]

D. Beyond Limits: Punitive Surveillance Abolition

As some scholars, commentators, and organizers warn, reform presents significant risks.[343] Rather than shrink the footprint of the criminal legal system, reform efforts cause new harms, such as legitimating policing through "surveillance bureaucracy," thereby undermining efforts to defund and abolish police.[344] Reform efforts often result in simply tinkering around the edges but leaving in place the entrenched problem of institutionalized racism that gave rise to both mass incarceration and punitive surveillance.[345]

Constitutional and regulatory limits may do little to shift the larger carceral paradigm, as "a digital cell is still a form of high-tech social control."[346] Rather, as abolition scholar Angela Davis has urged, the "most difficult and urgent challenge today is that of creatively exploring

[340] MediaJustice, No More Shackles: Ten Arguments Against Pretrial Electronic Monitoring (2019); James Kilgore, Electronic Monitoring Is NOT an Alternative to Incarceration, Challenging E-Carceration (June 18, 2017), https://www.challengingecarceration.org/2017/06/18/why-electronic-monitoring/ [https://perma.cc/T7F5-7Z8L].

[341] Andrew Sheeler, New California Law Strikes Criminal Court Fees Charged by Sheriffs, Police, Sacramento Bee (Sept. 21, 2020), https://www.sacbee.com/news/politics-government/capitol-alert/article245898415.html; A.B. 1869, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (eliminating fees for electronic monitoring).

[342] See Organizational Letter to Close 850 Bryant, No New SF Jail Coalition (July 23, 2019), https://nonewsfjail.org/orgletter2019/#:~:text=July%2023%2C%202019%20%7C%20Over%2065,a%20closure%20of%20850%20Bryant.&text=In%202017%2C%20City%20Administrator%20Naomi,the%20jail%20has%20been%20implemented [https://perma.cc/G46K-6XNJ]; Who We Are, No New SF Jail Coalition, https://nonewsfjail.org/about/ [https://perma.cc/D77P-5JMP] (last visited Oct. 29, 2021).

[343] Schenwar & Law, supra note 10, at 9; Arnett, supra note 22, at 682; Fuck the Police, Trust the People: Surveillance Bureaucracy Expands the Stalker State, Stop LAPD Spying Coal. (June 24, 2020), https://stoplapdspying.org/surveillance-bureaucracy-expands-the-stalker-state/ [https://perma.cc/WG55-9ETJ].

[344] Stop LAPD Spying Coal., supra note 343.

[345] See Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. Rev. 405, 440–41 (2018); Dorothy E. Roberts, Democratizing Criminal Law as an Abolitionist Project, 111 Nw. U. L. Rev. 1597, 1604 (2017); Jessica M. Eaglin, Algorithms as Racial Ideology in Law 11 (Jan. 24, 2022) (unpublished manuscript) (on file with author).

[346] Benjamin, supra note 13, at 166.

new terrains of justice, where the prison no longer serves as our major anchor."[347] Even the most well-intended reform may do nothing to change the basic nature of punitive surveillance, which is, at its core, a highly racialized tool of carceral control.

One solution is for surveillance-abolition goals to guide collective thinking about the role and future of punitive surveillance. In particular, eliminating reliance on punitive surveillance as a "primary means of addressing what are essentially social, economic, and political problems."[348] Because punitive surveillance is often viewed as a benevolent alternative to incarceration, however, reform risks further solidifying its perceived legitimacy, thereby undermining abolitionist goals.

Using abolition as a baseline also forces an important inquiry into the net widening impact of punitive surveillance. Rather than assume that punitive surveillance is being used as an alternative to incarceration, an abolition lens focuses not on who *would* otherwise be incarcerated, but rather, who *should* be incarcerated. So long as punitive surveillance is relied on—and justified as an alternative to incarceration—the risk of people being on a monitor who should not be on a monitor *or* incarcerated remains high. The abolitionist critique also reveals that the "alternatives" narrative perpetuates a "false binary between incarceration or surveillance and ignores a third option: unconditional freedom."[349] This Article does not resolve the tension between reform and abolition but brings the question of surveillance abolition to the surface.

