Mass E-Carceration: Electronic Monitoring as a Bail Condition

Sara Zampierin

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MASS E-CARCERATION: ELECTRONIC MONITORING AS A BAIL CONDITION

Sara Zampierin*

Abstract
Over the past decade, the immigration and criminal legal systems have increasingly relied on electronic monitoring as a bail condition; hundreds of thousands of people live under this monitoring on any given day. Decisionmakers purport to impose these conditions to release more individuals from detention and to maintain control over individuals they perceive to pose some risk of flight or to public safety. But the data do not show that electronic monitoring successfully mitigates these risks or that it leads to fewer individuals in detention. Electronic monitoring also comes with severe restrictions on individual liberty and leads to harmful effects on individuals’ economic stability, relationships with family and their community, and physical and mental health.

Pretrial electronic monitoring should be severely limited if decisionmakers follow the inquiries required by the Eighth Amendment, Due Process Clause, and state law and require the government to prove that the bail condition is the least restrictive condition that could mitigate the risks of flight and to public safety. This Article examines those standards in depth and observes that electronic monitoring provides an opportunity to clarify some of the uncertainty that has surrounded these inquiries when previously applied primarily in the context of monetary bail.

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INTRODUCTION

The bail system and its contribution to mass incarceration have captured the attention of much scholarship, litigation, and advocacy over the past five years. To date, much of that work has focused on examining pretrial detention and the use

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2 See, e.g., In re Humphrey, 482 P.3d 1008 (Cal. 2021); ODonnell v. Harris Cnty., 892 F.3d 147, 151 (5th Cir. 2018), rev’d en banc, 22 F.4th 522, 540 (5th Cir. 2022).
of money bail. Though the bail reform movement has made gains in securing many individuals’ release from incarceration, its success has also ushered in a dramatic increase in burdensome bail conditions that seek to surveil and control those released—especially electronic monitoring. Far less attention has been paid to these onerous nonmonetary bail conditions and any constitutional implications of their use.

This Article critically examines the recent surge in electronic monitoring and resulting mass e-carceralion in the criminal and immigration systems. Part I explores the history and evolution of the bail system, including the rise of electronic monitoring conditions. Bail, in both the criminal and immigration systems, was historically a mechanism for allowing the release of individuals with assurances that they would appear at trial. It has also been abused over the years as a way to economically benefit those in power, as a tool of racial and economic oppression, and as a mechanism of control.

Part II explores common rationales offered for the expansion of pretrial electronic monitoring. I conclude that none can sufficiently justify the current expansive monitoring regimes in the pretrial immigration and criminal systems. Decisionmakers often impose electronic monitoring conditions because of the notion that they will help to ensure that someone perceived as “risky” will come to court or will refrain from committing serious crimes. After examining the social sciences research on electronic monitoring, I conclude that the evidence does not

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6 See Jenny E. Carroll, Beyond Bail, 73 FLA. L. REV. 143, 193–94 (2021) (highlighting the need for additional scholarship and advocacy on the topic of bail conditions).
8 See infra Part I
9 See infra Part I.C.
10 See infra notes 120–126 and accompanying text.
11 See infra Part II.
12 See infra Part II.A.
show that electronic monitoring achieves these purported government interests. Rather, the dramatic expansion in electronic monitoring can be linked to the desire for control over those perceived as “dangerous.”

Furthermore, while electronic monitoring is offered as a more humane alternative to detention, decisionmakers fail to appreciate the burden that electronic monitors place on individuals on bail. Some judges have concluded that electronic monitoring does not implicate any liberty interest and instead functions only as a “virtual monitor” standing watch outside an individual’s door to ensure compliance with release conditions. But this assessment dramatically understates the harm that the device and its constant surveillance imposes. Electronic monitoring conditions are often imposed for an indefinite pretrial period that could last well over a year. The bulky ankle monitor functions as a type of shackle that restricts movement, requires frequent charging, emits warnings alerting others to its presence, and causes physical harm to many of those who wear it. While smartphone tracking can mitigate the concern of physical harm, this variation of electronic monitoring still poses serious risks to privacy, keeps individuals under a constant threat of detention, and causes emotional distress. Individuals on all forms of electronic monitoring report that they are experiencing a form of prison.

The current electronic monitoring regime that fails to properly analyze the perceived benefits and burdens of electronic monitoring should not survive constitutional scrutiny under the Excessive Bail Clause or Due Process Clause, as I explore in Part III. Existing jurisprudence in both contexts requires decisionmakers to evaluate the constitutionality of any pretrial electronic monitoring condition by comparing the fit between the monitoring condition and the government’s asserted interests in preventing flight and protecting public safety. The current electronic monitoring regime raises serious constitutional concerns because of the lack of evidence that these conditions are effective in preventing flight or protecting public safety.

Though electronic monitoring raises concerns under any plausible legal interpretation of these provisions, it is valuable to examine the relevant constitutional limits in detail to illuminate the standards that should apply to these decisions. Excessive Bail Clause jurisprudence has been marred by a lack of clarity and nuanced assessment, in large part because it has developed in the context of

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13 See infra Part II.A.
14 See infra Part I.B–C.
15 See infra Part II.D.
17 See infra nn.116–119 and accompanying text.
18 See infra Part II.
19 See infra Part II.
20 See infra Part II.
21 See infra Part III.A–B.
22 See infra notes 273–284, 303–314 and accompanying text.
assessing the propriety of different dollar amounts of bail and their ability to satisfy the government’s interests. Examining electronic monitoring as a bail condition provides a more robust means of analyzing the Eighth Amendment excessiveness inquiry. I argue that the bail condition must be the least restrictive condition that can achieve the government’s interests—the standard that best satisfies existing jurisprudence and the purpose of the Excessive Bail Clause.\(^{23}\) Next, I explore disputed questions within the Due Process Clause caselaw and literature. I demonstrate that a strict scrutiny framework provides the best understanding of Supreme Court cases evaluating restrictions on pretrial liberty in both the criminal and immigration contexts.\(^{24}\) I also conclude that electronic monitoring must be considered a form of carceral punishment that constitutes a significant deprivation of liberty. Furthermore, I determine that the process by which electronic monitoring is currently imposed in most jurisdictions fails to satisfy procedural due process: first, by not requiring the government to prove by clear and convincing evidence the purported risk that an individual poses to public safety or to flee; and second, through the use of ICE officers and biased decisionmakers to impose these conditions in the immigration system.\(^{25}\)

Finally, I highlight that particular state laws and state constitutional Fourth Amendment analogues may provide additional protections against the current expansion in electronic monitoring as a bail condition in state criminal proceedings.\(^{26}\)

The vast system of electronic monitoring in the criminal and immigration systems should not continue to exist in its current form. Rather, governments should turn to non-punitive pretrial support to satisfy their interests in public safety and appearance, including court date reminders and connecting individuals with social services. If electronic monitoring continues, judges and policymakers must grapple with the serious constitutional and legal issues posed by the current regime and impose procedural and substantive limits to address these concerns.

I. THE EVOLUTION OF BAIL, BAIL CONDITIONS, AND ELECTRONIC MONITORING

A. The Origins of Bail

1. Criminal Legal System

Bail originated as part of the early public criminal legal system in medieval England after the Norman invasion in 1066.\(^{27}\) As changes to the criminal legal system caused more arrests and long delays between arrest and trial, a system of

\(^{23}\) See infra Part III.A.
\(^{24}\) See infra Part III.B.
\(^{25}\) See infra Part III.C.
\(^{26}\) See infra Part III.D.
\(^{27}\) See TIMOTHY R. SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 24 (2014).
pretrial release was essential.\textsuperscript{28} Bail was used to ensure that individuals would pay any debt and appear for trial.\textsuperscript{29} Sheriffs were responsible for release and detention decisions, and they retained great discretion in whether to release individuals, except those accused of certain non-bailable offenses.\textsuperscript{30} Generally, individuals who were arrested on bailable offenses could be released if an individual or group was willing to serve as surety by taking responsibility for the accused and paying any required financial sentence.\textsuperscript{31} However, sheriffs began to abuse the system by improperly requiring bailable defendants to pay a fee for release and also by releasing non-bailable defendants who paid a fee.\textsuperscript{32} In 1275, the Statute of Westminster sought to correct these abuses by expressly categorizing offenses as bailable or non-bailable and making clear that sheriffs could only detain those arrested on non-bailable offenses.\textsuperscript{33}

Abuses in this system continued, and reform measures from the central government were targeted at curbing these abuses of the sheriffs, and similar abuses later perpetrated by judges.\textsuperscript{34} After years of studying and documenting judges’ practices in setting bail at unattainably high amounts that made it difficult to find personal sureties, a provision directing that “excessive bail ought not to be required” was added to the English Bill of Rights.\textsuperscript{35} These practices largely continued in the United States, including the use of personal sureties and unsecured bonds.\textsuperscript{36} With very little recorded congressional debate,\textsuperscript{37} the U.S. Bill of Rights included language in the Eighth Amendment largely lifted from the English Bill of Rights’ Excessive Bail Clause.\textsuperscript{38} In addition, individual colonies, and later the federal and state governments, enlarged the right


\textsuperscript{29} SCHNACKE, supra note 27, at 25.

\textsuperscript{30} Duker, supra note 28, at 44–45.

\textsuperscript{31} See SCHNACKE, supra note 27, at 25.

\textsuperscript{32} Id. at 27.

\textsuperscript{33} See Duker, supra note 28, at 45–46.

\textsuperscript{34} Id. at 51–56; SCHNACKE, supra note 27, at 28. After continued malfeasance of sheriffs, justices of the peace were given bail authority during the fourteenth century. Duker, supra note 28, at 53–55.

\textsuperscript{35} See Samuel Wiseman, Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause, 36 FORDHAM URB. L.J. 121, 127 (2009) [hereinafter Wiseman, Discrimination, Coercion, and the Bail Reform Act of 1984]. The only recorded discussion in Congress raised questions about the meaning of the clause that were not answered on the record, including “What is meant by the terms excessive bail? Who are to be the judges?” Id. at 128 (quoting 1 ANNALS OF CONG. 754 (Joseph Gales & William Seaton eds., 1834), reprinted in 5 THE FOUNDERS’ CONSTITUTION 377 (Philip B. Kurland & Ralph Lerner eds., 1987)).

\textsuperscript{36} SCHNACKE, supra note 27, at 22–24.

\textsuperscript{37} See 1 ANNALS OF CONG. 754 (Joseph Gales & William Seaton eds., 1834), reprinted in 5 THE FOUNDERS’ CONSTITUTION 377 (Philip B. Kurland & Ralph Lerner eds., 1987).

\textsuperscript{38} SCHNACKE, supra note 27, at 28.
to bail, generally making only capital crimes non-bailable.\(^{39}\) Most individuals facing criminal charges were released pretrial.\(^{40}\)

In the mid-nineteenth century, two main shifts drove changes to the bail system. First, migration to urban areas and Westward with the expanding frontier meant that many individuals had fewer community ties and were perceived to be a greater flight risk.\(^{41}\) When individuals had trouble finding sureties as a result, judges responded by “eroding historic rules against profiting from bail and indemnifying sureties, slowly ushering in the commercial bail bonding business at the end of the century.”\(^{42}\) This shift also gave bail sureties the power of arrest, and bounty hunters assumed powers similar to those previously performed by slave hunters.\(^{43}\) Bail amounts began to increase, and bail was often set at arbitrarily high amounts.\(^{44}\)

Second, after the Civil War and the end of slavery, bail, like the rest of the criminal legal system, became a tool of racial oppression. As part of the “Black Codes” and other lawmaking, States created new offenses designed to target or apply only to Black people, including vagrancy, speaking loudly in the presence of white women, or carrying a weapon.\(^{45}\) When a Black person was arrested, white plantation owners and companies would often offer to serve as surety.\(^{46}\) In exchange, they required the individual to provide labor until bail was terminated, any monetary sentence was paid off, or any additional debts the surety decided to charge were worked off.\(^{47}\) As a practical matter, this meant sureties could extend this forced labor relationship indefinitely.\(^{48}\) This practice continued well into the twentieth century, slowly phasing out only as it was replaced by other mechanisms of control within the criminal legal system.\(^{49}\)

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\(^{39}\) Id. at 28–30.

\(^{40}\) Id. at 30.

\(^{41}\) TIMOTHY R. SCHNACKE, MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE’S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL 24 (2014).

\(^{42}\) Id. at 24–26.

\(^{43}\) See FLOZELL DANIELS, JR., BENJAMIN D. WEBER & JON WOOL, FROM BONDAGE TO BAIL BONDS: PUTTING A PRICE ON FREEDOM IN NEW ORLEANS 3, https://s3.amazonaws.com/gnocdc/reports/Daniels_bondage_to_bail_bonds.pdf [https://perma.cc/QS2E-BB4L] (“Sureties could exercise these powers through agents, known as bounty hunters, continuing the commerce begun with slave hunting.”).

\(^{44}\) SCHNACKE, supra note 27, at 9 (“[P]retrial justice appears arbitrarily rationed out only to those with access to money.”).

\(^{45}\) Cohen, Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis, 42 J. S. Hist. 31, 34 (1976); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 67 (2008). Professor Kellen Funk identifies that, at least in Mississippi, owning a gun as a Black person became an unbailable offense, joining a very short list of unbailable crimes (like capital offenses). Funk, supra note 1, at 1119 & n.115 (citing 1866 Miss. LAWS 165).

\(^{46}\) BLACKMON, supra note 45, at 66–67.

\(^{47}\) Id. at 67.

\(^{48}\) Id.

Black persons accused of minor crimes and trumped-up charges and often required minimal bail for white defendants charged with serious crimes. 50

Litigation began to challenge some of these practices, including the increasing monetary bail amounts. In 1951, twelve individuals accused of Communist party affiliation and violating the Smith Act challenged their $50,000 bail. 51 In the Supreme Court’s first case meaningfully interpreting the Excessive Bail Clause of the Eighth Amendment, the Court held that “[b]ail set at a figure higher than an amount reasonably calculated” to assure an individual’s presence at trial is excessive under the Eighth Amendment. 52 The Court also stressed the importance of the “traditional right to freedom before conviction,” as it “permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.” 53

Despite this ruling, many individuals continued to be detained because they could not afford bail, 54 leading to a wave of reform beginning in the 1960s. Scholars and advocates for reform argued that most of those who could not afford bail should be released on recognizance because they posed no risk of flight. 55 Their work led to changes in state laws as well as the federal Bail Reform Act of 1966, which established that every federal defendant, except those charged with capital offenses, should be released on their own recognizance unless the court determined that such release would not “reasonably assure” their appearance. 56

Similarly, there were growing calls in the 1970s for alternatives to detention and dramatically limiting prison and pretrial detention, focusing instead on correcting the conditions in our society that produce crime, including high unemployment, racism, education, and poor housing. 57 “Supervised release” was proposed as an alternative to money bail or detention, with probation officers or new pretrial services agencies tasked with duties relevant to initial bail determination

50 DANIELS ET AL., supra note 43, at 2–3; see also Gilbert Ware, Criminal Justice and Blacks, in FROM THE BLACK BAR: VOICES FOR EQUAL JUSTICE 82–83 (Gilbert Ware ed., 1976) (showing Black defendants routinely received higher bail than white defendants accused of serious crimes in a 1971 study).


52 Stack, 342 U.S. at 5.

53 Id. at 4.


55 See id. at 60–62; WAYNE H. THOMAS, BAIL REFORM IN AMERICA 7, 15 (1976).


57 See CÉSAR CUAUHTEMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON 55–56 (2019); CALVERT R. DODGE, A NATION WITHOUT PRISONS 22 (1975).
recommendations, as well as monitoring and providing services to those released.\textsuperscript{58}

By the mid-1970s, there was a growing sentiment that prisons were cruel, ineffective, and obsolete.\textsuperscript{59}

2. Immigrant System

Detention in the federal immigration system began in the 1890s as a way to control individuals arriving in the United States whom the government desired to exclude—namely, Chinese immigrants.\textsuperscript{60} In 1896, the Supreme Court approved of the use of temporary confinement “as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens.”\textsuperscript{61} For the most part, detention was used primarily for new arrivals\textsuperscript{62} and was not a major part of interior immigration enforcement during most of this country’s history. There were, however, notable exceptions for Japanese internment camps during WWII, German-Americans during WWI, and suspected Bolsheviks, anarchists, and Communists.\textsuperscript{63}

Instead, the Immigration Act of 1917 allowed for individuals awaiting deportation proceedings to be released on bond. It provided that an individual “may be released under a bond in the penalty of not less than $500, with security approved by the Secretary of Labor,” under the condition that the individual must appear for all hearings and deportation, if ordered.\textsuperscript{64} Some courts interpreted this language as granting a right to release,\textsuperscript{65} while others found the Attorney General had broad discretion to determine the question of bail, with the decision reviewed only for


\textsuperscript{59} See García Hernández, supra note 57, at 55–56.

\textsuperscript{60} Id. at 23–27.

\textsuperscript{61} Wong Wing v. United States, 163 U.S. 228, 235 (1896).

\textsuperscript{62} The focus of this Article is those who are entitled to pretrial bail. This does not include two other categories of noncitizens who may also be on electronic monitoring: (1) “arriving aliens,” who are ineligible for bond but may be released on parole (including many asylum seekers apprehended at the border who pass an initial interview regarding their credible fear of persecution), see 8 U.S.C. § 1225(b), and (2) noncitizens who have final orders of removal, see 8 U.S.C. § 1231. Pretrial bail is available from the time of arrest through a final order of removal, which includes proceedings before the immigration court and any appeals of that decision to the Board of Immigration Appeals by either the noncitizen or by DHS. 8 C.F.R. § 1236.1(d)(1).


\textsuperscript{64} Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 891.

\textsuperscript{65} Prentis v. Manoogian, 16 F.2d 422, 424 (6th Cir. 1926).
abuse of that discretion.\textsuperscript{66} In response to these decisions, Congress amended the statutory language to “expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody” as part of the Internal Security Act of 1950\textsuperscript{67}—an Act whose purpose was to “deport all alien Communists as a menace to the security of the United States. . . .”\textsuperscript{68} A similar provision was also incorporated into the Immigration and Naturalization Acts (INA) of 1952 and 1965 but also granted the Attorney General explicit discretion to order conditions of bond beyond appearance.\textsuperscript{69}

This provision was tested and affirmed in \textit{Carlson v. Landon}, where the Supreme Court found that detention without bond was appropriate for four individuals accused of being members of the Communist party.\textsuperscript{70} The Supreme Court found it significant that Congress had enacted legislation based on its judgment that active subversion posed a threat to the nation and that each of the individuals detained was determined to be an active member of the party who was involved in activities supporting the party’s philosophy concerning violence.\textsuperscript{71}

Despite this broad discretion, most noncitizens were not detained before their removal hearings.\textsuperscript{72} Indeed, in 1954, the INS determined it would only utilize detention in extraordinary circumstances.\textsuperscript{73}

\textbf{B. Rise in “Tough on Crime” Policies and the Preventative State}

1. \textit{Criminal Legal System}

The successes of the civil rights movement, bail reform, and advocacy around prison abolition were short-lived as the nation moved into a war on drugs and crime. As Michelle Alexander and others have documented, these policies were part of a Republican strategy to attract poor and working-class white voters threatened by the civil rights movement and its resulting policies and to use concern with crime rate as a coded way to preserve the racial hierarchy.\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{66} United States ex rel. Potash v. District Director, 169 F.2d 747, 750–52 (2nd Cir. 1948).
\item \textsuperscript{68} \textit{Id.} at 541.
\item \textsuperscript{70} \textit{Carlson}, 342 U.S. at 541.
\item \textsuperscript{71} \textit{See id.} at 538–41; \textit{see also} I.N.S. v. Nat’l Ctr. for Immigrants’ Rts., Inc., 502 U.S. 183, 193–95 (1991).
\item \textsuperscript{72} \textit{GARCÍA HERNÁNDEZ, supra} note 57, at 47 (citing \textit{MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS} 8 (2004)).
\item \textsuperscript{73} \textit{Id.} at 48–49.
\item \textsuperscript{74} \textit{See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS} 50–57 (10th anniversary ed. 2020).
\end{itemize}
The policies resulted in a dramatic rise in incarceration rates, including pretrial detention in local jails.\(^75\) The pretrial criminal detention reforms of the 1960s and 1970s were criticized as releasing too many deemed “dangerous.”\(^76\) The 1966 federal Bail Reform Act had authorized detention only after a finding that detention was required to secure appearance in court, and the drafters had explicitly rejected the notion that pretrial bail could “be used as a device to protect society from the possible commission of additional crimes by the accused.”\(^77\) Just days after his inauguration, Richard Nixon called for legislation authorizing preventative detention for those whose “release presents a clear danger to the community.”\(^78\) Congress soon passed a preventative detention statute for the District of Columbia, which served as a model for other states.\(^79\) By 1984, thirty-four states passed laws authorizing some form of preventative detention, and Congress followed suit with legislation modifying the 1966 federal Bail Reform Act the same year.\(^80\)

The Supreme Court soon upheld the constitutionality of the preventative detention authorized by the 1984 federal reform law against a facial challenge from the top leaders of an infamous mafia family.\(^81\) The Court confirmed that the Government’s interest in community safety and preventing crime was legitimate and could outweigh an individual’s liberty interest “in appropriate circumstances.”\(^82\) In rejecting the facial due process challenge, the Court also relied on the “extensive” procedural safeguards—including detention that was limited in duration and the requirement of the Government to meet the standard of clear and convincing


\(^76\) See Walker, supra note 54, at 54.


