ELECTRONIC TECHNOLOGY AND THE CRIMINAL JUSTICE SYSTEM

Barry Latzer & Matthew Demchsak[*]

ABSTRACT

The adoption of prisons in the United States of the late 18th century was considered a liberal reform of the corporal punishment system of the colonial era. Problems with the prison system ensued, however, and led to the adoption of liberalizing reforms, such as probation and parole, in the late 19th century. In the wake of a major increase in imprisonment rates beginning in the mid-1970s, in response to a massive crime wave, an anti-imprisonment movement developed. This movement, led by people on the ideological left, calls the prison buildup "mass incarceration" and seeks to drastically reduce incarceration rates or eliminate prisons altogether. Conservatives, by contrast, criticize the criminal justice system for its leniency, which they believe creates incentives for increased crime, as well as its costliness.

We apply a six-point benchmark to measure the effectiveness of the current-day criminal justice system. We also employ this benchmark to evaluate the effectiveness of policies utilizing electronic technology. The six measures examine the impact on the criminal justice system in terms of: (1) the incapacitation of high-risk offenders, (2) general deterrence, (3) the rehabilitation of offenders, (4) punitive retribution, (5) cost-effectiveness, and (6) family and community impact. The current criminal justice system in the United States, which relies on imprisonment for the most serious crimes and for repeat offenders, scores reasonably well on the six criminal justice benchmarks.

---

[*] Barry Latzer, J.D., Ph.D., is an Emeritus Professor of Criminal Justice at John Jay College of Criminal Justice. Professor Latzer earned his Ph.D. in Political Science from the University of Massachusetts and his J.D. from Fordham University School of Law. Matthew Demchsak, J.D., is a recent graduate of Texas A&M School of Law (2025), where he earned a concentration in federal litigation. Matthew will be clerking on the Texas Court of Criminal Appeals following the Bar Exam.

The development of electronic technology in recent decades has tremendous potential to deter criminal behavior by monitoring pre-trial detainees and convicted offenders (probationers and parolees), thereby deterring future lawbreaking. In addition to monitoring, electronic technology also can provide resources to released offenders to facilitate integration into law-abiding society. Furthermore, technology can improve the delivery of in-prison rehabilitation programs through various computer-based interventions.

With respect to the six benchmarks for measuring criminal justice effectiveness, we find that compared with jail and prison, electronic technology falls short on incapacitation, general deterrence, and retribution, but provides significant advantages in rehabilitation of offenders, cost-effectiveness, and family and community impact.

A thorough review of case law involving electronic technology and the criminal justice system reveals that the courts have largely upheld electronic technology despite the various challenges to its use. While having only reached the Supreme Court once, in *Grady v. North Carolina* (2015), the lower federal and state courts have, in the past two decades, heard numerous claims based on the Fourth Amendment, the Due Process Clause, the Eighth Amendment, and the Ex Post Facto Clause. It seems, therefore, that the court system will not be a major barrier to widespread implementation of electronic technology in the sphere of criminal justice.

Electronic technology cannot be a perfect and complete replacement for incarceration. But it is enormously beneficial, and given the inevitable improvements in the technology, will become ever more valuable over time. It is entirely possible that current deficiencies will be overcome within the next decade or even the next several years. However, some of the advocates of electronic technology are overly optimistic and are counting on benefits that do not now, and may never, exist, such as real-time detection of crimes. Nonetheless, electronic technology already is a significant player in the criminal justice systems of First World nations, and eventually will be employed throughout the world. We predict that electronic technology will prove to be one of the greatest advances in penology since the invention of the prison 230 years ago.

TABLE OF CONTENTS

1. INTRODUCTION

Americans are as divided over the prison system as most everything else. Half of self-identified Democrats think too many people are in prison, whereas only 18 percent of Republicans agree.[1] 54 percent of those who consider themselves liberal believe that convicted adults spend too much time in prison, while only 30 percent of conservatives or moderates share this view.[2]

Some progressive advocacy organizations want massive cuts in the incarcerated population without regard to crime rates. For example, the Brennan Center favors a reduction of prison inmates by 39 percent,[3] and the American Civil Liberties Union advocates a 50 percent cutback for prisons

---

1 Oana Dumitru, *What Do Americans Think About the U.S. Prison System?*, YOUGOV (Aug. 10, 2023, 12:04 PM), https://perma.cc/2ZRE-VFVS.

2 John Gramlich, *U.S. Public Divided Over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), https://perma.cc/24QF-H2TP.

3 Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (Dec. 9, 2016), https://perma.cc/LEP5-QMXC.

and jails.[4] Indeed, some progressives, such as Black Lives Matter co-founder Patrisse Cullors, want to abolish prisons altogether.[5] The total de-prisonization position is often predicated on vast social change in the United States, including the elimination of war, racism, poverty, homelessness, and alleged lack of opportunity.[6] Even normally cautious law professors have caught the decarceration bug, one such view being based on far-fetched expectations respecting the effectiveness of e-carceration.[7]

Perhaps because of decarceration pressures from progressive advocacy groups or the policies of prosecutors who adhere to similar views, the United States prison population had declined by 22 percent from 2012 to 2022.[8] Violent crime rates per 100,000 fell only 2.8 percent in this same period,[9] suggesting that decarceration policies were not driven by crime rates but rather by anti-imprisonment views and policies.

---

4 Taylor Pendergrass, *We Can Cut Mass Incarceration by 50 Percent*, ACLU (July 12, 2019), https://perma.cc/5NQR-EACN.

5 *See Black Lives Matter Co-Founder Patrisse Cullors on Abolition & Imagining a Society Based on Care*, DEMOCRACY NOW! (Jan. 31, 2022), https://perma.cc/F3ZJ-RVAP.

6 *See generally* Dana Washington, *Black Lives Matter Co-Founder Patrisse Cullors Talks Prison Abolition, Therapy as Reparations, and Teaming Up with Angela Davis and Yara Shahidi*, TEEN VOGUE (Feb. 22, 2019), https://perma.cc/34NE-ZGGM; John Washington, *What Is Prison Abolition?*, THE NATION (July 31, 2018), https://perma.cc/K7DR-TS6N. For full-length analyses linking abolition to much broader leftist agendas, see ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 104–05 (2005) and Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1619 (2019).

7 *See* Paul H. Robinson & Jeffrey Seaman, *Electronic Prison: A Just Path to Decarceration*, 58 UIC L. REV. 307, 326 (2024) ("[I]mplementing electronic prison sentences could decarcerate over two-thirds of state prisoners and a large majority of federal prisoners.").

8 EMILY D. BUEHLER & RICH KLUCKOW, U.S. DEPT. JUST., BUREAU OF JUST. STATS., NCJ-308699, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2022 – STATISTICAL TABLES 5 (2024). On progressive prosecutors, see generally ZACK SMITH & CHARLES D. STIMSON, ROGUE PROSECUTORS: HOW RADICAL SOROS LAWYERS ARE DESTROYING AMERICA'S COMMUNITIES (2023).

9 *Reported Violent Crime Rate in the United States from 1990 to 2022*, STATISTA (Nov. 14, 2024), https://perma.cc/PUW4-P38S.

2. THE HISTORY OF PRISONS

Prisons began as a liberal reform shortly after the founding of the United States in the late 18th century.[10] During the colonial period, prisons were unknown.[11] Criminals were instead punished in public, then released.[12] They were placed in stocks or pillories, or whipped, branded, or fined.[13] Sometimes they were mutilated—an ear was cropped or totally cut off—and occasionally, though actually rather infrequently, they were hanged for the most serious offenses, especially those committed repeatedly.[14] Capital crimes included murder, of course; sometimes manslaughter; and depending on the colony, rape, robbery, burglary; and in Puritan New England, blasphemy, sodomy, and bestiality.[15] However, property crimes and religious offenses, though theoretically capital, seldom led to actual hanging.[16]

Shaming and corporal punishment made sense since colonial America was made up of small towns in which people knew one another, so public humiliation was a potent deterrent. Even as late as 1760, only seven colonial cities had more than three thousand people, and in 1775, on the eve of the American Revolution, Philadelphia, the biggest city, had only twenty-three thousand.[17] Moreover, public monies for long-term incarceration (had it been devised) did not exist.

But sensitivities were changing. Enlightenment thinking abhorred physical cruelty. Drawing and quartering, stretching on the rack, burning alive, and similar brutalities used in medieval Europe were now banned by

---

10 Carl E. Schneider, *The Rise of Prisons and the Origins of the Rehabilitative Ideal*, 77 MICH. L. REV. 707, 710–11 (1979).

11 *Id.* at 709–10.

12 Robert Shoemaker, *Punishments, 1780-1925*, DIGIT. PANOPTICON, https://perma.cc/AJ23-NV6N (explaining that punishments in the 18th century were more public before the shift to more private punishments in the 19th century).

13 *Id.*; Schneider, *supra* note 10, at 710.

14 *A Quaint Colonial Custom: "Ears Cut Off & Nailed to the Pillory!"*, HIST. SOC'Y PA. (Apr. 19, 2010, 4:24 PM), https://perma.cc/9EMZ-WM5S; *see* Schneider, *supra* note 10, at 710.

15 Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 332–33 (1982).

16 *See id.* at 334; STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 6 (2002).

17 Preyer, *supra* note 15, at 327.

the new Constitution as "cruel and unusual punishments."[18] Led by the Quakers and other liberal-minded thinkers, a new approach—criminal punishment in a dedicated facility out of public view—was intended to punish offenders, protect the public, and rehabilitate as well.[19] Mandatory labor in silence—either in a group (the New York approach) or in separate cells (the Pennsylvania's approach)—was supposed to give the inmates work skills while the sale of their products, if managed properly, would make the institutions financially self-sustaining.[20] It all sounded so good that Europeans as illustrious as Alexis de Tocqueville crossed the pond to see for themselves and take back any workable ideas.[21]

By the time de Tocqueville arrived in the 1830s, serious problems with American prisons were becoming evident. First, there was opposition to prison labor from free workers who considered the cheap competition unfair.[22] Second, crime was increasing, and cells for prisoners, especially in the Pennsylvania-type one-man, one-cell system, were becoming scarce.[23] In the famous Walnut Street facility in Philadelphia, the inmate population went from 41 in 1793 to around 150 in 1801 and to 464 in 1821.[24] Not only did this mean overcrowding and underemployment, it also meant increased tax money to run the facility. Third, some of the prisons, those in Charlestown, Massachusetts, and New York's Sing Sing, for instance, were run by cruel administrators who employed flogging, long periods of solitary confinement, and freezing cold baths for even slight transgressions.[25]

---

18 U.S. CONST. amend. VIII.

19 *See* Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1172–73 (2006).

20 THE NEW YORK REVIEW, PRISON DISCIPLINE: THE AUBURN AND PENNSYLVANIA SYSTEMS COMPARED 3 (1840); Richard G. Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATH. U. L. REV. 365, 368 (1971).

21 Renee Lettow Lerner, *The Surprising Views of Montesquieu and Tocqueville about Juries: Juries Empower Judges*, 81 LA. L. REV. 1, 33 (2020). *See generally* GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (Francis Lieber trans., 1833).

22 Singer, *supra* note 20, at 370.

23 *Id.* at 374.

24 ORLANDO F. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776–1845: WITH SPECIAL REFERENCE TO EARLY INSTITUTIONS IN THE STATE OF NEW YORK 39, 42 (1922).

25 *Id.* at 326–27.

3. THE DECARCERATION MOVEMENT

By the late 19th century reform, efforts had gathered steam. Many of the leniencies of today's system, though not necessarily considered lenient anymore—indeterminate sentences, probation, parole, "good time" release, classification of inmates, separate juvenile and women's facilities, and remedial interventions (educational and vocational; psychological interventions came later)—were adopted in this period.[26]

Fast-forward to the last decades of the 20th century, and we see the roots of a movement to decarcerate, i.e., to reduce, if not eliminate, incarceration, especially imprisonment. The immediate cause was a massive buildup of the criminal justice system, including, of course, the prison population. In the first half of the 20th century, 1910–1950, the average imprisonment rate in the United States was 98 per 100,000 people.[27] In the second half, 1960–2000, the average rate leaped to 207 per 100,000, an increase of 111 percent.[28] And this was not the peak. Rates kept rising in the 21st century, hitting a high of 500 per 100,000 in 2010.[29]

This upturn in imprisonment, commonly (though deceptively) called "mass incarceration," did not occur in a vacuum. It was triggered by the biggest increase in violent crime in the 20th century, perhaps in all U.S. history, a rise that produced more murder victims than there were wartime deaths from all of America's recent wars. War fatalities from the Second World War to the conflicts in Iraq and Afghanistan totaled 500,576, whereas between 1970 and 1995, a staggering 522,721 Americans were murdered.[30] And if

---

26 Katherine Sebok, *The Philosophy of Incarceration and Punishment and Its Evolvement. Is It Enough?* 15–16 (2024) (M.S. Capstone Paper, Illinois State University) (on file with author).

27 *See* MARGARET WERNER CAHALAN, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-102529, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984 30 tbl.3-3 (1986).

28 *See Sourcebook of Criminal Justice Statistics Online Table 6.28.2012*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., https://perma.cc/94MP-TUU2.

29 PAUL GUERINO ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-236096, PRISONERS IN 2010 1 (2012).

30 DAVID A. BLUM & NESE F. DEBRUYNE, CONG. RSCH. SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 1–3 tbl.1 (2020); JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., HOMICIDE TRENDS IN THE UNITED STATES 9–10 (2010).

we compare the war-wounded to those injured in criminal assaults, the toll of the massive crime wave is even more shocking. Nearly one million service personnel suffered nonfatal injuries in the foreign conflicts just named, whereas 2.2 million Americans per year were injured by violent crime.[31] Over six million of the assault injuries between 1973 and 1991 were considered serious, as they involved gunshot or knife wounds, broken bones, loss of consciousness, dislodged teeth, or internal damage.[32] This crime wave was a war on the American civilian population.

The wave—more like a tsunami—began in the late 1960s, and except for a few years of short-lived decline in the first half of the 1980s, the escalation continued right up to the early 1990s.[33] Public fear was palpable, as a national commission pointedly noted in 1969: "Violent crime (particularly street crime) engenders fear—the deep-seated fear of the hunted in the presence of the hunter. Today this fear is gnawing at the vitals of urban America."[34] By 1972, four out of ten Americans told interviewers they were afraid to walk alone in their communities at night, and for nonwhites, the poor, the elderly, and big-city dwellers, the figure was one out of two.[35]

Despite the overwhelming evidence of a massive crime wave, some decarcerationists deny that crime rose, claiming, with little justification, that crime anxiety was just a construct of conservative politicians who shaped public attitudes in order "to heighten opposition to the civil rights movement."[36] But public opinion expert Peter Enns demolished this contention,

---

31 BLUM & DEBRUYNE, *supra* note 30, at 1–3; U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-147486, VIOLENT CRIME 2 (1994).

