

Monitoring Youth: The Collision of Rights and Rehabilitation

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ABSTRACT: A monumental shift in juvenile justice is underway, inspired by the wide recognition that incarceration is not the solution to youth crime. In its place, “electronic monitoring” has gained widespread support as a new form of judicial control over youth offenders. Supporters herald it as “jail-to-go”: a cost-efficient alternative to incarceration that allows youth to be home while furthering rehabilitative and deterrent goals. But despite electronic monitoring’s intuitive appeal, virtually no empirical evidence suggests its effectiveness. Instead, given the realities of adolescent development, electronic monitoring may lead to more harm than good.

This Article is the first to examine the routine, and troubling, use of electronic monitoring in juvenile courts. After describing the realities of the practice and its proffered justifications, this Article refutes three key misperceptions about the practice: (1) that it lowers incarceration rates because it is used only on youth who would otherwise be detained; (2) that it effectively rehabilitates youth; and (3) that it is cost-effective.

Yet because of the deference afforded to judges in crafting terms of probation and pretrial release, the rehabilitative rhetoric of juvenile court, and the perception of electronic monitoring as non-punitive, electronic monitoring is subject to virtually no judicial oversight or scrutiny. The result is that the practice exists in a legal and policy netherworld: wielded and expanded with almost no limits. This Article concludes by arguing that electronic monitoring should be categorized as a form of punishment, warranting a new doctrinal framework that more rigorously evaluates and circumscribes monitoring and other forms of non-carceral control. Until that happens, electronic monitoring

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risks making worse the exact problem it seeks to address, namely, to rehabilitate youth.

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I. INTRODUCTION

R.V.'s story is a typical one in American juvenile justice: when he was 16, he admitted to vandalism and receiving stolen property—a stereo taken from a local high school. R.V. was placed on probation. One month later, R.V. violated his probation when he left home overnight. He was sentenced to 22 days of detention, followed by 90 days on an electronic ankle monitor. Referring to the ankle monitor, the juvenile court judge told him that the monitoring did him “a favor because it’s going to be a reminder to you that every moment that you are out . . . you have this device on you that it keeps track of you.”¹

R.V. could be any young person charged with a crime. Although spared physical detention, youth on electronic monitoring are in jails without walls. They are often on house arrest, unable to leave even when living space may be tight and family tensions run high. Unauthorized movement or the failure to properly charge the device results in youth cycling in and out of juvenile hall for minor monitoring violations.

Every day, American juvenile court judges order youths like R.V. to wear electronic ankle monitors—small devices that rely on the Global Positioning System (“GPS”) to monitor people’s movements. The monitors maintain records of the devices’ movements “moment-by-moment for days, weeks, or even years.”² Every state except New Hampshire has some form of electronic monitoring for juvenile defendants.³ In Los Angeles County, for example,

1. *In re R.V.*, 89 Cal. Rptr. 3d 702, 706 (Cal. Ct. App. 2009).

2. *United States v. Berry*, 300 F. Supp. 2d 366, 368 (D. Md. 2004).

3. See ALA. CODE § 12-15-209 (2012); ARIZ. REV. STAT. ANN. § 8-352; ARK. CODE ANN. § 16-17-133 (2014); CAL. WELF. & INST. CODE § 1960 (West Supp. 2015); COLO. REV. STAT. § 19-2-307 (2014); CONN. GEN. STAT. § 46b-141a (2013); DEL. CODE ANN. tit. 11, § 4121 (2007); FLA. STAT. § 985.27 (2013); IDAHO CODE § 20-219 (Supp. 2015); 705 ILL. COMP. STAT. 405/5-7A-120 (2014); IND. CODE § 31-37-6-6 (West 2008 & Supp. 2014); IOWA ADMIN. CODE r. 441-151.33(232) (2008); KAN. STAT. ANN. § 38-2330 (Supp. 2014); KY. REV. STAT. ANN. § 600.020 (West Supp. 2014); LA. STAT. ANN. 46:2600 (2010); 03-201-12 ME. CODE R. § 15.4 VI (LexisNexis 2007); MICH. COMP. LAWS § 780.798 (2012 & Supp. 2015); MISS. CODE ANN. § 43-21-605 (Supp. 2009); MONT. CODE ANN. § 46-18-1001 (2013); NEB. REV. STAT. § 43-288 (2008); N.J. ADMIN. CODE § 13:92-5.4 (Supp. 2011); N.M. CODE R. § 8.14.2.10 (LexisNexis 2009); N.Y. FAM. CT. ACT § 320.5(3)(c) (McKinney Supp. 2015); N.C. GEN. STAT. ANN. § 7B-2510 (West 2004 & Supp. 2014); N.D. CENT. CODE ANN. § 12-67-02 (2012); OHIO REV. CODE ANN. § 2152.19(A)(4)(k) (LexisNexis 2011 & Supp. 2015); OKLA. STAT. ANN. tit. 57, § 510.9 (2011); OR. REV. STAT. § 169.078 (2013); 37 PA. CODE § 200.3 (2007); 14-1 R.I. CODE R. § 800.0036 (LexisNexis 2011); S.C. CODE ANN. § 23-3-540 (2007 & Supp. 2014); 6 VA. ADMIN. CODE § 35-150-355 (2011); WASH. REV. CODE § 13.40.020(10) (2014); W. VA. CODE ANN. § 49-1-206 (LexisNexis Supp. 2015); WIS. STAT. § 302.425 (2013-14); WYO. STAT. ANN. § 14-6-309 (2015); MINN. R. JUV. DEL. P. 5.02; see also *In re Ryan S.*, 797 A.2d 39, 54 (Md. 2002); *Commonwealth v. Hector H.*, 865 N.E.2d 1178, 1180 (Mass. App. Ct. 2007); *In re J.O.*, 247 S.W.3d 422, 423-25 (Tex. Ct. App. 2008); ALASKA JUVENILE JUSTICE ADVISORY COMM., 1998 ANNUAL REPORT 2 (1998), <http://dhss.alaska.gov/djj/Documents/ReportsAndPublications/AJJAC/AJJAC98AnnualReport.pdf>; 21A NANCY A. GARRIS & JACK COCHRAN, MISSOURI PRACTICE SERIES § 19:20, at 13 (3d ed. 2008); STACY JOLLES, JUVENILE JUSTICE COMM’N, REPORT TO THE VERMONT LEGISLATURE: JUVENILE JUSTICE COMMISSION REPORT 11 (2009).

there are roughly 450–500 youth on monitors on any given day.⁴ Despite statutory and case law authority for the use of electronic monitoring in juvenile court, little is known about the precise way that it is used, or the extent it is used.⁵

A range of unlikely allies, from sheriffs to police to public defenders, advocate for the increased use of electronic monitoring as a successful alternative to incarceration.⁶ The American Bar Association has urged juvenile courts to use electronic monitoring as an alternative to secure

http://dcf.vermont.gov/sites/dcf/files/pdf/reports/FSD_JJC_Report.pdf; STATE OF TENN. DEP'T OF CHILDREN'S SERVS., ADMINISTRATIVE POLICIES AND PROCEDURES: 13.5 (2011), <http://www.state.tn.us/youth/dcsguide/policies/chap13/13.5.pdf>; WASHOE CTY. DEP'T OF JUVENILE SERVS., "PROBATION MANUAL": ELECTRONIC MONITORING, <http://www.jdaihelpdesk.org/aftermodelec/Washoe%20County%20NV%20House%20Arrest%20and%20Electronic%20Monitoring.pdf> (describing the electronic monitoring process for Washoe County, Nevada); *Intensive Supervision Juvenile Probation Program*, HAW. HEALTH MATTERS, <http://www.hawaiihealthmatters.org/index.php?controller=index&module=PromisePractice&action=view&pid=1017> (last visited Sept. 19, 2015); *Juvenile Justice Terms/Definitions: Definitions of Terms Used in the Department of Juvenile Justice*, GA. DEP'T JUV. JUST., <http://www.djj.state.ga.us/ResourceLibrary/resFactSheetsGlossary.shtml#Electronic%20Monitoring> (last visited Sept. 19, 2015); S.D. Second Circuit Court, *Welcome to Court Services*, UJS.SD.GOV, http://uj.s.sd.gov/Second_Circuit/Probation/ (last visited Sept. 19, 2015); *Second District Juvenile Court – FAQ's*, UTAH CTS., <http://www.utcourts.gov/courts/juv/juvsites/2nd/faq.html> (last modified July 16, 2015); Wash. D.C. Dep't of Youth Rehab. Servs., *Electronic Monitoring*, DC.GOV, <http://drys.dc.gov/node/422512> (last visited Sept. 19, 2015).

4. Bd. of State & Cmty. Corr., *Juvenile Detention Survey: Online Querying*, CA.GOV, <http://www.bscc.ca.gov/> (last visited Sept. 19, 2015) (follow "Data & Research" hyperlink; then scroll down to "The Juvenile Detention Survey" section; then follow "Juvenile Detention Survey-Online Querying" hyperlink; then select "Monthly" for the "Data Type" and "2002 & Forward" for the "Reporting Range"; then click the "Continue" button; then select "2014" for the "Year," "Jan" for the "Month From," and "Jun" for the "Month To"; then select "Los Angeles" from the list of counties and the "(Juv. on Home Sup. w/Elec. Monitor) Total ADP" query; then click the "Query" button).

5. There is little research on how electronic monitoring is used in the juvenile justice system in the United States. See discussion *infra* text accompanying notes 30–37. I conducted an informal survey through Survey Monkey, (a survey website), of juvenile defenders across the country to learn how often electronic monitoring is used, as well as the benefits and risks that are commonly identified. I disseminated the survey via professional association listserves. There were 67 respondents to the survey, representing 23 states and 57 different counties. All reported that electronic monitoring was extensively used in the juvenile courts in which they practice. The majority of respondents reported that clients were often on electronic monitors for weeks, if not months, at a time. My informal survey evidences the need for more robust empirical research into the use of electronic monitoring around the country. KATE WEISBURD, SURVEYMONKEY: ELECTRONIC MONITORING IN JUVENILE COURT (2015) (on file with author).

6. See, e.g., Rachel Swan, *Jail To-Go: Ankle Bracelets Could Be the Next Great Law Enforcement Tool, If the City Doesn't Get Defeated by Data*, S.F. WKLY. (May 21, 2014), <http://www.sfweekly.com/sanfrancisco/jail-to-go-ankle-bracelets-could-be-the-next-great-law-enforcement-tool-if-the-city-doesnt-get-defeated-by-data/Content?oid=2949655> (describing the wide support for monitoring in San Francisco, CA).

detention.⁷ As one reporter for the *Atlantic Monthly* observed: “[E]ven accepting a certain failure rate, by nearly any measure such ‘prisons without bars’ would represent a giant step forward for justice, criminal rehabilitation, and society.”⁸ Another reporter noted: “Why lock people in cells when their whole prison experience could be condensed into one piece of wearable gadgetry?”⁹ Indeed, some academics take the position that defendants have an affirmative right to be placed on electronic monitoring pretrial.¹⁰

The use of electronic monitoring as an alternative to incarceration is intuitively appealing for many reasons. There is little dispute that from the perspective of a defendant, a day in jail is worse than a day on electronic monitoring. At first glance, the financial savings also seem to weigh in favor of electronic monitoring programs over jail. The cost of electronic monitoring per youth per day is likely a fraction of the cost compared to incarcerating one youth for one night.¹¹

Moreover, courts and lawmakers have increasingly come to acknowledge that incarcerating young people is largely ineffective as a deterrent and is harmful to the child.¹² In response to civil rights lawsuits,¹³ high profile media

7. See AM. BAR ASS’N, RESOLUTION 104D: ADOPTED BY THE HOUSE OF DELEGATES 11–12 (2011), http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/104d_2011_my_authcheckdam.pdf.

8. Graeme Wood, *Prison Without Walls*, ATLANTIC MONTHLY (Sept. 2010), <http://www.theatlantic.com/magazine/archive/2010/09/prison-without-walls/308195>.

9. Swan, *supra* note 6.

10. See, e.g., Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014) (arguing that defendants have an affirmative right to pretrial release on electronic monitoring).

11. There is little research about the exact costs and benefits of electronic monitoring in juvenile courts. See discussion *infra* text accompanying notes 192–206. There is, however, ample research documenting the high costs of juvenile incarceration. See, e.g., JUSTICE POLICY INST., CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

12. See, e.g., BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2–16 (2011), http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf (describing the ways in which juvenile detention mirrors adult prison and the associated risks); RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 9–22 (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf> (documenting how juvenile incarceration is enormously costly, often puts youth at risk for abuse, and is largely ineffective in reducing recidivism); Nicholas Kristof, *‘Jane’ Didn’t Get the Help She Needed: When the Juvenile Justice System Isn’t the Answer*, N.Y. TIMES (June 28, 2014), http://www.nytimes.com/2014/06/29/opinion/sunday/nicholas-kristof-when-the-juvenile-justice-system-isnt-the-answer.html?_r=0 (discussing the systematic overreliance on the criminal justice system to deal with youths, rather than on social services or education).

13. See generally JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014) (describing the ways in which the prison litigation in California prompted a shift away from mass incarceration).

stories¹⁴, as well as the need to trim budgets, there is growing bipartisan interest in cheaper and more effective alternatives to secure detention.¹⁵ These alternative programs range from community probation supervision, bail reform, electronic monitoring to non-secure group homes and everything in between. These programs—though they vary widely in terms of whom they serve, what they do, and who administers them—are almost universally praised as success stories. Indeed, they have given rise to an entire new industry of “alternatives to incarceration” programs.¹⁶ While the goal of lowering incarceration rates is gaining widespread acceptance, it is not clear that these alternative programs, such as electronic monitoring, are furthering that goal. Instead, there is reason to worry that these detention alternatives, like community supervision and electronic monitoring, are simply exchanging “one burden for another.”¹⁷

This Article is the first to explore the disjuncture between the intuitive appeal of electronic monitoring and its more troubling reality. Specifically, it challenges three widely disseminated, but wholly untested, assumptions about the practice: that it lowers juvenile incarceration rates, is a good fit for youth, and is cost efficient. There is simply no empirical evidence that electronic monitoring lowers incarceration rates, is cost-saving in the long run, or furthers the goal of rehabilitating youth, which is the well established purpose of the juvenile court system.