\(^80\) Walker, supra note 54, at 55.

\(^81\) United States v. Salerno, 481 U.S. 739, 743 (1987). The challenge came from Anthony “Fat Tony” Salerno, the “boss” of the Genovese crime family, and his “captain,” Vincent Cafaro. The Genovese crime family was notorious for among other things, extortion and murder. As Professor Funk has noted, “[i]f broad segments of American society could agree that anyone ought to be detained pretrial without bail, it was Fat Tony.” Funk, supra note 1, at 1105. Interestingly, prior to the Supreme Court’s ruling, the government also determined that Cafaro’s release no longer threatened the safety of the community once Cafaro agreed to cooperate with the Government. Salerno, 481 U.S. at 766 (Marshall, J., dissenting).

\(^82\) Salerno, 481 U.S. at 748.
evidence.\textsuperscript{83} Since \textit{Salerno}, the number of people incarcerated pretrial due to these “tough on crime” policies has continued to rise.\textsuperscript{84}

Politicians have also increasingly relied on rhetoric that stokes racialized fear and blaming policymakers and judges for additional crime when their decisions led to the release of the accused. One of the most famous examples, the Willie Horton campaign advertisement, featured a dark-skinned Black man who was convicted of raping and murdering a white woman in her home after escaping from a furlough program from prison.\textsuperscript{85} The advertisement blamed presidential candidate Michael Dukakis because of his approval of the furlough program.\textsuperscript{86} Many judges, in turn, have let this fear control their decision making and resorted to overly-restrictive solutions where they see any risk, however remote, that an individual being considered for bail may commit a new crime.\textsuperscript{87}

\textbf{2. Immigration System}

The same policies and racialized fear have pervaded immigration law. Newer populations of migrants, including Haitians, Jamaicans, and dark-skinned Cuban migrants, were depicted as drug dealers and murderers, and immigration detention centers were created to incarcerate them in the early 1980s.\textsuperscript{88} Increased border enforcement meant that more migrants stayed in the United States rather than following the previously familiar pattern of moving back and forth to the U.S. based on job availability and the growing season.\textsuperscript{89} Congress set about implementing “tough on crime” policies in the immigration system as well, establishing the vast system that allows the federal government to request local governments to hold immigrants in their custody under “detainers” for ICE pickup as well as the legal framework allowing deportation for an expansive list of criminal convictions, including drug crimes.\textsuperscript{90} Incarceration increased exponentially.\textsuperscript{91}

\begin{itemize}
\item \textsuperscript{83} \textit{Id.} at 751–52.
\item \textsuperscript{85} ALEXANDER, \textit{supra} note 74, at 69.
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} W. David Ball, \textit{The Peter Parker Problem}, 95 N.Y.U. L. REV. 879, 887–89 (2020) (“[O]ne question about pretrial release—‘What if I release someone and something bad happens?’—play[s] such an outsized role that it is often the most important (or even the only) consideration[,]”); Shima Baradaran Baughman, \textit{The History of Misdemeanor Bail}, 98 B.U. L. REV. 837, 870 (2018).
\item \textsuperscript{88} See GARCÍA HERNÁNDEZ, \textit{supra} note 57, at 61–62.
\item \textsuperscript{89} See \textit{id.} at 65.
\item \textsuperscript{90} See \textit{id.} at 65–68.
\item \textsuperscript{91} See \textit{id.} at 60.
\end{itemize}
C. Use of Electronic Monitoring and Other “Alternatives to Detention”

1. Criminal Legal System

Judges first imposed electronic monitoring conditions in the criminal legal system in the 1980s to emphasize the severity of an offense but avoid incarcerating non-violent offenders. The technology was originally developed decades earlier by researchers at Harvard who hoped to find an additional tool to use in programs for rehabilitating youth, and it was widely rejected because of privacy concerns. The original monitors used radio-frequency technology that used an ankle transmitter to monitor whether an individual was near the receiving unit, generally placed in their home. By 1987, there were 826 individuals on electronic monitors across the country; just three years later, this number rose to an estimated 12,000. Monitoring technology evolved to utilize a GPS tracking receiver attached to a belt that goes around an individual’s ankle, allowing them to be tracked in real time on a digital map. In the past five years, many jurisdictions have also adopted technology that allows electronic tracking through features such as GPS location data and the camera of individuals’ cell phones.

Judges and other decisionmakers have increasingly turned to restrictive conditions of release as an alternative to detention, including electronic monitoring. Electronic monitoring in the criminal legal system increased by 140 percent between 2005 and 2015 to more than 125,000 individuals in 2015.

In the years since that data was collected, electronic monitoring has continued to increase exponentially in many jurisdictions. Cities such as Indianapolis and San Francisco saw their rates of pretrial electronic monitoring double or triple in the last

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93 Id. at 335.

94 Id. at 336.


96 Gable, supra note 92, at 336–37.


few years. In Houston, the use of monitors increased from 13 in 2015 to more than 500 in 2019 and then to over 4,000 in late 2021. The Cook County Sheriff’s office in Chicago dramatically increased its electronic monitoring in recent years, reaching a peak during the COVID-19 pandemic when it ran out of available monitors. Baldwin County, a mid-size county in Alabama, reported twenty to thirty new participants in its ankle monitoring program each week.

We are in the midst of another bail reform movement. There is consensus across political lines that the current money bail system is ineffective and unjust, and both courts and legislatures have considered, and in some instances enacted, reforms aimed at addressing these issues. Some reform advocates have taken note

99 Maya Schenwar & Victoria Law, Prison by Any Other Name: The Harmful Consequences of Popular Reforms 30–32 (2020). In San Francisco in particular, a court decision requiring judges setting bail to consider ability to pay and non-monetary conditions did not result in a significant change in the jail population, but it did result in a dramatic increase in pretrial electronic monitoring caseloads. See Johanna Lacoe, Alissa Skog & Mia Bird, Bail Reform in San Francisco: Pretrial Release and Intensive Supervision Increased After Humphrey, CAL. POL’Y LAB (May 25, 2021), https://www.capolicylab.org/wp-content/uploads/2021/05/Bail-Release-and-Intensive-Supervision-Increased-after-Humphrey.pdf [https://perma.cc/DUG2-WUYV].

100 Tyler Hicks, As Covid-19 Cases Surge, Some Incarcerated People Remain Behind Bars After Making Bail, TEXAS OBSERVER (June 29, 2020, 8:00 AM), https://www.texasobserver.org/pretrial-covid-dallas-electronic-monitoring/ [https://perma.cc/NB84-7GE3].


104 See Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, Reforming State Bail Reform, 74 SMU L. REV. 447, 448 (2021) (noting that we are in the midst of the third wave of bail reform).

of the expansion of pretrial electronic monitoring and the harm to communities that has resulted and have aimed to pass provisions to rein this practice. In Illinois, advocates highlighted the punitive nature of pretrial electronic monitoring and characterized it as another form of incarceration.\textsuperscript{106} The bail reform law that resulted allows electronic monitoring only where a judge makes and documents her findings that less restrictive options would not reasonably ensure the appearance of the defendant for later hearings or protect an identifiable person from imminent threat of serious harm.\textsuperscript{107} Furthermore, it restricts the duration of monitoring conditions by requiring judges to reconsider and make findings about the appropriateness of the monitoring every 60 days, guarantees movement to complete essential functions, and ensures that time spent on electronic monitoring will count as time served for any future sentence.\textsuperscript{108} The government must also collect and publicly report county-level data regarding the use of electronic monitoring, including the number of participants, the demographics of the participant population, the charges, and the average length of ankle monitoring conditions.\textsuperscript{109}

Advocates concerned about the burdens of monitoring and surveillance have also called on jurisdictions to allow release without monitoring where individuals have support within the community—whether from their existing networks or from organizations stepping in to fill the need.\textsuperscript{110} They have highlighted that individuals should be released without supervision from law enforcement, instead focusing on programs that can help coordinate access to and fund resources and services, especially in under-resourced communities of color most impacted by a history of public divestment and mass incarceration.\textsuperscript{111} But these pleas have largely not resulted in large changes to monitoring and supervision regimes. In Santa Clara County, California, for instance, though judges eliminated or reduced monetary bail when presented with evidence of community support, they often still assigned pretrial supervision and monitoring conditions.\textsuperscript{112}

Despite this advocacy and limited reforms, most jurisdictions lack substantive restrictions on pretrial electronic monitoring conditions. In assigning bail conditions


\textsuperscript{107} 725 ILL. COMP. STAT. 5/110-5(g), (h).

\textsuperscript{108} 725 ILL. COMP. STAT. 5/110-5(i); 730 ILL. COMP. STAT. 5/5-8A-4(A-1).

\textsuperscript{109} 20 ILL. COMP. STAT. 3930/7.7(b)(4), (c)(2), (4).


\textsuperscript{111} OKOH & CORONADO, supra note 110, 15–17.

\textsuperscript{112} Jayadev, supra note 110.
generally, judges largely do not evaluate or determine how the conditions will address any risk of flight or threat to public safety, and even fewer judges undertake any comparison to determine whether a less restrictive alternative would sufficiently mitigate the same risks.\footnote{113}{Carroll, supra note 6, at 182–83 (stating that the “nonmonetary conditions of release are routinely imposed on defendants prior to trial with little to no consideration of the function they actually serve.”); Alicia Virani, Stephanie Campos-Bui, Rachel Wallace, Cassidy Bennett & Akruti Chandravya, Coming Up Short: The Unrealized Promise of In re Humphrey 23–24, 33–34 (Oct. 2022), https://law.ucla.edu/sites/default/files/PDFs/Criminal_Justice_Program/Coming_Up_Short_Report_2022_WEB.pdf [https://perma.cc/HQB7-5XWV] (noting California judges’ failure to analyze the least restrictive conditions of bail and their routine imposition of conditions like electronic monitoring, “often without much of a nexus”). Even when courts examine in greater detail the risk posed to flight or public safety, there is little discussion of why electronic monitoring is appropriate to mitigate those risks. Examination of one federal district court decision—one that goes further than most courts in attempting to assess whether electronic monitoring is necessary upon the defendant’s motion to remove the monitor—is instructive. First, the court “asked what purpose the monitoring served,” a question it equated with “whether [the defendant was] a flight risk or a danger to the community.” United States v. Sanchez, No. CR 12-3182 JB, 2014 WL 3421003, at *5 (D.N.M. June 26, 2014). With respect to the risk of flight, the prosecutor noted that the monitor would not keep the defendant from fleeing but would provide “one added layer of protection there.” Id. The prosecutor instead focused on the benefit to mitigating risk to public safety, noting that it was necessary to monitor “his comings and goings, the times he’s allowed to leave his house, and the times he needs to return home”—not to any particular risk the defendant posed to the community. Id. Ultimately, the court found “this monitoring . . . is important to reduce to acceptable levels the risk of flight,” citing the defendant’s arrest history, substance abuse, potential danger to the community and the nature of the charges. Id. at 10.

Where courts have engaged directly with an analysis of whether electronic monitoring is appropriately tailored to the risk of flight or public safety, they have largely found electronic monitoring to be inappropriate. See Commonwealth v. Norman, 142 N.E.3d 1, 9 (Mass. 2020) (“Although the general specter of government tracking could provide an additional incentive to appear in court on specified dates, the causal link in this case is too attenuated and speculative to justify GPS monitoring.”); State v. Grady, 831 S.E.2d 542, 568 (N.C. 2019) (finding a lifetime electronic monitoring condition unreasonable under the Fourth Amendment because the state “did not present any evidence tending to show the . . . program’s efficacy in furthering the State’s legitimate interests”); Doe v. Bredesen, 507 F.3d 998, 1012 (6th Cir. 2007) (Keith, J., dissenting) (noting that the electronic monitoring device will not prevent an individual from committing crime, and instead may cause panic, assaults, harassment, and humiliation by functioning as a “modern day scarlet letter”).}

\footnote{114}{Paul Heaton, Sandra Mayson & Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. 711, 720, n.35 (2017).}
constant and indefinite monitoring solely because of an individual’s inability to pay.\textsuperscript{115}

Data on the duration of these requirements is not widely reported, and the duration varies by jurisdiction. In Chicago, a recent report notes that over 1,000 people have been on electronic monitors for over a year.\textsuperscript{116} While data is not available for many jurisdictions, it is likely that such lengthy electronic monitoring sentences are standard across the country, especially during the COVID-19 pandemic. Most jurisdictions allow electronic monitoring for the entirety of the pretrial period, which ends up functioning as the default period for any electronic monitoring imposed.\textsuperscript{117} Studies show that the average time for disposition across the country was over 250 days for a felony and almost 200 days for a misdemeanor.\textsuperscript{118} The time required to resolve cases also has increased dramatically during the COVID-19 pandemic as many jurisdictions have suspended speedy trial rights and face large backlogs.\textsuperscript{119}


\textsuperscript{117} Id.; see also Keith Cooprider, A Descriptive Analysis of Pretrial Services at the Single-Jurisdictional Level, 78 FED. PROBATION J. 9, 12 n.6 (2014) (noting that, as with many blanket conditions of pretrial release where the case officer has an option to remove the condition at a later date, “what tends to happen is an attitude best expressed as: ‘… if it works, leave it alone.’”); Sanchez, 2014 WL 3421003, at *8 (noting that, where electronic monitoring conditions are “working well,” “[The Court doesn’t] like to touch them unless everybody is sort of in agreement that something has changed to reduce the risk”).


Moreover, pretrial bail decisions, including imposing electronic monitoring conditions, are plagued by the same bias that permeates the criminal and immigration systems, thus subjecting Black and other marginalized communities to higher degrees of mass surveillance. Decisions about release and bail conditions depend on a judge’s perception of dangerousness, and the fear that someone on bail may commit additional criminal activity plays an outsized role in judges’ decisionmaking. As a result, Black, Latinx, migrant, or LGBTQ individuals often face biases and difficulty securing release without onerous monitoring conditions. Some jurisdictions have turned to pretrial risk assessment instruments, presenting them as a method that can help calculate “dangerousness.” Advocates have labeled electronic monitoring and other restrictive monitoring conditions as the “newest Jim Crow” or the “Black

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120 See, e.g., CHICAGO APPLESEED, supra note 116, at 5 (“Only 23 percent of the total Cook County population is Black, but 74 percent of those on electronic monitoring . . . are black.”).  
121 Ball, supra note 87, at 889–95; see also Shima Baradaran & Frank L. McIntyre, Predicting Violence, 90 Tex. L. Rev. 497, 558 (2012).  
122 See David Arnold, Will Dobbie & Crystal S. Yang, Racial Bias in Bail Decisions, 133 Q.J. of Econ. 1885, 1889, 1922–28 (2018) (discussing judges’ implicit bias and racially biased prediction errors based on racial stereotypes); see also Sharita Gruberg, No Way Out: Congress’ Bed Quota Traps LGBT Immigrants in Detention, CTR. FOR AM. PROGRESS (May 14, 2015), https://www.americanprogress.org/issues/lgbtq-rights/news/2015/05/14/111832/no-way-out-congress-bed-quota-traps-lgbt-immigrants-in-detention/ (noting that ICE officers overrode the risk assessment tool and chose to detain two out of every three LGBT migrants for whom the tool recommended release); see also L. Song Richardson, Arrest Efficiency and the Fourth Amendment, 95 Minn. L. Rev. 2035, 2046–48 (2011) (noting that individuals are more likely to find Black individuals violent than white individuals participating in identical behavior); see also Justin D. Levinson & Danielle Young, Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence, 112 W. Va. L. Rev. 307, 310 (2010) (finding that mock jurors were significantly more likely to find ambiguous evidence to be indicative of guilt for Black defendants).  
123 See Sandra Mayson, Bias In, Bias Out, 128 Yale L.J. 2118, 2228–30 (2019).  
124 See id. at 2229; Sean Allan Hill II, Reading Bail Reform Through a Critical Race Lens, LAW & POL. ECON. PROJECT: LPE BLOG (Feb. 14, 2020), https://lpeproject.org/blog/reading-bail-reform-through-a-critical-race-lens/ (noting that individuals are more likely to find Black individuals violent than white individuals participating in identical behavior); see also Jason Borenstein, The Death Penalty: Conceptual and Empirical Issues, 2 Cardozo Pub. L. Pol’y & Ethics J. 377, 391 (2004) (“[I]t has repeatedly been shown in the psychological and psychiatric literature that dangerousness assessments are notoriously unreliable.”).  
“Codes of Bail,” designed to limit freedom and to control, exploit, and destabilize Black people trapped in the pretrial system.126

2. Immigration System

The immigration system also began to explore alternatives to detention in the 1980s and 1990s. These early programs did not use any electronic monitoring and instead relied on case management and support services. Community organizations, including the Lutheran Immigration and Refugee Service (LIRS) and others, established small, local programs that operated as alternatives to detention largely for those who had final orders but who could not be deported or for arriving asylum seekers with few ties to the community.127 From 1997–2000, the Vera Institute for Justice ran a pilot program that supervised three groups: asylum seekers, undocumented workers, and people convicted of crimes and facing removal.128 Their services included case management—referring participants to pro bono lawyers, obtaining interpreters, accompanying individuals to a court or other government and immigration offices, and connecting individuals with social, medical, and educational services—in addition to explaining the benefits of appearing and consequences of nonappearance.129 Vera reported that the program was effective at increasing appearance rates—91 percent of participants on Vera’s intensive supervision attended all required hearings compared to 71 percent of noncitizens released on bond or parole.130

Electronic monitoring became a part of the immigration system’s Alternatives to Detention (ATD) program in 2004 when Congress appropriated funding to the newly-created Department of Homeland Security for two new programs—the Electronic Monitoring Device Program (EMP) and the Intensive Supervision


129 Id. at 15–17, 57–58.

130 Id. at 3–4.
ICE awarded the ISAP contract to Behavioral Interventions (BI) Inc., rejecting a bid from Vera to expand its pilot program. Both the EMP and ISAP contractors utilized electronic location monitoring, with ISAP utilizing GPS monitors and EMP utilizing radio-frequency monitors, devices designed to ensure someone remained at home during designated curfew hours. The programs were consolidated into a nationwide program (ISAP II) in 2009, and BI, Inc. was again awarded the contract.