CONCLUSION

New forms of punishment are booming: halfway houses, drug treatment centers, community supervision, drug courts, programs aimed at sex workers, work camps, and restitution centers, to name a few.[350]

[347] Angela Y. Davis, Are Prisons Obsolete? 21 (2003).

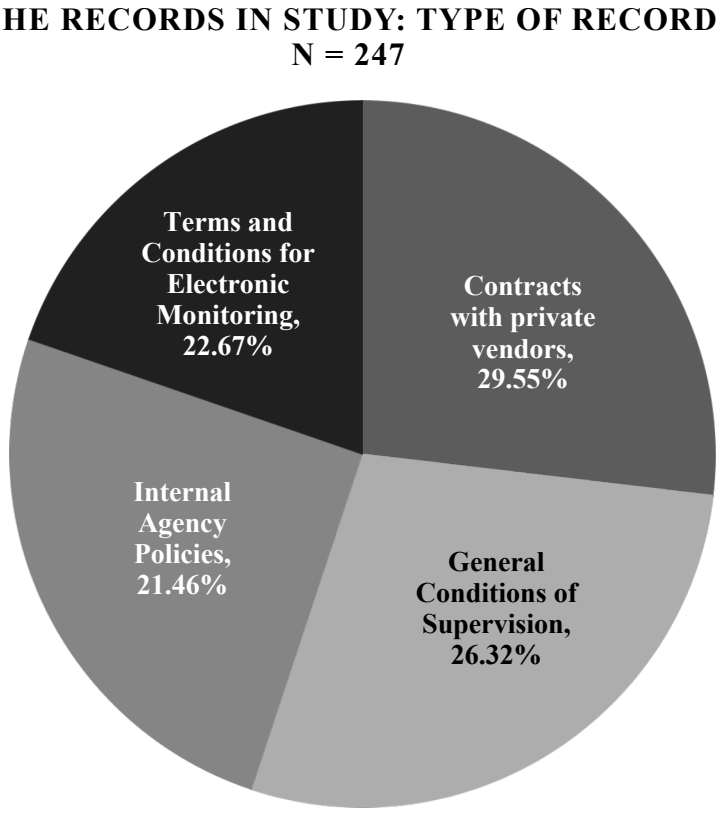
[348] Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. Rev. 1156, 1172 (2015) (discussing the goals of abolition generally).

[349] James Kilgore, Emmett Sanders & Kate Weisburd, The Case Against E-Carceration, Inquest (July 30, 2021), https://inquest.org/the-case-against-e-carceration/ [https://perma.cc/98K4-G6KE].

[350] See Schenwar & Law, supra note 10, at 8, 18–19, 57, 94–97; Laura I Appleman, The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt, 55 Harv. C.R.-C.L. L. Rev. 1, 12–23 (2020); Joshua Holland, Private Prison Companies Are Embracing Alternatives to Incarceration, Nation (Aug. 23, 2016), https://www.thenation.com/article/archive/private-prison-companies-are-embracing-