32 CAROLINE W. HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-116811, INJURIES FROM CRIME 3 (1989); Marianne W. Zawitz, Patsy A. Klaus, Ronet Bachman, Lisa D. Bastian, Marshall M. DeBerry, Jr., Michael R. Rand & Bruce M. Taylor, *Highlights from 20 Years of Surveying Crime Victims: The National Crime Victimization Survey, 1973–92*, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. 5, 15 (1993) https://perma.cc/8849-YRZ9.

33 BARRY LATZER, THE RISE AND FALL OF VIOLENT CRIME IN AMERICA 160 (2016).

34 NAT'L COMM'N ON CAUSES & PREVENTION VIOLENCE, NCJ-275, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 18 (1969).

35 Hazel Erskine, *The Polls: Fear of Violence and Crime*, 38 PUB. OP. Q. 131, 137–38, 140–41 (1974).

36 KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 27, 31–32 (1997).

demonstrating persuasively that the reverse was true: a terrified public had pushed a law-and-order agenda before the politicians adopted it.[37]

Fear of crime was heightened by the rampant disorder stemming from violent protests against the Vietnam War and urban riots in low-income African American communities. Economists William Collins and Robert Margo tallied a shocking 752 racial disorders from 1964 to 1971.[38] By an objective measure of severity, 130 of the 752 riots were considered "major" and 37 were labeled "massive" in destructiveness.[39] In 1968, an astonishing 81 percent of the American public told interviewers that law and order had broken down altogether in the United States.[40]

This massive crime wave and its attendant fear were the backdrop to the enormous increase in incarceration.[41] Around 1993, violent crime began to decline.[42] But the buildup of the criminal justice system continued, in large measure because no one could be sure how long the crime decline would last. Professor Lawrence M. Friedman, not known as a "law-and-order" conservative, captured the mood of the country in early 1993 to introduce his book on the history of crime and punishment:

> Crime, in our decade, is a major political issue. Of course, people have always been concerned about crime. But there is reason to believe that people are more upset about crime today than ever before—more worried, more fearful. They are most afraid of sudden violence or theft by strangers; they feel the cities are jungles; they are afraid to walk the streets at night. Millions of parents are afraid their children will turn into junkies. Millions see some sort of rot, some sort of decay infecting society, and crime is the pus oozing out from the wound. . . .

---

37 *Compare id.* at 31–32, *with* PETER K. ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD 65 (2016).

38 William J. Collins & Robert A. Margo, *The Economic Aftermath of the 1960s Riots in American Cities: Evidence from Property Values*, 67 J. ECON. HIST. 849, 853 tbl.1 (2007).

39 *Cf. id.*

40 STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 176 (1997).

41 *See* LATZER, *supra* note 33, at 133 fig.3.10.

42 CHERYL RINGEL, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-165812, CRIMINAL VICTIMIZATION 1996 1 (1997).

> We seem to be in the midst of a horrendous crime storm—a hurricane of crime. The homicide rate in American cities is simply appalling. It takes months or even years for Helsinki or Tokyo to equal the *daily* harvest of rape, pillage, looting, and death in New York City. Why is this happening to us?[43]

Decarcerationists claimed that the 1990s crime fall was due to causes unrelated to incarceration, such as economic growth, the end of the crack cocaine binge, and improved policing.[44] While some of these factors were significant (e.g., the decline of crack), several careful analyses concluded that increased imprisonment was the principal cause of the downturn.[45]

Lethal police encounters with blacks in 2014 and again in 2020 underscored the second biggest issue for decarcerationists: the treatment of African Americans by the criminal justice system.[46] The 2014 death of Michael Brown, an 18-year-old black male shot by Darren Wilson, a white police officer, initiated protests and violence that spiked in 2014 and continued sporadically into 2015.[47] Brown was unarmed, but the officer testified that he had reached into the police cruiser to grab his service revolver.[48] A grand jury refused to charge Wilson, and the federal Justice Department declined

---

43 LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY x–xi (1993).

44 *See, e.g.*, Jenni Gainsborough & Marc Mauer, *Diminishing Returns: Crime and Incarceration in the 1990s*, SENTENCING PROJECT 27 (Sept. 2000) (finding the positive effects of increased incarceration "limited," while "the harms are clear").

45 William Spelman, *The Limited Importance of Prison Expansion*, *in* THE CRIME DROP IN AMERICA 97, 123 (Alfred Blumstein & Joel Wallman eds., 2000); Steven D. Levitt, *Understanding Why Crime Fell in the 1990's: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 178–79 (2004); BERT USEEM & ANNE MORRISON PIEHL, PRISON STATE: THE CHALLENGE OF MASS INCARCERATION 79 (2008).

46 Elliot C. McLaughlin, *What We Know About Michael Brown's Shooting*, CNN (Aug. 15, 2014, 12:10 AM), https://perma.cc/Q96N-557Q (2014 shooting of Michael Brown); Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), https://perma.cc/KP4U-4T6P (2020 killing of George Floyd).

47 Curtis Bunn, *A Feeling of Stagnation Runs Through Ferguson, a City Once Known as Ground Zero for Change*, NBC NEWS (Aug. 9, 2024, 3:18 PM), https://perma.cc/DHE5-LJEQ.

48 DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON, at 14 (Mar. 4, 2015), https://perma.cc/697B-9EKD.

to prosecute for civil rights violations and concluded that he had acted in self-defense.[49]

Even more violent and widespread protests followed the 2020 death of African American George Floyd.[50] Floyd, age 46, was arrested by officer Derek Chauvin, who placed his knee on Floyd's neck to detain him, causing his death.[51] Chauvin was convicted of murder and manslaughter and sentenced to 22.5 years in prison.[52] Floyd's murder led to nationwide and even worldwide protests, many violent, directed at alleged police brutality and police racism.[53]

Although the Michael Brown and George Floyd protests focused on police, the incidents spurred broader criminal justice concerns, including the alleged overincarceration of blacks. While it is true that a disproportionate number of African Americans are in prison,[54] there is no convincing evidence that this is due to race bias as opposed to high black crime rates.[55] Indeed, several sophisticated quantitative analyses of race bias by investigators known for their impartiality refuted race bias allegations.[56] As a thorough review of the literature put it, "[c]onsidering all the evidence, it seems reasonable to conclude that the racial disproportionality in the prison

---

49 Moni Basu et al., *Fires, Chaos Erupt in Ferguson After Grand Jury Doesn't Indict in Michael Brown Case*, CNN (Nov. 25, 2014, 8:53 AM), https://perma.cc/69HM-BWZF; Erik Eckholm & Matt Apuzzo, *Darren Wilson is Cleared of Rights Violations in Ferguson Shooting*, N.Y. TIMES (Mar. 4, 2015), https://perma.cc/3BB2-4P63.

50 *See Protests Across the Globe After George Floyd's Death*, CNN (June 13, 2020, 3:22 PM), https://perma.cc/26EB-B2E2 [hereinafter *Protests Across the Globe*].

51 Hill et al., *supra* note 46.

52 Juliana Kim, *Derek Chauvin, Officer Convicted of George Floyd's Murder, Was Stabbed in Prison*, NPR (Nov. 25, 2023, 10:56 AM), https://perma.cc/9C98-XG4F.

53 *See Protests Across the Globe*, *supra* note 50.

54 Around 32 percent of prison inmates, or three times the proportion of the black population of the United States, are black. E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-307149, PRISONERS IN 2019 – STATISTICAL TABLES 1, 21 tbl.14 (2023).

55 Paul J. Larkin & GianCarlo Canaparo, *The Fallacy of Systemic Racism in the American Criminal Justice System*, 18 LIBERTY U. L. REV. 1, 1–2 (2023).

56 *Cf.* Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1280 (1982); Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666, 682 (1985); William Wilbanks, *The Myth of a Racist Criminal Justice System*, J. CONTEMP. CRIM. J. 88, 93 (1987).

population results to a large extent from racial disparities in criminal involvement."[57]

Black violent crime rates have been much higher than whites for the entire 20th century. For example, black homicide victimization rates were, on average, seven times white rates throughout the 1920s and seven times the white rate from 1976 to 1995.[58] Although these are victimization rates, homicide is highly intraracial, and consequently, high rates of black victimization signify high rates of black perpetration.[59] Recent figures indicate that African American homicide victimization rates have declined significantly since the early 1990s, but still remain many multiples of white rates.[60] From 1980 to 2008, when they were around 12 percent of the U.S. population, African Americans were 47.4 percent of the homicide victims and 52.5 percent of the perpetrators.[61] Nonetheless, advocacy groups alleging black overincarceration attributed it to various types of racial discrimination.[62]

---

57 CASSIA C. SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 184 (2d ed. 2009).

58 *Cf.* FORREST E. LINDER & ROBERT D. GROVE, FED. SEC. AGENCY, NAT'L OFF. VITAL STATS., VITAL STATISTICS RATES IN THE UNITED STATES 1900–1940 280–81 tbl.16, 288–89 (1947). *See generally* BARRY LATZER, THE ROOTS OF VIOLENT CRIME IN AMERICA: FROM THE GILDED AGE THROUGH THE GREAT DEPRESSION (2020); FOX & ZAWITZ, *supra* note 30, at 11.

59 From 1976 to 2005, 86 percent of white victims were killed by whites, while 94 percent of black victims were killed by blacks. FOX & ZAWITZ, *supra* note 30, at 62.

60 Homicide mortality data for 2018 to 2021 indicate that black rates were, on average, 12.3 times non-Hispanic white rates, and 5.5 times Hispanic rates. *Multiple Cause of Death, 2018-2023, Single Race Request*, CDC WONDER: CENTERS FOR DISEASE CONTROL AND PREVENTION, https://perma.cc/Z6NQ-783P (navigate to the live page, filter, then select "Send"). The average black victimization rate, 2018–2021, was 24.2 per 100,000. *See id.* In 1990, the black victimization rate was 37.6 per 100,000. *See* FOX & ZAWITZ, *supra* note 30, at 59. It is noteworthy that these data points are generated from county medical examiner records and do not involve law enforcement, courts, or other actors in the criminal justice system.

61 ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-236018, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008 3 tbl.1, 12 tbl.7 (2011).

62 *See Mass Incarceration: An Animated Series*, ACLU (Jan. 10, 2018), https://perma.cc/4JEH-HJRU ("Racial bias keeps more people of color in prisons and on probation than ever before."); Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), https://perma.cc/9A7Q-RMVF ("The racism inherent in mass incarceration affects children as well as adults, and is often especially punishing for people of color who are also marginalized along

Although prison rates have declined in the last two decades, efforts to make deeper cuts have been stymied by the lack of effective alternatives to incarceration.[63] Currently, the leading alternative is restorative justice (RJ), which is discussed next. As explained below, RJ is of limited value as a replacement for incarceration. In the medium and long run, electronic technology will provide a much more effective option.[64]

Restorative justice involves a meeting of crime victims and perpetrators under the direction of a trained facilitator.[65] The aim is to repair the harms caused by the offense and prevent future harms by focusing on the needs of the victim, the perpetrator, and the community.[66] RJ has been used with juveniles, relatively low-level offenses, such as harassment or minor theft, and with parolees and probationers to discourage repeat offenses.[67] It is said to be increasingly used as a diversion from prosecution and even as an alternative to incarceration for more serious offenders.[68]

However, restorative justice will not address "so-called" mass incarceration or alleged African American overincarceration where the participating offenders are not facing imprisonment. Low-level offenders are rarely sentenced to prison, so restorative justice with this population will not help reduce real-world incarceration.[69] Probationers, by definition, have received

---

other lines, such as gender and class."); Ruth Delaney et al., *American History, Race, and Prison*, VERA (Sept. 2018), https://perma.cc/HC8P-T2AP ("It is a narrative founded on myths, lies, and stereotypes about people of color, and to truly reform prison practices . . . it is a narrative that must be reckoned with and subverted."); Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality*, CTR. FOR AM. PROGRESS (June 5, 2018), https://perma.cc/BWE2-26Z4 ("The system of mass incarceration is perhaps the clearest manifestation of structural racism in the United States . . . .").

63 *See* BUEHLER & KLUCKOW, *supra* note 8, at 1 fig.1.

64 *See infra* Part 5.

65 BAILEY MARYFIELD ET AL., JUST. RSCH. & STAT. ASS'N, RESEARCH ON RESTORATIVE JUSTICE PRACTICES 1 (2020).

66 *Id.* at 2.

67 *Id.* at 4.

68 *Id.* at 2.

69 Low-level offenders may be briefly confined in jails, and mass incarceration, broadly defined, probably includes jail as well as prison. But the time served in jail is short, so the RJ impact on incarceration, if any, would be minimal. The average jail confinement is approximately one month, and arrested persons released upon their initial court

a non-incarcerative sentence, though they face incarceration if they violate the terms of probation. Theoretically, therefore, RJ could reduce reoffending by probationers. However, only around 15 percent of probationers are incarcerated,[70] and the effectiveness of RJ in reducing reoffending within this population is largely unknown, so the incarceration-reduction benefit with probationers is speculative at best.

A similar conclusion applies to parolees. They have already served part of a prison sentence and have been released; like probationers, they too could be reincarcerated if they contravene their release terms. Parolees are at a bigger risk for incarceration than probationers: 30 percent, on average, were reincarcerated or otherwise exited parole unsatisfactorily in the nine-year period prior to the 2020 pandemic.[71] RJ may be useful with those parolees who have matured in prison and regret their crimes, but the proportion of parolees who fall into this category is unknown, as is the effectiveness of RJ with such a population. Nevertheless, there probably is little disadvantage in giving a parolee the opportunity to take responsibility for his misconduct, especially since he already will have served time in prison. RJ would reduce incarceration if it helped parolees desist from committing more crime, but whether it could do so is undetermined as the research on RJ and desistance from crime is in a preliminary stage.[72]

Restorative justice has other shortcomings. What is to be done if the offender has no remorse, doesn't want to engage with or help the victim, or just goes through the motions to avoid incarceration? Alternatively, what if the victim isn't interested in sitting down with the perpetrator, perhaps because she fears reprisals if RJ is unsuccessful? Or, what if the crime is "victimless," as with consensual offenses, such as drug possession or sale, or

---

appearance are confined for only a few days. *See* ZHEN ZENG, U.S. DEP'T JUST, BUREAU OF JUST. STATS., NCJ-307086, JAIL INMATES IN 2022 – STATISTICAL TABLES 1 (2023). Given the inmate churn and the difficulties in managing jails, especially in big cities, it is unlikely that a program of restorative justice could successfully be administered in such facilities.