Electronic monitoring in the immigration system has continued to grow under DHS’ contracts with BI, Inc.—now owned by the GEO Group, one of the nation’s largest private prison corporations. The ISAP program monitors individuals whom ICE assigns to one of three technologies—GPS monitoring, telephone call-in reporting, or, since 2018, a smartphone application that reports location and photo data, SmartLINK. BI, Inc. has been awarded four contracts since 2004, including contracts in 2014 (“ISAP III”) and 2020 (“ISAP IV”), to continue and dramatically expand the ISAP program.

ICE has steadily grown its ISAP program, with a large portion of the population required to participate in some form of electronic monitoring. In 2015, ICE reported 26,625 people enrolled in the ISAP program; that number increased by almost 300 percent, with over 100,000 people by 2019, and then tripled again to more than 320,000 people by the end of 2022. ICE data from the end of the 2019 fiscal year shows 26,625 people enrolled in the ISAP program; that number increased by almost 300 percent, with over 100,000 people by 2019, and then tripled again to more than 320,000 people by the end of 2022. ICE data from the end of the 2019 fiscal year.

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131 LUTHERAN IMMIGR. AND REFUGEE SERV., supra note 127, at 29.
132 Id.
133 Id. at 29–30.
134 Id. at 31.
137 GEO GRP., INC., ANNUAL REPORT (FORM 10-K) 6, 136–37 (2014), https://www.sec.gov/Archives/edgar/data/923796/000119312515062920/d861850d10k.htm [https://perma.cc/V178-ZFKM] (explaining that ISAP III was expected to generate approximately $47 million in revenue annually); see CoreCivic, Inc., B-418620, 2020 WL 4346850 (Comp. Gen. July 8, 2020) (highlighting that ISAP IV was awarded based on BI’s total price of $2.6 billion for the five-year contract term).
138 SINGER, supra note 136, at 7.
showed that two-thirds of ISAP enrollees were on GPS monitors. In recent years, the majority of those enrolled in ISAP were required to participate in SmartLINK. By the end of the fiscal year 2021, there were approximately 30,000 individuals wearing ankle monitors and just under 80,000 reporting via SmartLINK; by the end of 2022, data showed 9,324 wearing ankle monitors and more than 250,000 reporting via SmartLINK, adding over 175,000 SmartLINK enrollees in a year.

A DHS official also noted that the Biden administration plans to ask Congress for funding to place as many as 400,000 individuals in alternatives to detention programs, including a new home confinement pilot program that would require individuals to remain in their homes from 8:00 pm to 8:00 am every day.

Beyond general data about the number of participants on each form of monitoring and the average length of time in ISAP, ICE does not regularly report other participant data. But the data it has reported confirms that the program is comprised largely of Latinx migrants who have not yet been ordered removed. As of 2018, 86 percent of ISAP participants were released pretrial, with no final order of removal, and 90 percent had no criminal convictions. The vast majority of

See FY 2019 Detention Statistics, IMMIGR. & CUSTOMS Enf’t, https://www.ice.gov/detain/detention-management [https://perma.cc/2FN8-DEJD] (last visited Sept. 20, 2022) (showing that at year end count, 55,677 individuals were enrolled in GPS monitoring, with a total of 83,186 enrollees) (scroll down to “Detention Statistics” and click “Previous Year-End Reports” to find the download link). While there were some declines in total population from the peak in 2019, this is likely attributable to the Trump administration’s policies restricting entry to many asylum seekers at the southern border—many of whom had previously been placed on ankle monitors after crossing the border and being paroled into the United States. See Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration, U.S. DEP’T HOMELAND SEC. (Dec. 20, 2018) https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration [https://perma.cc/ARA9-W3E6]; see also GEO GRP., INC., ANNUAL REPORT (FORM 10-K) 59 (2020), https://sec.report/Document/0001564590-21-006003/ge0-10k_20201231.htm [https://perma.cc/9ZX5-JFZE] (“We also experienced a decrease of $8.6 million due to decreases in average client and participant counts under our ISAP services as a result of policy changes by the administration which reduced the number of enrollments at the southern border.”). There is no reason to believe that these changes impacted the group of individuals released on pretrial bond.


See FY 2022 Detention Statistics, supra note 139.

Ted Hesson, U.S. to Try House Arrest for Immigrants as Alternative to Detention, REUTERS (Feb. 8, 2022, 12:03 PM), https://www.reuters.com/world/us/us-try-house-arrest-immigrants-alternative-detention-2022-02-08/ [https://perma.cc/MRM7-UGQS]. While some individuals, including those under various court orders, have been subject to some sort of home confinement and curfew, this marks the first formal ICE program requiring this condition. The Big Picture, BORDER/LINES (Feb. 11, 2022), https://borderlines.substack.com/p/administration-to-implement-pilot [https://perma.cc/3ELZ-VQR3].

SINGER, supra note 136, at 8. 136
enrollees (71 percent in 2018) were from the Northern Triangle countries of Guatemala, Honduras, and El Salvador, 17 percent were from Mexico, and the remaining 12 percent were from all other countries.145

While ICE has recognized the effectiveness of case management programs without electronic monitoring, it has not created programs that are available to most individuals awaiting trial. ICE operated a smaller Alternatives to Detention program called the Family Case Management Program (FCMP) for vulnerable families beginning in January 2016.146 The program was designed to run for five years, but instead, it was terminated after only a year and a half.147 It was premised on a model of comprehensive case management and did not utilize electronic monitoring.148 Multiple nonprofit organizations submitted bids, including LIRS, but ICE selected a different subsidiary of GEO Group as the contractor.149 ICE also modified the contract to require GEO Group to subcontract with community organizations to fulfill the program’s goals—thereby reducing the number of families served and increasing the cost per family.150 While the program boasted an extremely high court appearance rate of 99 percent, ICE terminated the contract solely because of the higher cost relative to ISAP.151 ICE announced in early 2022 a desire to start a similar program but only for young adults (18 and 19 years old), explicitly noting that—in contrast to its other alternative to detention programs—this program “will not include GPS or other monitoring technology.”152

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145 Id.
146 Id. at 10.
148 WOMEN’S REFUGEE COMMISSION, supra note 147, at 6; OFF. OF INSPECTOR GEN., supra note 147, at 6.
150 SINGER, supra note 136, at 11–13; see also OFF. OF THE INSPECTOR GEN., supra note 147, at 5–6; WOMEN’S REFUGEE COMMISSION, supra note 147, at 5.
151 SINGER, supra note 136, at 13.
152 ICE, Young Adult Case Management Program, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (JAN. 28, 2022, 2:57 PM), https://sam.gov/opp/8cfcc382debc7414ca1cf60299d72ena51/view [https://perma.cc/XF7S-ZYB8]. The GEO Group has expressed to its investors that it believes it is “well-positioned for this procurement given the ICE unparalleled expertise and skills.” Motley Fool Transcribing, The Geo Group (GEO) Q4 2021 Earnings Call Transcript, MOTLEY FOOL (Feb. 17, 2022, 9:30 PM), https://www.fool.com/earnings/call-transcripts/2022/02/17/the-geo-group-geo-q4-2021-earnings-call-transcript/ [https://perma.cc/M92G-8LJ8].
Individuals also face increasing amounts of time on electronic monitoring conditions. ISAP enrollees averaged approximately a year in the program at the end of 2019, which increased to 816 days on average by the end of 2020. The average reported time in ISAP has declined more recently in 2021 and 2022, but this decline corresponds with a dramatic increase in the overall ISAP population. ICE has more than doubled the population in ISAP from 2021 to 2022, with more than 185,000 new enrollees; this massive influx of new participants in such a short time span has thus driven down the average length of time in the program. In a report to Congress in April 2022, ICE reported that individuals remain in ISAP for an average of 14 to 18 months, not the duration of their full case, and thus that ICE would “continue to have challenges on reporting on the program’s effectiveness unless the agency receives sufficient resources to keep individuals enrolled in ISAP through resolution of their immigration cases.”

ICE noted that it was “exploring the use of a significant portion of the program resources to place a smaller number of individuals on ISAP throughout their immigration process,” a timeline that currently can extend more than five years.

ICE officers have significant discretion to decide whether to release an individual and, if so, what conditions to impose—no judge is involved in these decisions. ICE officers have discretion to decide whether to require enrollment in

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153 Though this data includes all individuals in ISAP—including telephone reporting in addition to those on GPS monitors and SmartLINK—it provides helpful insight into the length of time individuals are monitored. ICE moves participants between the monitoring programs in its discretion, with no clear factors guiding that decision. See infra notes 159–160 and accompanying text. Indeed, it has used the SmartLINK program and likely the telephone reporting as a “step down” from GPS monitoring. See JUST FUTURES LAW & MIJENTE, ICE DIGITAL PRISONS 7 (2021), https://www.flipsnack.com/justfutures/ice-digital-prisons-1w8y3md1j/full-view.html [https://perma.cc/F7SQ-CNR6]. There are also reports that BI employees were encouraged to use SmartLINK with individuals on other forms of monitoring, blurring the lines between these three supervision categories. See Bhuiyan, infra note 158.

154 See FY 2021 Detention Statistics, supra note 141 (average of 615 days in ISAP); see also FY 2022 Detention Statistics, supra note 139 (average of 348 days in the program).

155 See FY 2021 Detention Statistics, supra note 141; see also FY 2022 Detention Statistics, supra note 139.


157 Id. at 11.

ISAP, whether to impose a GPS monitor or other monitoring technology, and when an individual may transition to a less-intrusive form of supervision. These decisions do not require written reasoning or the consideration of any specific factors. Indeed, though Congress has required DHS to report on “ICE guidance for referral, placement, escalation, and de-escalation decisions in ATD programs,” ICE has only responded that it is a “case-by-case” decision where individual officers consider “several factors,” providing examples including “criminal and immigration history, supervision history, family and/or community ties, status as a caregiver or provider, and other humanitarian or medical considerations.” BI employees also reported it was up to individual employees to recommend de-escalation, and even for employees motivated to submit such requests, only about 20 percent were approved.

In sum, these pretrial monitoring programs fit within a larger trend of governments focusing criminal and immigration prosecution resources on the prevention of future crime, with programs designed to assert control over anyone thought to be a threat to social order. While many of these systems are branded as an alternative to mass incarceration, they are better considered part of what Professor Fiona Doherty calls the “continuum of excessive penal control.”

II. ASSESSING THE PURPORTED BENEFITS OF ELECTRONIC MONITORING

Proponents of electronic monitoring offer four general benefits to using this technology to monitor individuals released on bail: (A) satisfying government interests in court appearance and public safety; (B) satisfying goals of decarceration; (C) saving money compared to detention; and (D) providing a more humane alternative to detention. As explored more fully below, none of these benefits is substantiated. Instead, the burdens on individuals shackled with these monitors far outweigh the benefits.

159 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(c)(8); 8 C.F.R. § 1236.1(c)(8); see also Detention Management, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/detain/detention-management [https://perma.cc/H8JB-GXKG] (last visited Sept. 30, 2022). ICE maintained that it alone could impose these conditions, but the Board of Immigration Appeals and federal courts have recognized that immigration judges have authority to impose non-monetary conditions of release as well. See, e.g., In re Garcia-Garcia, 25 I. & N. Dec. 93, 98 (BIA 2009); Hernandez v. Sessions, 872 F.3d 976, 991–93 (9th Cir. 2017). See generally Mary Holper, Immigration E-Carceration: A Faustian Bargain, 59 SAN DIEGO L. REV. 15–16 (2022).

160 ISAP FY2020 REPORT TO CONGRESS, supra note 156, at 3.

161 Bhuiyan, supra note 158.

162 Carol S. Steiker, Foreword: The Limits of the Preventive State, 88 J. CRIM. L. & CRIMINOLOGY 771, 774–75 (1998); see also Sandra G. Mayson, Collateral Consequences and the Preventive State, 91 NOTRE DAME L.J. 301, 331 (2015).

A. Government Interests in Appearance and Public Safety

The Supreme Court has recognized two compelling government interests in bail decisions—public safety and preventing flight.164 When individuals are assigned to electronic monitoring, it is largely based on a generalized theory that electronic monitors generally boost these two interests,165 but studies do not support this theory. Rather, this research demonstrates that there is no evidence to support the effectiveness of pretrial electronic monitoring conditions.166 Review of some of the individual studies helps further illuminate these findings.

165 Jyoti Belur, Amy Thornton, Lisa Tompson, Matthew Manning, Aiden Sidebottom & Katie Bowers, A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders, J. of CRIM. JUST. 68 at 8–9, 15 (2020), https://openresearch-repository.anu.edu.au/bitstream/1885/220330/1/1-s2.0-S004723522030026X-main.pdf [https://perma.cc/T6BS-P7H4] (finding that evidence showed increased recidivism for those on pre-trial ankle monitors and, even in the post-trial studies, “[t]here is limited evidence . . . to enable confident identification of the mechanisms that produced the effect of EM on [reducing] recidivism’); see also CRIM. JUST. COORDINATING COUNCIL FOR THE DIST. OF COLUMBIA & URBAN INSTITUTE, THE RISK PRINCIPLE IN ACTION: RIGHT-SIZING SUPERVISION MONITORING FOR HIGH AND LOW RISK OFFENDERS, MEETING SUMMARY (2010), https://cjcc.gov/sites/default/files/dc/sites/cjcc/release_content/attachments/19929/Risk%20Principle%20Symposium%20Meeting%20Summary.pdf [https://perma.cc/CRT2-V22Q] (noting perceptions of GPS monitoring as “a ‘wonder bracelet’ that prevents offenders from recidivating’); Joseph Darius Jaafari, Illinois Puts Ankle Monitors on Thousands. Now It Has to Figure Out Who Gets Tracked—and Why, JUST. LAB (July 15, 2019), https://www.themarshallproject.org/2019/07/15/illinois-puts-ankle-monitors-on-thousands-of-people-now-it-has-to-figure-out-exactly-who-gets-tracked-and-why? [https://perma.cc/39C2-SLR2] (noting that the parole board “struggled to answer some pretty basic questions about who was using their program, why they were putting certain people on electronic monitoring, how they were making those decisions and what the results were’); Matthew DeMichele, Electronic Monitoring: It Is a Tool, Not a Silver Bullet, 13 CRIMINOLOGY & PUB. POL’Y 393, 397 (2014) (“[Electronic monitors] are not a silver bullet or panacea. Instead, if electronic monitoring is going to be used, then policies and research should identify how this component is embedded within larger supervision goals and missions.”).
166 See, e.g., Marc Renzema & Evan Mayo-Wilson, Can Electronic Monitoring Reduce Crime for Moderate to High-Risk Offenders? 1 J. EXPERIMENTAL CRIMINOLOGY 215 (2005); MARIE VANNOstrand, KENNETH ROSE & KIMBERLY WEIBRECHT, PRETRIAL JUST. INST., STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 27 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PJI_PrettrialRiskAssessment.pdf [https://perma.cc/QD3B-QC5S]; Karla Dhungana Sainju, Stephanie Fahy, Booz Allen Hamilton, Katherine Baggaley, Ashley Baker, Tamar Minassian, & Vanessa Filippelli, Electronic Monitoring for Pretrial Release: Assessing the Impact, 82 FED. PROB. 3 (2018); Belur et al., supra note 165, at 8–9 (finding support that electronic monitoring reduced recidivism when imposed after conviction, but that only pretrial electronic monitoring increased recidivism). These studies also largely involve GPS trackers and other location tracking devices; smartphone apps have received even less research attention.
The earliest pretrial studies showed worse pretrial outcomes—more failures to appear, rearrests, or both—for those released on electronic monitoring. While one early study in Mesa County, Arizona, showed that those on electronic monitoring had fewer failures to appear, the authors admitted that the decrease may have been due to a program that placed calls to remind participants of their court hearing the next day—an intervention that has been shown to be successful in reducing failures to appear in other jurisdictions. Indeed, in another study that compared electronic monitoring with other pretrial support, researchers found GPS monitoring was no more or less effective than traditional, non-technology-based supervision.

Two recent studies, in the Federal District of New Jersey and California’s Santa Clara county, purported to show some positive results for those on electronic monitoring. Their findings actually point in different directions, with one showing improvements only in court appearances and the other showing improvements only in public safety; neither purported to show an overall success in individuals on electronic monitoring remaining out of detention during the pretrial period. The New Jersey study indicated that those on electronic monitoring had fewer rearrests for new criminal activity than those released without electronic monitoring, with no effect on the failure to appear rate. But, for those on GPS location monitors specifically (as opposed to those on radio frequency monitoring), the authors noted a significant increase in technical violations, some of which led to bond revocation. The Santa Clara study showed a decrease in failure to appear rates for the group on electronic monitoring; no effect on rearrests for new criminal activity; and a significant increase in technical violations. The authors noted that each of

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169 VANNOSTRAND ET AL., supra note 166, at 15–20; Alissa Fishbane, Aurelie Ouss, & Anuj K. Shah, Behavioral Nudges Reduce Failure to Appear for Court, 370 Science 682, 682–684 (demonstrating that reminder text messages reduced failures to appear by 21 percent).


172 Wolff et al., supra note 171, at 12–13; Sainju, supra note 166, at 7.

173 Wolff et al., supra note 171, at 12–13.

174 Id. (finding it impossible to differentiate between technical violations that led to bail revocation and detention and those that did not).

175 Sainju, supra note 166, at 7.
these outcomes was mutually exclusive: either a defendant had successfully completed probation or was revoked for one of the three reasons. Overall, similar numbers for each group had unsuccessful outcomes and had their bail revoked.

The Department of Homeland Security has provided little data on whether electronic monitoring in the immigration system effectively prevents flight and promotes public safety, and what it has produced shows mixed messages. Between 2010 to 2012, ICE reported that the rates at which ISAP II participants absconded and were arrested for criminal acts declined each year, and from 2011 to 2013, reported a 99 percent appearance rate (95 percent at a final hearing) for those with scheduled court hearings. However, this measured only those who were on “full-service” reporting, including additional case management services and home and office visits, and not those on “technology-only” (monitoring only), who composed 39 percent of the overall program participants in 2013. Also, during much of this time period, ICE also instructed field offices to remove GPS monitors from individuals out on pretrial bond who were complying with the terms of release for two reasons: ICE believed it was not feasible to continue GPS monitoring over the years it would take to complete the removal proceedings, and that those who were already compliant and had a court date would be less likely to flee before their hearing. It did not continue to track these individuals’ compliance and appearance rates after they were removed from monitoring. DHS recently reported that the rate of non-compliance and absconders from the alternatives to detention program has increased over the years, though its data has been inconsistent and sparse.

176 Id. at 5.
177 Id. at 8. Sixty-five individuals were revoked in the control group and 62 in the electronic monitoring group.
180 Id.
181 Id. of the Inspector Gen., supra note 178, at 7.
182 Id. at 7–8.
183 U.S. DEPT. OF HOMELAND SEC., U.S. IMMIGR. AND CUSTOMS ENF’T BUDGET OVERVIEW 153 (2022), https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf [https://perma.cc/4BRD-LUHE]. DHS reported an absconder rate of 22.6 percent in 2019, though it attributed the highest rates of flight not to the population on pretrial bail, but to those who have final orders of removal as well as those who have recently arrived to the U.S. and lack family ties—most of whom are released on parole rather than bail. Id. In its April 2022 report to Congress, ICE reported different “failure” rates from the ISAP program, noting a failure rate (including both non-compliance and absconding) in 2019 of 27.2 percent and a rate of 40.3 percent in 2020. See ISAP FY2020 REPORT TO CONGRESS, supra note 156, at 6. ICE did not provide any data that
includes claims in a leaked draft ISAP report from the Trump administration alleging that, for the small number of individuals in 2019 who ICE required to report to ISAP during the full duration of their immigration case, nearly 90 percent absconded from the program. Very recently, in the beginning of fiscal year 2023, ICE has begun to report court appearance rates for some undefined subset of ISAP participants “with court tracking assigned,” but again has failed to explain what type of monitoring is represented in this data or how it compares to the appearance rates for those not being monitored. ICE data, therefore, does not provide support for the notion that monitoring is effective at satisfying the government’s interests in preventing flight or risk to public safety.