The conclusion that electronic monitoring is an effective alternative to incarceration fails to account for the problems and unintended consequences of the practice. Many youth who would not otherwise be detained are placed on electronic monitoring as a term of probation. The terms of both probation and electronic monitoring are numerous and detailed and often involve some

14. The death of Kalief Browde at Rikers Island exemplifies the ways in which the media sheds light on troubling prison and jail conditions. See Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>.

15. See, e.g., David Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 266, 266–76 (2014); Eric Schnurer, *Shrinking Prisons: Good Crime-Fighting and Good Government*, ATLANTIC MONTHLY (Oct. 29, 2014), <http://www.theatlantic.com/politics/archive/2014/10/shrinking-prisons-good-crime-fighting-and-good-government/381910/>; Ovetta Wiggins, *How Republicans Are Experimenting with Criminal Justice Reform*, WASH. POST (June 18, 2015), http://www.washingtonpost.com/local/md-politics/how-republicans-are-experimenting-with-criminal-justice-reform/2015/06/18/a26e04fa-12ab-11e5-9518-f9e0a8959f32_story.html (describing bipartisan and republican support for prison reform).

16. Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc> (describing the increase, and corresponding complications, in private probation companies).

17. Robin Steinberg & David Feige, *The Problem with NYC's Bail Reform: It Trades One Burden for Another*, MARSHALL PROJECT (July 9, 2015), <https://www.themarshallproject.org/2015/07/09/the-problem-with-nyc-s-bail-reform> (explaining the ways that the bail reform movement in NYC is creating new ways to further ensnarl poor people in the criminal justice system).

version of being on house arrest. One violation of the rules can result in detention in juvenile hall, more time on electronic monitoring, extended probation, and in some circumstances, placement in a residential group home.¹⁸ Youth are violated for a range of behavior, including failing to charge the electronic monitoring device, unauthorized movement outside of their house, missing curfew, skipping class, failing to attend court-ordered counseling, and not obeying parents.¹⁹ Because a sentence of juvenile probation is indeterminate, poor performance on electronic monitoring often means that a youth remains on electronic monitoring, and probation, for longer than had they never been on electronic monitoring in the first place. Even though most states do not consider electronic monitoring to be custody for purposes of sentencing, youth can be charged with escape if they remove the device.²⁰

The result is net-widening and net-deepening: more youth are subjected to court control for longer, and with heightened chances of being detained on probation violations or new charges. Perhaps most significant, monitoring programs do not impact youth equally. Poor youth and youth of color are at a distinct disadvantage when it comes to monitoring. Stringent and detailed rules, the need to receive permission for all movement, being on house arrest and the technology requirements (owning a cell phone and having the ability to charge device) adds almost impossible stress to families already struggling to survive day to day on very little.²¹ For African-American and Latino youth, who are already overrepresented in the juvenile justice system,²² electronic monitoring is part of what sociologist Victor Rios calls the “youth control complex,” a system of constant surveillance in which everyday youthful behavior is viewed as potentially criminal.²³

18. See, e.g., CAL. WELF. & INST. CODE § 202(b) (West 2008) (authorizing courts to detain youth as punishment if it is consistent with rehabilitation); *In re M.R.*, 162 Cal. Rptr. 3d 709 (Ct. App. 2013) (describing the required findings before a court can exercise its contempt powers to detain youth).

19. This is based on my experiences representing youth through the Youth Defender Clinic, at UC Berkeley School of Law, as well as the results of the informal survey. WEISBURD, *supra* note 5.

20. See, e.g., CAL. WELF. & INST. CODE § 871(d); *Commonwealth v. Wegley*, 791 A.2d 1223, 1226 (Pa. Super. Ct. 2001) (providing criminal sanctions for removing electronic monitoring device).

21. Eldar Shafir, *Poverty and Civil Rights: A Behavioral Economics Perspective*, 2014 U. ILL. L. REV. 205, 209.

22. MELISSA SICKMUND & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 157 (2014), <http://www.ncjj.org/nr2014/downloads/chapter6.pdf>; *Unbalanced Juvenile Justice*, BURNS INST., <http://data.burnsinstitute.org/#comparison=2&placement=1&racess=2,3,4,5,6&offenses=5,2,8,1,9,11,10&y ear=2011&view=map> (last visited Sept. 19, 2015).

23. VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 24 (2011).

Sam's story exemplifies the problems with electronic monitoring.²⁴ Sam, a 16-year-old, was arrested for stealing two pairs of sneakers from a department store. This was his second arrest in less than a month; both allegations involved low-level misdemeanors. Sam admitted to one misdemeanor charge and was placed on formal probation. As a condition of his probation, Sam had to wear an electronic monitoring device on his ankle.

Before being placed on the monitor, Sam signed an "electronic monitoring contract," which set forth more than two dozen rules, including the requirements that he charge the device every night from 7 p.m. to 9 p.m., that he remain in his house except if attending school, and that any other movement outside of the house—going to work, to church or to the grocery store—had to be approved at least 48 hours in advance.²⁵ Sam was also told to call the electronic monitoring office at least three times a day.

Wearing the device and being subject to the accompanying rules deeply impacted Sam and his mother, a single working mother struggling to support three children. Sam's mother was billed \$15 per day by the County for the device, paid for a cell phone that she did not previously own, tried to plan their lives 48 hours in advance, and aimed to be home every day at exactly 7 p.m. so that Sam could charge the device. Staying inside their small, cramped apartment all day, every day—especially on days when there was no school—was almost impossible for Sam. On two separate nights, Sam stayed out past 7 p.m., once when he was walking his dog, and another time when he was talking to kids in his apartment complex. The next time he was in court, the judge placed him in custody for three days for electronic monitoring violations.

In the end, Sam was in the juvenile justice system for a year and a half. During that time, he spent seven months on electronic monitoring and was incarcerated ten different times for either monitoring or probation violations—never a new offense. In total, he was detained in juvenile hall for three and half months, including Christmas and his birthday. Sam's story is not unique. It represents what I often see as a defense lawyer in juvenile court.

The challenges to reforming electronic monitoring are formidable. Even if there were a greater understanding about the poor fit between electronic monitoring and youth, existing doctrine does not offer an obvious solution to the problem. Because electronic monitoring is often imposed as an alternative to pretrial detention or as a term of probation, and because it does not look like traditional "punishment," it typically falls outside the scope of traditional discourses about procedural or substantive due process. Instead, electronic

24. "Sam," is based on one of the clients my law students and I represented in the Youth Defender Clinic at UC Berkeley School of Law. Some identifying facts and his name have been changed to protect confidential client information.

25. ALAMEDA CTY. PROB. DEP'T, JUVENILE ELECTRONIC MONITORING (EM)/GLOBAL POSITIONING SATELLITE (GPS) PROGRAM CONTRACT APPENDIX D ¶¶ 4, 10, APPENDIX E ¶ 3a (n.d.), <http://s3.documentcloud.org/documents/1155257/gps-contract.pdf>.

monitoring is seen as rehabilitative, and thus is subject to almost no judicial oversight or scrutiny.²⁶ As a result, electronic monitoring exists in a legal netherworld: welded and expanded with almost no limits or review.

The problems posed by electronic monitoring are not limited to this particular technology. Indeed, non-carceral treatment of juveniles is rarely subjected to effective legal regulation or rigorous analysis. Accordingly, this Article uses electronic monitoring as a lens through which to critically examine larger questions about the rights of young people as new forms of “alternatives to detention” continue to emerge and grow in popularity. Although much has been written about the limitations of the juvenile justice system²⁷ and there has been some scholarly discussion of the constitutional implications of electronic and non-carceral restraints,²⁸ none of the literature examines both. In contrast, this Article examines electronic monitoring at the intersection of punishment, privacy, and juvenile justice jurisprudence.

Part II provides an overview of how electronic monitoring is used, as well as proffered policy and legal justifications for the practice. Part III looks beyond the enthusiasm for electronic monitoring to question the ways in which electronic monitoring may in fact be problematic as a matter of law and policy. This Part challenges three key assumptions: First, that electronic monitoring is used selectively and is generally limited to youth who would otherwise be detained. Second, that electronic monitoring is effective at rehabilitating youth and that it is applied in a way that accounts for adolescent development. And third, that electronic monitoring is less expensive than incarceration.

26. See *infra* Part IV.C.

27. See, e.g., Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1454, 1512–13 (2009) (arguing that certain procedural rights are protected and informed by the adolescent developmental capacities recognized in *Roper v. Simmons*, 543 U.S. 551 (2005)); Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013) [hereinafter Henning, *Criminalizing Normal*] (discussing the disparate impact of the juvenile justice system on youth of color); Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 28 (2012) [hereinafter Henning, *Juvenile Justice*] (cautioning to not use the limited cognitive abilities of youth to further paternalism and deny autonomy); Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607 (2013) (discussing the ways in which the framework articulated in *Gault* allows for racial disparity).

28. See, e.g., Dorothy K. Kagehiro, *Psychological Issues of Home Confinement*, 37 ST. LOUIS U. L.J. 647 (1993) (explaining potential impact of home confinement programs on confines, innocent third parties, and communities); Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321 (2008) (examining the use of innovative technologies to regulate and punish targeted populations); Wiseman, *supra* note 10; Natasha Alladina, Note, *The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical Yet Incomplete Alternative to Incarceration*, 28 ALASKA L. REV. 125 (2011) (analyzing the use of electronic monitoring in Alaska adult criminal court); Molly Carney, Note, *Correction Through Omniscience: Electronic Monitoring and the Escalation of Crime Control*, 40 WASH. U. J.L. & POL'Y 279 (2012) (discussing the use of electronic monitoring as an alternative to incarceration).

Despite its critical analysis, this Article does not take the position that electronic monitoring is not a potentially viable alternative to incarceration. Rather, in Part IV, this Article posits that if electronic monitoring is used in juvenile court, it must be viewed for what it is: punishment. In other arenas of the law—such as the Fourth Amendment and sex-offender supervision—courts have described electronic monitoring as punishment because it treats a person as if they were a “feral animal.”²⁹ Here, too, the law ought to recognize the punitive characteristics of monitoring. If electronic monitoring in juvenile court were treated as punishment that infringes on fundamental rights, it would be subject to heightened levels of judicial scrutiny and oversight.

Without safeguards and oversight, electronic monitoring, as well as other “alternative” non-carceral programs, risk exacerbating the very problems they were created to address. Ultimately, this Article calls for a new juvenile rights framework. A framework that accounts for emerging forms of “alternatives to detention” and recognizes the many ways punishment exists outside of a prison cell.

II. ELECTRONIC MONITORING AS THE NEW NORMAL

We know surprisingly little about the extent to which electronic monitoring is used in the juvenile justice system. Although almost every state allows for electronic monitoring for youth, no existing data reflects precisely who is placed on electronic monitoring, in what circumstances, or for how long. Federal agencies, such as the Bureau of Justice Statistics and the Office of Juvenile Justice and Delinquency Prevention, do not track the use of electronic monitoring in juvenile courts. Virtually no empirical studies exist that examine the effectiveness of electronically monitoring youth.³⁰ Thus, there is a significant disconnect between the popularity of electronic monitoring and what is actually known about its effectiveness.

This Part provides background information on electronic monitoring, describes the limited empirical research on electronic monitoring in juvenile court, and examines both the proffered policy and legal justifications for the practice in juvenile court.

A. *THE HISTORY AND USE OF ELECTRONIC MONITORING IN JUVENILE COURT*

The use of electronic monitoring in the juvenile justice system is still relatively new. Adults were first placed on electronic monitoring in 1983.³¹ A

29. *United States v. Polouizzi*, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010); *see also* *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (holding that attaching GPS tracking device to criminal suspect’s vehicle for use in monitoring movements constitutes a search under the Fourth Amendment).

30. *See infra* notes 71–77 and accompanying text.

31. *See* J. Robert Lilly & Mike Nellis, *The Limits of Techno-Utopianism: Electronic Monitoring in the United States of America*, in *ELECTRONICALLY MONITORED PUNISHMENT* 21, 25 (Mike Nellis et al. eds., 2013).

few years later, a company in Florida began manufacturing electronic monitoring devices and the use of electronic monitoring slowly expanded.³² Electronic monitoring quickly became part of a growing push towards intensive adult probation services in the 1990s.³³ The development of electronic monitoring was also propelled by private, for-profit companies that marketed the devices as a foolproof, safe, punitive, and cheap solution to overcrowding in jails and prisons.³⁴ The origin of monitoring in juvenile court is unknown. In California, for example, courts simply concluded that because electronic monitoring is a condition of adult probation, it could also be a condition of juvenile probation.³⁵

Electronic monitoring programs vary tremendously in terms of the technology used, who is placed on electronic monitoring, and when and how electronic monitoring is used in the course of a typical juvenile delinquency case. In general, electronic monitoring programs rely on a small device that is strapped to a person's ankle. Using GPS technology, the device tracks the precise location of the youth.³⁶ The youth can be monitored in real time or his movement can be reviewed later.³⁷ In several states, the device also has communication capabilities, such as a microphone or buzzing system, allowing probation officers to communicate with youth.³⁸

According to respondents to my survey,³⁹ and anecdotally based on my own experience as a defense attorney in juvenile court, youth remain on electronic monitoring on average between a few weeks and a few months. Only one jurisdiction reported that youth stay on monitoring for only a matter of days.⁴⁰ Sometimes youth will go on and off electronic monitoring several times over the course of several months, or even years.

Youth on electronic monitoring are generally confined to their homes and cannot leave unless they have prior permission or are attending school.⁴¹ The monitoring program allows probation officers to verify the exact location of youth and whether they are complying with other terms of release or probation, such as attending school and obeying court imposed curfews.

Youth on electronic monitoring must comply with numerous probation terms in addition to detailed rules governing the electronic monitoring

32. *Id.* at 32.

33. *See id.* at 25–26.

34. *Id.* at 27.

35. *In re R.V.*, 89 Cal. Rptr. 3d 702, 708 (Ct. App. 2009).

36. *See* Murphy, *supra* note 28, at 1333; *see also* WEISBURD, *supra* note 5.

37. *See* Murphy, *supra* note 28, at 1333.

38. Defense lawyers in Minnesota, Montana, Pennsylvania, Washington, South Carolina, Nevada, and California all reported that the devices had communication features. *See* WEISBURD, *supra* note 5.