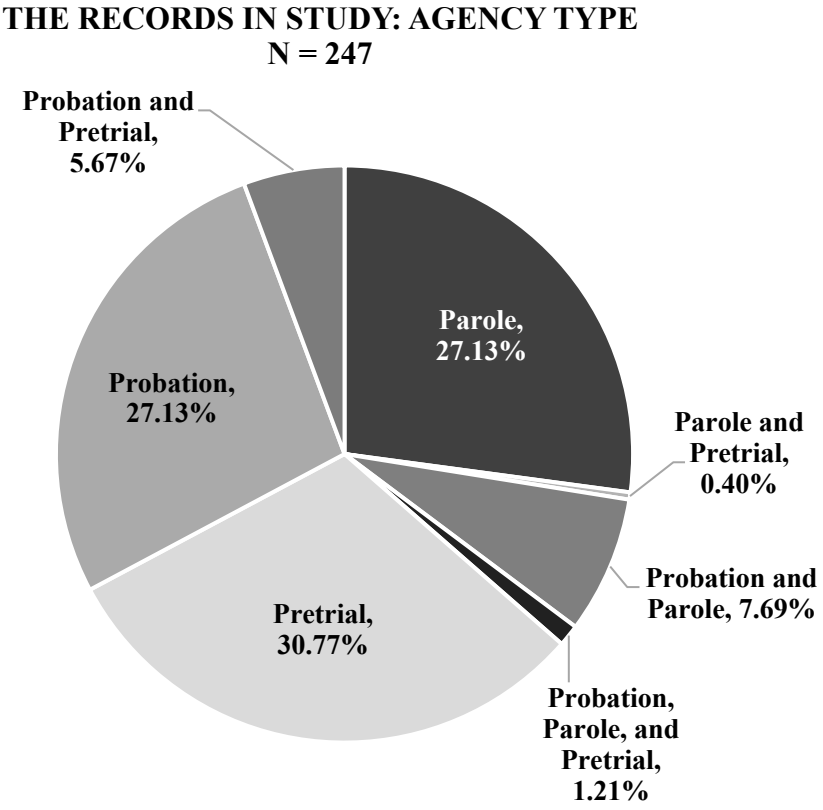
These additional forms of restraint and surveillance not only expand the footprint of the carceral state, they also evade close judicial scrutiny. In the shadows of the criminal legal system, people's fundamental rights are stripped away with no meaningful limitation or oversight. This Article makes the case that punitive surveillance should be recognized for its carceral nature and limited accordingly.

APPENDIX: RECORDS IN STUDY[351]



alternatives-to-incarceration/ [https://perma.cc/7T84-QG74]; Anna Wolfe & Michelle Liu, Think Debtors Prisons Are a Thing of the Past? Not in Mississippi, Marshall Project (Jan. 9, 2020), https://www.themarshallproject.org/2020/01/09/think-debtors-prisons-are-a-thing-of-the-past-not-in-mississippi [https://perma.cc/Y7GU-CGEA].

[351] Electronic Prisons, supra note 4, at 29.



Records Relied on in Report

State	Name of Agency	What does the agency oversee?	Records Collected
Alabama	Bureau of Pardons and Paroles	Probation and Parole	General Conditions of Supervision
Alabama	Jefferson County Sheriff's Office	Pretrial	General Conditions of Supervision
Alaska	Department of Corrections	Pretrial, Probation and Parole	Contract, General Conditions of Supervision, Terms and Conditions of Electronic Monitoring
Arizona	Department of Corrections, Rehabilitation & Reentry	Parole	General Conditions of Supervision
Arizona	Judicial Branch, Adult Probation Services	Pretrial and Probation	General Conditions of Supervision, Terms and Conditions of Electronic Monitoring
Arizona	Mohave County Probation Department	Pretrial	General Conditions of Supervision
Arkansas	Department of Corrections, Division of Community Corrections	Probation and Parole	Contract, General Conditions of Supervision, Internal Policies Terms and Conditions of Electronic Monitoring
California	Los Angeles County Probation Department	Probation	Contract, Internal Policies, Terms and Conditions of Electronic Monitoring
California	Orange County Probation Department	Probation	Contract, General Conditions of Supervision, Internal Policies

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
California	Sacramento County Sheriff's Department	Pretrial and Probation	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
California	San Diego County Sheriff's Department	Pretrial	Contract, Internal Policies, Terms and Conditions of Electronic Monitoring
California	San Francisco Sheriff's Department	Pretrial	Contract, Terms and Conditions of Electronic Monitoring
Colorado	Denver Adult Probation Department	Probation	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Colorado	Denver Department of Public Safety	Pretrial	Contract, General Conditions of Supervision
Colorado	Department of Corrections	Parole	Contract, General Conditions of Supervision, Internal Policies
Connecticut	Department of Correction	Parole	Terms and Conditions of Electronic Monitoring
Connecticut	Judicial Branch, Court Support Services Division	Probation	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Delaware	Department of Correction, Bureau of Community Corrections	Pretrial, Probation and Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
District of Columbia	Court Services and Offender Supervision Agency for the District of Columbia	Probation and Parole	Contract, General Conditions of Supervision
District of Columbia	Pretrial Services Agency	Pretrial	Contract Terms and Conditions of Electronic Monitoring
Florida	Broward Sheriff's Office, Pretrial Services Division	Pretrial	Contract, General Conditions of Supervision, Internal Policies
Florida	Department of Corrections and Rehabilitation	Probation	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Florida	Miami-Dade Corrections and Rehabilitation Department	Pretrial and Probation	Contract, General Conditions of Supervision
Georgia	Department of Community Supervision	Probation and Parole	General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Hawaii	Department of Public Safety	Parole	Contract, Internal Policies