70 From 2011 to 2021 an average of 15.2 percent of probationers were incarcerated. DANIELLE KAEBLE, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-305589, PROBATION AND PAROLE IN THE UNITED STATES, 2021 5 tbl.5 (2023).

71 *Id.* at 6 tbl.6.

72 *See, e.g.*, Sungil Han et al., *Reducing Recidivism Through Restorative Justice: An Evaluation of Bridges to Life in Dallas,* 60 J. OFFENDER REHAB. 444, 457 (2021).

public order crimes such as driving with a revoked license or illegal possession of a firearm? RJ will not be successful with remorseless offenders, and with victimless crimes it is not even applicable.

Compared with incarceration, restorative justice has three manifest shortcomings.

(1) *RJ does not protect the public by incapacitating the offender.* If the offender is truly remorseful, an attitude that may be cultivated by RJ, he may refrain from committing more crime. But this outcome is less certain with a non-incarcerative treatment for the obvious reason that the offender is free and at large.

(2) *Restorative justice does not provide retribution or justice for offenders who have committed crimes on the serious side of the harms spectrum.* Retribution requires punishment that is appropriate to the harms done without regard to the capacities of the offender (so long as they meet minima of criminal responsibility). With offenses perceived as creating significant harm, RJ alone will be considered inadequate, as it is not punitive. Since RJ costs much less than prison, there will be an incentive to "net-widen" or expand its use, thereby magnifying the risk of injustice through excessive leniency. A good analogy is the expanded use of probation in recent years for felonies and violent crimes. It is a little-known fact that over one-in-four violent offenders is sentenced to probation instead of jail or prison.[73]

(3) *RJ does not provide general deterrence or discourage others from committing crimes.* Unlike jail or prison, restorative justice will not be feared by would-be offenders, especially young males, who are responsible for the majority of violent crimes. It doubtlessly is seen as soft and lenient.

In short, restorative justice will have, at best, minimal impact on incarceration rates or the claimed overincarceration of minorities. Standing alone, it cannot provide incapacitation, retribution, or general deterrence as effectively as jail or prison. It is best thought of as an appropriate treatment for juvenile offenders, a potential source of satisfaction for crime victims, and a possible aid to rehabilitation for some lawbreakers.

---

[73] From 2011 to 2021 the proportion of probationers charged with a felony rose from 53 to 64 percent, and the percentage of probationers supervised for a violent offense increased from 18 to 26 percent. KAEBLE, *supra* note 70, at 6.

4. THE MEASURE OF CRIMINAL PUNISHMENTS

A satisfactory criminal justice system must answer six questions regarding its treatment of lawbreakers. These six questions may be considered the benchmarks for an acceptable system. They can be used for assessing the current treatment system as well as for evaluating proposed reforms. Further on we will apply these questions to e-carceration and compare it to the present-day incarceration system.

The first three questions involve the protection of the public, undoubtedly the primary concern of society with any criminal justice system.

1. *Does the system incapacitate offenders?*

Every justice system must seek to keep the public safe. Jail and prison achieve this by isolating the offender from the public, referred to as "incapacitation." Of course, if too many factually guilty offenders are unpunished, or if the sanctions are insufficient because offenders are released prematurely, then public protection will be inadequate. An example of arguable underpunishment, which we alluded to above, is the use of probation in lieu of prison to sanction offenders who have committed violent crimes.[74]

2. *Does the system provide general deterrence?*

A second way in which the current system strives for public protection is by discouraging putative offenders from engaging in criminal activity, an effect known as "general deterrence." General deterrence is premised on the belief by members of the public, especially those at high risk of committing crime, that they will be apprehended and punished if they break the law. If the public perception is that offenders frequently "get away with crime," the deterrent effect will be diminished. This could occur if the system is perceived to be too lenient, or if would-be offenders are particularly prone to impulsiveness, thus reducing their amenability to deterrence.

The effectiveness of general deterrence has long been a subject of debate. Weakness in the criminal justice system in the late 1960s and early

---

[74] In 2021, 26 percent of offenders on probation had committed violent crimes. *Id.*

1970s was blamed for the massive rise in violent crime, and, likewise, the buildup of the criminal justice system in the 1980s and 1990s has been credited for the decline in crime that began around 1993.[75] However, there is no consensus on the extent to which these changes in crime rates were the product of general deterrence as opposed to other factors.

3. *Does the system promote the reform or rehabilitation of offenders?*

Offender reform benefits the convicted person as well as the general public. It means that the offender will henceforth lead a law-abiding life and therefore avoid additional criminal sanctions. At the same time, a reformed criminal will refrain from further harm to others in the community.

Some differentiate rehabilitation and specific deterrence.[76] Specific deterrence means that the punishment imposed for prior wrongdoing inhibits future offenses by the same offender. To some, this implies that harsh punishment in prison is more effective than incarceration alone because it makes the offender more fearful of reoffending. However, many believe that harsh punishment does not rehabilitate, perhaps because it embitters the offender, making him even more anti-social. Whether this is true or not is unknown as researchers have difficulty differentiating the reformed offender from the offender inhibited by prior punishment. Contemporary justice systems, at least in liberal democratic countries, reject the kind of harsh punishments imposed in previous centuries (such as flogging, ice water baths, forcible hard labor, etc.) and prefer interventions that are believed to rehabilitate.[77] To further complicate matters, however, some believe that rehabilitation programs are too lenient, thereby undercutting both general deterrence and retribution.

4. *Does the system provide retribution?*

---

75 LATZER, *supra* note 33, at 159–64, 232.

76 *See* Edgardo Rotman, *Beyond Punishment*, *in* A READER ON PUNISHMENT 281, 294 (Antony Duff & David Garland eds., 1994).

77 *See* Michael Tonry, *Punishment, Politics, and Prisons in Western Countries*, 51 CRIME & JUST. 7, 25 (2022).

Retribution means the imposition of a punishment that is appropriate in light of the harms caused by the crime without regard to the capacities of the offender (so long as they meet the basic requirements of criminal responsibility) or the impact on rehabilitation or general deterrence.

Although sometimes decried as "vengeance," retribution does not assign a role to the crime victim in determining or imposing a punishment, and it actually limits punishment in two ways. First, it prohibits the punishment of anyone who is not guilty in fact. Second, it proscribes punishment that is too harsh (or lenient) given the nature of the crime and the harms caused. For some, retribution best aligns with determinate or fixed sentencing policies, as opposed to indeterminate sentences, i.e., a maximum sentence and a lesser sentence established by law or set by corrections authorities. The reasoning in support of determinate sentencing is that, in accordance with retributive theory, one, and only one, definitive sentence is appropriate for an offense, and anything more or less than that sentence is therefore unfitting or unjust. Nowadays however, this view is seen as too rigid due to the prevailing belief that a range of punishments is usually acceptable for each particular crime.[78]

In democratic political systems, the public determines the appropriateness of punishments through the election of the lawmakers who establish them. Consequently, as a practical matter, to be retributively appropriate, a punishment must meet public approval, though such approval is, in and of itself, insufficient to establish retribution. In the United States, during periods of high and rising crime, the public has demanded punishments that the courts have held to be cruel and unusual in violation of the Eighth Amendment to the Constitution—the equivalent of declaring them retributively disapproved.[79] As explained below, retribution will be a significant issue for the acceptability of e-carceration.

5. *Is the cost of the treatment worth bearing given the likely benefit gained and the likelihood of support by taxpayers?*

---

78 *Id.* at 26.

79 *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 469 (2008) (holding that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits the imposition of the death penalty for the rape of an eight-year-old girl).

We can imagine criminal justice interventions that would be so costly that, their effectiveness notwithstanding, the public would refuse to bear the expense. An example would be individual counseling and training by professional staff for each prisoner in order to achieve rehabilitation. Another example might be the abolition of parole and "good time" to eliminate reductions in prison sentences.[80] Elimination of all discretionary release policies probably would require additional prison construction and the employment of more corrections personnel to administer the new facilities. Both the lenient and punitive policies above are unlikely to be adopted because of the sheer expense of doing so.

6. *Does the treatment have significant negative or positive impact on families and the offender's community?*

High levels of incarceration are believed to have negative consequences for the families and communities of prisoners.[81] For families, incarceration of the male parent may mean a reduction in income and more female-headed units, with a loss of effective child-rearing. This may be the case even where the male leads a criminogenic lifestyle. Second, the children of incarcerated parents often have significant problems, including emotional difficulties, misbehavior at school, delinquency, and crime later in life.[82] For communities, incarceration at high rates can damage fragile social networks and therefore reduce informal controls, leading to more crime in the neighborhood.[83]

---

80 Sixteen states, the District of Columbia, and the federal government have essentially abolished discretionary parole, but may maintain other methods of discretionary release. KEVIN R. REITZ ET AL., ROBINA INST., AMERICAN PRISON-RELEASE SYSTEMS: INDETERMINACY IN SENTENCING AND THE CONTROL OF PRISON POPULATION SIZE 28 tbl.5. (2022).

81 *See* Nancy Rodriguez & Jillian J. Turanovic, *Impact of Incarceration on Families and Communities*, *in* THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT 189, 190 (John Wooldredge & Paula Smith eds., 2018).

82 *See* Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, 50 J. OFFENDER REHAB. 18, 29 (2011).

83 Todd R. Clear et al. *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 1, 34, 38, 55 (2003).

On the other hand, some offenders have negative histories prior to incarceration. They are "bad neighbors, absentee fathers, and a general drain on their communities' resources."[84] For men who, prior to incarceration, were dangerous, reckless, mentally ill, or addicted, prison may actually provide a positive benefit for the family.

In addition, elevated crime rates can be very destructive to communities, driving out prosocial residents as well as stores that are mainstays of the local economy and employers of neighborhood inhabitants.[85] To the extent that incarceration reduces community lawlessness through incapacitation and general deterrence, its positive values should be weighed against the likely benefits of decarceration. Given that there is no consensus on effective alternatives to jail and prison, we think the collateral damage from incarceration is clearly outweighed by the benefits.

***

The current criminal justice system in the United States, which relies on imprisonment for the most serious crimes and for repeat offenders, scores reasonably well on the six central criminal justice issues. An oft-claimed weakness is its apparent failure to rehabilitate most offenders released from prison. The recidivism rate, measured by the rearrest of those released from state facilities, is a disturbing 83 percent.[86] However, state reincarceration rates tell a different tale. A recent report on reincarceration in the United States by the Council of State Governments Justice Center (CSG) seems to challenge prevailing assumptions about recidivism by serious offenders.[87] Analysis by co-author Latzer found that discharged prisoners here are returned to prison within three years of release at rates comparable to those

---

84 Rodriguez & Turanovic, *supra* note 81, at 191.

85 Richard M. McGahey, *Economic Conditions, Neighborhood Organization, and Urban Crime*, 8 CRIME & JUST. 231, 235 (1986).

86 MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ-250975, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 1 (2018).

87 JUSTICE CENTER, U.S. DEP'T OF JUST., BUREAU JUST. ASSISTANCE, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, 50 STATES, 1 GOAL: EXAMINING STATE-LEVEL RECIDIVISM TRENDS IN THE SECOND CHANCE ACT ERA 3 (2024).

of other nations.[88] The inconsistency between the relatively low state reincarceration rates and the elevated rearrest rates may be explained in part by the fact that offending is bound to produce many more arrests than imprisonments. More significantly, these analyses can be reconciled by examining prison admissions-to-arrest ratios. From 1995 to 2019 the ratio declined by 28 percent.[89] The decline in imprisonments explains the apparently modest return-to-prison rates found by the Council of State Governments.[90] Therefore, it cannot be concluded that the United States is very successful at rehabilitating prisoners.[91] On the other hand, based on the preceding, one may conclude that the United States probably has recidivism rates—and certainly has reimprisonment rates—commensurate with or lower than most other countries with rates known to researchers.[92]

Regarding the expense of the criminal justice system, it is difficult to establish benchmarks for assessing the outlay. State expenditures for corrections in 2021 totaled $55 billion or 2.4 percent of $2.3 trillion in direct state expenditures.[93] To contrast, the biggest state outlay, $346.2 billion, was for education—mainly higher education.[94] Spending per prisoner varies enormously from state to state. Arkansas spent just under $23,000 per person, whereas Massachusetts paid out $307,468 per inmate.[95] Comparisons with other countries should be illuminating, but the cross-country data are so

---

88 Barry Latzer, Does the United States Have High Recidivism Rates? New Data Raise Questions About Prevailing Beliefs 1 (Nov. 28, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5029176.

89 *Id.*

90 *Id.* at 10.

91 *Id.* at 1.

92 *Id.*; *cf.* Ian O'Donnell et al., *Recidivism in the Republic of Ireland*, 8 CRIMINOLOGY & CRIM. JUST. 123, 132 (2008) ("[A]pproximately 30 to 50 per cent [sic] of persons released from prison in most nations are reimprisoned for a new offense within 3 to 6 years of release.").

93 RUSSELL PUSTEJOVSKY & JEFFREY LITTLE, U.S. CENSUS BUREAU, G21-ALFIN, ANNUAL STATE AND LOCAL GOVERNMENT FINANCES SUMMARY: 2021 2–3 (2023); *see also Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., https://perma.cc/W7SF-9HVF.

94 PUSTEJOVSKY & LITTLE, *supra* note 93, at 2–3; *see also State and Local Expenditures*, URB. INST., https://perma.cc/YYE8-P29Q.

95 *How Much Do States Spend on Prisoners?*, USAFACTS (Apr. 17, 2024), https://perma.cc/VU8L-T3GZ.

discrepant that their comparative value is minimal. Nonetheless, here are some figures which do not place United States expenditures in a bad light.

Spending per prisoner in the six U.S. states with the most prisoners[96]

STATE	ANNUAL
Texas	$31,484
California	$128,089
Florida	$41,679
Georgia	$29,982
Ohio	$44,040
Pennsylvania	$67,275
Total	$342,549
Average	$57,092
Per day	$156.42; in Euros: €137.18 (2020 avg exchange rate)

Spending per prisoner, per day, in the U.S. and 5 other nations[97]

COUNTRY	PER DAY
Canada	€327.13
Czech Republic	€46.06
Italy	€131.39
Japan	€13.80
New Zealand	€350.96
United States	€137.18 (Figure for six U.S. states with the most prisoners.)