39. *Id.*

40. *Id.*

41. *Id.*; *see also* ALAMEDA CTY. PROB. DEP'T, *supra* note 25.

program. Standard probation terms often include requirements that the youth participate in certain programming (such as drug treatment, family therapy, or other services), attend school regularly, submit to drug testing, stay away from known gang members, abide by a court-determined curfew, perform community service, attend weekend work boot camps at juvenile hall, and pay restitution, among several other conditions.⁴²

Youth on electronic monitoring have additional requirements. Many jurisdictions have firm rules about when and how youth must charge their electronic monitoring device.⁴³ In Alameda County, California, for example, youth must call the electronic monitoring office every time they leave their house to go to school, when they arrive at school, and when they return from school. Youth are required to obtain permission from their probation officer to go anywhere other than school at least 48 hours in advance.⁴⁴ Once they have obtained permission from the probation officer, they must call the electronic monitoring office to convey the permission that was granted.⁴⁵

Respondents to my survey reported that violations of electronic monitoring are common.⁴⁶ Most respondents said that at least 50% of their clients on electronic monitoring had violated the program at least once.⁴⁷ In my experience, violations range from failing to obey a parent, to staying out past curfew, not attending school, failing to properly charge the device, failing to get permission to leave the house, or cutting off the device.

Whether a transgression results in a formal probation violation depends on the discretion of both the probation officer and prosecutor. In my experience, sometimes prosecutors and probation officers are lenient, allowing youth to make a few mistakes before there are consequences. Others are quick to file a formal probation violation. Among the survey respondents, temporary detention is the most frequent sanction for electronic monitoring violations.⁴⁸

B. PROFFERED POLICY JUSTIFICATIONS FOR ELECTRONIC MONITORING IN JUVENILE COURT

Electronic monitoring in juvenile court emerged against the backdrop of a shift in policy from locking up youth to recognition that juvenile incarceration may be doing more harm than good.⁴⁹ Although the number of detained youth is declining, the United States still confines a larger share of

42. CTY. OF ALAMEDA JUVENILE PROB., CONDITIONS OF PROBATION AND COURT ORDERS (n.d.) (on file with author) (showing a redacted example of court ordered probation terms).

43. See WEISBURD, *supra* note 5.

44. ALAMEDA CTY. PROB. DEP'T, *supra* note 25, APPENDIX D ¶ 10.

45. *Id.* ¶¶ 10–11.

46. See WEISBURD, *supra* note 5.

47. *Id.*

48. *Id.*

49. See *supra* note 12 and accompanying text.

youth than any other developed country.⁵⁰ The vast majority of youth are confined for nonviolent offenses.⁵¹ Nearly 40% of detained youth are in custody for “technical violations of probation, drug possession, low-level property offenses, public order offenses and status offenses.”⁵²

In light of these numbers, there is growing understanding that incarcerating youth is not only ineffective at rehabilitation and protecting public safety, but is detrimental to youth. Incarcerated youth are routinely subjected to violence, abuse, and mistreatment.⁵³ Incarceration also fails to reduce recidivism: 70–80% of youth released from residential corrections programs are rearrested within two or three years.⁵⁴ The cost of juvenile incarceration is high, often as much as \$88,000 per child per year.⁵⁵ It is also well documented that youth of color are disproportionately represented among detained youth.⁵⁶

The notion that the juvenile incarceration is not working is gaining greater acceptance and broad support.⁵⁷ Combined with pressure to cut costs, local municipalities and state legislatures are looking for creative—and cheaper—alternatives to juvenile incarceration.⁵⁸ As a result, many alternatives to detention programs are being implemented, often with little empirical evidence of effectiveness at reducing recidivism.⁵⁹

The pressure to find alternatives to incarceration is not limited to the juvenile justice system. In California, for example, the prison system is under federal court orders to substantially reduce its population, resulting in a shift in the supervision of prisoners from the state to local county probation

50. ANNIE E. CASEY FOUND., REDUCING YOUTH INCARCERATION IN THE UNITED STATES 1 (2013), <http://www.aecf.org/m/resourcedoc/AECF-DataSnapshotYouthIncarceration-2013.pdf>.

51. *Id.* at 2.

52. *Id.*

53. See KAREN M. ABRAM ET AL., PTSD, TRAUMA, AND COMORBID PSYCHIATRIC DISORDERS IN DETAINED YOUTH (2013), <http://www.ojjdp.gov/pubs/239603.pdf> (detailing the risks that detained youth are exposed to on a daily basis); MENDEL, *supra* note 12; see also NELL BERNSTEIN, BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON (2014) (describing the problems that plague juvenile incarceration).

54. MENDEL, *supra* note 12, at 10.

55. *Id.* at 17.

56. In 2013, youth of color made up 66% of detained youth. See *Unbalanced Juvenile Justice*, *supra* note 22.

57. See *supra* note 12 and accompanying text.

58. Robert B. Acton, *Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform*, 5 J.L. & POL'Y 277, 293–97 (1996).

59. *Id.* at 294–95 (discussing how politicians—such as Governor Zell Miller of Georgia—pushed juvenile boot camps even though there was no evidence that they worked); *id.* at 295 (“Nobody can tell me from some ivory tower that you take a kid, you kick him in the rear end, and it doesn’t do any good. I don’t give a damn what [the experts] say.” (alteration in original) (quoting Governor Zell Miller)).

departments.⁶⁰ The lawsuits, and their aftermath, generated a move throughout the state from mass incarceration to other forms of correctional control and surveillance.⁶¹ In New York, the same phenomenon is present with respect to bail and pretrial detention. Prompted by lawsuits and high profile media stories,⁶² New York City is adopting a system of pretrial community supervision as an alternative to detention.⁶³

Advancements in technology offer an appealing opportunity to experiment with new alternatives to adult and juvenile incarceration. Electronic monitoring is hailed as a “superior alternative” to detention that is at a fraction of the cost of incarceration.⁶⁴ As the Atlantic Monthly reported:

The potential upside [of electronic monitoring] is enormous. Not only might such a system save billions of dollars annually, it could theoretically produce far better outcomes, training convicts to become law-abiders rather than more-ruthless lawbreakers. The ultimate result could be lower crime rates, at a reduced cost, and with considerably less inhumanity in the bargain.⁶⁵

In 2005, the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) issued a bulletin calling for the implementation of alternatives to secure detention for youth and suggested electronic monitoring as a viable option.⁶⁶

Electronic monitoring programs are also popular in light of the growing caseloads of juvenile probation officers.⁶⁷ Between 1985 and 2009, the

60. *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2010 WL 99000, at *3 (E.D. Cal. Jan. 12, 2010), *aff'd sub nom. Brown v. Plata*, 131 S. Ct. 1910 (2011) (affirming the three judge panel that mandated population reductions in California prisons to alleviate overcrowding).

61. *See generally* SIMON, *supra* note 13 (describing the ways in which the prison litigation in California prompted a shift away from mass incarceration).

62. *See, e.g.,* Gonnerman, *supra* note 14; Benjamin Weiser, *Settlement Talks over Rikers Island Class-Action Lawsuit Are Planned*, N.Y. TIMES (Dec. 24, 2014), http://www.nytimes.com/2014/12/25/nyregion/settlement-talks-over-rikers-island-class-action-lawsuit-are-set.html?_r=0.

63. *See* Rick Rojas, *New York City to Relax Bail Requirements for Low-Level Offenders*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html>.

64. *See, e.g.,* Lilly & Nellis, *supra* note 31, at 29 (“The destructive capacity of incarceration and institutionalization *far outweigh the dangers and risks of electronic monitoring . . .*” (quoting RICHARD ENOS ET AL., *ALTERNATIVE SENTENCING: ELECTRONICALLY MONITORED CORRECTIONAL SUPERVISION* 163 (1992))); Swan, *supra* note 6 (“[Electronic monitoring] could change San Francisco’s law enforcement strategy, allowing nonviolent offenders to live at home, clearing the jail, and saving thousands of dollars in the process. Or, it could burden the city with a population of criminals it’s unable to supervise—and oceans of data it’s unequipped to paddle through.”).

65. Wood, *supra* note 8.

66. James Austin et al., *Alternatives to the Secure Detention and Confinement of Juvenile Offenders*, JUV. JUST. BULL. (U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention), Sept. 2005, <https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf>.

67. Lilly & Nellis, *supra* note 31, at 29 (discussing how electronic monitoring has been seen as a remedy to high probation caseloads).

number of youth placed on probation grew by almost 30%.⁶⁸ Probation is the most likely disposition for all adjudicated youth.⁶⁹ As probation officers face higher caseloads,⁷⁰ devices such as electronic monitors make their ability to supervise youth easier. Without leaving her office, a probation officer can see if her young charges are at school, at home, or someplace they are prohibited from going. Documenting infractions is also significantly easier since it only requires printing out “proof” that the youth was someplace he was not supposed to be.

Despite its popularity and the practical advantages, empirical evidence about electronically monitoring youth is extremely limited.⁷¹ While there are some limited studies about electronic monitoring, mostly about adults, no extensive and comprehensive studies exist about electronic monitoring programs for youth, a fact that the OJJDP conceded in the same bulletin in which it recommended electronic monitoring as an alternative.⁷²

The conclusions of the studies that do exist vary widely, depending on what the study is measuring and the type of technology used. Success of an electronic monitoring program can be measured in several ways: (1) if a person violated the conditions and failed to finish the program; (2) if a person is arrested or convicted of new offense; and (3) public support for the program.⁷³ Precisely how, and with whom, electronic monitoring is used varies widely, making any empirical study difficult. As a result, “there is still little known about [electronic monitoring’s] effectiveness as an alternative to incarceration or in protecting public safety by reducing rates of reoffending.”⁷⁴

68. Sarah Livsey, *Juvenile Delinquency Probation Caseload, 2009*, JUV. OFFENDERS & VICTIMS NAT’L REP. SERIES (U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention), Oct. 2012, <http://www.ojjdp.gov/pubs/239082.pdf>.

69. SICKMUND & PUZZANCHERA, *supra* note 22, at 168 (noting that in 2010, 61% of all adjudicated youth were put on probation).

70. For urban areas, caseloads averaged around 47 youth per officer in 1996. See Patricia McFall Torbet, *Juvenile Probation: The Workhorse of the Juvenile Justice System*, JUV. JUST. BULL. (U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention), Mar. 1996, at 3, <https://www.ncjrs.gov/pdffiles/workhors.pdf>. It is likely much higher now.

71. Lilly & Nellis, *supra* note 31, at 21 (observing that despite extensive literature on electronic monitoring in the U.S., it “leaves a lot to be desired, methodologically and substantively . . . and few academic commentators believe that [electronic monitoring’s] growth has been informed by significant evidence of its effectiveness”).

72. Austin et al., *supra* note 66, at 14 (“Few published evaluations of electronic monitoring exist, even though such monitoring is widely used for juveniles.”).

73. Brian K. Payne & Randy R. Gainey, *The Electronic Monitoring of Offenders Released from Jail or Prison: Safety, Control, and Comparisons to the Incarceration Experience*, 84 PRISON J. 413, 416–17 (2004).

74. Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 CRIMINOLOGY & PUB. POLY 61, 65 (2006); see also Annesley K. Schmidt, *Electronic Monitoring: What Does the Literature Tell Us?*, 62 FED. PROB. 10 (1998) (explaining why little is definitively known about the effectiveness of electronic monitoring).

The few studies that do exist suggest that, as a general matter, older people do better than younger people on electronic monitoring, as measured by successfully completing the monitoring program and not being rearrested.⁷⁵ One of the only studies that focused on electronic monitoring and youth, from over 20 years ago, concluded that the program resulted in fewer youth being detained, but larger numbers of youth being subjected to in-home detention, suggesting a net-widening effect.⁷⁶ Another study from 1989 found that the treatment benefits of electronic monitoring programs for youth still remain in question.⁷⁷

Despite the lack of empirical evidence suggesting that electronic monitoring is effective, juvenile courts routinely rely on it. In the next Subpart, I situate electronic monitoring within the larger legal landscape of juvenile justice jurisprudence.

C. PROFFERED LEGAL JUSTIFICATIONS FOR ELECTRONIC MONITORING IN JUVENILE COURT

Legal challenges to electronic monitoring in juvenile court are few and far between. There are two possible explanations for this. First, challenging electronic monitoring places youth advocates, myself included, in a difficult position. The more that advocates challenge electronic monitoring, the greater the risk that judges will simply opt for detention, or placement in a group home, as the other viable alternative. For this reason, even advocates who see faults with electronic monitoring often favor having it as an option for clients who might otherwise be detained.⁷⁸ Second, conditions of juvenile probation and pretrial release are virtually impervious to legal challenges because of the deference afforded to juvenile court judges.

1. The Vast Discretion of Juvenile Courts to Impose Conditions of Release and Probation

Although there is some variation, the regulatory scheme that allows for the imposition of electronic monitoring is virtually the same throughout the country. Electronic monitoring is used in two primary ways in juvenile courts: first, as a condition of pretrial release and second, as a condition of formal

75. See, e.g., Sudipto Roy, *Exit Status of Probationers and Prison-Bound Offenders in an Electronic Monitoring Home Detention Program: A Comparative Study*, 77 FED. PROB. 26 (2013) (noting that older offenders were more likely to exit the program successfully, as compared to younger cohorts); Robert Stanz & Richard Tewksbury, *Predictors of Success and Recidivism in a Home Incarceration Program*, 80 PRISON J. 326, 326 (2000) (noting that significant factors that increase chances of rearrest include being “younger, male and African-American”).

76. Sudipto Roy & Michael P. Brown, *The Juvenile Electronic Monitoring Program in Lake County, Indiana: An Evaluation*, in INTERMEDIATE SANCTIONS: SENTENCING IN THE 1990S, at 21, 27–35 (John Ortiz Smykla & William L. Selke eds., 1995).

77. Joseph B. Vaughn, *A Survey of Juvenile Electronic Monitoring and Home Confinement Programs*, 40 JUV. & FAM. CT. J. 1, 33–34 (1989).

78. See WEISBURD, *supra* note 5.

probation. With respect to pretrial release, courts may impose electronic monitoring as an alternative to detention, and do so under their authority to detain.⁷⁹ Youth sometimes remain on electronic monitoring after a sustained finding (either an admission or trial) and until the date of their dispositional (sentencing) hearing.