Other non-governmental studies confirm that those awaiting immigration proceedings—especially those with community and legal support—attend their hearings. As noted above, the Family Case Management Program reported 99 percent compliance rates with immigration check-ins and court appearances—only one of the over 900 participants missed a hearing during the duration of the program. Three community-based programs boasted appearance rates of 96 to 97 percent; a fourth reported rates of 100 percent. Vera’s pilot program also reported appearance rates of 91 percent, compared to overall appearance rates of 71 percent. Data collected from legal services providers also showed fairly consistent

would allow comparison between the rates of failure of those in ISAP programs and those without any monitoring requirements, nor did it separate out individuals on GPS monitoring or SmartLINK from those reporting by telephone.

U.S. IMMIGR. AND CUSTOMS ENF’T, INTENSIVE SUPERVISION APPEARANCE PROGRAM (ISAP), FIRST SEMIANNUAL FISCAL YEAR 2018–2020 REPORT TO CONGRESS at iii (2020), https://cis.org/sites/default/files/2022-05/571131207-ICE-report-on-ISAP.pdf [https://perma.cc/RASZ-6L53]. The report includes this and other edits made with the track changes feature designed to support the claim that “increased detention is the only way to ensure compliance with the immigration court system for the majority of illegal aliens in the United States.” Id. The final version does not contain this data or argument. ISAP FY2020 REPORT TO CONGRESS, supra note 156, at 1.


See supra text accompanying notes 146–151.

ISAP FY2020 REPORT TO CONGRESS, supra note 156, at 10.


VERA INST. OF JUST., supra note 128, at 3–4. 128
and high rates of appearance between groups of clients with and without electronic monitoring requirements: 98 percent of their clients without electronic monitors attended all hearings and ICE check-ins, compared to 93 percent of their clients with electronic ankle monitors.\footnote{191 See Tosca Guistini, Sarah Greisman, Peter L. Markowitz, Ariel Rosen & Zachary Ross, Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles, CARDozo SCH. L. 1, 26 (2021).} An analysis of ICE data from 2008 to 2018 also shows that 83 percent of all non-detained immigrants attended all of their court hearings, including 96 percent of those who were represented by a lawyer.\footnote{192 INgrid EAGLY & Steven Shafer, Measuring In Absentia Removal in Immigration Court 4 (Jan. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/measuring_in_absentia_in_immigration_court.pdf [https://perma.cc/RU55-FC3V].} Moreover, it found that 15 percent of removal orders issued because of the noncitizen’s failure to appear were successfully overturned, demonstrating that these individuals’ failure to appear was due to hardship or failure to receive notice of the hearing.\footnote{193 Id.}

prohibits bail for anyone with criminal convictions that fit the definitions of aggravated felonies (including any crime of violence), controlled substance offenses, firearm offenses, and crimes involving moral turpitude; data confirms that 90 percent of ISAP enrollees have no criminal convictions. Moreover, ICE’s identified priorities for enrollment in ISAP include those with final orders of removal who are a danger to the community or who have committed crimes while on supervision; its only priority category for those in removal proceedings is those at “high risk of absconding.”

There is no evidence that electronic monitoring generally satisfies government interests in controlling the risks of flight and to public safety. Government data and statements confirm that they largely do not believe electronic monitoring has any impact on these risks. Thus, the government should face a difficult burden in proving that pretrial electronic monitoring is appropriate for any individual case.

B. Decarceration

Proponents of electronic monitoring also argue it serves to decrease the number of people incarcerated pretrial. But these benefits have not been realized. First, electronic monitoring is still a form of carceral control, and individuals required to wear a monitor experience harms very similar to physical detention. Individuals reported physical and psychological harm, stigma, isolation, restricted movement, and economic hardship similar to those reported by people in detention. This includes individuals reporting via SmartLINK, who report stress about scheduled and unscheduled check-ins, including taking time off of work to

196 8 U.S.C. § 1226(c).
199 Id. § 1227(a)(2)(C).
200 Id. § 1227(a)(2)(A)(i)–(ii).
201 SINGER, supra note 136, at 8.
202 OFF. OF INSPECTOR GEN., supra note 178, at 4. The “risk of absconding” may change over the life of the case—for instance, if an individual in immigration proceedings receives a removal order and pursues an appeal to the Board of Immigration Appeals that has little chance of success. But even in these instances, it appears ankle monitors would not help mitigate risk, given the ability for individuals to cut off monitors if they want to flee. See Hager, supra note 194.
comply with the requirements, about ICE and BI, Inc. accessing data in their phone, about putting their family members and friends at risk, and ultimately of being at risk of ankle monitoring or detention if they missed a notification.\footnote{205 Mijente, Freedom for Immigrants, GLAHR, Just Futures L., Boston Immigr. Justice and Accountability Network, Resistencia, Cmyt. Justice Exch., Envision Freedom Fund, Detention Watch Network, Organized Cmty. Against Deportations et al., Tracked & Trapped: Experiences from ICE Digital Prisons 13, 33 (2022) [hereinafter Tracked & Trapped]; Sofia Mejías-Pascoe, ICE Uses Cellphones to Track Thousands in San Diego, Imperial Counties, INewssource (May 23, 2022), https://inewssource.org/2022/05/23/immigrants-under-smartphone-surveillance/ [https://perma.cc/QX4N-SXDL]; Giulia McDonnell Nieto Del Río, Meet SmartLINK, the App Tracking Nearly a Quarter Million Immigrants, Documented (June 27, 2022), https://documentedny.com/2022/06/27/smartlink-app-tracking-immigrants-ice-privacy/ [https://perma.cc/6FGY-E7GA].}

There is also no evidence that electronic monitoring has led to decarceration. Pretrial detention has continued to increase as electronic monitoring also expanded.\footnote{206 Sawyer & Wagner, supra note 84 (showing the increase of pretrial detentions since the 1980s); Eunice Hyun hye Cho, Tara Tidwell Cullen & Clara Long, Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration 14 Fig.1 (2020), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2020-04/Justice-Free%20Zones_Immigrant_Detention_Report_ACLU-HRW-NIJC_April-2020.pdf [https://perma.cc/TDS8-EHLY] (reporting, pre-COVID-19 pandemic, the steady increase in detention rates since the 1990s). While the average daily detention population decreased between early 2020 and 2021, numbers appear to be rising again above the pre-COVID-19 pandemic rates. See César Cuauhtémoc García Hernández, ICE Prison Population Returns to Pre-Pandemic Levels, Crimmigration (July 21, 2021, 11:35 AM), http://crimmigration.com/2021/07/21/ice-prison-population-returns-to-pre-pandemic-levels/ [https://perma.cc/BS3N-G3MF].} Jurisdictions are using monitoring as “added security” for people who they would have released rather than as a tool to release additional people from jail.\footnote{207 See The Dilemma of Bond, Bond Conditions and Electronic Monitoring, WBTV (May 4, 2017, 6:23 PM), https://www.wbtv.com/story/35296191/the-dilemma-of-bond-bond-conditions-and-electronic-monitoring/ [https://perma.cc/FQ4T-58WU]; see also Remkus, supra note 103 (“[I]f the technology didn’t exist, many of the people in Baldwin County would be free to lead their lives out on bail pending trial.”).} The Council of Europe has also observed that electronic monitoring can be particularly “net-widen[ing]” when used at the pretrial stage; different jurisdictions apply these conditions based on different levels of risk, resulting in many individuals wearing electronic monitors who would not otherwise have been at risk of custody.\footnote{208 Eur. Consult. Ass., Recommendation CM/Rec(2014)4 and Explanatory Memorandum (2014); Scottish Gov’t, Electronic Monitoring: Uses, Challenges and Successes 45 (2019), https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2019/04/electronic-monitoring-uses-challenges-successes/documents/electronic-monitoring-uses-challenges-successes/electronic-monitoring-uses-challenges-successes/electronic-monitoring-uses-challenges-successes/}
Even during the COVID-19 pandemic, jurisdictions using electronic monitoring reported an initial dip in pretrial detention rates, but those detention rates quickly returned to their earlier numbers.209 Rather, most of those now released on electronic monitoring conditions are not individuals who would have remained in detention before the expansion of these monitoring programs, but instead would likely have been released without such conditions.210 Indeed, GEO Group’s CEO reported to investors in 2022 that there is no reason to think that increased ISAP participation rates should correspond to fewer noncitizens in detention; the populations were “totally separate” and both had experienced “steady growth.”211

Finally, electronic monitoring has itself increased detention. As noted above, studies have shown an increase in technical violations for those being monitored.212 Defects in monitoring technology have also led to incarceration, including inaccurate locations and batteries that fail to maintain a charge.213 ICE has also used
electronic monitors to track the users’ locations and conduct immigration raids, leading to the arrest and detention of many additional individuals accused of unlawful presence and employment.\textsuperscript{214} While electronic monitoring is advertised as a method to reduce incarceration, there is little evidence to support this claim, and it may, in fact, create additional arrests and jail time for those monitored.

\textbf{C. Cost Savings}

Advocates also tout the financial savings that could result for jurisdictions that implement electronic monitoring as an alternative to detention.\textsuperscript{215} There is no evidence showing that these benefits have materialized. First, as noted above, jurisdictions adopting electronic monitoring have largely failed to decrease their jail populations significantly.\textsuperscript{216} When individuals who would have previously been released from detention are instead placed on monitoring, the costs actually increase.\textsuperscript{217} Even where jail populations have periodically declined, temporary


\textsuperscript{215}Blasco, supra note 203, at 713–14; Wiseman, \textit{Pretrial Detention}, supra note 203, at 1404.

\textsuperscript{216}See supra notes 206–210 and accompanying text.

\textsuperscript{217}Brian K. Payne, \textit{It’s a Small World, but I Wouldn’t Want to Paint It: Learning from Denmark’s Experience with Electronic Monitoring}, \textit{13 Criminology & Pub. Pol’y} 381, 385 (2014) (“If the tool is replacing a prison sentence, then cost savings occur, but if it is enhancing probation or parole sanctions, then the costs of punishing offenders increase.”).
reductions in jail populations do not result in large savings for the government, as the fixed costs of physical and systems infrastructure—including building costs, staff, and service costs—remain static.\textsuperscript{218}

Additionally, comparing per-day costs of monitoring against per-day costs of incarceration also often fails to account for the lengthier amount of time individuals may spend on pretrial monitoring as opposed to pretrial detention.\textsuperscript{219} Moreover, governments attempt to cut their own costs by passing significant costs onto individuals; thus, any accounts of government cost savings present only part of the picture. In many criminal courts, individuals must pay for their own ankle monitors, often at the cost of up to $10 to $20 per day.\textsuperscript{220} Fixed detention costs, new spending on electronic monitoring programs, and costs passed onto the monitored all mean that electronic monitoring does not, in fact, save money.

**D. Humane Alternative to Detention**

Finally, advocates of electronic monitoring argue that it is a more humane alternative to detention, allowing individuals some measure of stability in remaining connected to their community and maintaining employment.\textsuperscript{221} Many courts see electronic monitoring as not infringing on any liberty interests at all but merely functioning as a very attentive and effective pretrial supervision officer.\textsuperscript{222} These


\textsuperscript{220} Kofman, *supra* note 194; see also Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 162 (2022) [hereinafter Weisburd, *Punitive Surveillance*] (noting that electronic monitoring “[f]ees vary widely, from $1.50 per day to $47 per day.”).

\textsuperscript{221} See, e.g., AM. PROB. & PAROLE ASS’N, *supra* note 213 (distinguishing incarceration from electronic monitoring because those incarcerated are “truly deprived of their freedom,” and incarceration significantly impacts “physical health, mental health, relationships, and prospects for future employment . . . .”).

\textsuperscript{222} See, e.g., United States v. Dokku, No. 3:18-CR-341-S (1), 2020 WL 2065633, at *4 (N.D. Tex. Apr. 28, 2020) (explaining that “the electronic monitoring condition does not affect or restrict his liberty: it is only a means the Court chose to enforce the location restriction requirement that it concluded was necessary to reasonably assure Dokku’s
accounts ignore the harms articulated by those required to wear electronic monitors and ignore the fact that many individuals will wear these monitors for years until their trial date. Some of these harms include restricted movement, limited job opportunities, and the social, psychological, and physical harms that stem from monitoring—each explored here.

1. Movement and Activity Restrictions

Electronic monitoring conditions generally include limitations on movement. This can range from house arrest, curfews, location restrictions (such as remaining within the state or a certain number of miles from home), or requiring prior approval to leave home. These restrictions cause social isolation and rifts in familial and other supportive relationships, as individuals may be prevented from visiting family members in certain locations, having houseguests, or having certain living arrangements.

[https://perma.cc/F22C-ENTQ]. This is also true with smartphone monitoring like SmartLINK, as BI reports they can “verify client identity and location through fixed or randomly scheduled check-ins[,] enabling officers to confirm location, curfew, and travel restriction compliance.” See BI Inc., BI SmartLINK, https://www.omniapartners.com/fileadmin/public-sector/suppliers/A-D/BI_Incorporated/Marketing/Overview/FS_SmartLINK_AgencyAssistLOC8_XT.pdf [https://perma.cc/CMV5-JDEY] (last visited Sept. 30, 2022).

224 Guistini et al., supra note 191, at 20 (“[A] quarter of individuals (24%) reported that they were unable to take care of a minor or an elderly or disabled family member,” and “at least a third of participants reported that the ankle shackles negatively impacted their relationship with their spouse or partner (39%), children (33%), and/or other family members (49%)”); Aaron Cantú, When Innocent Until Proven Guilty Costs $400 a Month—and Your
when those family members have less time to themselves within the home and are subject to the individual’s frustrations over their own lack of autonomy while being monitored.225

The physical monitors also require charging, generally, every 8 hours or less, as the batteries degrade over time.226 The monitors’ regular charging needs pose an increased burden on individuals who do not have stable housing or locations to charge their devices throughout the day.227 Moreover, because the device may not be submerged in water, individuals are unable to swim or take baths.228

2. Limiting Job Possibilities

Finding and maintaining employment poses challenges for those on electronic monitoring. First, job possibilities are limited because individuals must abide by location, curfew, or other check-in restrictions and requirements to charge their ankle monitor batteries or submit check-in photos on a smartphone app throughout the day.229 One BI employee noted that SmartLINK participants spent hours attempting to complete check-ins, and App Store reviews note many issues that prevented individuals from complying with requirements.230 Second, the physical device is hard to hide from sight and can emit random alarms or voice messages

225See Payne, supra note 217, at 385; see also NAT’L INST. OF JUST., U.S. DEP’T OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM 2 (Sept. 2011), https://www.ojp.gov/pdffiles1/nij/234460.pdf [https://perma.cc/PZ7B-BWS2] (“Of the officers interviewed, 89 percent felt that offenders’ relationships with their significant others changed because of being monitored.”).
226Guistini et al., supra note 191, at 19; WEISBURD ET AL., supra note 223, at 8–9; TRACKED & TRAPPED, supra note 205, at 12, 19, 20, 32 (reporting batteries often only last a couple of hours).
229See Commonwealth v. Feliz, 119 N.E.3d 700, 713–14 (Mass. 2019); Cantú, supra note 224; TRACKED & TRAPPED, supra note 205, at 21, 25, 33; Mejias-Pascoe, supra note 205 (noting difficulty for a construction worker reporting via SmartLINK to find jobs in his location radius).
throughout the day, disrupting the workplace and causing concerns, especially for individuals working in the service industry or with individual clients.\textsuperscript{231} Alerts may also require some individuals to leave their workplace in search of a better signal.\textsuperscript{232} Some employers fear attracting the attention of immigration officers or law enforcement.\textsuperscript{233} Others in the construction industry reported that a bulky monitor created grave safety concerns when it was caught on nearby obstacles or caused them to trip.\textsuperscript{234} In one recent survey of individuals on electronic monitoring through ISAP, over two-thirds of participants reported that they lost or had difficulty obtaining work because of the monitor.\textsuperscript{235}

3. Other Stigma and Psychological Harm

Electronic monitoring also results in individuals withdrawing from their communities and social contacts because they are embarrassed or worried about being seen as a dangerous criminal.\textsuperscript{236} The monitors themselves are often visible to others, and both the monitors and smartphone apps emit loud alerts in public.\textsuperscript{237} This fear was especially acute for those with children, who reported that the monitor kept them from attending school functions for fear of adverse consequences for their children; some instances included where a child lost a spot in the school once school officials noticed the parent’s monitor and other parents limited their children’s contact with the children of those being monitored.\textsuperscript{238}

Anxiety, sleeplessness, depression, and isolation are common among individuals being monitored.\textsuperscript{239} The UN Special Rapporteur on the Human Rights of Migrants has stated that “the stigmatizing and negative psychological effects of the electronic monitoring are likely to be disproportionate to the benefits of such monitoring.”\textsuperscript{240} Individuals, including those fleeing persecution in other countries,

\begin{itemize}
  \item \textsuperscript{231} Guistini et al., \textit{supra} note 191, at 17, 19, 22; \textit{see also} Feliz, 119 N.E.3d at 706–07, 707 n.9 (noting that probation officers must respond to “approximately 1,700 alerts,” on any given day, which corresponds to “roughly thirty-four percent of the total individuals monitored.”).
  \item \textsuperscript{232} Feliz, 119 N.E.3d at 713–14; Cantú, \textit{supra} note 224.
  \item \textsuperscript{233} Guistini et al., \textit{supra} note 191, at 19.
  \item \textsuperscript{234} \textit{Id.}
  \item \textsuperscript{235} \textit{Id.} An earlier survey funded by the National Institute of Justice found that 22 percent of participants were fired or asked to leave a job. \textit{See} NAT’L INST. OF JUST., \textit{supra} note 225, at 2.
  \item \textsuperscript{236} \textit{See} Chaz Arnett, \textit{From Decarceration to E-carceration}, 41 CARDOZO L. REV. 641, 677–79 (2019).
  \item \textsuperscript{237} \textit{Id.} at 678–79; \textit{see also} Payne, \textit{supra} note 217, at 386; TRACKED & TRAPPED, \textit{supra} note 205, at 15, 23; OWENS ET AL., \textit{supra} note 230, at 4084–85.
  \item \textsuperscript{238} Guistini et al., \textit{supra} note 191, at 20–22; TRACKED & TRAPPED, \textit{supra} note 205, at 17.
  \item \textsuperscript{239} Guistini et al., \textit{supra} note 191, at 14–15.
\end{itemize}
have also reported that the monitor triggers past traumatic experiences.\(^{241}\) In a recent survey, over 88 percent of individuals being monitored reported these concerns, and 12 percent reported considering suicide as a result of the monitor.\(^{242}\)

Individuals being monitored also must regularly interact with law enforcement and often a private company providing the monitoring, causing additional distress and conflict. For instance, BI employees reported that they were discouraged from providing any individual help and instructed to be tough on those being monitored, including responding to complaints about the ankle monitor by telling individuals that “that’s life” and to “deal with it.”\(^{243}\) BI employee training primed employees to be ready for self-defense in the face of attacks from ISAP participants.\(^{244}\)

Finally, individuals report distress at the amount of data retained about their personal movements and other habits.\(^{245}\) In some cases, the private company contracting to provide monitors retains that information for years, long after the person has stopped wearing the monitor.\(^{246}\) The SmartLINK app, in particular, has come under fire for failing to release information on what data it tracks, retains, and reports to ICE, and the government currently faces a lawsuit over its failure to disclose this information.\(^{247}\) A recent study showed that these monitoring apps, including SmartLINK, require dangerous permissions giving them access to a great amount of data; indeed, researchers remarked that the apps “can collect and share significantly more data than ankle monitors.”\(^{248}\)

4. Physical Harm

Additionally, many individuals experience physical harm from their ankle monitor, including pain and cramps, blisters, infections, numbness, heat from the device, headaches, and cuts.\(^{249}\) An overwhelming majority of individuals in a recent


\(^{242}\) Guistini et al., supra note 191, at 15.