As for incapacitation, general deterrence, and retribution, the assessment of system performance depends on how one views the time periods that prisoners actually spend in prison. While murderers and rapists served long median prison terms (17.5 years and 7.2 years, respectively), all inmates released from state prisons together served, on average, only 2.7

---

96 *Id.*

97 THAILAND INST. OF JUST. & PENAL REFORM INT'L, GLOBAL PRISON TRENDS 16 (2020), https://perma.cc/63SD-GPBX.

years, and the median time served was a mere 1.3 years.[98] The typical time served is short when compared to the sentences imposed but lengthy compared with time served in some other countries. Recent data for Europe is difficult to come by, but from 1980 to 1999, a period during which the American system was becoming more punitive, the length of time served here for some offenses was double the average for Europe.[99] On the other hand, there is evidence of underpunishment as well. As mentioned earlier, felons and even violent felons are frequently sentenced to probation in lieu of prison.[100]

Public opinion surveys indicate dissatisfaction with the justice system, with ideological splits over the nature of the deficiency. 54 percent of self-identifying liberals think that convicted criminals serve too much time in prison, while 49 percent of self-identifying conservatives believe that the system is insufficiently punitive.[101] While there is little consensus on the nature of the deficiencies of the United States justice system, objective measures are insufficient to conclude that the system is markedly deficient when it comes to incapacitation, general deterrence, and retribution.

Last of all, with respect to the family and community impact of imprisonment, as concluded above, the negative consequences are clearly outweighed by the benefits of the justice system overall, especially in light of the absence of any consensus on alternatives to prison.

5. The Criminal Justice Benefits and Limitations of Electronic Technology

It is becoming increasingly difficult to imagine life in the 21st century without electronic technology. This is especially the case in technology-reliant First World nations like the United States. Given the level of dissatisfaction with America's 200-plus-year-old prison system and the ample benefits of electronic technology, it will be surprising if we don't dramatically expand the application of that technology to the criminal justice system. Thousands

---

98 U.S. Dep't of Just., Bureau of Just. Stats., NCJ-309958, Time Served in State Prison, 2018 – Supplemental Tables 1 tbl.1 (2025). For violent crimes, as one would expect, the time served is greater: 4.8 years (mean), and 2.4 years (median). *Id.*

99 Barry Latzer, The Myth of Overpunishment 113 (2022).

100 *See supra* text accompanying notes 68–69.

101 Gramlich, *supra* note 2.

of offenders in the United States are already subject to Electronic Monitoring (EM) with the Global Positioning System (GPS), and monitoring technology is also being used in an estimated 40 countries.[102]

Virtually all components of the criminal justice system could benefit from electronic technology. At the front end of the system, EM can be used with selected pre-trial detainees in lieu of bail as well as with probationers to assure compliance with release terms. Within prisons, electronic technology can enable digital rehabilitation, which would include computer-based learning and vocational training, plus computer-based treatment and behavior change interventions.[103] On the back end, EM can facilitate conformity with parole requirements and help ensure parolee reintegration into law-abiding society. In addition to monitoring and surveillance, post-release electronic applications can provide informational resources, tools to access services in the community, and apps for ongoing recovery support.[104]

Given such a wide range of applications, electronic technology offers hope for greater public safety through enhanced conformity with offender release requirements and increased crime desistance among those no longer under correctional control. At the same time electronic technology can reduce the amount of incarceration since crime desistance means fewer arrests and imprisonments. In short, expanding the application of electronic technology to the criminal justice system offers one of those rarities in public policy—a win-win.

This has led some advocates to exaggerate the benefits of the technology. For instance, Mirko Bagaric, dean of Swinburne Law School in Melbourne, Australia, contends that implemented properly, e-carceration could

---

102 The actual extent of EM usage is not known. A Pew research survey of 2015 estimated that more than 125,000 people in the United States were supervised with such devices. *Use of Electronic Offender-Tracking Devices Expands Sharply*, PEW (Sept. 7, 2016), https://perma.cc/WPJ7-M5Z7; Mike Nellis, *Electronic Monitoring Around the World*, CRIMINOLOGY & CRIM. JUST., Apr. 26, 2021, at 2 (estimating EM usage in 40 countries). Some early monitoring systems in the United States used Radio Frequency (RF) technology, but as RF cannot monitor outside a specific location, such as a home, it has largely been replaced here (though not in Europe) by GPS. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1365–66 (2014).

103 *Digital Rehabilitation in Prisons*, U.N. INTERREGIONAL CRIME & JUST. RSCH. INST., Mar. 2024, at 12–13.

104 *Id.* at 13.

reduce the prison population by 95 percent.[105] American professors Paul H. Robinson and Jeffrey Seaman speculate that electronic technology "could decarcerate over two-thirds of state prisoners and a large majority of federal prisoners."[106]

These claims depend on a major expansion of the capacity of EM to deter, detect, and respond to criminal behavior. Currently, EM can monitor the location of the subject, which has an effective, though limited, crime-deterring effect. For example, IT personnel could create customized geofenced exclusion zones, such as a crime victim's or a prosecution witness's residence or workplace, or in the case of a child sexual offender, a playground or schoolyard. The subject's entry into such no-go zones would then be detected by the EM device, which will alert the monitoring agents who, in turn, would inform law enforcement and the corrections authorities of the breach. Since the subject knows that the authorities will be almost immediately notified of the violation, it is expected that he will be deterred from such a transgression.

However, EM as currently designed cannot stop a determined subject from entering a no-go zone and committing a crime there. This level of public protection is one of the benefits of incarceration that EM cannot presently match. Furthermore, there always will be countless offenses that a subject could commit outside geofenced exclusion zones which would not trigger an alert. On the other hand, since the GPS system provides time-stamped location data, evidence linking the monitored subject to such crimes may be generated by determining that the subject was located at the situs of the offense at the time it occurred. This too should provide some deterrent benefit but without anything approaching the protections of traditional incarceration.

A more effective electronic crime detection would require the capacity to electronically observe the subject: that is, to monitor his voice, physiognomy, and bodily movements, so that monitoring agents could actually see him committing the crime. There are recent reports of the development of a deep learning model for suspicious behavior detection by CCTV,

---

105 Mirko Bagaric et al., *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 73–74 (2018).

106 Robinson & Seaman, *supra* note 7, at 326.

ostensibly capable of identifying various offenses.[107] Whether the model, if workable, would be applicable to a body cam worn by an offender is unclear.

To achieve crime detection in real-time, Dean Bagaric proposes a harness with a camera that, like the "cop cams" commonly worn by police officers, could transmit audio and video signals.[108] The harness would have to operate and be worn at all times, 24/7, which would be highly intrusive and create various difficulties.[109] First, the sensor would have to function at nighttime with minimal light. Second, there are activities, such as swimming, bathing, athletics, or even sleeping, that may not be compatible with a harness. Third, the monitored subject simply could attach the harness to another person. Dean Bagaric suggests that this last issue could be resolved by having an upward-facing camera that captures the face of the subject and transmits it continuously, perhaps utilizing biometric software to provide facial recognition.[110] If, however, the subject uses a stand-in, the monitoring agents will not be able to detect criminal activity by the subject in real time, though they should be able to determine that he removed the harness. Fourth and finally, even if the subject's face is transmitted to monitoring agents, this does not always translate to observation of criminal activity. Real-time crime detection remains a separate and problematic issue.

If the harness-with-camera proposal proves unworkable, it still may be possible to identify a particular subject through the use of non-facial biometric measures, such as heartbeat.[111] However, this too will not enable monitors to detect criminal activity by the subject, though it would make it possible to determine that the subject removed or disabled the monitoring device.

EM advocates assuming real-time observations of potential offenders also propose an automated taser-like response in the event an offense is detected. Dean Bagaric advocates incorporating a remote CED, a conducted

---

107 Virender Singh et al., *Real-Time Anomaly Recognition Through CCTV Using Neural Networks*, 173 PROCEDIA COMPUT. SCI. 254, 262 (2020) (claimed to detect abuse, burglary, the setting off of explosives, shooting, fighting, shoplifting, arson, robbery, stealing, assault, and vandalism).

108 Bagaric et al., *supra* note 105, at 103.

109 *Id.* at 104.

110 *Id.*

111 *See* Heart Electronic Actions as Biometric Indicia, U.S. Patent No. 8,489,181 (filed Jan. 2, 2009).

energy device, such as a stun gun or a Taser, into the electronic bracelet attached to the prisoner's ankle:[112]

> If [monitored offenders] attempt to escape, commit harmful acts, or disable or remove their body sensors, the computers monitoring the events will instantly activate the CEDs embedded in their ankle bracelets to administer the electric shock. This will incapacitate offenders until the arrival of law enforcement officers, whom the computer system will have alerted.[113]

Whether current technology is sufficiently reliable to generate automated electric shocks without false positives—i.e., spurious alerts, as well as other malfunctions—is unknown, and the risk of improper, remote-activated electric shocks is likely to disturb the public and almost certainly raise hackles among civil libertarians.

In addition, given the potential of having to monitor thousands of EM subjects in a populous urban location in order to detect criminal activity in real time, big city EM is likely to overwhelm the capacities of any human monitoring system. Given the problems with real time detection of criminal activity, such use of EM must be considered more aspirational than operational. Nevertheless, EM can effectively contribute to post-offense detection. This is most likely to be workable when a crime is reported to law enforcement and the police investigate and identify suspects or persons of interest. If it turns out that the suspect/person of interest was monitored by an EM device, the police could then determine if he was at the situs of the offense at the time it occurred.

At a more experimental level, it may be possible to identify perpetrators in real time if they are monitored electronically and are at a hot-spot location known to be especially vulnerable to criminal activity, such as a particular street corner, bus stop, or street fronting a tavern or liquor store. Since thousands of persons might enter these locations, Artificial Intelligence (AI) will probably be needed to monitor for the presence of subjects on EM and alert monitoring agents about their presence. While this technique would not tell police that a crime was actually occurring when the EM subject was present, 911 calls might provide that information. Nor would this procedure definitively prove that the subject was engaged in any criminal

---

112 Bagaric et al., *supra* note 105, at 107.

113 *Id.* at 109.

activity. However, it would inform the police of the subject's presence in the high crime location and of his possible involvement in a reported crime at that location.

More effectively, but with greater civil liberties concerns, cities could erect CCTV cameras in crime hot spots and review the video recordings from the time of a reported offense to identify perpetrators. While EM may not be relevant to CCTV detection, it might provide additional evidence of a suspect's location—especially useful if a perpetrator cannot be identified from the video recordings, say because his face is obscured. Civil libertarians may be expected to strenuously protest the video recording of Americans on public streets à la communist China, and vigorous public discussion of such a policy would no doubt ensue.

In addition to monitoring released offenders, electronic technology can facilitate community corrections in a positive way through the creation of geofenced *inclusion* zones. These zones can apply to locations that provide important benefits for the released offender, such as a drug treatment clinic, an educational or training facility, or a place of employment. The electronic device can be programmed to remind the subject with audible prompts of the need to present himself at the appropriate facility. Once at the facility, the subject can then check in with the device, perhaps at an electronic kiosk on the premises. Reminders like these can significantly improve participation in programs and employment. In this way, electronic technology can provide substantial benefits to released offenders that effectively facilitate crime desistance and reintegration into the law-abiding community.

To summarize, electronic technology has tremendous potential to deter criminal behavior by enhancing community corrections—that is, monitoring pre-trial detainees and convicted offenders (probationers and parolees)—thereby deterring future lawbreaking. In addition to monitoring, electronic technology also can provide resources to released offenders to facilitate integration into law-abiding society. Furthermore, technology can improve the delivery of in-prison rehabilitation programs through various computer-based interventions.

Currently, however, electronic technology *cannot* in any practical way detect criminal activity in real time, nor can it substitute for incarceration in other ways, which we turn to next.

We now apply our six benchmarks to the use of electronic technology in the criminal justice system.

1. *Does electronic technology incapacitate offenders?*

Electronic technology can be used in jails and prisons, but the institutions, not the electronic technology, keep the public safe. A sentence to home confinement facilitated by monitoring technology would be considered incapacitative, and in this situation, the monitoring serves as a major facilitator of the confinement. With respect to probationers and parolees, who are generally free to move about within a specific geographic area, such as a city or a county, electronic technology can monitor movements, but it does not incapacitate.

2. *Does electronic technology provide general deterrence?*

No. General deterrence is based on the theory that the perceived risk of sanctions (i.e., punishment) discourages members of the public from engaging in crime. Electronic technology, as most courts have held,[114] is not punitive, and we believe that the general public does not perceive it to be punitive. Certainly, it is not commonly perceived to be anywhere near as punishing as jail or prison. Consequently, electronic technology will not produce general deterrence.

3. *Does electronic technology promote the reform or rehabilitation of offenders?*

Yes. It facilitates access to programs and services that will greatly benefit prisoners during incarceration and after release. Post-release benefits include encouraging attendance at worksites and participation in drug rehabilitation, educational, and vocational training programs. In addition, by monitoring pre-trial releasees, probationers, and parolees, technology will help discourage reoffending, thereby supporting rehabilitation.

4. *Does electronic technology provide retribution?*

---

[114] *See infra* Part 6.3 (discussing the jurisprudence of electronic monitoring technology).

No. To the extent that electronic technology is nonpunitive, it is incapable of providing retribution for criminal acts. We believe that although the public and the courts may perceive electronic technology to be inconvenient, stigmatizing, or embarrassing, they do not think these negative effects rise to the level of retribution for crime. It is difficult to believe that the general public would consider electronic technology, as opposed to jail or imprisonment, sufficiently punitive for such serious violent crimes as murder, rape, robbery, or aggravated assault.

5. *Is the cost of electronic technology worth bearing given the likely benefit gained and the likelihood of support by taxpayers?*

We think the public will support the costs associated with electronic technology (which are not inconsequential) when they realize that they are offset by the savings in reduced incarceration. It has been proven that imprisonment is far more costly than EM.[115] If, as we posit, electronic technology results in reduced offending, it also will reduce incarceration and, in turn, the expenses associated with jails and prisons.

However, many offenders on EM are required by the courts to reimburse the state for the cost of the technology. While it is arguable that the offender, and not the general public, should assume costs associated with his crime, the limited resources of the vast majority of offenders makes this cost-shift problematic. Released offenders often are unskilled, under-educated, and unemployed, with personal financial obligations related to housing, food, transportation, and childcare. To add EM expenses to their financial burdens increases their debts, encourages further resort to crime in order to make payments, and undercuts successful rehabilitation. Such policies should be reconsidered.[116]

6. *Will electronic technology have significant negative or positive impact on families and the offender's community?*

---

115 WILLIAM BALES ET AL., FLORIDA STATE UNIV., A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ELECTRONIC MONITORING 31–32, 150–51 (2010), https://perma.cc/JS74-TSS6.