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Idaho	Ada County Sheriff's Office	Probation and Pretrial	Internal Policies, General Conditions of Supervision, Terms and Conditions of Electronic Monitoring
Idaho	Canyon County Misdemeanor Probation Department	Probation	General Conditions of Supervision
Idaho	Canyon County Sheriff's Office	Pretrial	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Idaho	Department of Correction	Probation and Parole	Contract, Internal Policies, Terms and Conditions of Electronic Monitoring
Illinois	Circuit Court of Cook County Adult Probation Department	Probation	General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Illinois	Cook County Sheriff's Office and Adult Probation Department	Probation and Pretrial	Contract, Terms and Conditions of Electronic Monitoring
Illinois	Cook County Government: Cook County Adult and Juvenile Probation	Pretrial	Contract
Illinois	Department of Corrections	Parole	Contract, Internal Policies

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Illinois	Lake County Sheriff's Department Community Based Corrections Center, Electronic Monitoring Program	Pretrial and Probation	Contract, Terms and Conditions of Electronic Monitoring
Illinois	Prisoner Review Board	Parole	General Conditions of Supervision
Indiana	Department of Corrections, Division of Parole Services	Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Indiana	Marion County Community Corrections	Probation and Pretrial	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Iowa	Department of Administrative Services	Pretrial	Contract
Iowa	Department of Corrections	Pretrial, Probation and Parole	Internal Policies, Terms and Conditions of Electronic Monitoring
Iowa	Fifth Judicial District Department of Correctional Services	Probation	General Conditions of Supervision

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Kansas	Department of Corrections, Community and Field Services Division	Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Kansas	Johnson County Department of Corrections	Probation and Pretrial	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Kansas	Sedgwick County Department of Corrections	Probation and Pretrial	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Kentucky	Department of Corrections	Probation and Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Kentucky	Jefferson County Pretrial Services	Pretrial	General Conditions of Supervision
Kentucky	Lexington Division of Community Corrections	Probation and Pretrial	Contract, Internal Policies
Kentucky	Louisville Metropolitan Department of Corrections	Pretrial	Internal Policies, Terms and Conditions of Electronic Monitoring
Kentucky	Louisville-Jefferson County Pretrial Services	Pretrial	Contract

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Maine	Cumberland County Pretrial Services	Pretrial	Contract
Maine	Department of Corrections	Probation	General Conditions of Supervision
Maine	Pretrial Services, Inc.	Pretrial	Internal Policies
Maryland	Department of Public Safety and Correctional Services	Parole	General Conditions of Supervision, Internal Policies
Maryland	Prince George's County Department of Corrections	Probation and Pretrial	Contract, Internal Policies, Terms and Conditions of Electronic Monitoring
Massachusetts	Parole Board	Parole	General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Michigan	Department of Corrections	Probation and Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Michigan	Oakland County Community Corrections Division	Pretrial	General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Michigan	Oakland County Compliance Office	Pretrial	Contract