\(^{243}\) Bhuiyan, supra note 158.

\(^{244}\) Id.

\(^{245}\) See Arnett, supra note 236, at 675.

\(^{246}\) James Kilgore & Emmett Sanders, Ankle Monitors Aren’t Humane. They’re Another Kind of Jail, WIRED (Aug. 4, 2018, 8:00 AM), https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail/ [https://perma.cc/52QR-UHDV]; see also Weisburd et al., supra note 223, at 11.


\(^{248}\) OWENS ET AL., supra note 230, at 4080–81, 4087.

\(^{249}\) Guistini et al., supra note 191, at 12; Pittman, supra note 210, at 601–02; TRACKED & TRAPPED, supra note 205, at 15; Bhuiyan, supra note 158.
survey (90 percent) experienced physical harm from their ankle monitor, including almost 60 percent who indicated that the harm was “severe” or “very severe.”

Many individuals also experienced electric shocks from the devices, which an ISAP officer noted: “was normal.”

In sum, none of electronic monitoring’s intended benefits bear out in practice. Electronic monitoring does not substantially reduce the risk of flight, increase public safety, lower the number of individuals incarcerated, or save money. In fact, electronic monitoring introduces a myriad of harms that render inappropriate its current extensive use as a bail condition for hundreds of thousands of individuals.

III. LEGAL LIMITATIONS ON IMPOSING PRETRIAL ELECTRONIC MONITORING

The imposition of electronic monitoring as a condition of pretrial release implicates various federal constitutional rights, including rights under the Excessive Bail Clause and the Due Process Clause, and implicates other statutory and state constitutional rights. I analyze doctrines developed largely in the context of pretrial and civil detention and explore both how it impacts pretrial electronic monitoring and how this analysis sheds light on the scope of these doctrines. First, I find that the Excessive Bail Clause of the Eighth Amendment requires that any need for electronic monitoring be justified in light of the government’s interests in controlling the risk of flight and public safety, and thus, electronic monitoring should be allowed only when it is no more burdensome than necessary to protect those interests. Second, and similarly, I find that the Substantive Due Process Clause requires strict scrutiny in analyzing electronic monitoring’s restriction on liberty, and thus, electronic monitoring must be rejected where it is not narrowly tailored to satisfy the government’s interests in preventing flight or protecting public safety. Third, I find that there is a substantial risk of erroneous deprivation under the current regime, and thus, that safeguards must include requiring the government to satisfy a clear and convincing evidence burden to justify electronic monitoring conditions and a neutral decisionmaker. Finally, additional state constitutional provisions and statutes—including state Fourth Amendment analogues, state law regarding imposing the “least restrictive” bail condition, and other state law regarding the proper purposes and limits on bail conditions—also should limit the availability of electronic monitoring as a bail condition.

Ultimately, these provisions require decisionmakers to alter their current practices and more thoughtfully consider the benefits and burdens to the individual when imposing electronic monitoring. In light of the lack of evidence supporting electronic monitoring as effective in supporting the government’s goals, such consideration would lead to far fewer individuals being monitored.

250 Guistini et al., supra note 191, at 12.
251 Pittman, supra note 210, at 602.
252 See infra Part III.A.
253 See infra Part III.B.
254 See infra Part III.C.
255 See infra Part III.D.
A. Excessive Bail Clause

Scholars and litigators in recent years have largely ignored the Excessive Bail Clause of the Eighth Amendment, deeming it a “near nullity.” The Supreme Court has held that the Clause provides no right to bail and has approved statutes that deny bail based on findings of dangerousness. Excessive bail has been largely litigated in the context of money bail, where courts have difficulty determining whether a monetary bail amount is appropriate or excessive in any individual instance. But, as recent cases suggest, the Eighth Amendment’s standard can be better understood by analyzing onerous non-monetary conditions of release, like electronic monitoring. Where those conditions are more onerous than necessary to meet the state’s interests in preventing flight and harm to the community, those conditions are inappropriate. Thus, the widespread use of electronic monitoring divorced from individual need for such conditions cannot survive constitutional scrutiny.

1. History of the Excessive Bail Clause

The Excessive Bail Clause of the Eighth Amendment provides simply that “excessive bail shall not be required.” As explained in more detail above, the language was adopted from the English Bill of Rights, enacted to curb the practice

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256 See, e.g., Funk, supra note 1, at 1110; Michael S. Woodruff, The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation, 66 Rutgers L. Rev. 241, 243 (2013). Even before the Supreme Court’s decision in Salerno limited the Eighth Amendment and thus attention to this issue, scholars largely focused on whether the Eighth Amendment could be interpreted to provide a substantive right to bail or not, rather than examining issues of how “excessiveness” should be interpreted. See Wiseman, Discrimination, Coercion, and the Bail Reform Act of 1984, supra note 35, at 135–139.

257 Wiseman, Discrimination, Coercion, and the Bail Reform Act of 1984, supra note 35, at 148; see also Carlson v. Landon, 342 U.S. 524, 556 (1952) (Black, J., dissenting) (finding the Court’s interpretation reduced the Excessive Bail Clause “below the level of a pious admonition.”); CRIM. JUST. POL’Y PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 8 (Oct. 2016), https://www.prisonpolicy.org/scans/cjpp/FINAL-Primer-on-Bail-Reform.pdf [https://perma.cc/Q68V-2S22] (finding courts have not applied the Eighth Amendment “in a way that has meaningfully constrained the use of bail”).


259 Jocelyn Simonson, Bail Nullification, 115 Mich. L. Rev. 585, 628 (2017) (finding the Eighth Amendment standard “elusive”; “how, after all, can one prove that a certain amount of money is not a rational way to protect the compelling government interest of public safety?”); see also Funk, supra note 1, at 1110 (“[E]xcessiveness is understood in relation to the state’s goals, not in relation to what the defendant can afford or the consequences of an amount set beyond the defendant’s means.”).

260 U.S. CONST. amend. VIII.
of holding individuals who had the right to bail by setting unattainably high bail amounts.\footnote{261} The Supreme Court has only meaningfully addressed the standard for challenges under the Excessive Bail Clause on three occasions. The first was \textit{Stack v. Boyle}, where, in 1951, the Supreme Court found that bail set at $50,000 for twelve Communist party members accused of conspiring to violate the Smith Act was excessive.\footnote{262} The Court explained that any “[b]ail set at a figure higher than an amount reasonably calculated” to assure an individual’s presence at trial is excessive under the Eighth Amendment.\footnote{263} The Court also stressed the importance of the “traditional right to freedom before conviction,” as it “permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.”\footnote{264}

Just four months later, in \textit{Carlson v. Landon}, the Supreme Court issued another decision relating to bond set for suspected Communist party members, finding, this time, that the Eighth Amendment did not prohibit the decision to deny bail entirely to individuals awaiting deportation proceedings.\footnote{265} The \textit{Carlson} Court found that the Eighth Amendment did not provide a right to bail in all instances but instead prevented “excessive bail” where it was proper to grant bail.\footnote{266} Congress, it found, could define the classes of persons who could be held without bail without running afoul of the Eighth Amendment.\footnote{267}

Finally, in \textit{United States v. Salerno}, the Court rejected a facial Eighth Amendment challenge to the Bail Reform Act, which allowed detention of those awaiting trial for federal crimes based on perceived risk to public safety.\footnote{268} The Court explained at length \textit{Carlson}’s finding that the Eighth Amendment contained no substantive right to bail in the civil context.\footnote{269} But the Court found it unnecessary to resolve whether the same was true in the context of criminal pretrial bail, holding instead that the Bail Reform Act was constitutional because it authorized detention on the basis of a “compelling interest”—public safety.\footnote{270} In so holding, it gave additional guidance on the Excessive Bail standard, noting that it requires a comparison between the bail conditions and the “interest the government seeks to

\footnote{261} \textit{See supra} notes 35–38.  
\footnote{263} \textit{Stack}, 342 U.S. at 5.  
\footnote{264} \textit{Id.} at 4.  
\footnote{266} \textit{Id.}  
\footnote{267} \textit{Id.} Separately, the Court examined the limits of Congress’s ability to detain individuals under substantive due process principles, finding that Congress could order to detain those who pose a risk to the security of the United States government. \textit{Id.} at 535.  
\footnote{269} \textit{Id.} at 754.  
\footnote{270} \textit{Id.}
“[T]he Government’s proposed conditions of release or detention [can] not be ‘excessive’ in light of the perceived evil,” and thus, “bail must be set” at a level designed to ensure the government’s interests, “and no more.”

During the majority of our country’s history, where challenging bail was largely a question of the appropriate monetary amount, appellate courts have not provided much helpful guidance on this test. In evaluating whether a given bail amount is “excessive,” courts have often compared the challenged bail amount to bail schedules or judicially-created tests regarding the presumptively appropriate amount of bail for a given charge. They have considered factors including the charges pending in the case, the particular facts of the case, any evidence (or lack thereof) showing the necessity of the bail imposed, or comparisons to other similar cases.

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271 Id. (citing Stack v. Boyle, 342 U.S. 1 (1951)). The Court gave little explanation for its finding that the Bail Reform Act met this standard because it reiterated its finding that detention was mandated only on the basis of a compelling interest, thereby rejecting Salerno’s arguments that risk to the judicial process (through flight or harm to witnesses) was the only proper reason to deny bail. Id. In using the language of compelling interest, it also invoked its findings on the earlier substantive due process portion of the opinion, which found that the Bail Reform Act sought to advance a compelling government interest that outweighed individuals’ liberty interests, as detention was authorized only where the government proved by clear and convincing evidence that an arrestee presented an identified and articulable threat to the individual or community. Id. at 749–51.

272 See, e.g., Ex parte Cardenas, 557 S.W.3d 722, 730 (Tex. Crim. App. 2018) (“Case law is of relatively little value in addressing the ultimate question of the appropriate amount of bail in a particular case because appellate decisions on bail matters are often brief and avoid extended discussions, and because the cases are so individualized that generalization from results reached in others is difficult.”) (citation omitted). Claims of excessive bail also rarely reach appellate courts, often becoming moot before the question can be litigated or left unchallenged by criminal defense attorneys because of a lack of resources and the slim chance of success under the current caselaw. Caleb Foote, The Coming Constitutional Crisis in Bail: II, 113 U. PA. L. REV. 1125, 1131 (1965); Dorothy Weldon, More Appealing: Reforming Bail Review in State Courts, 118 COLUM. L. REV. 2401, 2418 (2018); Woodruff, supra note 256, at 275–76; see also Murphy v. Hunt, 455 U.S. 478, 481 (1982) (vacating Court of Appeals decision upon finding that excessive bail claims were mooted by conviction in state court before bail issue reached federal courts).

273 See, e.g., Stack, 342 U.S. at 6 (comparing the bail set to the amount “usually fixed for serious charges of crime”); Murphy v. State, 807 So. 2d 603, 606 (Ala. Crim. App. 2001) (invalidating bail that was 51 times the amount calculated by the “rough rule of thumb” method).

While most courts have determined that an individual’s inability to pay the set bail amount is not dispositive,\(^\text{276}\) it is often a factor in their excessiveness analysis.\(^\text{277}\)

Courts have also examined excessiveness by considering “whether the terms of release are designed to ensure a compelling interest of the government.”\(^\text{278}\) Courts have held that bail set to satisfy non-compelling government interests—including the government’s pecuniary interests in collecting fines, avoiding administrative costs, or detaining an individual for reasons unrelated to flight risk or public safety—is excessive under the standard articulated in \textit{Stack} and \textit{Salerno}.\(^\text{279}\)

A difficult question thus arises: when the government presents evidence of compelling interests in public safety or risk of flight, when does a monetary bail amount cross the line and become excessive under \textit{Stack} and \textit{Salerno}? In other words, when can a court feel comfortable determining that bail is set at a sum designed to ensure the government’s interests are met and “no more”?\(^\text{280}\) Courts and commentators have considered four possible standards of the level of proportionality required by the Excessive Bail Clause on a spectrum of least to most deferential. First, as Professor Scott Howe suggests, the excessiveness inquiry could require de novo review of whether the bond imposed was the least restrictive alternative among all the feasible options.\(^\text{281}\) Second, as Professor Samuel Wiseman argues, the inquiry

\(^{276}\) See, e.g., United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988) (“[A] bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.”); Walker v. City of Calhoun, GA, 901 F.3d 1245, 1258 (11th Cir. 2018) (“[W]e have implicitly held that bail is not excessive under the Eighth Amendment merely because it is unaffordable.”).

\(^{277}\) See, e.g., Robinson v. State, 95 So. 3d 437, 438–39 (Fla. Dist. Ct. App. 2012); \textit{Ex parte} Davis, 147 S.W.3d 546, 553 (Tex. App. 2004); see also \textit{Stack}, 342 U.S. 8 (noting Congress set out more precise standards in evaluating whether bail is excessive, including an individual’s ability to pay).

\(^{278}\) See Cohen v. United States, 82 S. Ct. 526, 528 (1962) (Douglas, J., in chambers) (stating that requiring a portion of bond to be paid toward the fine rendered bail excessive under the Eighth Amendment as it was “used to serve a purpose for which bail was not intended.”); \textit{Campbell}, 586 F.3d at 842–44 (finding it “questionable” whether a county’s pecuniary interests can rise to the level of a compelling interest); United States v. Rose, 791 F.2d 1477, 1480 (11th Cir. 1986) (finding excessive a condition that money bail should be retained to pay for any subsequently-levied fine); \textit{Wagenmann}, 829 F.2d at 211–13 (affirming the jury’s finding that bail was excessive where it was set solely for the purpose of preventing defendant from securing his release and contacting his daughter before her wedding to the son of a locally powerful family); Nashville Cmty. Bail Fund v. Gentry, 496 F. Supp. 3d 1112, 1134–36 (M.D. Tenn. 2020) (finding that the court’s garnishment policy exceeded the boundaries of permissible bail under the Eighth Amendment); see also United States v. Salerno, 481 U.S. 739, 753 (1987) (stating that the Eighth Amendment does not prohibit the government from “pursuing other admittedly compelling interests through regulation of pretrial release”).

\(^{279}\) \textit{Salerno}, 481 U.S. at 754.

\(^{280}\) See Scott W. Howe, \textit{The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail}, 43 \textit{Hofstra L. Rev.} 1039, 1069 (2015); People v. Portoreal,
could require an intermediate form of proportionality, and bail would be excessive where it is “substantially broader than necessary to achieve the governmental interests at stake,” considering any equally effective alternatives.\(^\text{282}\) Third, some courts have seemingly conflated the excessiveness inquiry in the Excessive Bail Clause with that of the Excessive Fines Clause and cited the “gross disproportionality” standard.\(^\text{283}\) Finally, some courts have considered Eighth Amendment claims only for abuse of discretion.\(^\text{284}\)

We can immediately dismiss the lowest two possible standards for excessiveness as inappropriate under the Supreme Court’s Eighth Amendment jurisprudence. The gross disproportionality standard, used in evaluating the Excessive Fines Clause and the Cruel and Unusual Punishments Clause,\(^\text{285}\) is “a more forgiving standard than any plausible interpretation of Stack.”\(^\text{286}\) As courts have interpreted gross disproportionality, it requires “such a level of excessiveness

\(^{282}\) Wiseman, *Pretrial Detention*, supra note 203, at 1393; Marouf, *supra* note 149, at 2171–72; see also Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 699–700 (2018) (arguing that Stack and Salerno require a finding that pretrial restrictions not tailored to the specific risk an arrestee presents are unconstitutionally excessive, while not specifically defining the level of tailoring required). Notably, Professor Wiseman proposed this standard in order to advocate for a right to monitoring for detained individuals, but Professor Wiseman also noted that the standard may also be applied to limit the extent of monitoring by requiring justification of the amount and nature of monitoring by reference to their effect on flight risk. Wiseman, *Pretrial Detention*, supra note 203, at 1395.


\(^{284}\) See, e.g., United States ex rel. Garcia v. O’Grady, 812 F.2d 347, 354 (7th Cir. 1987); United States v. James, 674 F.2d 886, 891 (11th Cir. 1982); Sebuma v. I.N.S., No. 3:00-CV-1915-D, 2001 WL 984884, at *3 (N.D. Tex. Aug. 14, 2001) aff’d 33 F. App’x 704 (5th Cir. 2002).


\(^{286}\) Howe, *supra* note 281, at 1068.
that in justice the punishment is more criminal than the crime.”

The Supreme Court has found this standard appropriate in the context of imposing punishment, both because courts should defer to the judgments of the legislature in the first instance in determining the appropriate punishment and because determinations about the severity of the punishment are “inherently imprecise.”

Neither consideration is relevant here. Unlike in sentencing, where the legislature must affirmatively set out any punishments in a statute, judges, not legislatures, have largely set the limits in the bail context. While the legislature may make determinations about the categories of people entitled to bail or certain conditions of bail, as well as the procedures a decisionmaker must use to make those decisions, it leaves decisions about the appropriate scope of bail to judges or, in the context of immigration, to executive branch officers. Pretrial liberty is fundamental; as a result, the Supreme Court has required findings that justify any legislative restriction on pretrial liberty in a way not required for punishment, which is imposed only after a finding of guilt. Furthermore, in contrast to “imprecise” determinations about the severity of the crime, the Supreme Court has explained that there is “nothing inherently unattainable” about requiring the government to prove its interest in preventing criminal conduct and flight. As I discuss below, courts should require the government to prove these interests by clear and convincing evidence under the Due Process Clause—or at least by a preponderance of the evidence—in order to impose pretrial detention or other severe restrictions of liberty, like electronic monitoring.

Similarly, review of excessiveness only for abuse of discretion would be an abrogation of the role Stack and Salerno required of courts to examine the

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287 United States v. 829 Calle de Madero, 100 F.3d 734, 738 (10th Cir. 1996) (quoting United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993)).

288 Bajakajian, 524 U.S. at 336 (“Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.” (citing Solem, 463 U.S. at 290 (1983))); Gore v. United States, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment, . . . these are peculiarly questions of legislative policy.”).

289 Bajakajian, 524 U.S. at 336.

290 Tiffany v. Nat’l Bank of Mo., 85 U.S. 409, 410 (1873) (“The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it.”).

291 See United States v. Salerno, 481 U.S. 739, 742–43 (1987) (describing the Bail Reform Act’s approach and the ways in which it allows for judicial decision making); Id. at 747 (finding the Bail Reform Act is regulatory, rather than punishment, because its restrictions were not “excessive” in light of the non-punitive purpose); see also supra Part I.C.2.

292 Salerno, 481 U.S. at 750; see also Carlson v. Landon, 342 U.S. 524, 538–41 (1952).

293 Salerno, 481 U.S. at 751 (citing Schall v. Martin, 467 U.S. 253, 264 (1984)); see also Campbell v. Johnson, 586 F.3d 835, 842–44 (11th Cir. 2009) (finding bail was excessive where government provided no evidence to show that their asserted interests were better satisfied by the requirement to use in-county property to post bail than they would be by processing the bond on out-of-county property).