116 *Id.* at 102.

While electronic technology may contribute to familial stress and conflict, it also will enable offenders to avoid confinement and stay with their families for longer periods of time. Furthermore, if electronic technology successfully prevents additional offending, it will be a real benefit to the communities in which former offenders and their families reside.

6. THE JURISPRUDENCE OF ELECTRONIC MONITORING TECHNOLOGY

The further development of EM in the criminal law system has naturally been accompanied by numerous challenges in the courts. While having only reached the Supreme Court once, challenges to electronic monitoring technology have littered the appellate, district, and state supreme courts in the past two decades.

These courts have heard numerous claims based on the Fourth Amendment, the Due Process Clause, the Eighth Amendment, and the Ex Post Facto Clause, and, as this section will show, have generally upheld EM despite the various challenges to its use.

6.1. Fourth Amendment

In *United States v. Jones*, the Supreme Court decided that the attachment of a GPS device on a vehicle to track that vehicle's movements was a Fourth Amendment search.[117] Three years later, the Court would be faced with a similar question: is the placement of an electronic device on a person to track that person's movements a search?[118]

In 2015, Torrey Grady, a convicted sex offender, challenged his condition of lifetime electronic monitoring based on the Court's ruling in *Jones*.[119] Under the monitoring program, Grady was forced to appear for a hearing to determine "whether he should be subjected to satellite-based monitoring (SBM) as a recidivist sex offender."[120] The North Carolina

---

117 565 U.S. 400, 404 (2012).

118 *See* Grady v. North Carolina, 575 U.S. 306 (2015) (per curiam).

119 *See id.* at 307.

120 *Id.*

appellate and supreme courts both rejected Grady's Fourth Amendment challenge, and he appealed to the United States Supreme Court.[121]

The Supreme Court took the case and decided that electronic monitoring was a search under the Fourth Amendment, reasoning that "[t]he State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search."[122] But a search must be unreasonable to violate the Fourth Amendment, and the Court did not address the reasonableness of the monitoring program.[123] The case was then remanded back to the state court to consider the reasonableness issue.[124]

On remand, the North Carolina Supreme Court overturned the electronic monitoring program as unconstitutional but stopped short of extending that ruling to all such programs.[125] The court reasoned that "the intrusion of mandatory lifetime SBM on legitimate Fourth Amendment interests outweighs the promotion of legitimate governmental interests[]" but clarified that its "decision . . . does not address whether an individual who is classified as a sexually violent predator . . . may still be subjected to mandatory lifetime SBM."[126] Justice Newby authored a two-justice dissent in which he decried the court's "unbridled analysis" which, he said, "could be used to strike down every category of lifetime monitoring under the SBM statute."[127] Pointing to the defendant's relaxed expectation of privacy and the importance of the SBM program, Justice Newby characterized the "nature of the search providing location information" as more "inconvenient than intrusive."[128]

Following the Supreme Court's ruling in *Grady*, lower courts have consistently held EM conditions to be reasonable searches that do not violate the Fourth Amendment. In 2016, the Seventh Circuit Court of Appeals considered a *Grady*-type fact pattern in *Belleau v. Wall*.[129] Belleau was convicted of sexually assaulting a boy for five years beginning when the boy was only

---

121 *Id.* at 308.
122 *Id.* at 310.
123 *Id.*
124 *Id.* at 311.
125 State v. Grady, 831 S.E.2d 542, 569–72 (N.C. 2019).
126 *Id.* at 569, 572 (internal quotations omitted).
127 *Id.* at 573 (Newby, J. dissenting).
128 *Id.* at 587–88 (Newby, J. dissenting).
129 811 F.3d 929, 936 (7th Cir. 2016).

eight years old.[130] While he was in prison, a Wisconsin statute was passed that required "persons released from civil commitment for sexual offenses wear a GPS monitoring device 24 hours a day for the rest of their lives."[131] Belleau was released from his commitment in 2010 and forced to wear a GPS monitor in accordance with the statute.[132] He subsequently appealed the condition on the grounds that his monitoring violated the Fourth Amendment and Ex Post Facto Clause.[133] The Seventh Circuit held that the condition did not violate the Fourth Amendment, pointing out that "warrantless searches do not violate the Fourth Amendment as long as they are reasonable," and that as "[t]he 'search' conducted in this case via the anklet monitor is less intrusive than a conventional search," it was reasonable.[134]

While other federal jurisdictions have also found EM compatible with the Fourth Amendment,[135] not all state courts have been on board. In *State v. Ross*, the South Carolina Supreme Court held that the automatic imposition of EM on a man for his failure to register as a sex offender was an unreasonable search.[136] In addition to the nature of the offense, the court

---

130 *Id.* at 930–31.

131 *Id.* at 931; *see also* WIS. STAT. ANN. § 301.48 (West 2018).

132 *Belleau*, 811 F.3d at 931.

133 *Id.* For a discussion of the ex post facto challenge, see *infra* notes 125–131 and accompanying text.

134 *Id.* at 937.

135 *See* United States v. Lambus, 897 F.3d 368, 412 (2nd Cir. 2018) (holding that condition of EM on parolee did not violate the Fourth Amendment as parolee had no expectation of privacy that EM violated); Holland v. Rosen, 895 F.3d 272, 301 (3rd Cir. 2018) (holding that plaintiff's consent to EM conditions precluded such conditions from being a search and seizure); Atkinson v. MDOC, No. 16-cv-10564, 2016 WL 6696044, at *7 (E.D. Mich. Nov. 15, 2016) (affirming state court's determination that petitioner's condition of EM did not violate the Fourth Amendment because no binding case law clearly forecloses that ruling); Daily v. Olson, No. 2:17-cv-210, 2020 WL 4573979, at *6 (W.D. Mich. June 5, 2020) (same reasoning as *Atkinson*); Hamlet v. Irvin, No. 7:20-cv-00013, slip op., 2024 WL 1976539, at *6–7 (W.D. Va. May 3, 2024) (holding that Hamlet's status as a probationer and the lack of controlling authority to the contrary show that Hamlet's rights were not violated); USA v. Anthony, No. 3:23-CR-001990RJC-DCK, 2024 WL 993888, at *5, 7 (W.D.N.C. March 7, 2024) (holding that Anthony did not have a reasonable expectation of privacy in his movements due to his status as a parolee, and thus condition of EM, which Anthony agreed to, did not violate the Fourth Amendment).

136 815 S.E.2d 754, 754–55 (S.C. 2018).

emphasized the status of the defendant and the length of time since his conviction when coming to this conclusion:

> Ross . . . was not on probation, and thus no longer under the jurisdiction of the sentencing court when he was ordered to be placed on electronic monitoring for his failure to register. In fact, Ross was ordered to be placed on electronic monitoring thirty-six years after his conviction, and at least twenty-nine years after he completed serving his punishment for that crime. Also, Ross has not been convicted of any sexual offense since 1979.[137]

In *Commonwealth v. Norman*, the Massachusetts Supreme Judicial Court held that a condition of EM violated Article 14 of the Massachusetts Declaration of Rights—the state's parallel to the Fourth Amendment.[138] The defendant filed a motion to suppress location data from a GPS device placed on him as a condition of release.[139] The GPS device condition was likely initially imposed as a mechanism for keeping Norman out of Boston because he had been trafficking drugs there.[140] In balancing the governmental interest with the intrusion on the defendant's privacy, the court found that "[b]ecause the GPS monitoring at issue here did not serve the purposes of the statutory scheme, the monitoring did not further any legitimate governmental interest. Therefore the search was clearly impermissible."[141] Given that the goal of the statute was to "permit pretrial release while ensuring that a defendant appears in court," the court found there was "no indication on this record that GPS monitoring would have increased" that goal.[142] Because the decision was not made pursuant to the Fourth Amendment of the United States Constitution but rather Article 14 of the Massachusetts

---

137 *Id.* at 757.

138 142 N.E.3d 1, 10 (Mass. 2020). Article 14 is the Massachusetts parallel to the U.S. Constitution's Fourth Amendment, and states in relevant part: "Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all possessions." MASS. CONST. art. 14.

139 *Norman*, 142 N.E.3d at 4, 5.

140 *Id.* at 4. *But see id.* at 4 n.2 (stating that the record does not indicate the judge's exact reasons for imposing the condition of GPS monitoring).

141 *Id.* at 10.

142 *Id.*

Declaration of Rights, the United States Supreme Court could not review the Judicial Court's decision.

While the courts in *Ross* and *Norman* held that certain applications of EM amounted to unreasonable searches, there have been other circumstances in which state courts have rejected Fourth Amendment challenges to monitoring. In *Commonwealth v. Johnson* the defendant's status as a probationer, his "extensive criminal history, and his willingness to recidivate while on probation" led the Massachusetts Supreme Judicial Court to uphold EM as a reasonable condition of probation.[143] This 2019 decision differed from *Norman* (which was decided a year later) in that it presented a very different question.[144] While *Johnson* addressed a condition of EM on a probationer with a relaxed expectation of privacy, *Norman* dealt with a condition of EM on a defendant awaiting trial: a status which comes with a "greater expectation of privacy."[145]

In *H.R. v. New Jersey State Parole Board*, the New Jersey Supreme Court used the special needs search exception to the warrant requirement to uphold EM as a release condition.[146] The New Jersey special needs exception balances a search's purpose with its "encroachment on an individual's [privacy] interests."[147] When H.R. was placed on a condition of EM pursuant to New Jersey's Sex Offender Monitoring Act (SOMA), the court found that the legislatively enumerated purposes behind the Act supported the conclusion that "a special need—not an immediate need to gather evidence to pursue criminal charges—motivate[d] the GPS monitoring prescribed by the Legislature."[148] Turning to the encroachment factor, the court held that the diminished expectation of privacy at play here minimized the invasiveness of the intrusion, thus resulting in a valid search.[149]

---

143 119 N.E.3d 669, 674 (Mass. 2019).

144 *See Norman*, 142 N.E.3d at 5.

145 *Id.* at 3–4, 6.

146 231 A.3d 617, 620 (N.J. 2020).

147 *Id.* at 626 (alteration in original) (quoting State in Interest of J.G., 701 A.2d 1260, 1265 (N.J. 1997)).

148 *Id.* at 619–20, 627. The court specifically listed enhanced supervision, community protection, deterrence, and rehabilitation as purposes for which the legislature passed SOMA. *Id.* at 627.

149 *Id.* at 630.

Fourth Amendment challenges to EM seem to be failing overall. No federal jurisdiction has yet held EM to be unreasonable on Fourth Amendment grounds, and the state supreme courts have upheld EM as often as they have overturned it.[150] While a few states, such as Massachusetts, have based their EM decisions on state search and seizure provisions, enabling them to establish broader rights for defendants and therefore more limited use of monitoring, it is unlikely that many other states will follow suit.[151]

6.2. Due Process

EM has been challenged under the Due Process Clause on both substantive and procedural due process grounds.[152] Substantive due process "protects against government power arbitrarily and oppressively exercised."[153] It is implicated when the government attempts to deprive a person of something that is their fundamental right.[154] Procedural due process deals

---

150 *See supra* Section 6.1.

151 *See* Joshua Windham, *States May Close the "Open Fields" Exception to the Fourth Amendment*, STATE CT. REP. (May 21, 2024), https://perma.cc/ZRP5-JP9P (exemplifying a narrower approach to search and seizure jurisprudence in the states of Mississippi, Montana, New York, Oregon, Tennessee, Vermont, and Washington, in part, because they have based portions of their jurisprudence on their own state constitutions); *see also* Alicia Bannon, *Fourth Amendment Lags Behind State Search and Seizure Provisions*, STATE CT. REP. (May 31, 2024), https://perma.cc/HU3U-TN74.

152 A large number of due process challenges surrounded the Adam Walsh Amendments, which were added to the federal Bail Reform Act in 2006 and dealt with, among other things, conditions of pre-trial and post-bail release for child sex offenders. The Amendments mandate the automatic application of certain conditions, including EM, to such defendants when released pending trial. 18 U.S.C. § 3142(c)(1).
There have been many challenges to these Amendments and the EM condition based on due process grounds. Given the quantity and nature of these challenges, they will be addressed in a separate section on the Adam Walsh Amendments. *See supra* Section 6.6.

153 Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (citing Daniels v. Williams, 474 U.S. 327, 331 (1986)).

154 For a right to be fundamental, it must be "deeply rooted in this Nation's history and tradition." Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977). The Supreme Court has held the right to marry, Loving v. Virginia, 388 U.S. 1 (1967), the right to custody of one's children, Santosky v. Kramer, 455 U.S. 745 (1982), and the right of a tortfeasor to be free from grossly excessive punishments, Cooper Indus., Inc. v.

instead with the procedures the government must follow prior to depriving a person of his rights.[155] It is implicated when the government fails to follow proper procedures when denying a person's rights.[156]

In *Holland v. Rosen*, the Third Circuit Court of Appeals addressed a challenge to EM on both due process fronts.[157] In 2017, New Jersey passed the New Jersey Criminal Justice Reform Act, which replaced monetary bail with a set of pre-trial release conditions.[158] Brittan Holland challenged the condition of EM based, in part, on the Due Process Clause of the Fourteenth Amendment.[159] The Third Circuit examined the Act's condition under both a substantive and procedural due process lens.[160] The court held that the rights to cash bail and corporate surety bond "are not protected by substantive due process because they are neither sufficiently rooted historically nor implicit in the concept of ordered liberty."[161] Because of this, the condition being challenged "need only be rationally related to a legitimate State interest. And it is."[162] The court stated that the factors laid out in the New Jersey Constitution for determining a defendant's pre-trial release (flight risk, danger to others, and obstruction of the criminal process) were legitimate state interests.[163]

Holland then challenged the Reform Act under a procedural due process theory, arguing that the Act "enables the State court to impose . . . home detention and [EM] without having the option to impose monetary bail together with or in place of these non-monetary conditions."[164] The court

---

Leatherman Tool Grp., Inc., 532 U.S. 424 (2001), are all substantive rights that cannot be infringed upon absent the appropriate level of scrutiny.

155 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 609 (Aspen Publishing 7th ed. 2023).

156 Thus, the state cannot impose on property owners the cost of local improvements without providing them an opportunity to be heard. Londoner v. Denver, 210 U.S. 373, 386 (1908).

157 895 F.3d 272, 292 (3rd Cir. 2018).

158 *Id.* at 278.

159 *Id.*

160 *See id.* at 292.

161 *Id.* at 296.

162 *Id.*

163 *Id.*; *see also* N.J. CONST. art. 1, ¶ 11.