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Minnesota	Ramsey County Correctional Facility	Probation	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Mississippi	Department of Corrections	Probation and Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Missouri	Department of Corrections	Probation and Parole	General Conditions of Supervision
Missouri	St. Louis County Department of Justice Services	Pretrial	Terms and Conditions of Electronic Monitoring
Nebraska	Department of Correctional Services	Probation	Contract
Nebraska	Douglas County Department of Corrections	Pretrial	Contract
Nebraska	Lancaster County Community Corrections	Pretrial	Contract, General Conditions of Supervision
Nevada	Department of Public Safety, Division of Parole and Probation	Probation and Parole	Contract, General Conditions of Supervision
New Hampshire	Department of Corrections	Probation and Parole	Internal Policies, Terms and Conditions of Electronic Monitoring

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
New Jersey	Judiciary	Pretrial	Terms and Conditions of Electronic Monitoring
New Jersey	State Parole Board	Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
New Mexico	Corrections Department	Pretrial, Probation and Parole	Contract, General Conditions of Supervision, Terms and Conditions of Electronic Monitoring
New York	State Department of Corrections and Community Supervision	Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
North Carolina	Department of Public Safety, Division of Adult Correction, Community Corrections	Probation and Parole	General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
North Carolina	Department of Public Safety	Probation	Contract
North Carolina	Rockingham County Courts	Pretrial	General Conditions of Supervision
Ohio	Cuyahoga County Probation Department	Probation	General Conditions of Supervision, Terms and Conditions of Electronic Monitoring

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Ohio	Department of Rehabilitation and Correction	Parole	Contract, General Conditions of Supervision, Internal Policies
Oklahoma	Department of Corrections, Probation and Parole Services	Probation and Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Oklahoma	Tulsa County Court Services	Pretrial	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Oregon	Department of Corrections	Parole	Contract
Oregon	Multnomah County Department of Community Justice, Adult Services Division	Probation	General Conditions of Supervision
Pennsylvania	Board of Parole and Probation	Probation and Parole	Contract, General Conditions of Supervision, Terms and Conditions of Electronic Monitoring
Pennsylvania	Luzerne County Division of Corrections	Probation	Contract
South Dakota	Department of Corrections	Parole	General Conditions of Supervision

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
South Dakota	Minnehaha County Sheriff's Office, Jail Division	Pretrial	Terms and Conditions of Electronic Monitoring
South Dakota	Unified Judicial System	Probation	General Conditions of Supervision
Texas	Dallas County Pre-Trial Services	Pretrial	Internal Policies
Texas	Department of Criminal Justice, Parole Division	Parole	Internal Policies
Utah	County Sheriff's Office	Pretrial	Internal Policies, Terms and Conditions of Electronic Monitoring
Utah	Department of Corrections	Probation and Parole	Contract, Internal Policies, Terms and Conditions of Electronic Monitoring
Utah	Department of Corrections	Probation and Parole	General Conditions of Supervision
Utah	Salt Lake County Criminal Justice Services	Pretrial	General Conditions of Supervision
Virginia	Department of Corrections	Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Virginia	Fairfax County Sheriff's Office Alternative Incarceration Branch	Pretrial and Probation	Contract, Internal Policies, Terms and Conditions of Electronic Monitoring

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Virginia	Richmond Department of Justice Services	Probation and Pretrial	General Conditions of Supervision, Internal Policies
Washington	King County Department of Adult & Juvenile Detention	Pretrial	Terms and Conditions of Electronic Monitoring
West Virginia	Berkeley County Community Corrections	Probation and Pretrial	Terms and Conditions of Electronic Monitoring
West Virginia	Division of Corrections and Rehabilitation, Parole Services	Parole	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
West Virginia	Kanawha County Sheriff's Office, Home Confinement Division	Pretrial	Terms and Conditions of Electronic Monitoring
Wisconsin	Dane County Pretrial Services	Pretrial	Contract, General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring
Wisconsin	Department of Corrections	Pretrial, Probation and Parole	Contract, General Conditions of Supervision, Internal Policies
Wisconsin	JusticePoint (Milwaukee County)	Pretrial	General Conditions of Supervision, Internal Policies, Terms and Conditions of Electronic Monitoring

State	**Name of Agency**	**What does the agency oversee?**	**Records Collected**
Wyoming	Department of Corrections	Parole	Contract, General Conditions of Supervision