294 See infra Part III.C.2.
excessiveness of bail. Even in the gross disproportionality context, the Supreme Court has made clear that abuse of discretion review is inappropriate and that the Eighth Amendment requires an independent examination of the relevant criteria.295

2. The Excessive Bail Clause and Non-Monetary Conditions

Evaluating electronic monitoring as a bail condition under the Eighth Amendment can shed light on the remaining two possible proportionality standards for evaluating excessiveness. Analyzing electronic monitoring conditions can illuminate the differences in these standards; in contrast to monetary bail, it is easier to discern whether and how an electronic monitoring condition satisfies government interests, compare it to alternative bail conditions, and identify the burdens posed by the condition.296 This, in turn, aids in the inquiry of which test better satisfies the purpose of the Eighth Amendment in preventing abuses of decisionmakers in imposing bail that was excessive in light of the government’s interests and instead imposed for improper reasons.297 The current pretrial electronic monitoring regime fails under both the intermediate standard—requiring a substantial relationship between pretrial burdens and the government’s interest—and the strict standard—requiring the bail condition to be the least restrictive condition that can satisfy the government’s interests. But the strict standard is superior, as it better satisfies the purpose of the Eighth Amendment and provides meaningful limits to judges.

Proportionality review traditionally encompasses both ends proportionality, which assesses whether the costs and burdens of a condition outweigh the likely benefits, and means proportionality, which assesses whether the condition is unnecessarily costly or burdensome when compared to alternative means of achieving the same benefits.298 The concept of assessing government action as “proportional” and determining how proportional an action must be to the government’s goals is much like the decision of what level of scrutiny to apply to government action that violates individual rights.299 Professor Richard Fallon, for instance, asserts that a strict scrutiny analysis can alternatively be considered as a...
question of proportionality; courts should consider “whether a particular, incremental reduction in risk justifies a particular infringement of protected rights in light of other reasonably available, more or less costly and more or less effective, alternatives.”

Similarly, the Council of Europe has required the execution and intrusiveness of electronic monitoring to be proportionate to the alleged offense and “properly assessed risk” of the individual absconding, interfering with the course of justice, or threatening public safety.

It has explained that this means that electronic monitoring should not be used pretrial where “there are less intrusive and more socially inclusive means of preventing such risks.” These analyses point to the strictest form of review under the Excessive Bail Clause—courts should consider whether the particular risk reduction that an electronic monitor can provide justifies the imposition on individual liberty in light of other available alternatives.

Recently, individuals have had mixed success challenging mandatory electronic monitoring, curfew, and related conditions, and courts have not applied a consistent Eighth Amendment analysis. Many of these cases have challenged the Adam Walsh Act, which requires these monitoring conditions of all persons released from detention pretrial accused of committing offenses involving sexual violence or exploitation of minor children, including child pornography offenses. A few district courts have found the statute unconstitutional as applied to individuals for whom it found those conditions unnecessary to guard against risk to public safety or of nonappearance. But the majority of courts to consider the challenge rejected Eighth Amendment claims, including the Eighth and Ninth Circuits. Some courts found the conditions were appropriate for the individual defendants, including

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302 See id.


305 See, e.g., United States v. Stephens, 594 F.3d 1033, 1039 (8th Cir. 2010) (rejecting facial challenge but expressing no view as to any as-applied challenge Stephens might assert on remand); United States v. Peeples, 630 F.3d 1136, 1139 (9th Cir. 2010) (rejecting facial challenge and as-applied challenge, noting magistrate made individualized determination regarding appropriate release conditions).

some courts that explicitly found that electronic monitoring was not unduly burdensome or intrusive. 307

Furthermore, some courts summarily determined that the Eighth Amendment did not apply, finding that because Congress could choose to limit bail for some classes of people, it could also choose to impose conditions of bail on certain classes of individuals. 308 This is a misreading of caselaw, which does not provide such blanket approval of statutorily mandated detention or bail conditions. Rather, in Salerno, the Court approved of a “sharply focused scheme” that both limited detention to those accused of the most serious crimes and further required the government to bear the burden of proving that no conditions of release could reasonably assure the community safety interest asserted by the government. 309 Courts must still analyze Eighth Amendment challenges by comparing the government interests at issue with the bail conditions imposed and must reject any conditions not reasonably calculated to safeguard those interests. In the context of the Adam Walsh Act, Congress failed to make any findings regarding the need for all persons charged under the act to submit to electronic monitoring and curfews in order to protect public safety or why those monitoring conditions were appropriate. 310 Nor could it do so rationally, in light of the lack of research supporting any assertion that electronic monitoring increases public safety or decreases risk of flight. 311 This failure is fatal. Congress cannot, in the interest of preventing crime, impose an arbitrary, onerous condition; there must be some rationale that explains why the condition is reasonably calculated to satisfy government interests. 312

307 See supra note 222.
308 Stephens, 594 F.3d at 1039; Rondeau, 2010 WL 5253847 at *2.
310 United States v. Polouizzi, 697 F. Supp. 2d 381, 392 (E.D.N.Y. 2010) (“[T]here is no statistical foundation for a finding of risk.”); see also United States v. Gardner, 523 F. Supp. 2d 1025, 1030 n.2 (N.D. Cal. 2007) (noting the conditions were “passed without substantive debate or supporting congressional reports.”); United States v. Karper, 847 F. Supp. 2d 350, 361 (N.D.N.Y. 2011) (“When enacting the Adam Walsh Act, Congress did not make any empirical finding that persons charged with the possession of child pornography are more likely to flee or continue to harm children, if released. There was no assessment nor statistical finding of a greater risk of future crimes by these defendants at this initial juncture of a prosecution.”).
311 See supra Part II.A; see also Commonwealth v. Norman, 142 N.E.3d 1, 9 (Mass. 2020) (noting, in the context of balancing interests under the Fourth Amendment, that “[a]lthough the general specter of government tracking could provide an additional incentive to appear in court on specified dates, the causal link in this case is too attenuated and speculative to justify GPS monitoring.”); State v. Grady, 831 S.E.2d 542, 568 (N.C. 2019) (finding a lifetime electronic monitoring condition unreasonable under the Fourth Amendment because the state “did not present any evidence tending to show the [] program’s efficacy in furthering the State’s legitimate interests”).
Courts have struggled to establish a coherent Excessive Bail doctrine. Analyzing electronic monitoring can help provide meaning to the general proclamations in *Salerno* and *Stack*, requiring bail conditions “designed to ensure [the government’s] goal, and no more.” The most natural reading of the Supreme Court’s guidance and purpose of the Eighth Amendment would allow electronic monitoring only when it is the least restrictive condition that could satisfy the government’s identified interests in an individual case in preventing flight or harm to the community. This would be a difficult burden for the government to meet, given the failure of electronic monitoring to consistently aid in meeting the government’s interests and the availability of community resources that could mitigate the relevant risks. Even under an intermediate proportionality standard, based on the current research, it would be difficult for the government to prove a substantial relationship between electronic monitoring and these interests; this standard would require the government to make clear why electronic monitoring would be particularly effective for the individual in question. Either standard should result in a dramatic decrease in the number of individuals subject to pretrial electronic monitoring conditions.

**B. Substantive Due Process**

Similarly, the current system of pretrial electronic monitoring in the criminal and immigration systems infringes on individuals’ substantive due process rights. The doctrine of substantive due process also contains analogous restrictions to the Excessive Bail Clause in this context, requiring strict scrutiny of decisions significantly restricting pretrial liberty. The Supreme Court confirmed this in *Salerno*, where it confirmed the government’s ability to abridge the “fundamental” right to pretrial liberty only in the context of a statute narrowly tailored to protecting the community from a demonstrable danger where no other conditions would provide a reasonable assurance of safety. Because electronic monitoring impinges

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313 *Salerno*, 481 U.S. at 754.

314 For instance, in some cases involving domestic violence, electronic monitoring might be appropriate where the government can show that the individual seeking bail imposes a clear and present danger of harming another, that the monitoring program at issue is necessary to and can adequately prevent that harm, and that no other less restrictive conditions could protect that interest, electronic monitoring may be appropriate. See *Kilgore*, supra note 204, at 18.

315 Funk, *supra* note 1, at 1111 n.72 (concluding that the Excessive Bail Clause analysis “tend[s] to mimic a tailoring standard similar to heightened scrutiny” under due process). While the Excessive Bail Clause directly analyzes whether the bail condition is excessive in light of government interests, the Due Process Clause addresses whether the court erred in “fail[ing] to consider” issues such as “ability to pay or the efficacy of less restrictive conditions of release. . . .”; *In re Humphrey*, 482 P.3d 1008, 1018 n.4 (Cal. 2021), in depriving an individual of liberty without compelling interests, see *id.* (citing United States v. Salerno, 481 U.S. 739, 749 (1987), or in discriminating against those unable to pay, see *Walker* v. City of Calhoun, 901 F.3d 1245, 1259 (11th Cir. 2018).

316 *Salerno*, 481 U.S. at 750–51.
substantially on an individual’s liberty interest, such a condition is constitutional only where it is narrowly tailored to a substantial interest asserted by the government.

To draw this conclusion, I address three counterarguments presented within the literature and caselaw on substantive due process. First, I address whether Salerno and other Supreme Court jurisprudence apply strict scrutiny in cases involving pretrial liberty. Second, I analyze whether noncitizens in removal proceedings have similar due process protections triggering heightened scrutiny of these conditions. Third, I analyze whether electronic monitoring implicates a fundamental liberty interest. I conclude that the current pretrial electronic monitoring regime should not survive under this analysis.

1. Strict Scrutiny

A threshold question is whether Salerno recognized that strict scrutiny is appropriate to analyze the deprivation of pretrial liberty. Recently, in the face of challenges to money bail practices, judges in the Tenth and Eleventh Circuits have refused to apply heightened scrutiny under Salerno,317 as has the Fifth Circuit in a now-vacated panel decision.318 Those cases are incorrect to the extent they read Salerno as applying rational basis scrutiny. A careful reading of Salerno, the cases it relied on, and the cases that followed confirm that the right to pretrial liberty is fundamental and, thus, that deprivation of that liberty must be narrowly tailored to serve a compelling state interest.

The substantive due process analysis in Salerno begins by addressing the plaintiffs’ arguments that their detention amounted to punishment under Bell v. Wolfish.319 In Bell, pretrial detainees challenged the conditions of confinement and other detention practices as imposing punishment before a finding of guilt in violation of the Fifth Amendment320; they did not challenge the original decision to detain and the resulting deprivation of liberty.321 The Supreme Court held that

317 Walker, 901 F.3d at 1262 (noting that “the Salerno Court’s analysis was much closer to a relatively lenient procedural due process analysis than it was any form of heightened scrutiny,” while also not ruling out that Salerno may have “embrac[ed] a form of heightened scrutiny” in cases involving preventative detention); Schultz v. Alabama, 42 F.4th 1298, 1331–32 (11th Cir. 2022) (noting that “[p]retrial detainees have no fundamental right to pretrial release” and that “the substantive due process claim is a nonstarter”); Dawson v. Bd. of Cnty. Comm’rs. of Jefferson Cnty., 732 F. App’x 624, 630–31 (10th Cir. 2018) (concluding that plaintiff’s “interest to be free from pretrial detention . . . is a nonfundamental right”); see also Hon. Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, A Workable Substantive Due Process, 95 NOTRE DAME L. REV. 1961, 1996 (2020).
318 Daves v. Dallas Cnty., 984 F.3d 381, 409–13 (5th Cir. 2020), reh’g en banc granted, order vacated, 988 F.3d 834 (5th Cir. 2021), on reh’g en banc, 22 F.4th 522 (5th Cir. 2022).
319 Salerno, 481 U.S. at 746–48.
321 Id. at 533–34.
plaintiffs could prove a constitutional violation if they could show that detention facility officials intended to inflict punishment.\footnote{Id. at 538.} Plaintiffs could also prove unconstitutional punishment without intent by showing that the restriction is not rationally related to a legitimate nonpunitive governmental purpose or appears to be excessive in relation to that purpose.\footnote{Id. at 538, 561.}

The Salerno Court first rejected the Bell argument, finding that the Bail Reform Act was not intended as punishment and was not excessive in light of the government’s asserted purposes.\footnote{Salerno, 481 U.S. at 746–48.} But the Court did not stop there and next addressed the argument that the Bail Reform Act “nevertheless” violated substantive due process.\footnote{Id. at 748.} The Supreme Court recognized that “the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.”\footnote{Salerno, 481 U.S. at 749–51.} It found that individuals’ pretrial liberty interests were “fundamental,” that the asserted interest in public safety was “both legitimate and compelling,” and that the Bail Reform Act “narrow[ly]” and “careful[ly]” delineat[ed] the circumstances under which detention was appropriate to satisfy that interest—where no conditions of release could reasonably assure the safety of the community or any person.\footnote{Id.} Thus, though it did not invoke the phrase “strict scrutiny,” the Court applied the test, finding that the government’s interest in public safety could outweigh individuals’ liberty interests under the narrowly tailored circumstances outlined in the Bail Reform Act.

The Court’s subsequent decisions confirmed this reading of Salerno. In Reno v. Flores, Justice Scalia, writing for the Court, cited Salerno as part of the line of substantive due process cases that “forbid[] the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the

\footnote{Id. at 538.} \footnote{Id. at 538, 561. Though the Court’s standard included an “excessiveness” inquiry, it did not give teeth to this part of the standard. See id. at 565 (Marshall, J., dissenting) (“[W]hen the Court applies this standard, it loses interest in the inquiry concerning excessiveness, and, indeed, eschews consideration of less restrictive alternatives, practices in other detention facilities, and the recommendations of the Justice Department and professional organizations.”). Commentators have thus interpreted the standard as something akin to rational basis review. See Tymkovich et al., supra note 317, at 1994 (noting that Bell requires only rational basis review). Salerno later confirmed that “excessiveness” is an appropriate part of the Bell inquiry. Salerno, 481 U.S. at 747–48.} \footnote{Salerno, 481 U.S. at 746–48. The Court found that the Bail Reform Act was not excessive because it carefully limited the circumstances in which detention may be sought, required a prompt hearing, did not allow detention beyond the stringent time limitations of the Speedy Trial Act, and required those detained pretrial to be held separate from persons awaiting or serving sentences. Id. at 747–48.} \footnote{Id. Judges who find that Salerno does not require strict scrutiny have relied on an interpretation that Salerno did not apply something beyond the Bell test. See Tymkovich et al., supra note 317, at 1996 (citing Dawson v. Bd. of Cnty. Comm’rs of Jefferson Cnty., 732 F. App’x 624, 631 (10th Cir. 2018)); see also Daves v. Dallas Cnty., 984 F.3d 381, 409–13 (5th Cir. 2020).} \footnote{Salerno, 481 U.S. at 748.} \footnote{Id. at 749–51.}
infringement is narrowly tailored to serve a compelling state interest.”328 In Foucha v. Louisiana, the Supreme Court struck Louisiana’s scheme of detaining those found not guilty by reason of insanity because it was not “narrowly focused” like the Bail Reform Act in Salerno.329 Similarly, though cases prior to Salerno also did not name their analysis as “strict scrutiny,” they undertook a careful review of the stated government rationales and the fit between the government’s interests and the detention at issue.330 For instance, in Jackson v. Indiana, the Supreme Court struck down Indiana’s scheme of indefinite civil commitment for those deemed incompetent to stand trial, rejecting the government’s asserted rationales for its scheme because it was clear that those rationales were not considered in Mr. Jackson’s individual commitment proceedings.331 The Court’s focus on the liberty interest—to be free from indefinite commitment based solely on a finding of incompetence—and the rejection of post hoc rationalization and broad government interests untethered to the scheme at issue makes clear that Jackson was applying something greater than rational basis scrutiny.332 The Court declined to address “broad questions” about the substantive constitutional limitations on civil commitment powers, instead noting only that, “[a]t the least, due process requires

331 Jackson v. Indiana, 406 U.S. 715, 730–31, 737–38 (1972) (holding that proceedings afforded to Mr. Jackson did not consider any of the articulated bases for the power to commit, which included “dangerousness to self, dangerousness to others, and the need for care or treatment or training,” and therefore indefinite commitment violated his constitutional rights). Even the reasonableness inquiry itself may indicate a “somewhat heightened standard.” Foucha, 504 U.S. at 121 n.15 (Thomas, J., dissenting); see also Stephen McAllister, Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers, 4 PSYCH. PUB. POL’Y & L. 268, 282 (1998) (arguing that “reasonableness review” puts the burden on the state to “prove to the courts the actual purposes of the statute, that those purposes are constitutionally legitimate, and that the statute reasonably serves those purposes”). Early cases dealing with the issue of civil commitment, like Jackson, were also decided before Roe v. Wade, when the Supreme Court first applied the “narrowly-tailored-to-a-compelling-interest” formula from other cases in a fundamental rights substantive due process case. See Fallon, supra note 300, at 1283.
332 See, e.g., Witt v. Dep’t of Air Force, 527 F.3d 806, 817 (9th Cir. 2008) (finding that rational basis review does not involve analyzing the “extent of the liberty interest at stake” and requires courts to accept plausible post hoc rationalizations).
that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.\textsuperscript{333}

Finally, the bail system’s history and continued patterns of abuse counsel in favor of strict scrutiny. As Professor Kellen Funk argues, the need for federal oversight of state and local bail regimes drove the passage of the Fourteenth Amendment, other Reconstruction Amendments, and federal civil rights statutes.\textsuperscript{334} Abuses in bail were common before and after that time as well, and such abuses are not easily addressed without heightened scrutiny. The government’s interests in preventing flight and protecting public safety, and the associated risks that each person presents, are difficult to quantify or prove. Careful examination of each asserted goal and the fit between the deprivation and that goal helps to ensure that governments will not be able to apply new technology to deprive large portions of the population of their liberty.

2. Substantive Due Process in Immigration Proceedings

This substantive due process analysis also applies to civil detention in the immigration context. The Supreme Court has confirmed in that context that freedom from “government custody, detention, or other forms of physical restraint [] lies at the heart of the liberty that [the Due Process] Clause protects.”\textsuperscript{335}

In \textit{Zadvydas v. Davis}, the Court highlighted the “serious constitutional problem[s]” raised by any statute that permits the indefinite detention of a

\textsuperscript{333} \textit{Jackson}, 406 U.S. at 738 (emphasis added). Courts and commentators have expressed confusion over the significance of this “reasonable relation” language, including whether it applies a form of heightened scrutiny. See \textit{Foucha}, 504 U.S. at 121 n.15 (Thomas, J., dissenting) (reasonable relation inquiry may involve a “somewhat heightened standard”); see also \textit{McAllister}, \textit{supra} note 331, at 282 (arguing that “reasonableness” review puts the burden on the state to “prove to the courts the actual purposes of the statute, that those purposes are constitutionally legitimate, and that the statute reasonably serves those purposes”); \textit{cf.} David D. Meyer, \textit{Lochner Redeemed: Family Privacy After Troxel and Carhart}, 48 UCLA L. REV. 1125, 1182–89 (2001) (analyzing the “reasonableness” standard in family privacy cases and endorsing Justice Souter’s approach in his concurrence in \textit{Washington v. Glucksberg} that defined reasonableness on a sliding scale—where greater violations of private interests require greater government justification).

As Justice Thomas noted in dissent, the \textit{Foucha} court cited the “reasonable relation” standard \textit{and still} found the statute at issue violated due process because its detention provisions were not “sharply focused” or “carefully limited,” in contrast with the provisions at issue in \textit{Salerno}. See \textit{Foucha}, 504 U.S. at 81; \textit{id.} at 116–17 (Thomas, J., dissenting). As Professor Eric Janus argues, \textit{Foucha} and other civil commitment cases not only employ heightened scrutiny but also rest on an analysis of whether the statute contravenes the categorical limits of the civil commitment power and seeks to implement a forbidden purpose (such as punishment). Janus, \textit{supra} note 330, at 364, 373. This is similar to the test applied in \textit{Bell}.