164 *Holland*, 895 F.3d at 297.

disagreed.[165] The Reform Act granted Holland (1) a pre-trial detention hearing where he had the "right to counsel, . . . opportunity to testify, present witnesses, cross-examine witnesses, and present information" and (2) the ability to receive all exculpatory evidence and all reports relating to probable cause.[166] The "court could then take into account various factors to determine whether any . . . release conditions, or a combination of conditions, would reasonably assure not only Holland's presence at trial but also the other goals of the Act."[167] The Third Circuit reasoned that these "extensive safeguards provided by the Reform Act are not made inadequate by its subordination of monetary bail."[168] Therefore, the imposition of EM via the Reform Act provided procedural due process.

The Fifth Circuit also dismissed a due process challenge to EM.[169] In *Hernandez v. Livingston*, Hernandez argued that EM as a condition of release violated due process because it was "not listed on the face of his original certificate of mandatory supervision" and "the certificate of mandatory supervision was a contract that he refused to sign."[170] The court, however, said that "Hernandez's allegation that conditions of electronic monitoring and house arrest could not apply to him because he refused to sign his certificate of mandatory supervision is without merit."[171] The mere fact that the conditions ultimately imposed were not on the original certificate did not implicate due process, and "Texas law does not require inmates released on mandatory supervision to sign a contract. It requires only that inmates released on mandatory supervision be given the rules and conditions of their release in writing."[172] In fact, the contention that release paperwork is a contract simply because the inmate is asked to sign it is wholly without merit.[173]

---

165 *Id.*

166 *Id.* at 298.

167 *Id.*

168 *Id.* at 300.

169 *See* Hernandez v. Livingston, 495 F. App'x 414 (5th Cir. 2012) (per curiam).

170 *Id.* at 416.

171 *Id.* at 417.

172 *Id.* (citing TEX. GOV'T CODE ANN. §§ 508.154(b)–(c)).

173 *Id.*

Other jurisdictions have also upheld EM in the face of due process challenges.[174] Indeed the only legitimate due process challenges that have risen out of the use of EM have come through the Adam Walsh Amendments, which will be addressed later in this article.[175]

It is very unlikely that EM will ever be held to infringe upon a fundamental right, thereby raising a substantive due process issue. There simply are no grounds to believe that the "rights" EM supposedly infringes will meet the threshold of being so deeply rooted in American history and tradition that they are fundamental.[176] Therefore, most due process challenges will address procedural due process. And as *Holland* illustrates, the intentional placement of safeguards—such as pre-trial detention hearings where a defendant has counsel and an opportunity to testify—should bar EM from any serious danger on the due process front.

---

174 In *United States v. Taylor*, the Western District of Pennsylvania held that the defendant's EM condition did not violate substantive or procedural due process as the defendant had ample opportunity to object to his release conditions and EM is not so violative as to "shock the conscience." No. 19-303, 2023 JLCat, at *25–26 (W.D. Pa. Aug. 22, 2023). In *Hamlet v. Irvin*, the Western District of Virginia found that the defendant did not have a protected liberty interest that was implicated by the monitoring condition. No. 7:20-cv-00013, slip op., 2024 WL 1976539, at *5 (W.D. Va. May 3, 2024). In *Williams v. Director, TDCJ-CID*, the Eastern District of Texas also found that the petitioner's condition of EM "did not violate his right to due process of law because imposition of electronic monitoring to a person convicted of a sexual offense does not implicate a protected liberty interest." No. 5:08cv156, 2011 WL 3880538, at *6 (E.D. Tex. Aug. 9, 2011). In *Randall v. Cockrell*, the Northern District of Texas summarily dismissed a due process challenge, stating that the "state habeas court . . . decision [in finding the condition of EM constitutional] is not contrary to clearly established federal law or otherwise unreasonable." No. 3-02-CV-0648-G, 2002 WL 31156704, at *3 (N.D. Tex. Sept. 25, 2002). In *Noonan v. Hoffman*, the Western District of Michigan held that petitioner's due process challenge to EM was without merit as there is no prejudice resulting from the trial court's failure to inform him of the condition and the Supreme Court has never held that lifetime EM is something a defendant must be aware of before entering a guilty plea. No. 1:14–cv–830, 2014 WL 5542745, at *9–10 (W.D. Mich. Oct 31, 2014).

175 *See infra* Section 6.6.

176 *See supra* notes 161, 162 and accompanying text.

6.3. EM as Punishment

Whether a condition of EM is considered punitive has key implications for Eighth Amendment and ex post facto challenges. The Eighth Amendment prohibits cruel and unusual punishments, which the Supreme Court has interpreted as "the imposition of inherently barbaric punishments under all circumstances" or "extreme sentences that are grossly disproportionate to the crime."[177] For a law to violate the Ex Post Facto Clause of the Constitution, it must "render[] an act punishable in a manner in which it was not punishable when it was committed."[178] Thus for EM to violate either of these provisions, it *must* be categorized as a punishment. In determining whether a statutory condition is punitive, the Supreme Court has said:

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[179]

In analyzing whether a statute is punitive in purpose or effect, courts have looked to the often-cited *Mendoza-Martinez* factors. This analysis presents seven factors for courts to consider in deciding whether an act of Congress was penal in character.[180]

A handful of courts have tried their hand at applying this framework to statutes regulating EM.

---

177 Graham v. Florida, 560 U.S. 48, 59–60 (2010) (internal quotations and citations omitted).

178 Fletcher v. Peck, 10 U.S. 87, 138 (1810); *see also* U.S. CONST. art I, § 10.

179 Smith v. Doe, 538 U.S. 84, 92 (2003) (alteration in original).

180 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963). The factors are:

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

Perhaps most notably, the Seventh Circuit Court of Appeals in *Belleau v. Wall* held that a Wisconsin statute's imposition of EM on released sex offenders was not punitive in intent or effect.[181] As mentioned above, Belleau was convicted of sexually abusing a boy for five years beginning when the boy was only eight years old.[182] While he was in prison, Wisconsin enacted a law requiring EM for sexual offenders who had been released from commitment.[183] In addition to his Fourth Amendment challenge, Belleau challenged the Wisconsin statute's application to him as a violation of the Ex Post Facto Clause.[184] He argued that the statute was enacted after he was convicted, so its application to him violated the Ex Post Facto Clause.[185] In walking through the framework, the court first stated that "[t]he monitoring law is not punishment; it is prevention" as the "aim was not to enhance the sentences for his crimes but to prevent him from continuing to molest children."[186] In analyzing whether the law was nevertheless punitive in its effect, the court reasoned that, while wearing a monitor may be an annoyance, it "no more is punishment than being stopped by a police officer on the highway and asked to show your driver's license . . . or being placed on a sex offender registry."[187]

In *Doe v. Bredesen*, the Sixth Circuit Court of Appeals held that a Tennessee monitoring statute was not punitive, and thus not violative of the Ex Post Facto Clause.[188] The statute, which became effective after Doe pleaded guilty to multiple sexual battery offenses, changed Doe's status from "sex offender" to "violent sexual offender."[189] The court held that the statute was not punitive as there was "nothing on the face of the statutes [that] suggest[ed] that the legislature sought to create anything other than a civil scheme designed to protect the public from harm."[190] Further, the "Acts'

---

181 811 F.3d 929, 937 (7th Cir. 2016).

182 *See supra* notes 129–133 and accompanying text.

183 *Belleau*, 811 F.3d at 931.

184 *See id.* at 937.

185 *See id.* at 931, 937.

186 *Id.* at 937.

187 *Id.*

188 507 F.3d 998, 1007–08 (6th Cir. 2007).

189 *Id.* at 1000.

190 *Id.* at 1004.

registration, reporting, and surveillance components [were] not of a type that we have traditionally considered as a punishment."[191]

While numerous courts have also concluded that EM is not punishment,[192] others have sidestepped the question. In *Daily v. Olson*, petitioner Daily was convicted of continuously sexually abusing his girlfriend's daughter when the daughter would visit them every weekend.[193] Part of the petitioner's sentence was lifetime EM.[194] He argued (through a federal habeas petition) that this condition constituted cruel and unusual punishment.[195] The Western District of Michigan found that an EM requirement for habitual sex offenders was not cruel and unusual punishment because the petitioner could not establish that such a determination is "contrary to . . . clearly established federal law."[196] Because the success of a habeas petition on these

---

191 *Id.* at 1005.

192 In *Randall v. Cockrell*, the Northern District of Texas found that conditions of EM and placement in a halfway house upon release from prison "do not constitute punishment" as the intent of the Texas law mandating such conditions is not punitive. No. 3-02-CV-0648-G, 2002 WL 31156704, at *2 (N.D. Tex. Sept. 25, 2002). In *Williams v. Quarterman*, the Northern District of Texas reaffirmed this stance in holding that EM as a condition of parole was not punishment because "[t]he imposition of a condition of parole is not a 'punishment' imposed on an inmate, rather, conditions of parole are placed upon a releasee to ensure they conduct themselves in a manner consistent with acceptable norms, to prevent situations which could lead to criminal behavior, and to monitor the releasee's conduct and activity." No. 2:07-CV-0154, 2009 WL 81144, at *3 (N.D. Tex. Jan. 12, 2009).

On the state level, in *In re Justin B.*, the South Carolina Supreme Court rejected a cruel and unusual punishment challenge to conditions of EM because "Section 23-3-540's electronic monitoring requirement is a civil obligation similar to other restrictions the state may lawfully place upon sex offenders." 747 S.E.2d 774, 776 (S.C. 2013). In *Hassett v. State*, the Delaware Supreme Court found that the Delaware statute's "requiring registered Tier III sex offenders to wear GPS monitoring bracelets while on supervision . . . does not implicate the ex post facto clause because the statute is intended for public safety and is not punitive in nature." No. 601, 2011 WL 446561, at *1 (Del. Feb. 8, 2011). Finally, in *State v. Trosclair*, the Louisiana Supreme Court found that a state statute that mandated EM upon release for convicted sex offenders was "predominantly nonpunitive in both intent and effect" and did not constitute an ex post facto violation. 89 So.3d 340, 357 (La. 2012).

193 No. 2:17-cv-210, 2020 WL 4573979, at *1 (W.D. Mich. June 5, 2020).

194 *Id.* at *4.

195 *Id.*

196 *Id.* at *5.

grounds would require finding that the condition of EM was contrary to, or an unreasonable application of, clearly established federal law, the court determined that Daily was not entitled to habeas relief.[197] The court, however, never formally addressed whether the requirement was punitive. In *Hamlet v. Irvin*, the Western District of Virginia found that, as in *Olson*, a release condition of EM did not violate the Eighth Amendment because the EM requirement did not actually violate any constitutional right.[198] The court acknowledged the fact that sister courts have found "that having to wear an ankle monitor [was] not a form of punishment" but ultimately stopped short of expressly adopting that interpretation for itself.[199]

Several state courts have dismissed challenges to EM, holding the respective statutory conditions to be nonpunitive. For example, the South Carolina Supreme Court emphasized legislative intent in finding that a state statute was not punitive by design and then found that an application of the *Mendoza-Martinez* factors showed that "the statute [was] not so punitive in effect as to negate the intention to deem it civil."[200] Delaware and Louisiana also dismissed challenges to EM, holding the respective statutory conditions to be nonpunitive.[201]

The New Jersey Supreme Court is the outlier among the state courts.[202] In *Riley v. New Jersey Parole Board*, the Court held that the Sex Offender Monitoring Act (SOMA) was punitive as "[t]he constraints and disabilities imposed on Riley by SOMA, and SOMA's similarity to parole supervision for life clearly place this law in the category of a penal rather than civil law."[203] The Court went on to find that the Act's application violated the Ex Post Facto Clause.[204]

As most uses of EM will likely stem from legislation that does not express an intent to punish, the effect of the condition will be the focus of Eighth Amendment determinations. Nevertheless, it would be unusual for a

---

197 *Id.*

198 No. 7:20-cv-00013, slip op., 2024 WL 1976539, at *8 (W.D. Va. May 3, 2024).

199 *Id.*

200 In re Justin B., 747 S.E.2d 774, 775, 781 (S.C. 2013).

201 *See* Hassett v. State, No. 601, 2011 WL 446561, at *1; State v. Trosclair, 89 So.3d 340, 357 (La. 2012).

202 *See* Riley v. New Jersey Parole Bd., 98 A.3d 544, 547 (N.J. 2014).

203 *Id.*

204 *Id.* at 560. *See also* U.S. CONST. art. I, § 10; N.J. CONST. art. IV, § 7, ¶ 3.

court to find a condition of EM so punitive in effect as to violate the Eighth Amendment. In addition, the ex post facto challenges that will be raised are unlikely to overturn legislation as a whole but rather simply disallow the imposition of legislation in specific instances.

6.4. EM as Custody/Confinement/Detention

Whether a person subject to electronic monitoring is in custody or confinement has important implications for several rights. For example, writs of habeas corpus can only be granted to those who are "in custody."[205] Likewise, the Miranda warnings are only required to be given when a person is in custody.[206] A defendant may receive credit "toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences."[207] Whether EM is detention or custody is an important determination that several courts have addressed.

In 1991, the Fourth Circuit Court of Appeals heard one such case.[208] In *United States v. Insley*, Insley moved for credit against her sentence based on her conditions of pre-trial release, which included EM.[209] She argued that "the conditions of her appeal bond were so restrictive that they constituted 'official detention.'"[210] The court disagreed, stating that "[c]onditions of release are not custody" as "official detention means imprisonment in a place of confinement, not stipulations or conditions imposed upon a person not subject to full physical incarceration."[211]

The federal Sixth and Ninth Circuits both addressed the custodial implications of EM in the context of habeas proceedings.[212] In *Corridore v. Washington*, Corridore argued that the conditions of lifetime sex offender registration and EM were sufficient to amount to custody for purpose of his

---

205 28 U.S.C. § 2254(a).

206 *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

207 18 U.S.C. § 3585(b).

208 *See* U.S. v. Insley, 927 F.2d 185 (4th Cir. 1991).

209 *Id.* at 186.

210 *Id.*

211 *Id.* (internal quotations and citations omitted).