Courts also commonly impose electronic monitoring at disposition as a condition of probation. In California, for example, a judge may “impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.”⁸⁰ The power of the juvenile court is generally broader than that of a criminal court.⁸¹ This is because “[j]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor’s reformation and rehabilitation.”⁸² As explained by one court:

[J]uvenile [probation] conditions may be broader than those pertaining to adult offenders. This is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor’s constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents. And a parent may “curtail a child’s exercise of the constitutional rights . . . [because a] parent’s own constitutionally protected ‘liberty’ includes the right to ‘bring up children’ and to ‘direct the upbringing and education of children.’”⁸³

Even conditions that infringe on constitutional rights may be valid if they are specifically tailored to fit the needs of the juvenile.⁸⁴ It is precisely this regime of broad discretion and diminished constitutional rights that allows juvenile courts in particular to impose electronic monitoring as a condition of probation.⁸⁵ In California, for example, a “condition of probation will not be held invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future

79. See, e.g., CAL. WELF. & INST. CODE § 635 (West 2008); N.Y. FAM. CT. ACT § 320.5(3) (McKinney 2008 & Supp. 2015) (delineating grounds for detention, including flight risk, and protection of the minor or the person, property of another).

80. CAL. WELF. & INST. CODE § 730(b); see also MO. REV. STAT. § 211.181 (2000); OHIO REV. CODE ANN. § 2151.354 (West 2014); 42 PA. STAT. AND CONS. STAT. ANN. § 6352(a)(2) (West 2013).

81. See *In re Christopher M.*, 26 Cal. Rptr. 3d 61, 66 (Ct. App. 2005).

82. See *In re Francisco S.*, 102 Cal. Rptr. 2d 514, 518 (Ct. App. 2000) (alteration in original).

83. *In re Antonio R.*, 93 Cal. Rptr. 2d 212, 215 (Ct. App. 2000) (alteration in original) (citations omitted).

84. *Id.*

85. *In re R.V.*, 89 Cal. Rptr. 3d 702, 708 (Ct. App. 2009); *T.S. v. State*, 682 So. 2d 1202, 1202–03 (Fla. Dist. Ct. App. 1996); *Commonwealth v. Hanson H.*, 985 N.E.2d 1179, 1186–87 (Mass. 2013).

criminality.”⁸⁶ In *In re R.V.*, the court concluded that electronic monitoring was reasonable because it “permitted the probation officer to more effectively scrutinize R.V.’s behavior, reduced the likelihood of further misconduct, and facilitated the determination of whether more stringent measures were called for.”⁸⁷ The court also observed “GPS monitoring condition as a less harsh alternative to an out-of-home placement at a juvenile camp, which certainly would have been within the court’s authority.”⁸⁸ The *R.V.* case exemplifies the deference afforded to judges in crafting probation terms.

If a youth does poorly on electronic monitoring, judges rely on contempt powers to detain the youth or judges adapt the conditions of probation to include temporary detention.⁸⁹ Upon the filing of a formal probation violation, a court can also detain a youth if they find that the youth violated a court order and if “it is a matter of immediate and urgent necessity for the protection of the minor . . . that the minor be detained.”⁹⁰

2. The Constitutional Leeway Given to Juvenile Courts Acting as “*Parens Patriae*”

The legal justification for electronic monitoring is also rooted in the Supreme Court’s juvenile justice jurisprudence, which has long recognized juvenile courts as acting as *parens patriae*. Benevolence and rehabilitation are the hallmarks of the juvenile system, and the stated reason for affording youth only some of the constitutional protections enjoyed by adults.⁹¹ In his concurrence in *In re Gault*, the seminal case justifying different treatment for youth and fewer constitutional protections, Justice Black specifically cautioned against denying youth constitutional safeguards on the basis of their age.⁹² In many respects, Justice Black forecasted the doctrinal turbulence that lay ahead.

86. *People v. Lent*, 541 P.2d 545, 548 (Cal. 1975).

87. *In re R.V.*, 89 Cal. Rptr. 3d at 710.

88. *Id.*; see also *T.S.*, 682 So. 2d at 1202–03 (“Electronic monitoring is a means of enforcing compliance with such a geographical restriction.”).

89. See, e.g., CAL. WELF. & INST. CODE § 202 (2015) (authorizing courts to impose detention as a condition of probation); *In re M.R.*, 162 Cal. Rptr. 3d 709, 716–20 (Ct. App. 2013) (describing the required findings before a court can exercise its contempt powers to detain youth).

90. CAL. WELF. & INST. CODE § 635(b)(1) (2015).

91. See Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 558 (1998) (explaining that the majority in *In re Gault*, 387 U.S. 1 (1967) aimed to “find a jurisprudential basis for affording the essential protections of the adult criminal process while preserving the rehabilitative goals, confidentiality, and other benevolent features of the juvenile court process”).

92. *In re Gault*, 387 U.S. at 61 (Black, J., concurring). Justice Black stated:

Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights

During the 1980s and 1990s, juvenile court jurisprudence and practice shifted from a focus on rehabilitation to a focus on punishment. Responding to the public perception of a rise in teen violence, state legislatures passed a series of “get tough on crime laws,” including expanding the circumstances when youth may be tried as adults, and requiring youth to submit DNA samples and register in sex offender databases.⁹³ Many legislatures amended the stated purpose of juvenile court “to incorporate the goals of public safety, youth accountability, and victims’ rights.”⁹⁴ Juvenile incarceration rates rose dramatically during these years.⁹⁵

It was against this backdrop that the Supreme Court recently did what publicly elected legislators did not do: reaffirm the original rehabilitative premise of the juvenile courts. In *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, the Court relied on extensive scientific evidence about adolescent development and the distinctions between adults and youth to hold that the death penalty and life without the possibility of parole for youth constituted cruel and unusual punishment.⁹⁶ The Court in those cases reasoned that the characteristics of youth suggest that they are capable of rehabilitation and that, therefore, the differences in punishment between youth and adults are justified.

These three cases were victories for youth advocates. The Supreme Court recognized the diminished capacity of youth to make good decisions and to control impulses in the face of peer pressure and fast paced stressful situations.⁹⁷ As discussed in Part III, these are precisely the characteristics that make electronic monitoring a poor fit for most youth.

The limitations of youth reaffirmed by the Court are also the characteristics that justify a paternalistic role for juvenile courts, in which practices—such as electronic monitoring—that promise rehabilitation are implicitly presumed effective. The rehabilitative justification for electronic monitoring not only immunizes electronic monitoring from legal challenges

made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards.

Id.

93. Henning, *Juvenile Justice*, *supra* note 27, at 22 (describing increasingly punitive policy shifts in the 1980s and 1990s).

94. *Id.*

95. ANNIE E. CASEY FOUND., *supra* note 50, at 1 (explaining that youth confinement peaked in 1995, with 107,637 youth confined on a single day). Since then, the number of confined youth has declined. *Id.*

96. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

97. See *Miller*, 132 S. Ct. at 2458 (citing *Roper* and *Graham* in finding that the lack of maturity and underdeveloped sense of responsibility “lead to recklessness, impulsivity, and heedless risk-taking” among youth).

but it obscures the ways in which electronic monitoring is overly punitive and encroaches on fundamental freedoms.

The invasive nature of electronic monitoring is well recognized in other areas of the law outside juvenile justice. For example, in *United States v. Jones*, the Supreme Court held that attaching a GPS tracking device to a suspect's vehicle for purposes of monitoring his movement constituted a search under the Fourth Amendment.⁹⁸ In her concurrence, Justice Sotomayor cautioned against the extensive use of GPS surveillance because it "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."⁹⁹ Justice Sotomayor noted the following reservation about GPS monitoring:

[T]he Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."¹⁰⁰

Justice Sotomayor's concerns echoed those of Judge Jack Weinstein in his decision holding that the mandatory pretrial electronic monitoring of sex offenders under the Adam Walsh Act violated due process. In *United States v. Polouizzi*, Judge Weinstein opined: "Electronic monitoring devices that inhibit straying beyond spatial home property limits, like those used to restrain pet dogs, are intrusive."¹⁰¹

Both Justice Sotomayor's and Judge Weinstein's critiques of electronic monitoring are based not on the legal context of the cases, but on the specific invasive attributes of monitors. These attributes (constant surveillance, being confined to one's house, and the susceptibility to abuse) are all present in electronic monitoring used with youth. The general proposition that GPS technology needs to be used with extreme caution and safe guards should not be limited to Fourth Amendment analysis. As of now, the critique of GPS monitoring is generally limited to this context and has yet to be extended to the use of electronic monitoring on probationers (youth or adult).

98. *United States v. Jones*, 132 S. Ct. 945, 951 (2012).

99. *Id.* at 955 (Sotomayor, J., concurring).

100. *Id.* at 956.

101. *United States v. Polouizzi*, 697 F. Supp. 2d 381, 391 (E.D.N.Y. 2010); *see also* *United States v. Arzberger*, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008) (finding that mandatory electronic monitoring violated due process); *United States v. Torres*, 566 F. Supp. 2d 591, 597 (W.D. Tex. 2008) (striking down mandatory curfew and electronic monitoring provisions of Adam Walsh Act on grounds that "an individual's right to freedom of movement among locations and the right to remain in a public place are fundamental to our sense of personal liberty protected by the Constitution").

By virtue of being on probation, youth (and adults) have fewer Fourth Amendment protections from government searches. This means that Fourth Amendment challenges to GPS monitoring as a probation condition are often doomed. At least one California court specifically rejected a Fourth Amendment challenge to electronic monitoring in juvenile court on these grounds. In *In re R.V.*, the court found that the electronic monitor did not constitute a further invasion of privacy than the invasion R.V. was already subjected to under the search condition of his probation terms.¹⁰² The court also reiterated the ways in which the constitutional rights of youth are more circumscribed than adults.¹⁰³ Since “monitoring is a permissible condition for adult probation, *a fortiori* the condition is permissible for juvenile probation since broader conditions may be imposed on juveniles.”¹⁰⁴ It is worth noting that youth who are placed on electronic monitoring as a condition of pretrial release may have a stronger Fourth Amendment claim since their Fourth Amendment rights are not yet circumscribed. Despite the appeal of this argument, youth advocates may be wary of raising this argument in the pretrial context, lest their client is detained in the alternative.

III. ELECTRONIC MONITORING: AN EMPTY PROMISE?

The rhetoric of rehabilitation and “incarceration alternatives” masks the profound ways in which electronic monitoring expands both the depth and breadth of court control and surveillance. With no empirical evidence to establish that electronic monitoring is effective at helping youth, it is critical to look beyond the initial appeal and better understand the ramifications of electronic monitoring in the juvenile justice system.

This Part examines three key assumptions upon which the intuitive appeal of electronic monitoring is based: (1) that electronic monitoring lowers incarceration rates; (2) that electronic monitoring works; and (3) that electronic monitoring is cheap.

A. ELECTRONIC MONITORING AND INCARCERATION RATES

The appeal of electronic monitoring is that, in theory, it only applies to youth who would otherwise be detained and that there is a connection—causal or not—between electronic monitoring and lower incarceration rates.¹⁰⁵ Electronic monitoring, however, may have the opposite effect: electronic monitoring subjects more youth to greater court control for

102. *In re R.V.*, 89 Cal. Rptr. 3d 702, 709 (Ct. App. 2009).

103. *Id.*

104. *Id.* at 708.

105. See Wiseman, *supra* note 10, at 1375 (taking position that despite privacy and net-widening concerns, monitoring is preferable to pretrial detention).

longer,¹⁰⁶ resulting in more opportunities for youth to be detained on probation violations or new charges related to electronic monitoring. In this way, electronic monitoring technology both increases the breadth (the number of youth on electronic monitoring) and the depth (the intensity of court supervision) of court involvement.¹⁰⁷ This is true with respect to both pretrial and post-adjudication use of electronic monitoring.

Youth who would otherwise not be detained are regularly placed on electronic monitoring. For example, in California, youth with status offenses such as truancy are often placed on electronic monitoring as a condition of probation, even though they cannot legally be detained as part of their disposition.¹⁰⁸

In the pretrial context, youth charged with first-time low-level offenses may be detained upon arrest, but after the first court appearance are often released. In many jurisdictions, these same youth are now released on electronic monitoring.¹⁰⁹ In some jurisdictions, pretrial release is, in practice, contingent on the young person being placed on an electronic monitor.¹¹⁰ Judges have significant discretion with respect to pretrial detention options.¹¹¹ Electronic monitoring is used for the same reasons pretrial detention is used: as a method of control and assurance that the youth will obey the court's orders to return.¹¹²

Electronic monitoring is also routinely used in the post-adjudication setting for youth who would otherwise not be detained. Throughout the country, electronic monitoring is most commonly ordered as a condition of formal probation.¹¹³ Youth on probation spend sometimes several months on a monitor—months that most judges would not otherwise order detention. Because of the discretion afforded to juvenile court judges in crafting terms of probation, there is no constraint on a judge's decision to impose electronic

106. See Murphy, *supra* note 28, at 1367–68 (noting that “the economics of technological control enable the regulation of greater numbers of persons under less stringent conditions for a longer period of time and to a greater degree than an equivalent physical intrusion”).

107. See AM. BAR ASS'N, *supra* note 7, at 3 (explaining that “net widening applies to juvenile electronic monitoring when judges and law enforcement officials order juveniles to utilize an electronic monitoring program even though they score low enough on a risk assessment to go home . . . without electronic monitoring”).

108. *In re A.M.*, 163 Cal. Rptr. 3d 793, 797 (Ct. App. 2013) (finding that court could impose electronic monitoring as condition of probation for a youth charged with truancy).

109. See WEISBURD, *supra* note 5.

110. *Id.*

111. Shana Conklin, *Juveniles Locked in Limbo: Why Pretrial Detention Implicates a Fundamental Right*, 96 MINN. L. REV. 2150, 2171 (2012).

112. *Id.* at 2164–66 (describing the problems with pretrial detention).

113. See, e.g., *In re R.V.*, 89 Cal. Rptr. 3d 702, 709 (Ct. App. 2009); *In Re Justin B.*, 747 S.E.2d 774, 783 (S.C. 2013) (upholding electronic monitoring for juveniles convicted of sex-related offenses); see also WEISBURD, *supra* note 5.

monitoring as a condition of probation.¹¹⁴ Furthermore, electronic monitoring is an attractive option for judges intent on closely monitoring a youth's compliance with the other terms of his probation. The increased availability of cost-efficient monitors will also continue to create a "if you have it, use it" mentality towards the technology.¹¹⁵ The result is net-widening: youth who would not otherwise be detained are placed on electronic monitoring.