\textsuperscript{334} Funk, \textit{supra} note 1, at 1118–20 (arguing that strict scrutiny, or at least heightened scrutiny, should apply under both the Substantive Due Process and Equal Protection clauses).

noncitizen.\textsuperscript{336} It analyzed the government’s asserted interests in both preventing risk of flight and preventing danger to the community.\textsuperscript{337} The Court rejected the government’s rationale in preventing flight, finding that it was “weak or nonexistent” where removal was only a remote possibility.\textsuperscript{338} It also found that the scheme was not narrowly tailored to protecting public safety, as—unlike cases like \textit{Salerno} and \textit{Carlson}—it was not “limited to specially dangerous individuals and subject to strong procedural protections” or limited in duration.\textsuperscript{339} Thus, the Supreme Court closely analyzed the liberty interest and burden imposed, the government’s asserted interests, and the fit between the two—seemingly applying strict scrutiny, though not labeling it as such. The Court also found that cases involving pretrial criminal detention, like \textit{Salerno}, and civil commitment, like \textit{Foucha} and \textit{Jackson}, supplied the closest analogies; it rejected the government’s argument that an “alien status” can itself justify indefinite detention, distinguishing cases authorizing indefinite detention of noncitizens who had not yet been admitted to the country.\textsuperscript{340}

Two years later, the Supreme Court muddied the water in \textit{Demore v. Kim}, finding that mandatory pretrial detention of those with criminal convictions satisfied due process.\textsuperscript{341} The Court’s review was deferential to government interests, though again without naming the level of scrutiny that it applied explicitly in its analysis, leaving the circuit split unaddressed on the level of scrutiny required after \textit{Zadvydas}.\textsuperscript{342}

First, the Court took pains to point out that Mr. Kim had conceded deportability, even though it also acknowledged Mr. Kim was challenging the sufficiency of his criminal convictions as a basis for removal in immigration court and that conceding deportability did not equate to conceding that he would be ordered removed.\textsuperscript{343} This

\textsuperscript{336} Id. at 690, 692.
\textsuperscript{337} Id. at 690–91.
\textsuperscript{338} Id. at 690.
\textsuperscript{339} Id. at 690–91.
\textsuperscript{340} Id. at 690–93 (rejecting reliance on Shaughnessy v. United States \textit{ex rel.} Mezei, 345 U.S. 206 (1953) because Mezei was “‘treated,’ for constitutional purposes, ‘as if stopped at the border.’ . . . The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.” (quoting \textit{Shaughnessy}, 345 U.S. at 213, 215)).
\textsuperscript{342} \textit{Compare} Hoang v. Comfort, 282 F.3d 1247, 1256–57 (10th Cir. 2002) (requiring heightened scrutiny), \textit{and} Kim v. Ziglar, 276 F.3d 523, 535 (9th Cir. 2002) (naming liberty interest as fundamental and closely scrutinizing the fit between the government’s asserted rationale and violation of liberty), \textit{and} Patel v. Zemski, 275 F.3d 299, 310 (3d Cir. 2001) (requiring heightened scrutiny), \textit{with} Welch v. Ashcroft, 293 F.3d 213, 221 (4th Cir. 2002) (finding that there was no fundamental right implicated, but finding substantive due process violation where detention was excessive and therefore punitive).
\textsuperscript{343} Demore, 538 U.S. at 522 n.6; id. at 540–43 (Souter, J., concurring in part and dissenting in part). As the dissent explained, “[t]o suggest, as the Court seems to do, that an alien has conceded removability simply because he does not dispute that he has been charged with facts that will render him removable if those facts are later proven is like saying that a
maneuver served to minimize Mr. Kim’s liberty interest, certainly taking it below the “fundamental” level that some courts deemed was required by Salerno and Zadvydas. 344

Then, the Court disputed the Ninth Circuit’s assessment of whether the detention was appropriate to meet the government’s interests in public safety or preventing flight. 345 The Ninth Circuit had found that the scheme was not narrowly tailored to these interests; it rejected the government’s contention that individuals subject to mandatory detention had little incentive to appear at their hearings, 346 it took issue with the government’s statistics on flight risk, 347 and it found no narrow tailoring in the classification of who was deemed to be dangerous and thus unbailable. 348 The Supreme Court, however, gave great deference to Congress’s findings that mandatory detention would satisfy the government’s interests in preventing flight and criminal activity. 349 It rejected arguments that the mandatory detention scheme was much more restrictive than necessary, including an argument that the high rates of nonappearance relied upon by Congress (and the Court) came from a time when the INS was releasing individuals almost exclusively based on the number of beds available, not a determination of flight risk or public safety. 350 It also explicitly rejected narrow tailoring, again relying on Mr. Kim’s status as a “deportable alien” and noted that “when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.” 351

Finally, the Court relied on what it characterized as the “very limited time of the detention at stake” and, in that way, distinguished the detention at issue from the “indefinite” detention in Zadvydas. 352 Relying on data from the government, the Court found that detention lasted an average time of 47 days and a median of 30 days, and about five months in the 15 percent of cases in which an individual chose to appeal. 353 Justice Kennedy, providing the fifth vote for the Court’s decision on

civil defendant has conceded liability by failing to move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) or that a criminal defendant has conceded guilt by failing to dispute the validity of the indictment.” Id. at 542 n.3 (Souter, J., concurring in part and dissenting in part).

344 In Justice Breyer’s dissent in Demore, he also expressed the view that Mr. Kim’s concession of deportability (had he made one) would necessarily lead to a “formal entry of a removal order” in a few weeks. Demore, 538 U.S. at 576–77 (Breyer, J., concurring in part and dissenting in part).

345 Id. at 528 (majority opinion).

346 Kim v. Ziglar, 276 F.3d at 531.

347 Id. at 532.

348 Id. at 533–34.

349 Demore, 538 U.S. at 528.

350 Id. at 519; id. at 563–64 (Souter, J., concurring in part and dissenting in part).

351 Id. at 528 (majority opinion).

352 Id. at 528–30, 529 n.12.

353 Id. at 529–30. The government has since admitted that the five-month estimate was incorrect, instead noting that the average length of detention for cases on appeal exceeded
the due process issue, wrote separately to clarify that “[w]here there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.”

The Court’s reliance on the concession of removability and the limited duration of detention support a limited reading of Demore in the context of pretrial bail. Where the deprivation of liberty is not “very limited,” courts must analyze the fit between the detention and the government’s purported interests. Where that fit is not tailored to compelling interests, there may be other, non-compelling interests at issue that cannot support the deprivation of liberty. Deprivations of liberty in the electronic monitoring context are not “very limited,” as individuals regularly spend well over a year on electronic monitoring (or much more if the government finds the resources to continue monitoring over the duration of their case). Where individuals have not conceded removability and are eligible for bail while they await their day in immigration court, courts should carefully scrutinize the nature of the deprivation and the government’s purported interest—a test that will be challenging for the current electronic monitoring regime to withstand.

twelve months. Letter from Ian Heath Gershengorn, Acting Solicitor General, to Hon. Scott S. Harris, Clerk, Supreme Court 2–3 (Aug. 26, 2016), https://online.wsj.com/public/resources/documents/Demore.pdf [https://perma.cc/H4HD-SYVG] (“The corrections . . . yield an average and median of 382 and 272 days, respectively, for the total completion time in cases where there was an appeal.”). The time in detention has continued to rise in the almost two decades since Demore. See, e.g., Brief for American Immigration Council et al. as Amici Curiae Supporting Appellee at 8–9, Ayom v. Garland (8th Cir. 2021) (No. 20-2274) (collecting data showing that the average period of detention for those subject to mandatory detention reached over 800 days in 2020 and over 900 days in 2021).

354 Demore 538 U.S. at 532–33 (Kennedy, J., concurring).

355 Indeed, courts have agreed that Demore should be limited and have acknowledged that unreasonably prolonged detention may violate the Due Process Clause. See Velasco Lopez v. Decker, 978 F.3d 842, 854 (2d Cir. 2020); German Santos v. Warden Pike City. Corr. Facility, 965 F.3d 203, 208–09 (3d Cir. 2020); Reid v. Donelan, 390 F. Supp. 3d 201, 215 (D. Mass. 2019), rev’d on other grounds, No. 19-1787, 17 F.4th 1, 2021 WL 4958251 (1st Cir. Oct. 26, 2021) (noting that “the government concedes ‘that mandatory detention . . . without a bond hearing violates the Due Process Clause when it becomes unreasonably prolonged in relation to its purpose in ensuring the removal of deportable criminal aliens.’”). The Supreme Court has not weighed in on this issue. In Jennings v. Rodriguez, the Supreme Court held that the statute unambiguously requires no-bond incarceration for the entire duration of removal proceedings and thus that there was no room for application of the canon of constitutional avoidance; the Court did not reach the issue of whether prolonged imprisonment without bond hearings violated the Constitution. 138 S. Ct. 830, 844, 851 (2018).

356 Demore, 538 U.S. at 530 n.12.

357 See supra notes 153–154 and accompanying text.
3. **Fundamental Liberty to Be Free from Electronic Monitoring**

Electronic monitoring burdens individuals’ fundamental liberty interests. As explained above, cases have recognized the fundamental nature of the right to bodily integrity and freedom from bodily restraint and government custody. These rights are “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.”

Courts have been split on their understanding of the liberty curtailed by electronic monitoring and attending restrictions. For instance, many courts have found electronic monitoring imposes no independent liberty restriction if a court has found that location restrictions are valid. Other courts similarly have found the deprivation of liberty is no greater than necessary. But these cases give only cursory consideration to the liberty interests and fail to consider these conditions as a whole.

Electronic monitoring is a bodily restraint, similar in nature and different only in degree from confinement in a secure facility. The psychological harms inflicted by constant surveillance and inhibited movement are similar to prison. In the case of a physical monitor, the monitor itself is always attached to an individual’s body, which may serve as a constant reminder of their condition (to themselves and to any others who can see it) and may disturb their activities with noise or physical pain at any moment. For those on smartphone monitoring, they must constantly have their phone with them with GPS location tracking turned on and could be required to report for random check-ins at any time. As Judge Weinstein noted, “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.”

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358 See supra Part III.B.1–2.
361 See cases cited supra note 222.
362 United States v. Brown, 821 F. App’x 902, 903 (9th Cir. 2020) (rejecting argument that “GPS condition implicates a ‘particularly significant liberty interest’”); see also United States v. Miller, 530 F. App’x 335, 337 (5th Cir. 2013); United States v. Johnson, 773 F.3d 905, 908 (8th Cir. 2014).
363 For instance, in United States v. Blaser, the court concluded that a curfew does not impede any right to travel, just the timing of travel. But when individuals cannot physically travel to a place and back to their home within their curfew hours, or within the time that their monitor can retain a charge, such conditions certainly restrict travel. No. 19-10075-EMF, 2019 WL 3934802, at *3 (D. Kan. Aug. 20, 2019).
364 WEISBURD ET AL., supra note 223, at 2; Guistini et al., supra note 191, at 23.
365 See Nieto Del Rio, supra note 205; Mejías-Pascoe, supra note 205; TRAPPED & TRAPPED, supra note 205, at 26.
While individuals are often afforded the ability to leave their homes, these rights are also sometimes granted to those in jail.\textsuperscript{367}

This liberty interest, like detention, also implicates many other important rights protected by the Due Process Clause.\textsuperscript{368} This includes “adverse social consequences” or “stigma” that “can have a very significant impact on the individual,”\textsuperscript{369} the “right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security,”\textsuperscript{370} including “mandatory behavior modification programs”\textsuperscript{371}; the right to travel and freedom of movement, including the ability of each individual to “shape his own life as he thinks best, do what he pleases, [and] go where he pleases”;\textsuperscript{372} and the right to informational privacy that protects individuals from the exposure of sensitive information.\textsuperscript{373}

Until the 1980s, technology did not allow mass government surveillance and location tracking of individuals awaiting trial. Instead, the government was constrained by the bounds of the Due Process Clause, the Excessive Bail Clause, and the Fourth Amendment’s restraints on searches and seizures; individuals enjoyed liberty and privacy, including in their homes and workplaces.\textsuperscript{374} As Professor Orin Kerr has noted in the context of the Fourth Amendment, courts should (and do) adjust jurisprudence to adopt more stringent protections when


\textsuperscript{368} Cf. Obergefell v. Hodges, 576 U.S. 644, 665–67 (2015) (examining the principles and traditions that demonstrate why marriage is fundamental to show they apply equally to same-sex couples, including drawing meaning from related rights).


\textsuperscript{371} Vitek, 445 U.S. at 492.


\textsuperscript{373} Whalen v. Roe, 429 U.S. 589, 605 (1977); see also United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010) (“A person who knows all of another’s travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.”), aff’d in part sub nom; United States v. Jones, 565 U.S. 400 (2012); id. at 415 (Sotomayor, J., concurring) (“GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”).

\textsuperscript{374} O’Connor v. Ortega, 480 U.S. 709, 718 (1987) (holding that individuals can have reasonable expectations of privacy in the workplace); Mancusi v. DeForte, 392 U.S. 364, 370–71 (1968) (finding the same).
technology significantly enhances government power. It is appropriate to recognize electronic monitoring as impinging a fundamental liberty right, different not in substance but only in degree from pretrial incarceration.


Under the framework outlined above, the current expansion of electronic monitoring in both the criminal and immigration systems does not satisfy substantive due process. Pretrial detention and civil commitment have survived strict scrutiny only where the duration of the infringement was very limited. However, individuals are required to wear GPS monitors for years, with governments often seeking to require the conditions for the duration of the case.

Moreover, where there are not individualized reasons supporting the effectiveness of an electronic monitor, the violation is not narrowly tailored to satisfying the government’s interest in public safety and preventing flight. There is no evidence to support that the electronic monitoring condition effectively contributes to these goals, and there are far less restrictive measures—including court date reminders or other forms of community support—that support those goals in a far less burdensome manner. Thus, like the excessive bail analysis, the substantive due process analysis also should result in a dramatic decrease in the number of individuals subject to pretrial electronic monitoring in the immigration and criminal legal systems.

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377 See supra note 157 and accompanying text.
379 Even setting aside a strict scrutiny analysis, electronic monitoring should fail the Bell v. Wolfish test for the same reasons: electronic monitoring is “excessive” in relation to the government’s interests in public safety and preventing flight. 441 U.S. 520, 538 (1979) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)); Salerno, 481 U.S. at 747–48. Not only does the data show the ineffectiveness of electronic monitoring, but, unlike Salerno, there are generally no restrictions on the categories of people who may be subject to electronic monitoring, and the conditions may be imposed for a much longer duration. See id. at 747 (relying on the fact that detention was limited in duration by the Speedy Trial Act). Moreover, unlike in Salerno, where the court observed that those in pretrial detention faced different and better conditions than those convicted, individuals on pretrial electronic monitoring generally are subject to the same conditions as those on electronic monitoring as a condition of probation or parole. Weisburd, Punitive Surveillance, supra note 220, at 153–71, 192 (collecting data on the conditions of electronic monitoring in the context of pretrial release, probation, and parole, and concluding that “the experience of being on a GPS ankle monitor is equally punitive whether someone is on pretrial release or probation.”); see also
C. Procedural Due Process

Because electronic monitoring impinges on individuals’ liberty interests, the government also must provide appropriate procedural protections when imposing it as a bail condition. The amount of process due is determined by examining the factors laid out in Mathews v. Eldridge: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. 380

The private interest—the deprivation of liberty over an indefinite period—and the Government’s interests—mitigating risk of flight or risks to public safety—have already been well-documented above and will not be repeated here. Thus, I will consider the risk of erroneous deprivation through the current framework and the fiscal and administrative burdens imposed by two additional procedural safeguards—requiring the government to meet a clear and convincing burden of proof and requiring a neutral decisionmaker.

1. Risk of Erroneous Deprivation

Salerno also considered and rejected a procedural due process challenge, and the decision provides insight into the types of procedure that can satisfy the due process clause in the pretrial bail context. The Court found that the Bail Reform Act provided sufficient protections by creating a “sharply focused scheme” 381: it limited the circumstances under which detention could be sought to the most serious crimes; limited the duration of any detention; enumerated the factors to be considered in making a finding of dangerousness; and required a “full-blown adversary hearing,” including a neutral decisionmaker, written findings and reasoning, and a requirement that the government prove, by clear and convincing evidence, that no conditions of release can reasonably assure the safety of the community or any person. 382 Thus, the Court found the statute included procedures designed to further the accuracy of any determination of dangerousness that would prevent a person’s release on bail. 383

In considering electronic monitoring, an erroneous deprivation of liberty occurs when an individual is subjected to monitoring conditions that are unnecessary and not narrowly tailored to satisfy the government’s interest in preventing flight and

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382 Salerno, 481 U.S. at 750–52.
383 Id. at 751.
protecting public safety.\textsuperscript{384} In the federal criminal legal system and most states, an erroneous deprivation occurs where the restriction imposed is not the least restrictive condition of release.\textsuperscript{385}

Erroneous deprivations are highly likely under the current system. First, these conditions are largely imposed on individuals who have been arrested and are in detention, seeking release. These individuals may not have counsel or, in the criminal system, may have only recently been appointed counsel.\textsuperscript{386} They face difficulties in gathering evidence on their behalf.\textsuperscript{387} They will also be facing off against experienced government lawyers who know well the particular preferences of judges and the procedures employed.\textsuperscript{388} In the immigration system, prosecutors also have sole discretion to impose the conditions at issue without any input from an impartial decisionmaker.\textsuperscript{389}

\textsuperscript{384} As explained thoroughly above, substantive due process requires a close fit between the governments’ interest and the deprivation of liberty—or, at the very least, a “reasonable relation” between the two. See supra Part B.1–4; see also Hernandez-Lara v. Lyons, 10 F.4th 19, 32, 32 n.5 (1st Cir. 2021).

\textsuperscript{385} See, e.g., 18 U.S.C. § 3142(c)(1)(B) (requiring the “least restrictive further condition, or combination of conditions, that [a] judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community,” but also requiring electronic monitoring in cases involving a minor child covered by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 216, 120 Stat. 587); ALA. R. CRIM. P. 7.2; ALASKA STAT. § 12.30.011(b); In re Humphrey, 482 P.3d 1008, 1022 (Cal. 2021); COLO. REV. STAT. § 16-4-103(4)(a); CONN. GEN. STAT. § 54-63(b); D.C. CODE § 23-1321(c)(1)(B); FLA. STAT. § 907.041(a); GA. CODE § 17-6-1(b)(1); HAW. REV. STAT. § 804-4(a); 725 ILL. COMP. STAT. 5/110-5(a-5); IOWA CODE § 811.2(1)(a); KY. R. CRIM. P. 4.12; ME. STAT. tit. 15 § 1026(3)(A); MASS. GEN. LAWS ch. 276 § 58A(3)(B); MINN. STAT. § 629.53 (incorporating by reference MINN. R. CRIM. P. cmt. to 6.02(1)); MO. R. CRIM. P. 33.01(c); MONT. CODE § 46-9-108(3); NEB. REV. STAT. § 29-901(3); NEV. REV. STAT. § 178.4851; N.J. STAT. §§ 2A:162-16(2)(b)(2), 17(3)(b)(2); N.M. R. CRIM. P. DIST. CTXS. § 5-401(B); N. Y. CRIM. PROC. LAW § 510.10(1); N.C. GEN. STAT § 15A-534(b); OHIO CRIM. R. 46(B); OR. REV. STAT. § 135.245(3); 12 R.I. GEN. LAWS § 12-13-1.3(e); S.D. CODIFIED LAWS § 23A-43-3; TENN. CODE ANN. § 40-11-116; TEX. CODE CRIM. PROC. ANN. ART. 17.028; UTAH CODE § 77-20-1; V. STAT. tit. 13, § 7554; WASH. CRIM. R. 3.2; WYO. R. CRIM. P. 46.1. Legislation has also been introduced in Congress to apply the same standard in the immigration system. See 1186, 117th Cong. (2021); H.R. 2415, 116th Cong. (2019); H.R. 3923, 115th Cong. (2017).