212 *See* Corridore v. Washington, 71 F.4th 491 (6th Cir. 2023); Munoz v. Smith, 17 F.4th 1237 (9th Cir. 2021).

habeas petition.[213] The Sixth Circuit rejected this argument, reasoning that "Corridore's LEM [location monitoring] requirements . . . [are] collateral consequences of conviction rather than severe restraints on liberty."[214] In *Munoz v. Smith*, the Ninth Circuit rejected Munoz's habeas petition because his conditions of release did not cause him to be in custody.[215] In addressing the EM condition, the Court stated that "[t]he electronic monitoring allows the State to track Munoz's whereabouts, but it does not limit his physical movement, nor does it require him to go anyplace."[216] While Nevada's electronic monitoring of Munoz may "'create some kind of subjective chill' on where Munoz may choose to go,"[217] this too was not enough to rise to the level of custody.[218]

The Third Circuit Court of Appeals, however, found a condition of house arrest with EM to be a term of imprisonment.[219] In *Ilchuk v. Attorney General of the United States*, Ilchuk challenged the Department of Homeland Security's decision to remove him from the United States for commission of an aggravated felony.[220] Ilchuk was convicted of "theft of services, . . . three counts of reckless endangerment, . . . and one count of criminal conspiracy" and sentenced to "six to twenty-three months of house arrest with electronic monitoring."[221] Central to the question of Ilchuk's removability was the determination as to whether his sentence was imprisonment.[222] In finding this sentence was imprisonment, the court held that "the [Immigration and Nationality Act]'s disjunctive phrasing . . . suggests that [C]ongress intended for 'imprisonment' to cover more than just time spent in jail."[223] Thus, the court concluded that "the sentence here was a term of 'imprisonment' in the

---

213 *Corridore*, 71 F.4th at 493.

214 *Id.* at 498.

215 *Munoz*, 17 F.4th at 1246.

216 *Id.* at 1245.

217 *Id.*

218 *Id.*

219 *See* Ilchuk v. Att'y Gen. of U.S., 434 F.3d 618, 623 (3rd Cir. 2006).

220 *Id.* at 620.

221 *Id.* at 621 (internal citations omitted).

222 *See id.* If his sentence was not determined to be imprisonment, he would not be within the statutory definition of "aggravated felony" for a theft offense and thus not removable. 8 U.S.C. § 1101(a)(43)(G).

223 *Ilchuk*, 434 F.3d at 623; *see* 8 U.S.C. § 1101(a)(48)(B) (emphasizing that the statute provides imprisonment to be "incarceration or confinement").

broad sense intended by the INA."[224] In so deciding, though, the court did not distinguish EM from Ilchuk's home detention in any way. It simply held that the entirety of Ilchuk's home imprisonment was custody.[225] Therefore, it is possible that EM had little to do with their conclusion.

Ilchuk is in the minority, however, as other courts, including several state supreme courts, have maintained the position that EM is not confinement.[226] Still other courts have declined to address the question though presented with opportunities.[227] It currently appears as if EM by itself will not be held to be on par with custody, but the use of EM to ensure home confinement could contribute to a finding of custody.

6.5. EM as a Condition of Release: Pre-Trial and Post-Conviction

The courts have also addressed challenges to EM as a condition of release. In deciding whether to release a defendant pre-trial, the magistrate has to determine whether he is a flight risk or poses a danger to the community or himself.[228] The burden is on the government to find "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[229]

---

224 *Ilchuk*, 434 F.3d at 623.

225 *Id.*

226 *See, e.g.*, United States v. Theyerl, No. 05-CR-113, 2006 WL 1388840, at *1 (E.D. Wis. May 15, 2006) (finding that release condition of EM is not detention); Bush v. State, 2 S.W.3d 761, 765 (Ark. 1999) (finding that the state legislature's language precluded finding bond conditions as custodial); Commonwealth v. Morasse, 842 N.E.2d 909, 912 (Mass. 2006) (holding the fact that EM is restriction on probationer's liberty does not mean probationer is in custody but rather, "our terminology refers to a probationer as under the 'supervision' of the probation department, not as committed to the 'custody' of the probation department."); State v. Priel, No. 2007–0432, 2008 WL 11258705, at *1 (N.H. Mar. 6, 2008) (holding that language of New Hampshire statute precludes finding of pre-sentence EM as custody).

227 In *People v. Campa*, the Illinois Supreme Court did not address the issue raised by the State that pre-trial EM is not custody. 840 N.E.2d 1157, 1173 (Ill. 2005). Likewise, in *Klotz v. Richardson*, the Eastern District of Wisconsin determined that the question of sentence credit for time spent on EM "is not cognizable in a federal habeas corpus proceeding," and thus did not examine the question. No. 14–CV–1040, 2015 WL 3454277, at *2 (E.D. Wis. June 1, 2015).

228 *See* 18 U.S.C. § 3142(e).

229 *Id.*

If such a condition exists, the defendant shall be released subject to it.[230] Given the nature of the law in this area, the government is typically the party challenging a condition of EM while the defendant is attempting to uphold his own EM condition.

In *United States v. O'Brien*, O'Brien—who was a high-ranking federal drug agent—was arrested pursuant to a government sting operation and indicted for trafficking in cocaine.[231] In his pre-trial release hearing, the magistrate ordered him detained because of a serious risk of flight, citing his understandings of the inner workings of law enforcement, his proximity to an international airport, and his international connections as reasons for the detainment.[232] However, she later ordered him released, finding that a condition of EM could rebut the presumption of flight.[233] The government, "[b]elieving the defendant still posed an unacceptable risk of flight," appealed.[234] The magistrate found that a combination of factors—namely "the use of the electronic bracelet coupled with the posting of the home . . . in which he lived with his new wife"—existed to reasonably assure the defendant's appearance.[235] The First Circuit affirmed and upheld the conditions of release, concluding that "the government has not met its burden of showing that no condition or combination of conditions will reasonably assure O'Brien's appearance."[236] Thus, having the option of imposing a condition of EM may serve to make a magistrate more likely to release defendants pending trial.

Although a pre-trial release hearing is highly individualized, the use of EM, as seen in *O'Brien*, may be a strong motivating factor in a magistrate's decision to release a defendant pending trial. In fact, courts dealing with similar fact patterns have consistently held that release conditions that

---

230 *See id.*

231 895 F.2d 810, 810 (1st Cir. 1990).

232 *Id.* at 810–11.

233 *Id.* at 811.

234 *Id.*

235 *Id.*

236 *Id.* at 817.

included EM were enough to ensure the safety of the community and the appearance of the defendant in court.[237]

Whereas a pre-trial determination looks to the potential flight risk and dangerousness of the defendant, for a post-conviction setting, a condition of release must be

> reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.[238]

In *United States v. Vega-Rivera*, the First Circuit examined EM as a sentencing condition using these factors.[239] Vega was charged with, and pled guilty to, possession of a firearm by a convicted felon and illegal possession of a machine gun.[240] As part of his sentence, the court imposed conditions of curfew and EM as terms of supervised release.[241] Vega argued that "the imposition of a curfew and electronic monitoring [is] not reasonably related to the nature and circumstances of his offense."[242] The court disagreed, reasoning that "the critical test is whether the challenged condition is sufficiently related to one or more of the permissible goals of supervised release," and "[h]ere, the district court's imposition of [EM] and a curfew is sufficiently related to the defendant's offense, history, and characteristics."[243] It

---

237 In *United States v. Sabhani*, the Second Circuit upheld the release conditions largely because of the presence of "on-site visual surveillance [and] electronic monitoring," which the Court reasoned would minimize the risk of flight. 493 F.3d 63, 78 (2d Cir. 2007). Also, in *United States v. Digiacomo*, the District Court of Massachusetts found conditions including EM would reasonably assure both the defendant's appearance in future court proceedings and the safety of the community despite the government's fears to the contrary. 746 F. Supp. 1176, 1187, 1188 (D. Mass. 1990).

238 U.S. SEN'G GUIDELINES MANUAL § 5D1.3(b) (U.S. SENT'G COMM'N 2024); *see also* 18 U.S.C. § 3583(d)(1) (describing the conditions of a supervised release).

239 866 F.3d 14, 20–21 (1st Cir. 2017).

240 *Id.* at 16.

241 *Id.* at 18.

242 *Id.* at 20.

243 *Id.* at 21 (internal quotations omitted).

therefore did not matter that the condition was not related to the nature of the offense. Thus, the "district court properly imposed the conditions because of Vega's history, the need to deter Vega from further criminal conduct, the need for heightened electronic supervision, and the need to protect the public from further crimes by the defendant."[244]

In analyzing EM in the post-conviction context, the courts have consistently upheld it as reasonably related to the defendant's "offense, his characteristics and history, deterrence, protection of the public, and correctional treatment."[245]

6.6. Adam Walsh Act

In 1981, Adam Walsh went missing from a Sears department store in a Florida mall.[246] He was six years old.[247] A few weeks after his disappearance, a fisherman found Adam's head along Florida's Turnpike over one hundred miles from the mall.[248] The boy's murder went unsolved for decades.[249] Adam's story led to the signing of the Adam Walsh Act in 2006.[250] The Act stated its purpose was to "protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote

---

244 *Id.*

245 United States v. Russell, 45 F.4th 436, 439 (D.C. Cir. 2022). In *Russell*, the D.C. Circuit found EM reasonably related to the defendant because (1) it is related to enforcing other conditions of his supervised release; (2) it is directly related to deterring him and protecting the public; (3) it supervises his travel which is a key component of the underlying offense of "Travel With Intent to Engage in Illicit Sexual Conduct;" and (4) it is related to the defendant's commission of a future crime. *Id.* at 439–40. In *United States v. Rivera-Lopez*, the First Circuit held that "Rivera's history of drug abuse, charged conduct, and request for treatment" shows that the release conditions, which included EM, "are sufficiently related to legitimate goals of sentencing." 736 F.3d 633, 637 (1st Cir. 2013). The First Circuit also upheld a condition of EM in *United States v. Quiñones-Ortega* because the condition was "necessary to ensure compliance" with another valid condition of release. 869 F.3d 49, 52 (1st Cir. 2017).

246 *The Loss of Innocence: The Abduction of Adam Walsh Changed Hollywood & the Country Forever*, S. FLA. SUN TIMES (May 24, 2023), https://perma.cc/Q6LE-VTPQ.

247 *Id.*

248 *Id.*

249 *Id.*

250 *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109–248, 120 Stat. 587.

Internet safety, and to honor the memory of Adam Walsh and other child crime victims."[251] Title I of the Act, entitled the Sex Offender Registration and Notification Act (SORNA), provides minimum standards for sex offender registration, an expanded sphere of offenses for which registration is required, and methods of registration.[252] SORNA has been adopted by eighteen states.[253] The Act also amended the Bail Reform Act (18 U.S.C. § 3142) by adding numerous conditions of release, including a "condition of electronic monitoring" to "any release order" associated with twenty-one specified cases.[254] These Adam Walsh Amendments[255] became the basis for numerous challenges from applicable defendants.[256]

There have been three common grounds for challenging the Amendments: due process, excessive bail, and separation of powers. Many cases addressed challenges on all three grounds.[257] In the early years of the Act's existence, a handful of Adam Walsh cases arose in the federal district courts, and most of them overturned the implementation of the conditions.[258] But

---

251 *Id.*

252 *SORNA Sex Offender Registration and Notification Act*, SMART, https://perma.cc/5G2D-YNWR.

253 Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming have "substantially implemented" SORNA. *SORNA Implementation Status*, SMART, https://perma.cc/P4B6-V5ZK. SORNA covers sections 101 through 155 of the Act and addresses registration procedures and requirements for sex offenders. Adam Walsh Child Protection and Safety Act of 2006 §§ 101–55; *see* 34 U.S.C. § 20901.

254 Adam Walsh Child Protection and Safety Act of 2006 § 216 (codified as amended at 18 U.S.C. § 3142). These conditions were to attach "[i]n any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title." *Id.*

255 For clarity, this article will refer to the Adam Walsh Act in full as "the Act," and refer to the portion of the Act which amended the Bail Reform Act as "the Amendments."

256 *See* 18 U.S.C. § 3142(c)(1)(B).

257 *See infra* notes 258–311 and accompanying text.

258 *See e.g.*, United States v. Crowell, Nos. 06-M-1095, 06-CR-291E(F), 06-CR-304S(F), 2006 WL 3541736 (W.D.N.Y. Dec. 7, 2006) (holding the mandated imposition of release conditions violated the Excessive Bail Clause, procedural due process, and the

as challenges to the Amendments continually arose, eventually one reached the circuit level.[259] In 2009, the Ninth Circuit Court of Appeals heard an appeal from the government that sought to overrule the magistrate's determination that the Amendments were unconstitutional and impose their required conditions.[260] The defendant in the case, after being indicted for possession of child pornography, was released pending trial.[261] A week later, he was charged with an additional count of transportation of child pornography.[262] This additional charge triggered the Amendments' requirements, and the government made a motion to modify the conditions of his release to include them.[263] The defendant challenged the Amendments' requirements on excessive bail, due process, and separation of powers grounds.[264] A magistrate for the Western District of Washington ruled in the defendant's favor on each ground and denied the government's motion to add the conditions.[265] Shortly thereafter, the government brought a motion to revoke the magistrate's order denying the motion to modify.[266] The district court again ruled against the government, agreeing with the magistrate's ruling because the Amendments violated the Excessive Bail Clause, the Due Process Clause, and separation of powers.[267] The Ninth Circuit took the case on appeal, and in a brief unpublished memorandum, held that the Amendments are constitutional.[268] In vacating the magistrate's order, the court considered the

---

separation of powers); United States v. Arzberger, 592 F. Supp. 2d 590 (S.D.N.Y. 2008) (holding the mandatory imposition of release conditions as facially violative of due process); United States v. Torres, 566 F. Supp. 2d 591 (W.D. Tex 2008) (holding the mandatory imposition of release conditions as facially violative of due process and violative of excessive bail as applied to the defendant). *But see* United States v. Gardner, 523 F. Supp. 2d 1025 (N.D. Cal. 2007) (finding added condition of EM to defendant's pre-trial release pursuant to the Adam Walsh Amendments did not violate the Excessive Bail Clause, procedural due process, or separation of powers).

259 *See* United States v. Kennedy, 327 F. App'x 706, 707 (9th Cir. 2009).

260 *Id.*

261 United States v. Kennedy, 593 F. Supp. 2d 1221, 1224 (W.D. Wash. 2008).

262 *Id.*

263 *Id.* at 1224–25.

264 *Id.* at 1226.

265 *Id.* at 1224.

266 *See* United States v. Kennedy, 593 F. Supp. 2d 1233, 1234 (W.D. Wash. 2009).

267 *Id.* at 1235.