One might conclude that electronic monitoring helps young defendants on probation avoid more restrictive placements (such as group homes or time in a locked facility) by encouraging compliance with probation terms. This conclusion, however, assumes electronic monitoring works with young people and ignores the ways that electronic monitoring actually increases the frequency with which youth are detained for violations of electronic monitoring, probation or both.

On average, youth stay on electronic monitoring longer than they stay in juvenile hall.¹¹⁶ When youth are on electronic monitoring, they must comply not just with the terms of probation, but also the terms of electronic monitoring. The more detailed and lengthy the monitoring and probation terms, the harder it is for adolescents—especially those already struggling—to comply. The risk of either probation or electronic monitoring violations, or both, is that much higher—and for longer. There is also no set amount of time that youth are kept on probation. By law, judges may keep youth on probation until the court determines they are rehabilitated.¹¹⁷ In this way, the longer a youth is on electronic monitoring, the longer he is exposed to probation violations and the longer that he is under the control of the juvenile court system.¹¹⁸ When courts place numerous probation conditions and restrictions on low-level offenders, the result is probation violations for minor infractions that are unrelated to either public safety, or in the case of youth, to rehabilitation.¹¹⁹ For many youth, a series of violations of electronic

114. Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 80–81 (2000) (describing wide discretion afforded to courts in imposing any probation condition).

115. See Wiseman, *supra* note 10, at 1378 (acknowledging the concern with expanded use of monitoring for parole and probation).

116. In Alameda County, California, for example, the average stay in juvenile hall is 18 days and youth stay an average of 33 days on electronic monitoring. See ALAMEDA CTY. PROB. DEP'T, A LOOK INTO PROBATION: MONTHLY REPORT 13, 16 (2013), <http://www.acgov.org/probation/documents/July2013Report.pdf>.

117. See Sterling, *supra* note 27, at 674 (noting that "in all but one state, sentencing in juvenile court is indeterminate, and can be extended by the court in the name of the youth's rehabilitation").

118. MICHELLE ALEXANDER, *THE NEW JIM CROW* 94–95 (2012) (discussing the ways in which probation restrictions leads to increased court supervision for longer).

119. ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 142–43 (2008) (describing the focus of adult probation and parole agents on technical compliance over trying to find programs in resource strapped areas); PEW CTR. ON

monitoring exposes them to a much harsher punishment than the original offense for which they were placed on electronic monitoring.

Technical and unintentional violations of electronic monitoring and probation are frequent.¹²⁰ Faulty devices also account for false-positive reports of violations,¹²¹ and respondents to the survey noted how hard it was to prove that a device malfunctioned.¹²² Furthermore, probation officers have wide discretion in their decision to file a formal violation with the court.¹²³ This discretion, coupled with heavy caseloads and the ability to easily document an electronic monitoring violation, means that a youth's exposure to possible probation violations is that much greater when they are on electronic monitoring.¹²⁴ In at least one jurisdiction, youth are sometimes told to report to the electronic monitoring office for purpose of adjusting the device or just checking in, and when they arrive, they are detained for a violation.¹²⁵

If a young person removes the electronic monitoring device, they can be charged with a new crime, often a felony.¹²⁶ This means that a young person may be placed on electronic monitoring for a misdemeanor offense, but then be charged with a felony if he removes the device. In some jurisdictions, electronic monitoring has created a new class of crimes for youth who tamper, destroy, or fail to charge the device.¹²⁷

The sanctions for a sustained probation violation invariably involves more time in the juvenile justice system. It also increases the chances that a youth may be detained—even if only for a short period of time. Detention is the most frequent sanction for electronic monitoring violations.¹²⁸ The standard governing when a court can detain a youth is broad. So long as the

THE STATES, PUB. SAFETY POLICY BRIEF NO. 3, WHEN OFFENDERS BREAK THE RULES: SMART RESPONSES TO PAROLE AND PROBATION VIOLATIONS 3 (2007), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2007/when200offenders20break20the20rulespdf.pdf (observing that adult probation and parole is often revoked for violations that are noncriminal offenses, such as missing appointments or failing a drug test); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1044 (2013) (describing how advocates of “evidence-based practices” are critical of jurisdictions that place too many restrictions on low-level offenders).

120. Klingele, *supra* note 119, at 1035 (observing that “[w]hile often reasonable when considered individually, in the aggregate, the sheer number of requirements imposes a nearly impossible burden on many offenders”).

121. Robert S. Gable, *Left to Their Own Devices: Should Manufacturers of Offender Monitoring Equipment Be Liable for Design Defect?*, 2009 U. ILL. J.L. TECH. & POL'Y 333, 337–38.

122. See WEISBURD, *supra* note 5.

123. Hilary Smith et al., *Race, Ethnicity, Class, and Noncompliance with Juvenile Court Supervision*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 117 (2009).

124. See JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 (1993) (describing how the adult parole function has moved from a casework-focused model to one that simply attempts to manage risk through increased surveillance).

125. See WEISBURD, *supra* note 5. This coincides with my own experience.

126. See *supra* note 20 and accompanying text.

127. See WEISBURD, *supra* note 5.

128. *Id.*

court concludes that the young person violated a court order (such as following the rules of the electronic monitoring program) or that detention is needed for the protection of the youth, the court has the authority to detain.¹²⁹ Judges also have the authority to impose short sentences in juvenile hall as a condition of probation, which can be imposed if a youth violates electronic monitoring.¹³⁰ The net result is frequent, albeit short, stays in juvenile hall as “punishment” for the violations.

Kathy’s case is typical.¹³¹ Kathy was placed on probation after she admitted to a low-level drug possession charge. Her probation terms were standard: attend school regularly; complete 25 hours of community service; obey curfew; and attend counseling. The court ordered several service providers to work with her. At the time, Kathy was struggling. She lived with her ailing grandmother who provided love and support but whose health was poor and their only source of income was her social security. She could not drive and living in the suburbs, Kathy relied on public transportation to get anywhere. Kathy rarely went to school because she was disengaged: her Individualized Education Plan, which mandated that she receive special education services, had not been implemented in years. The daily chore of caring for her grandmother and herself kept her busy and anxious.

At the next court date, Kathy had little to report except the news that she was pregnant. She was not going to school and she had yet to do community service. None of the court-ordered services had started working with her. The prosecutor threatened to file a probation violation and asked that Kathy be detained over the weekend. Kathy’s attorney objected. Perhaps trying to appease both sides, the judge placed her on electronic monitoring and ordered her to participate in a weekend training program that was a 60-minute bus ride from her house. At the next court date, Kathy was making some progress. She had made it to the weekend training program two of the four days, she was in regular contact with her probation officer and she was obeying curfew. Although she regularly called the electronic monitoring office, and was home by curfew, she failed to get advance permission to leave her house: once she was going to a prenatal appointment, another time she was taking her grandmother to the doctor, and the third time she was running an errand for her grandmother. Because of these unauthorized movements, combined with her still poor school attendance, the judge detained her in juvenile hall for five days. When released, she was released back on monitoring.

Kathy’s story represents the ways that electronic monitoring becomes a gateway to months of cycling in and out of detention and on and off of

129. See CAL. WELFARE & INST. CODE § 635 (West 2008).

130. CAL. WELFARE & INST. CODE § 202 (West 2008); *In re Josh W.*, 63 Cal. Rptr. 2d 701, 706 (Ct. App. 1997) (finding short terms of confinement, as a condition of probation, reasonable).

131. “Kathy” is roughly based on one of my clients from the Youth Defender Clinic. Some facts have been alerted to protect her identity.

electronic monitoring, reflecting what Loïc Wacquant labeled the “closed . . . self-perpetuating cycle of social and legal marginality.”¹³² Kathy’s experience also reflects the ways that courts, probation officers, and prosecutors focus more on technical compliance with the electronic monitoring program than on Kathy’s overall, albeit slow, upward trajectory.

Even apart from violations, electronic monitoring also expands the scope of surveillance in additional ways. Police departments routinely use electronic monitoring as an investigative tool to determine if a suspect was at the scene of a crime.¹³³ In Washington, D.C.—and elsewhere—electronic monitoring data is one of the first sources that police turn to when a crime is reported.¹³⁴ The police obtain the available monitoring data for everyone in the vicinity and create photograph arrays for victims to review.¹³⁵ This use of monitoring data arguably furthers the public interest in solving crimes; but it also increases the frequency with which people on monitors will interface with police.

The revolving door caused by electronic monitoring raises the question: Are youth on electronic monitoring going in and out of juvenile hall at a higher frequency than youth who are not on electronic monitoring? No data tracks these numbers in the juvenile court context. There is also limited data on number of probation violations among youth. If adult probation violations are any indication, however, youth are routinely detained for probation violations; half of the U.S. jail population is incarcerated for failure to abide by conditions of some form of community supervision.¹³⁶

The discretion afforded judges in crafting probation terms, probation officers in enforcement, and prosecutors in deciding to file formal probation violates also increases the opportunities for racial bias.¹³⁷ It is well established that African-American youth and youth from poorer neighborhoods are most likely to have a probation officer document noncompliance and are more likely to receive more severe consequences, such as being sent to an out-of-

132. Loïc Wacquant, *The New ‘Peculiar Institution’: On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 384 (2000).

133. Emma Anderson, *The Evolution of Electronic Monitoring Devices*, NPR (May 24, 2014, 5:26 AM), <http://www.npr.org/2014/05/22/314874232/the-history-of-electronic-monitoring-devices>. For two recent examples from the news, see Joe Marusak, *Electronic Monitoring Device Helps Police Nab Charlotte Break-In Suspect*, CHARLOTTE OBSERVER (Jan. 29, 2015), <http://www.charlotteobserver.com/news/local/crime/article9496109.html>; Darian Trotter, *Teens Arrested in Pizza Delivery Worker’s Murder Were on House Arrest*, WGNO (Sept. 23, 2014, 10:53 PM), <http://wgno.com/2014/09/23/teens-arrested-in-pizza-delivery-workers-murder-were-on-house-arrest>.

134. See WEISBURD, *supra* note 5; Anderson, *supra* note 133.

135. See WEISBURD, *supra* note 5.

136. See THOMPSON, *supra* note 119, at 144–45 (describing the large numbers of parolees returning to prison for technical violations of parole, including positive drug tests, curfew violations and other prohibited—but not criminal—behavior).

137. See Henning, *Juvenile Justice*, *supra* note 27, at 34–35 (explaining that discretion in juvenile justice process “has been identified as a significant contributor to the current disproportionate incarceration of youth of color in state institutions and residential facilities”).

home placement.¹³⁸ This problem is exacerbated in the context of electronic monitoring, where it is even easier for probation officers to identify and document violations of both probation and the electronic monitoring program.¹³⁹ For African-American and Latino youth, electronic monitoring represents another way that every aspect of their daily lives is subject to surveillance and control.¹⁴⁰

In sum, the widely held belief that electronic monitoring is a successful alternative to juvenile detention is not, without more supporting empirical evidence, a sound conclusion. Electronic monitoring results not in a perfect substitution of juvenile detention, but instead in the “proliferation, expansion, and enhancement” of judicial control over young people.¹⁴¹ In many ways, the critique of electronic monitoring as net-widening mirrors the critique of specialty courts, such as drug and misdemeanor courts, which, as one commentator remarked, “increase reliance on criminal supervision . . . expand incarceration . . . and dilut[e] procedural protections . . . without generating other demonstrated desirable outcomes.”¹⁴²

B. ELECTRONIC MONITORING AND YOUTH OFFENDERS

When compared to the documented harms associated with juvenile incarceration, electronic monitoring appears to be a positive alternative, notwithstanding the lack of evidence about its effectiveness. Ask any incarcerated youth if they would prefer one night incarcerated or one day on electronic monitoring and presumably most would say electronic monitoring.¹⁴³ Ask if they would prefer one day incarcerated or three months on electronic monitoring, and the responses might be more varied.¹⁴⁴ The reason for this ambivalence may well be the inherently poor fit between monitoring and the realities of adolescent development.

138. Smith et al., *supra* note 123, at 117–18.

139. See *infra* notes 183–84 and accompanying text.

140. See RIOS, *supra* note 23, at 25–27 (describing the extent to which the lives of many young men of color are constantly governed by the criminal justice system).

141. Murphy, *supra* note 28, at 1375.

142. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1644 (2012); see also Lesli Blair et al., *Juvenile Drug Courts: A Process, Outcome, and Impact Evaluation*, JUV. JUST. BULL. 1 (U.S. Dep’t of Justice: Office of Juvenile Justice & Delinquency Prevention), May 2015 (documenting low success rates of juvenile drug courts); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 623 (2014) (discussing how New York City’s policy of prosecuting low-level misdemeanors results in a managerial model of justice, where “the imperative of social control is at work largely irrespective of guilt or innocence in any particular case”).

143. Wiseman, *supra* note 10, at 1380 (noting that “[f]rom the perspective of the defendant who would otherwise sit in jail, the privacy and liberty gains are immense”).

144. Murphy, *supra* note 28, at 1372.

1. The Adolescent Brain on Electronic Monitoring

A close examination of the Supreme Court's recent juvenile justice jurisprudence reveals a nuanced and newly recognized understanding of adolescent brain development. In invalidating the death penalty and life sentences for youth, these cases concluded that youth "are categorically less deserving of retribution than adults because the same characteristics that make juveniles less culpable make them less susceptible to deterrence."¹⁴⁵ The same characteristics that make youth less receptive to deterrence also explain why electronic monitoring is not an appropriate match for the developing adolescent brain.

Being monitored at all times and having to follow the prescribed and detailed electronic monitoring conditions is in tension with the behavioral, emotional, and intellectual development of adolescents, and is especially burdensome for those youth with mental illness or learning disabilities. This gap between the requirements of electronic monitoring and the capacity of youth to understand and cope with its requirements calls into question its effectiveness as a tool for rehabilitation.

Adolescent development is not a one-size-fits all concept—it must be understood in the particular context at issue.¹⁴⁶ Here, for example, it is most relevant to look at how youth make decisions in "unstructured informal settings, where information is not provided" and young people must make choices based on their own knowledge.¹⁴⁷ With that in mind, there are several aspects of adolescent brain development that exemplify the ways in which electronic monitoring is a poor fit with adolescents who have not yet reached full neurological maturity.