\textsuperscript{387} Hernandez-Lara, 10 F.4th at 30; Moncrieffe v. Holder, 569 U.S. 184, 201 (2013) (finding detained noncitizens “have little ability to collect evidence”).

\textsuperscript{388} Hernandez-Lara, 10 F.4th at 31.

\textsuperscript{389} See supra note 159 and accompanying text.
Decisionmakers also tend to overvalue risk at the expense of those seeking bail, and individuals face a difficult path in arguing that they are not a danger or flight risk in the face of even minimal government evidence. Both “risk of flight” and “public safety” are also standards that decisionmakers may interpret in a way that harms the individual seeking bail: is previous failure to appear in court for any reason—including scheduling problems, childcare or work conflicts, or other routine issues—appropriate evidence of risk of flight? Is risk of any criminal activity sufficient, or must there be a tangible risk of serious harm to another person? Finally, individuals may not be able to articulate to the decisionmaker the burdens imposed by electronic monitoring if they have not previously been exposed to it, and they also will likely not have access to the social science research showing its ineffectiveness.

2. Government’s Burden of Proof as an Additional Safeguard

Due process requires the government to prove flight risk or dangerousness by clear and convincing evidence before depriving an individual of liberty through electronic monitoring. The Due Process Clause mandates a standard of proof that will appropriately “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” Where individual interests at stake are “both ‘particularly important’ and ‘more substantial than mere loss of money,’” the Supreme Court has required the government to bear the burden by “clear and

390 See Ball, supra note 87; see also Kofman, supra note 194 (“Every judge’s fear is to let somebody out on recognizance and he commits murder, and then everyone asks, ‘How in the hell was this person let out? . . . But with GPS, you can say, ‘Well, I have him on GPS, what else can I do?’”); Mary Moriarty, The Bail System: A Look at How It Works in Minnesota, MINN. SPOKESMAN REP. (June 14, 2021), https://spokesman-recorder.com/2021/06/14/the-bail-system-a-look-at-how-it-works-in-minnesota/ [https://perma.cc/8TBM-WULS] (“Judges have told me that they worry about letting people out of jail because if something goes wrong someone might run against them in their next election.”).

391 See Hernandez-Lara, 10 F.4th at 31 (noting the difficulty in proving lack of dangerousness); cf. Addington v. Texas, 441 U.S. 418, 427 (1979) (“[T]here is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct.”).


396 Addington, 441 U.S. at 423 (internal quotation marks and citation omitted).
convincing evidence”—an intermediate standard of proof. This “level of certainty [is] necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with ‘a significant deprivation of liberty’ or ‘stigma.'”

Following these cases, courts have split on whether the government is required to prove facts supporting risk of flight and public safety by clear and convincing evidence in both the immigration and criminal legal systems. The consequences to the individual seeking bail for an erroneous decision imposing overly burdensome

399 Lopez v. Decker, 978 F.3d 845, 854–55 (2d. Cir. 2020) (requiring government to satisfy clear and convincing evidence in proving risk of flight and danger to society); Hernandez-Lara v. Lyons, 10 F.4th 19, 40–41 (1st Cir. 2021); Arellano v. Sessions, No. 6:18 cv-06625, 2019 WL 3387210, at *12 (W.D.N.Y. Jul. 26, 2019) (“[M]ost courts that have decided the issue have concluded that Government must supply clear and convincing evidence that the alien is a flight risk or danger to society”).

Recently, the Third, Fourth, and Ninth circuits, over dissents, found that the Due Process Clause does not require the government to bear the burden of proof in bail proceedings against noncitizens. Rodriguez Diaz v. Garland, 53 F.4th 1189, 1196–1214 (9th Cir. 2022); Miranda v. Garland, 34 F.4th 338, 359–66 (4th Cir. 2022); Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F. 3d 274, 279 (3d Cir. 2018). These cases undervalue the important liberty rights that noncitizens possess, see Part III.B.2, brush aside the difficulties in individuals proving that they do not pose risks to public safety or of flight, supra note 391, and paint the civil commitment cases as irrelevant to noncitizens by ignoring their importance in the Zadvydas opinion. Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (relying on Foucha and Jackson). They also, as Professor Alison Siegler has persuasively argued, misstate the law regarding the burden of proof in the federal Bail Reform Act. Compare Miranda, 34 F.4th at 363 with Alison Siegler, Freedom Denied 153–57 (Oct. 2022), https://freedomdenied.law.uchicago.edu/static/media/Freedom-Denied-Full-Report.33d80c1e78a1b4612ae.pdf [https://perma.cc/FE9Y-PKDZ]. However, they are also distinguishable in a few ways: first, as they analyze instances in which individuals were previously afforded a bail hearing and had the right to request a new one with changed circumstances, see, e.g., Rodriguez Diaz, 53 F.4th at 1197; second, because they note that no individual proved that their detention was indefinite or unreasonably prolonged and thus implicated weightier liberty interests, see, e.g., Borbot, 906 F.3d at 279-80; and third, they do not analyze any burden of the government in proving that bail conditions like electronic monitoring would be the effective in mitigating any risk to public safety or of flight, or that other less restrictive conditions would not be as effective, see, e.g., Miranda, 34 F.4th at 362.
restrictions are “certain and grave.” On the other hand, the potential harm to society is “speculative,” as the determination is based on “the possibility, rather than the certainty, that a particular defendant will fail to appear” or harm another.

Because electronic monitoring has not been found effective in guarding against those risks for the average person, the clear and convincing evidence standard provides the level of certainty needed to ensure fundamental fairness in this judgment. Though the standard will require the government to expend additional resources to impose electronic monitoring, this burden is justified because it will “impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [conditions] will be ordered.”

The cases challenging electronic monitoring to date have not considered this standard explicitly. Rather, most of these cases challenged the mandatory electronic monitoring conditions of the Adam Walsh Act and the fact that the statute does not require or allow any findings by the district court before imposing the electronic monitor. Many courts have found that the statute improperly denies individuals an individualized determination about whether an electronic monitor is appropriate to

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401 Caliste, 329 F. Supp. 3d at 313–14 (quoting United States v. Motamedi, 767 F.2d 1403, 1409 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part)).
402 Id.
403 Schultz, 330 F. Supp. 3d at 1371–72.
404 Addington v. Texas, 441 U.S. 418, 427 (1979). Though a handful of courts, including the First Circuit, have found otherwise, there is no reason that flight risk should be subject to a lesser standard of preponderance of the evidence. The First Circuit, for instance, relied on the fact that the risk of error was not as great as the dangerousness inquiry, as individuals had knowledge of the most relevant factors, including family and community ties, residence, and employment. Hernandez-Lara, 10 F.4th at 40–41. But the difficulty in rebutting flight risk often does not turn on pointing to specific evidence on these factors, but instead in how the decisionmaker assesses the risk in light of those factors. Addington, thus, placed little emphasis on this second Mathews factor, instead finding that “[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.” 441 U.S. at 427. Moreover, Hernandez-Lara and other cases rely in part on interpretations of the statutory Bail Reform Act—a statute which itself is silent on the burden of proof required to prove flight risk. But these Bail Reform Act opinions only cursorily address the statutory interpretation question and fail to analyze the constitutional requirements. See generally Jaden M. Lessnick, Note: Pretrial Detention by a Preponderance: The Constitutional and Interpretive Shortcomings of the Flight-Risk Standard, 89 U. Chi. L. Rev. 1245, 1248 (2022).

Other courts have found that “[t]here is no compelling reason why the quantum of evidence needed to establish that a given arrestee poses a risk of flight should differ from the quantum of evidence needed to establish that a given arrestee poses a risk to public or victim safety.” In re Humphrey, 482 P.3d 1008, 1020 (Cal. 2021); Kleinbart v. United States, 604 A.2d 861, 870 (D.C. 1992) (“A defendant’s liberty interest is no less — and thus requires no less protection — when the risk of his or her flight, rather than danger, is the basis for justifying detention without right to bail.”).
satisfy the government’s bail interests. Others have rejected procedural due process challenges, finding that the court can sufficiently tailor the required electronic monitoring and curfew conditions to the individual’s situation. However, as noted above, these cursory decisions fail to engage with the fact that there is no determination—either judicial or congressional—that electronic monitoring will further the government’s interests in preventing flight or protecting public safety and additionally fail to consider the line of due process cases regarding the government’s burden of proof.

Electronic monitoring conditions imposed with a standard less stringent than requiring the government to prove clear and convincing evidence—or no standard at all—should therefore be found unconstitutional. The “clear and convincing” evidence standard will also be difficult for the government to meet in light of the research on the effectiveness of electronic monitoring conditions in meeting the government’s interests in preventing flight and protecting public safety.

3. **Impartial Decisionmaker as an Additional Safeguard**

Who should decide whether an electronic monitor is necessary? In the criminal legal system, this is largely done by judges. But in the immigration system, ICE...

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407 See supra notes 310–312 and accompanying text.

408 Many pretrial services agencies are involved in making recommendations to a court about supervision conditions that a judge should order. If these entities are delegated true decision making power about conditions, they should be held to the same standard of impartiality, and such delegation may be an improper delegation of judicial powers. Cf.
officers largely (and until a few years ago, exclusively) make this decision. 409 These decisions are then presented to individuals in a take-it-or-leave-it offer—an individual can either secure release subject to the conditions or stay in jail. There are no uniform criteria or guiding factors in this decision making, leading to large disparities in decisions across the country. 410 Moreover, the opportunity for review by an immigration judge is extremely limited by current regulations and available only if the appeal is taken within seven days of the imposition of the bond condition. 411

Notice and an opportunity to be heard before an impartial decisionmaker is critical to due process. 412 The decisionmaker must also “state the reasons for his determination and indicate the evidence he relied on.” 413

Though an immigration officer may constitutionally decide to release someone before a bail hearing, the Constitution does not allow her to decide to impose onerous reporting requirements like electronic monitoring in exchange for release. Electronic

Harper v. Pro. Prob. Servs. Inc., 976 F.3d 1236, 1243 (11th Cir. 2020) (finding that a private probation company was performing a judicial function and did not meet the strict impartiality standards by which it was bound); United States v. Heath, 419 F.3d 1312, 1315 (11th Cir. 2005) (per curiam) (finding that the district court improperly delegated a judicial function to the probation office); United States v. Nash, 438 F.3d 1302, 1305–06 (11th Cir. 2006) (per curiam) (finding that the district court plainly erred in delegating the decision of mental health counseling to the probation officer); United States v. Peterson, 248 F.3d 79, 85 (2d Cir. 2001) (“If [the defendant] is required to participate in a mental health intervention only if directed to do so by his probation officer, then this special condition constitutes an impermissible delegation of judicial authority to the probation officer.”); United States v. Pruden, 398 F.3d 241, 251 (3d Cir. 2005) (expressing agreement with Peterson); United States v. Allen, 312 F.3d 512, 516 (1st Cir. 2002) (same); United States v. Sines, 303 F.3d 793, 799 (7th Cir. 2002) (“[A] district court . . . must itself impose the actual condition requiring participation in a sex offender treatment program.”); United States v. Kent, 209 F.3d 1073, 1079 (8th Cir. 2000) (finding that the district court improperly delegated a judicial function to the probation officer when it allowed the officer to determine whether the defendant would undergo counseling).

409 Holper, supra note 159, at 15–16.


411 8 C.F.R. § 1236.1(d)(1). An individual can ask the District Director for amelioration of the bond condition, with appeal to the BIA. 8 C.F.R. § 1236.1 (d)(2)-(3). It is unclear what standard of review would apply on such appeal.


413 Goldberg, 397 U.S. at 271.
monitoring is a large deprivation of liberty and therefore requires an impartial decisionmaker in order to impose it.\footnote{United States v. Salerno, 481 U.S. 739, 751 (1987); Reyes-Melendez v. I.N.S., 342 F.3d 1001, 1006 (9th Cir. 2003) (“A neutral judge is one of the most basic due process protections.”) (internal quotation marks omitted) (citing Castro-Cortex v. I.N.S., 239 F.3d 1037, 1049 (9th Cir. 2001))); Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996) (“The current asylum procedure for stowaways, however, fails to provide two of the most basic of due process protections—a neutral judge and a complete record of the proceeding.”).}

In sum, because of the risk that individuals may face electronic monitoring where it is not the least restrictive condition or narrowly tailored to meet government interests in light of available alternatives, the Procedural Due Process Clause requires additional safeguards. If courts require the government to satisfy a clear and convincing evidence burden and require neutral adjudicators in the immigration system, pretrial electronic monitoring should be severely limited.

\textit{D. State Constitutions and Statutes}

The current electronic monitoring regimes of state criminal courts may also violate state constitutions or other state laws. State courts that are imposing these bail conditions or evaluating any challenges to the use of GPS evidence in new criminal cases must be aware of this law. While a full examination of state law is beyond the scope of this Article, I briefly highlight three sources of law that are instructive in considering the problems of the current electronic monitoring regime: state Fourth Amendment analogues; state law regarding imposing the “least restrictive” bail condition; and other state law regarding the proper purposes and limits on bail conditions.

First, state interpretations of their Fourth Amendment analogues may provide additional guidance on evaluating electronic monitoring conditions. The Supreme Court confirmed in \textit{Grady v. North Carolina} that the government “conducts a search when it attaches a device to a person’s body, without consent, for the purpose of tracking that individual’s movements.”\footnote{Grady v. North Carolina, 575 U.S. 306, 309 (2015).} This decision followed a series of Supreme Court cases in which the Court condemned warrantless digital searches and confirmed the privacy interests in electronic data, including GPS location information.\footnote{Carpenter v. United States, 138 S. Ct. 2206 (2018) (requiring law enforcement to get a warrant in order to obtain location records from a cell phone); Riley v. California, 573 U.S. 373, 393–401 (2014) (ruling that law enforcement may not conduct a warrantless search of data stored on a cell phone absent exigent circumstances); United States v. Jones, 565 U.S. 400 (2012) (discussing a GPS location device that “established the vehicle’s location within 50 to 100 feet, and communicated that location . . . to a Government computer, . . . relay[ing] more than 2,0000 pages of data over [a] 4-week period”); \textit{see also Jones, 565 U.S. at 415 (Sotomayor, J., concurring)} (“GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”).}
Professor Kate Weisburd extensively explored the Fourth Amendment implications of electronic monitoring imposed after conviction, including as a condition of probation or parole. She explains how federal Fourth Amendment jurisprudence requires a reasonableness balancing test to determine whether electronic monitoring is constitutional in that context—a test that is very deferential to the government and is “an inherently subjective exercise that invites differences of opinion.” While it is certainly arguable that this standard would not apply to pretrial electronic monitoring conditions, it remains an open question.

As a result, state Fourth Amendment analogues are important in interpreting rights in this context. Some states have refused to employ the reasonableness balancing test. Others, including Massachusetts, have applied the test only after noting that warrantless searches are “presumptively unreasonable and, therefore, presumptively unconstitutional.” In doing so, the Massachusetts Supreme Judicial Court found pretrial electronic monitoring conditions to violate the constitution.

Second, most states require a finding that a bail condition like electronic monitoring is the least restrictive condition that will satisfy the government’s interests before imposing it. Many other less-restrictive bail conditions—including court date reminders or support services—can often satisfy the

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417 Weisburd, Sentenced to Surveillance, supra note 394, at 750–51.
419 The Supreme Court has applied the reasonableness balancing test only in three instances, and some, like Professor Kit Kinports, have persuasively argued that it should not be expanded beyond those three cases or it will swallow the historic warrant presumption model. Id. at 245–46. However, she also notes that courts have already been applying this model in electronic monitoring cases and those involving pretrial conditions more generally. See id. at 221–22, 224–28.

While the Supreme Court has used the balancing test once in the pretrial context for a search immediately after arrest, Maryland v. King, 569 U.S. 435, 463 (2013), this was only where the search was “essential to the safe and effective administration of criminal proceedings,” like accurately identifying defendants. Sandra G. Mayson, Dangerous Defendants, 127 YALE L.J. 490, 529 (2018). As Professor Mayson notes, the idea that the DNA samples at issue in King were purely for “identification purposes” is “patently false” and obscures the larger motive in collecting evidence to solve other crimes. Id. at 532. But the majority went to great lengths to identify and justify this purpose, over Justice Scalia’s vigorous dissent. Id. at 531–32.

420 See Kinports, supra note 418, at 214–17 (citing cases from Iowa, Hawaii, Vermont, Kansas, and Texas); see also State v. Kane, 169 A.3d 762, 774 (Vt. 2017) (analyzing GPS monitor imposed as probation condition under both Fourth Amendment and state analogue, ultimately finding the condition reasonable under both provisions).
421 Commonwealth v. Norman, 142 N.E. 3d 1, 7 (Mass. 2020) (internal quotations omitted).
422 Id. at 10.
423 See supra note 385.
government’s interests in assuring appearance in court and protecting public safety and thus must be considered by judges considering electronic monitoring.424

Third, state bail laws may provide additional substantive limits on bail conditions that may be imposed. The Massachusetts Supreme Judicial Court, for instance, invalidated a pretrial electronic monitoring condition imposed to protect public safety where the relevant bail statute did not allow dangerousness to be considered in imposing release conditions.425 Illinois has imposed limits on electronic monitoring as a bail condition, including requiring the judge to make certain findings and reevaluate the conditions periodically.426 New York has also limited electronic monitoring such that it cannot be imposed in most misdemeanor cases and only if no other conditions will suffice to assure the individual will return to court.427

State law and interpretation of state constitutional provisions can provide clear guidance to judges considering whether to impose electronic monitoring as a bail condition. As advocates continue to elucidate the burdens that electronic monitoring imposes,428 additional states should impose clear limits on electronic monitoring as a bail condition.429

CONCLUSION

The system of electronic monitoring that has developed in both the immigration and criminal systems should not continue in its current form. Electronic monitoring greatly infringes on individuals’ liberty and privacy interests, with no widespread benefits to individuals, courts, or society as a whole.

Judges and ICE officers impose these conditions without due consideration to the limits already contained in the Excessive Bail Clause, Due Process Clause, and state law and constitutional provisions. In explaining these limits and resolving some ambiguity in the current doctrine, I hope to provide some clarity to decisionmakers who impose these conditions.

424 See supra Part II.A.
425 See supra Part II.A.
426 Act of Jan. 25, 2013, Ill. Pub. Act 101-0652, 725 ILCS 5/110-5(i), 1, 342 (“If electronic monitoring, GPS monitoring, or home confinement is imposed, the court shall determine every 60 days if no less restrictive condition of release or combination of less restrictive conditions of release would reasonably ensure the appearance, or continued appearance, of the defendant for later hearings or protect an identifiable person or persons from imminent threat of serious physical harm. If the court finds that there are less restrictive conditions of release, the court shall order that the condition be removed.”).
427 N.Y. CRIM. PROC. LAW §§ 500.10(3-a)(j), 510.40(4)(a).
In light of the lack of evidence showing the effectiveness of electronic monitoring and the availability of community resources to mitigate risk of flight and threats to public safety, judges or legislatures must eliminate or dramatically limit pretrial electronic monitoring. Electronic monitoring should be imposed only if there are specific, identifiable reasons why it would be effective to satisfy government interests in an individual case, as well as a finding that no less onerous conditions can satisfy those interests. This should be a challenging burden for the government to meet with clear and convincing evidence. Shifting reliance away from this onerous monitoring condition towards other available pretrial services, including court date reminders or other social services and community support, can move the bail system in a direction that is more faithful to the Constitution and further away from harmful forms of carceral control.