268 *See* United States v. Kennedy, 397 F. App'x 706, 707 (9th Cir. 2009).

flexibility of the Amendments, noting that "the Walsh Act permit[s] an individualized determination by the district court to set appropriate parameters based upon the particular facts and circumstances of each case."[269] It also relied on the canon of constitutional avoidance in determining that the Amendments raised "no constitutional infirmity . . . on the bases argued by defendant."[270]

In 2010, two key circuit level decisions came down, both of which upheld the Amendments' conditions.[271] In February 2010, the Eighth Circuit decided *United States v. Stephens* and became the first federal appellate court to offer extended reasoning on the constitutionality of the Amendments.[272] After being indicted by a grand jury for receiving and transporting child pornography, Stephens pled not guilty and was subsequently released by a magistrate judge pending trial.[273] The release order did not include a curfew or an electronic monitoring condition, so the government filed a motion to amend, pointing to the Adam Walsh requirements.[274] Stephens challenged the Amendments' mandatory release conditions as violative of the Due Process Clause and the Excessive Bail Clause.[275] The district court found that the Act violated due process, stating that it was "unconstitutional on [its] face because the absence of procedural protections is universal: no defendant is afforded the opportunity to present particularized evidence to rebut the presumed need to restrict his freedom of movement."[276] Upon government appeal, the Eighth Circuit heard the case and overturned the district court's ruling.[277] The court pointed out that "[t]he fact that [an act] might operate unconstitutionally under some conceivable set of circumstances is

---

269 *Id.*

270 *Id.*

271 *See generally* United States v. Stephens, 594 F.3d 1033 (8th Cir. 2010); United States v. Peeples, 630 F.3d 1136 (9th Cir. 2010).

272 *See* 594 F.3d at 1038. The Ninth Circuit's earlier decision in *Kennedy* was a memorandum that merely rendered the Court's decision without an in-depth analysis. *See Kennedy*, 397 F. App'x at 707.

273 *See Stephens*, 594 F.3d at 1035.

274 *Id.*

275 *Id.* at 1036.

276 United States v. Stephens, 669 F. Supp. 2d 960, 969 (N.D. Iowa 2009) (quoting United States v. Arzberger, 592 F. Supp. 2d 590, 601 (S.D.N.Y. 2008)).

277 *See Stephens*, 594 F.3d at 1035.

insufficient to render it wholly invalid,"[278] and "Stephens cannot establish [that] there are no child pornography defendants for whom a curfew or electronic monitoring is appropriate."[279] Furthermore, the court showed that Stephens would not be "deprive[d] . . . of a detention hearing or an individualized determination whether detention or release is appropriate."[280] The Act does mandate some form of monitoring and curfew, but it does not mandate a version so extreme that it violates due process.[281] The court then turned to the excessive bail challenge and pointed out the broad nature of Congress's "power in fashioning bail procedures."[282] Given the potentially sweeping nature of congressional authority, the court upheld the Adam Walsh Act's "much less restrictive mandatory release conditions" against the Eighth Amendment challenge.[283] The court thus overturned the finding that the Act's mandatory conditions constitute a facial violation of the Constitution.[284]

Later that year, in *United States v. Peeples*, the Ninth Circuit adopted the Eighth Circuit's *Stephens* conclusion.[285] When Peeples was indicted on a charge of receipt of child pornography and released subject to the Adam Walsh conditions, he "filed a motion to declare the [amendments'] mandatory conditions of release unconstitutional."[286] Both the magistrate and district courts denied the motion, and Peeples appealed.[287] He argued that the release provisions were, facially and as-applied, "violative of (1) the

---

278 *Id.* at 1037 (internal quotations omitted) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

279 *Id.* at 1038.

280 *Id.* at 1039.

281 *Id.*

282 *Id.*

283 *Id.*

284 The Court did not address "any as-applied challenge Stephens might assert on remand" as they had no evidence with which to conduct such a determination. *Id.* The determination of an "as-applied" violation, however, would hold little weight anyways as "[i]n an as-applied challenge, the question is whether the statute would be unconstitutional if applied literally to the facts of the case." United States v. Polouizzi, 697 F. Supp. 2d 381, 387 (E.D.N.Y. 2010). Therefore, a decision in one case holds little bearing, outside of persuasive authority, on the decision in a different case.

285 630 F.3d 1136, 1139 (9th Cir. 2010).

286 *Id.* at 1137.

287 *Id.*

Excessive Bail Clause of the Eighth Amendment; (2) the Due Process Clause of the Fifth Amendment, including the presumption of innocence; and (3) the separation of powers doctrine."[288] The court quickly dismissed the facial challenge, saying that "Peeples' facial challenge to the Walsh Act fails because he cannot establish that a curfew or electronic monitoring would be inappropriate for all defendants charged with knowingly receiving child pornography."[289] The court likewise dismissed the as-applied challenges, highlighting the "well-established principle of statutory construction" that "[a] statute . . . is to be construed, if such a construction is possible to avoid raising doubts of its constitutionality."[290] The Act's conditions compel the court to exercise discretion in applying them; thus the "argument that [Peeples'] constitutional rights have been violated because he has not been afforded an individualized determination of his release conditions cannot stand in light of the district court's duty to exercise its discretion in imposing the mandated release conditions."[291] Simply put, the Act does not mandate, as Peeples would have it, the uniform imposition of electronic monitoring on all releasees.[292] It mandates the imposition of some form of electronic monitoring within the release conditions.[293] This form of monitoring is based on an individualized determination of the releasee's circumstances.[294] Thus, it would be impermissible for the court to interpret the Act in a manner that raises the constitutional issues claimed by Peeples.[295]

After these decisions, most courts adopted the position that the Act was not facially unconstitutional, but they differed some when interpreting the Act as applied to individual defendants. For example, in *United States v. Polouizzi*, the Eastern District of New York found that the Act's condition of

---

288 *Id.* at 1138.

289 *Id.*

290 *Id.* (internal quotations omitted) (quoting St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981)).

291 *Id.* at 1139.

292 *See id.*

293 *See id.*

294 *See id.*

295 *See id.* To interpret the Adam Walsh Act in a manner that applies the conditions to everyone equally regardless of individualized determination constitutes a clear due process and separation of powers issue. Thus, such an interpretation cannot be the intent of Congress when an equally valid interpretation exists that avoids this issue.

EM violated due process and excessive bail as applied to Polouizzi.[296] Polouizzi's crime was consuming child pornography "on his computer screen behind locked doors."[297] Taking into consideration that he had been a "model citizen" who has a good relationship with his family, had been successfully completing intensive mental health treatment, and had complied fully with the terms of his bail, the court found that "electronic monitoring is not needed to avoid flight or any danger to children or to society."[298] The Act therefore is unconstitutional as applied to Polouizzi.[299]

The District of South Dakota reached the opposite conclusion in *United States v. Campbell*.[300] The defendant was indicted on four counts of aggravated sexual abuse of a minor and then released on conditions which included the Adam Walsh conditions.[301] Campbell argued that the conditions were unconstitutional both facially and as applied to him.[302] The court held that the Act, as applied to Campbell, did not violate his Eighth or Fifth Amendment rights because he "ha[d] been afforded a hearing and an appeal. Every effort ha[d] been made to protect his constitutional rights to be free from excessive bail and to receive due process."[303] The Court also held that the Amendments did not infringe upon separation of powers because the legislature has a substantial role in "shaping the bail process."[304] Congress, the court reasoned, can impose certain conditions of release for certain classes.[305] There is therefore no separation of powers issue.

---

296 697 F. Supp. 2d at 384.

297 *Id.*

298 *Id.* at 384–86.

299 *Id.* at 386. For another example of a district court finding the Amendments unconstitutional as applied, see United States v. Blaser, 390 F. Supp. 3d 1306, 1315 (D. Kan. 2019) (finding the Adam Walsh Amendments violate procedural due process in this case).

300 309 F. Supp. 3d 738 (D.S.D. 2018), *aff'd*, No. 18-1578, 2018 WL 11392845 (8th Cir. May 4, 2018).

301 *Id.* at 741.

302 *Id.*

303 *Id*.

304 *Id.* at 754 (quoting United States v. Gardner, 523 F. Supp. 2d 1025, 1035–36 (N.D. Ca. 2007)). The *Campbell* court proceeded to expressly adopt *Gardner*'s reasoning. *Id.* at 755.

305 *Id.* at 755.

Despite *Stephens* and *Peeples*, one district showed no reluctance in finding the Amendments facially violative of the Constitution.[306] In *United States v. Karper*, the Northern District of New York held the Act as facially violative of due process.[307] The court said that "the law is unconstitutional in all of its applications because it universally forfeits an accused's opportunity to contest whether such conditions are necessary to ensure his return and to ameliorate any danger to the community."[308] In addressing the *Stephens* and *Peeples* decisions, the court reasoned that the Eighth and Ninth Circuits were too quick to dismiss the facial challenges they heard.[309] The court emphasized that "when the Adam Walsh Act is at play, there is no judicial discretion to be exercised in any respect."[310] The court rejected the idea that the Act provides discretion for judges to determine the duration and location of the required curfew.[311] This was the only decision ever rendered that held the Adam Walsh Amendments were per se unconstitutional, but contrary decisions from other courts invite a United States Supreme Court ruling to resolve the conflict.[312]

The Adam Walsh Act has provided an example of broad, sweeping legislation imposing electronic monitoring. While the Act drew praise for making the country safer for American children,[313] it has also been criticized for being confusing and expensive to comply with.[314] The main criticism of the Amendments, at least in the courts, has been the mandating of EM based solely on the nature of the offense.[315] Despite this, the Amendments, and the corresponding condition of EM, have only been rejected as unconstitutional by the Northern District of New York.[316] Until more courts reject the

---

306 *See* United States v. Karper, 847 F. Supp. 2d 350 (N.D.N.Y. 2011).

307 *See id.* at 360.

308 *Id.*

309 *See id.* at 361 n.6.

310 *Id.*

311 *Id.*

312 *See supra* notes 268–295 and accompanying text.

313 *See Adam Walsh Act Fifteenth Anniversary*, U.S. MARSHALS SERV., https://perma.cc/5VY5-TT27.

314 Derek W. Logue, *After 15 Years, Does the Adam Walsh Act Need Rethinking?*, FLA. ACTION COMM. (Aug. 3, 2021), https://perma.cc/Z6QK-X2Y7.

315 *See generally supra* Section 6.6.

316 United States v. Karper, 847 D. Supp. 2d 350, 359–60 (N.D.N.Y. 2011).

Amendments, or the United States Supreme Court overturns the statute, it will continue to apply across the United States to sex offenders on release.

7. CONCLUSION

There is no question that electronic technology can furnish exceptionally valuable benefits to the criminal justice system. It already is doing so.[317] It significantly aids in the rehabilitation of offenders by promoting compliance with conditions of release and facilitating access to services among jail and prison inmates as well as probationers and parolees. For these reasons, electronic technology reduces crime, protects crime victims, and benefits an offender's family and community.

Even at current-day levels of advancement, electronic technology can provide significant benefits in rehabilitating offenders by teaching skills and facilitating behavior modification in prison. These supports should not be confused with electronic monitoring. Rather, they are computer-based interventions that will assist inmates by familiarizing them with 21st century technologies while facilitating effective treatment programs. Post-release, those same technologies, along with offender monitoring, can foster completion of drug abstinence and vocational training programs as well as fulfilment of job responsibilities. EM also can create geofenced exclusion zones to deter attacks on the subject's victims and other vulnerable members of society (such as children, in the case of sex offenders). These are major benefits, as they contribute to desistance from crime and the integration of offenders into law-abiding society while simultaneously protecting the innocent.

As for costs, it must be conceded that current electronic technology is expensive. There are costs for both hardware and software when providing computer access to prisoners. Post-release offender monitoring is even more expensive as it requires ankle bracelets or smart watches for every subject, software to operate it, and monitors to detect violations and report them to the appropriate authorities. Undoubtedly, these costs will diminish with the scaling up of EM. Moreover, the effectiveness of EM in reducing reoffending and the attendant need for further incarceration will be a cost-saver. In this regard, EM will prove cost-effective when compared with unmonitored

317 *See supra* Part 5.

release from incarceration. Indeed, whenever electronic monitoring can replace costly jailing or imprisoning of offenders, it will reduce criminal justice expenditures. A careful study of EM in Florida noted that "six offenders could be placed on active GPS . . . for one year for the same cost of housing one inmate in a correctional facility for one year."[318] These savings would occur whenever EM replaces jail for pre-trial offenders, or when it enables more offenders to be released to probation or parole instead of serving time in prison.

Finally, with respect to family and community impact, while it is true that ankle bracelets, and even smart watches, can contribute to family tensions, they also reduce offending so that the subject can spend more time with his or her family. And needless to say, the crime reduction achieved through electronic monitoring is a great boon to the offender's community and society at large. On balance, then, EM will prove beneficial to both family and community.

While electronic technology can reduce incarceration, it cannot totally or even substantially replace jail or prison as it falls short on three of the six benchmarks for effective and appropriate treatment of criminal offenders. First, it does not incapacitate. Although an electronically monitored subject is discouraged from further offending, EM cannot completely prevent additional crimes by the subject. Furthermore, stratagems to detect offending in real-time and restrain the offender through autonomous conducted energy devices are too primitive, unreliable, and dangerous for routine use. The public is unlikely to accept the automatic firing of a 50,000-volt electric shock into a human being selected by a machine programmed to detect suspicious behavior.

Second, electronic technology used for mere monitoring doesn't provide retribution, which requires punishment. Nor does it furnish general deterrence, which is based on the apprehension of punishment. EM is neither punitive nor feared. It is capable of determining the location of the subject and reporting the same to authorities. But this monitoring through an ankle bracelet or a smart watch is at most an inconvenience and does not, in and of itself, rise to the level of punishment. While electronic monitoring also is used to administer home confinement as a criminal sentence, it is the confinement, not the monitoring, that punishes. This becomes evident when we

---

[318] BALES, *supra* note 115, at 32.

compare confinement without monitoring, which is deemed punitive, and monitoring without confinement, which ordinarily is not. Consequently, EM is not "punishment" in violation of the Eighth Amendment to the United States Constitution.[319] It therefore cannot significantly provide the retribution or general deterrence demanded by the criminal justice system.

Since jail and imprisonment are unquestionably incarcerative and punitive, electronic technology cannot be a perfect and complete replacement for incarceration. But it is, nevertheless, enormously beneficial and, given the inevitable improvements in the technology, will become ever more valuable over time.

We think this fairly assesses EM at the current time. However, as is generally understood, electronic technology is steadily improving, and it is entirely possible that current deficiencies will be overcome within the next decade or even the next several years. We think, however, that some of the advocates of electronic technology—and we certainly are among them—are overly optimistic and are counting on benefits that do not now, and may never, exist (such as real-time detection of crimes). Nonetheless, we have little doubt that electronic technology is a significant player in the criminal justice systems of First World nations and, eventually, will be employed throughout the world. Indeed, we predict that electronic technology will prove to be the greatest advance in penology since the invention of the prison 230 years ago.

---

[319] *See supra* Section 6.3.