First, youth do not yet have the fully formed ability to process information and think hypothetically about future outcomes, including what alternative options might extricate them from the current situation.¹⁴⁸ This is significant because it means that youth are also less likely to be deterred by hypothetical future ramifications.¹⁴⁹ Youth have less ability than adults to self-regulate.¹⁵⁰

Second, youth are more susceptible to peer pressure and have less control over their environment.¹⁵¹ Young people live wherever their family or

145. Henning, *Juvenile Justice*, *supra* note 27, at 28.

146. *Id.*

147. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 165 (1997).

148. *Id.* at 157.

149. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

150. Louk W.H. Peters et al., *A Review of Similarities Between Domain-Specific Determinants of Four Health Behaviors Among Adolescents*, 24 HEALTH EDUC. RES. 198, 216 (2009).

151. Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in YOUTH ON TRIAL 33, 47 (Thomas Grisso & Robert G. Schwartz eds., 2000).

caregiver lives, which means they have little choice in whom they spend time with in the neighborhood. Research also shows that young people are less able to resist peer pressure and the fear of rejection.¹⁵² Relatedly, they lack the capacity for self-regulation in emotionally charged contexts and more quickly respond to immediate incentives.¹⁵³ Adults tend to make more adaptive decisions than adolescents because they have greater maturity to resist the pressure of social and emotional influences and can remain focused on long-term goals.¹⁵⁴

Third, neurobiological research suggests that the parts of the brain that govern impulse control, planning ahead, weighing risks and rewards, and coordinating emotion and cognition continue to mature throughout adolescence.¹⁵⁵ Adolescents begin to form their identities and develop adult skills through “experimentation and novelty-seeking behavior that tests limits.”¹⁵⁶ Identity formation also includes finding a sense of autonomy, and as a result, adolescents are hyper-sensitive to social control by authority figures they view illegitimate, inconsistent, or unpredictable.¹⁵⁷ In short, as Professor Frank Zimring has noted, “expecting the experience-based ability to resist impulses . . . to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking.”¹⁵⁸

It is precisely these aspects of cognitive development and maturity that are most challenged by electronic monitoring. In moments of excitement or high stress, a young person on electronic monitoring who is deciding if he should stay out past curfew, go out with a friend, attend school, obey his parent, or cut off the electronic monitor may not fully appreciate the future consequences of a formal probation violation or more time in jail. Relatedly, many electronic monitoring regimes require that youth not leave their home, and if they do, to first obtain permission from their probation officer,

152. ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 38 (2008); see also Kristan Glasgow Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 J. YOUTH & ADOLESCENCE 395, 420–21 (2000) (discussing peer influence on delinquency).

153. RICHARD J. BONNIE ET AL., NAT’L RESEARCH COUNCIL, *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* 91 (2013).

154. Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 220 (2011); see also Adriana Galvan et al., *Risk Taking and the Adolescent Brain: Who Is at Risk?*, 10 DEVELOPMENTAL SCI. F8, F13 (2007) (finding, in study of individuals aged 7–29, that impulse control continues to develop throughout adolescence and early adulthood).

155. Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270–71 (2007); Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 L. & HUM. BEHAV. 78, 79–80 (2008).

156. See BONNIE ET AL., *supra* note 153, at 90.

157. *Id.* at 187.

158. Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, in *YOUTH ON TRIAL*, *supra* note 151, at 271, 282.

sometimes as much as 48 hours in advance. This rule requires that youth engage in planning behavior and organizational skills that are often beyond their developmental capacity. Planning activities such as haircuts, doctor appointments, going to the supermarket, or visiting family is a challenge for a typical teenager, but to plan and request permission for any movement outside of the house borders on impossible. “Kathy” for example, was detained in a juvenile hall after she failed to get advance permission go to a prenatal appointment and to take her grandmother to the doctor.

It is also not clear that youth on electronic monitoring fully understand the rules. State courts have repeatedly recognized that for terms of probation to be effective, they must be comprehended. As one California court noted: “[P]robation conditions—particularly in juvenile cases—should be as *comprehensible* as possible.”¹⁵⁹ However, in Alameda County, for example, the terms and conditions of the electronic monitoring contract are beyond the reading comprehension of many juvenile offenders. According to the Flesch–Kincaid reading assessment, the Alameda County contract that is given to youth requires a 10th–11th grade reading level.¹⁶⁰ This puts the language of the contract far beyond the understanding of many youth who are in the juvenile justice system—especially those who have intellectual impairments and learning disabilities.¹⁶¹

Electronic monitoring is especially challenging for youth who suffer from mental health disorders or intellectual disabilities. It is estimated that 65–70% of the youth arrested in the United States each year have a mental health disorder.¹⁶² Some of the most common conditions include anxiety disorders, post-traumatic stress disorder, depression, and disruptive behavior disorders.¹⁶³ For many of these young people, electronic monitoring presents a profound cognitive and psychological challenge: They experience the rules governing monitoring as excessively complicated and extensive.

In addition to mental health disorders, a significant percentage of juvenile offenders also have intellectual and learning disabilities. While approximately 10% of youth in the general population have a specific learning disability, it is estimated that 36% of juvenile offenders have such

159. *In re E.O.*, 115 Cal. Rptr. 3d 869, 875 (Ct. App. 2010).

160. The Flesch–Kincaid reading assessment is commonly used to assess the potential for comprehension. *See, e.g.*, Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1573 (2008) (explaining that reading assessments, such as Flesch–Kincaid, reveal that youth are unlikely to comprehend written *Miranda* warnings).

161. Studies show that confined youth score four years below their grade level on average. *See, e.g.*, Michael P. Krezmien et al., *Detained and Committed Youth: Examining Differences in Achievement, Mental Health Needs, and Special Education Status*, 31 EDUC. & TREATMENT CHILD. 445, 453 (2008); *see also* MENDEL, *supra* note 12, at 28 (describing the education needs of detained youth).

162. NAT’L CONFERENCE OF STATE LEGISLATURES, MENTAL HEALTH NEEDS OF JUVENILE OFFENDERS 2 (n.d.), <http://www.ncsl.org/documents/cj/jjguidebook-mental.pdf>.

163. *Id.* at 4.

conditions.¹⁶⁴ Youth with intellectual impairments and learning disabilities are even less able to understand the terms and conditions of electronic monitoring.

What is known about adolescent development, as well as the mental health challenges that many youth struggle with, begs the question: How, if at all, does electronic monitoring further the rehabilitative efforts of juvenile court? Is monitoring supporting or undermining rehabilitation and deterrence? The next Subpart of this Article addresses these questions.

2. The Rehabilitative and Deterrent Effects of Electronic Monitoring with Youth

Normal adolescent development—combined with the prevalence of mental health impairments among court-involved youth and the poverty in which most court-involved youth live—implicates both the deterrent and rehabilitative functions of electronic monitoring programs. In theory, a youth's knowledge that they are being watched at all times deters them from making poor decisions about where they go and when. However, the difficulty youth have controlling their impulses and hypothesizing about future consequences means that they are not automatically deterred by sanctions.¹⁶⁵ "If deterrence does not work in the context of the harshest of penalties (the death penalty and life without parole)," then it is hard to imagine that electronic monitoring is an effective deterrent.¹⁶⁶ Indeed, social science research suggests that deterrence-based programs are less efficient and effective than systems perceived by youth as fair.¹⁶⁷

Far from deterring youth from making poor decisions, electronic monitoring simply confirms what we already know about adolescent behavior: youth make impulsive, peer-driven decisions that are often not in their long-term best interest. Electronic monitoring does not, because it cannot, change these immutable characteristics of adolescents. Electronic monitoring, without more, does little other than expose youth to more punishment for typical adolescent behavior.

For youth living in poverty, compliance with monitoring programs is even more challenging. Indeed, behavioral economists point out that poverty creates unique stress: it occupies much of the mind and results in diminished capacity in other areas of life, such as planning and making hard decisions.¹⁶⁸

164. NAT'L COUNCIL ON DISABILITY, ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATUS OF EVIDENCE-BASED RESEARCH 57 (2003).

165. See Henning, *Juvenile Justice*, *supra* note 27, at 28–29.

166. *Id.* at 29.

167. See Birckhead, *supra* note 27, at 1505–06; see also MENDEL, *supra* note 12, at 16 (programs oriented toward surveillance, deterrence, or discipline all yield weak, null, or negative results).

168. Shafir, *supra* note 21, at 209 ("Just as an air traffic controller who is focused on a potential collision course is prone to neglect other planes under her control, so do the poor.

Imposing detailed requirements on families that are struggling on a day-to-day basis simply increases the chances for formal probation violations.

Given what is known about adolescent development, combined with the daily stressors associated with poverty, there are also several reasons to question the extent to which electronic monitoring is rehabilitative. First, electronic monitoring fails to account for the conditions of everyday life for system-involved youth. Many electronic monitoring programs require youth to stay home at all times when they are not at school; electronic monitoring is a monitored version of house arrest. If the youth's home is no more than a small room or two, or if no one is home for many hours at a time, youth are subjected to a form of solitary confinement. This is challenging for anyone, but especially for adolescents who have high energy and limited ability to control their impulses. For youth struggling with conditions such as depression or post-traumatic stress disorder, being confined to their home, isolated from peers, or being alone (if their caregivers work), without any structured activities, can have a profound negative impact on their mental health.¹⁶⁹ Working parents, meanwhile, must make the decision between missing work to stay home with their child or leaving their child at home alone.

For youth on electronic monitoring who may live in poverty or in small apartments, and sometimes with multiple family members, the stress at home may be amplified.¹⁷⁰ The inability to walk away and go outside, especially when school is not in session, further exacerbates strained familial relationships. The need to leave is magnified if there is unreported abuse in the house, or other situations that make home confinement challenging, if not impossible. Likewise, prosocial activities, like playing sports and attending after school or summer programming is of critical importance for adolescent development.¹⁷¹ However, many electronic monitoring programs explicitly prohibit youth from leaving their homes for any reason without prior permission.¹⁷² In short, the temptation to be outside, even if just for a little while, is overwhelming, especially for young people. But the price of going

When attending to pressing monetary concerns, the poor lose their capacity to give other problems their full consideration.”).

169. Multiple experts on child and adolescent psychology report that prolonged isolation can cause or exacerbate mental disabilities or other serious mental health problems. Solitary confinement is stressful and youth “have fewer psychological resources than adults do to help them manage the stress, anxiety and discomfort they experience in solitary confinement.” IAN KYSEL, HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 29 (2012), <http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf>.

170. See THOMPSON, *supra* note 119, at 142 (discussing how crowded living conditions contribute to high tensions and the need for adult probationers to be outside, leading to greater exposure to further police contact and potential violations).

171. BONNIE ET AL., *supra* note 153, at 125.

172. See, e.g., *supra* text accompanying notes 43–45.

outside is steep: a possible probation violation, followed by a short detention, or worse.

Second, because of the wide discretion afforded to probation officers and prosecutors about if and when to file a formal probation violation, youth perceive monitoring violations as unpredictable and inconsistent. In my experience, some probation officers generate violation reports for the first instance of unauthorized movement while others will allow a few minor transgressions to pass before filing a probation violation. Still other officers may ask a youth to come into the office and then arrest them. Under all of these approaches, the young person is left wondering if they will be caught doing innocuous chores like walking the dog or going to the laundry room in their apartment complex. When they are not “caught,” they sometimes assume they have permission to go further away from home. For a youth already suffering from a mental health impairment, not knowing if and when they might be out of compliance with electronic monitoring is a source of confusion at best, and extreme anxiety, at worst. As a result, youth do not perceive electronic monitoring as fairly applied, much less helpful or rehabilitative.¹⁷³

Third, electronic monitoring programs also change the nature of the relationship between probation officers and the youth they supervise, which further undermines the rehabilitative goals of the juvenile court system. Electronic monitoring allows probation officers to have less interaction with youth and to more easily find grounds for probation violations.¹⁷⁴ Electronic monitoring contributes to a phenomenon observed in the adult system: parole officers focus on technical compliance instead of more time-intensive case management.¹⁷⁵

As electronic monitoring allows for constant monitoring, there is a significant risk that the program may evolve into merely a surveillance program at the expense of effective rehabilitative programming. Exacerbating the problem is that system-involved youth and their families often view court-ordered programs like electronic monitoring as a burden, in part because one misstep will result in an extension of probation, detention, placement in a group home, or worse.¹⁷⁶ The daily requirements of electronic monitoring, and the accompanying uncertainty and anxiety, are precisely the types of

173. See Birkhead, *supra* note 27, at 1502–05 (discussing how youth respond positively when they perceive they are being treated with respect, and that programs viewed as unfair are less effective at deterrence).

174. See Klingele, *supra* note 119, at 1035 (“[M]ost of our violations are technical. . . . I mean, if you can’t write up a report, and cite at least a technical violation, you’re not really struggling very hard, because there are so many conditions. There’s got to be something that the guy didn’t do right, right?” (alterations in original) (quoting a probation officer)).

175. THOMPSON, *supra* note 119, at 144–45.

176. See Birkhead, *supra* note 27, at 1505–06.

hyper-criminalization that is part of what Professor Rios calls the “youth control complex.”¹⁷⁷

Fourth, wearing an electronic monitor is a modern day scarlet letter, subjecting youth to additional stigmatization and marginalization.¹⁷⁸ The devices themselves are almost always visible, unless the youth is wearing wide-legged or baggy pants.¹⁷⁹ This means that wearing shorts, often required to play sports, exposes the device. Even if the device is hidden, technology in some jurisdictions allows probation officers to buzz youth through an alarm sounding on the device.¹⁸⁰ The devices sometimes go off during school hours, adding to embarrassment and shame.¹⁸¹ Not only is the visibility of the device stigmatizing, it undermines the confidentiality of juvenile court proceedings.¹⁸² The device announces to teachers, coaches, friends, and community members the youths’ status as delinquent.

Fifth, the consequences for electronic monitoring violations also reflect the way that monitoring fails to rehabilitate. As a threshold matter, youth do not necessarily understand the rules of electronic monitoring, and because their cognitive capabilities are still developing, they may often violate without the intention to do so.¹⁸³ California courts have held that “[i]t is well established that a probation violation must be willful to justify revocation of probation.”¹⁸⁴ Given what is known about adolescent development, an inadvertent violation is often missing the required scienter to prove the violation. Punishing youth for not comprehending their probation conditions is incompatible with rehabilitation.

Additionally, a violation of electronic monitoring often results in a youth returning to custody (even if only for a short time), which can lead to more collateral negative consequences.¹⁸⁵ Frequent and short stays in juvenile detention facilities are detrimental for all youth, especially youth with mental

177. See RIOS, *supra* note 23, at 40–42.

178. Cf. 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, 787 (1999) (examining state court challenges to scarlet-letter probation terms).

179. For a visual depiction of an electronic monitor and audio accounts of youth on the monitor, see Sayre Quevado, *Double Charged: Teens on House Arrest on GPS*, YOUTH RADIO (May 9, 2014), <https://youthradio.org/news/article/double-charged-teens-on-house-arrest-on-gps>.

180. See WEISBURD, *supra* note 5.

181. See *id.*; Henning, *Criminalizing Normal*, *supra* note 27, at 454 (noting that “youth who are labeled delinquents may develop fears about their future”).

182. See, e.g., CAL. WELF. & INST. CODE § 827 (West 2008 & Supp. 2015); *J.E. v. Superior Court*, 168 Cal. Rptr. 3d 67, 72 (Ct. App. 2014) (“There is a strong public policy of confidentiality of juvenile records.”).

183. See *supra* Part III.B.1.

184. *People v. Rodriguez*, 166 Cal. Rptr. 3d 187, 200 (Ct. App. 2013).

185. See WEISBURD, *supra* note 5; see also discussion *supra* Part III.A.

health needs.¹⁸⁶ Detention exposes youth to all the risks that are offered as a justification for electronic monitoring in the first place. There is ample evidence that juvenile incarceration does more harm than good.¹⁸⁷ Detention—even short stays—interrupts school, jobs, counseling programs, and family relationships, all factors that increase stabilization and further the rehabilitative goal of the juvenile justice system.¹⁸⁸ In my experience, youth who are medicated also experience an interruption in their medication, which can have profoundly negative implications for their health.

Supporters of electronic monitoring could argue that success depends on youth engaging more fully in both school and community-based programs.¹⁸⁹ Presumably, the argument goes, if a young person is busy and engaged in prosocial activities, there is less time and temptation to violate the terms of electronic monitoring. This argument, however, assumes a sufficient supply of community-based programs for youth. With shrinking government funding for youth services, there are fewer programs, and they are harder to get to via public transportation.¹⁹⁰ This argument also requires that youths' lives to be otherwise stable—that they have a home, parents or caregivers that can help them access and get to programs, and a working phone that allows them to remain in regular communication with the probation officer. In my experience, the pure logistics of finding a program, applying, receiving permission from the probation officer, finding transportation, and then remaining in constant contact with the monitoring program or probation officer, often present insurmountable hurdles. Even if there were ample and accessible programs, there is still no evidence that being on electronic monitoring contributes in any positive way to the youth attending.

Supporters of electronic monitoring may also argue that electronic monitoring teaches responsibility and ensures that youth go to school, and stay away from dangerous neighborhoods. However, unless electronic monitoring devices could actually transport people, there is no way the electronic monitoring device alone will ensure that a youth is where they are

186. See Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges*, Q.J. ECON. 1, 8 (forthcoming 2015) (showing that incarceration leads to lower high-school graduation rates and job prospects).

187. *Id.* at 31–33.

188. *Id.* at 7–8.

189. As discussed *supra* Part II.C.1, monitoring is often juxtaposed as a promising alternative to detention, yet its promise assumes that the monitoring program allows for continued participation in a range of prosocial activities. See, e.g., Aizer & Doyle, *supra* note 186, at 32 (discussing the appeal of monitoring as an alternative to detention because it allows youth to return to school and engage with the community).

190. See, e.g., SHAENA M. FAZAL, YOUTH ADVOCATE PROGRAMS, INC., SAFELY HOME 19–43 (2014) (describing the various ways that community-based organizations can most effectively serve at-risk youth); ROSABETH MOSS KANTER, MOVE: PUTTING AMERICA'S INFRASTRUCTURE BACK IN THE LEAD (1st ed. 2015) (describing the ways that poor people suffer the most from unreliable and limited public transportation, a reality prevalent throughout most urban areas in the United States).

supposed to be at any given time. As detailed above, what is known about adolescent development suggests that a potential violation of electronic monitoring programs does not necessarily deter youth.¹⁹¹ Furthermore, there is nothing to suggest that electronic monitoring teaches responsibility more effectively than other effective community-based alternatives.

C. THE ECONOMICS OF ELECTRONIC MONITORING

One of the stated virtues of electronic monitoring is that it is cheaper than incarceration.¹⁹² This is true, to an extent. The overhead costs of incarceration are greater than the overhead costs of electronic monitoring.¹⁹³ However, the picture is less clear if one compares the costs of one day of incarceration to many months on electronic monitoring, which still may lead to many days of incarceration. The true cost of electronic monitoring also depends on what is counted as a cost and to whom. This Subpart examines the financial implications of electronic monitoring in the context of the juvenile court system and explains why, as it is currently used, electronic monitoring is not necessarily cost-saving.

Electronic monitoring is big business. Most counties contract with a private company to provide both the devices and the monitoring equipment.¹⁹⁴ Dozens of private companies compete for county contracts.¹⁹⁵ The GEO Group, one of the largest private prison companies, recently acquired the country's largest electronic monitoring firm, BI Incorporated, for \$415 million.¹⁹⁶ The privatization of electronic monitoring companies is part of a larger trend of the privatization of de-incarceration programs.¹⁹⁷ One private company markets itself as offering "turnkey solutions that can deliver

191. See discussion *supra* Part III.B.2.

192. Wiseman, *supra* note 10, at 1372 (noting the potential cost-saving of using monitors instead of pretrial detention).

193. See, e.g., JOHN K. ROMAN ET AL., D.C. CRIME POLICY INST., THE COSTS AND BENEFITS OF ELECTRONIC MONITORING FOR WASHINGTON, D.C. 3-4, 6 (2012) (finding the overall financial costs of electronic monitoring to be less than the costs of jail and related court involvement).

194. For example, Alameda County, California, has a contract with Satellite Tracking of People LLC to provide electronic monitoring services for adults and youth. The contract is for three years at a cost of \$1.5 million. For the terms and a copy of the contract, see Letter from LaDonna Harris, Chief Prob. Officer, Alameda Cty. Prob. Dep't, & Aki K. Nakao, Dir., Gen. Servs. Agency, to Honorable Board of Supervisors, Cty. of Alameda (June 11, 2013), <http://www.documentcloud.org/documents/1155256-alameda-county-probation-department-gps-proposal.html>.

195. Examples of private companies that market electronic monitoring are numerous: Judicial-Link Electric Monitoring Service (<http://judiciallink.com>); Omnilink (<http://www.omnilink.com/house-arrest-monitoring>); LCA (<http://lcaservices.com>); Sentinel Offender Services (<http://www.sentrak.com>); GPS Monitoring Solutions Inc. (<http://www.gpsmonitoring.com>).

196. See *The GEO Group Closes \$415 Million Acquisition of B.I. Incorporated*, BUS. WIRE (Feb. 11, 2011, 7:37 AM), <http://www.businesswire.com/news/home/20110211005372/en/GEO-Group-Closes-415-Million-Acquisition-B.I.#.Vc5LTRRVikr>.

197. See, e.g., Stillman, *supra* note 16 (examining the implications of private "extra-carceral institutions, such as private halfway houses, electronic monitoring, 'civil commitment' centers for sex offenders, and for-profit residential treatment facilities").

enhanced quality and cost savings across a comprehensive continuum of care.”¹⁹⁸

The emergence of private electronic monitoring companies raises ethical concerns about profit motives driving an expansion of the criminal justice system through the increased use of electronic monitoring programs.¹⁹⁹ As the demand for the monitors increases, private companies will increase supply. At the right price point, counties will increase the availability of devices, which may result in electronic monitoring becoming so standardized that youth are only released on the devices.

When evaluating the cost of electronic monitoring it is also critical to look not just at the cost to the county, but also the cost to the family of the young defendant. Many jurisdictions seek reimbursement from families for the cost of the electronic monitoring program.²⁰⁰ In Alameda County, for example, families are billed \$15 for each day their child is on electronic monitoring.²⁰¹ If a young person removes the electronic monitoring device, the family may be billed hundreds of dollars in replacement costs.²⁰² If youth are incarcerated as a result of a monitoring violation, the family is also billed for the nights that their child is in custody.²⁰³ The costs add up and push already impoverished families further into debt.²⁰⁴

Not only must families often reimburse the county for the cost of electronic monitoring programs, they must also ensure that their child has constant access to a cellular phone and electricity, which can be a substantial financial burden for many families. In my experience, if the parent fails to pay the phone or electric bill for a month, the child is automatically out of technical compliance with the electronic monitoring requirements.

Also, it is not obvious that electronic monitoring is cheaper for local governments. It all depends on what is being measured and when. The assumption that every youth on electronic monitoring would otherwise be detained—and for the exact same amount of time—is inaccurate.²⁰⁵ This

198. See *GEO Continuum of Care*, GEO, <http://www.geogroup.com/services> (last visited Sept. 19, 2015).

199. See Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 262 (2009) (noting that the “surpluses in capital, land, labor, and state capacity made prisons an increasingly attractive investment”).

200. For example, roughly half of the counties in California impose a fee for the use of electronic monitoring in juvenile court. See POLICY ADVOCACY CLINIC, UNIV. OF CAL., PAC CPO SURVEY (Oct. 2014 & Mar. 2015) (on file with author) (surveying chief probation officers of California).

201. The \$15 fee was approved of by the Alameda County Board of Supervisors on Dec. 15, 2009. ALAMEDA CTY. BD. OF SUPERVISORS, MINUTE ORDER (2009), <https://www.documentcloud.org/documents/1155252-alameda-county-considers-more-court-fees-for.html>.

202. See WEISBURD, *supra* note 5.

203. See POLICY ADVOCACY CLINIC, *supra* note 200.

204. See, e.g., Wiseman, *supra* note 10, at 1373–74 (noting the problems associated with billing indigent defendants for monitoring).

205. See discussion *supra* Part III.A.

means that youth are often placed on electronic monitoring for longer than they would be in custody and are often not even eligible to be in custody. In calculating costs, maintaining a youth on electronic monitoring for several months may in fact be more expensive than incarcerating a youth for two or three nights. This is because with each violation of electronic monitoring, young people are often detained and kept on probation longer—adding additional expense to the county. These questions reflect the significant need for further empirical research about the costs and benefits of electronic monitoring.

It is also easy to say that electronic monitoring is cheaper when the comparison is to incarceration. This view is too narrow, as the comparison should include other alternatives to incarceration, such as community-based programs. The cost per child per day in a community-based program may be significantly less than an electronic monitoring program.²⁰⁶ If community-based programs—or other types of therapy-based programs—are more effective, then they also promise savings in the long run.

IV. BEYOND ELECTRONIC MONITORING

Criticism of electronic monitoring raises two related questions. First, what, other than detention, is a viable alternative to electronic monitoring programs? Second, is the problem with electronic monitoring itself or with the court-imposed conditions of the electronic monitoring programs? This Part begins by addressing these two practical questions.

This Part also takes a broader view and examines how referring to electronic monitoring programs as “alternatives” and “rehabilitative” allows electronic monitoring to escape judicial scrutiny and the due process protections usually afforded to anyone facing the loss of liberty. Given the restrictions placed on a young person’s liberty, and the reality of how electronic monitoring operates, it should be viewed as punishment and subjected to a higher level of judicial scrutiny. Finally, this Part suggests the development of a new juvenile rights framework that could be applied to the growing number of “alternative” programs in juvenile courts.

A. REEXAMINING THE USE OF ELECTRONIC MONITORING

As a threshold matter, there is a critical need for empirical research about the effectiveness of electronic monitoring for youth. Until that happens, any analysis of electronic monitoring, including this analysis, is incomplete. There is simply no data on electronic monitoring, much less juvenile probation in general, to suggest that electronic monitoring is effective at helping youth

206. No study has yet to compare the costs of community-based programs with monitoring. However, there is growing evidence that, in general, the costs of community programs are low, at least as compared to incarceration. *See, e.g., FAZAL, supra* note 190, at 5–7 (detailing the cost-savings of community-based programs).

gain the skills and knowledge they need to survive and thrive. In the absence of empirical evidence, and given what is known about adolescent development, the presumption should be that electronic monitoring is a poor fit for youth.²⁰⁷

With that disclaimer, there are several evidence-based practices that are viable alternatives to both incarceration and electronic monitoring. For example, multisystemic therapy (“MST”) works with families in their homes and helps parents get skills to support their children and resources they need to advocate for themselves and their children in the community and at school.²⁰⁸ The goal is to address all the environmental systems affecting the youth, from their homes and families, schools and teachers, neighborhoods and friends. Trauma-informed care is another proven approach to working with system-involved youth.²⁰⁹ Other programs, such as community-based after school programs and Evening Reporting Centers, where youth are ordered to report after school each day, offer youth the opportunity to have structured, instructive, and supportive activities in their neighborhoods.²¹⁰ Finally, restorative justice also offers more thoughtful approaches to addressing and resolving conflict, including creating support plans for both offenders and victims.²¹¹ All of these programs allow youth to remain in their communities and with their families, while also offering support and guidance. They are less expensive than electronic monitoring, are more consistent with what is known about adolescent development, and have excellent track records.²¹²

A related question is whether the problem with electronic monitoring programs is the technology itself or how it is used. In other words, if young people were required to wear the device but had no conditions attached, would that address all the criticism of electronic monitoring? For several reasons, the answer is no. First, if there were no conditions attached to wearing an electronic monitoring device, there is little reason to think that the device would bring about any additional results that would exist without

207. David E. Arredondo, *Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL’Y REV. 13, 22 (2003) (describing the need for evidence-based solutions that are in the community).

208. See Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 490 (2009).

209. Renée VandenWallBake, *Considering Childhood Trauma in the Juvenile Justice System: Guidance for Attorneys and Judges*, 32 A.B.A. CHILD. L. PRAC. 171, 171–73 (2013).

210. For examples of evidence-based community programs, see NAT’L JUVENILE JUSTICE NETWORK, COMMUNITY-BASED SUPERVISION: INCREASED PUBLIC SAFETY, DECREASED EXPENDITURES 4 (2014), http://njjn.org/uploads/digital-library/NJJN-YAP_CBA-costs_Nov2014_FINAL2.pdf.

211. See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 19–38 (1999); Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 544 (2007).

212. See *supra* Part III.B; FAZAL, *supra* note 190, at IV, 11–12, 21–22, 46; NAT’L JUVENILE JUSTICE NETWORK, *supra* note 210, at 1–7.

the device. Merely being subject to surveillance does not, without more, serve as a deterrent for youth and arguably, makes youth worse off.²¹³

Second, it is hard to imagine a scenario where there would be no conditions attached to an electronic monitoring program. Electronic monitoring is justified on the grounds that it allows judges and probation officers to monitor, at a minimum, a youth's compliance with certain terms of probation, such as curfews and school attendance. More often than not, electronic monitoring programs involve many terms and conditions that are imposed in addition to standard probation conditions.²¹⁴

Third, the concern with electronic monitoring is not just with the conditions attached to the programs but also the net-widening effect. Even with no conditions or rules, electronic monitoring programs allow more youth to be subject to court surveillance and control for longer. Electronic monitoring devices also result in further stigmatization and marginalization, regardless of the conditions.

B. REFRAMING ELECTRONIC MONITORING AS PUNISHMENT

Although electronic monitoring is not as severe as incarceration in a locked facility, electronic monitoring represents the closest the government has come to creating the "conditions of incarceration without ever erecting a single wall."²¹⁵ Many youth on electronic monitoring are confined to their homes and experience the program as house arrest or, worse, solitary confinement.²¹⁶ Electronic monitoring is a loss of liberty and as such, is a form of punishment. As Judge Weinstein vividly described, the required "wearing of an electronic bracelet, every minute of every day, with the government capable of tracking a person not yet convicted as if he were a feral animal would be considered a serious limitation on freedom by most liberty-loving Americans."²¹⁷ Although Judge Weinstein's opinion was in the context of a Fourth Amendment analysis, his description of monitoring would apply with equal force in an Eighth Amendment analysis. As described herein, the cost of monitoring to a young person's dignitary interests are high.²¹⁸ To be confined to one's home, stigmatized, unable to engage in sports and other activities, and unable to lead a normal life, is in many ways degrading to the point of raising Eighth Amendment concerns.

While physical incarceration in a locked facility triggers a host of due process protections precisely because it is viewed as punishment, the same procedural protections are not triggered in the context of electronic

213. See discussion *supra* Part III.B.2.

214. See discussion *supra* Part II.A.

215. Murphy, *supra* note 28, at 1328.

216. See discussion *supra* Part III.

217. *United States v. Polouizzi*, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010).

218. See discussion *supra* Part III.B.

monitoring.²¹⁹ As Professor Erin Murphy explains, noncustodial restraints, such as electronic monitoring, “fall outside the conventional boundaries of constitutional criminal process because they are not considered ‘punishment.’ They evade scrutiny under either procedural or substantive due process because they do not affect a cognizable ‘fundamental right’ or ‘liberty interest.’”²²⁰

In the same respect, the punitive nature of electronic monitoring in juvenile court is almost completely obscured by the rhetoric of rehabilitation. In crafting dispositional orders, judges can impose not just electronic monitoring, but also custody time, so long as it is in furtherance of rehabilitation.²²¹ Professor Kristin Henning explains the danger of the rehabilitation rhetoric:

While the flexibility and informality of most juvenile courts have significant advantages for youth, history has shown that these features often come at the high cost of inaccurate fact-finding, punishment in the name of rehabilitation, and abuse of discretion that may be consciously or subconsciously motivated by class and racial biases throughout the system.²²²

Because electronic monitoring is not considered punitive, or even restrictive, youth do not receive custody credit for the time they are on electronic monitoring or in a non-locked facility.²²³ Courts are quick to explain that although a youth’s “liberty was restricted by wearing an electronic monitor, his home did not qualify as a secure placement within the meaning of Welfare and Institutions Code.”²²⁴ As one court observed: “An ordinary electronic monitoring system is a notification device, not a physical barrier. Any confinement thus created is psychological, rather than physical.”²²⁵

219. Murphy, *supra* note 28, at 1347 (“The Constitution spells out a long litany of entitlements that must be granted before a criminal ‘punishment’ may be imposed. Full criminal process, along with its individualized proceedings for finding guilt, its high standard and burden of proof, and the full range of Fifth and Sixth Amendment rights, must precede all ‘punishment.’”).

220. *Id.* at 1363.

221. CAL. WELF. & INST. CODE § 202 (West 2008 & Supp. 2015) (authorizing courts to detain youth as punishment if it is consistent with rehabilitation).

222. Henning, *Juvenile Justice*, *supra* note 27, at 30.

223. *People v. Lorenzo L.*, 78 Cal. Rptr. 3d 150, 153 (Ct. App. 2008) (“Because the minor’s electronic monitoring was not physical confinement, it does not entitle him to credit against his subsequent confinement.”).

224. *In re Steven C.*, No. F041677, 2003 WL 21665605, at *1 (Cal. Ct. App. July 17, 2003); *see also* *Correa v. State*, 43 So. 3d 738, 745 (Fla. Dist. Ct. App. 2010) (finding that electronic monitoring is not punitive); *Commonwealth v. Kyle*, 874 A.2d 12, 23 (Pa. 2005) (electronic monitoring is not imprisonment for purposes of qualifying for credit against a sentence of imprisonment); *In re Justin B.*, 747 S.E.2d 774, 775 (S.C. 2013) (concluding that electronic monitoring is not punishment).

225. *Lorenzo L.*, 78 Cal. Rptr. 3d at 153.

The only time that electronic monitoring is viewed as “punishment” is when youth are charged with escape, tampering or other crimes related to removing the monitor.²²⁶ If convicted, youth are often ordered to pay restitution to cover the cost of the device, which is often several hundred dollars.²²⁷ In short, youth do not receive any benefit from electronic monitoring (such as custody credit) but they do face criminal charges if they “escape” from the monitoring. These seemingly opposite positions about the definition of custody in juvenile court reflect the overall murky line between punishment and rehabilitation.

Despite the punitive nature of electronic monitoring, the promise of “rehabilitation” essentially acts as a shield against any legal challenge not only to electronic monitoring, but also to the other restrictive conditions of juvenile probation. Due to the juvenile court’s posture *in parens patriae*, numerous decisions have established that “a condition of probation that would be unconstitutional . . . for an adult probationer may be permissible for a minor.”²²⁸ In California, as is common elsewhere, “the liberty interest of a minor is not coextensive with that of an adult,” and the state can “control the conduct of children” even in those circumstances “where there is an invasion of protected freedoms.”²²⁹ Courts have found that electronic monitoring infringes on a youth’s liberty interest, but have nonetheless upheld the practice on the grounds that electronic monitoring is “tailored to meet the needs of the minor” and the rehabilitative goals of the juvenile justice system.²³⁰

To categorize restrictive probationary terms, such as electronic monitoring, as punishment is not only more accurate, but signals the need for closer judicial scrutiny, oversight and evaluation. As the era of mass incarceration gives way to an era of mass surveillance, it is critical that the problems of mass incarceration, such as valuing public safety over human dignity, and racial marginalization and stigmatization, are not replicated in the “alternative to detention” setting.²³¹ The critique of the prison industrial complex maps eerily well onto the use of electronic monitoring in juvenile court.²³²

226. CAL. WELF. & INST. CODE § 871(d) (West 2008); *Commonwealth v. Wegley*, 829 A.2d 1148, 1148 (Pa. 2003) (affirming a lower court decision that provided criminal sanctions for removing an electronic monitoring device).

227. See WEISBURD, *supra* note 5.

228. *In re Sheena K.*, 153 P.3d 282, 293 (Cal. 2007).

229. *In re Byron B.*, 14 Cal. Rptr. 3d 805, 808 (Ct. App. 2004) (quoting *In re Frank V.*, 285 Cal. Rptr. 16 (Ct. App. 1991)).

230. *In re R.V.*, 89 Cal. Rptr. 3d 702, 709 (Ct. App. 2009) (quoting *In re Antonio C.*, 100 Cal. Rptr. 2d 218 (Ct. App. 2000)); see *supra* Part II.

231. See SIMON, *supra* note 13, at 172.

232. See generally ALEXANDER, *supra* note 118 (critiquing the intensive surveillance, disparate impact on communities of color and poor people, and collateral consequences of incarceration); SIMON, *supra* note 13, at 76, 151, 171 (describing mass incarceration as a form of control of

Youth are placed on electronic monitoring for purposes of deterrence, often at the expense of the dignity of the youth and their family. Wearing a visible device, having to call for permission to go to the grocery store, having to abide by all of the technical rules, and constantly worrying about violations and more time incarcerated all contribute to youth feeling further stigmatized and distrusted.²³³

As described in Part II, it is far from clear that electronic monitoring is tailored to “meet the needs” of youth or furthers the rehabilitative goal of the juvenile justice system.²³⁴ Yet, electronic monitoring is justified based on rehabilitative paternalism. The stated justification for electronic monitoring reflects exactly what Professor Henning warned against: the diminished capacity of youth is offered as the justification for policies that are rehabilitative in name only and in fact, may do more harm than good.²³⁵

Although Professor Henning’s argument is focused on procedural due process rights, her position can be applied with equal force in the context of substantive due process: The complexity and elastic nature of adolescent cognitive development must inform not just procedural rights, but what types of programs are effective and, conversely, what programs are punitive and ineffective.

C. THE NEED FOR A NEW JUVENILE RIGHTS FRAMEWORK

As more alternatives to incarceration continue to emerge and proliferate, such as electronic monitoring for youth, now is the time to consider more suitable doctrinal frameworks for scrutinizing these programs.²³⁶ This is especially true for programs relying on emerging technology that burden the constitutional rights of politically vulnerable groups, like youth. Legislatures are often the force behind promoting monitoring as an alternative,²³⁷ and therefore cannot be relied on to regulate, or circumscribe, the use of the potentially invasive technology. Absent legislative action, courts are the avenue for oversight and review.²³⁸

Despite the clear need for judicial intervention, courts are reluctant to review the constitutional implications of technology. As Justice Alito stated in

communities of color that reflects the vestiges of slavery); ANGELA DAVIS, *THE PRISON INDUSTRIAL COMPLEX* (AK Press Audio CD, July 2001).

233. See Jennifer L. Woolard et al., *Anticipatory Injustice Among Adolescents: Age and Racial/Ethnic Differences in Perceived Unfairness of the Justice System*, 26 *BEHAV. SCI. & L.* 207, 223 (2008) (observing that the anticipation of injustice shapes behavioral compliance with court officials); see also Birkhead, *supra* note 27, at 1471–74 (discussing how youth who experience the legal process as fair, respectful, and consistently applied are more likely to comply with court orders).

234. *In re Byron B.*, 14 Cal. Rptr. 3d at 808 (citation omitted).

235. See Henning, *Juvenile Justice*, *supra* note 27, at 50.

236. See Wiseman, *supra* note 10, at 1378 (noting the rapid proliferation of electronic monitoring in the pretrial context as a reason for additional scrutiny).

237. *Id.* at 1397–98.

238. *Id.*

his concurrence in *Jones*, “[i]n circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative.”²³⁹

There is no obvious response to Justice Alito’s concern, nor does this Article purport to have a full answer. However, his concern highlights the need for more discussion about the judicial response to technological advances, such as electronically monitoring youth. Two points bear mentioning with respect to his concern. First, as a threshold matter, empirical studies examining the benefits and burdens of electronic monitoring will certainly provide, to some extent, a stronger basis with which make appropriate constitutional challenges to the practice.

Second, and equally important, is identifying a new doctrinal framework that accounts for the ways in which electronic monitoring is both invasive and punitive. One possible avenue is a more robust due process and equal protection analysis.²⁴⁰ Empirical evidence, for example, could help establish that electronic monitoring is not necessarily narrowly tailored to meet a compelling government interest, here, the rehabilitation of minors.²⁴¹

Applying either a due process or equal protection analysis to electronic monitoring might not, necessarily, invalidate the use of electronic monitoring altogether. Indeed, there may be circumstances when electronic monitoring is appropriate, or even desired.²⁴² Nonetheless, there remains a need for a doctrinal framework with which to evaluate and regulate the use of electronic monitoring.

V. CONCLUSION

In many ways, the future of juvenile justice has never been brighter. The Supreme Court’s decisions in *Roper*, *Graham*, and *Miller* reaffirmed the need for adolescent-appropriate responses to juvenile crime, juvenile incarceration rates are down, and there is a greater push to find creative and community-based alternatives to secure detention. As explained in this Article, electronic monitoring offers a tempting—but ultimately problematic—approach to supporting youth in their homes and communities.

Most problematic is how little is known about monitoring, despite its widespread and growing use. Other than outdated surveys, mostly about

239. *United States v. Jones*, 132 S. Ct. 945, 964 (Alito, J., concurring); *see also* *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010) (“The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”).

240. *See* *Murphy*, *supra* note 28, at 1402.

241. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (asserting that the narrowly tailored requirement “ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate”); *Waters v. Barry*, 711 F. Supp. 1125, 1139 (D.D.C. 1989) (noting that restrictions must “bear an intimate relationship to the problem”).

242. *See supra* text accompanying note 65.

adults, there are no comprehensive studies evaluating the ways in which monitoring supports, or hinders, the rehabilitative goals of juvenile court. While emerging monitoring technology is appealing, it cannot be used at the expense of it working well.

Nonetheless, so long as electronic monitoring is imposed as a condition of pretrial release and probation, it will continue to expand court control, both in depth and duration. Youth who may never have been detained find themselves cycling in and out of juvenile halls based on technical violations. For this reason, electronic monitoring should be categorized as a form of punishment, triggering greater judicial scrutiny and oversight.

Ultimately, the problem with electronic monitoring may be that any juvenile court-based approach to “alternative programs” risks creating more harm than good.²⁴³ Going forward, a more comprehensive approach, including greater investment in community-based non-legal interventions, offers more promise than heavy reliance on electronic monitoring.

²⁴³. See Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 271 (2008) (questioning whether court-based and court-supervised solutions are the best answer to “solve some of the most intractable social problems of our time”).